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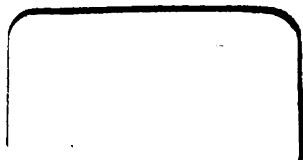
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DIGEST

OF DECISIONS OF THE

SUPREME COURT OF THE UNITED STATES

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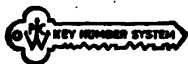
VOLUME 1

ABANDONMENT—INDIANS

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EXPLANATION



THIS Digest covers all United States Supreme Court cases reported between October, 1882, and July, 1916. These opinions are reported in

Supreme Court Reporter, Vols. 1-36,
United States Reports, Vols. 106-241,
Lawyers' Edition, United States Reports, Vols. 27-60.

Every digest paragraph gives references to all of the above Reports, making the Digest equally valuable to the owners of any series of reports.

The Key-Number device () used in place of the section mark (§), which has been commonly in use heretofore, indicates that the Digest is compiled on the Key-Number System. This means that Topics and Key-Number Sections in this Digest are identical with those in the Decennial and American Digests, Key-Number Series. Moreover, the Index-Digests in the Advance Sheets and Bound Volumes of the Supreme Court Reporter are arranged on the same System, making the Index-Digests in volumes subsequent to Vol. 36 Supreme Court Reporter current supplements to this Digest.

Whenever you find a case in point in this Digest, and wish to find other authorities on the same point, turn to the same topic and Key-Number Section in the other Digests and Indexes.

ILLUSTRATION

A legal proposition found in this Digest under
CARRIERS, , 12, Charges,

Will also be found under

CARRIERS, § 12, in the Decennial Digest;
CARRIERS, § 12, in the American Digest, Key-Number Series; and
CARRIERS, § 12, in Supreme Court Reporter volume Indexes.

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OF
VOLS: 1-36 SUPREME COURT
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VOLUME 1

ABANDONMENT.

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ABATEMENT.

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ABATEMENT AND REVIVAL.

Scope-Note.

[INCLUDES suspension or defeat of civil actions in general by matters affecting the procedure merely, not the merits of the cause of action; grounds of such abatement of actions, more particularly want of jurisdiction of the court, bringing more than one action for the same cause, defects or irregularities in bringing an action, and death or disability of parties, occurring either before or after action is brought; necessity of pleading or otherwise taking advantage of matter in abatement, and effect of failure to do so; and revival of actions which survive.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Objections to Jurisdiction.

¶3. Necessity and mode of making objection.

II. Another Action Pending.

¶8. Identity of cause of action, issues, or relief.

10. Action in different jurisdiction.

III. Defects and Objections as to Parties and Proceedings.

¶27. Nonjoinder of party.

39. Dissolution of corporation.

40. Necessity and mode of making objection.

IV. Transfer or Devolution of Title, Right, Interest, or Liability.

¶45. Termination or devolution of representative or official capacity.

47. Continuance or revival by or against successor in interest.

V. Death of Party and Revival of Action.

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¶49. What law governs.

51. Causes of action which survive.

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55. — Actions for injuries to property.

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(B) CONTINUANCE OR REVIVAL OF ACTION.

¶73. Persons against whom action may be continued or revived.

75. Application and proceedings thereon.

76. Order for continuance or revival.

VI. Waiver of Grounds of Abatement and Time and Manner of Pleading in General.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Abate. & R. §§ 495-512.]

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Pleas in abatement, see—

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Rights of action by or against personal representatives, see Executors and Administrators, ¶428-430.

I. OBJECTIONS TO JURISDICTION.

¶3. Necessity and mode of making objection.

See 1 Cent. Dig. Abate. & R. §§ 7-24.

Defendant does not preclude himself from raising the question of jurisdiction by interposing a plea of former adjudication, and waiting until it is decided against him. The court is bound, even of its own motion, to determine questions of jurisdiction whenever and however they are presented.—*Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690.

II. ANOTHER ACTION PENDING.

Abatement of proceedings for review, see Appeal and Error, ¶13.

Successive proceedings for infringement, see Copyrights, ¶71.

¶8. Identity of cause of action, issues, or relief.

See 1 Cent. Dig. Abate. & R. §§ 29-55, 58-63, 68-72; 6 Cent. Dig. Banks, § 114; 17 Cent. Dig. Dower, § 356; 30 Cent. Dig. Judgment, § 1729.

The pendency in one district of a suit for forfeiture of a vessel for certain alleged violations of statute, and the existence of a bond for her entire value, given for her release therein, do not prevent the bringing of a subsequent suit in another district for her forfeiture for other violations of the same statutes, committed before the bringing of the first suit, and which could have been joined therein. 57 Fed. 508, 59 Fed. 476, 8 C. C. A. 182, reversed.—*United States v. The Haytian Republic*, 154 U. S. 118, 14 S. Ct. 992, 38 L. Ed. 930.

When the pendency of a suit for forfeiture is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interests, and the same offenses must be alleged as grounds for the forfeiture, and the relief demanded must be founded on the same facts. The mere fact that the remedy is the same will not entitle the defendant to plead the former action in abatement, if the offenses for which forfeiture is claimed were committed on different dates from those alleged in the former action.—*United States v. The Haytian Republic*, 154 U. S. 118, 14 S. Ct. 992, 38 L. Ed. 930.

¶10. Action in different jurisdiction.

See 1 Cent. Dig. Abate. & R. §§ 86-104.

A seizure of a vessel for violation of the revenue laws, and her release on bond, cannot be pleaded in abatement of a subsequent libel in another district for similar offenses committed during the same period as those for which the first libel was filed.—*United States v. The Haytian Republic*, 154 U. S. 118, 14 S. Ct. 992, 38 L. Ed. 930.

III. DEFECTS AND OBJECTIONS AS TO PARTIES AND PROCEEDINGS.

¶27. Nonjoinder of party.

See 1 Cent. Dig. Abate. & R. §§ 160-163.

In an action by an assignee, brought in a state court and removed thence to a federal

court, the objection that the assignors were not made parties, as required by Rev. St. Ind. 1881, §§ 251, 276, is an objection to the nonjoinder of parties, and not to the jurisdiction of the court.—*Delaware County Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674.

¶39. Dissolution of corporation.

See 1 Cent. Dig. Abate. & R. §§ 194-204; 12 Cent. Dig. Corp. § 2589.

Where a judgment of the federal circuit court in Tennessee against a New York corporation is reversed by the supreme court, and a new trial is ordered, but, pending the appeal, said corporation is dissolved by the courts of New York, and a receiver is appointed, the suit abates.—*Pendleton v. Russell*, 144 U. S. 640, 12 S. Ct. 743, 36 L. Ed. 574.

Where a judgment of the federal circuit court in Tennessee against a New York corporation is reversed by the supreme court, and a new trial is ordered, but, pending the appeal, said corporation is dissolved by the courts of New York, and a receiver is appointed, a judgment by default, subsequently rendered by the circuit court against the company, without reviving the action against the receiver, or serving him with notice, is without jurisdiction, and void.—*Id.*

¶40. Necessity and mode of making objection.

See 1 Cent. Dig. Abate. & R. §§ 205-211; also, 141-143, 147, 153-156, 168-174, 188; 1 Cent. Dig. Action, § 722.

Where an action against a foreign corporation is commenced by attachment under the provisions of Comp. St. tit. 8, §§ 198, 199, and personal service is obtained upon the president of defendant by means of a fraudulent device, but the corporation appears, demurs, answers, and petitions to remove the cause into the United States circuit court, it cannot, during the trial of the case, object to the validity of the service by motion for a nonsuit, motion to dismiss, or request for an instruction, as such motions attack the jurisdiction of the court over the subject-matter, and not its jurisdiction over the person of defendant.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

IV. TRANSFER OR DEVOLUTION OF TITLE, RIGHT, INTEREST, OR LIABILITY.

¶45. Termination or devolution of representative or official capacity.

See 1 Cent. Dig. Abate. & R. §§ 226-236; 27 Cent. Dig. Ins. Per. § 160; 42 Cent. Dig. Receivers, § 256.

Pending suit against a board of five levee commissioners, one from each county of the district, a statute was enacted abolishing their offices, and substituting the state treasurer and auditor "in place of the board of levee commissioners now in office." A bill of revivor was filed against the board as newly constituted.

Held, the suit could be maintained against them notwithstanding they both resided out of the district, and that, upon final judgment in favor of plaintiff, they were entitled to appeal as *ex officio* the levee board.—*Hemingway v. Stansell*, 106 U. S. 399, 1 S. Ct. 473, 27 L. Ed. 245.

A bill against the secretary of the interior and the commissioner of the general land office, which, as to the latter, seeks only to enjoin the execution of the orders of the secretary relative to the disposition of certain lands, its chief purpose being to compel the secretary to issue patents to such lands, cannot be maintained against the commissioner alone after the suit, as against the secretary, has abated by reason of his resignation.—*Warner Valley Stock Co. v. Smith*, 17 S. Ct. 225, 165 U. S. 28, 41 L. Ed. 621.

A suit in equity against the secretary of the interior to compel him to issue patents to certain lands abates upon his resignation of the office.—*Id.*

A change in the personnel of the loan commission of Arizona, created by Laws Ariz. 1887, tit. 31, substantially re-enacted in Act Cong. June 25, 1890 (26 Stat. 175, c. 612), for the express purpose of liquidating and providing for the payment of the outstanding indebtedness of the territory, does not abate a proceeding against the members of such commission in their official capacity, to compel by mandamus the issue of refunding bonds, as such board was by the acts creating it made a continuing body, with corporate succession, though not made a corporation by name.—*Murphy v. Utter*, 22 S. Ct. 776, 186 U. S. 95, 46 L. Ed. 1070.

The expiration of the term of office of a state official, and the induction of his successor into office, abates a suit to require him, when certifying the names of nominees for Congress to the clerks of the various county courts, to proceed under a specified apportionment act rather than under a later one, attacked as invalid, there being no statutory authority for the substitution of his successor in a suit of this character.—*Richardson v. McChesney*, 31 S. Ct. 43, 218 U. S. 487, 54 L. Ed. 1121.

47. Continuance or revival by or against successor in interest.

See 1 Cent. Dig. Abate. & R. §§ 239-244; 6 Cent. Dig. Bankr. §§ 631-635, 640-647; 12 Cent. Dig. Corp. §§ 2249-2251.

A bill against the Secretary of the Interior and the Commissioner of the General Land Office, which as to the latter seeks only to enjoin the execution of the orders of the Secretary relative to the disposition of certain lands, its chief purpose being to compel the Secretary to issue patents to such lands, cannot be amended by making the successor of the Secretary a defendant when he resigns.—*Warner Valley Stock Co. v. Smith*, 17 S. Ct. 225, 165 U. S. 28, 41 L. Ed. 621.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) ABATEMENT OR SURVIVAL OF ACTION.

Death of party to appeal or error, see Appeal and Error, 331-334.

Rights of action by or against personal representatives, see Executors and Administrators, 428-430.

49. What law governs.

See 1 Cent. Dig. Abate. & R. §§ 246, 247.

An action in a federal court for the penalty provided by Rev. St. § 4965, for the infringement of a copyright, abates by the death of de-

fendant, though the statutes of the state in which the action was brought allows suits on state penal statutes to be prosecuted after the death of the offender, since such state statutes can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of congress.—*Ex parte Schreiber*, 110 U. S. 76, 3 S. Ct. 423, 28 L. Ed. 65.

The right to revive an action for personal injuries in the name of plaintiff's personal representative is determined exclusively by the law of the state in which the action is brought, though the injury was incurred in a different state.—*Baltimore & O. R. Co. v. Joy*, 19 S. Ct. 387, 173 U. S. 226, 43 L. Ed. 677.

A right given by a state statute to revive a pending action for personal injuries in the name of the personal representative is not lost on the removal of the case to a federal court, even when, by the state law, the cause of action would have abated if no action had been commenced before the plaintiff's death. The federal law declaring that the right of revivor exists only when the "cause of action" survives (Rev. St. § 955) does not apply to such a case.—*Id.*

51. Causes of action which survive.

See 1 Cent. Dig. Abate. & R. §§ 248-253; 12 Cent. Dig. Corp. § 1495; 17 Cent. Dig. Dower, § 254.

52. — In general.

See 1 Cent. Dig. Abate. & R. §§ 248-254.

A cause of action for the infringement of a patent survives, upon the death of the patentee, to his representatives.—*Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 4 S. Ct. 5, 28 L. Ed. 154.

55. — Actions for injuries to property.

See 1 Cent. Dig. Abate. & R. §§ 255-260, 267, 271-278, 282, 285, 292, 299; 12 Cent. Dig. Corp. § 1496; 48 Cent. Dig. Waste, § 15.

A cause of action to recover from a collector of internal revenue a sum alleged to have been paid him under protest to protect property from unlawful seizure for illegal taxes survives the death of the defendant, both under the common law and Code Va. 1837, § 2655, providing that "trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."—*Patton v. Brady*, 22 S. Ct. 493, 184 U. S. 608, 46 L. Ed. 713.

58. Actions and proceedings which abate.

See 1 Cent. Dig. Abate. & R. §§ 294-309; 48 Cent. Dig. Waste, § 15.

Under Rev. St. Ohio, § 5144 (1 Rev. St. 1890, p. 1491), as construed by the state supreme court, an action for personal injuries may, on the plaintiff's death, be revived in the name of his administrator, though by the common law (in force in that regard in the state) the cause of action would have abated if no suit had been brought.—*Baltimore & O. R. Co. v. Joy*, 19 S. Ct. 387, 173 U. S. 226, 43 L. Ed. 677.

A plaintiff, whose cause of action must be treated as an action of tort in order to involve an amount sufficient to give the court jurisdiction, cannot prevent an abatement by reason of defendant's death, because facts are averred in the declaration from which a contract to pay a sum below the jurisdiction of the court might

be implied.—*Bank of Iron Gate v. Brady*, 22 S. Ct. 529, 184 U. S. 665, 46 L. Ed. 739.

69. **Death pending appeal or other review.**

See 1 Cent. Dig. Abate. & R. §§ 349-354; 13 Cent. Dig. Courts, § 128.

A judgment for plaintiff in an action for personal injuries having been erroneously set aside, and a subsequent final judgment against him brought up by writ of error, pending which he dies, the judgment in his favor will be affirmed nunc pro tunc, to prevent the abatement of the action.—*Coughlan v. District of Columbia*, 106 U. S. 7, 1 S. Ct. 37, 27 L. Ed. 74.

On the death of plaintiff in an action for personal injuries, after judgment for defendant and pending a writ of error, the writ abates, notwithstanding the provision of Code, c. 127, § 2, that "if a plaintiff or defendant dies pending any action, whether the cause of action would survive at common law or not, the same may be revived, and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract," as that clause, construed with other provisions relating to survivorship of causes of action, merely prescribes the mode of procedure in actions the cause of which survives, either at common law or by virtue of such other provisions, and its whole effect is to avoid the necessity of bringing a new action when the right of action so survives.—*Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 S. Ct. 533, 38 L. Ed. 311, dismissing writ of error *Martin v. Baltimore & O. R. Co.* (C. C.) 41 F. 125.

(B) **CONTINUANCE OR REVIVAL OF ACTION.**

See—

Appeal and Error, 91, 333, 334.
Death, 10.

73. **Persons against whom action may be continued or revived.**

See 1 Cent. Dig. Abate. & R. §§ 403-411, 417-428.

An executor or administrator of a defendant who dies after the filing of a complaint, which is declared by statute to constitute the commencement of the action, may be made a party by scire facias under Rev. St. U. S. § 955, although such defendant dies before summons is served upon him, especially if there is another defendant in the case against whom the cause of action survives.—*Ex parte Connaway*, 20 S. Ct. 951, 178 U. S. 421, 44 L. Ed. 1134.

75. **Application and proceedings thereon.**

See 1 Cent. Dig. Abate. & R. §§ 441, 445-465, 467-482.

The suggestion of the death of the sole plaintiff, and the substitution of his heir, under *Hurd's Rev. St.* p. 94, c. 1, § 10, without objection, settles prima facie the fact of his death, and the defendant cannot on the trial require further proof thereof, without notice of his purpose to raise that issue.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

76. **Order for continuance or revival.**

See 1 Cent. Dig. Abate. & R. §§ 483-487.

Where the validity of the appointment of the substituted plaintiff as executor of the deceased plaintiff, for whom a decree was rendered, is not questioned, no objection is raised that some one else is the proper person in whose name the suit should be revived, and defendant has not complied with the original decree, the order of revival will be affirmed.—*Terry v. Sharon*, 131 U. S. 40, 9 S. Ct. 705, 33 L. Ed. 94.

VI. WAIVER OF GROUNDS OF ABATEMENT AND TIME AND MANNER OF PLEADING IN GENERAL.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Abate. & R. §§ 495-512.]

ABDUCTION.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Abduc.]

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 Trust by trustee, see Trusts, ¶38.

ACCESS.

Compensation for obstruction, see Eminent Domain, ¶106.

ACCESSION.

Scope-Note.

[INCLUDES additions or increments to property, real or personal, or augmentation of its value otherwise than by intermingling goods of the same kind.

[For related matters under other topics, see cross-references following.]

Cross-References.

Accretion or reliction, see Navigable Waters, ¶44.

Annexation of personal to real property, see Fixtures.
 Intermixture of goods, see Confusion of Goods.

¶1. Nature and effect in general.

See 1 Cent. Dig. Accession, §§ 1-10.

Though one taking property through inadvertence or mistake is liable only for its value when taken, and is entitled to a credit for added value bestowed upon it by his labor and expense, a willful trespasser is liable for the full value of the whole property, and receives no such allowance.—*E. E. Bolles Wooden-Ware Co. v. United States*, 1 S. Ct. 398, 106 U. S. 432, 27 L. Ed. 230.

One who knowingly takes the property of another cannot, by changing its form or value

or by commingling it with other property of his own, acquire title by accession.—*Union Naval Stores Co. v. United States*, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

The mortgagee of spirits of turpentine and rosin, which the mortgagor is to extract from trees on government lands, cannot escape liability to the United States for the value of the manufactured product under the doctrine of accession, though the mortgagor mixes the crude product with other property of which he has unquestioned title.—*Id.*

ACCESSORIES.

Acts and declarations, see Criminal Law, ¶422-427.
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 Testimony, see Criminal Law, ¶507, 508.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

ACCORD AND SATISFACTION.

Scope-Note.

[INCLUDES agreements for discharge of contracts or satisfaction for injuries by payment, performance, or delivery and acceptance of something different from what might legally be claimed; nature, requisites, validity, operation, and effect of such agreements and of performance thereof; and pleading accord and satisfaction and proof thereof as a defense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ③. Persons between whom made.
- 4. Form of agreement of accord.
- 5. Consideration of accord in general.
- 6. Part payment.
- 7. — In general.
- 10. — Disputed or unliquidated claims.
- 21. Rescission by parties.

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See—

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③. Persons between whom made.

See 1 Cent. Dig. Accord, §§ 22-30.

Plaintiffs, who were lawyers, were employed by a state to recover the proceeds of misappropriated bonds, for which services they were to receive 20 per cent. of the sums realized. After one judgment had been recovered, defendants were employed as "outside aids" to assist in the negotiations, under an arrangement by which they also were to receive a percentage. In consequence of the efforts of the plaintiffs, the defendants were enabled to collect a large sum of money, which they had agreed not to pay over to the state authorities until plaintiffs contingent fee had been provided for. In violation of this arrangement, they turned over the whole sum, retaining only their own percentage, and a much less sum as a compensation for plaintiffs' services. Plaintiffs were notified by the governor that, unless they would accept that sum under a receipt in full for all services, he would pay it into the treasury, and leave the matter to be settled by the legislature, and under that pressure plaintiffs executed the receipt and took the money. *Held*, that they are precluded thereby from recovering damages from the defendants for having surrendered the fund in advance of the payment of their fees.—*Morris v. Giddings*, 115 U. S. 300, 6 S. Ct. 65, 29 L. Ed. 403.

④. Form of agreement of accord.

See 1 Cent. Dig. Accord, §§ 32-39.

In admiralty proceedings a bond was given on appeal to the circuit court of the United States. After the decision on appeal was decided, the sureties' obligation was compromised, the sureties agreeing not to appeal further, and the attorneys for the obligees executed receipts to each surety, reciting that the amount received was in full satisfaction of the decree rendered against him as surety. *Held*, that this was an accord and satisfaction equivalent to a payment of the decree, and to a satisfaction and discharge

in equity, constituting a good defense to an action on the appeal bond.—*Bofinger v. Tuyen*, 120 U. S. 198, 7 S. Ct. 529, 30 L. Ed. 649.

⑤. Consideration of accord in general.

See 1 Cent. Dig. Accord, §§ 40-45.

An accord and satisfaction results from the receipt, under protest, in discharge of a particular payment, of a different money medium from that which was required by a contract.—*City of San Juan v. St. John's Gas Co.*, 25 S. Ct. 108, 195 U. S. 510, 49 L. Ed. 299, 1 Ann. Cas. 796.

⑥. Part payment.

See 1 Cent. Dig. Accord, §§ 46-53, 60-62, 84-96; 30 Cent. Dig. Judgm. § 1666; 39 Cent. Dig. Paymt. §§ 133, 134.

⑦. — In general.

See 1 Cent. Dig. Accord, §§ 46-53, 63, 94, 95; 30 Cent. Dig. Judgm. § 1666; 39 Cent. Dig. Paymt. §§ 133, 134.

The rule that payment of a less sum in satisfaction of a larger sum is not binding for want of consideration only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of a part of it, and the rule itself is considered so far with disfavor as to be confined strictly to cases within it. Judgment 92 F. 968, 35 C. C. A. 120, reversed.—*Chicago, M. & St. P. Ry. Co. v. Clark*, 20 S. Ct. 924, 178 U. S. 353, 44 L. Ed. 1099.

⑩. — Disputed or unliquidated claims.

See 1 Cent. Dig. Accord, §§ 67-74; 30 Cent. Dig. Judgm. § 1666.

The payment of a specified sum conceded to be due, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole sum, where the aggregate amount is

in dispute. Judgment: 92 F. 968, 35 C. C. A. 120, reversed.—Chicago, M. & St. P. Ry. Co. v. Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. Ed. 1099.

An agreement that payment in United States currency should extinguish a larger amount due under a street-lighting contract estimated in Porto Rican currency is binding where there was a bona fide dispute between the parties as to the medium of payment; the municipality insisting that it was Porto Rican money, and the lighting company that it was current foreign money.—City of San Juan v. St. John's Gas Co., 25 S. Ct. 108, 195 U. S. 510, 49 L. Ed. 299, 1 Ann. Cas. 796.

⌚21. Rescission by parties.

See 1 Cent. Dig. Accord, § 143.

A board of levee commissioners made a settlement with contractors, paid a certain sum,

and took a receipt in full of all demands. An agreement was subsequently executed reciting a complaint of the contractors of injustice in the settlement, and stipulating for a remeasurement of the work, and an arbitration of differences; that as to questions of measurement the contractors might introduce evidence, and the board might rebut it; but that, before proceeding with the measurement, the contractors should give written notice to the board of the points to be proved and the evidence to be offered. The contractors gave notice of their intention to introduce evidence of several matters which did not concern the measurement, and, upon objection, the arbitration fell through. *Held*, that there was no rescission of the settlement and receipt as an accord and satisfaction, entitling the contractors to maintain suit on the original contract for further compensation.—Hemingway v. Stansell, 106 U. S. 399, 1 S. Ct. 473, 27 L. Ed. 245.

ACCOUNT.

Scope-Note.

[INCLUDES actions to compel the rendering of accounts, more particularly common-law actions of account or account render and similar statutory remedies and equitable actions of account, and operation and effect of accounts rendered and settled, either in such actions or by voluntary act of the parties; nature and scope of the remedy to obtain an account in general; grounds of such actions and defenses thereto; by and against whom they may be maintained; jurisdiction to compel accounting and proceedings therefor, and proceedings before auditors, referees, masters, etc.; incidental relief; judgments or decrees and enforcement thereof; review of proceedings; and opening, correcting, surcharging, and falsifying accounts in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Action and Defenses.

- ⌚1. Nature and grounds of right to an account.
- 4. Fiduciary relations.
- 6. Complicated transactions or circumstances.

II. Proceedings and Relief.

- ⌚12. Equitable jurisdiction.
- 13. Equitable actions.
- 15. — Limitations and laches.
- 16. — Parties.
- 18. — Evidence.

III. Operation and Effect of Accounting.

- ⌚25. Opening and correcting.

Cross-References.

See Account Stated.

Books of account, see Evidence, ⌚354.
Interstate Commerce Commission, authority to prescribe system of accounting for carriers, see Commerce, ⌚85; delegation of legislative power relative to system of accounting for carriers, see Constitutional Law, ⌚62.
Review of final decree, see Appeal and Error, ⌚78.
Settlement of balance of mutual accounts, see Compromise and Settlement.

Accounting by particular classes of persons.

See—

Ambassadors and Consuls, ⌚7.

See—

Associations, ⌚25.
Executors and Administrators, ⌚462-495.
Partnership, ⌚304-311, 318-340.
Receivers, ⌚192-203.
Trusts, ⌚295-308.
United States, ⌚44, 50.
United States Commissioners, ⌚3.
United States Marshals, ⌚25.

Accounting incidental to particular actions or proceedings.

See Copyrights, ⌚87.

I. RIGHT OF ACTION AND DEFENSES.

1. Nature and grounds of right to an account.

See 1 Cent. Dig. Acct. §§ 1-3.

The estate of an attorney who agreed to divide the net fees received in the prosecution of French spoliation claims, in consideration of the exclusive use of certain papers, may be required to account for fees received for services performed by his administrator, where the accounting has been treated by both parties as one proper to be made for the whole period. Judgment, *Waggaman v. Earle* (1905) 25 App. D. C. 582, reversed.—*Earle v. Myers*, 28 S. Ct. 86, 207 U. S. 244, 52 L. Ed. 191.

A mere creditor, as such, has no right to compel his debtor to account in equity, in the absence of any trust relation between them. Decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversed.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

4. Fiduciary relations.

See 1 Cent. Dig. Acct. §§ 13, 14.

Plaintiffs, real-estate speculators, agreed to intrust the negotiations for and the purchase of such real estate as they might elect to acquire to defendants, real-estate agents, who agreed to give to plaintiffs their best judgment, knowledge, and experience in the selection of property for purchase, and in all cases negotiate for the purchase of any property at the lowest figure obtainable from the owner, and after obtaining such figure advise plaintiffs as to the desirability of its purchase. The bill alleged purchase of several tracts, and charged fraud on the part of defendants, in that they failed to report to plaintiffs the lowest figures at which the property was obtainable, and also that defendants had a large amount of plaintiffs' money on hand which they had wrongfully appropriated. Defendants answered, denying the fraud, and setting up a counterclaim for services performed. Defendants, before their agreement with plaintiffs, had bargained for a tract of land for \$40,000. This tract they offered to plaintiffs at \$65,000, without disclosing the fact that they were the owners, which offer was accepted. Held that, while they ought to have disclosed their relation to it, yet as their contract did not give plaintiffs the benefit of existing contracts, and as the latter were willing to accept the tract at those figures, defendants cannot be required to account for the \$25,000.—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 S. Ct. 594, 32 L. Ed. 1005.

Equity has jurisdiction of a suit for an accounting under a contract to receive a 10 per cent. interest in a concession where the bill alleges an abuse of a fiduciary relation thus created, by a secret transaction from which profits accrued.—*Valdes v. Larrinaga*, 34 S. Ct. 750, 233 U. S. 705, 58 L. Ed. 1163.

6. Complicated transactions or circumstances.

See 1 Cent. Dig. Acct. §§ 17, 18.

Plaintiffs, real-estate speculators, agreed to intrust the negotiations for and the purchase of such real estate as they might elect to acquire to defendants, real-estate agents, who agreed to give to plaintiffs their best judgment, knowledge, and experience in the selection of property, and negotiate for the purchase of any property at the lowest figure obtainable, and, after obtaining such figure, advise plaintiffs as to the desirability of its purchase. The bill alleged purchase of several tracts, and charged fraud by defendants, in that they failed to report to plaintiffs the lowest figures at which the property was obtainable, and also that defendants had a large amount of plaintiffs' money on hand

which they had wrongfully appropriated. Defendants, without objecting to the jurisdiction, answered, denying the fraud, and setting up a counterclaim for services performed. There had been several changes both in defendants' and plaintiffs' firms, and the accounting before the adjustment of the various interests was apparently complicated. Held, that plaintiffs' remedy at law was so embarrassed and doubtful that equity would take jurisdiction.—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 S. Ct. 594, 32 L. Ed. 1005.

II. PROCEEDINGS AND RELIEF.

12. Equitable jurisdiction.

See 1 Cent. Dig. Acct. §§ 62-70.

Redress cannot be had in equity for the wrongful cutting, carrying away, and conversion of timber from the public domain on the theory that, because the wrongdoers had been granted permits to cut timber from other lands, a case was made for an accounting. Decree 133 F. 274, 66 C. C. A. 652, affirmed.—*United States v. Bitter Root Development Co.*, 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

13. Equitable actions.

See 1 Cent. Dig. Acct. §§ 71-135.

15. — Limitations and laches.

See 1 Cent. Dig. Acct. § 72.

Failure to bring suit for an accounting under an agreement to divide the net attorneys' fees received in the prosecution of French spoliation claims until two years after the enactment of Appropriation Act March 3, 1899, c. 426, 30 Stat. 1161, 1191 [U. S. Comp. St. 1901, p. 751], from which payment might be made, is not such laches as defeats a recovery. Judgment, *Waggaman v. Earle* (1905) 25 App. D. C. 582, reversed.—*Earle v. Myers*, 28 S. Ct. 86, 207 U. S. 244, 52 L. Ed. 191.

16. — Parties.

See 1 Cent. Dig. Acct. §§ 74-76.

Where a landlord seized crops liable to a factor's lien, in an action by the latter for an accounting, the lessees are necessary parties.—*Saloy v. Bloch*, 136 U. S. 338, 10 S. Ct. 996, 34 L. Ed. 468.

In an action by the mortgagees of an undivided part of timber land, after the death of the mortgagor, against a purchaser at execution sale under a judgment against a firm of which the mortgagor was a member, and his copartner, holding title to the other part of the land, for an accounting for timber converted by defendant, a decree for plaintiffs should not be disturbed because the mortgagor's heirs were not parties, where the debt was unpaid, and the firm was insolvent, and only the wife of the mortgagor survived.—*McGahan v. National Bank of Rondout*, 156 U. S. 218, 15 S. Ct. 347, 39 L. Ed. 403.

18. — Evidence.

See 1 Cent. Dig. Acct. §§ 89-93.

Where, in a suit for an accounting, an allowance for expenses is asked which is clearly excessive and exorbitant, the party claiming such allowance must establish the amount which he is entitled to, and it is not the duty of the court or its officers to arbitrarily guess at such amount.—*Spalding v. Mason*, 161 U. S. 375, 16 S. Ct. 592, 40 L. Ed. 738.

III. OPERATION AND EFFECT OF ACCOUNTING.

25. Opening and correcting.

See 1 Cent. Dig. Acct. §§ 143-153.

A bill alleged a contract between the firm of complainant's testator and defendant railroad

companies, under which, during a certain year the firm made about 250 shipments of cattle and hogs, the freights upon which aggregated nearly \$350,000; alleged fraud and concealment on the part of defendants in the monthly settlements of the freight accounts which were had; and asked to have the settlements opened, and to recover what should upon a reaccounting appear due. *Held*, that a case was made for equitable jurisdiction.—*Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, 7 S. Ct. 430, 30 L. Ed. 569.

ACCOUNT, ACTION ON.

See 1 Cent. Dig. Acct. Action on.

See—

Account Stated.

Evidence, ¶354.

Limitation of Actions, ¶52-54.

ACCOUNT RENDER.

See—

Account, ¶12-18, 25.

Account Stated.

ACCOUNT STATED.*Scope-Note.*

[INCLUDES obligations implied or imposed by law to pay the balance of an account rendered or stated between parties and admitted to be due, independent of any express promise of payment; nature, requisites, incidents, operation, and effect of such statements of accounts; and rights, liabilities, and remedies of the parties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶6. Implied assent of party to be charged.
- 11. Opening and correcting.

Cross-References.

See—

Account.

Assumpsit, Action of.

¶6. Implied assent of party to be charged.

See 1 Cent. Dig. Acct. St. §§ 30-39.

The entries in a depositor's pass book, striking a balance, and the delivery of the book to the depositor, which he retains without objection, constitutes an account stated.—*Leather Manufrs' Nat. Bank v. Morgan*, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811.

¶11. Opening and correcting.

See 1 Cent. Dig. Acct. St. §§ 61-72.

Though the lapse of time from September, 1875, when the account was rendered, to January, 1876, during which no objection is made, is sufficient to convert it into an account stated, still it may yet be impeached by evidence of a mistake in the count of the goods on which it is founded.—*Standard Oil Co. v. Van Etten*, 1 S. Ct. 178, 107 U. S. 325, 27 L. Ed. 319.

ACCRETION.

See—

Navigable Waters, ¶44.

Waters and Water Courses, ¶93.

ACCRUAL.

Liability on bonds, see Injunction, ¶234, 235.
Right of action, see Limitation of Actions, ¶44-59.

ACCUSATION.

See Indictment and Information.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

ACKNOWLEDGMENT.

Scope-Note.

[INCLUDES formal declarations of the genuineness of an instrument in writing, made by a person executing it, or proof of due execution of such an instrument, made by an attesting witness or other person, before a competent court or officer, to establish the validity of such instrument, or to entitle it to be admitted in evidence or to be recorded; nature and necessity of making acknowledgment; making, taking, form, and requisites of such acknowledgments, and form and requisites of certificates of acknowledgment; amendment of defects therein; and conclusiveness and effect of acknowledgments and of certificates of acknowledgment.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and necessity.

- ⌚ 4. Instruments to be acknowledged or proved.
- 5. Unacknowledged instruments.

II. Taking and Certificate.

- ⌚ 10. Time of making.
 - 11. Persons who may make acknowledgment.
 - 35. Contents of certificate.
 - 36. ——— Matters certified in general.
 - 37. ——— Acknowledgments of married women.
 - 39. Further certificate of authenticity and conformity to law.
 - 43. Curing defects.
 - 44. ——— Subsequent acknowledgment.
 - 47. ——— Curative statutes.

III. Operation and Effect.

- ⌚ 49. Construction and operation of certificate in general.
- 55. Conclusiveness of certificate.

IV. Pleading and Evidence.

- ⌚ 62. Evidence to impeach or contradict certificate.

Cross-References.

Admissions as evidence, see Evidence, ⌚ 206—265.	Illegitimate child, see Bastards, ⌚ 13.
Consul fees, see Ambassadors and Consuls, ⌚ 7.	Indebtedness, see Limitation of Actions, ⌚ 140-150.

I. NATURE AND NECESSITY.

⌚ 4. Instruments to be acknowledged or proved.

See 1 Cent. Dig. Ack. §§ 7-21.

Acknowledgment by the grantor before a proper officer is made as much a prerequisite to the validity of a deed as the signing, by Rev. St. Ariz. 1901, par. 725, providing that "every deed or conveyance of real estate must be duly acknowledged by some officer authorized to take acknowledgments, and properly certified to by him for registration." Judgment (Ariz. 1906) 85 P. 245, affirmed.—Lewis v. Herrera, 28 S. Ct. 412, 208 U. S. 309, 52 L. Ed. 506.

⌚ 5. Unacknowledged instruments.

See 1 Cent. Dig. Ack. §§ 22-42, 44; 16 Cent. Dig. Deeds, § 98; 20 Cent. Dig. Evid. § 1420.

Under Act March 27, 1869, providing that any feme covert above the age of 18, joining with her husband in any deed, mortgage, or other writing relating to land shall be bound by it as if she were sole and of full age, and that the acknowledgment of such instrument may be the

same as if she were sole, a conveyance of the wife's land, executed by husband and wife, but not acknowledged by her, passes her title, subject only to homestead rights which are governed by a different statute. Paxton v. Marshall 18 Fed. 361, affirmed.—Knight v. Paxton, 124 U. S. 552, 8 S. Ct. 592, 31 L. Ed. 518.

II. TAKING AND CERTIFICATE.

Conveyance by wife, see Husband and Wife, ⌚ 194.

Conveyance of homestead, see Homestead, ⌚ 119.

⌚ 10. Time of making.

See 1 Cent. Dig. Ack. §§ 60-61.

Under the Virginia statute a deed by husband and wife, conveying the wife's land, is inoperative to pass her title, unless the husband, she having duly acknowledged the deed, has, in her lifetime, and by an acknowledgment in the form prescribed by law, signified his consent.—Sewall v. Haymaker, 127 U. S. 719, 8 S. Ct. 1348, 32 L. Ed. 299.

§11. Persons who may make acknowledgment.

See 1 Cent. Dig. Ack. §§ 63-74.

Under Sayles' Civ. St. art. 559, providing that no conveyance of a wife's separate property shall take effect unless made by her and her husband jointly, and acknowledged by her privily, and apart from her husband, a conveyance by the husband for himself, and as attorney for his wife, by virtue of a power of attorney privily acknowledged by her, is void, unless the deed itself is privily acknowledged by her. *Cannon v. Boutwell*, 53 Tex. 626, and *Peak v. Brinson*, 71 Tex. 310, 11 S. W. 269, followed.—*Merix v. Oliver*, 148 U. S. 664, 13 S. Ct. 754, 37 L. Ed. 602.

§35. Contents of certificate.

See 1 Cent. Dig. Ack. §§ 181-223.

§36. — Matters certified in general.

See 1 Cent. Dig. Ack. §§ 181, 182, 184-198, 221-223.

A recital in a certificate of acknowledgment of a deed that "personally came" the grantors, naming them, "known to me to be the persons who executed the foregoing instrument," satisfies the requirement of Rev. St. Ill. 1845, p. 107, § 20, that the certificate shall state that the person making the acknowledgment was personally known to the officer to be the real person executing the deed.—*Schley v. Pullman's Palace Car Co.*, 120 U. S. 575, 7 S. Ct. 730, 30 L. Ed. 789, affirming judgment (C. C.) 25 F. 890.

§37. — Acknowledgments of married women.

See 1 Cent. Dig. Ack. §§ 182, 199-216.

The statement, in a certificate of a married woman's acknowledgment, that she executed the deed freely and without compulsion from any one, "fully understanding the contents" of it, is equivalent to a statement that she was informed of its contents, or, at least, that she "knew the contents," within Act Ill. Feb. 11, 1853, § 1.—*Schley v. Pullman's Palace Car Co.*, 120 U. S. 575, 7 S. Ct. 730, 30 L. Ed. 789, affirming judgment (C. C.) 25 F. 890.

§39. Further certificate of authenticity and conformity to law.

See 1 Cent. Dig. Ack. §§ 244-254.

Under How. Ann. St. § 5660, providing that where an acknowledgment of a deed is taken in another state the clerk certifying to the official character of the officer shall also state that the deed was "executed and acknowledged according to the laws of such state," such certificate by the clerk sets at rest any question as to the form of the acknowledgment.—*Culbertson v. H. Witbeck Co.*, 127 U. S. 326, 8 S. Ct. 1136, 32 L. Ed. 134.

§43. Curing defects.

See 1 Cent. Dig. Ack. §§ 231-240.

§44. — Subsequent acknowledgment.

See 1 Cent. Dig. Ack. §§ 232, 233.

Under the Virginia statute an acknowledgment by a husband of a deed by himself and wife, conveying the wife's land, made after her decease, will not make the deed operative to pass her title.—*Sewall v. Haymaker*, 127 U. S. 719, 8 S. Ct. 1343, 32 L. Ed. 299.

§47. — Curative statutes.

See 1 Cent. Dig. Ack. §§ 235-240.

An act of the legislature, providing that the acknowledgment of a deed may be made under the hand and seal of any officer having a public seal, and extending this provision to deeds made prior to the act, cures the omission of the county clerk's certificate as to the official character of a notary who took an acknowledgment without the state.—*Smith v. Gale*, 144 U. S. 509, 12

S. Ct. 674, 36 L. Ed. 521, affirming judgment *Gale v. Shillock*, 29 N. W. 661, 4 Dak. 182, and *Same v. Frazier*, 30 N. W. 138, 4 Dak. 196.

A deed of North Carolina land, acknowledged before a North Carolina commissioner in the District of Columbia, so that the order for registration under Rev. Code N. C. 1855, c. 37, § 5, would issue as of course, was probated, within curative provision of Laws N. C. 1869-70, c. 32, though order for registration never issued.—*United States v. Hiawasse Lumber Co.*, 35 S. Ct. 851, 238 U. S. 553, 59 L. Ed. 1453, reversing judgment 202 F. 35, 120 C. O. A. 289.

Deeds already registered, as well as those unregistered, were within curative provision of Laws N. C. 1869-70, c. 32, if deed was already registered when statute was adopted, though the judicial order contemplated by Rev. Code N. C. 1855, c. 37, was never issued.—Id.

Necessity of registration within two years from date of deed, under Rev. Code N. C. 1855, c. 37, § 1, was not dispensed with by Laws N. C. 1869-70, c. 32.—Id.

Curative provisions of Laws N. C. 1876-77, c. 23, as to defectively probated deeds, do not apply to a deed not registered within two years after ratification of that statute.—Id.

III. OPERATION AND EFFECT.

§49. Construction and operation of certificate in general.

See 1 Cent. Dig. Ack. §§ 255-263.

The signature of one of the grantors was expressly attested by only one witness, but the justice who took his acknowledgment signed, together with such witness, a memorandum in the deed in reference to an interlined word, and also certified in taking the acknowledgment that the person making it was "the individual described in and who executed the within instrument." *Held* a sufficient attestation by two witnesses.—*Culbertson v. H. Witbeck Co.*, 127 U. S. 326, 8 S. Ct. 1136, 32 L. Ed. 134.

§55. Conclusiveness of certificate.

See 1 Cent. Dig. Ack. §§ 290-300, 303-314.

A notary public took the acknowledgment to a deed of a married woman, in the form given by the statute. In an action to set the deed aside, she testified that it was her signature, and that she did not recollect acknowledging or executing it, and denied that it was explained to her. *Held*, that her signature being admitted, and there being no proof of fraud or duress in taking or procuring the acknowledgment, extrinsic evidence was incompetent to impeach the certificate of the notary as to the manner in which he had performed his duty.—*Hitz v. Jenks*, 123 U. S. 297, 8 S. Ct. 143, 31 L. Ed. 156.

IV. PLEADING AND EVIDENCE.

§62. Evidence to impeach or contradict certificate.

See 1 Cent. Dig. Ack. §§ 345-347.

Where, in a suit to set aside a deed of trust to secure a note by husband and wife, it appears that she was before an officer competent to take her acknowledgment, and that she knew or might have ascertained the property referred to in the deed, and the object of its execution, the certificate must stand against a mere conflict of evidence as to whether she willingly executed it, or had its contents explained to her, or was privily examined apart from her husband. It cannot be impeached in those respects, except upon proof clearly showing it to be false or fraudulent.—*Young v. Duvall*, 109 U. S. 578, 3 S. Ct. 414, 27 L. Ed. 1036.

After 24 years, the certificate of two justices of the peace, who have since died, to the

acknowledgment of a deed by a husband and wife, should prevail over the wife's doubtfully made assertion that she never heard of the deed, and the husband's testimony that he signed his wife's name, and that they never acknowledged the instrument, he being of doubtful credibility. —Hammond v. Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. Ed. 134.

ACQUIESCENCE.

Estoppel in pais, see Estoppel, ¶89-94.
To taking property, see Eminent Domain, ¶280.

ACQUITTAL.

Element of jeopardy, see Criminal Law, ¶186.

ACTION.

Scope-Note.

[INCLUDES nature, grounds, and incidents of civil actions in general; what constitutes causes of action and defenses in general; who are entitled to sue and to defend; distinctions between civil and criminal remedies and legal and equitable remedies, between actions on contract and actions of tort, and between particular forms of actions; cumulative and exclusive remedies; joinder and splitting of causes of action, and consolidation and severance of actions; demand or notice before suit, leave to sue, and other conditions precedent; and commencement, prosecution, and termination of actions in general, and stay of proceedings therein.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Grounds and Conditions Precedent.

- ¶2. Acts or omissions constituting causes of action in general.
- 8. Frivolous or collusive actions.
- 13. Persons entitled to sue.

II. Nature and Form.

- ¶17. What law governs.
- 21. Legal or equitable.
- 22. — Nature of action:
- 23. — Equitable relief in action at law.
- 25. — Under codes and practice acts.
- 26. Contract or tort.
- 27. — Nature of action.

III. Joinder, Splitting, Consolidation, and Severance.

- ¶43. Joinder of causes of action under Codes and practice acts.
- 46. — Legal and equitable.
- 50. — Parties and interests involved.
- 54. Consolidation of actions.
- 57. — Actions which may be consolidated.

IV. Commencement, Prosecution, and Termination.

- ¶64. Proceedings constituting commencement.

Cross-References.

See Abatement and Revival.

Accrual, see Limitation of Actions, ¶44-59.

Authority of attorney, see Attorney and Client, ¶87, 88.

Bar by former adjudication, see Judgment, ¶541-632.

Claim or position in judicial proceedings, see Estoppel, ¶68.

Constitutional guaranties of remedies, see Constitutional Law, ¶322-329.

Damages recoverable, see Damages.

Election of remedy, see Election of Remedies.

Judicial admissions, see Evidence, ¶206-210.

Judicial notice, see Evidence, ¶43.

Jurisdiction of courts, see Courts.

Laches, see Equity, ¶67-87.

Limitation by statutes, see Limitation of Actions.

Malicious actions, see Malicious Prosecution.

Officious intermeddling in suits between others, see Champerty and Maintenance.

Pendency of action, limitation, see Limitation of Actions, ¶105.

Pendency of other action ground for abatement, see Abatement and Revival, ¶8-10.

Privilege in publication of judicial proceedings, see Libel and Slander, ¶38.

Recovery in civil action as bar to criminal prosecution, see Criminal Law, ¶43.

Restraining action at law, see Injunction, ¶26-32.
 Retrospective laws relating to remedies, see Constitutional Law, ¶191.
 Rights of action as vested rights, see Constitutional Law, ¶105.
 Rights of trustees in bankruptcy as to pending actions, see Bankruptcy, ¶156.
 Right to trial by jury, see Jury, ¶9-37.
 Statutes, due process of law, see Constitutional Law, ¶304-317; equal protection of laws, see Constitutional Law, ¶249; subjects and titles of acts, see Statutes, ¶117.
 Survival, see Abatement and Revival, ¶49-69.
 Suspension, due process of law, see Constitutional Law, ¶308.
 Validity of proceedings on Sunday, see Sunday, ¶30.

Actions between parties in particular relations.

See—

Attorney and Client, ¶157-166.
 Bailment, ¶24-31.
 Brokers, ¶38, 88.
 Chattel Mortgages, ¶268-281.
 Corporations, ¶189, 319.
 Husband and Wife, ¶205.
 Master and Servant, ¶34-40, 250¼-297.
 Mortgages, ¶380-590.
 Partition, ¶12-112.
 Partnership, ¶102-118, 318-340.
 Principal and Agent, ¶79.
 Principal and Surety, ¶145-159.
 Tenancy in Common, ¶38.
 Territories, ¶32.

Actions by or against particular classes of persons.

See—

Assignments, ¶117-121.
 Attachment, ¶341-351.
 Attorney and Client, ¶157-166.
 Bankruptcy, ¶277-306, 390, 391.
 Banks and Banking, ¶175, 275, 278.
 Brokers, ¶38.
 Carriers, ¶126-136, 181-185, 220-230, 273-278, 309-321, 342-347, 375-384.
 Chattel Mortgages, ¶268-281.
 Colleges and Universities, ¶10.
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Particular remedies in or incident to actions.

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I. GROUNDS AND CONDITIONS PRECEDENT.

Acquittal, effect, see Judgment, ¶559.

¶2. Acts or omissions constituting causes of action in general.

See 1 Cent. Dig. Action, §§ 10-16.

A railroad company which, by bribing the officials of a rival company, obtains control of the latter's stock, causes the calling in of its engineering parties so as to stop construction work, spreads abroad notices which break down the credit of the contractor and result in the seizure of his tools, and by such means prevents the completion of the road in time to earn a land grant, and then by false representations to the legislature secures a forfeiture of the lands and a subsequent grant to itself, is liable to such contractor for the damage caused by

these wrongful acts, and such damages may be enforced in equity against the lands in its hands, without questioning the validity of the legislature's action.—*Angle v. Chicago, St. P., M. & O. Ry. Co.*, 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55, reversing decree (C. C.) 39 Fed. 912.

¶3. Frivolous or collusive actions.

See 1 Cent. Dig. Action, §§ 9, 41.

A suit will not be dismissed as collusive, when brought by stockholders against the corporation and its officers and the attorney general to restrain the enforcement of a statute, merely because the officers of the corporation agree with the stockholders as to the unconstitutionality of the statute. *Decree, Cotting v. Kansas City Stockyards Co. (C. C.)* 82 F. 850, reversed.—*Cotting v. Godard*, 22 S. Ct. 30, 183 U. S. 79, 46 L. Ed. 92.

13. Persons entitled to sue.

See 1 Cent. Dig. Action, §§ 76-83.

Plaintiff recovered a judgment against a county on bonds issued by it, and, in obedience to a writ of mandamus, a special tax was levied and property seized to satisfy such judgment. Defendant, in pursuance of a conspiracy to prevent the collection of such tax, prevented, by menaces and hostile acts, any one from bidding for the property levied on, and influenced taxpayers not to pay the special tax. *Held*, that plaintiff had such an interest in the special tax, and sustained such damage, as entitled him to maintain an action against defendants.—*Findlay v. McAllister*, 113 U. S. 104, 5 S. Ct. 401, 28 L. Ed. 930.

Code Civ. Proc. N. Y. § 449, authorizing a person with whom or in whose name a contract is made with another to sue thereon in his own name, is by Rev. St. U. S. § 914, made applicable to the federal courts.—*Albany & Rensselaer Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 S. Ct. 958, 30 L. Ed. 982.

An action by a private person against a sheriff to compel him to release from custody another person, whom he alleges to be held in forcible custody in violation of the constitutional rights of the prisoner, cannot be maintained because of any friendship or sympathy that the plaintiff may have for the prisoner, or any concern he may feel as to the enforcement of unconstitutional laws.—*Gusman v. Marrero*, 21 S. Ct. 293, 180 U. S. 81, 45 L. Ed. 436.

II. NATURE AND FORM.

Adoption by federal courts of practice of state courts, see Courts, 342.

Affecting appealability of final judgments, see Appeal and Error, 77.

Affecting appealability of interlocutory decisions, see Appeal and Error, 69.

Affecting appellate jurisdiction, see Appeal and Error, 41.

Affecting conclusiveness of judgment, see Judgment, 643-646.

Affecting manner of review, see Appeal and Error, 4, 5.

Affecting right to trial by jury, see Jury, 12.

Limitations as affected by nature and form of action, see Limitation of Actions, 16.

Review of decisions, see Appeal and Error, 182-184.

Particular actions or proceedings.

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Attachment, 368.

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Contracts, 324.

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Customs Duties, 133.

Master and Servant, 35.

Mortgages, 380.

Trusts, 359.

Vendor and Purchaser, 269.

17. What law governs.

See 1 Cent. Dig. Action, § 94.

Whether an action to enforce against the grantee of a mortgagor an agreement in the deed to assume the mortgage debt must be brought at law or in equity is to be determined by the law of the place where the remedy is sought.—*Willard v. Wood*, 17 S. Ct. 176, 164 U. S. 502, 41 L. Ed. 531.

21. Legal or equitable.

See 1 Cent. Dig. Action, §§ 124-139, 143, 145-159; 19 Cent. Dig. Equity, §§ 4, 5.

22. — Nature of action.

See 1 Cent. Dig. Action, §§ 124-139, 143, 145.

A debt was secured by both a real-estate and a chattel mortgage, and subsequently the chattels were attached at suit of other creditors in the circuit court. The real estate was sold, and the proceeds applied to the debt, but failed to satisfy it, and the mortgagees brought an action against the United States marshal and his bondsmen to recover the value of attached chattels. *Held*, that this was a legal, not an equitable, action, and it was not error to refuse to transfer it from the law to the equity docket.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892.

A suit by laborers and materialmen, brought in the name of the United States under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, upon a public contractor's bond is one at law and not in equity, notwithstanding the provisions as to priority of the United States and the limitation of recovery to the penalty of the bond.—*Illinois Surety Co. v. United States*, 36 S. Ct. 321, 240 U. S. 214, 60 L. Ed. 609, modifying judgment 215 F. 334, 131 C. C. A. 476.

23. — Equitable relief in action at law.

See 1 Cent. Dig. Action, §§ 146-153; 19 Cent. Dig. Equity, § 5.

State statutes making equitable rights enforceable in actions at law cannot affect the equity jurisdiction of the federal courts; and, in determining whether there is an adequate remedy at law, the inquiry is whether, by the principles of common law and equity, as distinguished and defined in this country and England at the time of the adoption of the constitution of the United States, the relief sought was obtainable at law.—*Mississippi Mills v. Cohn*, 150 U. S. 202, 14 S. Ct. 75, 37 L. Ed. 1052, reversing decree (C. C.) 39 Fed. 865.

The adoption of the state practice in circuit courts of the United States does not allow a suit to enjoin collection of taxes—an equitable suit—to be brought therein on the law side of the court, though in the state court no distinction is made between the legal and equitable sides.—*Lindsay v. First Nat. Bank of Shreveport*, 156 U. S. 485, 15 S. Ct. 472, 39 L. Ed. 505.

25. — Under codes and practice acts.

See 1 Cent. Dig. Action, §§ 124-145, 147-149, 153, 156-159, 312; 19 Cent. Dig. Equity, § 4.

Recovery may be had on a complaint which states facts constituting a cause of action either at law or in equity.—*Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 S. Ct. 293, 32 L. Ed. 688.

26. Contract or tort.

See 1 Cent. Dig. Action, §§ 160-215; 5 Cent. Dig. Assumpsit, §§ 42-54.

27. — Nature of action.

See 1 Cent. Dig. Action, §§ 160-195; 9 Cent. Dig. Carr. § 1075.

Where a trustee of a corporation is sued under section 12 of the corporation act to recover a debt of the corporation because of failure of the trustee to make the statutory report, the liability is one for tort, and, though reduced to judgment, it does not thereby become a debt by the corporation.—*Chase v. Curtis*, 113 U. S. 452, 5 S. Ct. 554, 28 L. Ed. 1038.

An allegation that plaintiff, as a passenger on defendant's road at the time of the injury, was traveling on a certain kind of ticket, does not render the action one *ex quasi contractu*; there being no allegation of any undertaking or

promise, or breach thereof, by the defendant.—*Atlantic & P. Ry. Co. v. Laird*, 17 S. Ct. 120, 164 U. S. 393, 41 L. Ed. 485, affirming judgment 58 F. 760, 7 C. C. A. 489.

Where holder of a ticket of admission to a race course is forcibly prevented from entering, or forcibly ejected just after he had dropped his ticket in the box, his remedy is by an action for damages for breach of contract and not by an action of trespass.—*Marrone v. Washington Jockey Club of District of Columbia*, 33 S. Ct. 401, 227 U. S. 633, 57 L. Ed. 679, 43 L. R. A. (N. S.) 961, affirming judgment 35 App. D. C. 82.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

Consolidation in federal court, see Courts, ¶352.

Consolidation of action in admiralty, see Admiralty, ¶37.

Joinder of counts, see Indictment and Information, ¶126-132.

Joinder of proceedings for review of decisions, see Appeal and Error, ¶15.

Judgment as bar to another action, see Judgment, ¶591-596.

Jurisdictional amount on appeal, see Courts, ¶387(1).

¶43. Joinder of causes of action under Codes and practice acts.

See 1 Cent. Dig. Action, §§ 378-547; 7 Cent. Dig. Bills & N. § 1453; 8 Cent. Dig. Bonds, § 137; 15 Cent. Dig. Death, § 22; 17 Cent. Dig. Eject. §§ 123, 124; 22 Cent. Dig. Ex. & Ad. §§ 1673, 1689-1691; 24 Cent. Dig. Fraud. Conv. § 688; 28 Cent. Dig. Insurance, § 1519; 30 Cent. Dig. Judgm. § 881; 32 Cent. Dig. Land. & Ten. §§ 872, 1182; 32 Cent. Dig. Libel, § 171; 42 Cent. Dig. Replev. § 112; 46 Cent. Dig. Tresp. §§ 66, 67; 46 Cent. Dig. Tresp. to T. T. § 27; 47 Cent. Dig. Trover, § 170; 48 Cent. Dig. Ven. & Pur. § 766.

¶46. — Legal and equitable.

See 1 Cent. Dig. Action, §§ 449, 451-468; 22 Cent. Dig. Ex. & Ad. §§ 1689-1691; 30 Cent. Dig. Judgm. § 881; 46 Cent. Dig. Tresp. to T. T. § 27.

Congress granted to a railroad company right of way through the Indian Territory, and provided for the appointment of commissioners to assess the compensation to be paid to the owners of the land, giving such owners the right of appeal from the award of the commissioners to the circuit court of the United States, where the case should be tried de novo. The Cherokee Nation filed its bill in the circuit court seeking to set aside the award made by the commissioners, and to perpetually enjoin the company from maintaining its road, through its land, on the ground that congress had no authority to grant the right of way, and united with such cause of action a prayer that, if the injunction should be refused, it might be awarded adequate damages. *Held*, that the bill was demurrable for joinder of equitable and legal causes of action. 33 Fed. 900 reversed.—*Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295.

¶50. — Parties and interests involved.

See 1 Cent. Dig. Action, §§ 511-547; 7 Cent. Dig. Bills & N. § 1453; 12 Cent. Dig. Corp. §§ 819, 1130, 1132, 1504; 15 Cent. Dig. Death, § 22; 17 Cent. Dig. Eject. § 123; 22 Cent. Dig. Ex. & Ad. §§ 1673, 1689-1691; 23 Cent. Dig. Insurance, § 1519; 30 Cent. Dig. Judgm. § 881; 32 Cent. Dig. Libel, § 171; 36 Cent. Dig. Mun. Corp. §§ 992, 1717; 39 Cent. Dig. Plead. § 137; 48 Cent. Dig. Ven. & Pur. § 766.

Several fire insurance companies contracted with each other to defend against claims for insurance of certain property on which they all had policies, agreed to bear the expense thereof pro rata in proportion to their respective risks, and appointed a committee to take charge of the defense, employ counsel, and collect from each company the proportionate amount necessary for fees and expenses, and to disburse the

same. The committee communicated the contract to plaintiff, and employed him as counsel. *Held*, in an action for fees, that the liability of the companies was several, and a joint action could not be maintained.—*Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 2 S. Ct. 772, 27 L. Ed. 754.

The joinder by amendment of the assignee of a policy of insurance as a party plaintiff in a suit in Porto Rico by a mortgage creditor of the assured to enforce his rights under the mortgage to the avails of the insurance cannot be deemed a clear abuse of the trial court's discretion, where the assignee's rights are alleged to be subordinate to those of the mortgage creditor, in view of the provision of Law Civ. Proc. Cuba and Porto Rico, art. 156, that "causes of action against several persons, or by several persons against one, arising from the same source of title, or based upon the same cause of action, may be joined and brought in one action."—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

¶54. Consolidation of actions.

See 1 Cent. Dig. Action, §§ 624-698; 17 Cent. Dig. Eject. § 124; 18 Cent. Dig. Em. Dom. § 701; 35 Cent. Dig. Mtg. § 1389; 42 Cent. Dig. Replev. § 112.

¶57. — Actions which may be consolidated.

See 1 Cent. Dig. Action, §§ 632-675; 17 Cent. Dig. Eject. § 124; 18 Cent. Dig. Em. Dom. § 701; 35 Cent. Dig. Mtg. § 1389; 42 Cent. Dig. Replev. § 112.

Under Rev. St. § 921, providing that "causes of a like nature, or relative to the same question," may be consolidated, for the purpose of avoiding unnecessary costs or delays, "when-ever it appears reasonable to do so," actions on life insurance policies by one plaintiff against different defendants, in which the defenses are the same, may be consolidated, but the causes of action must remain distinct, requiring separate verdicts, and no defendant must be deprived of any right material to his defense.—*Mutual Life Ins. Co. of New York v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

Action on bond of public contractor, see United States, ¶67.

Arrest of judgment, see Judgment, ¶263-266.

Commencement and pendency as affecting lis pendens, see Lis Pendens, ¶6-11.

Commencement as fixing time from which interest begins to run, see Interest, ¶47.

Commencement within period of limitation, see Limitation of Actions, ¶117-130.

Premature action, see Replevin, ¶129.

Stay of proceedings, see—
Appeal and Error, ¶459-489.

Bankruptcy, ¶391.

Criminal Law, ¶1084.

Supersedeas, see Supersedeas.

Want of prosecution ground for dismissal or nonsuit, see Dismissal and Nonsuit, ¶60.

¶64. Proceedings constituting commencement.

See 1 Cent. Dig. Action, §§ 725-734.

Rev. St. Wis. 1878, §§ 4239, 4240, relating to the commencement of an action, provide that an action shall be deemed commenced as to each defendant when the summons is served on him, and that an attempt to commence an action shall be deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer of the county in which defendant usually or last resided, or, in case of a corporation, to the proper officer of the county where its general business is transacted, but such an attempt must be followed by

the first publication of summons, or the service thereof, within 60 days. *Held*, that the action was not commenced by service of summons on an officer not authorized to receive it—*Knowlton v. Watertown*, 130 U. S. 327, 9 S. Ct. 539, 32 L. Ed. 956.

ACTION ON THE CASE.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Action on Case.]

ACT OF GOD.

See Carriers, ¶285.

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ADEQUATE REMEDY AT LAW.

Constitutional guaranties, of remedies, see Constitutional Law, ¶322-329.
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Cancellation of Instruments, ¶9-15.
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See 1 Cent. Dig. Adj. Land.

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Boundaries.
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ADJOURNMENT.

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Bankruptcy proceedings, see Bankruptcy, ¶100.
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See—
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See Dower, ¶70-72.

ADMINISTRATION.

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Executors and Administrators.
Husband and Wife, ¶276.
Receivers, ¶90-106.
Trusts, ¶181-268.
Public finances, see—
Counties, ¶150-194.
Municipal Corporations, ¶895-901.
United States, ¶81-91.

ADMIRALTY.

Scope-Note.

[INCLUDES administration of the maritime law, general or local, as a distinct system of jurisprudence, by courts of admiralty; nature, grounds, limits, and subjects of jurisdiction of admiralty in general; and procedure peculiar to suits in admiralty.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Jurisdiction.

1. Nature, grounds, and scope in general.
2. Saving of common-law remedy.
3. Conflict of jurisdiction as to the res.
4. Waters, places, and voyages.
5. Persons.
6. Vessels and other property.
7. Rights and controversies in general.
8. Ownership and possession of vessels.
9. Contracts.
10. — Maritime contracts in general.
16. Liens.
17. Torts.
19. — Injuries to vessels or other property.

I. Jurisdiction—Continued.

- 20. — Personal injuries.
- 21. — Causing death.
- 22. — Torts partly committed or causing damage on land or nonnavigable waters.
- 23. Penalties, forfeitures, and seizures.

II. Remedies in Personam and in Rem.

- 27. Grounds of proceeding in personam.
- 28. Grounds of proceeding in rem.
- 29. Proceeding in personam and in rem for same cause.
- 31. Defenses in general.
- 32. Place of bringing suit.
- 37. Consolidation and severance.

III. Parties, Process, Claims, and Stipulations or Other Security.

- 42. Defendants.
- 45. Process in proceedings in personam.
- 47. — Attachment and garnishment.
- 50. Intervention and bringing in new parties.
- 51. Death of party.
- 54. Bonds and stipulations in general.
- 57. Security for release of vessel or other property.

IV. Pleading, Petitions, and Motions.

- 60. Libel.

V. Evidence, and Taking and Filing Proofs.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Adm. §§ 563-591.]

VI. Hearing or Trial, and Decision.

- 81. Decision.

VII. Commissioners and Proceedings Before Them.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Adm. §§ 612-626.]

VIII. Decree and Enforcement Thereof.

- 92. Judgments on bonds or stipulations

IX. Appeal.

- 103. Decisions reviewable.
- 115. Record.
- 117. Amendments, new pleadings, and proofs, and trial of cause anew.
- 118. Review.

X. Costs.

- 121. Power to award in general.

Cross-References.

See—
Collision.
Maritime Liens.
Salvage.
Seamen.

See—
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Towage.
Jurisdiction of offenses on vessels, see Criminal Law, 97.

I. JURISDICTION.

Concurrent and conflicting jurisdiction, see Courts, 489, 502.
Question of admiralty jurisdiction of District Court as ground for appeal to the United States Supreme Court, see Courts, 385(4).
Territorial courts, see Courts, 429.

1. Nature, grounds, and scope in general.

See 1 Cent. Dig. Adm. §§ 1-17.

The court, in proceedings to limit liability, does not lose jurisdiction by allowing the steamship, after giving a stipulation for her value to go into another district in the ordinary

course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight.—*Morrison v. District Court for Southern District of New York*, 147 U. S. 14, 13 S. Ct. 246, 37 L. Ed. 60.

The maritime usages of foreign countries are not obligatory upon the courts of the United States, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. Decree 77 F. 754, 23 C. C. A. 527, reversed.—*The Elfrida*, 19 S. Ct. 146, 172 U. S. 186, 43 L. Ed. 413.

◀2. Saving of common-law remedy.

See 1 Cent. Dig. Adm. §§ 12-22.

Jurisdiction of state courts of a suit in case for damages by fires from a burning scow is preserved by the provision of the judiciary act (Rev. St. § 563) "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."—*Chappell v. Bradshaw*, 128 U. S. 132, 9 S. Ct. 40, 32 L. Ed. 369.

A bill to enforce a lien for towage by foreclosure of the lien on a raft of lumber in the complainant's possession, where the suit is brought against individual defendants, seeking a decree against them, and, in default of the payment thereof, a sale of the property to satisfy it, is not a proceeding in rem within the exclusive admiralty jurisdiction of the federal courts, but is a suit in personam to enforce a common-law remedy, which may be brought in a state court by virtue of Rev. St. U. S. § 563, saving the suitor's right of a common-law remedy in all cases where the common law is competent to give it. Decree 52 N. E. 898, 178 Ill. 107, 69 Am. St. Rep. 290, affirmed.—*Knapp, Stout & Co. Company v. McCaffrey*, 20 S. Ct. 824, 177 U. S. 638, 44 L. Ed. 921.

A suit in personam against shipowners for work and materials in repairing vessel in which an attachment was for the purpose only of satisfying personal judgment is not within exclusive admiralty jurisdiction of the federal courts, under Judicial Code, § 24, saving to suitors the common-law remedies.—*Rounds v. Cloverport Foundry & Mach. Co.*, 35 S. Ct. 506, 237 U. S. 303, 59 L. Ed. 966, affirming judgment 167 S. W. 384, 159 Ky. 414.

◀3. Conflict of jurisdiction as to the res.

See 1 Cent. Dig. Adm. §§ 23-26.

An admiralty court may have jurisdiction of a libel in rem for seamen's wages which accrued while the vessel was in custody of a receiver appointed by a state court, the vessel having been subsequently sold so as to pass out of the receiver's hands. The rendition of the services imports prima facie the existence of a lien, and whether any lien in fact arose or continued in existence after the sale is a matter to be determined at the hearing on the merits. 69 F. 742 (D. C.) affirmed.—*The Resolute*, 18 S. Ct. 112, 168 U. S. 437, 42 L. Ed. 533.

◀4. Waters, places, and voyages.

See 1 Cent. Dig. Adm. §§ 32-63.

The United States district court for the Northern district of Illinois has jurisdiction in admiralty of a suit in rem against a steam canal boat, to recover damages caused by a collision between her and another canal boat, while the two boats were navigating the Illinois and Lake Michigan Canal, although the libellant's boat was bound from one place in Illinois to another place in Illinois.—*In re Petition of Boyer*, 109 U. S. 629, 3 S. Ct. 434, 27 L. Ed. 1056.

Navigable rivers, though tideless, are subject to the maritime law and the admiralty jurisdiction of the United States.—*Ex parte Garnett*, 141 U. S. 1, 11 S. Ct. 840, 35 L. Ed. 631.

The Erie Canal, which, though lying wholly within the state of New York, forms a part of a continuous highway for interstate and foreign commerce by connecting Lake Erie with the Hudson river, is a navigable water of the United States, as contradistinguished from a navigable water of the state. Judgment, *In re Haines*, 60 N. E. 1112, 168 N. Y. 596, reversed.—*Perry v. Haines*, 24 S. Ct. 8, 191 U. S. 17, 48 L. Ed. 73.

The public laws of New Jersey are in force in the littoral waters of Sandy Hook peninsula below low-water mark, whether enacted prior or subsequently to the cession to the United States, by Act N. J. March 12, 1846, of jurisdiction over a portion of that peninsula for military purposes.—*Hamburg-American S. S. Co. v. Grube*, 25 S. Ct. 352, 196 U. S. 407, 49 L. Ed. 529.

A court of admiralty has jurisdiction of a libel claiming salvage for services rendered by tugs in subduing a fire communicated from the shore to a vessel undergoing repairs in a dry dock from which all the water had been emptied. Decree, *The Jefferson* (D. C. 1908) 158 F. 358, reversed.—*Simmons v. The Jefferson*, 30 S. Ct. 54, 215 U. S. 130, 54 L. Ed. 125, 17 Ann. Cas. 907.

◀5. Persons.

See 1 Cent. Dig. Adm. §§ 69-85.

The courts of the United States in admiralty may, in their discretion, take jurisdiction of a case of collision between foreign vessels on the high seas. Such a case is pre-eminently one communis juris, in which special grounds should appear to induce a court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged.—*The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152.

The United States admiralty courts have jurisdiction of a libel in personam against an American corporation for injuries received by a foreign vessel in a foreign port, by a concealed obstruction at a dock owned by such corporation.—*Panama R. Co. v. Napier Shipping Co.*, 17 S. Ct. 572, 166 U. S. 280, 41 L. Ed. 1004, affirming decree *The Stroma*, 50 F. 557, 1 C. C. A. 576, and *Panama R. Co. v. Napier Shipping Co.*, 61 F. 408, 9 C. C. A. 553.

◀6. Vessels and other property.

See 1 Cent. Dig. Adm. §§ 86-98.

A claim for salvage of a dry dock permanently moored in the Mississippi river is not within the admiralty jurisdiction of the courts of the United States.—*Cope v. Vallette Dry-Dock Co.*, 119 U. S. 625, 7 S. Ct. 336, 30 L. Ed. 501.

Canal boats engaged in navigating the Erie Canal and Hudson river, which are drawn by animal power while in the canal, and are taken in tow of steamers for the trip on the river, are ships or vessels, within the contemplation of the maritime law. Judgment, *In re Haines*, 60 N. E. 1112, 168 N. Y. 596, reversed.—*Perry v. Haines*, 24 S. Ct. 8, 191 U. S. 17, 48 L. Ed. 73.

◀7. Rights and controversies in general.

See 1 Cent. Dig. Adm. §§ 99-120.

The district court of the United States cannot take jurisdiction in admiralty of a petition for limitation of liability under the Revised Statutes of the United States, where it would not have had cognizance in admiralty, original-

ly, of the cause of action involved.—*Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 S. Ct. 25, 30 L. Ed. 274.

The limited liability act being a part of the Maritime Code, it is co-extensive with the territorial operation of the general admiralty and maritime jurisdiction, and applies notwithstanding the fact that the injury sued for happened within the technical limits of a county of a state, and that the liability sought to be enforced arose from a state law.—*Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017.

The court in proceedings to limit liability does not lose jurisdiction by allowing the steamship, after giving a stipulation for her value, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight.—*Morrison v. District Court of United States for Southern District of New York*, 147 U. S. 14, 13 S. Ct. 246, 37 L. Ed. 60.

A court of admiralty has jurisdiction of a libel to enforce contribution from the owner of one of two vessels, which were both at fault for a collision with a third, in favor of the charterer of the other vessel at fault, who has paid a judgment recovered against him in a suit at common law, founded upon the wrong, to which the other wrongdoer was not made a party.—(1910) *Lehigh Valley R. Co. v. Cornell Steamboat Co.*, 31 S. Ct. 17, 218 U. S. 264, 54 L. Ed. 1039, 20 Ann. Cas. 1235, reversing decree *The Ira M. Hedges* (D. C. 1908) 163 F. 587.

§8. Ownership and possession of vessels.

See 1 Cent. Dig. Adm. §§ 121-125.

The owners of a steamboat, including the master, who was the owner of a half interest and was in possession, holding the legal title to the vessel, appointed a committee with authority to sell her, specifying the minimum price. The committee made a contract to sell her for a given price "if she was not damaged" beyond a named sum; but the master refused to sign the bill of sale, and gave notice that his interest was not for sale, after which the intended purchasers paid a part of the price agreed on with the committee. *Held*, that the contract, not being within the power conferred, was without effect on the legal title, and that the rights of the purchasers thereunder were purely equitable, so that a court of admiralty had no jurisdiction to grant relief.—*Rea v. The Eclipse*, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269.

§9. Contracts.

See 1 Cent. Dig. Adm. §§ 131-190; 44 Cent. Dig. Ship. § 312.

§10. — Maritime contracts in general.

See 1 Cent. Dig. Adm. §§ 131-149, 185-190.

The state courts have jurisdiction of an action based on a maritime contract to be performed on the high seas. Judgment, *Gill v. North American Transportation & Trading Co.* (1905) 79 P. 778, 37 Wash. 694, affirmed.—*North American Transportation & Trading Co. v. Gill*, 27 S. Ct. 778, 203 U. S. 579, 51 L. Ed. 326.

§16. Liens.

See 1 Cent. Dig. Adm. §§ 23-25, 191-205.

A suit brought on a petition setting forth that defendant was the owner of a vessel named, that the vessel was so negligently managed by him that it damaged plaintiff's warehouse on the land near the bank of the river on which the vessel was plying, and praying that a writ of attachment against defendant be issued to the sheriff, commanding him to attach the vessel, and summoning defendant to appear, and

for a decree subjecting the vessel to a lien for such damages, is an action in personam, and not a proceeding in rem, nor can the lien sought to be enforced be deemed a maritime lien; and hence the cause is not a proceeding in rem against a vessel, cognizable by United States district courts sitting as courts of admiralty.—*Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447.

The sole essentials of admiralty jurisdiction in a suit in rem for breach of contract are that the contract is maritime, and that the property proceeded against is within the lawful custody of the court. The existence of a maritime lien is not jurisdictional, but is a matter going to the merits.—*The Resolute*, 18 S. Ct. 112, 168 U. S. 437, 42 L. Ed. 533, affirming decree (D. C.) 69 F. 742.

§17. Torts.

See 1 Cent. Dig. Adm. §§ 206-234; 44 Cent. Dig. Ship. § 312.

§19. — Injuries to vessels or other property.

See 1 Cent. Dig. Adm. §§ 233, 234.

The maritime law, and not the local law, governs in determining the liability of a city for injury to a vessel by a fire boat owned by the city and in the custody and management of its fire department, which is negligently handled while hastening to assist in putting out a fire raging in a building at the head of a dock. Decree, *City of New York v. Workman*, 67 F. 347, 14 C. C. A. 530, reversed.—*Workman v. City of New York*, 21 S. Ct. 212, 179 U. S. 552, 45 L. Ed. 314.

A court of admiralty has jurisdiction of a libel brought by one of two vessels, which were both adjudged to be in fault for a collision, to enforce contribution on account of its payment of the entire damage to the cargo of the other vessel. Decree, *Erie & W. Transp. Co. v. Erie R. Co.* (C. C. A. 1905) 142 F. 9, 73 C. C. A. 195, reversed.—*Erie R. Co. v. Erie & W. Transp. Co.*, 27 S. Ct. 246, 204 U. S. 220, 51 L. Ed. 450.

Admiralty jurisdiction embraces a libel in rem to recover for damages inflicted by colliding vessel on unfinished foundation pier intended to support a beacon to be installed by the United States.—*Latta & Terry Const. Co. v. British Steamship "Raithmoor"*, 36 S. Ct. 514, 241 U. S. 166, 60 L. Ed. 937, reversing decree *The Raithmoor* (D. C.) 186 F. 849.

§20. — Personal injuries.

See 1 Cent. Dig. Adm. §§ 216, 225, 231; 44 Cent. Dig. Ship. § 312.

Admiralty jurisdiction of a federal District Court extends to a cause of action against a stevedore company arising out of an injury to one of its employes, caused by its failure to secure the hatch covers on a vessel in navigable waters, whereby the employe was injured.—*Atlantic Transport Co. of West Virginia v. Imbrovek*, 34 S. Ct. 733, 234 U. S. 52, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, affirming decree 193 F. 1019, 113 C. C. A. 398; Same v. *State of Maryland*, 34 S. Ct. 736, 234 U. S. 63, 58 L. Ed. 1213, affirming decree 193 F. 1019, 113 C. C. A. 408.

§21. — Causing death.

See 1 Cent. Dig. Adm. §§ 218-220.

A suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on navigable waters, independently of statute.—*The Harrisburg*, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358.

The admiralty courts cannot take cognizance of a libel for damages for death caused by negligence on the high seas, in the absence of an act of congress giving a right of action therefor, though the vessel proceeded against is a foreign

one.—The Alaska, 130 U. S. 201, 9 S. Ct. 461, 32 L. Ed. 923.

⚓22. — **Torts partly committed or causing damage on land or non-navigable waters.**

See 1 Cent. Dig. Adm. §§ 222-234.

A cause of action for injuries to a warehouse on land near the bank of a river by a vessel is not a maritime tort of which the federal courts have jurisdiction.—*Johnson v. Chicago & P. El. Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447.

The admiralty jurisdiction of the federal courts extends to a libel in rem against a vessel for negligently colliding with and destroying a beacon standing some 15 or 20 feet from the channel, in water 12 or 15 feet deep, though it is built upon piles driven firmly into the bottom. Decree (D. C.) *The Blackheath*, 122 F. 112, reversed.—*United States v. Evans*, 25 S. Ct. 46, 195 U. S. 361, 49 L. Ed. 236.

A court of admiralty has no jurisdiction of a libel in rem against a vessel, based on injuries inflicted to the piers or abutments of a railroad bridge spanning a navigable stream, to the piling placed around the center abutment in order to protect vessels from injury, and to a shore dock or wharf.—*Cleveland Terminal & V. R. Co. v. Cleveland S. S. Co.*, 28 S. Ct. 414, 208 U. S. 316, 52 L. Ed. 506, 13 Ann. Cas. 1215.

Redress cannot be afforded in admiralty for injuries inflicted by a colliding vessel upon the draw of a bridge over a navigable stream, and to its center pier protection.—*Duluth & Superior Bridge Co. v. The Troy*, 28 S. Ct. 416, 208 U. S. 321, 52 L. Ed. 512.

⚓23. **Penalties, forfeitures, and seizures.**

See 1 Cent. Dig. Adm. §§ 235-249.

A pleasure yacht brought from a foreign country to the United States was seized by the collector of customs for failure to pay duty. The owner thereupon libeled her in the federal district court, and caused the marshal to seize her, claiming that she was not an imported article, within the meaning of the tariff laws, and that her seizure by the collector was a marine tort. The collector answered the libel, putting in issue these claims. Rev. St. § 934, provides that all property taken or detained under authority of any revenue law of the United States shall be irreplevable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. *Held*, that the district court had jurisdiction of the yacht, with authority to determine whether or not she was an imported article.—*Ex parte Fassett*, 142 U. S. 479, 12 S. Ct. 295, 35 L. Ed. 1087.

That jurisdiction would not fail on the ground that the owner's remedy was under the customs administrative act of 1890 (26 Stat. 131), since, under sections 14 and 15 thereof, the decision of the collector, of the board of general appraisers, and of the circuit court on appeal therefrom, is limited to determining "the rate and amount" of duties chargeable, and does not extend to the question whether or not an article is imported merchandise, within the meaning of the tariff laws.—*Id.*

II. REMEDIES IN PERSONAM AND IN REM.

⚓27. **Grounds of proceeding in personam.**

See 1 Cent. Dig. Adm. §§ 275-277.

An exemption of a fire boat belonging to a city from seizure in rem, if such exemption ex-

ists, will not relieve the city from liability to an action in personam under the maritime law for injuries to another vessel, caused by negligence of those in charge of the fire boat. Decree, *City of New York v. Workman*, 67 F. 347, 14 C. C. A. 530, reversed.—*Workman v. City of New York*, 21 S. Ct. 212, 179 U. S. 552, 45 L. Ed. 314.

⚓28. **Grounds of proceeding in rem.**

See 1 Cent. Dig. Adm. §§ 278-283.

No action in rem lies for damages incurred by loss of life, though by the local law a right of action survives to the administrator or relatives of the deceased, unless a lien is expressly created by such local law.—*The Corsair*, 145 U. S. 335, 12 S. Ct. 949, 36 L. Ed. 727.

⚓29. **Proceeding in personam and in rem for same cause.**

See 1 Cent. Dig. Adm. §§ 289-297.

In no case under the admiralty rules prescribed by the supreme court, except in possessory suits, can the ship and her owner be joined in the same suit, though perhaps they may be in cases not falling within the rules.—*The Corsair*, 145 U. S. 335, 12 S. Ct. 949, 36 L. Ed. 727.

⚓31. **Defenses in general.**

See 1 Cent. Dig. Adm. §§ 301-305.

A longshoreman, who, while in the employ of the stevedore in loading a vessel, is injured, partly through the vessel's negligence and partly through his own, is not prevented by his contributory negligence from a recovery, but is entitled to a decree for divided damages.—*The Max Morris v. Curry*, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 586, affirming (C. C.) 28 F. 881.

⚓32. **Place of bringing suit.**

See 1 Cent. Dig. Adm. §§ 306-312.

By the compact between New York and New Jersey of September 16, 1833 (ratified by Act Cong. June 28, 1834, 4 Stat. p. 708, c. 126), the boundary between two states from a point in the Hudson river, in the forty-first degree of north latitude, to the sea, is declared to be the middle of the river, of the bay of New York, of the waters between Staten island and New Jersey, and of Raritan Bay. *Held*, that a vessel afloat on the New Jersey side of the Kill von Kull is within New Jersey, and subject to the jurisdiction of the United States district court for the district of New Jersey.—*In re Devoe Manufg Co.*, 108 U. S. 401, 2 S. Ct. 894, 27 L. Ed. 764.

Act Cong. March 3, 1887, c. 373, § 1 (24 Stat. 552), providing that no civil suit shall be brought before a district or circuit court, against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, does not apply to causes of admiralty and maritime jurisdiction; and a libel in admiralty, in personam, may be maintained against a corporation of another state in any district in which service may be had upon it.—*In re Louisville Underwriters*, 134 U. S. 488, 10 S. Ct. 587, 33 L. Ed. 991; *In re St. Paul Fire & Marine Ins. Co.*, 134 U. S. 493, 10 S. Ct. 589, 33 L. Ed. 994.

⚓37. **Consolidation and severance.**

See 1 Cent. Dig. Adm. §§ 335, 336.

Where both parties to a collision file libels, the courts have the power to consolidate the actions, and prescribe one proceeding, and pronounce one decree, for one-half of the difference of damage suffered by the two vessels.—*The North Star and The Ella Warley*, 106 U. S. 17, 1 S. Ct. 41, 27 L. Ed. 91.

III. PARTIES, PROCESS, CLAIMS, AND STIPULATIONS OR OTHER SECURITY.

42. Defendants.

See 1 Cent. Dig. Adm. §§ 369-375.

Where suit is brought against one owner of a vessel for damages caused by his negligence in managing the vessel, and the vessel is attached, and liberated on the bond of such owner to abide the judgment, another part owner will not be permitted to defend, as the subsequent judgment can only be one in personam against the obligors on the bond.—*Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 80 L. Ed. 447.

45. Process in proceedings in personam.

See 1 Cent. Dig. Adm. §§ 393-403.

47. — Attachment and garnishment.

See 1 Cent. Dig. Adm. §§ 396-403.

A writ in the usual form of a monition and warrant of arrest in a suit in rem, issued from the office of the clerk of a federal District Court, and bearing the seal of that court, will protect the marshal in seizing and detaining a vessel in conformity to the command of the writ, although the purported signature of the deputy clerk was affixed under an attempted but ineffectual delegation of authority, and although the case stated in the libel upon which the writ issued was not cognizable as a suit in rem in admiralty, but only as a personal action for damages.—(1911) *Bryan v. Ker*, 32 S. Ct. 26, 222 U. S. 107, 56 L. Ed. 114, reversing judgment (1908) *Ker v. Bryan*, 163 F. 233, 90 C. C. A. 179.

50. Intervention and bringing in new parties.

See 1 Cent. Dig. Adm. §§ 414-429.

Adm. Rule 34, relating to intervening petitions, applies only to those cases in which the vessel is still in custody, or in which she has been sold, and the proceeds paid into court.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

A proceeding on petition of the owner and claimant of a libeled vessel to call in the charter to show cause why it should not be condemned for damage resulting from the collision for which the libel is filed is within the power of the court under general admiralty rule 59, as it is clearly within the spirit, though not within the words, of the rule. Decree 94 F. 213, 36 C. C. A. 199, reversed.—*The Barnstable*, 21 S. Ct. 684, 181 U. S. 464, 45 L. Ed. 954.

51. Death of party.

See 1 Cent. Dig. Adm. §§ 430-432.

The exigency presented by the death of Rear Admiral Sampson pending an appeal from a decree of condemnation in a libel in prize, filed in his own behalf and in behalf of other officers and enlisted men of the United States navy, will be satisfactorily met by the substitution, to carry on the proceedings in the interest of all, of Rear Admiral Taylor, who is among those represented in the litigation by counsel, and is within the jurisdiction of the court.—*United States v. Sampson*, 23 S. Ct. 216, 187 U. S. 436, 47 L. Ed. 248.

54. Bonds and stipulations in general.

See 1 Cent. Dig. Adm. §§ 443-447.

To limit their liability to the value of the vessel, the owners had her appraised under the provisions of Rev. St. §§ 4283-4289. They then filed a stipulation to perform the final decree in the case. *Held*, that the allowance of interest upon the amount of the stipulation from the day it was filed in court rested in the

discretion of the court below.—*The Maggie J. Smith*, 123 U. S. 849, 8 S. Ct. 159, 31 L. Ed. 175.

57. Security for release of vessel or other property.

See 1 Cent. Dig. Adm. §§ 452-478.

On appeal in admiralty, the circuit court has jurisdiction, under Rev. St. § 941, to render judgment on the stipulation against both principals and stipulators, without waiting until the time for perfecting an appeal to the supreme court has expired; and a mandamus will not be granted to vacate the decree because it is a lien on the stipulators' real estate, nor will the supreme court set aside the decree for that reason.—*Ex parte Warden*, 108 U. S. 153, 2 S. Ct. 383, 27 L. Ed. 685.

A stipulation given for the release of a vessel upon the original libel to recover damages done to a vessel with which she collided, although it purports to be "for the benefit of whom it may concern," does not bind the sureties to respond to claims set up by intervening petitions filed subsequently to the release; and hence the court should not entertain jurisdiction of such intervening petitions.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

IV. PLEADING, PETITIONS, AND MOTIONS.

60. Libel.

See 1 Cent. Dig. Adm. §§ 482-496.

A libel in personam against the owners of a vessel for damages arising out of a collision is defective when it fails to aver that respondent was the owner of the vessel at the time of the collision.—*The Corsair*, 145 U. S. 335, 12 S. Ct. 949, 36 L. Ed. 727.

V. EVIDENCE, AND TAKING AND FILING PROOFS.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Adm. §§ 563-591.]

VI. HEARING OR TRIAL, AND DECISION.

81. Decision.

See 1 Cent. Dig. Adm. §§ 600-611.

The law to be applied to cases of collision arising on the high seas beyond the jurisdiction of any nation, and between ships of different nationalities, is the general maritime law, as understood and administered in the country in which the case is tried.—*The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152.

The allowance of interest by way of damages in cases of collision, and other cases of pure damage, as well as the allowance of costs, is in the discretion of the court.—*Dyer v. National Steam Nav. Co.*, 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153.

VII. COMMISSIONERS AND PROCEEDINGS BEFORE THEM.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Adm. §§ 612-626.]

VIII. DECREE AND ENFORCEMENT THEREOF.

Accord and satisfaction operating as payment, see Accord and Satisfaction, 4.

92. Judgments on bonds or stipulations.

See 1 Cent. Dig. Adm. §§ 646-649.

Where a bond is given for the release of a vessel attached for injuries to property on shore,

under a statute providing that, "if, upon the trial, judgment shall pass for the petitioner, and the vessel has been discharged from custody as herein provided, said judgment or decree shall be rendered against the principal and sureties in the bond," the statute forms part of the bond, and the surety cannot object that judgment is given against him without notice or due process of law.—*Johnson v. Chicago & Pac. Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447.

IX. APPEAL.

Accord and satisfaction defense to bond, see Accord and Satisfaction, ◀4.
Appellate jurisdiction of federal supreme court, see Courts, ◀385(4).

◀103. Decisions reviewable.

See 1 Cent. Dig. Adm. §§ 712-719.

Where a decree in admiralty sustains exceptions to the libel, and gives permission to amend within 10 days otherwise the libel to stand dismissed, the prosecution of an appeal within that time is an election to waive the right to amend, so that the decree takes effect immediately, and becomes a final, appealable decree.—*The Three Friends*, 17 S. Ct. 495, 166 U. S. 1, 41 L. Ed. 897, reversing decree (D. C.) 78 F. 175.

A decree of a district court of the United States dismissing a cross libel in a suit in admiralty to recover damages sustained by one vessel in a collision with another is not a final judgment, and therefore cannot be reviewed by the supreme court under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], on the theory that the jurisdiction of the lower court was in issue. Appeal (D. C.) 105 F. 398, dismissed.—*Bowker v. United States*, 22 S. Ct. 802, 186 U. S. 135, 46 L. Ed. 1090.

A decree in proceedings in admiralty for limitation of liability, which grants such limitation, determines the question of pending freight to be surrendered, and disallows all claims for loss of life, but refers all other claims to a commissioner to take testimony and report, cannot be regarded as final for the purpose of an appeal, especially where the court below and the parties have treated such decree as a mere interlocutory one.—(1908) *Deslions v. La Compagnie Generale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973, affirming decrees (1906) *La Bourgogne*, 144 F. 781, 75 C. C. A. 647, and (1905) 139 F. 433, 71 C. C. A. 489, which reversed (D. C. 1902) 117 F. 261.

◀115. Record.

See 1 Cent. Dig. Adm. §§ 743-745.

On a libel for the condemnation of a vessel for taking fur seal, contrary to law, within waters of Alaska belonging to the United States, the vessel owner asked no finding as to the exact locality of the seizure, but, after the findings and conclusion of law were filed, moved in arrest of judgment, on the ground that "from the evidence produced on the part of the United States it appears that this court has no jurisdiction over the subject-matter of this cause." *Held*, that this motion was not equivalent to a plea in abatement, nor to a declinatory allegation in the nature of a plea to the jurisdiction, and therefore could not make the evidence referred to a part of the technical record.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

◀117. Amendments, new pleadings, and proofs, and trial of cause anew.

See 1 Cent. Dig. Adm. §§ 748-757.

Amendments allowed by Adm. Rule No. 24 may be made in the circuit court on appeal from

a decree in the district court.—*The Charles Morgan v. Kouns*, 115 U. S. 69, 5 S. Ct. 1172, 29 L. Ed. 318.

Since the act of congress of February 16, 1875, "to facilitate the disposition of cases in the supreme court," a case in admiralty cannot be retried in the United States supreme court on all the evidence.—*Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67, 7 S. Ct. 821, 30 L. Ed. 858.

On appeal in admiralty from the district to the circuit court, the whole case is tried de novo, and the circuit court has jurisdiction to reduce an award decreed to libelants as salvors in the district court, although the libelees have themselves failed to appeal.—*The Hesper*, 122 U. S. 256, 7 S. Ct. 1177, 30 L. Ed. 1175.

On appeal in admiralty from the district to the circuit court, the whole case is tried de novo, and the circuit court had jurisdiction to reduce an award decreed to libelants as salvors in the district court, although the libelees have themselves failed to appeal.—*Id.*

An appeal in admiralty from the district court to the circuit court vacates the decree appealed from, and the cause is heard de novo.—*The Louisville*, 154 U. S. 657, 14 S. Ct. 1190, 25 L. Ed. 771.

An appeal to a Circuit Court of Appeals from a District Court in admiralty brings the case up for trial de novo so that the court may review interlocutory decree not appealed from.—*Reid v. Fargo*, 36 S. Ct. 712, 241 U. S. 544, 60 L. Ed. 1156, reversing decree 213 F. 771, 130 C. C. A. 285.

◀118. Review.

See 1 Cent. Dig. Adm. §§ 758-775, 794.

Where the libel in a suit in admiralty on a contract of reinsurance avers the identity of the two insurances, which is essential to a recovery, and the answer denies it, but the findings of fact by the trial court do not assert it, the question on appeal is not whether it may be deduced as a conclusion of fact from the facts found, but whether it follows as a conclusion of law.—*Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 S. Ct. 582, 27 L. Ed. 337.

A finding of facts by the circuit court in an admiralty case has, under Act Cong. Feb. 16, 1875, c. 77, the same effect on appeal as a special verdict in an action at law; and its sufficiency in connection with the pleadings, to support the decree, is open to consideration, even in the absence of exceptions.—*Marshall v. The Adriatic*, 107 U. S. 512, 2 S. Ct. 355, 27 L. Ed. 497.

Although, in a case of collision, there is no express finding of negligence, as matter of fact, if the facts found by the court below furnish conclusive proof of negligence, it may be regarded, on appeal, as properly found among the conclusions of law, as a legal inference from those facts.—*The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152.

The United States supreme court will not, upon an appeal in admiralty from the circuit court, revise a decree on the ground that the amount awarded therein is excessive, unless it is so clearly so that the award cannot be justified by any rule of law applicable to the facts.—*The Hesper*, 122 U. S. 256, 7 S. Ct. 1177, 30 L. Ed. 1175.

Under Act Cong. Feb. 16, 1875 (18 Stat. 315), entitled "An act to facilitate the disposition of cases in the supreme court of the United States," and requiring the circuit court to find the facts, the supreme court is bound to accept as conclusive findings of the court on disputed questions of fact.—*The E. A. Packer*, 11 S. Ct. 794, 140 U. S. 360, 35 L. Ed. 453.

When the district court established by Act Cong. May 17, 1884, for the territory of Alaska, sits as a court of admiralty, the same rule applies to it as is prescribed by Act Cong. Feb. 16, 1875, for the circuit courts in admiralty causes, namely, that it shall make separate findings of fact and conclusions of law, and that the supreme court's power of review on appeal shall be limited to the questions of law arising on the record and rulings properly presented by a bill of exceptions.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

Act Cong. May 17, 1884, provides that "the territory ceded to the United States by Russia" "and known as 'Alaska'" shall constitute a civil and judicial district. A libel for the condemnation of a vessel for taking fur seal contrary to law alleged that she was seized "within the limits of Alaska territory and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the United States and said district"; that the vessel and crew "were then and there found engaged in killing fur seals within the limits of Alaska territory and the said waters thereof," in violation of Rev. St. § 1956. The court found that the vessel and crew were engaged in killing fur seal "in that portion of Behring Sea ceded by Russia to the United States," "and within the waters of Alaska." *Held*, that on the face of this record the offense was committed within the jurisdiction of the court, whether the dominion of the United States over the waters of Behring Sea extended to the boundaries defined by the treaty of cession from Russia, or was confined to the usual limit of three miles from the shore, since, if the latter construction prevail, it must be presumed from the libel and findings that the seizure was made within that limit.—*Id.*

Act Cong. Feb. 16, 1875, limiting the power of the supreme court, on appeals from the circuit courts in admiralty causes, to a review of the questions arising on the face of the record, and to such rulings as are properly presented by a bill of exceptions, applies to appeals from the district court of Alaska sitting in admiralty. *Ex parte Cooper*, 12 S. Ct. 453, 143 U. S. 472, 36 L. Ed. 232, followed.—*The Sylvia Handy*, 12 S. Ct. 464, 143 U. S. 513, 36 L. Ed. 246.

On an appeal from a decree of the district court of Alaska forfeiting a vessel for taking fur seal contrary to law, it was claimed that the court had no jurisdiction because the vessel was seized more than three miles from the shore. In the bill of exceptions, the only exception stated was that defendants "there and then excepted to the ruling of the court, and the law as declared by the court, viz," and then followed the findings and conclusion. The only finding in relation to the place of seizure was that it was made "in that portion of Behring Sea ceded by Russia to the United States," "and within the waters of Alaska." The bill did not purport to set out all the evidence. *Held*, that the supreme court could not examine the evidence to discover the exact locality of the seizure, and it must be presumed that it was within the waters of Alaska, even though the dominion of the United States in Behring Sea should be held to extend only three miles from the shore.—*Id.*

In admiralty causes, findings of fact by the circuit court are conclusive on appeal.—*The Louisville*, 154 U. S. 657, 14 S. Ct. 1190, 25 L. Ed. 771.

Where a commissioner to whom the cause was referred, the district court, and the circuit court of appeals, all agreed that a certain claim for expenses of keeping a vessel wrongfully detained by a collector of customs was reasonable, *held*, that the supreme court would not disturb the finding, though the charge seemed large.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D. C.) 49 F. 99.

Successive concurring decisions of two courts on questions of fact in admiralty are not to be disturbed by the Supreme Court, unless clearly shown to be erroneous. Decree 10 App. D. C. 469, affirmed.—*Smith v. Burnett*, 19 S. Ct. 442, 173 U. S. 430, 43 L. Ed. 756; *Compania De Navigacion La Flecha v. Brauer*, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree *Brauer v. Compania Navigacion La Flecha*, 66 F. 776, 14 C. C. A. 88.

The allowance of interest in admiralty cases is discretionary, and not reviewable on appeal by the supreme court of the United States, except in a very clear case. Decree *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

Concurrent findings of both the courts below as to the density of a fog and the rate of the speed of a steamship at the time of collision will not be disturbed by the federal Supreme Court on appeal, unless such findings are so unwarranted by the evidence as clearly to be erroneous. Decree, *La Bourgogne* (1906) 144 F. 781, 75 C. C. A. 647, affirmed.—*Deslions v. La Compagnie Generale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

X. COSTS.

121. Power to award in general.

See 1 Cent. Dig. Adm. §§ 795, 796.

The allowance of costs in cases of collision and other cases of pure damages, is in the discretion of the court.—*Dyer v. National Steam Nav. Co.*, 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153.

To limit their liability to the value of the vessel, the owners had her appraised under the provisions of Rev. St. §§ 4283-4289. They then filed a stipulation to perform the final decree in the case. *Held*, that the costs of the circuit and district courts rested in the discretion of the court below.—*The Maggie J. Smith*, 123 U. S. 349, 8 S. Ct. 159, 31 L. Ed. 175.

ADMISSION.

To partnership, see *Partnership*, 241.
To practice law, see *Attorney and Client*, 4.

ADMISSIONS.

See *Stipulations*.

Affecting questions for review, see *Appeal and Error*, 176.

As evidence, see—

Criminal Law, 405, 406.

Evidence, 206-265.

By witness, see *Witnesses*, 389.

In pleadings, see—

Equity, 239, 339.

Pleading, 36, 129, 214, 377.

ADOPTION.

Scope-Note.

[INCLUDES taking child of another as one's own child; proceedings therefor, and rights, duties, and liabilities arising therefrom.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
Common Law, ¶10-12.
Statutes, ¶5-64.

¶25. Foreign adoption.

See 1 Cent. Dig. Adop. ¶6, 37.

Children adopted in Louisiana held to acquire no contract rights to land subsequently acquired in Alabama by their foster parents, by a clause in the instrument of adoption requiring them to support the adopted children and invest them with all the rights of legitimate chil-

dren in their estate.—Hood v. McGehee, 35 S. Ct. 718, 237 U. S. 611, 59 L. Ed. 1144, affirming decree 199 F. 989, 117 C. C. A. 664.

ADULTERATION.

See 1 Cent. Dig. Adulteration.

Food regulation, see Food.

ADULTERY.

Scope-Note.

[INCLUDES sexual intercourse by a married woman with a man other than her husband, or by a married man with a woman other than his wife, and solicitation to commit such acts, regarded as an offense against public morals, not merely as a breach of the obligation of marriage; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
Bigamy.
Indians, ¶36.
Former jeopardy, see Criminal Law, ¶202.

¶16. Sentence and punishment.

See 1 Cent. Dig. Adultery, §37.

Rev. Code, §3602, providing a punishment for adultery between a negro and a white per-

son different from that provided for adultery between persons of the same race is valid.—Pace v. State, 106 U. S. 583, 1 S. Ct. 637, 27 L. Ed. 207.

ADVANCEMENTS.

See Wills, ¶757-759.

ADVANCES.

See Contracts, ¶194.

ADVERSE CLAIM.

See—
Attachment, ¶290-308.
Execution, ¶187-202.
Mines and Minerals, ¶38, 41.
Quieting Title.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 27]

ADVERSE POSSESSION.

Scope-Note.

[INCLUDES possession of property so inconsistent with the possession or title of another as to constitute an element of title or evidence of title in the possessor; nature, requisites, incidents, operation, and effect of such possession; evidence relating thereto, and acquisition of title thereby.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Requisites.

(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.

- ⇒ 3. Constitutional and statutory provisions in general.
- 5. Property subject to prescription.
- 7. — Public property in general.
- 8. — Property dedicated to or acquired for public use.
- 13. Character and elements of adverse possession in general.

(B) ACTUAL POSSESSION.

- ⇒ 14. Necessity.
- 25. Possession of agent, tenant, or vendee.

(C) VISIBLE AND NOTORIOUS POSSESSION.

- ⇒ 33. Evidence.

(D) DISTINCT AND EXCLUSIVE POSSESSION.

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(F) HOSTILE CHARACTER OF POSSESSION.

- ⇒ 59. Possession consistent with that of another, and possession becoming adverse after amicable entry.
- 60. — In general.
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- 71. — Validity and sufficiency of instruments in general.
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(G) PAYMENT OF TAXES.

- ⇒ 87. Statutory provisions.
- 88. Act of ownership.
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II. Operation and Effect.

(A) EXTENT OF POSSESSION.

- ⇒ 99. Possession under color of title.
- 100. — Constructive possession in general.
- 101. — Relation to each other of different premises or parts of same premises.
- 103. — Mixed possession under hostile titles, or conflicting grants or surveys.

II. Operation and Effect—Continued.**(B) TITLE OR RIGHT ACQUIRED.**

104. Presumption of grant.

106. Nature and extent of title or right.

III. Pleading, Evidence, Trial, and Review.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Adv. Poss. §§ 636-701.]

Cross-References.

See Limitation of Actions.

Acquisition of water rights by prescription, see

Waters and Water Courses, 128-130.

By or under life tenant, see Life Estates, 8.

Due process of law, see Constitutional Law, 278, 308.

Establishment of highways by prescription, see Highways, 7-17.

Grants of lands held adversely, see Champerty and Maintenance, 7.

Indian lands, see Indians, 22.

Orders of military government in Porto Rico as to acquisition of prescriptive title, see War, 31.

Title to support ejectment, see Ejectment, 10.

I. NATURE AND REQUISITES.**(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.**

Due process of law, see Constitutional Law, 308.

Equal protection of laws, see Constitutional Law, 249.

3. Constitutional and statutory provisions in general.

See 1 Cent. Dig. Adv. Poss. §§ 1-5.

A retrospective operation will not be given to provision of Act June 24, 1913, that adverse possession of a part of the railroad right of way granted by Act July 1, 1862, shall have the same effect, when of the duration prescribed by the laws of the state, as if the land within the right of way had been granted absolutely or in fee.—Union Pac. R. Co. v. Laramie Stock Yards Co., 34 S. Ct. 101, 231 U. S. 190, 58 L. Ed. 179.

Retrospective operation will not be given to Act June 24, 1912, providing that adverse possession of part of a railroad right of way granted by Act July 1, 1862, shall have the same effect when of the character prescribed by the laws of the state in which the land is situated as though the right of way had been granted absolutely or in fee.—Union Pac. R. Co. v. Snow, 34 S. Ct. 104, 231 U. S. 204, 58 L. Ed. 184, reversing judgment (Colo.) Snow v. Union Pac. R. Co., 183 P. 1037, 55 Colo. 175; Union Pac. R. Co. v. Sides, 34 S. Ct. 107, 231 U. S. 213, 58 L. Ed. 189.

The Constitution is not violated by confining to Spanish and Mexican grants the provision of Comp. Laws N. M. 1865, c. 73, § 1 (Comp. Laws 1897, § 2937), under which ten years' possession under a deed purporting to convey a fee simple gives title in fee to the land specified, if, during the ten years, no claim by a suit effectually prosecuted has been set up.—Montoya v. Gonzales, 34 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment Same v. Unknown Heirs of Vigil, 120 P. 676, 16 N. M. 349.

5. Property subject to prescription.

See 1 Cent. Dig. Adv. Poss. §§ 7-10, 12-57; 25 Cent. Dig. High. § 280; 33 Cent. Dig. Lim. of Act. § 223, 224; 34 Cent. Dig. Mines, § 126.

7. — Public property in general.

See 1 Cent. Dig. Adv. Poss. §§ 24-42; 33 Cent. Dig. Lim. of Act. §§ 223, 224; 41 Cent. Dig. Pub. Lands, §§ 51-53.

The statute of limitations will run against the purchaser of land from the United States

in favor of one holding adversely only from the issuance of the patent.—Redfield v. Parks, 10 S. Ct. 83, 132 U. S. 239, 33 L. Ed. 327.

Adverse ownership for private use under a state statute of limitations can confer no title on an individual to a portion of the right of way granted by Act Cong. July 2, 1864, c. 217, § 2 (13 Stat. 365), to the Northern Pacific Railroad Company for the construction of its road. Judgment 86 N. W. 1007, 84 Minn. 152, 87 Am. St. Rep. 342, reversed.—Northern Pac. Ry. Co. v. Townsend, 23 S. Ct. 671, 190 U. S. 267, 47 L. Ed. 1044.

Adverse possession of land within the 10-mile limit of the grant to the Central Pacific Railroad Company, made by Act Cong. July 1, 1862, c. 120 (12 Stat. 489, c. 216), as amended by Act July 2, 1864 (13 Stat. 356), under a claim of right, and for the period prescribed by a state statute of limitations, transferred the title, although the patent to the railroad company in pursuance of such grant had not been issued. Judgment 66 P. 876, 24 Utah, 183, and 67 P. 1123, 24 Utah, 453, affirmed.—Toltec Ranch Co. v. Cook, 24 S. Ct. 166, 191 U. S. 532, 48 L. Ed. 291; Same v. Babcock, 24 S. Ct. 169, 191 U. S. 542, 48 L. Ed. 294.

The confirmation by commissioners appointed under Act Cong. March 3, 1807, c. 36 (2 Stat. 440), of a claim to 913.98 acres of land in the territory of Orleans, based on occupancy and settlement, followed by the confirmation by Congress in Act April 29, 1816, c. 159 (3 Stat. 329), of the claim so confirmed, and by a survey, passed title so as to permit prescription, founded on uninterrupted possession, to begin to run before the patent issued. Judgment, Jopling v. Chachere, 32 So. 243, 107 La. 522, affirmed.—Joplin v. Chachere, 24 S. Ct. 214, 192 U. S. 94, 48 L. Ed. 359.

Title to the right of way granted by Congress to the Northern Pacific Railroad Company for the construction of its road cannot be acquired by adverse possession for private use under a state statute of limitations, except so far as the land so adversely held was so situated that a conveyance from the grantee company or its successor would have been confirmed by Act April 28, 1904, c. 1782, 33 Stat. 538, validating such conveyances of the right of way as should not diminish it to a less width than 100 feet on each side of the center of the main track.—Northern Pac. Ry. Co. v. Ely, 25 S. Ct. 302, 197 U. S. 1, 49 L. Ed. 639, reversing judgment 65 P. 555, 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766; Same v. Hasse, 25 S. Ct. 305, 197 U. S. 9, 49 L. Ed. 642, reversing judgment 68 P. 882, 28 Wash. 353, 92 Am. St. Rep. 840.

The two years' limitation prescribed by Rev. St. Ariz. 1887, par. 2301, re-enacted as Rev. St. Ariz. 1901, par. 2941, for suits to recover real property from one claiming by possession only, in which defendant is not required to show title or color of title as against plaintiff who shows no better right, is not applicable to an action by one claiming the title as grantee of the railroad company to land within the place limits of the grant made by Act July 27, 1866, c. 278, 14 Stat. 292, to the Atlantic & Pacific Railroad Company. Judgment 76 P. 460, 8 Ariz. 347, affirmed.—Howard v. Perrin, 26 S. Ct. 195, 200 U. S. 71, 50 L. Ed. 374.

A railway company which has complied with all the terms and conditions of a congressional land grant, as fixed by Congress and by the act of the state Legislature after the acceptance of the grant by the state, has such a title to lands within the place limits of the grant that the statute of limitations will run against it in favor of one who occupies the premises by adverse possession under color of title, notwithstanding the want of final certification and issue of patent. Judgment, Blumer v. Iowa R. Land Co. (1905) 105 N. W. 342, 129 Iowa, 32, affirmed.—Iowa R. Land Co. v. Blumer, 27 S. Ct. 769, 206 U. S. 482, 51 L. Ed. 1148.

The title of the state of Alabama to the sixteenth section school lands given to such state by Act March 2, 1819, § 8, may be extinguished by adverse possession for the length of time prescribed by the state statute of limitations.—State of Alabama v. Schmidt, 34 S. Ct. 301, 232 U. S. 168, 58 L. Ed. 555, affirming judgment 61 So. 293.

§8. — Property dedicated to or acquired for public use.

See 1 Cent. Dig. Adv. Poss. §§ 14, 27, 43-57; 25 Cent. Dig. High. § 280; 41 Cent. Dig. R. R. § 186.

Adverse possession after passage of act April 28, 1904, confirming conveyances heretofore made of portions of Northern Pacific Railroad Company's right of way outside the 200-foot limit, cannot be considered in determining whether possession ripened into title.—Northern Pac. Ry. Co. v. Concannon, 36 S. Ct. 156, 239 U. S. 382, 60 L. Ed. 342, reversing judgment 135 P. 652, 75 Wash. 591.

§13. Character and elements of adverse possession in general.

See 1 Cent. Dig. Adv. Poss. §§ 65, 67-76; 17 Cent. Dig. Eject. § 35.

Where the evidence shows that defendant in ejectment has been in adverse possession under claim of title for the statutory period, an instruction that, "unless he had a right to the possession of such lands when he took possession of them, he has no right now; time never makes a wrong right,"—is erroneous.—Probst v. Trustees of Board of Domestic Missions, 129 U. S. 182, 9 S. Ct. 263, 32 L. Ed. 642.

Mere proof of pasturing cattle upon land is entitled to little weight as evidence of adverse possession upon which to base a claim of title under an alleged Mexican grant.—Bergere v. United States, 18 S. Ct. 4, 168 U. S. 66, 42 L. Ed. 383.

(B) ACTUAL POSSESSION.

§14. Necessity.

See 1 Cent. Dig. Adv. Poss. §§ 77-81.

A special verdict finding "open, continued, notorious, and adverse" possession for the statutory period is insufficient to support a judgment, because it fails to state that the possession was actual and exclusive.—Ward v. Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. Ed. 1195.

§25. Possession of agent, tenant, or vendee.

See 1 Cent. Dig. Adv. Poss. §§ 116-120.

Possession for the statutory period by army officers of land acquired by the United States for a military reservation, although it is in fact for the United States, is adverse as to other claimants, and a complete defense to an action of trespass to try title brought against such officers. 85 Tex. 348, 19 S. W. 264 reversed.—Stanley v. Schwalby, 147 U. S. 508, 13 S. Ct. 418, 37 L. Ed. 259.

(C) VISIBLE AND NOTORIOUS POSSESSION.

§33. Evidence.

See 1 Cent. Dig. Adv. Poss. §§ 134, 135.

One who seeks to establish title by adverse possession for the statutory period is entitled to show that it was generally understood in the neighborhood, not only that he pastured cattle on the lands, but that he did so under a claim of ownership, and that he was generally reputed to be the owner.—Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

(D) DISTINCT AND EXCLUSIVE POSSESSION.

§36. Possession exclusive of others.

See 1 Cent. Dig. Adv. Poss. §§ 139-143.

A special verdict finding "open, continued, notorious, and adverse" possession for the statutory period is insufficient to support a judgment, because it fails to state that the possession was actual and exclusive.—Ward v. Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. Ed. 1195.

Possession of an unfenced lot for the purpose of marble and stone cutting, involving the scattering of stone all over the lot, is sufficiently exclusive.—Holtzman v. Douglas, 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466.

One having a constructive but mixed possession of lands under a void tax deed, and not in actual possession of any part thereof, cannot acquire title by adverse possession.—Deputron v. Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. Ed. 923, affirming Young v. De Putron (C. C.) 37 F. 46.

(E) DURATION AND CONTINUITY OF POSSESSION.

§39. Time requisite for acquisition of rights.

See 1 Cent. Dig. Adv. Poss. §§ 148-204.

§40. — In general.

See 1 Cent. Dig. Adv. Poss. §§ 143-153.

A possession of only six or eight years prior to the treaty of cession was not, under any construction of the Spanish or Mexican laws, sufficient to constitute a title by prescription as against the sovereign.—Crespin v. United States, 18 S. Ct. 53, 168 U. S. 208, 42 L. Ed. 438.

Twenty years' adverse possession of wild land before the passage of Pub. Laws Me. 1895, c. 162, would not bar a suit by the former owner to recover possession, under the provision of that act barring such actions "unless brought within said twenty years, or before January 1, 1900," if such adverse possession did not continue for the five years following the passage of that act. Judgment 56 A. 908, 98 Me. 268, 99 Am. St. Rep. 397, affirmed.—Soper v. Lawrence Bros. Co., 26 S. Ct. 473, 201 U. S. 359, 50 L. Ed. 788.

In the District of Columbia an action for the recovery of land is barred in 20 years, and an open, visible, continuous, and exclusive pos-

session for that period, with a claim of ownership adverse to all titles and claimants, gives title to the occupant.—*Sharon v. Tucker*, 144 U. S. 533, 12 S. Ct. 720, 36 L. Ed. 532; *Stellwagen v. Same*, 144 U. S. 548, 12 S. Ct. 724, 36 L. Ed. 537.

⚡41. — Under claim or color of title.
See 1 Cent. Dig. Adv. Poss. §§ 184-208.

Prior to August 1, 1877, title to land could be acquired by three years' adverse possession in Montana, and actual possession under a claim of title for more than three years' perfected title as against an adverse claimant.—*Dunphy v. Sullivan*, 117 U. S. 346, 6 S. Ct. 766, 29 L. Ed. 912.

⚡43. Tacking successive possessions.
See 1 Cent. Dig. Adv. Poss. §§ 213-224.

It is proper to charge that, to sustain the defense of adverse possession, the jury must find that defendants, in person or by their tenants, have for more than 20 years had actual, exclusive, continuous, open, notorious, and adverse possession, and that they cannot extend their possession by tacking it to the prior possession of a person who, during such prior possession, did not claim any title or right to the premises.—*Holtzman v. Douglas*, 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466.

⚡50. Recognition of title of former owner.
See 1 Cent. Dig. Adv. Poss. §§ 255-261.

An attempt to acquire title from the United States under Act March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], enacted in behalf of bona fide purchasers of land excepted from the operation of a railroad land grant, with the view of removing a cloud upon the title, is not an act of recognition or acknowledgment of a superior title, either in the United States or in the railroad company, which can operate to interrupt the continuity of an adverse possession; and much less can it be held to have destroyed a title which had already become perfect by the expiration of the statutory period for acquiring legal title by adverse possession.—*Missouri Valley Land Co. v. Wiese*, 28 S. Ct. 294, 208 U. S. 234, 52 L. Ed. 466, affirming judgment *Wiese v. Union Pac. Ry. Co. (Neb.)* 108 N. W. 175; *Missouri Valley Land Co. v. Wrich*, 28 S. Ct. 299, 208 U. S. 250, 52 L. Ed. 473, affirming judgment *Wrich v. Union Pac. Ry. Co. (Neb.)* 108 N. W. 178.

(F) HOSTILE CHARACTER OF POSSESSION.

⚡59. Possession consistent with that of another, and possession becoming adverse after amicable entry.

See 1 Cent. Dig. Adv. Poss. §§ 282-364.

⚡60. — In general.

See 1 Cent. Dig. Adv. Poss. §§ 282-312, 323, 328.

One who continues in possession or resumes possession after a decree quieting title against him, and declaring it to be vested in another, is presumed to have possession in subordination to the real owner, and he cannot assert adverse possession without bringing express notice thereof to the owner or his vendee.—*Root v. Woolworth*, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123, affirming decree *Woolworth v. Root* (C. C.) 40 F. 723.

No title to lands under water can be obtained by possession and use thereof for the cultivation of oysters under implied license from the state.—*Lowndes v. Board of Trustees of Town of Huntington*, 153 U. S. 1, 14 S. Ct. 758, 38 L. Ed. 615, affirming judgment Board of Trus-

tees of Town of Huntington v. Lowndes (C. C.) 40 F. 625.

One who takes possession of land without any claim of right or title may, on the subsequent sale of the land for taxes, by agreement with the purchaser at such sale, hold in subordination to him, so as to render the possession that of the purchaser, without notifying the owner of the record title of such agreement. Judgment 5 App. D. C. 397, affirmed.—*Holtzman v. Douglas*, 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466.

⚡61. — By persons in fiduciary relations.

See 1 Cent. Dig. Adv. Poss. §§ 315-322.

Where the donee of a power took possession of the lands included therein, and claimed ownership, which claim was undisputed by the donor of the power or any one else for 31 years, during which time the period of limitations expired, the property largely increased in value, and many interests were acquired therein, the donee and those claiming under him have title by adverse possession.—*Teall v. Schroder*, 158 U. S. 172, 15 S. Ct. 768, 39 L. Ed. 938.

⚡63. — By vendor or purchaser.

See 1 Cent. Dig. Adv. Poss. §§ 333-357; 24 Cent. Dig. Fraud. Conv. § 532.

The mistaken belief that Surveyor General could adjudicate and approve unconfirmed Mexican land grants of both parties to an executory contract for sale of land, investing vendees with possession until such action by that official, prevents such possession from being adverse after he recommends rejection of the grant and such possession continues in virtue of the agreement until a final adverse decision by the proper authorities.—*Chavez v. De Bergere*, 34 S. Ct. 144, 231 U. S. 482, 58 L. Ed. 325, affirming judgment *De Bergere v. Chavez*, 93 P. 762, 14 N. M. 352.

⚡69. Validity and sufficiency of title or claim.

See 1 Cent. Dig. Adv. Poss. §§ 394-435; 24 Cent. Dig. Fraud. Conv. § 589.

⚡71. — Validity and sufficiency of instruments in general.

See 1 Cent. Dig. Adv. Poss. §§ 415-429; 24 Cent. Dig. Fraud. Conv. § 589.

A wholly unauthorized grant of public land in the Philippine Islands by subordinate Spanish officials, showing its invalidity on its face, cannot serve as the basis of a prescriptive title under the Spanish royal decree of June 25, 1880, under which a prescriptive right can be founded on possession for 10 years under just title and in good faith.—*Tiglaio v. Insular Government of Philippine Islands*, 30 S. Ct. 129, 215 U. S. 410, 54 L. Ed. 257.

⚡73. — Patents, grants, certificates, surveys, and plats.

See 1 Cent. Dig. Adv. Poss. §§ 435-442.

Possession for ten years under a deed purporting to convey a fee simple of any lands granted by Spain, Mexico, or the United States, gives a title in fee simple under Comp. Laws N. M. 1865, c. 73, § 1 (Comp. Laws 1897, § 2937), as construed by the New Mexico courts to the land specified in the deed, if, during such time, no claim by a suit effectually prosecuted has been set up.—*Montoya v. Gonzales*, 84 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment *Same v. Unknown Heirs of Vigil*, 120 P. 676, 16 N. M. 349.

⚡79. — Tax sales and tax deeds.

See 1 Cent. Dig. Adv. Poss. §§ 459-462.

A tax deed void on its face is not sufficient color of title to bring possession thereunder

within Mansf. Dig. Ark. § 4475, which provides that no action for the recovery of lands, against persons holding them by virtue of a purchase at a tax sale, shall be maintained, unless plaintiff or those under whom he claims has been in possession within two years before.—*Redfield v. Parks*, 132 U. S. 239, 10 S. Ct. 83, 33 L. Ed. 327.

A tax deed is sufficient to support an adverse possession under color of title.—*Lewis v. Barnhart*, 145 U. S. 56, 12 S. Ct. 772, 36 L. Ed. 621, affirming judgment *Same v. Barnhardt*, (C. C.) 43 F. 854.

§81. — Persons executing instruments.

See 1 Cent. Dig. Adv. Poss. §§ 473-485.

A deed executed by an Indian patentee under the treaty of January 31, 1855, between the United States and the Wyandotte Indians, valid upon its face, in which the grantor covenanted that he was seised in fee simple, had good right to sell the same, that it was free from incumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons, constitutes color of title in the grantees, who paid value therefor and had no notice of any defect in the title of their grantor, although the patentee was classed as an incompetent under such treaty, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs without the consent of the secretary of the interior. Judgment, *Schrimpcher v. Stockton*, 51 P. 276, 58 Kan. 758, affirmed.—*Schrimpscher v. Stockton*, 22 S. Ct. 107, 183 U. S. 290, 46 L. Ed. 203.

§84. Good faith and diligence.

See 1 Cent. Dig. Adv. Poss. §§ 488-500; 24 Cent. Dig. Fraud. Conv. § 560.

One in possession of lands under a preemption entry and patent from the United States is not charged with notice that the lands were swamp lands 20 years prior to the patent, and, as such, had passed under a prior act of congress granting swamp lands to the state, nor with notice that the land was within the territorial limits of a town, where neither of these facts nor the date of entry appears on the face of the receiver's receipt or patent; and therefore such patent is a "just title," and sufficient to sustain a plea of prescription, under Code La. arts. 3481-3484.—*Texas & P. Ry. Co. v. Smith*, 159 U. S. 66, 15 S. Ct. 994, 40 L. Ed. 77.

Knowledge of the rejection of his first timber culture entry of land within the place limits of a railway land grant does not require the imputation of bad faith to the entryman in going into possession on the advice of counsel under a second entry, afterwards summarily canceled without his knowledge, so as to prevent his open, notorious, and continuous possession from ripening into full title as against the railway company if the latter fails to assert its rights, within the period prescribed by the statute of limitations. Judgment, *Blumer v. Iowa R. Land Co.* (1905) 105 N. W. 342, 129 Iowa, 32, affirmed.—*Iowa R. Land Co. v. Blumer*, 27 S. Ct. 769, 206 U. S. 482, 51 L. Ed. 1148.

A person procuring a fraudulent entry of a possessory title cannot avail himself of Civ. Code Porto Rico, art. 1957, declaring a prescription by possession for 10 years as to persons present, and for 20 years as to those absent, for lack of good faith.—*Ochoa v. Hernandez y Morales*, 33 S. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

§85. Evidence.

See 1 Cent. Dig. Adv. Poss. §§ 213, 498-503, 656, 657, 660, 663, 688-690.

Possession of land under a deed does not absolutely preclude the grantee from showing

title by adverse possession to a much larger tract, but the presumption is against him; and, if his testimony as to his possession is reconcilable with his position as grantee under the deed, the theory that he holds under the deed, and not by adverse possession, should be adopted.—*Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

(G) PAYMENT OF TAXES.

§87. Statutory provisions.

See 1 Cent. Dig. Adv. Poss. §§ 504-532.

Under Rev. St. 1872, c. 24, § 8, actual possession of lands for more than seven years, under claim and color of title made in good faith, accompanied by a payment of all taxes legally assessed during that period, confers an absolute title according to the purport of the paper title.—*Lewis v. Barnhart*, 145 U. S. 56, 12 S. Ct. 772, 36 L. Ed. 621, affirming judgment *Same v. Barnhardt* (C. C.) 43 F. 854.

§88. Act of ownership.

See 1 Cent. Dig. Adv. Poss. §§ 509-511.

Payment of taxes for 25 years is strong evidence of a claim of title, and the failure to make claim or to pay the taxes is some evidence of an abandonment of any rights in the property. 5 App. D. C. 397 affirmed.—*Holtzman v. Douglas*, 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466.

§94. Sufficiency of payment.

See 1 Cent. Dig. Adv. Poss. §§ 523, 529.

Persons paying taxes on railroad right of way cannot, where the railway has returned the right of way for taxation and paid the taxes, claim adverse possession under Act June 24, 1912.—*Stuart v. Union Pac. R. Co.*, 33 S. Ct. 338, 227 U. S. 342, 57 L. Ed. 535, affirming decree 178 F. 753, 103 C. C. A. 89.

II. OPERATION AND EFFECT.

(A) EXTENT OF POSSESSION.

§99. Possession under color of title.

See 1 Cent. Dig. Adv. Poss. §§ 547-594.

§100. — Constructive possession in general.

See 1 Cent. Dig. Adv. Poss. §§ 547-574.

The possession of one who has a colorable title is co-extensive with the boundaries of the instrument under which he claims, in the absence of any actual possession by the true owner.—*Smith v. Gale*, 144 U. S. 509, 12 S. Ct. 674, 36 L. Ed. 521, affirming judgment *Gale v. Shillock*, 29 N. W. 661, 4 Dak. 182, and *Same v. Frazier*, 30 N. W. 138, 4 Dak. 196.

A partial actual possession of alleged tide lands actually belonging to a city cannot be extended by construction to the boundaries of the occupant's claim, under the state possessory act (St. 1852, p. 158). Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 69 P. 1064, 139 Cal. 370, affirmed.—*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

§101. — Relation to each other of different premises or parts of same premises.

See 1 Cent. Dig. Adv. Poss. §§ 575-589.

In determining questions of adverse possession of lands, the rule is that, if the lands in controversy embrace several grants or surveys which are coterminous, they will all be regarded as forming one tract.—*Rich v. Braxton*, 158 U. S. 375, 15 S. Ct. 1006, 39 L. Ed. 1022, affirming decree (C. C.) *Braxton v. Rich*, 47 F. 178.

The erection of houses on two lots of an uninclosed town block held under a deed describing it as composed of a number of lots, and referring to a plat showing the lots, is not, as mere matter of law, constructive possession of the whole.—*Carter v. Ruddy*, 17 S. Ct. 640, 166 U. S. 493, 41 L. Ed. 1090, affirming judgment 56 F. 542, 6 C. C. A. 3.

⇐103. — Mixed possession under hostile titles, or conflicting grants or surveys.

See 1 Cent. Dig. Adv. Poss. §§ 590-594.

The heirs of the original grantee in the Alameda land grant cannot claim the benefit so far as they are not excluded by adverse claimants of the provisions of Comp. Laws, N. M. 1865, c. 73, § 1 (Comp. Laws 1897, § 2937), under which possession for ten years under a deed purporting to convey a fee simple of any lands granted by Spain, Mexico, or the United States, gives a title in fee to the land specified in the deed, if, during the ten years, no claim by a suit effectually prosecuted has been set up.—*Montoya v. Gonzales*, 34 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment *Same v. Unknown Heirs of Vigil*, 120 F. 676, 16 N. M. 349.

(B) TITLE OR RIGHT ACQUIRED.

⇐104. Presumption of grant.

See 1 Cent. Dig. Adv. Poss. §§ 595-602; 41 Cent. Dig. Pub. Lands, § 622.

In order to presume a lost grant, it is not necessary for the jury to believe that a conveyance was in point of fact executed.—*Fletcher v. Fuller*, 7 S. Ct. 667, 120 U. S. 534, 30 L. Ed. 759.

Long and uninterrupted possession of real property, in the absence of rebutting circumstances, creates a presumption that formal instruments or records of title have once existed, even if they cannot be found.—*United States v. Chavez*, 20 S. Ct. 159, 175 U. S. 509, 44 L. Ed. 255.

A presumption of title arising from long possession extends to all that may be necessary to the repose of the title, and is not limited to a presumption of only one step in the title.—*Id.*

⇐106. Nature and extent of title or right.

See 1 Cent. Dig. Adv. Poss. §§ 604-623.

An adverse possession of land for the period of time prescribed by the statute of limitations not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the adverse holder.—*Bicknell v. Comstock*, 113 U. S. 149, 5 S. Ct. 399, 28 L. Ed. 962; *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 453, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

Where one has had the peaceable, undisturbed, open possession of real or personal property,

with an assertion of his ownership for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title,—a title superior to that of the latter, whose neglect to avail himself of his legal right has lost him his title,—and a legislative act that would remove the bar of the statute of limitations in such a case would deprive the former of his property without due process of law, and would be void.—*Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483.

Where the evidence shows that defendant is in adverse possession under claim of title for the statutory period, it is error to refuse to charge that "an uninterrupted occupancy of land by a person who has in fact no title thereto for [the statutory period], adversely to the true owner, operates to extinguish the title of the true owner thereto, and vests the right to the premises absolutely in the occupier."—*Probst v. Trustees of Board of Domestic Missions*, 129 U. S. 182, 9 S. Ct. 263, 32 L. Ed. 642.

In the District of Columbia an action for the recovery of land is barred in 20 years, and an open, visible, continuous, and exclusive possession for that period, with a claim of ownership adverse to all titles and claimants, gives title to the occupant.—*Sharon v. Tucker*, 144 U. S. 533, 12 S. Ct. 720, 36 L. Ed. 532; *Stellwagen v. Same*, 144 U. S. 548, 12 S. Ct. 724, 36 L. Ed. 537.

Possession for ten years under a deed purporting to convey a fee simple of any lands granted by Spain, Mexico, or the United States, gives a title in fee simple under Comp. Laws N. M. 1865, c. 73, § 1 (Comp. Laws 1897, § 2937), as construed by the New Mexico courts to the land specified in the deed, if, during such time, no claim by a suit effectually prosecuted has been set up.—*Montoya v. Gonzales*, 34 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment *Same v. Unknown Heirs of Vigil*, 120 P. 676, 16 N. M. 349.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

[No paragraphs or references in this Digest. But see 1 Cent. Dig. Adv. Poss. §§ 636-701.]

ADVERTISEMENT.

Acceptance by carrier in lieu of transportation charges, exclusiveness of federal power to regulate commerce, see Commerce, ⇐8; violation of interstate commerce regulations, see Carriers, ⇐35.

Photograph prohibited for advertising purposes, due process of law, see Constitutional Law, ⇐278.

Publication of process, see Process, ⇐86-106. Vehicles, ordinance denying due process of law, see Constitutional Law, ⇐292; equal protection of the laws, see Constitutional Law, ⇐235; impairing obligation of contract, see Constitutional Law, ⇐154.

This Digest is compiled on the Key-Number System. For explanation, see page iii.
SUP.CT.DIG.—3

AFFIDAVITS.

Scope-Note.

[INCLUDES formal declarations or statements in writing and under oath, as to matters of fact, whether made voluntarily or not, taken ex parte for use in legal proceedings; making, taking, and requisites of such affidavits; amendment of defects; and use in evidence in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
Depositions.
Oath.
As evidence in court of claims, see Courts, ¶ 464.
False affidavit, see Perjury.
Fees of commissioner for drafting affidavits, see United States Commissioners, ¶ 3.
Record for purpose of review, see Appeal and Error, ¶ 523, 528.
Particular proceedings or purposes.
See—
Appeal and Error, ¶ 670, 799.

See—
Attachment, ¶ 102-125.
Courts, ¶ 280.
Criminal Law, ¶ 603, 957.
Detinue, ¶ 14.
Equity, ¶ 320.
Landlord and Tenant, ¶ 303.
Mines and Minerals, ¶ 12.
New Trial, ¶ 40, 141-143.
Pleading, ¶ 289-304.
Process, ¶ 96.
Public Lands, ¶ 98.

¶ 18. Use in evidence.

See 2 Cent. Dig. Afft. ¶ 69-78.

The fact that an affidavit to obtain an order of court was sworn upon information and belief

affects only its weight, and not its competency, when offered in evidence against the party making it on the trial of another issue.—Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 6 S. Ct. 632, 29 L. Ed. 837.

AFFIRMANCE.

Judgment or order, see Appeal and Error, ¶ 1124-1146.

AFFRAY.

[No paragraphs or references in this Digest. But see 2 Cent. Dig. Affray.]

AFTER-ACQUIRED PROPERTY OR TITLE.

See Estoppel, ¶ 36-38.

AGE.

Affecting right to enlist, see Army and Navy, ¶ 18.

AGENCY.

See Principal and Agent.

AGGRAVATION.

Injury, see Damages, ¶ 33.

AGGREGATION.

Patentable inventions, see Patents, ¶ 25.

AGISTMENT.

See Animals, ¶ 21-23.

AGREED CASE.

See Appeal and Error, ¶ 573.

AGREEMENT.

See Contracts.

AGRICULTURAL COLLEGES.

See Colleges and Universities, ¶ 10.

AGRICULTURE.

See 2 Cent. Dig. Agric.

Agricultural colleges, see Colleges and Universities, ¶ 10.

Boards, delegation of legislative powers, see Constitutional Law, ¶ 62.

Drainage of lands, see Drains.

Duties on agricultural products, see Customs Duties, ¶ 30.

Inspection of fertilizers as interference with commerce, see Commerce, ¶ 51.

Irrigation, see Waters and Water Courses, ¶ 213-257.

Judgment on note for price of fertilizer, as bar to action for damages for defective quality, see Judgment, ¶ 622.

Property in crops, see Crops.

Protection and promotion of growth of trees, see Woods and Forests.

AIDER BY VERDICT.

See—
Indictment and Information, ¶ 200-203.
Pleading, ¶ 431-436.

AIDERS AND ABETTERS.

See—
Banks and Banking, ¶ 256, 257.
Criminal Law, ¶ 792.

ALABAMA CLAIMS.

See—
Treaties, ¶13.
United States, ¶111.

ALASKA.

See Territories, ¶6, 20.

ALCOHOLIC LIQUORS.

See Intoxicating Liquors.

ALIAS WRITS.

See Attachment, ¶155.

ALIBI.

See Criminal Law, ¶358, 824.

ALIENATION.

Lands of Indians, see Indians, ¶15.
Married woman's separate property, see Husband and Wife, ¶181-196.
Suspension of absolute power of alienation, see Perpetuities, ¶5, 6.

ALIENS.

Scope-Note.

[INCLUDES persons of foreign allegiance; their rights and disabilities in general; exclusion or expulsion from the country; regulation and restriction of immigration; and admission to citizenship.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Disabilities.

- ¶1. Who are aliens.
- 2. Evidence of alienage.
- 5. Real property.
- 6. — Disabilities in general.
- 12. — Enabling acts.
- 13. — Effect of treaties.

II. Exclusion or Expulsion.

- ¶18. Power to exclude or expel aliens in general.
- 19. Chinese exclusion acts.
- 20. — Constitutionality.
- 21. — Construction and operation in general.
- 22. — Effect of treaties with China.
- 23. Chinese persons excluded.
- 25. — Persons other than laborers.
- 27. — Persons departing from and returning to United States.
- 28. — Certificates of identification.
- 30. Exclusion and deportation of Chinese.
- 32. — Proceedings and review.

III. Immigration.

- ¶39. Power to regulate or restrict immigration.
- 40. Constitutional and statutory provisions.
- 41. Immigration officers.
- 42. — Appointment and qualification.
- 44. — Powers, duties, and proceedings.
- 45. Immigrants excluded.
- 49. — Liable to become a public charge.
- 50. — Imported under contracts to labor.
- 51. — Prostitution.
- 52. Detention and return of immigrants.
- 53. — In general.
- 54. — Proceedings and review.
- 55. Offenses against immigration laws.
- 56. — Unlawful importation and harboring.

III. Immigration—Continued.

- 57. — Liability of vessel, owner, or master.
- 58. Actions for penalties under immigration laws.
- 59. Criminal prosecutions under immigration laws.

IV. Naturalization.

- 60. Power to naturalize and nature of right in general.
- 63. Minor residents.
- 67. Jurisdiction of courts.
- 69. Record, certificate, and evidence.
- 70. Operation and effect.
- 71½. [New, vol. 7 Key-No. Series]. Cancellation of Certificate.
- 72. Offenses against naturalization laws.

Cross-References.

See—
 Citizens.
 Indians.
 Master and Servant, 11.
 Treaties, 11.
 Alien enemies, see War.
 District in which action must be brought, see Courts, 274.
 Due process of law, see Constitutional Law, 278.

Equal protection of laws, see Constitutional Law, 210, 212.
 Escheat, see Escheat.
 Jurisdiction of federal courts, see Courts, 321.
 Suit in federal court to enjoin enforcement of Anti-Alien Labor Law, as suit against state, see Courts, 308.

I. DISABILITIES.

Employment, class legislation, see Constitutional Law, 208; equal protection of laws, see Constitutional Law, 238; privileges and immunities of citizens, see Constitutional Law, 207.
 Employment, review of decisions, see Courts, 394(3).
 Injunction against prosecution under Anti-Alien Labor Law, see Injunction, 105.
 Location of mining claim, see Mines and Minerals, 12.

1. Who are aliens.

See 2 Cent. Dig. Aliens, § 1.

A native of Porto Rico, who was an inhabitant of that island at the time of its cession to the United States by the treaty of April 11, 1899 (30 Stat. 1754), with Spain, is not, upon her arrival at the port of New York, an alien immigrant, within the meaning of Act Cong. March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, pp. 1294, 1296], providing for the detention and deportation of alien immigrants likely to become public charges. Order, *In re Gonzalez* (C. C.) 118 F. 941, reversed.—*Gonzales v. Williams*, 24 S. Ct. 177, 192 U. S. 1, 48 L. Ed. 317.

2. Evidence of alienage.

See 2 Cent. Dig. Aliens, § 2, 3.

The alienage of a defendant is not to be presumed from the mere fact that he is the consul, in this country, of a foreign government.—*Bors v. Preston*, 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419.

5. Real property.

See 2 Cent. Dig. Aliens, § 5-52.

6. — Disabilities in general.

See 2 Cent. Dig. Aliens, § 5-10.

Under the California constitution, foreigners who are bona fide residents of the state have the same rights in respect to the possession of real property as a native-born citizen.—*Griffith v. Godey*, 113 U. S. 89, 5 S. Ct. 383, 28 L. Ed. 934.

From the recital in a power of attorney to sell land, "In the city of Mexico, January 10,

1837, * * * personally appeared * * * a citizen, * * *" it will be presumed, in the absence of proof, that the grantor was a citizen of Mexico, having the right to dispose of land in Texas at the time.—*Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

An alien's incapacity to take and hold, by reason of alienage, is open to question by the government only.—*Manuel v. Wulff*, 152 U. S. 505, 14 S. Ct. 651, 38 L. Ed. 532, reversing judgment *Wulff v. Manuel*, 9 Mont. 276, 279, 286, 23 P. 723.

12. — Enabling acts.

See 2 Cent. Dig. Aliens, §§ 12, 23-44.

Act Tex. March 18, 1848, § 9 (Pasch. Dig. art. 44), allowing alien heirs nine years in which to naturalize, or to sell land inherited by them, before they shall forfeit it, is not repealed by Act Feb. 13, 1854, providing that aliens shall enjoy in Texas the same rights as are accorded to Americans in their country under the laws and treaties thereof, and expressly repealing the former act only so far as inconsistent therewith, but, under the former act, alien heirs, by the law of whose country aliens cannot inherit real estate, obtain a defeasible title to lands in Texas good for nine years at least, and which will ripen into an indefeasible title if, before the expiration of the nine years, the law of their country is so changed as to enable aliens to inherit.—*Manrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

13. — Effect of treaties.

See 2 Cent. Dig. Aliens, §§ 47-58.

The treaty between the United States and France of February 23, 1853, art. 7 (10 St. 996), provided that "in all the states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner, as the citizens of the United States," and the president engaged to recommend the passage of laws permitting aliens to hold realty in states whose laws did not permit it. It was further provided that "in like manner * * * France accords to the citizens of the United States the same rights, within its territory, in respect to real

and personal property and to inheritance, as are enjoyed there by its own citizens." Act Cong. March 3, 1887 (24 St. 476, c. 340), provided that it should be unlawful for aliens to acquire, hold, or own realty in any of the territories or the District of Columbia, except by inheritance, etc. Prior to the treaty of 1853, French citizens could hold lands in the District of Columbia, but could not take them by inheritance from citizens of the United States. *Held*, that the words "states of the Union" in the treaty of 1853 included the District of Columbia, and under that treaty French citizens may take lands therein by inheritance from a citizen of the United States. 7 Mackey, 331, reversed.—*De Geofroy v. Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642.

II. EXCLUSION OR EXPULSION.

Due process of law, see Constitutional Law, ¶ 314.

Exclusion act conflicting with treaties, see Treaties, ¶ 11.

Exclusion of anarchists as denial of personal rights, see Constitutional Law, ¶ 82.

Laws relating to evidence in deportation proceedings as encroachment on judiciary, see Constitutional Law, ¶ 55.

¶ 18. Power to exclude or expel aliens in general.

See 2 Cent. Dig. Aliens, ¶ 70-72.

Congress has power, even in times of peace, to exclude aliens from, or prevent their return to, the United States, for any reason it may deem sufficient.—*Chae Chan Ping v. United States*, 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068, affirming *In re Chae Chan Ping (C. C.)* 36 F. 431.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.—*Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905.

The political department of the federal government, through the constitutional grant to it of control over international relations, has authority to expel aliens who have taken no steps to become citizens, even though they are subjects of a friendly power, and have acquired a domicile in this country.—*Id.*

Chinese laborers residing in the United States are entitled, like all other aliens, so long as they are permitted by the government to remain in the country, to all the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility; but as they have taken no steps to become citizens, and are incapable of becoming such under the naturalization laws, they remain subject to the power of congress to order their expulsion or deportation whenever, in its judgment, such a measure is necessary or expedient for the public interest.—*Id.*

Congress, having constitutional power to exclude alien contract laborers, also had power to impose a penalty upon persons who assist in their introduction.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.

Congress did not exceed its delegated powers by enacting the provisions of Immigration Act March 3, 1903, c. 1012, § 2, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, pp. 172, 180], for the exclusion and deportation of alien anarchists. *Order (C. C.)* 128 F. 253, affirmed.—*United States ex rel. Turner v. Williams*, 24 S. Ct. 719, 194 U. S. 279, 48 L. Ed. 979.

The conclusion of the immigrant inspectors, approved by the Secretary of Commerce and

Labor, that an alien came within the provisions of Immigration Act March 3, 1903, c. 1012, § 2, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, pp. 172, 180], for the exclusion and deportation of alien anarchists, cannot be said, as a matter of law, to be wholly unsupported by the evidence, even though such act be so construed as to include only advocates of the forcible overthrow of the federal government or of all governments, or of the assassination of officials, where there was evidence that such alien advocated "as an anarchist" a universal strike, and proposed to lecture upon "the legal murder of 1887," and to address mass meetings on that subject, in association with a person who had been convicted of advocating revolution and murder.—*Id.*

The enactment of the provisions of Immigration Act March 3, 1903, c. 1012, § 2, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, pp. 172, 180], for the exclusion and deportation of alien anarchists, does not violate either Const. U. S. art. 3, § 1, or amendments 5 and 6.—*Id.*

¶ 19. Chinese exclusion acts.

See 2 Cent. Dig. Aliens, ¶ 73-75.

¶ 20. — Constitutionality.

See 2 Cent. Dig. Aliens, ¶ 73.

Act March 3, 1891, c. 551, which provides for the exclusion from admission into the United States of certain classes of aliens, and that the decision by the inspectors of immigration adverse to the right of any alien to land shall be final and conclusive unless appeal is taken to the superintendent of immigration, whose action is subject to review by the secretary of the treasury, is a constitutional exercise of the power of congress.—*Nishimura Ekiu v. United States*, 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146.

Act May 5, 1892, requires in section 6 that all Chinese laborers entitled to remain in this country shall within one year from the date of the act obtain from the collector of internal revenue of the districts in which they reside, free of cost, a certificate of residence, which shall be in the nature of a passport enabling them to go into all parts of the United States, and which shall be recorded in the office of the collector; and provides that Chinese laborers who neglect to obtain such certificates, or are found in the United States without them, "shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge." The act makes it the duty of the judge to order that such laborer be deported from the United States, "unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act." *Held*, that the proceeding here provided for is in no proper sense a trial and sentence for crime, nor is the order of deportation a banishment in the technical sense, but the whole proceeding is merely a method of enforcing the return to his own country of an alien who fails to comply with the conditions prescribed for his continued residence here; and the provisions of the constitution requiring due process of law and trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.—*Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905.

Act May 5, 1892, § 4, providing that a Chinese person adjudged to be not lawfully entitled to remain in the United States shall

be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States, in effect provides for such imprisonment upon the adjudication of a justice, judge, or commissioner upon a summary hearing, and conflicts with Const. U. S. Amends. 5, 6, declaring that no person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a grand jury, and that the accused shall enjoy the right to a speedy and public trial by an impartial jury.—*Wong Wing v. United States*, 163 U. S. 228, 16 S. Ct. 977, 41 L. Ed. 140.

21. — Construction and operation in general.

See 2 Cent. Dig. Aliens, § 74.

The provisions of 23 Stat. c. 220, amending 22 Stat. c. 126, relative to evidence of identity, are not retroactive.—*United States v. Jung Ah Lung*, 124 U. S. 621, 8 S. Ct. 663, 31 L. Ed. 591.

Chinese laborers held not tacitly exempted from the general provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), for deportation of any alien unlawfully entering the United States, because of Chinese exclusion acts of an earlier date, though by section 43 of the later act its provisions are not to be construed to alter or amend the laws relating to the Chinese.—(1912) *United States v. Wong You*, 32 S. Ct. 195, 223 U. S. 67, 56 L. Ed. 354, reversing judgment (1910) *Wong You v. United States*, 181 F. 313, 104 C. C. A. 535, which reverses order 176 F. 933.

The extension of the Chinese exclusion and immigration laws to the Philippine Islands does not deprive the government of the islands of the power to authorize summary executive deportation of aliens.—*Chuoco Tiaco v. Forbes*, 33 S. Ct. 585, 228 U. S. 549, 57 L. Ed. 960.

22. — Effect of treaties with China.

See 2 Cent. Dig. Aliens, § 75.

Chinese laborers who came to this country after the making of the Chinese treaties of July 28, 1868, and November 17, 1880 (16 Stat. 740; 22 Stat. 826), acquired no right thereunder, or under the acts of congress in relation to the Chinese, as denizens or otherwise, to remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn whenever, in its opinion, the public welfare might require it. *Chae Chan Ping v. United States*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068, followed.—*Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905.

No abrogation of the judicial procedure for deportation of Chinese laborers, provided for by Act May 6, 1882, c. 126, § 12, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310], and continued in force for 10 years from and after the passage of Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], was affected by the treaty with China of December 8, 1894, because of its failure to prescribe any such procedure for deportation, or to continue in force any prior statute on that subject, as such provision is in harmony with, and can be enforced without affecting or impairing any right secured by, the treaty, and such enforcement will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in such treaty.—*United States v. Lee Yen Tai*, 22 S. Ct. 629, 185 U. S. 213, 46 L. Ed. 878.

The regulations of the treasury department of December 8, 1900, governing the privilege of transit by Chinese laborers across the territory of the United States, which require that evidence be produced which shall satisfy the col-

lector of customs "that a bona fide transit only was intended," were authorized by the provision of the treaty with China of March 17, 1894 (28 Stat. 1211), that Chinese laborers shall continue to enjoy such privilege of transit, subject to such regulations by the government of the United States as may be necessary to prevent abuse of the privilege.—*Fok Young Yo v. United States*, 22 S. Ct. 686, 185 U. S. 296, 46 L. Ed. 917; *Lee Gon Yung v. Same*, 22 S. Ct. 690, 185 U. S. 306, 46 L. Ed. 921, affirming order (C. C.) *In re Lee Gon Yung*, 111 F. 998.

No abrogation of the provisions of the Chinese exclusion act of 1882 and the acts amendatory thereof [U. S. Comp. St. 1901, p. 1305], relative to the evidence which a member of the exempted class of the Chinese must produce to secure admission into the United States, was effected by the treaty of 1894 with China. Judgment (D. C.) *In re Lee Lung*, 102 F. 132, affirmed.—*Lee Lung v. Patterson*, 22 S. Ct. 795, 186 U. S. 168, 46 L. Ed. 1108.

No repeal of the provisions of Act May 5, 1892, c. 60, § 3, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], imposing on Chinese the burden of establishing their right to remain in the United States, was effected by Act April 29, 1902, c. 641, § 1 (32 Stat. 176), continuing all laws then in force so far as not inconsistent with treaty obligations, on the theory that the former section was inconsistent with the treaty with China of December 8, 1894 (28 Stat. 1210) art. 4, giving the Chinese the rights of citizens of the most favored nation, since the treaty itself in article 5 expressly refers to the act of 1892, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], and states that the Chinese government will not object to the enforcement of those acts.—*Ah How v. United States*, 24 S. Ct. 357, 193 U. S. 65, 48 L. Ed. 619.

Likewise the provisions for Chinese registration made by Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], were not repealed by Act April 29, 1902, c. 641, § 1 (32 Stat. 176).—*Id.*

23. Chinese persons excluded.

See 2 Cent. Dig. Aliens, §§ 76-90.

A foreign-born Chinese woman, though married to a Chinaman of American birth, is an alien within Act Feb. 20, 1907, as amended by Act March 26, 1910, providing for deportation of aliens found in houses of prostitution.—*Low Wah Suey v. Backus*, 32 S. Ct. 734, 225 U. S. 460, 56 L. Ed. 1165.

25. — Persons other than laborers.

See 2 Cent. Dig. Aliens, §§ 79-82.

The wife and minor children of a Chinese merchant, who is domiciled in this country may, under the act of congress of 1884, construed in connection with the treaty of 1880, enter the country by reason of the right of the husband and father, without the certificate mentioned in the act. Judgment (D. C.) 83 F. 136, affirmed.—*United States v. Gue Lim*, 20 S. Ct. 415, 176 U. S. 459, 44 L. Ed. 544.

The names of any of the partners need not appear in the company name under which a Chinese grocery is actually conducted at a fixed place of business in order to constitute them "merchants" within the meaning of Chinese Exclusion Act May 5, 1892, c. 60, § 2, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], which defines a merchant as "a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is

necessary in the conduct of his business as such merchant."—*Tom Hong v. United States*, 24 S. Ct. 517, 193 U. S. 517, 48 L. Ed. 772.

—27. — **Persons departing from and returning to United States.**

See 2 Cent. Dig. Aliens, §§ 85-87.

Act Cong. May 6, 1882, c. 126, § 4, as amended by Act July 5, 1884, c. 120, prescribing the certificate which shall be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States, is not retrospective, and does not apply to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, which gave to such Chinese laborers the right to come and go at will, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884.—*Chew Heong v. United States*, 112 U. S. 536, 5 S. Ct. 255, 28 L. Ed. 770.

A Chinaman who left this country after the passage of the first act restricting Chinese immigration (22 Stat. c. 126), and before the amendment thereof (23 Stat. c. 220) was passed, and who returned after the passage of the latter act, is entitled to land upon complying with the requirements of the first act, the provisions of the amending act relating to evidence of identity not being retroactive.—*United States v. Jung Ah Lung*, 124 U. S. 621, 8 S. Ct. 663, 31 L. Ed. 591.

Act Cong. May 6, 1882, § 6 (22 Stat. 58, c. 126), provides that every Chinese person other than a laborer, who may be entitled to come within the United States, shall produce a prescribed certificate of his identity and of his right to enter; and Act July 5, 1884, provides that this certificate "shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States." Act Oct. 1, 1888, prohibits any Chinese laborer who had been, or was then, or might hereafter be, a resident within the United States, and who had departed or might depart therefrom, to return to or remain in the United States. *Held*, that since the passage of the latter act no Chinese person, formerly resident in the United States but temporarily absent therefrom, is entitled to return without the prescribed certificate.—*Wan Shing v. United States*, 140 U. S. 424, 11 S. Ct. 729, 35 L. Ed. 503.

—28. — **Certificates of identification.**

See 2 Cent. Dig. Aliens, §§ 88-90.

Under 22 Stat. c. 126, § 4, providing that every Chinaman entitled to return to the United States shall, on leaving the country, obtain a certificate of identification from the collector of customs, and shall deliver it to the collector on his return, in order to be entitled to land, a Chinaman having obtained such a certificate on his departure, and having had it stolen from him during his absence, is entitled to land on his return to the port whence he sailed (no one in the meantime having presented the certificate), on proving these facts, and identifying himself as the person to whom the certificate was issued.—*United States v. Jung Ah Lung*, 124 U. S. 621, 8 S. Ct. 663, 31 L. Ed. 591.

The certificates of identity issued to Chinese laborers under Act Cong. May 6, 1882, were mere licenses, revocable at the pleasure of congress.—*Chae Chan Ping v. United States*, 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068, affirming (C. C.) *In re Chae Chan Ping*, 36 F. 431.

The requirement of the sixth section of the amended exclusion act (28 St. p. 115), that the viséd certificate of identity therein provided for shall be the sole evidence permissible to establish a right to enter the United States, does not apply to a merchant, long domiciled

in this country, who is returning from a temporary visit to China, and he may establish his right by the documentary evidence of identity furnished to him by the customs officers on his departure from the United States.—*Wan Shing v. United States*, 140 U. S. 424, 11 S. Ct. 729, 35 L. Ed. 503, distinguished, and 47 F. 578, reversed.—*La Ow Bew v. United States*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

A Chinaman seeking to enter the United States on a certificate showing that he was formerly engaged in this country as a merchant is required by Act Cong. Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1323], to establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant. Judgment *In re Li Sing*, 86 F. 896, 30 C. C. A. 451, 38 U. S. App. 1, affirmed.—*Li Sing v. United States*, 21 S. Ct. 449, 180 U. S. 486, 45 L. Ed. 634.

—30. **Exclusion and deportation of Chinese.**

See 2 Cent. Dig. Aliens, §§ 84, 92-95.

—32. — **Proceedings and review.**

See 2 Cent. Dig. Aliens, §§ 84, 92-95.

There is nothing in 22 Stat. c. 126, and 23 Stat. c. 220, or in the treaty on which they are based, making the decision of the customs officers final, or ousting the courts of jurisdiction.—*United States v. Jung Ah Lung*, 124 U. S. 621, 8 S. Ct. 663, 31 L. Ed. 591.

A Chinese person 16 years of age claimed the right to enter the United States because he was born here, and hence a citizen. He and his father testified that he was born on a certain street, and went to China with his mother when he was 10 years old; but he remembered no circumstance of his early life, and knew nothing of the English language. The father, who worked on a sewing machine, produced a so-called "store book," showing the purchase of a ticket for the boy and his mother; but he gave no particulars of his life in San Francisco, or of his being known among his neighbors as having any children. The boy remembered nothing but the names of three men, who, he said, accompanied him to China, but he testified that his mother had frequently repeated these to him. *Held*, that the evidence was not sufficient to establish his citizenship.—*Quock Ting v. United States*, 140 U. S. 417, 11 S. Ct. 733, 35 L. Ed. 501.

Act Aug. 18, 1894 (28 Stat. 390), provided that, "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury." *Held*, that the authority of the courts to review the decision of the executive officers in relation to the exclusion of a Chinaman who had formerly conducted business as a merchant in the United States was taken away by this act.—*Lem Moon Sing v. United States*, 158 U. S. 538, 15 S. Ct. 967, 39 L. Ed. 1082.

The burden of establishing by affirmative proof his right to remain in the United States, which is put upon a Chinaman by Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], when he is arrested on the ground that he is unlawfully in this country, is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Judgment *In re Li Sing*, 86 F. 896, 30 C. C. A. 451, 38 U.

S. App. 1, affirmed.—*Li Sing v. United States*, 21 S. Ct. 449, 190 U. S. 486, 45 L. Ed. 634.

The decision of the collector of customs, denying the privilege of transit across the territory of the United States to a Chinese citizen possessing a through ticket to a point in foreign territory, cannot be reviewed by habeas corpus, since by the regulations of the treasury department of the United States, authorized by the treaty of March 17, 1894 (28 Stat. 1211), with China, the final decision as to permitting such transit was devolved on that officer, with no provision for a review of such decision.—*Fok Young Yo v. United States*, 22 S. Ct. 686, 185 U. S. 296, 46 L. Ed. 917; *Lee Gon Yung v. Same*, 22 S. Ct. 690, 185 U. S. 306, 46 L. Ed. 921, affirming order (C. C.) in *re Lee Gon Yung*, 111 F. 998.

A collector of customs, by disregarding the certificates which, by Chinese Exclusion Act July 5, 1884, c. 220, § 6, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1308], are made evidence to establish a right of entry into the United States on the part of the persons presenting them, does not lose his jurisdiction finally to determine the right of such persons to enter the United States. Judgment, in *re Lee Lung* (D. C.) 102 F. 132, affirmed.—*Lee Lung v. Patterson*, 22 S. Ct. 795, 186 U. S. 168, 46 L. Ed. 1108.

The provision in Chinese Exclusion Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], that Chinese laborers without certificates may be "taken before a United States judge," is satisfied by a proceeding before a "justice, judge, or commissioner," which are the words used in section 12, Act May 6, 1882, c. 126, 22 Stat. 58 [U. S. Comp. St. 1901, p. 1310], section 12, Act July 5, 1884, c. 220, 23 Stat. 115 [Id.], section 13, Act Sept. 13, 1888, c. 1015, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1317], and section 3, Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], while Act March 3, 1901, c. 845, § 1, 31 Stat. 1093 [U. S. Comp. St. 1901, p. 1327], expressly authorizes the district attorney to designate the commissioner before whom a Chinese person may be brought.—*Chin Bak Kan v. United States*, 22 S. Ct. 891, 186 U. S. 193, 46 L. Ed. 1121; *Chin Ying v. Same*, 22 S. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126.

A lack in the complaint of positive averments of the facts and as to the official character of the person making it does not deprive a United States commissioner of his jurisdiction to determine the right of a Chinese laborer to remain in the United States.—*Id.*

The mere assertion of citizenship cannot deprive a United States commissioner of his statutory jurisdiction to adjudge a Chinese person to be unlawfully within the United States, unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."—*Id.*

A re-examination of the facts bearing upon the question whether a Chinese person is unlawfully in the United States, which was decided in the affirmative by a United States commissioner and by a judge of the district court on appeal from the commissioner's decision, will not be entered upon by the supreme court on appeal, although such appeal was taken under Act March 3, 1891, c. 551, § 5, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1292], on the ground that the construction of a treaty with China was drawn in question, and the supreme court has, therefore, jurisdiction to dispose of the entire case.—*Id.*

No formal complaint or pleadings are required in the proceedings under Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], for the determination of the right of Chinese laborers to remain in the United States.—*Ah*

How v. United States, 24 S. Ct. 357, 193 U. S. 65, 48 L. Ed. 619.

A United States commissioner is not, as a matter of law, bound to be satisfied by the testimony of a Chinese laborer that he was disabled by sickness from obtaining the certificate of residence required by Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], in order to entitle him to remain in the United States.—*Id.*

The written statement by a United States commissioner that a Chinaman was brought before him charged with being unlawfully within the United States, and was adjudged to have the right to remain in the United States by reason of being a citizen thereof, is not evidence of such adjudication.—*Id.*

Orders for the deportation of Chinese laborers, made on the sole ground that they had failed to show that they were bona fide merchants within the meaning of Chinese Exclusion Act May 5, 1892, c. 60, § 2, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], at the time registration was required, will be reversed by the federal Supreme Court, where that court is satisfied, from an examination of the record, that the testimony did establish that fact.—*Tom Hong v. United States*, 24 S. Ct. 517, 193 U. S. 517, 48 L. Ed. 772.

Federal courts will not interfere by habeas corpus with the refusal of the right of entry into the United States of Chinese persons alleging citizenship, at least until after a final decision of the Secretary of Commerce and Labor on the appeal provided for by Act Aug. 18, 1894, c. 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303], and Act Feb. 14, 1903, c. 552, 32 Stat. 825, in case of a decision by the immigration officers adverse to the admission of an alien.—*United States v. Sing Tuck*, 24 S. Ct. 621, 194 U. S. 161, 48 L. Ed. 917, reversing judgment *Sing Tuck v. United States* (C. C.) 128 F. 592, 63 C. C. A. 199, which reversed order 126 F. 386.

The appeal to "the judge of the District Court of the district," authorized by Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312], where a Chinese person has been convicted before a United States commissioner of being unlawfully in the United States, is, in effect, an appeal to the District Court, and not to the district judge as an individual; and the commissioner's transcript and other papers pertaining to the cause may therefore be filed in that court, and the final order of the judge be entered as the final order of the court.—*In re United States*, 24 S. Ct. 629, 194 U. S. 194, 48 L. Ed. 931.

The decision of the Secretary of Commerce and Labor, affirming the denial by the immigration officers, after examination, of the right of a person of Chinese descent to enter the United States, is no less conclusive on the federal courts, under Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 372, 390 [U. S. Comp. St. 1901, p. 1303], in habeas corpus proceedings, when citizenship is the ground on which the right of entry is claimed, than when the ground is domicile and the belonging to a class excepted from the exclusion acts.—*United States v. Ju Toy*, 25 S. Ct. 644, 198 U. S. 253, 49 L. Ed. 1040.

A hearing de novo before the district judge is contemplated by the provision of Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312], giving a Chinese person convicted before a United States commissioner of being unlawfully within the United States the right to appeal to the judge of the federal District Court for the district.—*Liu Hop Fong v. United States*, 28 S. Ct. 576, 209 U. S. 453, 52 L. Ed. 888.

The deportation of a Chinaman lawfully admitted to the United States upon a student's

certificate, complying with the treaty with China of December 8, 1894, art. 3, 28 Stat. 1210, cannot be ordered by a federal District Court upon the transcript of the proceedings before the commissioner, which presents merely such student's certificate and a statement that witnesses were examined, without any findings, or the giving of any testimony, although additional separate findings of the commissioner were afterwards filed, where this was done without the order of the court, and there was no consent to a hearing upon such additional findings.—Id.

Decision of Secretary of Commerce and Labor, affirming denial by inspector of admission of Chinese into United States, is under Act Aug. 18, 1894, and Act Feb. 14, 1903, conclusive unless abuse of discretion is shown.—(1912) *Tang Tun v. Edsell*, 32 S. Ct. 359, 223 U. S. 673, 56 L. Ed. 606, affirming judgment (C. C. A. 1909) *In re Tang Tun*, 168 F. 488, 93 C. C. A. 644.

Rights of applicant of Chinese descent for admission into the United States held not violated by act of inspector in examining the records of the custom house and requiring explanation of apparent rejection.—Id.

Inspector, who has rejected the application of a person of Chinese descent for admission into the United States, held on habeas corpus by such applicant not guilty of unfair or improper conduct.—Id.

Inspector, who had rejected application of person of Chinese descent for admission into the United States, held not guilty of improper conduct in forwarding to Secretary of Commerce and Labor papers found by examination of the records of other Chinese persons who arrived with the applicant, which records show his rejection.—Id.

Refusal to admit person of Chinese descent into the United States on the ground that he was not born in the United States held not to show a denial of a fair hearing.—Id.

Decision of appeal from rejection of application of a person of Chinese descent for admission into the United States held that of the Secretary of Commerce and Labor, though communicated by a telegram from the assistant secretary.—Id.

Finality of decision by Secretary of Commerce and Labor of appeal from decision of inspector rejecting application of person of Chinese descent for admission held not affected by the fact that the department held the case under consideration for less than two days.—Id.

Entire case may be taken to the Circuit Court of Appeals for review, where the District Court took jurisdiction of habeas corpus by a person of Chinese descent who had been refused admission into the United States.—Id.

Advisory authority of collector of customs over enforcement in the Philippine Islands of Chinese exclusion acts held not exceeded by giving the board of inquiry right to determine, subject to review, right to enter under Chinese exclusion acts.—*Chieng Ah Sui v. McCoy*, 36 S. Ct. 95, 239 U. S. 139, 60 L. Ed. 183.

III. IMMIGRATION.

See Habeas Corpus, 2, 23.

Conspiracy to import contract laborers, see Conspiracy, 33.

Delegation of judicial power to administrative officers, see Constitutional Law, 80.

Due process of law, see Constitutional Law, 303, 318.

Encroachment on judicial powers, see Constitutional Law, 80, 89.

Fees of district attorney in deportation proceedings, see District and Prosecuting Attorneys, 6.

Jurisdiction of circuit courts in criminal prosecutions, see Courts, 424.

Jury trial, right to, see Jury, 21.

Tax on immigrants as interference with commerce, see Commerce, 72.

Venue, see Criminal Law, 113.

39. Power to regulate or restrict immigration.

See 2 Cent. Dig. Aliens, § 100.

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *Chae Chan Ping v. United States*, 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068, affirming order *In re Chae Chan Ping* (C. C.) 36 F. 431. *Nishimura Ekin v. United States*, 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146.—*Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905.

Congress can prohibit admission of aliens and regulate their entrance as is done by Act Feb. 20, 1907, § 3, providing for deportation of any alien for practicing prostitution within three years after entry.—*Zakonaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

40. Constitutional and statutory provisions.

See 2 Cent. Dig. Aliens, § 100.

Act N. Y. May 31, 1881, levying a duty of one dollar on every alien passenger coming by vessel from a foreign port to the port of New York, though intended to secure an inspection of passengers with reference to the landing of criminals, paupers, lunatics, orphans, or infirm persons, subject to become a public charge, is not an inspection law, within the meaning of Const. U. S. art. 1, § 10, cl. 2, but is void, as a regulation of foreign commerce.—*People of State of New York v. Compagnie Generale Transatlantique*, 107 U. S. 59, 2 S. Ct. 87, 27 L. Ed. 383, affirming judgment (C. C.) 10 F. 357, 20 Blatchf. 296.

Act Cong. Aug. 3, 1882, "to regulate immigration," which imposes upon the owners of vessels who shall bring passengers from a foreign port into a port of the United States a duty of 50 cents for every such passenger not a citizen of this country, is valid.—*Edye v. Robertson*, 112 U. S. 580, 5 S. Ct. 247, 29 L. Ed. 798, affirming (C. C.) 18 F. 135, 21 Blatchf. 460.

Congress had no power to enact Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1907, p. 392), for the criminal punishment of the mere keeping, maintaining, supporting, or harboring, for the purpose of prostitution, any alien woman within three years after she shall have entered the United States.—*Keller v. United States*, 29 S. Ct. 470, 213 U. S. 138, 53 L. Ed. 737, 16 Ann. Cas. 1066.

Congress, in the exercise of its authority over foreign commerce and of its power to regulate immigration, could lawfully enact the provisions of Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, which make it unlawful to bring into the United States any alien afflicted with a loathsome or dangerous contagious disease, provide for the exacting of a penalty for bringing in an alien so afflicted, and authorize the refusal of clearance papers to a vessel while any such fine imposed upon it remains unpaid. Judgment, *International Mercantile Marine Co. v. Stranahan* (C. C. 1907) 155 F. 428, affirmed.—*Oceanic Steam Nav. Co. v. Stranahan*, 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013; *International Mercantile Marine Co. v. Same*, 29 S. Ct. 678, 214 U. S. 344, 53 L. Ed. 1024.

Proceedings resulting in deportation under Act Feb. 20, 1907, as amended by Act March 26, 1910, held constitutional.—*Low Wah Suey v. Backus*, 32 S. Ct. 734, 225 U. S. 460, 56 L. Ed. 1165.

Act Feb. 20, 1907, § 3, for deportation of aliens for practicing prostitution, held constitutional.—*Zakonaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

Police power of the state is not unconstitutionally interfered with by Act Feb. 20, 1907, § 3, for deportation of aliens for practicing prostitution within three years after entry because giving federal authorities power to try an immigrant for violation of the penal laws of the state.—*Id.*

Congress could constitutionally provide by Act Feb. 20, 1907, § 3, as amended by Act March 26, 1910, § 2, for deportation of any alien woman practicing prostitution after entry into United States.—*Bugajewitz v. Adams*, 33 S. Ct. 607, 228 U. S. 585, 57 L. Ed. 978; *Schwartz v. Same*, 33 S. Ct. 609, 228 U. S. 592, 57 L. Ed. 980; *Weiner v. Same*, *Id.*

41. Immigration officers.

See 2 Cent. Dig. Aliens, §§ 101-104.

42. — Appointment and qualification.

See 2 Cent. Dig. Aliens, § 101.

Inspectors of immigration, under Act March 3, 1891, c. 551, are to be appointed by the secretary of the treasury, and not by the superintendent of immigration.—*Nishimura Ekiu v. United States*, 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146.

44. — Powers, duties, and proceedings.

See 2 Cent. Dig. Aliens, §§ 102-104.

The provision that inspectors of immigration and their assistants "shall have power to administer oaths, and to take and consider testimony touching the rights of" aliens to enter the United States, "all of which shall be entered of record," does not require inspectors to take such testimony. They may decide the question of the right to land upon their own inspection and examination.—*Nishimura Ekiu v. United States*, 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146.

The courts have no power to review the action of an inspector of immigration in refusing to allow an alien to land, as within the class excluded by Act March 3, 1891, c. 551. Section 13, which provides that the circuit and district courts of the United States are "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act," only refers to actions for penalties under sections 3 and 4, and indictments for misdemeanors under sections 6, 8, and 10.—*Id.*

Rules of Secretary of Commerce and Labor governing deportation of alien inmates of houses of prostitution are not so arbitrary as to be beyond his power, under Act Feb. 20, 1907, as amended by Act March 26, 1910.—*Low Wah Suey v. Backus*, 32 S. Ct. 734, 225 U. S. 460, 56 L. Ed. 1165.

45. Immigrants excluded.

See 2 Cent. Dig. Aliens, §§ 105-111.

49. — Liable to become a public charge.

See 2 Cent. Dig. Aliens, § 107.

Japanese subjects, who are "paupers or persons likely to become a public charge," and are therefore forbidden to enter the United States by Immigration Act March 3, 1891, 26 Stat. 1085, c. 551 [U. S. Comp. St. 1901, p. 1294], are not given such right of entry by the provision of the treaty of March 21, 1895, with Japan, that the citizens or subjects of each of

the two countries shall have "full liberty to enter, travel, or reside in any part of the territories of the other country," especially since such treaty expressly excepts from its operation any ordinance or regulation relating to "police and public security."—*Kaoru Yamataya v. Fisher*, 23 S. Ct. 611, 189 U. S. 86, 47 L. Ed. 721.

Alien immigrants cannot be deported under Act Feb. 20, 1907, § 2, as amended by Act March 26, 1910, § 1, as likely to become a public charge because the labor market is overstocked.—*Gegiow v. Uhl*, 36 S. Ct. 2, 239 U. S. 3, 60 L. Ed. 114, reversing order United States ex rel. *Gegiow v. Same*, 215 F. 573, 131 C. C. A. 641.

50. — Imported under contracts to labor.

See 2 Cent. Dig. Aliens, §§ 106-110.

Although the alien contract labor law (23 Stat. 332) prohibits the importation of "any" foreigners under contract to perform "labor or service of any kind," yet it does not apply to one who comes to this country under contract to enter the service of a church as its rector. 36 F. 303, reversed.—*Rector, etc., of Holy Trinity Church v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226.

A foreigner under contract to come to the United States to work as chemist on a sugar plantation is a person belonging to a recognized profession, within the meaning of Act March 3, 1891, excepting such persons from the operation of Act Feb. 26, 1885, prohibiting the importation of aliens under contract to perform labor.—*United States v. Laws*, 163 U. S. 258, 16 S. Ct. 998, 41 L. Ed. 151.

51. — Prostitution.

See 2 Cent. Dig. Aliens, § 111.

An alien woman, found in a disorderly house within three years after her return to the United States following temporary absence abroad, may be deported under Act Feb. 20, 1907, §§ 2, 3.—*Lapina v. Williams*, 34 S. Ct. 196, 232 U. S. 78, 58 L. Ed. 515, affirming judgment *Ex parte Hoffman*, 179 F. 839, 103 C. C. A. 327.

52. Detention and return of immigrants.

See 2 Cent. Dig. Aliens, § 112.

53. — In general.

See 2 Cent. Dig. Aliens, § 113.

An alien immigrant detained by the collector of the port of San Francisco on report of the state commissioner of immigration that she came within the excluded class, under Act Aug. 3, 1882, c. 376, was placed in a mission house as a more suitable place than the steamship, pending the decision of the question of her right to land, and was kept there, by agreement between her attorney and the attorney for the United States, until final judgment upon a writ of habeas corpus. *Held*, that placing her in such mission left her in the same position, as far as regarded her right to land, as if she had never been removed from the steamship.—*Nishimura Ekiu v. United States*, 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146.

Aliens of the excluded class are not protected from deportation by the executive officers of the government, because they have effected an entry into the United States, in view of the power given the Secretary of the Treasury by Act Oct. 19, 1888, 25 Stat. 566, c. 1210 [U. S. Comp. St. 1901, p. 1294], if satisfied that an immigrant has been allowed to land contrary to law, to cause his deportation at any time within a year after the landing, which power was again substantially conferred by the provision of Act March 3, 1891, § 11, 26 Stat. 1086, c. 551 [U. S. Comp. St. 1901, p. 1299], that an alien immigrant may be sent out of the

country, "as provided by law," at any time within a year after his illegal entry into the United States.—*Kaoru Yamataya v. Fisher*, 23 S. Ct. 611, 189 U. S. 86, 47 L. Ed. 721.

An alien domiciled some six years in the United States, who departs for a brief period, and on re-entering brings an alien with him for immoral purposes, subjects himself to the operation of the clauses of Immigration Act Feb. 20, 1907, as amended by Act March 26, 1910, relating to the exclusion and deportation of aliens as if he had had no previous residence in the country.—*Lewis v. Frick*, 34 S. Ct. 488, 233 U. S. 291, 58 L. Ed. 967, affirming judgment 195 F. 693, 115 C. C. A. 493.

An alien, though not previously convicted of importing an alien for immoral purposes under Immigration Act Feb. 20, 1907, § 3, as amended by Act March 26, 1910, § 2, may be deported under the other provisions of the immigration act enumerating in section 2 the classes of aliens which should be excluded and in sections 20 and 21 providing for deportation of any alien entering or found in the United States in violation of law.—*Id.*

Russia, not Canada, is the country to which should be deported, under Immigration Act Feb. 20, 1907, §§ 20, 21, an alien who, six years after coming to the United States from Russia, his native land, enters Canada and immediately re-enters the United States bringing an alien for immoral purposes, the three years' period prescribed by these sections for the return of an alien limiting only the authority to deport, and the legislative intent shown by section 35 being that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports if they came thence, rather than the foreign territory on this continent, though it may have been crossed on the way to this country.—*Id.*

◀54. — Proceedings and review.

See 2 Cent. Dig. Aliens, § 112.

Executive officers of the United States government were not invested, by the provisions of Act Oct. 19, 1888, 25 Stat. 566, c. 1210 [U. S. Comp. St. 1901, p. 1294] and Act March 3, 1891, 26 Stat. 1085, c. 551 [U. S. Comp. St. 1901, p. 1294], for the deportation of aliens of excluded classes within a year after their illegal entry, with the power arbitrarily to deport an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, without giving him an opportunity to be heard upon the question involving his right to be and remain in the United States.—*Kaoru Yamataya v. Fisher*, 23 S. Ct. 611, 189 U. S. 86, 47 L. Ed. 721.

Federal courts will not intervene by habeas corpus to prevent the deportation by the executive officers of the government, under the authority of Act Oct. 19, 1888, 25 Stat. 566, c. 1210 [U. S. Comp. St. 1901, p. 1294], and Act March 3, 1891, 26 Stat. 1085, c. 551 [U. S. Comp. St. 1901, p. 1294], of an alien found to be one of the excluded class, where such alien had notice, though not a formal one, of the investigation instituted for the purpose of ascertaining whether she was legally in the United States, and was not denied an opportunity to be heard, although she pleads a want of knowledge of the English language, preventing her from understanding the nature and import of the questions propounded to her, and that the investigation made was a "pretended" one, and that she did not at the time know that it had reference to her deportation.—*Id.*

The second hearing before a board of special inquiry, as a result of which a deportation of certain British aliens was ordered, could be directed by the Secretary of Commerce and Labor, acting under the authority conferred upon him by Act March 3, 1903, c. 1012, § 21, 32

Stat. 1218 [U. S. Comp. St. Supp. 1905, p. 234], to deport, within three years after landing or entry, an alien found to be unlawfully within the United States, although the first decision of the board of inquiry, at the time of landing, was unanimously in favor of the immigrants, and such decision is, by the express provisions of section 25, declared to be final. Judgment 136 F. 734, 69 C. C. A. 386, affirmed.—*Pearson v. Williams*, 26 S. Ct. 608, 202 U. S. 281, 50 L. Ed. 1029.

Findings of fact based on an order of the Secretary of Commerce and Labor for deportation under Act Feb. 20, 1907, § 3, of an alien for practicing prostitution within three years after her entry, are not subject to review by the courts.—*Zakonaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

Effect of Act March 26, 1910, § 2, striking out limitation of three years in provision of Act Feb. 20, 1907, § 3, for deportation of any alien woman practicing prostitution after entry into the United States, is not changed because amendatory act still refers to sections 20 and 21 of the earlier act as governing deportation, though those sections provide for taking custody of aliens subject to removal within three years.—*Bugajewitz v. Adams*, 33 S. Ct. 607, 228 U. S. 585, 57 L. Ed. 978; *Schwartz v. Same*, 33 S. Ct. 609, 228 U. S. 592, 57 L. Ed. 980; *Weiner v. Same*, *Id.*

Findings of the Secretary of Commerce and Labor in proceedings for deportation of an alien that the latter imported a woman for immoral purposes into the United States is binding on the courts if there was evidence to support it.—*Lewis v. Frick*, 34 S. Ct. 488, 233 U. S. 291, 58 L. Ed. 967, affirming judgment 195 F. 693, 115 C. C. A. 493.

An acquittal under an indictment charging an alien with the importation of another alien for immoral purposes, contrary to Immigration Act Feb. 20, 1907, § 3, as amended by Act March 26, 1910, § 2, is not res judicata in a proceeding before the department of commerce and labor to deport such alien, under sections 20 and 21 of the Immigration Act, because he had brought an alien for immoral purposes into the United States.—*Id.*

The conclusiveness of decisions of immigration officers under Act Feb. 20, 1907, § 25, is conclusiveness on matters of fact, not on questions of law.—*Gegiow v. Uhl*, 36 S. Ct. 2, 239 U. S. 3, 60 L. Ed. 114, reversing order United States ex rel. *Gegiow v. Same*, 215 F. 573, 131 C. C. A. 641.

◀55. Offenses against immigration laws.

See 2 Cent. Dig. Aliens, §§ 113-116.

◀56. — Unlawful importation and harboring.

See 2 Cent. Dig. Aliens, §§ 113-116.

The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place, notwithstanding the omission from this section of the word "immigrant," which had followed the word "alien" in the earlier acts. Judgment (C. C. A.) 152 F. 1, 81 C. C. A. 197, reversed.—*Taylor v. United States*, 28 S. Ct. 53, 207 U. S. 120, 52 L. Ed. 130; *Schrotter v. United States*, 157 F. 1005, 85 C. C. A. 679.

The fact that an alien seaman deserting while on shore leave was a stowaway under

order of deportation does not bring the case within the provisions of Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place.—Id.

The importation of an alien woman into the United States in order that she may live with the person importing her as his concubine is for an immoral purpose, within the meaning of Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 389), making it a crime against the United States to import alien women for the purposes of prostitution or for any other immoral purpose. Judgment (O. C. 1907) 155 F. 938, reversed.—United States v. Bitty, 28 S. Ct. 396, 208 U. S. 393, 52 L. Ed. 543.

The requirement of Act June 25, 1910, § 6, in connection with Act July 25, 1902, that every person harboring an alien prostitute shall file a statement with the Commissioner General of Immigration, is not confined to persons who have anything to do with the bringing in of such alien.—United States v. Portale, 35 S. Ct. 1, 235 U. S. 27, 59 L. Ed. 111.

57. — Liability of vessel, owner, or master.

See 2 Cent. Dig. Aliens, § 114.

Shipowners who have wrongfully brought aliens into the United States, and have received them back on board the vessel for deportation, are not made absolute insurers of the return of the immigrants to the port from whence they came, by Act March 3, 1891, c. 551, § 10, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1299], punishing as a misdemeanor the "neglect" to detain the persons so received, or to return them to that port; but nothing more is required than a faithful and careful effort to carry out the duty so imposed. Judgment 125 F. 596, 60 C. C. A. 428, reversed.—H. Hackfeld & Co. v. United States, 25 S. Ct. 456, 197 U. S. 442, 49 L. Ed. 826.

A foreign steamship company lawfully collecting in Germany return passage money from emigrants embarking for New York violates Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 458), prohibiting any charge for return of aliens unlawfully brought into the United States.—(1912) United States v. Nord Deutscher Lloyd, 32 S. Ct. 244, 223 U. S. 512, 56 L. Ed. 531, reversing judgment (C. C. 1911) 186 F. 391.

58. Actions for penalties under immigration laws.

See 2 Cent. Dig. Aliens, §§ 113, 114.

The penalty incurred under Act March 3, 1903, c. 1012, §§ 4, 5, 32 Stat. 1214, for inducing an alien to migrate to the United States for the purpose of performing labor there, may be recovered by a civil action of debt brought by the United States.—Hepner v. United States, 29 S. Ct. 474, 213 U. S. 103, 53 L. Ed. 720, 27 L. B. A. (N. S.) 739, 16 Ann. Cas. 960.

The court may direct a verdict for the government plaintiff in an action for the penalty incurred under Act March 3, 1903, c. 1012, §§ 4, 5, 32 Stat. 1214, for inducing an alien to migrate to the United States for the purpose of performing labor there, where undisputed testimony shows that defendant has committed the offense out of which the cause of action arises.—Id.

The enforcement of the exaction of \$100 which the Secretary of Commerce and Labor is authorized by Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, to impose for violations of its provisions against bringing into the United States aliens afflicted with loathsome or danger-

ous contagious diseases, is not necessarily governed by the rules controlling in criminal prosecutions merely because such exaction is a penalty. Judgment, International Mercantile Marine Co. v. Stranahan (C. C. 1907) 155 F. 428, affirmed.—Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013; International Mercantile Marine Co. v. Same, 29 S. Ct. 678, 214 U. S. 344, 53 L. Ed. 1024.

Violation by defendant of the contract labor provisions of Alien Immigration Act Feb. 20, 1907, § 4, need not be established beyond a reasonable doubt in an action of debt by the United States under section 5 to recover the penalty incurred; a reasonable preponderance of the proof being sufficient, though the statute denominated the violation a misdemeanor.—United States v. Regan, 34 S. Ct. 213, 232 U. S. 37, 58 L. Ed. 494; reversing judgment 203 F. 433, 121 C. C. A. 543.

Action of debt by the United States to recover penalty for violation of the Contract Labor Provisions of Act Feb. 20, 1907, § 4, is a civil action, and the court may permit the government to read depositions of absent witnesses and may also instruct to return verdict for the government.—Grant Bros. Const. Co. v. United States, 34 S. Ct. 452, 232 U. S. 647, 58 L. Ed. 776, affirming judgment 114 P. 955, 13 Ariz. 388.

A determination by an immigration board that certain persons were aliens is admissible in action of debt to recover prescribed penalty for violating the contract labor provisions of Act Feb. 20, 1907, § 4.—Id.

A separate penalty is incurred for each alien whose simultaneous importation is solicited contrary to Act Feb. 20, 1907, §§ 4, 5.—Id.

Costs are properly awarded to the government against unsuccessful defendant in action of debt to recover for violation of Act Feb. 20, 1907, § 4.—Id.

59. Criminal prosecutions under immigration laws.

See 2 Cent. Dig. Aliens, §§ 115, 116.

Congress, by providing in the Immigration act (Act Feb. 20, 1907, c. 1134, § 5, 34 Stat. 900 [U. S. Comp. St. Supp. 1907, p. 393]), a civil action for the recovery of a penalty in case of a violation of section 4 of that act, making it a misdemeanor to assist or encourage the importation of alien contract laborers, did not preclude a prosecution by indictment to enforce such penalty.—United States v. Stevenson, 30 S. Ct. 35, 215 U. S. 190, 54 L. Ed. 153.

IV. NATURALIZATION.

Clerks' fees, see Clerks of Courts, 35.
Right to jury trial, see Jury, 14.

60. Power to naturalize and nature of right in general.

See 2 Cent. Dig. Aliens, §§ 117, 118.

The right to naturalization under Rev. St. §§ 2165-2170 (U. S. Comp. St. 1901, pp. 1329-1333) was conferred on such aliens only as contemplated continuance of a residence already established in the United States.—Luria v. United States, 34 S. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming decree (D. C.) United States v. Luria, 184 F. 643.

63. Minor residents.

See 2 Cent. Dig. Aliens, §§ 126, 127.

Where a foreigner takes the oath declaring an intention to become a citizen, while his son is yet a minor, and the son, on coming of age, votes at an election under the erroneous belief that his father has completed his naturalization, and soon afterwards removes to a distant territory, and for many years endures all the privations and dangers of frontier life, votes

at elections, is elected to office, takes an oath to support the constitution of the United States, and takes part in the formation of a state constitution and government, he is entitled to the benefit of his father's declaration of intention in the same manner as if he himself had made the declaration; and where the territorial laws and the new state constitution, with the sanction of congress, confer political privileges upon foreigners who have made such declaration, he will be considered as belonging to that class, and on the admission of the state will become a citizen of the United States.—*Boyd v. State of Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

←67. Jurisdiction of courts.

See 2 Cent. Dig. Aliens, §§ 121-137.

Congress, in the exercise of its power under Const. U. S. art. I, § 8, cl. 4, to establish a uniform rule of naturalization, may confer jurisdiction upon the courts of a state of naturalization proceedings involving admission to citizenship in the United States, and may constitutionally provide for the punishment of false swearing in such a proceeding.—*Holmgren v. United States*, 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778, affirming judgment 156 F. 439, 84 C. C. A. 301.

←69. Record, certificate, and evidence.

See 2 Cent. Dig. Aliens, §§ 147-153.

When no record can be produced showing the naturalization of a foreigner, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen.—*Boyd v. State of Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

A judgment of naturalization which has never been recorded, or, if recorded, the record of which has been lost, cannot be entered by a common-law court *nunc pro tunc*, 33 years after its rendition, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered, especially where the declaration of intention was made before another court, in another state, and the territorial court which is alleged to have entered the judgment has itself been abolished and a state court substituted in its place. Judgment 38 Ct. Cl. 10, affirmed.—*Gagnon v. United States*, 24 S. Ct. 510, 193 U. S. 451, 48 L. Ed. 745.

←70. Operation and effect.

See 2 Cent. Dig. Aliens, §§ 146, 151, 154-160.

When a foreigner takes the oath declaring an intention to become a citizen of the United States, his minor sons thereby acquire an inchoate status as citizens; and, if they attain majority before their father completes his naturalization, that status is capable of being converted into complete citizenship by other means than the direct application provided for by the naturalization laws.—*Boyd v. State of Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

An alien's incapacity to hold land is removed by naturalization before judgment rendered in proceedings on adverse claim to a patent.—*Manuel v. Wulff*, 152 U. S. 505, 14 S. Ct. 651, 38 L. Ed. 532, reversing judgment *Wulff v. Manuel*, 9 Mont. 276, 279, 286, 23 P. 723.

An alien minor child who has never dwelt in the United States, is not, when coming to join a naturalized parent, exempt from the provision of Act March 3, 1903, c. 1012, § 2, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, p. 274],

debaring aliens from landing if they are afflicted with a dangerous contagious disease, on the theory that she was invested with citizenship by virtue of the declaration of Rev. St. U. S. § 2172 [U. S. Comp. St. 1901, p. 1334], that minor children of naturalized citizens shall, if "dwelling in the United States," be considered as citizens thereof.—*Zartarian v. Billings*, 27 S. Ct. 182, 204 U. S. 170, 51 L. Ed. 428.

←71½ [New, vol. 7 Key-No. Series]. Cancellation of certificates.

See 2 Cent. Dig. Aliens, § 146.

Certificate of naturalization may be canceled under Act June 29, 1906, § 15, as fraudulently and illegally procured.—*Johannessen v. United States*, 32 S. Ct. 613, 225 U. S. 227, 56 L. Ed. 1066.

Naturalization certificates issued prior or subsequent to Act June 29, 1906, are by section 15 of that act made liable to impeachment when fraudulently procured.—*Id.*

The sufficiency of a petition in a proceeding under Act June 29, 1906, § 15, to cancel a naturalization certificate, to tender the issue of fraud, cannot be raised for the first time on appeal.—*Luria v. United States*, 34 S. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming decree (D. C.) *United States v. Luria*, 184 F. 643.

The express declaration in Act June 29, 1906, § 15, making naturalization certificates impeachable when illegally procured, that the section shall apply to certificates issued under prior laws, makes applicable to such certificates the provisions of the second paragraph of that section dealing with the effect of a permanent residence in a foreign country within five years after securing the certificate, though the paragraph was inserted by way of amendment.—*Id.*

Congress had power to provide in Act June 29, 1906, § 15, for cancellation after notice and hearing of certificates illegally procured.—*Id.*

Constitutional rights are not invaded by the declaration in Act June 29, 1906, § 15, that taking up a permanent residence in a foreign country within five years after issuance of certificate of citizenship shall be prima facie evidence of lack of intent to become a permanent citizen, which shall be sufficient to warrant the cancellation of the certificate as fraudulent.—*Id.*

←72. Offenses against naturalization laws.

See 2 Cent. Dig. Aliens, § 161.

A conviction can be had in a federal court for false swearing in naturalization proceedings in a state court, under Rev. St. U. S. § 6395 (U. S. Comp. St. 1901, p. 3664), making punishable by fine and imprisonment the taking or making of a false oath or affidavit under or by virtue of any law relating to the naturalization of aliens, or in any proceeding under any such laws.—*Id.*

ALIMONY.

See Divorce, ←278-285, 331.

ALLOTMENT.

Indian lands, see Indians, ←13.

ALLOWANCE.

Account of marshal, see United States Marshals, ←25.

Alimony or counsel fees, see Divorce, ←278-285.

Appeal or writ of error, see Appeal and Error, ¶358-366.
 Bill of exceptions, see Exceptions, Bill of, ¶32-52.
 Claims, see—
 Executors and Administrators, ¶241.
 United States, ¶113, 114.
 Supersedeas or stay on appeal or writ of error, see Appeal and Error, ¶476-479.

ALMANAC.

Computation of time, see Time.

ALPHABET.

Letters of alphabet as subject of trade-mark, see Trade-Marks and Trade-Names, ¶6.

ALTERATION.

Flow or discharge of water as ground for compensation, see Eminent Domain, ¶98.
 Geographical or political divisions, see—
 Counties, ¶9-16.
 Municipal Corporations, ¶26-35.
 Schools and School Districts, ¶31-41.
 Towns, ¶5-9.

ALTERATION OF INSTRUMENTS.

Scope-Note.

[INCLUDES acts done upon instruments in writing, by a party or parties thereto or interested therein, by which the language or meaning is changed, and the materiality and effect of such alterations in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶1. Materiality.
- 3. — Parties.
- 5. — Subject-matter.
- 8. — Signatures and indorsements.
- 12. Authority or consent of parties.
- 15. Effect upon rights of parties.
- 17. — Conveyances.
- 20. — Negotiable instruments.
- 24. Admissibility of instrument in evidence.

Cross-References.

See Reformation of Instruments.
 Payment of altered paper by bank, see Banks and Banking, ¶147, 148.

¶1. Materiality.

See 2 Cent. Dig. Alt. of Inst. §§ 1-53.

¶3. — Parties.

See 2 Cent. Dig. Alt. of Inst. §§ 5-15.

The addition of the signature of a surety to a note, without the consent of the maker, is a material alteration.—*Mersman v. Verges*, 112 U. S. 139, 5 S. Ct. 65, 28 L. Ed. 641.

¶5. — Subject-matter.

See 2 Cent. Dig. Alt. of Inst. §§ 13-29.

Where accommodation notes are made payable to the accommodation maker, and indorsed in blank by him and by the real debtor, and the latter, without the former's knowledge, causes to be stamped upon the back a clause waiving demand and protest, and guarantying payment, the addition is not a material alteration, although the words are inadvertently stamped above the former signature.—*Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 S. Ct. 657, 36 L. Ed. 360.

The addition of property to the description in a deed is a material alteration.—*Moelle v. Sherwood*, 148 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350.

¶8. — Signatures and indorsements.

See 2 Cent. Dig. Alt. of Inst. §§ 40-46.

The addition of the signature of a surety to a promissory note without the consent of the maker is not a material alteration, and does not discharge the maker.—*Mersman v. Verges*, 5 S. Ct. 65, 112 U. S. 139, 28 L. Ed. 641.

¶12. Authority or consent of parties.

See 2 Cent. Dig. Alt. of Inst. §§ 77-92.

The grantor of a deed may authorize by parol the filling of a blank left therein.—*Allen v. Withrow*, 110 U. S. 119, 3 S. Ct. 517, 28 L. Ed. 90.

¶15. Effect upon rights of parties.

See 2 Cent. Dig. Alt. of Inst. §§ 114-191.

¶17. — Conveyances.

See 2 Cent. Dig. Alt. of Inst. §§ 122-139.

A mortgage of the wife's land was executed by husband and wife to secure a note made by the husband to his partner, and indorsed by the partner for the benefit of the partnership. The partner, before negotiating the note, added the wife's name as a maker, without the knowledge of herself or her husband. *Held*, that the

mortgage was not thereby avoided as against one who, in ignorance of the note having been so altered, lends money to the partnership upon the security of the note and mortgage.—*Mersman v. Werges*, 112 U. S. 139, 5 S. Ct. 65, 28 L. Ed. 641.

An alteration in the description contained in a deed, after it is delivered and recorded, does not convey the newly-described property.—*Moelle v. Sherwood*, 148 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350.

↔20. — Negotiable instruments.

See 2 Cent. Dig. Alt. of Inst. §§ 158-189.

The addition of the signature of a surety to a note, without the consent of the maker, is not a material alteration of the note, and does not discharge the maker.—*Mersman v.*

Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. Ed. 641.

↔24. Admissibility of instrument in evidence.

See 2 Cent. Dig. Alt. of Inst. §§ 208-215; 20 Cent. Dig. Evid. §§ 1429, 1539, 1579.

Where it appears in a deed that, wherever the grantor's name occurs, it has been changed from "Elizabeth O'B." to "Eliza O'B.," the alteration is sufficiently explained to warrant the admission of the deed in evidence by testimony that both names designate the same person.—*Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

ALTERNATIVE RELIEF.

See Cancellation of Instruments, ↔57.

AMBASSADORS AND CONSULS.

Scope-Note.

[INCLUDES diplomatic and consular officers and agents; their appointment, qualification, recognition, tenure, and recall; and their rights, privileges, powers, duties, and liabilities.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ↔1. Appointment, qualification, and tenure.
2. Compensation..
3. Privileges, immunities, and disabilities.
5. Powers, duties, and liabilities of consular officers.
6. Consular courts.
7. Consular fees.

Cross-References.

Administration, decedent's estate, see Executors and Administrators, ↔24.
Authentication of invoices by consul, see Customs Duties, ↔68.

Jurisdiction of federal courts, see Courts, ↔301.
Presumption of alienage, see Aliens, ↔2.
Statements certified to by ambassadors admissibility, see Extradition, ↔14.

↔1. Appointment, qualification, and tenure.

See 2 Cent. Dig. Amb. & C. §§ 1, 2.

The constitutional provision requiring the president to appoint consuls with the advice and consent of the senate, and empowering congress to vest in the president "the appointment of such inferior officers as they may think proper," authorizes congress to vest in the president power to appoint vice consuls to fill the offices of consuls in case of disability or absence from the country, without the advice and consent of the senate; and Rev. St. §§ 1695, 1703, are therefore valid.—*United States v. Eaton*, 18 S. Ct. 374, 169 U. S. 331, 42 L. Ed. 767.

Under section 87 of the consular regulations of 1888, authorizing "the diplomatic representative" to appoint a vice consul in case of emergency, the minister resident in Siam, who is also consul general, may, on becoming sick, so as to be disqualified from discharging his duties, appoint a vice consul general. The fact that he is unable to perform the duties of his office does not deprive him of power, in his ca-

pacity of minister resident, to make such an emergency appointment.—*Id.*

Under Rev. St. §§ 1695, 1703, authorizing the president to provide for the appointment of vice consuls, vice commercial agents, etc., and to fix the compensation therefor, and under sections 36 and 87 of the consular regulations of 1888, made in pursuance thereof, it is proper to appoint a vice consul general when the consul general is sick and unable to discharge his duties, and the vice consul previously appointed has not yet qualified, and is absent from the country.—*Id.*

↔2. Compensation.

See 2 Cent. Dig. Amb. & C. §§ 3-5.

Rev. St. U. S. § 1683, fixing the annual salary of the diplomatic representative to Hayti at \$7,500, without limitation as to time, should not be deemed abrogated or suspended by subsequent appropriation acts for 1882, 1883, and 1884, which merely appropriated a less amount for the services of that officer for those fiscal years, and which contained no words

which expressly or by clear implication modified or repealed the previous law.—*United States v. Langston*, 118 U. S. 389, 6 S. Ct. 1185, 30 L. Ed. 164.

The United States appropriation acts, prior to 1883, fixed the salary of the consul at Tangier at \$3,000 per annum. For and after that year the appropriation acts fixed it at \$2,000. *Held*, that congress, by making the change, repealed by implication the previous enactments, and that the consul was not entitled to recover the difference for the years of service after 1883.—*Mathews v. United States*, 123 U. S. 182, 8 S. Ct. 80, 31 L. Ed. 127.

Rev. St. § 1675, as amended by Act Cong. March 3, 1875, c. 153 (18 St. 483), fixed the annual rate of compensation for "envoys extraordinary and ministers plenipotentiary" to certain named countries, not including Turkey, and provided that "those to all other countries, unless where a different compensation is prescribed by law," should each have \$10,000. The office of envoy extraordinary and minister plenipotentiary to Turkey did not then exist, but congress appropriated \$7,500 in 1882, and annually thereafter, for the salary of such an official, without otherwise creating the office. *Held*, that \$7,500 was the salary of one appointed to the office.—*Wallace v. United States*, 133 U. S. 180, 10 S. Ct. 251, 33 L. Ed. 571.

Congress having fixed the salary of the minister resident and consul general to Siam at \$5,000, without any apportionment as between the two offices (which are held by the same person), a vice consul general appointed to discharge the duties of the office during the illness of the incumbent is entitled to have his compensation measured by the full salary of \$5,000.—*United States v. Eaton*, 18 S. Ct. 374, 169 U. S. 331, 42 L. Ed. 767.

Where a vice consul general is appointed by the diplomatic representative to fill the office in case of an emergency, and immediately enters on the discharge of the duties thereof, and is recognized by the state department, he is entitled to compensation from the time of appointment, though his bond is not executed until some time later.—*Id.*

3. Privileges, immunities, and disabilities.

See 2 Cent. Dig. Amb. & C. §§ 6-11.

Rev. St. U. S. § 687, gives the supreme court exclusive jurisdiction of suits "against ambassadors or other public ministers." Section 563 gives the district courts jurisdiction of all suits "against consuls or vice consuls." Section 4130, which is part of a title on "Foreign Relations," provides that the word "minister" shall mean the person invested with and exercising the principal diplomatic functions. Defendant was consul general of Guatemala in the United States. The minister from Guatemala notified the secretary of state of his intended absence, and requested that defendant be allowed to communicate any urgent matter relating to the peace of Central America. The secretary replied to defendant as "Consul General," and acceded to the request. Though a notification of the accession of a new secretary of state was addressed to defendant as "in charge of the legations of Guatemala," etc., he acknowledged its receipt as "Consul General." Of ten letters from the state department to defendant, two were addressed to him as in charge of the legations, and the remainder as "Consul" and "Consul General." Of seven letters sent by him to the state department, six were signed by him as "Consul General," and one by his name only. In a circular issued by the state department, concerning *chargés d'affaires* of countries having no ministers, or whose ministers were absent, defendant's name was referred to in a footnote, as "Consul General" only, and it did not appear that he was ever presented as *chargé* though this fact was noted

concerning other consuls, whose names appeared in the list. The Guatemala minister afterwards requested from the state department a certificate of defendant's status, but received in reply a résumé of the facts only. Defendant was an American citizen, and the secretary of state had previously refused, on that ground, to receive him as an accredited *chargé d'affaires* from Honduras, but received him as an agent only, and not in any diplomatic character. *Held*, that defendant was not a public minister, within the meaning of section 687, and could be sued in the district court.—*In re Baiz*, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222.

5. Powers, duties, and liabilities of consular officers.

See 2 Cent. Dig. Amb. & C. §§ 13-15.

Interest on "public moneys" deposited by the consul in bank belongs, not to him, but to the government.—*United States v. Mosby*, 133 U. S. 273, 10 S. Ct. 327, 33 L. Ed. 625.

An expenditure of \$5.73 by the vice consul at Bangkok, for lights on the celebration of the king's birthday, when approved by the state department, should be allowed by the treasury accounting officers.—*United States v. Eaton*, 18 S. Ct. 374, 169 U. S. 331, 42 L. Ed. 767.

The United States consul has no authority, by virtue of his official station, to grant any license or permit the exemption of a vessel of the enemy from capture and confiscation.—*The Benito Estenger*, 20 S. Ct. 489, 176 U. S. 568, 44 L. Ed. 592.

6. Consular courts.

See 2 Cent. Dig. Amb. & C. §§ 16-20.

Notwithstanding the constitutional guaranty of trial by jury and indictment by grand jury, a consular tribunal may try a citizen or a temporary subject in accordance with the treaty for offenses committed in a foreign country.—*Ross v. McIntyre*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581, affirming order (C. C.) *In re Ross*, 44 F. 185.

A citizen or subject of a foreign government who enlists as one of the crew of an American ship becomes a temporary subject of the United States, so as to give the consular tribunal of the United States in a foreign country jurisdiction to try offenses committed by him on board the ship.—*Id.*

The law providing that the trial of all offenses committed on the high seas out of the jurisdiction of any particular state shall be in the district where the offender is found, or into which he is first brought, does not exclude the jurisdiction of the consular tribunal in Japan given by treaty to try offenses committed in that country, where the offense was committed on an American vessel in the waters of such country.—*Id.*

7. Consular fees.

See 2 Cent. Dig. Amb. & C. §§ 21, 22.

Rev. St. § 1745, empowers the president to prescribe the fees to be charged for "official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law," in the business of the consulates, and provides that all persons connected with the consulates shall collect for "official services such fees only as may be prescribed." The consular regulations of 1874 provided that "all acts are to be regarded as 'official services' when the consul is required to use his seal and title officially, or either of them"; and those of 1881 provided that "all acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services," and it was provided that such fees should be accounted for to the treasury. The examination of Chinese carried as passengers on board any other than a United States vessel was not designated as an official service. *Held*,

that fees received by a consul for examination of Chinese emigrants to the United States on foreign vessels became his own property, and it is immaterial that he was employed because he was consul, and attached his official seal as evidence of his character.—*United States v. Mosby*, 133 U. S. 273, 10 S. Ct. 327, 33 L. Ed. 625.

Rev. St. §§ 2853, 2855, provide that all invoices of merchandise imported shall be made in triplicate, and that the consul shall indorse on each a certificate "under his hand and official seal," and file one of the triplicates in his office for preservation. The consular regulations of 1874 provided that copies of documents on file in consul's office should be certified on payment of a certain fee. Act Cong. June 10, 1880, c. 190 (21 Stat. 173), required all such invoices to be made in quadruplicate. The regulations of 1881 prescribed a certain fee for certificates "to invoice * * * in triplicate." *Held*, that fees received for certificates to extra copies of quadruplicate invoices were for official services, and belonged to the United States.—*Id.*

Under Rev. St. §§ 2853-2855, 2860, requiring "all invoices" of merchandise imported to be made in triplicate and certified by the consul, and providing that "no merchandise" shall be admitted to entry unless the invoice conforms to the requirements; and the consular regulations of 1874 and 1881, providing that "all invoices of importations" must be authenticated by the consul,—fees received by the latter for certifying invoices of "free goods imported into the United States" do not belong to him.—*Id.*

Fees received by the consul for certificates of shipment of merchandise in transit through the United States to other countries belong to him, as he is not required by law to issue such certificates, and it does not appear that he is so required by regulations of the treasury department.—*Id.*

A claim by the consul for fees collected for "recording instruments," and paid into the treasury while the regulations of 1874 were in force, should be allowed him, as such claim is not covered by article 25 of those regulations, requiring consuls to keep various books of records, but relates to private transactions for individuals.—*Id.*

Fees received for "cattle disease certificates" belong to the consul, there being nothing in the statutes or consular regulations in relation thereto.—*Id.*

Commissions received in the settlement of a private estate belong to the consul.—*Id.*

Fees received for "acknowledgments and authentications of instruments * * * certifying official character and signature of notary public" belong to the consul.—*Id.*

Fees received for "shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag" belong to the consul, as it must be taken that the vessels did not clear from a port of the

United States, so as to come within the consular regulations.—*Id.*

A consul general, during his entire period of service of eleven years, paid over to the treasury his fees for certifying invoices of merchandise to be shipped through the United States to other foreign countries, and never claimed a right thereto until after his accounts had been finally settled at the treasury department. About three years later his administrator sued to recover the amount of such fees from the United States. *Held*, that there was a voluntary payment to the United States, so as to preclude a recovery, irrespective of the question of his original right to the fees. Judgment 31 Ct. Cl. 471, reversed.—*United States v. Wilson*, 18 S. Ct. 85, 168 U. S. 273, 42 L. Ed. 464.

Under Rev. St. § 1709, which makes it the duty of consuls and vice consuls to administer upon the personal estate left by Americans dying within their consulates, and under the consular regulation of 1888, par. 508, item 56, the fee of 5 per cent. allowed for such services is an official fee, to be accounted for to the treasury.—*United States v. Eaton*, 18 S. Ct. 374, 169 U. S. 331, 42 L. Ed. 767.

AMBIGUITIES.

Parol or extrinsic evidence, see Evidence, ¶ 448-463.

AMENDMENT.

Effect of appeal or other proceeding for review, see Appeal and Error, ¶ 440.

In particular remedies or special jurisdictions.
See—

Admiralty, ¶ 117.
Appeal and Error, ¶ 403, 643, 645, 650, 652, 653, 885-888, 1185, 1199, 1201, 1222.
Bankruptcy, ¶ 84.
Trial, ¶ 400.

Of particular acts, instruments, or proceedings.
See—

Appeal and Error, ¶ 333, 336, 403, 643, 645-653, 888, 1149, 1185.
Bankruptcy, ¶ 84, 336.
Constitutional Law, ¶ 21, 24.
Corporations, ¶ 38.
Criminal Law, ¶ 1110.
Eminent Domain, ¶ 238.
Equity, ¶ 247, 267-288, 429.
Exceptions, Bill of, ¶ 59.
Indictment and Information, ¶ 157.
Insurance, ¶ 719.
Judgment, ¶ 324.
Mines and Minerals, ¶ 26.
Municipal Corporations, ¶ 492.
Patents, ¶ 109.
Pleading, ¶ 233-285.
Statutes, ¶ 6, 143.
Street Railroads, ¶ 19.
Taxation, ¶ 452-500.
Trial, ¶ 338, 339, 409-425.

AMICUS CURIAE.

Scope-Note.

[INCLUDES persons, whether attorneys or laymen, who interpose in a judicial proceeding to assist the court by giving information or otherwise, or who conduct an investigation or other proceeding on request or appointment therefor by the court; their rights, powers, duties, and liabilities.]

1. Right to appear and act in general.

See 2 Cent. Dig. Am. Cur. § 1.

Leave to file briefs in a pending case as amicus curiae will be denied, where it does not appear that the applicant is interested in any other case which will be affected by the decision, and the parties are represented by competent counsel, whose consent has not been secured.—Northern Securities Co. v. United States, 24 S. Ct. 119, 191 U. S. 555, 48 L. Ed. 299.

In consolidated cases, tried separately below, the Department of Justice asked leave to intervene on behalf of the United States at the trial, which was permitted in one case and denied in the other, but the United States was allowed to be heard as a friend of the court. In the Supreme Court the Attorney General was allowed to take part by printed brief and oral argument as a friend of the court.—(1908) Howard v. Illinois Cent. R. Co., 28 S. Ct. 141, 207 U. S. 463, 52 L. Ed. 297, affirming judgment (C. C. 1907) 148 F. 997.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see—
Appeal and Error, 45-65.
Courts, 326-330, 405.
Removal of Causes, 71-76.

AMUSEMENTS.

See Theaters and Shows.

ANARCHISTS.

Exclusion as denial of personal rights, see Constitutional Law, 82.
Exclusion of alien anarchists, see Aliens, 18.

ANCILLARY ADMINISTRATION.

See Executors and Administrators, 519-524.

ANCILLARY GUARDIANSHIP.

See Guardian and Ward, 170.

ANCILLARY JURISDICTION.

See—
Courts, 264.
Equity, 35.

ANGUISH.

Element of damages, see Damages, 47-50.

ANIMALS.

Scope-Note.

[INCLUDES animals the subjects of property or of legal protection or regulation, other than game and fish; nature and incidents of rights of property in animals, and liabilities for injuries by them; regulations for their protection from disease, ill treatment, etc., and relating to estrays; contracts for feeding, care, and use or hire; and the offense of cruelty to animals.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

1. Nature of property.
2. Animals subjects of ownership.
21. Agistment, keeping, and care.
23. — Loss of or injuries to animals.
28. Contagious and infectious diseases.
30. — Quarantine.
31. — Restrictions upon transportation.
33. — Liabilities for communication of disease.
43. Injuring or killing animals in general.
44. — Civil liability.
66. Personal injuries.
74. — Actions.

- ◀ 89. Trespassing.
- 90. — Duties of owners.
- 97. — Liabilities for trespasses in general.

Cross-References.

See—
 Chattel Mortgages, ▶ 118.
 Fish.
 Game.
 Carriage of live stock, see Carriers, ▶ 204-230.
 Conversion of cattle, see Trover and Conversion, ▶ 47.
 Equal protection of laws, see Constitutional Law, ▶ 237.
 Injuries to animals from operation of railroads, see Railroads, ▶ 433-444.

Inspection as regulation of commerce, see Commerce, ▶ 50.
 Privileges and immunities of citizens, see Constitutional Law, ▶ 207.
 Quarantine regulations as regulation of commerce, see Commerce, ▶ 7, 52.
 Regulation of grazing as denial of due process of law, see Constitutional Law, ▶ 296.
 Regulation of keeping of animals as denying due process of law, see Constitutional Law, ▶ 293.
 Transportation regulation as regulation of commerce, see Commerce, ▶ 35.

◀ 1. Nature of property.

See 2 Cent. Dig. Anim. §§ 1-4.

Property in dogs is of an imperfect or qualified nature, and it is within the discretion of the legislature to say how far they shall be recognized as property and under what restrictions they shall be permitted to roam the streets. But, even if they were property in the fullest sense, they would still be subject to the police power of the state.—*Sentell v. New Orleans & C. R. Co.*, 17 S. Ct. 693, 166 U. S. 698, 41 L. Ed. 1169.

◀ 2. Animals subjects of ownership.

See 2 Cent. Dig. Anim. §§ 1-4.

Only a qualified property can be had in animals *feræ naturæ*.—*Geer v. State of Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793.

◀ 21. Agistment, keeping, and care.

See 2 Cent. Dig. Anim. §§ 40-69; 11 Cent. Dig. Contracts, § 893.

◀ 23. — Loss of or injuries to animals.

See 2 Cent. Dig. Anim. §§ 43-48; 46 Cent. Dig. Trial, § 526.

A contract stipulated that, if any steers should die, the hides should be preserved as evidence of death. After agistment a number of steers were not on hand, and the hides were not produced, but there was evidence to show that defendant had previously produced them to plaintiffs, and requested them to accept delivery. *Held*, an instruction that the offer to count the hides, if proved, might be regarded by the jury as tending to show that defendant had the number of hides alleged, and that, if all the steers were thus accounted for, defendant should not be held responsible for them, was proper.—*Teal v. Bilby*, 123 U. S. 572, 8 S. Ct. 239, 31 L. Ed. 263.

◀ 28. Contagious and infectious diseases.

See 2 Cent. Dig. Anim. §§ 79-94.

◀ 30. — Quarantine.

See 2 Cent. Dig. Anim. § 80.

Quarantine regulations established by the governor of the state on recommendation of a live-stock sanitary commission in pursuance of Rev. St. Tex. 1895, art. 5043c, whereby the importation of all cattle from the state of Louisiana until the 15th day of the following November is prohibited, because the live-stock commission had reason to believe that anthrax had or was liable to break out in that state, are a proper exercise of the police power of the state. Judgment, *St. Louis S. W. Ry. Co. v. Smith*, 49 S. W. 627, 20 Tex. Civ. App. 451, affirmed.

—*Smith v. St. Louis & S. W. Ry. Co.*, 21 S. Ct. 603, 181 U. S. 248, 45 L. Ed. 847.

◀ 31. — Restrictions upon transportation.

See 2 Cent. Dig. Anim. § 81.

Rev. St. § 5258, authorizing every railroad company in the United States "to carry upon and over its roads, boats, bridges and ferries all passengers, * * * freight and property on their way from any state to another state," etc., does not authorize such companies to carry from one state to another, in violation of the state laws, cattle which are known to be in a condition to communicate disease to other cattle. Judgment 44 P. 632, 56 Kan. 694, affirmed.—*Missouri, K. & T. Ry. Co. v. Haber*, 18 S. Ct. 488, 169 U. S. 613, 42 L. Ed. 878.

A carrier does not transport, or deliver, or receive live stock for transportation, from a quarantined portion of a state, into another state, in violation of the prohibition of Act March 3, 1905, c. 1496, § 2, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1185), where, being a connecting carrier, it receives the live stock from the preceding carrier, at a point in a state other than the quarantined state, for delivery to a point in the same state.—*United States v. Baltimore & O. S. W. Ry. Co.*, 32 S. Ct. 6, 222 U. S. 8, 56 L. Ed. 68.

◀ 33. — Liabilities for communication of disease.

See 2 Cent. Dig. Anim. §§ 83-92.

The fact that plaintiff did not use all the precautions possible to prevent the infection of his cattle by defendants' cattle, which had come from the fever districts of Texas, did not necessarily show contributory negligence, it not being customary to fence the ranges in the vicinity, and it not appearing, at the time of the mingling of the cattle, that defendants' cattle had the fever.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

In an action for damages caused by the communication to plaintiff's cattle of disease from defendants' cattle, the fact that the declaration spoke of the disease as "Texas cattle fever," while the finding was that plaintiff's cattle died of "Texas fever," is immaterial.—*Id.*

The fact that one count of the declaration spoke of the fever as contagious, while the proof showed that it was infectious, was immaterial, another count speaking of it as both infectious and contagious, and these words being evidently intended to be limited by the specific words "Texas cattle fever."—*Id.*

The Kansas statute giving a civil action to any person damaged by the bringing into the state of cattle liable to impart Texas or splenic

fever, and declaring the bringing into the state of cattle from south of the thirty-seventh parallel of north latitude prima facie evidence that they were, between February 1st and December 1st in any year, capable of communicating the disease, and that the owner or person in charge had knowledge thereof (Laws 1891, c. 201, §§ 16, 17), is not in conflict with the animal industry act passed by congress, March 29, 1884, to prevent the spread of diseases among domestic animals, or the regulations prescribed by the secretary of agriculture for the execution thereof. Judgment 44 P. 632, 56 Kan. 694, affirmed.—Missouri, K. & T. Ry. Co. v. Haber, 18 S. Ct. 488, 169 U. S. 613, 42 L. Ed. 878.

43. Injuring or killing animals in general.

See 2 Cent. Dig. Anim. §§ 115-140.

44. — Civil liability.

See 2 Cent. Dig. Anim. §§ 115-123; 15 Cent. Dig. Damag. § 21.

A state statute (Rev. St. La. § 1201, as amended July 5, 1882) providing that no dog shall be entitled to the protection of the law, unless placed upon the assessment rolls, and limiting any recovery by the owner for their killing or injury to the value fixed by himself for the purpose of taxation, is within the police power of the state.—Sentell v. New Orleans & C. R. Co., 17 S. Ct. 693, 166 U. S. 698, 41 L. Ed. 1169.

66. Personal injuries.

See 2 Cent. Dig. Anim. §§ 222-275.

74. — Actions.

See 2 Cent. Dig. Anim. §§ 257-273; 27 Cent. Dig. Neglig. § 333.

In an action for damages growing out of an accident by which a passenger in a stagecoach was injured, which accident was alleged to have been caused by a vicious horse attached to the coach, it is not improper to admit evidence of the horse's misbehavior 20 months after the accident, in connection with evidence of his misbehavior before and at the time of the accident; it tending to show a vicious disposition and fixed habit, and to support the allegation that the horse was not safe and well broken. The length of time to which such evidence may extend is largely within the discretion of the trial court.—Kennon v. Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. Ed. 110.

89. Trespassing.

See 2 Cent. Dig. Anim. §§ 327-422.

90. — Duties of owners.

See 2 Cent. Dig. Anim. §§ 327, 328.

The common-law rule that every man must restrain his stock as within his own inclosure does not apply to the sparsely-settled portions of the Western states and territories.—Buford v. Houts, 133 U. S. 320, 10 S. Ct. 305, 33 L. Ed. 618, affirming 5 Utah, 591, 18 P. 633.

97. — Liabilities for trespasses in general.

See 2 Cent. Dig. Anim. §§ 338-343.

Rev. St. arts. 2431, 2434, relieving stock owners from liability for trespasses upon un-

fenced or insufficiently fenced lands, merely condones accidental trespasses, and does not operate in favor of one who intentionally causes his stock to graze upon lands of another.—Lazarus v. Phelps, 152 U. S. 81, 14 S. Ct. 477, 38 L. Ed. 368.

ANNEXATION.

Chattels to real property, see Fixtures.

Territory to municipal corporations, see Municipal Corporations, 29.

ANNUITIES.

See 2 Cent. Dig. Annuities.

Rights of Indians, see Indians, 3.

ANNULMENT.

Instruments, see—

Cancellation of Instruments.

Wills, 204-434.

ANSWER.

See—

Equity, 177-191, 338-345.

Garnishment, 128-148.

Pleading, 78-144, 253, 409.

Trial, 349-358.

ANTENUPTIAL CONTRACTS.

See Husband and Wife, 26-35.

ANTICIPATION.

Defenses, see Limitation of Actions, 176-178.

Invention, see Patents, 50-72.

ANTI-TRUST LAW.

See Monopolies, 9-31.

Appointment of receiver of foreign corporation, see Corporations, 684.

Denial of due process of law, see Constitutional Law, 258, 803.

Federal jurisdiction of actions involving violation, see Courts, 394(10).

Retroactive operation, see Constitutional Law, 200.

APEX.

Vein or lode having apex within claim, see Mines and Minerals, 28-33.

What constitutes, see Mines and Minerals, 17.

APOTHECARIES.

See Druggists.

APPEAL AND ERROR.

Scope-Note.

[INCLUDES review by superior tribunals of judicial action of inferior tribunals in general, and, more particularly, such review of decisions of courts of record in civil actions, by removal of the cause to the higher court by appeal or writ of error, or by hearing on a case made and reported or certified by the lower court, or on exceptions taken in the lower court; nature and scope of the remedy and of appellate jurisdiction in general; proceedings in the trial court to make objections to its action available on appeal, writ of error, etc.; proceedings to take and perfect appeals, sue out writs of error, etc., and effect thereof and of supersedeas or stay pending appeal, error, etc.; removal of cause, record, etc., to higher court; hearing and determination of appeals, writs of error, exceptions, etc., effect of decisions thereon, and proceedings on such decisions; and liabilities on and enforcement of securities given to perfect appeal or obtain supersedeas, stay, etc.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Form of Remedy.

⇒ 3. Proper mode of review.

4. — Appeal.

5. — Writ of error.

9. Existence of other remedy in lower court.

10. Existence of other remedy for review.

11. Right to different remedies in same case.

13. Pendency of another proceeding.

14. Successive appeals and cross-appeals or other proceedings.

15. Joinder of proceedings, and double appeals or other proceedings.

II. Nature and Grounds of Appellate Jurisdiction.

⇒ 19. Existence of actual controversy.

20. Jurisdiction of lower court.

22. Waiver of objections.

III. Decisions Reviewable.

(A) COURTS AND OTHER TRIBUNALS SUBJECT TO REVIEW.

(B) NATURE OF SUBJECT-MATTER AND CHARACTER OF PARTIES.

⇒ 25. Courts of original jurisdiction in general.

30. Judges and judicial officers.

33. Constitutional questions in general.

34. Validity of statutes or ordinances.

35. Franchises and matters of public interest.

36. Revenue.

37. States, political divisions, or officers as parties.

38. Title to real property.

41. Nature or form of action or proceeding.

43. Cases in intermediate courts.

(C) AMOUNT OR VALUE IN CONTROVERSY.

⇒ 45. Cases subject to pecuniary limitations.

46. Requisite amount or value.

47. Amount claimed.

48. Value of property or right claimed.

49. Amount or value actually involved.

50. — In general.

51. — Effect of set-off or counterclaim.

52. — Appeal as to part of subject-matter.

53. — Determination of amount.

III. Decisions Reviewable—Continued.

(C) AMOUNT OR VALUE IN CONTROVERSY —Continued.

- ↔ 54. Interest accrued.
- 55. Amount or value of recovery.
- 56. — In general.
- 57. — Effect of counterclaim.
- 58. — Interest on recovery.
- 60. — Collateral effect of judgment.
- 61. Aggregated claims, interests, or judgments.
- 62. Reduction by amendment or remission.
- 63. Reduction by payment or other satisfaction.
- 64. Cases in intermediate courts.
- 65. Cases originating in inferior courts.

(D) FINALITY OF DETERMINATION.

- ↔ 67. Interlocutory and intermediate decisions.
- 68. — Nature in general.
- 69. — Nature or form of action or proceeding.
- 70. — Nature and scope of decision.
- 71. — Affecting provisional remedies.
- 73. — Appealable judgments and orders.
- 75. Final judgments or decrees.
- 76. — Nature in general.
- 77. — Nature or form of action or proceeding.
- 78. — Nature and scope of decision.
- 79. — Finality as to all parties.
- 80. — Determination of controversy.
- 82. Orders after judgment.
- 84. Decisions of intermediate courts.

(E) NATURE, SCOPE, AND EFFECT OF DECISION.

- ↔ 86. Discretionary action.
- 87. — Matters resting in discretion.
- 89. — Abuse of discretion.
- 90. Involving merits.
- 91. Affecting substantial rights.
- 96. Relating to provisional remedies.
- 99. — Attachment and garnishment.
- 103. On motion relating to pleadings.
- 104. Relating to witnesses, depositions, affidavits, or discovery.
- 105. Dismissal or nonsuit.
- 110. On motion for new trial.
- 112. Void judgment or order.
- 118. In proceedings after decision of appellate court.
- 119. Relating to costs.
- 120. Decisions of intermediate courts.
- 122. Proceedings for review of part of judgment or order.

(F) MODE OF RENDITION, FORM, AND ENTRY OF JUDGMENT OR ORDER.

- ↔ 131. On proceedings at chambers or in vacation.

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- ↔ 136. Nature and grounds of right.
- 137. Parties of record.
- 141. — Representative or official capacity.
- 142. — States, political divisions, boards, or officers.
- 143. — Interveners and claimants.
- 148. Persons other than parties or privies.
- 149. Interveners for purpose of appeal.
- 150. Interest in subject-matter.
- 151. Parties or persons injured or aggrieved.

IV. Right of Review—Continued.**(B) ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT.**

- ⚡153. Inconsistent position or action in general.
- 156. Compliance with judgment or order.
- 157. — In general.
- 158. — Payment of or on judgment.
- 160. Acceptance of benefits.
- 161. — In general.
- 162. — Payment of or on judgment.
- 165. Pursuing other remedy.
- 166. Release of errors.

V. Presentation and Reservation in Lower Court of Grounds of Review.**(A) ISSUES AND QUESTIONS IN LOWER COURT.**

- ⚡169. Necessity of presentation in general.
- 170. Nature or subject-matter of issues or questions.
- 171. Nature and theory of cause.
- 172. Grounds of action or relief.
- 173. Grounds of defense or opposition.
- 174. Capacity or right to sue or defend.
- 176. Facts admitted or conceded in lower court.

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

- ⚡181. Necessity of objections in general.
- 182. Nature or form of remedy.
- 183. — Objections in general.
- 184. — Remedy at law or in equity.
- 185. Organization and jurisdiction of lower court.
- 187. Parties.
- 189. Motions and other incidental and collateral proceedings.
- 191. Pleading.
- 193. — Objections to declaration, complaint, or petition.
- 194. — Objections to plea or answer, or to subsequent pleadings.
- 197. — Variance.
- 198. Reference of cause or question.
- 199. Proceedings preliminary to trial or hearing.
- 201. Mode and conduct of trial or hearing.
- 202. Evidence and witnesses.
- 203. — In general.
- 204. — Admission of evidence.
- 206. — Reception of evidence and examination of witnesses.
- 208. Sufficiency of evidence.
- 209. — In general.
- 212. — Direction of verdict.
- 214. Instructions.
- 215. — Objections in general.
- 216. — Requests and failure to give instructions.
- 218. Verdict and findings by jury.
- 221. Amount of recovery or extent of relief.
- 227. Proceedings for review.
- 228. Objections to appeal to intermediate court.
- 230. Necessity of timely objection.
- 231. Necessity of specific objection.
- 232. Scope and effect of objection.
- 234. Necessity of motion presenting objection.
- 241. — Sufficiency and scope of motion.

V. Presentation and Reservation in Lower Court of Grounds of Review
—Continued.

(C) EXCEPTIONS.

- ⇐248. Necessity in general.
- 252. Review of rulings as to pleadings.
- 254. — On demurrer.
- 258. Review of proceedings at trial.
- 259. — Mode and conduct of trial in general.
- 260. — Rulings as to evidence.
- 263. — Instructions, and failure or refusal to give instructions.
- 265. Exceptions to decision or findings by court.
- 266. Exceptions to rulings, report, or findings of referee, commissioner, or auditor.
- 267. Exceptions to judgment.
- 268. Review of sufficiency of evidence to sustain verdict, findings, or judgment.
- 273. Necessity of specific exception.
- 274. Scope and effect.
- 280. Waiver of exceptions.

(D) MOTIONS FOR NEW TRIAL.

- ⇐287. Review of proceedings at trial.
- 292. — Instructions, and failure or refusal to give instructions.
- 293. Review of objections to verdict, findings, or judgment.
- 294. Review of sufficiency of evidence to sustain verdict, findings, or judgment.

(E) CASES AND QUESTIONS RESERVED OR CERTIFIED.

- ⇐314. Time for reservation or certification.

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- ⇐321. Appellants or plaintiffs in error.
- 322. — Proper or necessary parties in general.
- 323. — Separate proceeding by one or more coparties.
- 324. — Summons and severance.
- 325. — Joinder.
- 326. Appellees, respondents, or defendants in error.
- 327. — Proper or necessary parties.
- 330. Transfer or devolution of interest.
- 331. Death.
- 332. — Before appeal or writ of error.
- 333. — Pending appeal or writ of error.
- 334. — Continuance or revival of proceedings.
- 336. Defects, objections, and amendment.

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(A) TIME OF TAKING PROCEEDINGS.

- ⇐338. Nature and operation of limitations in general.
- 343. Commencement of period of limitation.
- 345. — Effect of motion for new trial or rehearing.
- 347. — Rendition or entry of judgment or order.
- 348. — Service of notice or copy of judgment or order.
- 349. Effect of disability or death of party.
- 351. Taking and perfecting proceeding in time.
- 352. Extension of time.
- 353. — Judicial authority.
- 356. Effect of delay or failure to take proceedings.
- 357. Relief in case of failure to proceed in time.

VII. Requisites and Proceedings for Transfer of Cause—Continued.**(B) PETITION OR PRAYER, ALLOWANCE, AND CERTIFICATE OR AFFIDAVIT.**

- ⇐358. Necessity of allowance or leave.
- 359. Authority of court or judge.
- 360. Prayer and allowance in open court.
- 362. Specification of errors.
- 364. Term of day to which appeal may be taken or writ made returnable.
- 365. Order for appeal or writ of error.
- 366. Certificate as to grounds.

(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

- ⇐370. Payment of fees on appealing.
- 372. Necessity of security to perfect appeal or other proceeding.
- 373. — In general.
- 374. — Exemptions.
- 375. Parties by and to whom security to be given.
- 376. — Obligees.
- 377. — Obligors.
- 378. Sureties.
- 381. — Sufficiency and justification.
- 384. Form and contents of bond or undertaking.
- 386. Approval of bond or undertaking.
- 387. Delivery or filing and service of bond or undertaking.
- 392. Waiver of security or of defects.
- 395. Effect of failure to give or defects in security.

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- ⇐396. Necessity of appellate process or of notice.
- 397. Process or notice on appeal in open court.
- 398. Writ of error.
- 399. — Issuance.
- 400. — Form and requisites.
- 402. — Return.
- 403. — Defects, objections, and amendments.
- 404. Citation or other process.
- 406. — Form and requisites.
- 407. — Service.
- 409. — Defects, objections, and amendments.
- 411. Nature and method of notice in general.
- 416. Form and requisites of notice.
- 417. — Sufficiency in general.
- 422. — Defects, objections, and amendments.
- 423. Service of notice.
- 425. — Time for service.
- 430. Effect of failure to serve process or to give notice.

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- ⇐432. Time for entry or docketing.
- 434. Necessity and requisites of appearance.
- 435. Effect of appearance.

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- ⇐438. New trial or rehearing.
- 440. Amendment of proceedings.
- 452. Irregular or ineffectual proceedings for review.

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- ⇐455. Time when jurisdiction attaches.

IX. Supersedeas or Stay of Proceedings.

- ⚡459. Taking and perfecting appeal or other proceeding for review as condition.
- 460. Operation of appeal or writ of error and necessity for security or allowance.
- 461. Use of appeal or cost bond as supersedeas bond.
- 462. Upon security.
- 468. — Time of giving bond.
- 475. — Additional or new security.
- 476. Upon allowance by court or judge.
- 477. — Authority of court or judge.
- 479. — Grounds for allowance.
- 482. Modifying or vacating.
- 484. Scope and effect as stay.
- 485. — Proceeding in cause in general.
- 488. — Injunction.
- 489. — Appointment and proceedings of receiver.

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(A) MATTERS TO BE SHOWN BY RECORD.

- ⚡493. Jurisdiction of lower court.
- 496. Proceedings sustaining judgment or order.
- 498. Presentation and reservation of grounds of review.
- 499. — Questions and objections in general.
- 500. — Rulings by lower court.
- 501. — Exceptions.
- 504. Taking and perfecting of appeal or other proceeding for review.
- 506. — Sufficiency of proceedings in general.
- 514. Successive appeals or proceedings for review.
- 515. Incorporating evidence and stenographer's report.

(B) SCOPE AND CONTENTS OF RECORD.

- ⚡517. Process and appearance.
- 521. Evidence.
- 523. — Depositions and affidavits.
- 524. — Documents.
- 525. Instructions.
- 528. Proceedings on motion in arrest, for new trial, or rehearing.
- 532. Record on review of decision of intermediate court.
- 533. Opinion of lower court.
- 535. Bill of exceptions, case, or statement.
- 537. — Necessity of timely making and filing in lower court.
- 539. Stipulations as to contents of record.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT OF FACTS.

- ⚡544. Decisions not otherwise reviewable.
- 552. Scope and sufficiency of case, statement, or certificate of evidence.
- 553. Substitutes.
- 554. Effect of failure to make bill, case, or statement.

(D) CONTENTS, MAKING, AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.

- ⚡563. Form and arrangement.
- 567. Time for settlement.
- 573. Making and filing agreed case or statement.

(E) ABSTRACTS OF RECORD.

[No paragraphs or references in this Digest. But see 3 Cent. Dig. App. & E. §§ 2573-2620.]

X. Record and Proceedings Not in Record—Continued.**(F) MAKING, FORM, AND REQUISITES OF TRANSCRIPT OR RETURN.**

- ⚡ 592. Effect of failure to make abstract or brief.
- 597. Record or part thereof included.
- 608. Sufficiency.
- 609. Supplemental transcript or return.

(G) AUTHENTICATION AND CERTIFICATION.

- ⚡ 613. Bill of exceptions.
- 616. Papers included, referred to, or annexed.

(H) TRANSMISSION, FILING, PRINTING, AND SERVICE OF COPIES.

- ⚡ 619. Necessity and duty of filing in appellate court.
- 620. Time for transmission and filing.
- 621. — Limitations applicable.
- 624. — Extension of time.
- 626. Failure to file in time.
- 627. — Effect in general.
- 628. — Excuses for delay.
- 630. Loss, destruction, or withdrawal from files.
- 631. Printing.
- 633. Effect of failure to print or serve copies.

(I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.

- ⚡ 635. Effect of omissions.
- 641. Defects in authentication or certificate.
- 643. Time to amend or to make objections.
- 645. Defects or errors amendable.
- 647. Amendment or correction in lower court.
- 650. — Certifying, transmitting, and incorporating amendment.
- 652. Amendment in appellate court.
- 653. — Authority.
- 658. Certiorari or other proceedings to bring up record.
- 659. — Authority and grounds.
- 660. — Proceedings.

(J) CONCLUSIVENESS AND EFFECT, IMPEACHING AND CONTRADICTING.

- ⚡ 666. Impeaching or contradicting.
- 670. — Affidavits.

(K) QUESTIONS PRESENTED FOR REVIEW.

- ⚡ 671. Limitation by scope of record in general.
- 674. Organization and jurisdiction of lower court.
- 689. Admissibility of evidence.
- 690. — In general.
- 691. — Necessity of setting forth all the evidence.
- 692. — Necessity of setting forth evidence excluded.
- 693. Sufficiency of evidence.
- 695. — Necessity of setting forth all the evidence.
- 696. — Necessity of recital or certificate that all the evidence is included.
- 697. — Sufficiency of recital or certificate that all the evidence is included.
- 698. Instructions.
- 699. — In general.
- 701. — Necessity of setting forth evidence.
- 702. — Necessity of setting forth entire charge.
- 704. Verdict, findings, or decision.
- 711. Questions in intermediate courts.

X. Record and Proceedings Not in Record—Continued.

(L) MATTERS NOT APPARENT OF RECORD.

- 712. Matters not included or shown in general.
- 714. Matters appearing otherwise than by record.
- 715. Evidence relating to question involved.
- 717. Opinion of lower court.

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- 719. Necessity.
- 722. Form and requisites in general.
- 723. Specification of errors.
- 727. — Conduct of trial.
- 728. — Rulings as to evidence.
- 729. — Submission of issues or questions to jury.
- 730. — Instructions.
- 731. — Verdict, findings, or decision.
- 734. — Proceedings after judgment.
- 745. Filing and annexing to record.
- 753. Effect of failure to make or file.

XII. Briefs.

- 763. Additional or supplemental briefs.
- 767. Striking out.
- 769. Failure to file or serve, or to file or serve in time.
- 773. — Dismissal or affirmance or reversal.

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- 777. Dismissal on consent.
- 779. Grounds for dismissal.
- 781. — Want of actual controversy.
- 782. — Want of jurisdiction.
- 786. — Proceedings frivolous or for delay.
- 792. Dismissal by court on its own motion.
- 793. Dismissal without prejudice.
- 794. Motion for dismissal.
- 796. — Parties.
- 797. — Time for making.
- 799. — Affidavits and other proofs.
- 801. — Hearing and determination.
- 802. Order of dismissal.
- 805. Abandonment.
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- 811. Advancement of cause.

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- 818. Continuance or postponement.
- 822. Arguments of counsel.
- 824. — Oral arguments.
- 826. Submission without argument.
- 829. Rehearing.
- 830. — In general.
- 832. — Grounds.
- 833. — Application.
- 835. — Scope and conduct.

XVI. Review.

(A) SCOPE AND EXTENT IN GENERAL.

- 836. Power of appellate court in general.
- 837. Matters or evidence considered in determining question.
- 838. Questions considered.

XVI. Review—Continued.**(A) SCOPE AND EXTENT IN GENERAL—Continued.**

- 839. — Scope of inquiry in general.
- 840. — Review of specific questions and particular decisions.
- 842. — Review dependent on whether questions are of law or of fact.
- 843. — Matters not necessary to decision on review.
- 844. Review dependent on mode of trial in lower court.
- 845. — In general.
- 846. — Trial by court in general.
- 847. — Trial in equitable actions.
- 848. — Trial by referee.
- 849. — Waiver of jury.
- 850. — General or special findings.
- 851. Theory and grounds of decision of lower court.
- 854. — Reasons for decision.
- 857. Extent of review dependent on mode of review.
- 859. — Writ of error.
- 862. Extent of review dependent on nature of decision appealed from.
- 863. — In general.
- 865. — On appeal from judgment by confession or default or from orders relating thereto.
- 866. — On appeal from decision on motion for dismissal or nonsuit or direction of verdict.

(B) INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.

- 869. On appeal from final judgment.
- 870. — Interlocutory proceedings brought up in general.
- 875. On appeal from order made after judgment.
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(C) PARTIES ENTITLED TO ALLEGE ERROR.

- 878. Appellee, respondent, or defendant in error.
- 879. Persons not parties in appellate court.
- 881. Estoppel to allege error.
- 882. — Error committed or invited by party complaining.
- 884. — Recognition of validity of proceeding.

(D) AMENDMENTS, ADDITIONAL PROOFS, AND TRIAL OF CAUSE ANEW.

- 885. Amendment of proceedings of lower court.
- 888. — As to pleadings.

(E) PRESUMPTIONS.

- 901. Burden of showing error.
- 905. Proceedings not included in record.
- 906. Facts or evidence not shown by record.
- 907. — In general.
- 909. — Particular facts necessary to sustain decision.
- 911. Organization and jurisdiction of lower court.
- 921. Right to trial by jury, and waiver thereof.
- 926. Admissibility and reception of evidence.
- 927. Dismissal, nonsuit, demurrer to evidence, or direction of verdict.
- 933. Order granting or refusing new trial.
- 934. Judgment.
- 937. Taking and perfecting appeal or other proceeding for review.
- 938. Making and contents of bill of exceptions, case, or statement of facts.

XVI. Review—Continued.

(F) DISCRETION OF LOWER COURT.

- ⌘949. Allowance of remedy and matters of procedure in general.
- 957. Opening default.
- 958. Amendment in general.
- 959. Amended and supplemental pleadings.
- 960. Rulings on motions relating to pleadings.
- 963. Proceedings preliminary to trial.
- 964. — In general.
- 965. — Change of venue.
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- 970. Reception of evidence.
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- 973. Dismissal, nonsuit, demurrer to evidence, or direction of verdict.
- 974. Submission of issues or questions to jury.
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- 977. — In general.
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- ⌘987. Power and duty to review.
- 988. Extent of review.
- 989. — In general.
- 992. Questions preliminary to admission of evidence.
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- 998. Verdicts.
- 999. — Conclusiveness in general.
- 1001. — Sufficiency of evidence in support.
- 1002. — On conflicting evidence.
- 1003. — Against weight of evidence.
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- 1005. — Approval of trial court.
- 1007. Findings of court.
- 1008. — Conclusiveness in general.
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- ⌘1025. Prejudice to rights of party as ground of review.
- 1026. — In general.
- 1027. — Errors not affecting result.
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- 1031. Presumption as to effect of error.
- 1033. Errors favorable to party complaining.
- 1035. Nature or form of remedy.
- 1036. Parties.
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XVI. Review—Continued.**(H) HARMLESS ERROR—Continued.**

- ⚡1040. — Demurrers or exceptions.
- 1042. — Striking out or dismissing.
- 1045. Selection and impaneling of jurors.
- 1046. Conduct of trial or hearing in general.
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- 1052. — Defect supplied or objection removed subsequently.
- 1053. — Error cured by withdrawal, striking out, or instructions to jury.
- 1054. — On trial without a jury.
- 1055. Exclusion of evidence.
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- 1057. — Facts otherwise established.
- 1059. — Error cured by instructions to jury.
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- 1062. Submission of issues or questions to jury.
- 1063. Instructions to jury.
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- 1066. — Applicability to issues and evidence.
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- 1068. — Error cured by verdict or judgment.
- 1071. Findings by court or referee.
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- 1073. Judgment or order.
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- ⚡1081. Questions considered.
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- 1083. — Review dependent on whether questions are of law or of fact.
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- 1090. Cross-appeal.
- 1091. Presumptions.
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- 1097. Former decision as law of the case in general.
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- 1128. On hearing in general.
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- 1133. Insufficient presentation of case or questions.
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- 1138. Reversal ineffectual or not beneficial.
- 1140. Remission of part of recovery.
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- ⚡ 1149. Amendment of defects and correction of errors.
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- 1166. Jurisdictional defects.
- 1170. Technical, formal, or trivial defects or errors.
- 1172. Reversal in part.
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- ⚡ 1184. Entry nunc pro tunc.
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- ⚡ 1186. Mandate, remittitur, or order of remand.
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- 1194. — Construction and operation in general.
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- 1196. Powers and duties of lower court.
- 1197. — Jurisdiction of lower court after remand.
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- 1199. — Opening, vacating, modification, or amendment of judgment or order.
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- 1208. Making or compelling restitution.
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XVII. Determination and Disposition of Cause—Continued.**(G) JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND.**

- ⇒ 1218. Recall or return of cause from lower court.
- 1220. Allowance of further appeal.
- 1222. Amendment or correction of mandate or remittitur.

XVIII. Liabilities on Bonds and Undertakings.

- ⇒ 1228. Accrual or release of liability by breach or fulfillment of conditions.
- 1232. — Affirmance or reversal of judgment or order.
- 1234. Extent of liability.

Cross-References.

See—

Certiorari.
 Exceptions, Bill of.
 New Trial.
 Appellate jurisdiction of United States Circuit Courts of Appeals, see Courts, ⇒ 405; United States Supreme Courts, see Courts, ⇒ 379-400.
 Costs on appeal or error, see Costs, ⇒ 223-263.
 Denial of remedy by appeal, see Constitutional Law, ⇒ 329.
 Due process of law, see Constitutional Law, ⇒ 316.
 Mandamus to control acts of court, judge, or judicial officer in reference to proceedings for review, see Mandamus, ⇒ 57.
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 Remedy by appeal or writ of error affecting other remedies, see—
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Review in particular civil actions.

See—

Commerce, ⇒ 98.
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 Divorce, ⇒ 184, 278-285.
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See—

Mortgages, ⇒ 570-578.
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Review in special proceedings.

See—

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 Bankruptcy, ⇒ 306, 449-468.
 Certiorari, ⇒ 70.
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 Eminent Domain, ⇒ 238, 239.
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 Mandamus, ⇒ 187.
 Municipal Corporations, ⇒ 321.
 Wills, ⇒ 356.

Review of criminal prosecutions.

See—

Criminal Law, ⇒ 1006-1193.
 Habeas Corpus.
 Homicide, ⇒ 325-340.

Review of proceedings in admiralty.

See Admiralty, ⇒ 103-118.

Review of proceedings of nonjudicial officers or bodies.

See Patents, ⇒ 113.

I. NATURE AND FORM OF REMEDY.

Bankruptcy proceedings, see Bankruptcy, ⇒ 440, 449.
 Practice peculiar to federal courts, see Courts, ⇒ 356.
 Review by Supreme Court of decisions of territorial courts, see Courts, ⇒ 387(4).
 Review of criminal prosecutions, see Criminal Law, ⇒ 1006-1011.

⇒ 3. Proper mode of review.

See 2 Cent. Dig. App. & E. §§ 8-24; 13 Cent. Dig. Costs, § 797; 21 Cent. Dig. Exceptions, Bill of, § 3; 28 Cent. Dig. Partit. § 424; 42 Cent. Dig. Refer. § 211.

⇒ 4. — Appeal.

See 2 Cent. Dig. App. & E. §§ 8-21; 42 Cent. Dig. Refer. § 211.

Plaintiffs brought a possessory action in the nature of ejectment, and defendant pleaded the general issue, and set up four affirmative defenses, to which plaintiffs demurred but which were sustained. The fourth defense was addressed to the judge of the district court. Code Wash. T. § 76, subd. 4, provides that

"when the relief sought is of an equitable nature the complaint shall be addressed to the judge of the district in which the action is brought." Section 83, subd. 3, provides that "defendant may set forth, by answer, as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both." *Held*, that the final judgment dismissing the action at law was not an exercise of chancery jurisdiction, within the meaning of Code Wash. T. § 445, which provides that every final judgment, where chancery jurisdiction has been exercised, shall be reviewed in the supreme court by appeal.—*Brown v. Rank*, 132 U. S. 216, 10 S. Ct. 54, 33 L. Ed. 340.

A proceeding for the probate of a will in the District of Columbia is not a suit in equity, but is a case in which the parties have a right to jury trial, and in which there may be adversary parties, and hence may be brought to the supreme court from the District courts by writ of error, instead of by appeal.—*Ormsby v. Webb*, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805; *Campbell v. Porter*, 162 U. S. 478, 16 S. Ct. 871, 40 L. Ed. 1044.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

The judgment of a United States circuit court, entered on findings by the court on trial of an action of assumpsit, a jury having been waived by the parties, cannot be reviewed by the supreme court on appeal, but only on writ of error, whatever may be the course pursued in courts of the state under its statutes, as the appellate jurisdiction of the supreme court is regulated by the acts of congress, which have generally observed the distinction between the two modes of review.—*Deland v. Platte County*, 155 U. S. 221, 15 S. Ct. 82, 39 L. Ed. 128.

A decree of a circuit court of the United States upon the merits can be reviewed in the supreme court of the United States only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause.—*City of Covington v. First Nat. Bank of Covington*, 22 S. Ct. 645, 185 U. S. 270, 46 L. Ed. 906.

Writ of error, and not appeal, is the proper method of obtaining a review in the federal Supreme Court of a judgment of the Supreme Court of the territory of Oklahoma which affirmed a judgment of the court below sustaining a demurrer to, and dismissing with costs, the petition in an action to recover damages for false imprisonment. Appeal 69 P. 955, 11 Okl. 487, dismissed.—*Comstock v. Eagleton*, 25 S. Ct. 210, 196 U. S. 99, 49 L. Ed. 402.

The fact that an action of ejectment was tried by the court, upon waiver of a jury, does not make appeal the proper method of obtaining a review in the federal Supreme Court of the final judgment of the Oklahoma Supreme Court, under Act May 2, 1890, c. 182, § 9, 26 Stat. 81, 85, authorizing such review in the same manner and under the same regulations as though the judgment were that of a federal circuit court. Judgment 73 P. 1012, 12 Okl. 570, reversed.—*Oklahoma City v. McMaster*, 25 S. Ct. 324, 196 U. S. 529, 49 L. Ed. 587.

Writ of error, and not appeal, is the proper method of obtaining a review in the Supreme Court of the United States of a judgment of the Oklahoma Supreme Court, affirming a judgment of the trial court, in an action on a contract, tried by the court without a jury. Judgment, 78 P. 170, 14 Okl. 296, affirmed.—*Guss v. Nelson*, 26 S. Ct. 260, 200 U. S. 298, 50 L. Ed. 489.

Writ of error is the proper method of reviewing a judgment of the Supreme Court of the territory of Oklahoma, affirming a judgment of the court below in an action of replevin tried by the court upon waiver of a jury. Judgment (1905) 79 P. 1134, affirmed.—*National Live Stock Bank v. First Nat. Bank*, 27 S. Ct. 79, 203 U. S. 296, 51 L. Ed. 192.

Errors alleged to have been committed in an action at law can be reviewed in the Supreme Court of the United States only by writ of error.—*Behn, Meyer & Co. v. Campbell & Go Taeco*, 27 S. Ct. 502, 205 U. S. 403, 51 L. Ed. 857.

Writ of error is the proper mode of bringing up to the federal Supreme Court for review a judgment of the Supreme Court of the Philippine Islands, affirming a judgment below, dismissing, upon grounds of law, an application for the registration of land.—*Cariño v. Insular Government of Philippine Islands*, 29 S. Ct. 334, 212 U. S. 449, 53 L. Ed. 594.

Writ of error, and not appeal, is the proper proceeding to obtain a review in the federal Supreme Court of a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the court of land registration, which denied registration of a tract of land.—*Tiglaio v. Insular Government of Philippine Islands*, 30 S. Ct. 129, 215 U. S. 410, 54 L. Ed. 257.

Writ of error, and not appeal, is the proper mode of bringing up to the Federal Supreme

Court for review a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the court of land registration, granting registration of a part only of a tract of land.—*Jover y Costas v. Insular Government of Philippine Islands*, 31 S. Ct. 664, 221 U. S. 623, 55 L. Ed. 884.

Writ of error and not appeal is the only method by which a review may be had in the Supreme Court of the judgment of the Supreme Court of the Philippine Islands in favor of a city in a suit to recover land.—*Harty v. Municipality of Victoria*, 33 S. Ct. 4, 226 U. S. 12, 57 L. Ed. 103.

§5. — Writ of error.

See 2 Cent. Dig. App. & E. §§ 8-21; 12 Cent. Dig. Costs, § 797; 21 Cent. Dig. Exceptions, Bill of, § 3; 31 Cent. Dig. J. P. § 751; 42 Cent. Dig. Refer. § 211.

Under Act Cong. April 7, 1874, c. 80 (18 Stat. 27), where the case was not tried in the territorial court by a jury, the judgment can only be brought up by appeal, and not by writ of error.—*Woolf v. Hamilton*, 108 U. S. 15, 1 S. Ct. 139, 27 L. Ed. 635; *Kahn v. Same*, 1 S. Ct. 139, 154 U. S. 677, 27 L. Ed. 635; *Story v. Black*, 119 U. S. 235, 7 S. Ct. 176, 30 L. Ed. 341; *Bonnifield v. Price*, 154 U. S. 672, 14 S. Ct. 1194, 26 L. Ed. 1022.

If the judgment complained of was rendered by a court proceeding according to the course of the common law, a writ of error lies.—*United States v. Hailey*, 118 U. S. 233, 6 S. Ct. 1049, 30 L. Ed. 173.

A petition of intervention or of third opposition, under Code Prac. La. arts. 395-400, to obtain the release of property seized under an execution to which it is not liable, is a legal remedy, and reviewable by writ of error.—*City of New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 9 S. Ct. 223, 32 L. Ed. 607.

A motion in the United States supreme court to dismiss a writ of error to a judgment in favor of the execution plaintiff, on the ground that the execution defendant cannot be a "third opponent," and that the land levied on is used for public purposes by the execution defendant, a city, and is therefore the subject of a trust, which is cognizable only in equity, and that thus such judgment is reviewable only on appeal, will be denied when the objection to the jurisdiction at law was not made in the trial court, and the cause was tried on its merits.—Id.

Act Cong. April 7, 1874, c. 80, § 2 (18 Stat. 27, 28), prescribes that the appellate jurisdiction of the supreme court over judgments of territorial courts, "in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal." Code Civ. Proc. Idaho, §§ 815, 826, authorize suits to enforce mechanics' liens in which there may be an order for the sale of the property subject to the lien, and personal judgment for deficiency, in like manner and with like effect as in actions for the foreclosure of mortgages. Held that, the proceeding being in its nature purely equitable, it could be reviewed only on appeal, though the court submitted issues to the jury, and though the Code of Idaho declares that there shall be but one form of civil action, in which either legal or equitable remedies may be administered, with or without a jury, according to the nature of the relief sought.—*Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hasb.) 239, 10 P. 620.

Since, under 18 Stat. p. 27, c. 80, § 2, a case tried by the state court without a jury can only be brought to the supreme court of the United States by appeal, that court has no jurisdiction of a writ of error in such case. 6 Mont. 485, 491, 13 P. 195-198, affirmed.—*Gregory Consolidated Min. Co. v. Starr*, 141 U. S. 222, 11 S. Ct. 914, 35 L. Ed. 715.

Exceptions to an accounting by an executrix in the supreme court of the District of Columbia, sitting as an orphans' court, make a case for equitable cognizance, which is properly reviewed by appeal rather than by writ of error. *Decree, Sinnott v. Kenaday*, 14 App. D. C. 1, reversed.—*Kenaday v. Sinnott*, 21 S. Ct. 233, 179 U. S. 606, 45 L. Ed. 339.

An appeal, and not a writ of error, from a decision of a district court denying an application for a discharge upon a writ of habeas corpus, where the construction of an extradition treaty is involved, is authorized by Court of Appeals Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], providing for appeals direct from the district court to the supreme court in any case in which the validity or construction of a treaty is drawn in question.—*Rice v. Ames*, 21 S. Ct. 406, 180 U. S. 371, 45 L. Ed. 577.

Appeal, and not writ of error, is the proper method of obtaining a review in the Supreme Court of the United States of a final order of the Supreme Court of the Philippine Islands in a habeas corpus case, under Act July 1, 1902, c. 1369, § 2 Stat. 691, 695 [U. S. Comp. St. Supp. 1905, p. 154], § 10, providing that judgments and decrees of the latter court can only be reviewed "in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts."—*Fisher v. Baker*, 27 S. Ct. 135, 203 U. S. 174, 51 L. Ed. 142, 7 Ann. Cas. 1018.

Judgment of Supreme Court of Philippine Islands affirming judgment reversing decision of insular collector as to classification, under Philippine Tariff Act, of an imported commodity, can be reviewed in the federal Supreme Court only by appeal under Act July 1, 1902.—*Gsell v. Insular Collector of Customs*, 36 S. Ct. 39, 239 U. S. 93, 60 L. Ed. 163.

A decree of the Hawaiian Supreme Court tried without a jury is reviewable in the federal Supreme Court by writ of error under Judicial Code, § 246.—*Hapai v. Brown*, 36 S. Ct. 201, 239 U. S. 502, 60 L. Ed. 407.

Appeal, not writ of error, is proper mode in reviewing in federal Supreme Court decree of Supreme Court of Philippine Islands in a suit by a wife for divorce, alimony, and division of property.—*De La Rama v. De La Rama*, 36 S. Ct. 518, 241 U. S. 154, 60 L. Ed. 932.

Appeal is a proper method of reviewing, in federal Supreme Court, under Act July 1, 1902, § 10, a decree of the Supreme Court of the Philippine Islands in equity suit.—*Montelibano v. La Compania General De Tabacos De Filipinas*, 36 S. Ct. 617, 241 U. S. 455, 60 L. Ed. 1099.

◀9. Existence of other remedy in lower court.

See 2 Cent. Dig. App. & E. §§ 25-33; 13 Cent. Dig. Costs, § 796; 42 Cent. Dig. Refer. § 213.

Whether plaintiff should be permitted to make the closing argument to the jury, as having the affirmative, is purely a question of practice, to be reviewed only by motion for new trial in the trial court, and cannot be made the subject of a bill of exceptions or writ of error.—*Lancaster v. Collins*, 115 U. S. 222, 6 S. Ct. 33, 29 L. Ed. 373.

◀10. Existence of other remedy for review.

See 2 Cent. Dig. App. & E. §§ 34-38; 21 Cent. Dig. Exceptions, Bill of, § 86.

Where the supreme court of a territory has entertained jurisdiction of a cause, but dismissed it because errors were not assigned in accordance with the rules of practice applicable to that form of action, the judgment can only

be reviewed by writ of error or appeal; mandamus will not lie.—*Ex parte Brown*, 116 U. S. 401, 6 S. Ct. 387, 29 L. Ed. 676.

◀11. Right to different remedies in same case.

See 2 Cent. Dig. App. & E. §§ 39-46.

When it is doubtful whether an appeal will lie directly from the circuit to the supreme court, a party does not waive his appeal to the supreme court by taking at the same time an appeal to the circuit court of appeals.—*Pullman's Palace-Car Co. v. Central Transp. Co.*, 18 S. Ct. 808, 171 U. S. 138, 43 L. Ed. 108, reversing judgment 76 F. 401, 22 C. C. A. 246.

◀13. Pendency of another proceeding.

See 2 Cent. Dig. App. & E. §§ 47, 1895; 13 Cent. Dig. Courts, § 1102.

The act of March 3, 1891 (26 Stat. 826), does not contemplate separate appeals or writs of error on the merits in the same case, and at the same time, to two different appellate courts; and a writ of error obtained from the supreme court to review a judgment of a circuit court, while the case was pending in the circuit court of appeals, will be dismissed.—*Columbus Const. Co. v. Crane Co.*, 19 S. Ct. 721, 174 U. S. 600, 43 L. Ed. 1102.

◀14. Successive appeals and cross-appeals or other proceedings.

See 2 Cent. Dig. App. & E. §§ 48-57.

A motion to dismiss a cross appeal will not be granted, when the record has not been printed, where it appears from the motion papers that, if the defenses set up under the other appeal are overruled, it will then become important to appellant to urge the defense under his cross appeal to a claim that will then amount to more than \$5,000.—*Mayer v. Walsh*, 108 U. S. 17, 1 S. Ct. 417, 27 L. Ed. 635.

The allowance of an appeal which afterwards becomes of no avail, from failure to file the record and prosecute it, is no bar to a second appeal within the time allowed by law.—*Evans v. State Nat. Bank*, 134 U. S. 330, 10 S. Ct. 493, 33 L. Ed. 917.

◀15. Joinder of proceedings, and double appeals or other proceedings.

See 2 Cent. Dig. App. & E. §§ 59, 60.

Where, in a consolidated action, each defendant brings error, and a writ of error is also sued out by them jointly, the latter is superfluous, and may be dismissed without costs.—*Mutual Life Ins. Co. of New York v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

Criminal prosecutions, see Criminal Law, ▶1016-1019.

Party to appeal in suit for diversion, see Appeal and Error, ▶322.

◀19. Existence of actual controversy.

See 2 Cent. Dig. App. & E. §§ 63-80.

The supreme court will not adjudicate between two corporations which, after judgment below, have come under control of the same persons, as the controversy then ceases to be a real one; and it is immaterial that a minority of the stockholders of the defendant in error retain the same interest they had at the time of the judgment, and that the present owners of both corporations are anxious to have the question decided, in order that such minority may receive "whatever, by the finding of the court, would be due them."—*South Spring Hill Gold-Min. Co. v. Amador Medean Gold-*

Min. Co., 145 U. S. 300, 12 S. Ct. 921, 36 L. Ed. 712.

The dismissal of a petition for a writ of prohibition to prevent the canvass of the votes cast at a congressional election cannot be reviewed in the federal Supreme Court after the canvass has been made, and certificates of election have been issued, and the House of Representatives has admitted the parties holding the certificates to seats in that body.—*Jones v. Montague*, 24 S. Ct. 611, 194 U. S. 147, 48 L. Ed. 913.

The denial of injunctive relief against a canvass of the votes cast at a congressional election cannot be reviewed in the federal Supreme Court after the canvass has been made, and certificates of election have been issued, and the House of Representatives has admitted the parties holding the certificates to seats in that body.—*Selden v. Montague*, 24 S. Ct. 613, 194 U. S. 153, 48 L. Ed. 915.

The validity of the action of the Philippine authorities in suspending the writ of habeas corpus is a moot question, which does not call for determination by the Supreme Court of the United States on writ of error, where the suspension was revoked on the day when copy of the petition for the writ of error was served on opposing counsel, and more than two months before the writ was issued.—*Fisher v. Baker*, 27 S. Ct. 135, 203 U. S. 174, 51 L. Ed. 142, 7 Ann. Cas. 1018.

The question whether the Anti-trust Act is violated by a combination of steamship companies to monopolize Trans-Atlantic transportation is moot in view of the existing European War, and hence will not be decided by the federal Supreme Court on appeal from a District Court.—*United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 36 S. Ct. 212, 239 U. S. 466, 60 L. Ed. 387, reversing decree *Same v. Hamburg-American S. S. Line* (D. C.) 216 F. 971.

20. Jurisdiction of lower court.

See 2 Cent. Dig. App. & E. §§ 81-87; 13 Cent. Dig. Courts, §§ 433, 439.

Where it is determined that the circuit court had no jurisdiction of the cause of action, the decree will be reversed, though it was stipulated in the court below that it should abide the decision in another case.—*Ryder v. Holt*, 128 U. S. 525, 9 S. Ct. 145, 32 L. Ed. 529.

22. Waiver of objections.

See 2 Cent. Dig. App. & E. § 98.

The United States supreme court will, of its own motion, deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act; even though the party against whose objection the error was committed does not complain.—*Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462.

The federal Supreme Court will inquire whether it has jurisdiction of the writ of error before it, although counsel do not raise that question.—*Fore River Shipbuilding Co. v. Hagg*, 31 S. Ct. 185, 219 U. S. 175, 55 L. Ed. 163.

III. DECISIONS REVIEWABLE.

See—

- Admiralty, 453.
- Bankruptcy, 455, 456.
- Contempt, 66.
- Criminal Law, 1021-1023.

(A) COURTS AND OTHER TRIBUNALS SUBJECT TO REVIEW.

See 2 Cent. Dig. App. & E. §§ 100-338.

Bankruptcy courts, see Bankruptcy, 455.

(B) NATURE OF SUBJECT-MATTER AND CHARACTER OF PARTIES.

25. Courts of original jurisdiction in general.

See 2 Cent. Dig. App. & E. § 101.

The district court established by Act Cong. May 17, 1884, for the territory of Alaska, is not merely a district court of the United States, and a district court exercising the powers of a circuit court; it is also a court of general law and equity jurisdiction; and, under section 7 of the act, the supreme court has power to review its decisions, not merely in the manner prescribed for a district and acting circuit court of the United States, but in the manner appropriate to the nature of the case, as in cases of the same kind from other courts.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

30. Judges and judicial officers.

See 2 Cent. Dig. App. & E. § 105.

Where a prisoner was discharged from custody by an order of the circuit judge in habeas corpus proceedings, the fact that the appeal was docketed "an appeal from the circuit court" does not make the decision appealable, since appeals in such proceedings are only given from the final decree of a circuit court.—*Carper v. Fitzgerald*, 121 U. S. 87, 7 S. Ct. 825, 30 L. Ed. 882.

33. Constitutional questions in general.

See 2 Cent. Dig. App. & E. § 110.

The right to transportation by a common carrier is not such a "privilege or immunity secured by the constitution of the United States," within the terms of Rev. St. § 699, subd. 4, giving jurisdiction to the supreme court in such cases, without regard to the sum in dispute, as to authorize an appeal thereto in an action against a railroad company for refusing to transport beer into Iowa because of the prohibition of the state law.—*Bowman v. Chicago & N. W. Ry. Co.*, 115 U. S. 611, 6 S. Ct. 192, 29 L. Ed. 502.

The refusal of the obligor to comply with the conditions of an appeal bond to prosecute an appeal from the circuit to the supreme court is not a "deprivation of any right, privilege, or immunity secured by the constitution of the United States," within the meaning of Rev. St. § 699, subd. 4, giving the supreme court jurisdiction to review any final judgment of any circuit court in such cases, without regard to the sum or value in dispute.—*Cogswell v. Fordyce*, 128 U. S. 391, 9 S. Ct. 112, 32 L. Ed. 484.

Actions brought by the same plaintiffs against different insurance companies to recover for a loss caused by a fire were consolidated for trial in the circuit court. Some of the defendants sought a reversal of judgment against them, on the ground that the circuit court had acted improperly in ordering such consolidation, and that thereby the defendant had been deprived of a trial by jury according to the settled course of judicial proceedings. *Heid*, not within Rev. St. § 699, subd. 4, providing for the review of judgments rendered by the circuit court, without regard to the amount in dispute, in a "case brought on account of the deprivation of any right, privilege, or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States."—*Hanover Fire Ins. Co. v. Kinneard*, 129 U. S. 176, 9 S. Ct. 269, 32 L. Ed. 653.

In an action in a territorial court to oust an officer claiming title under a territorial act, and to compel the surrender of the office to one appointed by the governor, by virtue of the authority conferred by the act of congress creat-

ing the territory, where the territorial supreme court bases its decision for plaintiff on the power conferred on the governor by the act of congress, an "authority exercised under the United States" is "drawn in question," within the meaning of Act Cong. March 3, 1885 (23 Stat. 443), § 2, which provides for appeals and writs of error from the supreme courts of the territories in such cases. It is not necessary under this clause that the decision should be against the "authority" asserted.—*Clayton v. Utah*, 132 U. S. 632, 10 S. Ct. 190, 33 L. Ed. 455; *Jack v. Same*, 132 U. S. 43, 10 S. Ct. 194, 33 L. Ed. 459.

Writs of mandamus issued by the supreme court of a territory, on the ground that a body of persons, claimed without right to be the lawful council and house of representatives of the territory, usurped the legislative power conferred by congress upon the legislative assembly of the territory by Rev. St. § 1846, raise questions as to the validity of an authority exercised under the United States, within the meaning of Act Cong. March 3, 1885, § 2, authorizing the supreme court of the United States to review the judgment of the supreme court of a territory in such cases, without regard to the amount in dispute.—*Clough v. Curtis*, 134 U. S. 361, 10 S. Ct. 573, 33 L. Ed. 945, affirming judgment 2 Idaho (Haab.) 523, 22 P. 8.

A decision by a territorial supreme court that a statute authorizing verdicts by less than the whole number of jurors is not in violation of the seventh amendment to the federal constitution, is reviewable on error in the supreme court of the United States without regard to the amount in controversy.—*Springville City v. Thomas*, 17 S. Ct. 717, 166 U. S. 707, 41 L. Ed. 1172.

34. Validity of statutes or ordinances.

See 2 Cent. Dig. App. & E. §§ 111, 173.

In an action in the supreme court of the District of Columbia against a railroad company, for maintaining a nuisance in a street, the company defended on the ground that it acted in occupying the street under certain statutes of the United States. The court recognized the right of the company to occupy the streets in a lawful manner for the purpose of transacting its lawful business, and charged the jury that no recovery could be had for injuries caused thereby, but held that the statutes did not authorize the occupation of the street for a freight yard. *Held*, that the "validity" of these statutes was not drawn in question, within the meaning of Act Cong. March 3, 1885 (23 Stat. 443), regulating writs of error to and appeals from the supreme court of the District of Columbia, and providing that the writ shall lie without reference to jurisdictional amount in cases "in which is drawn in question the validity" of a statute of the United States.—*Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 9 S. Ct. 503, 32 L. Ed. 908; *Same v. Crown*, 131 U. S. 429, 9 S. Ct. 795, 33 L. Ed. 222.

35. Franchises and matters of public interest.

See 2 Cent. Dig. App. & E. §§ 112, 113, 174.

A suit by a water company, having a grant of an exclusive privilege of supplying a city with water for 15 years, to enjoin the city from establishing waterworks of its own, or from issuing bonds for that purpose, is not within the appellate jurisdiction of the supreme court, when there is no allegation inconsistent with a purpose on the part of the city to commence operating its waterworks only after the expiration of the 15 years, and no averment showing that the taxes and other expenses or damages to which complainant will be subjected by reason of the proposed improvement will ex-

ceed \$5,000 in amount.—*El Paso Water Co. v. City of El Paso*, 152 U. S. 157, 14 S. Ct. 494, 38 L. Ed. 396.

36. Revenue.

See 2 Cent. Dig. App. & E. §§ 114-116, 175.

Rev. St. § 844, requiring the clerks of the circuit courts to pay into the treasury any surplus of fees and emoluments which their returns to the attorney general show to exist over and above their compensation and allowances, is not a "revenue law," within the contemplation of Rev. St. § 699, subd. 2, which provides for a writ of error, without regard to the amount in dispute, upon "any final judgment of a circuit court * * * in any civil action brought by the United States for the enforcement of any revenue law thereof."—*United States v. Hill*, 123 U. S. 681, 8 S. Ct. 308, 31 L. Ed. 275.

A bond for appearance, given by one charged with forging checks on a United States treasurer, does not come within the exceptions of Rev. St. U. S. § 699, providing that an appeal may be had to the United States supreme court, without regard to the sum in dispute, in suits for the enforcement of revenue laws, or acts done by a revenue officer, in patent or copyright cases, and in suits involving the constitutional privileges of citizens of the United States.—*United States v. Broadhead*, 127 U. S. 212, 8 S. Ct. 1191, 32 L. Ed. 147.

An action by the United States on the official bond of a collector of customs for money appropriated by him, as part of the emoluments of his office, is not to enforce a revenue law, or against a revenue officer for an "act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the treasury," in which cases, under Rev. St. § 699, an appeal may be taken to the supreme court, though the amount in controversy is less than \$5,000.—*United States v. Haynes*, 130 U. S. 653, 9 S. Ct. 648, 32 L. Ed. 1060.

Under Act March 3, 1885 (23 Stat. 443), no appeal lies from a decree of the supreme court of the District of Columbia dismissing a bill to enjoin the municipal authorities of the district from attempting to enforce the collection of certain license taxes on street cars on the ground that the act imposing the tax has been repealed, when the amount in controversy is less than \$5,000.—*Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 13 S. Ct. 64, 36 L. Ed. 951.

A writ of error from the Supreme Court of the United States to the Hawaiian Supreme Court, to review a judgment sustaining an assessment for taxation, will not lie under Act March 3, 1906, c. 1465, § 3, 33 Stat. 1035, where the amount of the tax assessed is less than the jurisdictional amount prescribed by that section.—*Honolulu Rapid Transit & Land Co. v. Wilder*, 29 S. Ct. 46, 211 U. S. 144, 53 L. Ed. 124.

37. States, political divisions, or officers as parties.

See 2 Cent. Dig. App. & E. § 117.

Act Cong. approved Feb. 16, 1875, § 3 (18 Stat. 315), fixing the amount necessary to give jurisdiction to the United States supreme court at a sum in excess of \$5,000, exclusive of costs, applies to suits where the United States is a party.—*United States v. Broadhead*, 127 U. S. 212, 8 S. Ct. 1191, 32 L. Ed. 147.

By Act Cong. March 3, 1887, the district court is given concurrent jurisdiction with the court of claims "where the amount of the claim does not exceed \$1,000," and the same right of appeal is given to the plaintiff or the

United States as "now reserved in the statutes of the United States in that behalf made." Rev. St. § 707, provides that "an appeal to the supreme court shall be allowed, on behalf of the United States, from all judgments of the court of claims adverse to the United States." *Held*, that an appeal lies on behalf of the United States from a judgment against it in the district court under the act of March 3, 1887, irrespective of amount.—*United States v. Davis*, 131 U. S. 36, 9 S. Ct. 657, 33 L. Ed. 93.

An application to the interior department, asking the government to retain, out of moneys due an Indian tribe, a certain amount alleged to be due the claimant under a contract with the Indians, is not a suit against the United States, within the meaning of section 9, which allows appeals to the supreme court.—*In re Sanborn*, 148 U. S. 222, 13 S. Ct. 577, 37 L. Ed. 429.

6-38. Title to real property.

See 2 Cent. Dig. App. & E. §§ 118-125, 178.

Under section 2 of the act of congress of March 3, 1885, exempting causes involving the validity of patents and copyrights from the rule limiting appeals to the United States supreme court to matters exceeding \$5,000 in value, patents for inventions and discoveries, and not patents for land, are intended.—*Street v. Ferry*, 119 U. S. 385, 7 S. Ct. 231, 30 L. Ed. 439.

No appeal lies from a judgment of the circuit court in relation to land valued at \$1,000.—*Jones v. Fritschle*, 154 U. S. 590, 14 S. Ct. 1171, 21 L. Ed. 552.

6-41. Nature or form of action or proceeding.

See 2 Cent. Dig. App. & E. §§ 127-155, 157, 158, 172, 178-184, 186-188, 190-194, 196, 197; 1 Cent. Dig. Action, § 116.

Where the county auditor, under Rev. St. Ohio 1880, § 2782, authorizing him to correct tax returns, and for that purpose to issue compulsory process, and examine any person whom he may suppose to have the requisite knowledge, summons the cashier of a national bank, directing him to bring with him the books of the bank showing its deposits, a proceeding by the bank for injunction to restrain him, on the ground that it will unduly expose its business affairs, lessen public confidence, and greatly impair the value of its franchises, does not involve money, nor anything the value of which can be measured by money; and an appeal from the judgment of the circuit court dismissing the bill will be dismissed for want of jurisdiction.—*First Nat. Bank of Youngstown v. Hughes*, 106 U. S. 523, 1 S. Ct. 489, 27 L. Ed. 268.

6-43. Cases in intermediate courts.

See 2 Cent. Dig. App. & E. §§ 161-165.

The decision in a proceeding to determine an adverse claim to mineral lands, under Rev. St. § 2326, providing for such a proceeding "in a court of competent jurisdiction," may be reviewed by the United States supreme court, where the case is tried in a territorial court.—*Chambers v. Harrington*, 111 U. S. 350, 4 S. Ct. 428, 28 L. Ed. 452.

Where a federal circuit court assumes jurisdiction of an action against a corporation created by congress, on the ground that the controversy arises under a law of the United States, and its judgment is reviewed by the circuit court of appeals, the latter judgment is reviewable in the supreme court, as the cause does not belong to any of the classes in which the judgment of the circuit court of appeals is made "final" by section 6, cl. 2, of the act creating it (26 Stat. 826). 49 F. 881. 1 C. C. A. 468, 1 U. S. App. 113 (1892) affirmed.—*Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 12 S. Ct. 740, 36 L. Ed. 506.

(C) AMOUNT OR VALUE IN CONTROVERSY.

6-45. Cases subject to pecuniary limitations.

See 2 Cent. Dig. App. & E. §§ 152-155, 157, 158, 172-176, 178-184, 186-197.

A decree of the supreme court of the District of Columbia enjoining the prosecution of an ordinary replevin suit, involving less than \$5,000, is not appealable to the supreme court, under Act March 3, 1885, § 2, which provides for an appeal, without regard to the sum in dispute, whenever the validity of a treaty or statute of or an authority exercised under the United States is involved.—*In re Craft*, 124 U. S. 370, 8 S. Ct. 509, 31 L. Ed. 449.

In an action in a circuit court on a contract of license to make a patented article, where defendant, admitting the contract, raises the issues, which the court determines, of infringement and the validity of the patent, an appeal lies, regardless of the amount in controversy, under Rev. St. § 699, giving appellate jurisdiction to the supreme court "in any case touching patent-rights."—*St. Paul Plow-Works v. Starling*, 127 U. S. 376, 8 S. Ct. 1327, 32 L. Ed. 251.

A writ of error does not lie to the supreme court from a judgment of the circuit court on an appeal bond, conditioned to prosecute an appeal from the circuit to the supreme court, where the amount in controversy is less than \$5,000.—*Cogswell v. Fordyce*, 128 U. S. 391, 9 S. Ct. 112, 32 L. Ed. 484.

Under Act Cong. Feb. 25, 1889, providing that in all appeals and writs of error from the United States circuit and district courts, where the amount involved is less than \$5,000, the review shall be limited to questions involving the jurisdiction of those courts, the supreme court cannot review the question as to the validity or effect of an assignment by a joint owner of land of his interest in a claim for damages for a trespass thereon.—*Ambler v. Eppinger*, 137 U. S. 480, 11 S. Ct. 173, 34 L. Ed. 765.

Act March 3, 1885 (23 Stat. 437), provides that an appeal from the circuit to the supreme court shall lie in cases where the prisoner is alleged to be restrained of his liberty in violation of the constitution or any law or treaty of the United States. 23 Stat. 443, of the same date, provides that no appeal shall lie from the supreme court of the District of Columbia, or of any territory, unless the amount in controversy exceeds \$5,000. *Held*, that habeas corpus proceedings are civil cases, and under the latter act no appeal therein lies from such courts. *Wales v. Whitney*, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277, overruled.—*Cross v. Burke*, 146 U. S. 82, 13 S. Ct. 22, 36 L. Ed. 896.

Authority exercised by the United States in removing a fence pursuant to the judgment of a court is not within the meaning of Act March 3, 1885, § 2, providing that the jurisdictional limit of \$5,000 shall not apply where there is drawn in question the validity of a statute or authority exercised under the United States.—*Cameron v. United States*, 146 U. S. 533, 13 S. Ct. 184, 36 L. Ed. 1077.

A plea alleged that, under an order made by another circuit court in receivership proceedings, plaintiff was bound to present his claim by intervention therein before a given date, and that he failed to do so, for which reason defendant was not liable, or, if liable at all, was only liable in that court. *Held*, that this was a plea in bar, and raised no jurisdictional question which would authorize a review in the supreme court, under the act of February 25, 1889, the amount involved being less than \$5,000.—*Texas & P. Ry. Co. v. Saunders*, 151 U. S. 105, 14 S. Ct. 257, 38 L. Ed. 90.

The supreme court has no jurisdiction of an appeal from a decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District dismissing a bill brought under Rev. St. § 4915, to procure an adjudication that complainant is entitled to the issuance of a patent for an invention, for such a suit involves neither "the validity of any patent," nor a sum of money exceeding \$5,000 in value (nor any money value whatever), within the meaning of section 8, Act Feb. 9, 1893.—*Durham v. Seymour*, 161 U. S. 235, 16 S. Ct. 452, 40 L. Ed. 682, distinguishing *Sparrow v. Strong*, 70 U. S. 97, 13 L. Ed. 49.

The Supreme Court of the United States has no jurisdiction to review the judgment of the court of appeals of the District of Columbia, in a controversy between a mother and a testamentary guardian involving the custody of infant children, since the matter in dispute cannot be reduced to any pecuniary standard of value, so as to determine whether the jurisdictional amount is involved.—*Perrine v. Slack*, 17 S. Ct. 79, 164 U. S. 452, 41 L. Ed. 510.

A controversy as to the continuance or dissolution of the status or relation of marriage cannot be reviewed by the Supreme Court of the United States on appeal from a territorial court, as the matter is not one the value of which can be estimated in money.—(1899) *Simms v. Simms*, 20 S. Ct. 58, 175 U. S. 162, 44 L. Ed. 115, modifying judgment 81 P. 1128, 5 *Ariz.* 212.

A decision requiring a county clerk to comply with an order of a territorial board of equalization increasing the assessed valuation of the property in the county does not involve any pecuniary rights of the clerk, where it does not appear that he is a property owner or taxpayer of the county, but bases his resistance to the order upon his duty as an officer; and therefore such decision is not within the jurisdiction of the United States supreme court on appeal from or writ of error to the supreme court of the territory.—*Caffrey v. Territory of Oklahoma*, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799, writ of error and appeal dismissed 20 S. Ct. 686, 177 U. S. 349, 44 L. Ed. 801.

The value of the matter in dispute in a proceeding to compel, by mandamus, the Secretary of State to seek to obtain \$500,000 damages from the German Empire in redress of petitioner's alleged wrongful imprisonment while on a visit to that country, is not such as will bring the cause within the appellate jurisdiction over judgments of the Court of Appeals of the District of Columbia conferred upon the federal Supreme Court by Code D. C. § 233, in cases in which the matter in dispute, exclusive of costs, exceeds \$5,000. Writ of error 20 App. D. C. 576, dismissed.—*United States ex rel. Holendorff v. Hay*, 24 S. Ct. 681, 194 U. S. 373, 48 L. Ed. 1025.

The liability to a fine on a judgment of ouster in quo warranto proceedings, or the possible effect of such judgment in subsequent litigation over the emoluments of the office, does not make the matter in dispute in the quo warranto proceedings after the term of office has expired measurable by some sum or value in money, and thus bring the judgment within the scope of the provisions of Act March 3, 1885, c. 355, 23 Stat. 443 [U. S. Comp. St. 1901, p. 572], for appeals from the territorial Supreme Court to the Supreme Court of the United States. Appeal (N. M.) 79 P. 719, dismissed.—*Albright v. Territory of New Mexico ex rel. Sandoval*, 26 S. Ct. 210, 200 U. S. 9, 50 L. Ed. 346.

The matter in dispute essential under Act Feb. 9, 1893, § 8, to sustain an appeal from the Court of Appeals of the District of Columbia to the Supreme Court, need not constitute

a technical debt of record.—*Thompson v. Thompson*, 33 S. Ct. 129, 226 U. S. 551, 57 L. Ed. 347, affirming decree 35 App. D. C. 14.

←46. Requisite amount or value.

See 2 Cent. Dig. App. & E. §§ 198-201.

Where, in an action of debt, under section 5198 of the Revised Statutes, brought in the circuit court of the United States for the Western district of Pennsylvania, against a national banking association established within that district, to recover twice the amount of interest, at the rate of 9 per cent., received by the defendant, upon the discount of certain promissory notes, a judgment was rendered for the plaintiffs in the sum of \$2,150.38, held, that this amount was insufficient to give jurisdiction to the supreme court of the United States.—*Williamsport Nat. Bank v. Knapp*, 119 U. S. 357, 7 S. Ct. 274, 30 L. Ed. 446.

Act Cong. March 3, 1885, c. 355, § 1, limiting the appellate jurisdiction of the supreme court from the supreme court of the District of Columbia, providing that "no appeal or writ of error shall hereafter be allowed" from any such judgment or decree, unless the matter in dispute, exclusive of costs, exceeds \$5,000, does not affect an appeal or writ of error theretofore allowed.—*Keller v. Ashford*, 133 U. S. 610, 10 S. Ct. 494, 33 L. Ed. 667.

Error assigned on the ground that the award of interest in the decree below was not in conformity with the previous mandate of the supreme court will not sustain an appeal, where the interest included is less than the jurisdictional amount.—*City Nat. Bank v. Hunter*, 152 U. S. 512, 14 S. Ct. 675, 38 L. Ed. 534.

An appeal lies to the Supreme Court of the United States from a decree of the District Court for the district of Porto Rico in a suit brought by a wife to obtain liquidation of the community, in which the matter in dispute exceeds the sum of \$5,000.—*Garrozi v. Dastas*, 27 S. Ct. 224, 204 U. S. 64, 51 L. Ed. 369.

The necessary jurisdictional amount to sustain a writ of error to the Court for Appeals of the District of Columbia to review decree denying probate of a will is not involved where the total amount of legacies to those interested is less than \$5,000.—*Morgan v. Adams*, 29 S. Ct. 213, 211 U. S. 627, 53 L. Ed. 362.

←47. Amount claimed.

See 2 Cent. Dig. App. & E. §§ 202-225.

The difference between the amount recovered and the amount sued for is the matter in dispute on plaintiff's appeal, and, if that is less than the jurisdictional amount, his appeal must be dismissed.—*Hilton v. Dickinson*, 108 U. S. 165, 2 S. Ct. 424, 27 L. Ed. 688.

Libellant in a suit in rem against a vessel, for damages growing out of a collision, claimed \$27,000 damages. After the attachment of the vessel in the district court, a stipulation in the sum of \$2,100, as her appraised value, was given. The libel having been dismissed by the circuit court, on appeal, the libellant appealed to the supreme court. Held, that the matter in dispute did not exceed the sum or value of \$5,000, exclusive of costs, as required by Act Cong. Feb. 10, 1875, § 3 (18 Stat. 316), and that the court had no jurisdiction of the appeal.—*Starin v. The Jesse Williamson, Jr.*, 108 U. S. 305, 2 S. Ct. 669, 27 L. Ed. 730.

Where the original petition demands a less sum than \$5,000, and afterwards an amended petition, demanding more than \$5,000, is filed, and the cause is brought to trial thereon, the sum demanded in the amended petition is the amount in controversy, and the supreme court of the United States has jurisdiction.—*Washer v. Bullitt County*, 110 U. S. 558, 4 S. Ct. 249, 28 L. Ed. 249.

Where a writ of error is sued out from the supreme court of the United States by the defendant below, and no question is presented growing out of a partial defense to the action or a counterclaim or a set-off, the value of the matter in dispute is fixed by the amount of the judgment.—*New York El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608, 7 S. Ct. 23, 30 L. Ed. 259.

On a libel for damages for a collision, a supplemental libel was filed for damages for the death of five persons who were drowned in the collision, \$5,000 being asked for each. To secure these claims, a stipulation for value in the sum of \$25,000 was made, by which the stipulators agreed that execution for \$25,000 might issue against their property, in case of default, etc., and which was conditioned to abide by and pay the money awarded by final decree. The supplemental libel was amended so that \$10,000 were asked for each life. *Held*, that \$10,000 at least were involved in each case, and that the supreme court had jurisdiction.—*The Alaska*, 130 U. S. 201, 9 S. Ct. 461, 32 L. Ed. 923.

On appeal from a decree setting aside a trustee's sale, removing the trustee, and denying him commissions, by the trustee and the purchaser, the value of the property determines the jurisdiction of the supreme court, as to both appellants, though there are funds in the registry of the trial court which can be paid over to reimburse the purchaser if the decree is affirmed. The right of the trustee to commissions does not constitute the whole matter in dispute as to him.—*Kenaday v. Edwards*, 134 U. S. 117, 10 S. Ct. 523, 33 L. Ed. 853.

Where the total value of libelants' property destroyed by a collision has been judicially ascertained to be \$6,057, the supreme court has no jurisdiction of their appeal from a decree of the circuit court awarding them only \$3,028.50, one-half of such valuation, as the sum in dispute—the difference between the total value and the award of the circuit court—is less than \$5,000. 31 Fed. 563 dismissed.—*Devere v. The Haverton*, 137 U. S. 145, 11 S. Ct. 35, 34 L. Ed. 603.

Where, in a suit in admiralty for injuries to a vessel, \$5,567 are awarded to libellant, the amount in controversy is still within the jurisdictional amount of the supreme court, though, on subsequent proceedings under the limited liability act, it appears that no more than \$4,658 can be collected.—*The Burlington v. Ford*, 137 U. S. 386, 11 S. Ct. 138, 34 L. Ed. 731.

Where a libel against two canal boats demands \$9,211.75, and one of them is sold for \$2,100, and the other is stipulated to be worth \$1,000, and the decree is that they be condemned for \$8,252.47, but no decree is entered against any person in personam for any sum, the amount involved is less than \$5,000, and an appeal to the supreme court will not lie. 27 Fed. 119 affirmed.—*The Sydney and The William Worden v. Providence Washington Ins. Co.*, 139 U. S. 331, 11 S. Ct. 620, 35 L. Ed. 177.

Where, in an action to recover a debt, defendant pleads usury, and plaintiff's recovery is reduced to that extent, on proceedings in error brought by plaintiff in the supreme court of the United States the amount in controversy between the parties for the purposes of the jurisdiction of that court is the difference between the amount of his actual recovery and the amount which he sought to recover.—*New England Mortg. Security Co. v. Gay*, 145 U. S. 123, 12 S. Ct. 815, 36 L. Ed. 646.

The amount in controversy is not affected by the fact that under the laws of Georgia, where the debt was contracted, usury avoids all titles to land given as security, where the action was solely on the money demand, and

the judgment does not affect the land, save in so far as it has effect as evidence.—*Id.*

The supreme court has no appellate jurisdiction of a suit to cancel a tax deed and certificate of tax sale, when complainant's title is admitted, and the only contest is as to the amount of money which he is equitably bound to pay to defendants, and when the difference between the sum which the court held him to pay and the highest sum claimed by defendants is less than \$5,000.—*Carne v. Russ*, 152 U. S. 250, 14 S. Ct. 578, 38 L. Ed. 428.

A bill against a debtor, his assignee, and a number of preferred creditors, set forth a judgment for \$1,000, a note for \$1,000, and an open account for \$1,846.50. A decree was entered awarding a recovery of the amount of the judgment, with costs, declaring the assignment void, and ordering an accounting of the property to be divided among the creditors, and that, on such accounting, complainants might prove the whole of their claim. *Held*, that on appeal by defendants the amount involved which must determine the appellate jurisdiction was the amount of the \$1,000 judgment only.—*Hollander v. Fechheimer*, 162 U. S. 326, 16 S. Ct. 795, 40 L. Ed. 985.

The amount in dispute in a suit for equitable relief because of fraud in a sale of real property exceeds the sum of \$5,000, which is essential, under Act Feb. 9, 1893, c. 74, 27 Stat. 434 [U. S. Comp. St. 1901, p. 573], to enable the Supreme Court of the United States to review a judgment of the Court of Appeals of the District of Columbia, although the bill prays for the conveyance of a strip of land of slight value, where, if such relief is denied, the complainant seeks, in the alternative, to have the contract rescinded and the payment decreed of the sum of \$6,000, the purchase money, with costs and interest. Judgment 20 App. D. C. 185, affirmed.—*Shapirio v. Goldberg*, 24 S. Ct. 259, 192 U. S. 232, 48 L. Ed. 419.

48. Value of property or right claimed.

See 2 Cent. Dig. App. & E. §§ 226-232.

In a suit upon a policy, which values the goods insured at a sum less than \$5,000, and limits the liability of the insurers to the amount of the valuation, the "matter in dispute" cannot exceed the stated value of the goods, no matter what may be their actual value; nor can the parties give jurisdiction to the supreme court of the United States by stipulating that judgment, if rendered for any sum, shall be for the real value of the goods, amounting to more than \$5,000.—*Webster v. Buffalo Ins. Co.*, 110 U. S. 386, 4 S. Ct. 79, 28 L. Ed. 172.

Where it appears on the record that the court below found, as a fact, that the premises in dispute exceed \$5,000 in value, affidavits on behalf of an intervenor showing that possibly the property may be worth less than that sum, will not overcome the finding of the court below.—*Zeigler v. Hopkins*, 117 U. S. 683, 6 S. Ct. 919, 29 L. Ed. 1019.

Where two witnesses swear that the property in controversy is worth over \$8,000, and six that it is worth \$5,000 or more, while eight on the other side testify that it is worth only from \$3,000 to \$3,500, and the certificate of the county clerk shows that it was valued for taxation in 1881 at only \$700, the evidence preponderates against jurisdiction, and the appeal will be dismissed.—*Wilson v. Blair*, 119 U. S. 387, 7 S. Ct. 230, 30 L. Ed. 441.

The grantor of lands re-entered for condition broken, the annuity charged thereon being \$1,300 in arrear, and sold the same to plaintiffs for less than that amount. The prior gran-

tee had judgment in ejectment against plaintiffs, and they sued to enjoin enforcement of the judgment, the only allegation of their bill as to the value of the land being that it was worth less than \$6,000. *Held*, that the showing as to the value of the property was not sufficient to support an appeal to the supreme court of the United States.—*Reynolds v. Burns*, 141 U. S. 117, 11 S. Ct. 942, 35 L. Ed. 648.

In a proceeding brought by the United States in a territorial court to abate a wire fence under the act of February 25, 1885 (23 Stat. 321), which forbids the inclosure of public lands by one having no "claim or color of title," etc., defendant justified under a Mexican grant; and the issue, therefore, was as to whether he had color of title. The court rendered judgment for the United States, which was affirmed by the territorial supreme court, and an appeal was taken. The only evidence as to the amount in dispute consisted of the affidavits of certain persons, and the finding of the chief justice that the property in controversy exceeded \$5,000, but these evidently referred to the value of the land inclosed. *Held*, that the jurisdiction was to be determined by the value of the color of title to the property, and, as there was no evidence of its value, the appeal must be dismissed.—*Cameron v. United States*, 146 U. S. 533, 13 S. Ct. 184, 36 L. Ed. 1077.

A judgment of the court of appeals of the District of Columbia refusing a mandamus to the commissioner of patents to register a trademark is not reviewable on the ground that the matter in dispute exceeds the sum of \$5,000 (Act Feb. 9, 1893, c. 74, § 8), where the value of the registration is not shown, as the right to the trademark is not in dispute.—*United States v. Seymour*, 153 U. S. 353, 14 S. Ct. 871, 38 L. Ed. 742.

The value of real estate in controversy held not shown to exceed \$25,000 so as to sustain a writ of error from the Supreme Court to the Supreme Court of the Philippine Islands.—*Hart v. Municipality of Victoria*, 33 S. Ct. 4, 226 U. S. 12, 57 L. Ed. 103.

◀49. Amount or value actually involved.

See 2 Cent. Dig. App. & E. §§ 233-260.

◀50. — In general.

See 2 Cent. Dig. App. & E. §§ 233-236, 239-253.

Rev. St. §§ 691, 692, limiting the jurisdiction of the supreme court to cases in which the matter in dispute exceeds \$5,000, have reference to the matter which is directly in dispute. Where a judgment for \$1,660.75 was rendered against a town on interest coupons detached from bonds which it claimed were issued under an unconstitutional statute, the fact that the bonds were for a larger sum than \$5,000 will not give the supreme court jurisdiction on writ of error.—*Town of Elgin v. Marshall*, 106 U. S. 578, 1 S. Ct. 484, 27 L. Ed. 249; *Town of Plainview v. Same*, 106 U. S. 583, 1 S. Ct. 489, 27 L. Ed. 250; *Bruce v. Manchester & K. R. Co.*, 117 U. S. 514, 6 S. Ct. 849, 29 L. Ed. 990.

Where a bill seeks reformation of a deed by which complainant is made to assume payment of a mortgage on the property, the amount in controversy is the amount of the incumbrance, and not of the deficiency which may remain after foreclosure.—*Elliott v. Sackett*, 108 U. S. 132, 2 S. Ct. 375, 27 L. Ed. 678.

Where judgment is given for an amount exceeding \$5,000, but a portion of this sum was admitted, so that less than \$5,000 is in dispute, an appeal to the supreme court of the United States will be dismissed.—*Jenness v. Citizens' Nat. Bank*, 110 U. S. 52, 3 S. Ct. 425, 28 L. Ed. 67; *Wabash, St. L. & P. Ry. Co. v. Knox*, 110 U. S. 304, 3 S. Ct. 638, 28 L. Ed. 155.

The value of the matter in litigation in a dispute over the assessment of the jury of condemnation is the difference between such assessment and the value of the entire property, nothing to the contrary effect appearing in the records; and, if such difference amounts to over \$5,000, the controversy may come within the law giving the supreme court appellate jurisdiction.—*East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 5 S. Ct. 168, 28 L. Ed. 746.

Under Act Cong. March 3, 1885, c. 366 (23 Stat. 443), an appeal will lie to the supreme court of the United States to review a judgment of the supreme court of the District of Columbia dismissing a petition for writ of prohibition to a court-martial convened to try a pay inspector in the navy for an offense punishable by dismissal and deprivation of salary exceeding \$5,000 during the residue of his term of office.—*Smith v. Whitney*, 116 U. S. 167, 6 S. Ct. 570, 29 L. Ed. 601.

Since, in a proceeding under Pol. Code Dak. c. 21, to contest the election for the selection of a county seat, it is impossible to determine the benefit the county may gain, or the damage it may suffer, from the result of the election contested, the matter in dispute does not exceed \$5,000, so as to permit its removal by appeal or error by the county from the supreme court of the territory to the supreme court of the United States, under the act of March 3, 1885, though the municipality to which it was voted to remove the county seat has conveyed to the county property of a value exceeding that amount, to be held by the county so long as it shall be used for court-house purposes, and to revert to the grantor when it shall cease to be so used.—*Smith v. Adams*, 130 U. S. 167, 9 S. Ct. 566, 32 L. Ed. 895.

As Rev. St. § 707, authorizes an appeal to the supreme court on behalf of the United States from all adverse judgments of the court of claims, where the United States appeals, and the amount of the adverse judgment is more than \$13,000, the claimant, who has also appealed, may show that certain items were improperly disallowed him, though they do not amount to more than \$3,000.—*United States v. Mosby*, 133 U. S. 273, 10 S. Ct. 327, 33 L. Ed. 625.

The petition alleged that plaintiffs were the owners of land (which was admitted on the trial to be worth \$10,000), that defendant T. was in possession of a part of it (which was worth \$2,000), and prayed for a recovery of the land in his possession. T. claiming to hold only as tenant of V., the latter was, by order of court, made defendant in his place; and answered, denying the allegations of the petition, and alleging ownership of the entire tract. Plaintiffs obtained judgment for the land in the possession of T. *Held*, that the amount involved did not exceed \$5,000, and the supreme court had no jurisdiction.—*Vicksburg, S. & P. R. Co. v. Smith*, 135 U. S. 195, 10 S. Ct. 728, 34 L. Ed. 95.

Where one of six legatees, entitled under the will to equal shares in the residuary estate, files a bill against her co-legatees to compel them to pay to the executor \$5,377.83 which they claim by gift inter vivos from the testatrix, the supreme court has no jurisdiction of an appeal by plaintiff, as her interest only amounts to one-sixth of the sum in controversy, or \$896.30½.—*Miller v. Clark*, 138 U. S. 223, 11 S. Ct. 300, 34 L. Ed. 966.

A de facto sheriff applied for a writ of mandamus to compel the county commissioners to issue warrants for the amount of his salary and disbursements. The writ was granted, and one claiming to be sheriff de jure appealed. The whole amount of relator's claim exceeded \$5,000.

000, but the amount claimed as salary alone was less than \$5,000. *Held* that, as appellant can only recover the salary, the amount involved is not within the jurisdiction of the supreme court of the United States.—*Gorman v. Havird*, 141 U. S. 206, 11 S. Ct. 943, 35 L. Ed. 717.

An appeal by complainant from a decree granting him an injunction on condition that he shall pay into court the costs of the suit, and \$1,000, for the benefit of defendant, cannot be entertained, as the amount involved is insufficient to give the supreme court jurisdiction.—*Johnson v. St. Louis, I. M. & S. Ry. Co.*, 141 U. S. 602, 12 S. Ct. 124, 35 L. Ed. 875.

An appeal to the supreme court from a decree under the act of February 25, 1885 (23 Stat. 321, c. 149), directing defendant to remove, within 30 days, a certain fence inclosing public lands, and, in default thereof, requiring the marshal to destroy the same, cannot be supported by showing that the fence is worth over \$5,000; for the fence is not the matter in dispute, nor does the decree deprive defendant thereof.—*Cameron v. United States*, 146 U. S. 533, 13 S. Ct. 184, 36 L. Ed. 1077, followed.—*Abadie v. United States*, 149 U. S. 261, 13 S. Ct. 836, 37 L. Ed. 726.

Where plaintiff is adjudged possession and ownership of the property, subject to payment of a money judgment in favor of defendant, and defendant acquiesces, but plaintiff objects to the money judgment, the amount of this judgment, and not the value of the whole property in controversy, determines plaintiff's right to a writ of error.—*Pittsburgh Locomotive & Car Works v. State Nat. Bank*, 154 U. S. 626, 14 S. Ct. 1180, 24 L. Ed. 270.

In partition, complainants claimed to be the owners each of one-eighth of the land, admitted to be worth only \$10,000. They alleged that the value of the annual income was \$5,000, and asked an account of the revenue as well as partition. Defendants appealed from a decree of the circuit court merely adjudging that plaintiffs are the owners each of one-eighth of the property, and referring the matter to a master to partition it according to law. *Held*, that the value of the matter in dispute did not exceed \$5,000, and the supreme court had no jurisdiction.—*Green v. Fisk*, 154 U. S. 668, 14 S. Ct. 1193, 26 L. Ed. 486.

Where a suit is brought by an individual taxpayer to enjoin a municipal corporation from issuing bonds, the jurisdictional amount is not the amount of the whole issue of bonds which is sought to be enjoined, but the amount of taxes which complainant would be compelled to pay for interest on the bonds, and to provide a sinking fund for the principal thereof. *El Paso Water Co. v. City of El Paso*, 152 U. S. 157, 14 S. Ct. 494, 38 L. Ed. 396, applied. *Brown v. Trousdale*, 138 U. S. 389, 11 S. Ct. 308, 34 L. Ed. 987, followed.—*Colvin v. City of Jacksonville*, 158 U. S. 456, 15 S. Ct. 866, 39 L. Ed. 1053.

Act March 3, 1891, § 6, granting appellate jurisdiction to the supreme court when the matter in controversy exceeds \$1,000, besides costs, does not authorize a review of a refusal to revise a discharge in bankruptcy merely because the claim of the petitioner for revision amounts to more than \$1,000, or because, if the discharge were refused, something might be made out of the bankrupt.—*Huntington v. Saunders*, 163 U. S. 319, 16 S. Ct. 1120, 41 L. Ed. 174.

The Supreme Court has no jurisdiction of a writ of error to the court of appeals of the District of Columbia in an action of forcible detainer, under the landlord and tenant act of the District, to recover possession under a trust deed giving plaintiff, as trustee, the right to take possession on default in payment of the debt secured thereby, though it is stipulated that the value of the real estate exceeds \$5,000;

there being nothing to show that the value of the possession reaches that amount, defendants being in possession under a lease for one year from the assignee of the debtor, at a rental of \$1,560 per annum.—*Willis v. Eastern Trust & Banking Co.*, 17 S. Ct. 739, 167 U. S. 76, 42 L. Ed. 83.

The value of land, and not simply the value of the right of present possession thereof, is the amount in controversy, for the purpose of an appeal to the supreme court of the United States from the supreme court of a territory, when the case involves a claim of right to land of which the naked legal title remains in the United States. Decree 52 P. 406, 6 Okl. 751, reversed.—*Black v. Jackson*, 20 S. Ct. 648, 177 U. S. 349, 44 L. Ed. 801.

The affirmance by a territorial Supreme Court of a judgment for plaintiff in an action of forcible entry and detainer, in which defendant set up an equitable title to the land, cannot be reviewed by the Supreme Court of the United States, where the value of the possession, which alone could be in contest in such an action, and which alone was determined by the judgment, was less than \$5,000. Writ of error 69 P. 499, 11 Okl. 474, dismissed.—*McClung v. Penny*, 23 S. Ct. 589, 189 U. S. 143, 47 L. Ed. 751.

51. — Effect of set-off or counterclaim.

See 2 Cent. Dig. App. & E. §§ 237, 267.

Where defendant files a counterclaim, the amount in dispute is the aggregate of what is claimed by both parties.—*Block v. Darling*, 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476.

The amount in dispute in a suit to recover damages for refusal of vendor to carry out a contract for sale of real property is sufficient to give the federal Supreme Court jurisdiction of a writ of error to the Court of Appeals of the District of Columbia to review a judgment in favor of plaintiff for \$1,250, where defendant, in his set-off, claims an unpaid balance of \$11,750 of the purchase price, and claims that the amount of the judgment against him is erroneous, and that a reversal will permit him to claim before the jury on another trial the full amount of his set-off, or, at least, the balance due for the purchase price. Judgment (1907) *Harten v. Löffler*, 29 App. D. C. 490, affirmed.—*Harten v. Löffler*, 29 S. Ct. 351, 212 U. S. 397, 53 L. Ed. 568.

The value of a mortgaged vessel and the profits from its use, demanded in a dismissed counterclaim in a suit to foreclose the mortgage, cannot be added to the amount of the mortgage debt in determining the value of the matter in controversy, for the purpose of an appeal to the federal Supreme Court from the Supreme Court of the Philippine Islands.—*Martinez v. International Banking Corporation*, 31 S. Ct. 408, 220 U. S. 214, 55 L. Ed. 438.

The amount in dispute on appeal from Supreme Court of Philippine Islands is less than amount prescribed by Act July 1, 1902, § 10, where judgment added to sum for which appellant could have recovered on its counterclaim is less than the jurisdictional amount.—*Export & Import Lumber Co. v. Port Banga Lumber Co.*, 35 S. Ct. 604, 237 U. S. 388, 59 L. Ed. 1009.

52. — Appeal as to part of subject-matter.

See 2 Cent. Dig. App. & E. § 238.

A motion to dismiss a cross appeal from a decree awarding against the defendants below less than \$5,000, which could not therefore be maintained by itself, will be overruled, where the appeal of the plaintiff below to which it is incident opened the whole controversy here so far as they were concerned, and that of de-

defendants must be allowed to have the same effect as to them, so that on both appeals the case was brought up as it stood for hearing in the court below, the claims of the respective parties involving the question of liability as to the whole amount.—*Walsh v. Mayer*, 111 U. S. 31, 4 S. Ct. 260, 28 L. Ed. 338.

Where the only errors assigned are in awarding interest and costs, if the interest included in the decree is less than the jurisdictional amount, there being no appeal from a decree for costs, the appeal must be dismissed.—*City Nat. Bank v. Hunter*, 152 U. S. 512, 14 S. Ct. 675, 38 L. Ed. 534.

That part of a judgment of a territorial district court in favor of plaintiff in an action to recover taxes, which was disallowed by the judgment of the territorial Supreme Court, reversing the judgment below except as to an item which was not contested, is the "matter in dispute," within the meaning of Act March 3, 1885, c. 355, 23 Stat. 443 [U. S. Comp. St. 1901, p. 572], providing for appeals to the Supreme Court of the United States from the territorial Supreme Courts.—*Territory of New Mexico v. Atchison, T. & S. F. Ry. Co.*, 26 S. Ct. 386, 201 U. S. 41, 50 L. Ed. 651.

—53. — Determination of amount.

See 2 Cent. Dig. App. & E. §§ 254-260.

When the amount in controversy cannot be ascertained, the appeal must be dismissed.—*Parker v. Morrill*, 106 U. S. 1, 1 S. Ct. 14, 27 L. Ed. 72.

When an appeal has been allowed after a contest as to the value of the matter in dispute, and there is evidence in the record sustaining the jurisdiction, the appeal will not be dismissed because, upon examination of all the affidavits, the court may be of opinion that the estimates acted on below were too high.—*Gage v. Pumpelly*, 108 U. S. 164, 2 S. Ct. 390, 27 L. Ed. 668.

The burden of proof of the amount in controversy, in order to establish the jurisdiction of the supreme court in a case brought before it by writ of error, is on the plaintiff in error.—*Johnson v. Wilkins*, 116 U. S. 392, 6 S. Ct. 600, 29 L. Ed. 671; *Wilson v. Blair*, 119 U. S. 387, 7 S. Ct. 230, 30 L. Ed. 441.

Under section 1 of the act of congress of March 3, 1885, c. 355 (23 Stat. 443), limiting appeals to the United States supreme court from the supreme courts of the territories to actions when the value of the matter in dispute exceeds \$5,000, an appeal from the territory of Utah, taken after that act went into effect, where nothing appears on the record proper to show the value of the matter in dispute, will be dismissed when, upon a consideration of the various affidavits of value filed, it appears that the value of the lands which are the subject of the action is less than \$5,000.—*Street v. Ferry*, 119 U. S. 385, 7 S. Ct. 231, 30 L. Ed. 439.

Where the value of the land in controversy was alleged by the principal defendant to be \$4,000, in his sworn answer, and the court found it to be \$5,000, defendants will not be allowed to present affidavits showing its value to be \$7,000, in order to give the United States supreme court jurisdiction of the appeal, under Act Cong. March 3, 1885, requiring the value to be over \$5,000 for that purpose.—*Talkington v. Dumbleton*, 123 U. S. 745, 8 S. Ct. 335, 31 L. Ed. 313.

Where it appears by the record that appellant held and owned a large amount of claims which were first liens on the property in the hands of a receiver, amounting to over \$38,000 in cash, and that appellant claimed that the greater part of this should be paid to him after the allowance of the expenses of the receiver-

ship, there is a showing that he claims an interest which may amount to more than \$5,000, if the expenses be sufficiently reduced.—*Stuart v. Boulware*, 133 U. S. 78, 10 S. Ct. 242, 33 L. Ed. 568.

The petition in trespass to try title alleged the value of the land in controversy to be \$4,400, and plaintiffs had judgment for an undivided half thereof, but there was no finding as to the value of the land. A writ of error was allowed on the ex parte affidavits of defendant that half of the land was worth more than \$5,000, and the trial court refused to set aside the same on plaintiffs' counter affidavits. Held, that affidavits of value would not be received in the supreme court.—*Red River Cattle Co. v. Needham*, 137 U. S. 632, 11 S. Ct. 208, 34 L. Ed. 799.

On appeal from a decree dismissing a bill to enjoin the collection of certain license taxes on street cars, a general allegation that complainant has refused to pay such license tax since 1876, and that the "amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of \$5,200," is insufficient to confer jurisdiction when the amount of the tax between 1876 and 1883 is not shown in any way, and the number of cars in use is given only for the years 1883 and 1884, during which the tax thereon, with the maximum penalties, would not approximate the jurisdictional sum of \$5,000.—*Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 13 S. Ct. 64, 36 L. Ed. 951.

Where a motion is made in the federal courts for leave to file a petition for a rehearing, and the allegations of the insufficiency of the amount involved to allow an appeal are conceded as true by the opposite party, the motion is properly granted, and such party cannot be allowed to show afterwards that the amount involved was sufficient to allow an appeal.—*Moelle v. Sherwood*, 148 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350.

In a suit to enjoin an association of railroads alleged to be illegal as restraining interstate commerce between competitive points, the fact that daily interstate shipments from the competitive points in question exceed \$1,000 in value, and that it is alleged in the answer that free competition would cause great losses and possible financial ruin to the railroad companies, sufficiently shows that there was in controversy the \$1,000 required to sustain an appeal from the circuit court of appeals to the supreme court.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

Jurisdiction to the supreme court of the United States on appeal from the court of appeals of the District of Columbia is not given by allegations of damages in excess of \$5,000 caused by levy on property worth not more than \$1,800, and compelling the payment thereby of a judgment amounting to less than \$100, although the pleading charges illegality and spite, where it alleges no acts of violence or insult which could justify exemplary damages.—*Magruder v. Armes*, 21 S. Ct. 454, 180 U. S. 496, 45 L. Ed. 638, dismissing writ of error 15 App. D. C. 379.

Owners of real property are not estopped by their tax returns under oath, valuing it at less than \$5,000, from asserting that such property has that value, to sustain the jurisdiction of the federal Supreme Court of a writ of error to review a judgment of the Hawaiian Supreme Court in ejectment.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

A writ of error to review a judgment of the Supreme Court of Hawaii in ejectment will

not be dismissed because the value of the land is less than \$5,000, where the contrary sufficiently appears by affidavits in the record and in the federal Supreme Court.—Id.

An affidavit that the value of the real property, the title to and possession of which is involved in a suit to set aside a conveyance, is in excess of the jurisdictional amount prescribed by Act July 1, 1902, c. 1369, § 10, 32 Stat. 695 (U. S. Comp. St. Supp. 1909, p. 226), governing appeals to the federal Supreme Court from the Supreme Court of the Philippine Islands, is inadequate to sustain such an appeal from a decree which, on the appeal of the defendants alone, reversed a decree of the trial court, upholding such conveyance as against objections of forgery and mental incapacity, and setting the same aside as to one-half of the property only, on the ground that it belonged to the estate of the grantor's deceased wife, as an acquet of the community.—*Enriquez v. Enriquez*, 32 S. Ct. 62, 222 U. S. 123, 56 L. Ed. 122.

Statements in the complaint and amended complaint in a suit to set aside a conveyance of real property, from which might be inferred the existence of the jurisdictional amount requisite, under Act July 1, 1902, c. 1369, § 10, 32 Stat. 695 (U. S. Comp. St. Supp. 1909, p. 226), to sustain an appeal from the Supreme Court of the Philippine Islands to the federal Supreme Court, are insufficient as against a motion to dismiss, where the record otherwise shows that such amount is not involved.—Id.

The value of the real property involved in a suit to set aside conveyances thereof as fraudulent simulations cannot be said to be shown by a preponderance of evidence to be in excess of the jurisdictional amount prescribed for appeals from the Supreme Court of the Philippine Islands to the federal Supreme Court by an affidavit to that effect, where there is an opposing affidavit, and the record shows that the requisite value does not exist.—*Enriquez v. Enriquez*, 32 S. Ct. 64, 222 U. S. 127, 56 L. Ed. 124.

Requisite jurisdictional amount held involved so as to sustain an appeal from the Philippine Supreme Court to review decree rejecting wife's demand for divorce, where affidavit for appeal asserts that the value of the property in controversy exceeds the jurisdictional amount.—*De Villanueva v. Villanueva*, 36 S. Ct. 109, 239 U. S. 293, 60 L. Ed. 293.

—54. Interest accrued.

See 2 Cent. Dig. App. & E. §§ 261-265.

On May 4, 1883, the balance due on a mortgage was \$24,000, but, before suit to foreclose, was reduced by sundry payments to \$4,000, exclusive of interest. Held that, in determining the jurisdictional amount on appeal, interest should not merely be computed on the \$4,000 from May 4, 1883, but on the \$24,000 from that date, calculating on the principle of partial payments.—*Woodward v. Jewell*, 140 U. S. 247, 11 S. Ct. 784, 35 L. Ed. 478, reversing decree (C. C.) 25 F. 689.

An appeal to the United States supreme court will not be dismissed, on the ground that the amount involved is not sufficient to give that court jurisdiction, where the amount in controversy, with interest properly allowable thereon at the time the decision was rendered, exceeded \$5,000.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

—55. Amount or value of recovery.

See 2 Cent. Dig. App. & E. §§ 266-275.

—56. — In general.

See 2 Cent. Dig. App. & E. § 266.

In a case appealed to the supreme court under the act of February 25, 1889 (25 Stat.

693), on the ground that the jurisdiction of the circuit court was in issue, the supreme court cannot review any question raised on the record, except that of jurisdiction, unless the judgment or decree exceeds \$5,000.—*Mississippi Mills v. Cohn*, 150 U. S. 202, 14 S. Ct. 75, 37 L. Ed. 1092, reversing decree (C. C.) 30 F. 865.

—57. — Effect of counterclaim.

See 2 Cent. Dig. App. & E. § 267.

Plaintiff sued defendant for \$8,000. Defendant pleaded the general denial, and set up two counterclaims, one of which was admitted, and the other, for \$1,833.42, for certain expenses, which it was alleged defendant was liable to pay, was denied. Judgment was rendered for plaintiff for \$3,333.92. Defendant's bill of exceptions stated that the evidence tended to show that the amount of expenses, for which plaintiff was liable, was \$61.10. Held, that the amount in dispute on the writ of error was the sum for which judgment was given (\$3,333.92), and the amount specified in the bill of exceptions (\$61.10); and, as these sums did not aggregate \$5,000, the supreme court of the United States had no jurisdiction.—*Bradstreet Co. v. Higgins*, 112 U. S. 227, 5 S. Ct. 117, 28 L. Ed. 715.

Where a cross bill is dismissed, and judgment for less than \$5,000 rendered against defendant, the amount claimed by the cross bill (where its averments are responsive to the allegations of the bill, and the claim therein set up is connected with the transaction which complainant alleged as the gravamen of his complaint) will be added to the amount of the judgment in determining the jurisdiction of the supreme court of the United States.—*Lovell v. Crugin*, 136 U. S. 130, 10 S. Ct. 1024, 34 L. Ed. 372.

Where, in an action for damages for breach of contract, defendant counterclaims in the sum of \$6,000 for an alleged breach by plaintiff, and plaintiff recovers judgment for \$2,485, the supreme court has jurisdiction of an appeal by defendant, although the record discloses no evidence sustaining his counterclaim.—*Sire v. Ellithorpe Air-Brake Co.*, 137 U. S. 579, 11 S. Ct. 195, 34 L. Ed. 801, affirming judgment (C. C.) *Ellithorpe Air-Brake Co. v. Sire*, 41 F. 662.

When, in an action at law, plaintiff recovers judgment, but it appears that, if defendant's theory of the transaction giving rise to the claim had been sustained by the jury, he would have been entitled to recover the amount of a counterclaim made by him, the amount in controversy on appeal is to be ascertained by adding to the judgment the amount of the counterclaim.—*Clark v. Sidway*, 142 U. S. 682, 12 S. Ct. 327, 35 L. Ed. 1157.

The amount of a verdict for plaintiff, and also the amount of a rejected counterclaim, are in dispute on a writ of error sued out by defendants.—*Buckstaff v. Russell & Co.*, 151 U. S. 626, 14 S. Ct. 448, 38 L. Ed. 292.

—58. — Interest on recovery.

See 2 Cent. Dig. App. & E. §§ 268, 269.

Under Act Cong. Feb. 16, 1875, c. 77, § 3 (18 Stat. 316), the supreme court has jurisdiction of an action for personal injuries, where the judgment (including interest and exclusive of costs) below is in excess of \$5,000, though the verdict may have been for less than that sum.—*Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 S. Ct. 397, 33 L. Ed. 656.

Rev. St. § 966, which allows interest on judgments recovered in the federal courts at the rate allowed by law on judgments recovered in the state courts, does not exclude the idea of a power in the several states to allow interest on verdicts; and since Act 1859 provides for the entry of judgment for the amount of the verdict, with interest thereon from the day of its rendition, the supreme court of the United

States has jurisdiction of an appeal from the circuit court of Pennsylvania where the amount of the verdict and the interest thereon to the time of the entry of the judgment exceeds \$5,000.—*Massachusetts Ben. Ass'n v. Miles*, 137 U. S. 689, 11 S. Ct. 234, 34 L. Ed. 834.

On a verdict for plaintiff for \$5,000, a judgment for that amount was entered, but, on defendant's motion *ex parte*, was amended to include interest on the verdict. *Held*, that this addition of an amount not claimed by plaintiff did not make the matter in dispute exceed \$5,000, so as to bring the case within the jurisdiction of the supreme court.—*Northern Pac. R. Co. v. Booth*, 152 U. S. 671, 14 S. Ct. 693, 38 L. Ed. 591.

◀60. — Collateral effect of judgment.

See 2 Cent. Dig. App. & E. § 375.

In an action of trespass *quare clausum fregit* and *de bonis asportatis*, where neither party set up title, and the only issue was the liability of the defendant for the value of certain ore taken from the land, and judgment was rendered for \$4,072.25, the value in dispute is less than \$5,000, though the decision may collaterally affect the title of land of much greater value, and the supreme court will not take jurisdiction.—*New Jersey Zinc Co. v. Trotter*, 108 U. S. 564, 2 S. Ct. 875, 27 L. Ed. 828.

Where an appeal is taken from a decree which, besides dealing with a matter in controversy of less than \$5,000, contains a provision that an earlier decree "entered herein shall stand ratified and confirmed," except in the respects modified, and such earlier decree involves an amount largely in excess of \$5,000, an appeal from the later decree will not be dismissed for want of jurisdiction.—*Richardson v. Green*, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

In determining the right to appeal to the supreme court from a decretal order made on application of a receiver for final settlement, allowing certain sums to the receiver and his counsel as compensation for their services, these sums will be considered as items of the receiver's account, as the allowance of counsel fees is to the receiver, and not directly to the counsel.—*Stuart v. Boulware*, 133 U. S. 78, 10 S. Ct. 242, 33 L. Ed. 588.

The supreme court has no jurisdiction to review a judgment against a city for hydrant rentals due under an existing contract, and amounting, with interest, to less than \$5,000, although such judgment involved a determination as to the validity of the contract, since rentals yet to accrue under the contract cannot avail to make up the jurisdictional amount.—*City of Clay Center v. Farmers' Loan & Trust Co.*, 145 U. S. 224, 12 S. Ct. 817, 36 L. Ed. 685.

On a petition to the supreme court of the District of Columbia for a writ of mandamus to compel the postmaster general to readjust a postmaster's salary, the jurisdictional amount must be determined by the amount in controversy in the particular proceeding, and not by the collateral effect of the decision upon claims by other postmasters. *New England Mortg. Sec. Co. v. Gay*, 145 U. S. 123, 12 S. Ct. 815, 36 L. Ed. 646, and *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 13 S. Ct. 64, 36 L. Ed. 951, followed.—*United States v. Wanamaker*, 147 U. S. 149, 13 S. Ct. 279, 37 L. Ed. 118.

◀61. Aggregated claims, interests, or judgments.

See 2 Cent. Dig. App. & E. §§ 276-292.

When, in admiralty, distinct causes of action, in favor of distinct parties, growing out of the same transaction, are united in one suit,

distinct decrees in favor of or against distinct parties cannot be joined, to make an aggregate of more than \$5,000, and give jurisdiction to the supreme court.—*Ex parte Baltimore & O. R. Co.*, 106 U. S. 5, 1 S. Ct. 35, 27 L. Ed. 78.

Distinct decrees in favor of or against distinct parties cannot be joined, so as to make up a sum sufficient to give the supreme court jurisdiction on appeal.—*Adams v. Crittenden*, 106 U. S. 576, 1 S. Ct. 92, 27 L. Ed. 99; *Tupper v. Wise*, 110 U. S. 398, 4 S. Ct. 26, 28 L. Ed. 189; *Lynch v. Bailey*, 110 U. S. 400, 4 S. Ct. 27, 28 L. Ed. 190; *Ex parte Phoenix Ins. Co.*, 117 U. S. 367, 6 S. Ct. 772, 29 L. Ed. 923.

In the foreclosure of a railroad mortgage, the claims of the interveners are distinct controversies, and decrees in their favor cannot be combined to an amount aggregating more than \$5,000, so as to give jurisdiction to the supreme court on appeal.—*Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265, 1 S. Ct. 131, 27 L. Ed. 115; *Hassall v. Wilcox*, 115 U. S. 598, 6 S. Ct. 189, 29 L. Ed. 504.

Judgment creditors, whose several demands, each less than \$5,000, aggregated more than that sum, successfully attacked as a fraudulent conveyance a judgment confessed by the insolvent debtor to a codefendant. *Held*, that an appeal will not lie to the supreme court.—*Schwed v. Smith*, 106 U. S. 188, 1 S. Ct. 221, 27 L. Ed. 158.

Though, where distinct causes of action in favor of distinct parties are united for convenience in one suit, distinct judgments, each less than \$5,000, cannot be joined so as to give the supreme court of the United States jurisdiction, yet where one of the parties has two judgments, and the aggregate amount due thereon exceeds \$5,000, the court will take jurisdiction as to the rights of that party.—*Hawley v. United States*, 108 U. S. 543, 2 S. Ct. 846, 27 L. Ed. 820.

From a decree of the circuit court, awarding a fund of \$6,000 to one claiming under a distinct title, the trustee in a deed of trust to secure debts to various other persons, exceeding that amount in all, but of less than \$5,000 each, may appeal to the supreme court of the United States.—*Freeman v. Dawson*, 110 U. S. 264, 4 S. Ct. 64, 28 L. Ed. 141.

In ejectment against several defendants for distinct parcels of land, the complaint alleged a joint entry and ouster, and the answer did not set up separate claims to distinct parcels of the land by the several defendants. Judgment was for the recovery of the possession against all of the defendants jointly. *Held* that, as the value of the lands was more than \$5,000, the amount in dispute was sufficient to give the supreme court jurisdiction.—*Friend v. Wise*, 111 U. S. 797, 4 S. Ct. 695, 28 L. Ed. 602.

One of the expectant beneficiaries of a proposed tax has a right to a writ of error to the supreme court to enforce the collection of the tax, although the sum to which he would be entitled out of the whole amount collected should not reach \$5,000. The value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided when collected.—*Davies v. Corbin*, 112 U. S. 36, 5 S. Ct. 4, 28 L. Ed. 627.

Where separate creditors unite in a suit in equity to recover their pro rata share of property of the common debtor in the hands of defendant, and each creditor obtains a separate decree for such pro rata share, the jurisdiction of the supreme court, on appeal by defendant, is to be determined, as to each creditor, by the amount in dispute in his case.—*Fourth Nat. Bank of St. Louis v. Stout*, 113 U. S. 684, 5 S. Ct. 695, 28 L. Ed. 1152.

The decree of a court being several as to the different parties, so that one or more are affected to an amount less than \$5,000, an appeal to the supreme court will not lie as to such parties.—*Stewart v. Dunham*, 115 U. S. 61, 5 S. Ct. 1163, 29 L. Ed. 329.

Though heirs who have not made an inventory are liable, under Code La. art. 1425, for all the debts of decedent, irrespective of whether they are greater or less in amount than the estate coming to their hands, yet that liability is not joint (Id. art. 1427) where there are two or more heirs, but each is chargeable only in proportion to his share in the estate. Consequently, in a suit by a creditor, where the judgment rendered against each defendant is less than \$5,000, though the total claim may exceed that amount, the liability of each is several, and the supreme court has no jurisdiction in error.—*Henderson v. Wadsworth*, 115 U. S. 264, 6 S. Ct. 40, 29 L. Ed. 377.

A suit to foreclose a railroad mortgage given to secure bonds greatly in excess of \$5,000, brought by plaintiffs on behalf of themselves and all others who may join them, does not involve more than that amount, if the overdue bonds and coupons held by plaintiffs are less, and the other bondholders do not see fit to join them.—*Bruce v. Manchester & K. R. Co.*, 117 U. S. 514, 6 S. Ct. 849, 29 L. Ed. 990.

Where actions have been conjoined, the sum in dispute in each action must exceed \$5,000, to give the supreme court jurisdiction to review, and it is not sufficient that the aggregate amount involved in all exceeds that sum.—*Wells v. Wilkins*, 118 U. S. 230, 6 S. Ct. 1049, 30 L. Ed. 210.

A. having attached property of his debtor on a claim for \$3,000, after the debtor had made an assignment with preferences, a creditor who was preferred by the assignment to the extent of \$10,000 brought suit against A., other creditors, and the assignee, to have the assignment declared valid, and to obtain payment of his \$10,000 thereunder. Pending the suit, a receiver was appointed, who sold the property, and realized \$5,300 from it. The court dismissed the bill, on the ground that the assignment was in fraud of creditors. *Held*, on appeal to the United States supreme court, that the amount in dispute exceeded \$5,000, so as to give that court jurisdiction.—*Estes v. Gunter*, 121 U. S. 183, 7 S. Ct. 854, 30 L. Ed. 884.

J. made a deed of assignment of a large amount of property to W., in trust to sell it and apply the proceeds to the payment of his debts, first to G. for more than \$20,000, next to other persons named, and lastly to his other creditors generally. S. & Co. filed a bill in equity in the United States circuit court against J., W., and G., to set aside the assignment as a fraud on creditors. M. filed a similar bill. Defendants answered severally, denying the allegations of the bill, and praying that it be dismissed, with costs. By consent the two bills and petitions of intervening creditors were heard together as one cause, and, on pleadings and proof, a receiver was appointed, the assignment declared void, and the case referred to the master, upon whose report a final decree was entered distributing the fund, paying \$6,756.22 to M., \$3,943.21 to S. & Co., and a less sum to each of the petitioning creditors. From this decree G. and W. appealed to the United States supreme court. *Held*, that, the suit being by the general creditors, only one of whose debts exceeded \$5,000, and the sole matter in dispute being between the defendants and each plaintiff as to the amount which the latter should recover, the court had no jurisdiction except as to the appeal of the creditor whose debt exceeds \$5,000, and that as to the others the appeal should be dismissed.—*Gibson v. Shufeldt*, 122 U. S. 27, 7 S. Ct. 1066, 30 L. Ed. 1083.

From a judgment of a district court of the United States determining the priority in the

application of the proceeds of a sale under a mortgage given by a railroad company to the payment of bonds thereby secured, persons holding less than \$5,000 in such bonds have no right of appeal to the supreme court of the United States.—*McMurray v. Moran*, 134 U. S. 150, 10 S. Ct. 427, 33 L. Ed. 814.

Plaintiffs, deriving title from one who purchased on foreclosure of a mortgage executed by a county to secure its bonds, filed their bill against defendants, who had purchased from the county part of the land covered by the mortgage before foreclosure, praying that defendants be compelled each to redeem the land so held by them within a given time. After a hearing on pleadings and proofs, it was decreed that each defendant, "acting for himself," should, within a year, redeem the tract held by him by paying into court the amount bid upon such tract at the foreclosure sale, or else be barred of his equities of redemption; whereupon certain of the defendants took a joint appeal. *Held*, that the right of each defendant to appeal from the decree, which was not a joint decree, was separate and distinct, and, since there was no one of them against whom the amount adjudged was \$5,000, the appeal must be dismissed.—*Wheeler v. Cloyd*, 134 U. S. 537, 10 S. Ct. 601, 33 L. Ed. 1008.

Where, in a creditors' bill by several creditors, the fund recovered and to be distributed exceeds \$5,000, the appellate jurisdiction of the United States supreme court is not affected by the fact that the amounts decreed to some of the creditors are less than \$5,000, and it has authority to hear the whole appeal.—*Handley v. Stutz*, 137 U. S. 366, 11 S. Ct. 117, 34 L. Ed. 706.

Where the decree in an admiralty cause awarded to libellant \$5,567, to be apportioned as follows, viz.: \$2,544, as owner of a vessel lost; and \$3,023, as trustee for the owners of the cargo,—the amount in controversy is the entire sum awarded, and the matter cannot be considered as though two separate suits had been brought, in each of which the amount in controversy was less than \$5,000, for the purposes of an appeal to the supreme court of the United States.—*The Burlington v. Ford*, 137 U. S. 386, 11 S. Ct. 138, 34 L. Ed. 731.

Where a surviving partner is decreed to account to the heirs of the deceased partner for the rental value of the partnership property, and the widow of such deceased partner, who has received her dower out of such property, is decreed to account to the surviving partner for money recovered by her as rents and profits in dower, and the amount found due from such widow is less than \$5,000, she has no right of appeal to the supreme court of the United States from such decree, since her interest in the controversy is distinct from that of the heirs.—*Clay v. Field*, 138 U. S. 464, 11 S. Ct. 419, 34 L. Ed. 1044.

The jurisdiction of the supreme court of the United States of an appeal from a decree refusing to allow a claim for more than \$5,000, against an administrator, all of which was disputed, cannot be questioned on the ground that it does not appear that the estate, when distributed, will yield for plaintiff's claim as much as \$5,000. 31 Fed. 670 affirmed.—*Clark v. Bever*, 139 U. S. 96, 11 S. Ct. 468, 35 L. Ed. 88.

A corporation held several leases on the coal under tracts of land owned by different lessors. In a suit for the appointment of a receiver all the lessors intervened in one petition to have the leases canceled. *Held*, that the amount of the interest of each lessor is the limit of the jurisdiction of the supreme court.—*Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 S. Ct. 691, 35 L. Ed. 332.

Where several plaintiffs claim under the same title, and the determination of the cause

necessarily involves the validity of that title, the supreme court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed \$5,000.—*New Orleans Pac. Ry. Co. v. Parker*, 143 U. S. 42, 12 S. Ct. 364, 36 L. Ed. 66, affirming decree (C. C.) *Parker v. New Orleans, B. R. & V. R. Co.*, 33 F. 693.

An appeal from a decree of the supreme court of Utah affirming a decree of a probate court denying a petition filed in administration proceedings, by the children of a plural wife, asking to be recognized as lawful distributees, and to have distribution on the same footing as the children of the first wife, must be dismissed when it appears that the share to which each petitioner would be entitled, if so recognized, would not reach the sum necessary to give jurisdiction; for the claims of distributees are several, and not joint.—*Chapman v. Handley*, 151 U. S. 443, 14 S. Ct. 386, 38 L. Ed. 227.

The several judgments held by different complainants, who join in a creditors' bill, cannot be added together to make the amount necessary to give appellate jurisdiction.—*Hunt v. Bender*, 154 U. S. 566, 14 S. Ct. 1163, 18 L. Ed. 915.

When each party claims the whole fund in court, but the court divides it, and only one appeals, the amount in controversy is not the whole fund, but only the part adjudged to appellee.—*Keogh v. Orient Fire Ins. Co.*, 154 U. S. 639, 14 S. Ct. 1181, 24 L. Ed. 650.

In a suit to set aside, as in fraud of creditors, several mortgages to different persons, each mortgage being subject to a separate suit, and the validity of each depending on its own consideration, and the decree in favor of each mortgagee being several and distinct, the jurisdiction of the supreme court on appeal will depend on the amount involved in each mortgage.—*Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289.

Tex. St. §§ 2899-2909, providing, in certain cases, for an action for injuries causing death, which shall be for the exclusive benefit of the surviving husband, wife, children, and parents, and authorizing the action to be brought by all the parties entitled, or by any one or more of them for the benefit of all, and requiring the jury to divide the amount recovered among the persons entitled to the benefit of the action, create but a single liability on defendant's part, and contemplate but one action, and the question whether the "matter in controversy" exceeds \$1,000, so as to confer appellate jurisdiction on the supreme court, under Act March 3, 1891, c. 517, § 6, is determined by the total amount recovered, and not by that allowed to any one of the beneficiaries of the action.—*Texas & P. Ry. Co. v. Gentry*, 163 U. S. 353, 16 S. Ct. 1104, 41 L. Ed. 186.

An appeal from the judgment of the supreme court of a territory in a suit involving the liability of three stockholders for a separate subscription of \$5,000 each to the capital stock will be dismissed as not involving the jurisdictional amount; the claims in such a case being several, and not joint.—*Wilson v. Kiesel*, 17 S. Ct. 124, 164 U. S. 248, 41 L. Ed. 422.

That certain subscribers to the stock of a corporation, in a suit against them to recover the amounts individually subscribed, claim to have paid for the stock by a conveyance of joint property, does not create a question of joint liability, by reason of which the sum of the subscriptions may be considered to give jurisdiction on appeal.—*Id.*

The amount of the estate which passes by a will, if that is held valid, constitutes the matter in dispute on a contest of the will, without regard to the amount of the interest of any one of the contestants, within the meaning of the act of congress of February 9, 1893 (27 Stat.

436), requiring the matter in dispute on appeal from a judgment of the court of appeals of the District of Columbia to exceed the sum of \$5,000. Judgment 13 App. D. C. 392, affirmed.—*Overby v. Gordon*, 20 S. Ct. 603, 177 U. S. 214, 44 L. Ed. 741.

The separate and distinct claims of attachment creditors cannot be united for the purpose of making the jurisdictional amount on appeal from a judgment denying an injunction to prevent the enforcement of their claims against real estate, where they do not jointly assert their claims, or claim under a common right.—*Chamberlin v. Browning*, 20 S. Ct. 820, 177 U. S. 605, 44 L. Ed. 906, dismissing appeal *Chamberlain v. Browning*, 14 App. D. C. 389.

An appellant cannot unite the separate interests of appellees, to make up the jurisdictional amount, for the purpose of an appeal, if the appellees could not have done so in case of recovery against them.—*Id.*

The judgment in a suit to recover realty in which plaintiff, though claiming under a single title all land occupied separately by various defendants, does not allege joint ownership or joint possession or joint action of any kind, controversy with each defendant relating to a separate and distinct parcel, does not show an amount in dispute sufficient to sustain writ of error from the federal Supreme Court, where such judgment, while apparently rendered jointly, so far as damages are concerned, against all defendants, runs separately against each for recovery of possession of that part of the land of which he was alleged and found to be in possession, and the whole amount of damages added to value of land in controversy with any of defendants does not equal the jurisdictional amount.—*Tupifo v. La Compania General De Tabacos De Filipinas*, 29 S. Ct. 610, 214 U. S. 268, 53 L. Ed. 992.

The contingent liability of owners of property assessed for benefits accruing from a street extension, incurred by reason of their disposal of other property pending the condemnation proceedings, under an undertaking to remove the lien of any assessment for benefits which might be made therein, does not enter into the amount in dispute on a writ of error from the federal Supreme Court to review a judgment of the Court of Appeals of the District of Columbia, confirming the assessment as to the property owned by them.—*Wallach v. Rudolph*, 30 S. Ct. 587, 217 U. S. 561, 54 L. Ed. 883.

Two suits separately commenced, but tried together for convenience, will not be treated as consolidated, for the purpose of increasing the amount in dispute so as to sustain an appeal to the federal Supreme Court from the Supreme Court of the Philippine Islands, where the understanding of court and counsel below was that there was in fact no consolidation.—*Martinez v. International Banking Corporation*, 31 S. Ct. 408, 220 U. S. 214, 55 L. Ed. 438.

Payments in the future to accrue under a decree in favor of the wife in a suit for maintenance may be added to installments already accrued to determine the amount necessary under Act Feb. 9, 1893, § 8, to sustain the appellate jurisdiction of the Supreme Court over the Court of Appeals of the District of Columbia, though, under Code D. C. §§ 976-980, such future payments may be increased or diminished or cut off.—*Thompson v. Thompson*, 33 S. Ct. 129, 226 U. S. 551, 57 L. Ed. 347, affirming decree 35 App. D. C. 14.

62. Reduction by amendment or remission.

See 2 Cent. Dig. App. & E. §§ 233-300.

Where the verdict was less than \$5,000, the fact that the suit was originally brought on cou-

pons amounting to more than \$5,000, but before trial the complaint was amended by leave of court, and a dismissal entered as to a portion of them, will not give jurisdiction to the supreme court.—*City of Opelika v. Daniel*, 109 U. S. 108, 3 S. Ct. 70, 27 L. Ed. 873.

Under Rev. St. Tex. 1879, arts. 1351, 1352, authorizing a remittitur by plaintiff in open court of a portion of a verdict in his favor, it is within the discretion of a federal court sitting in that state to allow a remission reducing a verdict to \$5,000, and to enter judgment accordingly; and, from a judgment so entered, no appeal will lie.—*Alabama Gold Life Ins. Co. v. Nichols*, 109 U. S. 232, 3 S. Ct. 120, 27 L. Ed. 915; *Pacific Postal Tel. Cable Co. v. O'Connor*, 128 U. S. 394, 9 S. Ct. 112, 32 L. Ed. 488.

Where a plaintiff, who has recovered a judgment for more than \$5,000, enters a remittitur in open court, reducing the amount to \$5,000 and costs, a writ of error to the supreme court of the United States will not lie.—*First Nat. Bank v. Redick*, 110 U. S. 224, 3 S. Ct. 640, 28 L. Ed. 124; *Northwestern Mut. Life Ins. Co. v. Martin*, 154 U. S. 640, 14 S. Ct. 1181, 24 L. Ed. 542.

When the jurisdiction of the supreme court of the United States on appeal has once attached, it cannot be defeated by a waiver or release of the amount of the judgment below in excess of \$5,000.—*New York El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608, 7 S. Ct. 23, 30 L. Ed. 259.

In an action for personal injuries the court directed judgment to be entered on the verdict for \$5,500. Plaintiff's motion in open court, for leave to remit the \$500, was granted, and judgment was entered for \$5,000 and costs, in the absence of the defendant, and a motion to set aside the remittitur was denied. *Held*, that the judgment, as it stands, being only for \$5,000, the motion to dismiss the writ of error will be granted.—*Pacific Postal Tel. Cable Co. v. O'Connor*, 128 U. S. 394, 9 S. Ct. 112, 32 L. Ed. 488.

The amount in dispute in a case where defendant files a counterclaim being the aggregate of what is claimed by both sides, and that being within the jurisdiction of the supreme court, on the disallowance of defendant's counterclaim plaintiff cannot defeat defendant's right to a writ of error by remitting enough of his judgment to bring it below the jurisdictional amount of the supreme court.—*Block v. Darling*, 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476.

A verdict was rendered for \$11,000, and plaintiff filed a remittitur of \$6,001, and prayed judgment for \$4,999. The bill of exceptions, the order allowing the writ of error, and the bond and citation, stated that the judgment was for the latter sum. The judgment, however, was in form for \$11,000, but recited that plaintiff had filed a remittitur of \$6,001, and ordered that execution should issue for \$4,999 only. *Held*, that defendant could not be allowed to insist that the judgment was for more than \$4,999, for the purpose of sustaining the writ of error in the supreme court.—*Texas & P. Ry. Co. v. Horn*, 151 U. S. 110, 14 S. Ct. 259, 38 L. Ed. 91; *Same v. Griffin*, 151 U. S. 105, 14 S. Ct. 259, 38 L. Ed. 90.

The absence of the clerk's signature and the seal of his office from a blank attestation of a release of part of a judgment, which is otherwise duly executed according to the requirements of the Arizona Revised Statutes, authorizing it to be filed in the Supreme Court, will not prevent the release from being valid and effective.—*Simms v. Simms*, 20 S. Ct. 58, 175 U. S. 162, 44 L. Ed. 115, modifying judgment 81 P. 1128, 5 Ariz. 212.

63. Reduction by payment or other satisfaction.

See 2 Cent. Dig. App. & E. §§ 301-305.

An action was originally brought for 135 head of steers, of the value of \$6,000; but before judgment a settlement as to a part of them was had, and the remainder were sold for less than \$5,000. *Held*, that the supreme court of the United States had no jurisdiction to hear the cause.—*Cox v. Western Land & Cattle Co.*, 123 U. S. 375, 8 S. Ct. 162, 31 L. Ed. 178.

A voluntary settlement by a judgment debtor with one of the plaintiffs, and payment to him, which leaves the amount unpaid on the judgment less than that which is necessary to give jurisdiction to review it, is fatal to the right of review, since the real matter in dispute in such case is the balance still remaining due on the judgment.—*Thorp v. Bonfield*, 20 S. Ct. 532, 177 U. S. 15, 44 L. Ed. 652.

64. Cases in intermediate courts.

See 2 Cent. Dig. App. & E. §§ 306, 307, 310-314.

A judgment was rendered in the district court of Arizona for \$4,000 and interest. When affirmed by the supreme court of the territory the judgment and interest amounted to over \$5,000. *Held*, that, in determining the jurisdiction of the United States supreme court on appeal, the value of the matter in dispute is to be determined by the amount due at the time of the judgment of the supreme court of the territory, from which the appeal to this court was taken.—*Zeckendorf v. Johnson*, 123 U. S. 617, 8 S. Ct. 261, 31 L. Ed. 277.

Under Act Cong. March 3, 1885 (23 Stat. 443), providing that no appeal or writ of error will lie from a judgment in the supreme court of the District of Columbia unless the matter in dispute, exclusive of costs, exceeds \$5,000, etc., appeal or error will not lie where the judgment is for \$5,000 and costs, but not with interest.—*District of Columbia v. Gannon*, 130 U. S. 227, 9 S. Ct. 508, 32 L. Ed. 922; *Same v. Emerson*, 130 U. S. 229, 9 S. Ct. 509, 32 L. Ed. 923.

A writ of error sued out of the United States supreme court to the supreme court of appeals of Virginia will be dismissed on motion where it appears that that court refused to entertain an appeal in the case on the ground that the matters involved were purely pecuniary, and that the amount in controversy was less than sufficient to give it jurisdiction under the state constitution.—*Callan v. Bransford*, 139 U. S. 197, 11 S. Ct. 519, 35 L. Ed. 144.

A judgment which, with its accrued interest, at the time of its affirmance by a territorial supreme court, amounts to more than \$5,000, is reviewable by the supreme court of the United States. *Zeckendorf v. Johnson*, 123 U. S. 617, 8 S. Ct. 261, 31 L. Ed. 277, followed.—*Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 S. Ct. 877, 36 L. Ed. 762, affirming judgment *Alta Mining & Smelting Co. v. Benson Mining & Smelting Co.* (Sup.) 16 P. 565.

65. Cases originating in inferior courts.

See 2 Cent. Dig. App. & E. §§ 315-323; 31 Cent. Dig. J. P. § 751.

Where a petitioner to the supreme court of the District of Columbia alleges on oath that he is in possession of certain premises under a lease having nearly a year to run, with privilege of extension for four years more, and that he has expended \$15,000 in permanent improvements upon the premises, of which he will be deprived if a judgment of a justice of the peace under the landlord and tenant act (which judgment he alleges is void for want of jurisdiction) is not set aside by certiorari, it reasonably appears that the amount in dispute exceeds \$5,000.—*Harris v. Barber*, 129 U. S. 366, 9 S. Ct.

314, 32 L. Ed. 697, affirming judgment *Barber v. Harris*, 6 Mackey (D. C.) 586.

(D) FINALITY OF DETERMINATION.

Contempt proceedings, see Contempt, ◀66.

In admiralty, see Admiralty, ◀103.

Review in circuit court of appeals, see Courts, ◀405.

Review in United States Supreme Court, see Courts, ◀382.

◀67. Interlocutory and intermediate decisions.

See 2 Cent. Dig. App. & E. §§ 344-425, 510-516.

◀68. — Nature in general.

See 2 Cent. Dig. App. & E. §§ 344-351.

An order of a United States circuit court that does not adjudicate the rights of the parties as to a fund in controversy, but directs that such fund shall be paid into the registry of the court for preservation pending the litigation, is not a final order, and cannot be reviewed by the United States supreme court.—*Louisiana Nat. Bank v. Whitney*, 121 U. S. 284, 7 S. Ct. 897, 30 L. Ed. 961.

An order of court that, if a party shall perform certain acts within a specified time, he will be granted relief, and, if not, his case will be determined against him, is not final.—*Barker v. Craig*, 127 U. S. 213, 8 S. Ct. 1175, 32 L. Ed. 147.

◀69. — Nature or form of action or proceeding.

See 2 Cent. Dig. App. & E. §§ 352-366, 386, 409, 410.

A decree in a suit to foreclose a railroad general mortgage determining the amount due upon the debt, and ordering a sale unless the same is paid by a day named, is not appealable as a final order, where it also contains a reference to masters to report "all prior liens," "statements of the several properties * * * subject to the lien of said general mortgage," and what "the order of sale of said mortgaged properties" shall contain, and what shall be the "form of the advertisement therefor."—*Parsons v. Robinson*, 122 U. S. 112, 7 S. Ct. 1153, 30 L. Ed. 1122.

◀70. — Nature and scope of decision.

See 2 Cent. Dig. App. & E. §§ 367-378, 386, 411.

A judgment on a plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause.—*Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 S. Ct. 369, 27 L. Ed. 211.

An order of the lower court, pending an appeal, directing a reference to ascertain whether a tenant should pay rent to the defendant, or to a receiver appointed, is an interlocutory order, and not appealable.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 118, 7 S. Ct. 849, 30 L. Ed. 909.

Orders of a federal Circuit Court directing witnesses to answer the questions put to them, and produce written evidence in their possession, on their examination before a special examiner appointed to a suit brought by the United States to enjoin an alleged violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], lack the finality requisite to sustain an appeal to the Supreme Court.—*Alexander v. United States*, 26 S. Ct. 356, 201 U. S. 117, 50 L. Ed. 686.

◀71. — Affecting provisional remedies.

See 2 Cent. Dig. App. & E. §§ 386-401.

Where goods taken in attachment are sold, an order distributing the proceeds of the sale is

final, as it disposes of the fund.—*Gumbel v. Pitkin*, 118 U. S. 545, 5 S. Ct. 616, 28 L. Ed. 1128.

A party having intervened by petition in an attachment proceeding, to assert a prior lien on the property attached, the order dismissing such intervention disposes of the party's rights, and is a final judgment of that issue, as to which he has a right to a writ of error.—*Id.*

An order fining a party for contempt in violating an injunction, and directing the fine to be paid to the other party as compensation for the damage done him by the violation of the injunction, and for his expense in the contempt proceedings, is reviewable in the United States supreme court, since it is an interlocutory order in a civil action, and not a criminal proceeding.—*Worden v. Searls*, 121 U. S. 14, 7 S. Ct. 814, 30 L. Ed. 853.

A decree perpetually enjoining defendant from entering upon or removing minerals from plaintiff's land, and ordering an account to be taken of minerals already removed therefrom, is not final, and not appealable.—*Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 91, 10 S. Ct. 32, 33 L. Ed. 275.

A decree for plaintiffs on a bill for an injunction and an accounting, and for the payment to plaintiffs of the amount found due them, granting an injunction, and ordering an accounting before a referee, is not final or appealable, and it is immaterial that it also dismisses a cross complaint of defendants.—*Winters v. Ethell*, 132 U. S. 207, 10 S. Ct. 56, 33 L. Ed. 339.

◀73. — Appealable judgments and orders.

See 2 Cent. Dig. App. & E. §§ 402-408, 412, 413, 416.

Judgment, finding defendants in a pending suit in equity guilty of contempt in violating an interlocutory injunction, held punitive and reviewable on writ of error without awaiting final decree in a suit in equity.—*In re Merchants' Stock & Grain Co.*, 32 S. Ct. 339, 223 U. S. 639, 56 L. Ed. 584.

◀75. Final judgments or decrees.

See 2 Cent. Dig. App. & E. §§ 426-516.

◀76. — Nature in general.

See 2 Cent. Dig. App. & E. §§ 426-428, 430, 431, 436-443.

An appeal lies from a decree in an equity cause, notwithstanding it is merely in execution of a prior decree in the same suit for the purpose of correcting errors which originate in it.—*Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 S. Ct. 10, 27 L. Ed. 47.

Under Rev. St. § 970, providing that, in proceedings for forfeiture for violation of the revenue laws, when the verdict is for claimant, a finding of probable cause of seizure shall deprive him of his right to costs, and neither the prosecutor nor the person making the seizure shall be liable to suit for damages, the refusal of the court to enter of record a certificate of probable cause is not a final judgment from which an appeal will lie.—*United States v. Frerichs*, 106 U. S. 160, 1 S. Ct. 169, 27 L. Ed. 128.

In a foreclosure suit pending in the circuit court, the mortgaged property being in possession of its receivers, the state of Georgia presented a petition in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the property in their hands, upon which executions for state taxes had been levied prior to their appointment. The petition was denied

and dismissed. *Held*, that the action of the court could not be reviewed upon the appeal of the state, for the reason that the order was not a final judgment concluding any right it had in virtue of the executions, or of the levies made thereunder.—*State of Georgia v. Jesup*, 106 U. S. 458, 1 S. Ct. 363, 27 L. Ed. 216.

In a suit by an express company against a railroad company to require it to carry plaintiff's express matter upon payment of reasonable charges, a decree that defendant must carry for reasonable rates, and fixing for the time being the maximum thereof, is final, notwithstanding a reference by interlocutory decree or supplemental order for the settlement of accounts which accrued pending suit.—*St. Louis, I. M. & S. Ry. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 S. Ct. 6, 27 L. Ed. 638; *Missouri, K. & T. Ry. Co. v. Dinsmore*, 108 U. S. 30, 2 S. Ct. 9, 27 L. Ed. 640.

Where the controversy raised by pleadings is whether the property passed under a trust deed to plaintiffs or under one in favor of defendant, and whether defendant was entitled to preference in the distribution of the proceeds, a decree in terms declaring that the facts stated in the amended answer, by which it was claimed that even under the deed to plaintiffs defendant was entitled to preference, did not change the rights of the parties, and making the injunction restraining defendant from selling the lands perpetual, and directing the fund to be brought into court for distribution in accordance with the deed to plaintiffs, is final, so that as to matters included therein an appeal will not lie to a subsequent decree merely in execution thereof rendered on the bringing in of the master's report on the claims entitled to share in the distribution.—*Bank of Lewisburg v. Sheffey*, 140 U. S. 445, 11 S. Ct. 756, 35 L. Ed. 493, affirming decree (D. C.) *Sheffey v. Bank of Lewisburg*, 33 F. 315.

There is no final decree until the amount due from the party cast has been ascertained.—*Follansbee v. Bailard Pav. Co.*, 154 U. S. 651, 14 S. Ct. 1189, 25 L. Ed. 802.

77. — Nature or form of action or proceeding.

See 2 Cent. Dig. App. & E. §§ 444-463.

An order awarding a peremptory writ of mandamus is a final judgment in a civil action, within the meaning of that term as used in the statute regulating writs of error to the United States supreme court.—*Davies v. Corbin*, 112 U. S. 36, 5 S. Ct. 4, 28 L. Ed. 627.

In condemnation proceedings where the right to condemn is contested, a judgment for condemnation is final, though the compensation is still to be determined by commissioners appointed to estimate it; and appeal lies from such judgment. 34 W. Va. 155, 11 S. E. 1009, affirmed.—*Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 S. Ct. 301, 34 L. Ed. 967.

In a proceeding in the federal circuit court to condemn land, the case, from the application for the appointment of commissioners until the entry of judgment upon their award or upon the verdict of a jury, remains in the circuit court of the United States; and an order appointing the commissioners is not a final judgment from which a writ of error will lie. *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 S. Ct. 301, 34 L. Ed. 967, distinguished.—*Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194.

The decision by the highest court of a state construing its own prior judgment, and holding that a party thereto has not been guilty of contempt, is not an appealable final judgment.—*Newport Light Co. v. City of Newport*, 151 U. S. 527, 14 S. Ct. 429, 38 L. Ed. 259.

78. — Nature and scope of decision.

See 2 Cent. Dig. App. & E. §§ 426, 434, 464-477, 480, 481.

On the bill of a junior mortgagee to foreclose and establish his right to redeem from the prior mortgage, a decree was entered finding that his right to redeem had not been cut off by the foreclosure of the prior mortgage; ordering that others were entitled to redeem from him at a time to be fixed by a further decree; that, if no redemption were had, the junior mortgage should be foreclosed, and the property sold, and the proceeds distributed as might thereafter be ordered; that the cause be referred to settle the amount of such redemption and the sums due on both mortgages; and that, this decree being interlocutory, the cause stand continued. *Held* an interlocutory decree, from which no appeal lay.—*Burlington, C. R. & N. Ry. Co. v. Simmons*, 123 U. S. 52, 8 S. Ct. 58, 31 L. Ed. 73.

An order of a United States circuit court remanding a suit, which was begun and had been improperly removed from a state court, cannot be reviewed by the supreme court on a certificate of division of opinion between the judges, under Rev. St. § 693, as it is not a final judgment.—*Morey v. Lockhart*, 123 U. S. 56, 8 S. Ct. 65, 31 L. Ed. 68.

An order of the circuit court remanding a case to the state court, on the ground of want of jurisdiction, is not a "final judgment or decree," within the meaning of Act Cong. Feb. 25, 1889 (25 Stat. 693), which provides that, "in all cases where a final judgment or decree shall be rendered in a circuit court of the United States, in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States."—*Richmond & D. R. Co. v. Thouron*, 134 U. S. 45, 10 S. Ct. 517, 33 L. Ed. 871; *Texas Land & Cattle Co. v. Scott*, 137 U. S. 436, 11 S. Ct. 140, 34 L. Ed. 730.

A remanding order is not a final judgment or decree, within Act Cong. Feb. 25, 1889 (25 Stat. 693, c. 236), providing that an appeal or writ of error will lie to the supreme court in all cases, without regard to the amount involved, where a final judgment or decree is rendered in a circuit court involving a question of the jurisdiction of the court.—*Gurnee v. Patrick County*, 137 U. S. 141, 11 S. Ct. 34, 34 L. Ed. 601; *Birdseye v. Shaeffer*, 140 U. S. 117, 11 S. Ct. 885, 35 L. Ed. 402.

The demurrer to the complaint was sustained, and the cause thereon remanded, on the ground that the court by law had no jurisdiction of the case. *Held*, that the remanding order did not, by reason of the sustaining of the demurrer, become a final judgment.—*Id.*

An order remanding a cause to a state court, from which it was removed, is not a final judgment, from which an appeal will lie.—*Joy v. Adelbert College*, 146 U. S. 355, 13 S. Ct. 186, 36 L. Ed. 1003; *Illinois Cent. R. Co. v. Brown*, 156 U. S. 386, 15 S. Ct. 656, 39 L. Ed. 461.

An order by the general term of the supreme court of the District of Columbia, granting a new trial, in a case in which it has power to grant the same, is not a final judgment reviewable on writ of error in the supreme court of the United States.—*Hume v. Bowie*, 148 U. S. 245, 13 S. Ct. 582, 37 L. Ed. 438.

An order overruling a motion to remand a cause to a state court is not a final judgment, so as to entitle the defeated party to a writ of error.—*Bender v. Pennsylvania Co.*, 148 U. S. 502, 13 S. Ct. 640, 37 L. Ed. 537.

A general decree of a court of equity, that funds not yet collected, but secured by judgments, shall be distributed among certain parties, and appointing a master to state an account, is not a final decree, and an appeal will

be dismissed as premature.—*Latta v. Kilbourn*, 150 U. S. 524, 14 S. Ct. 201, 37 L. Ed. 1169, reversing decree *Kilbourn v. Latta*, 5 Mackey, 304, 60 Am. Rep. 373.

A decree in a patent infringement suit against a single defendant, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed, is not, as to such dismissal, a final decree from which complainants can appeal.—*Ex parte National Enameling & Stamping Co.*, 26 S. Ct. 404, 201 U. S. 156, 50 L. Ed. 707; *Ex parte Automatic Switch Co.*, 26 S. Ct. 407, 201 U. S. 166, 50 L. Ed. 710.

A judgment of a federal Circuit Court, rendered after the plaintiff, having unsuccessfully moved to remand the cause to the state court whence it was removed, had elected to stand upon his motion to remand, and refused to recognize the jurisdiction of the federal court, that plaintiff take nothing by the suit, and that the defendants go hence without day and recover their costs against the plaintiff, is final for the purpose of appeal.—*Wecker v. National Enameling & Stamping Co.*, 27 S. Ct. 184, 204 U. S. 176, 51 L. Ed. 430, 9 Ann. Cas. 757.

§79. — Finality as to all parties.

See 2 Cent. Dig. App. & E. §§ 484-493.

Where a bill seeks reformation of a deed by which complainant is made to assume payment of a mortgage on the property, and a cross bill seeks foreclosure, a decree dismissing the bill, and directing foreclosure in default of payment, is a final order as to complainant, and will sustain his appeal.—*Elliott v. Sackett*, 108 U. S. 132, 2 S. Ct. 375, 27 L. Ed. 678.

Where an order taking the bill as confessed by defendant T., and directing that the cause be proceeded in henceforth ex parte as to him, was entered before the decree was made sustaining the demurrer of defendant M., and dismissing the bill as against him, that decree is final as to M., and appealable.—*Stewart v. Master-son*, 131 U. S. 151, 9 S. Ct. 682, 33 L. Ed. 114.

Before an appeal can be prosecuted by any one or more of several defendants, the case should be determined as to all.—*Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 12 S. Ct. 876, 36 L. Ed. 834.

A decree dismissing a bill in equity as to one of several defendants sought to be jointly charged is not a final decree, from which an appeal may be taken to the supreme court.—*Hohorst v. Hamburg-American Packet Co.*, 148 U. S. 262, 13 S. Ct. 500, 37 L. Ed. 443.

Where all of several defendants answer, except one, who demurs to the bill, a judgment sustaining the demurrer and dismissing the bill as to such demurring defendant is not final for the purpose of appeal by complainant.—*National Bank of Rondout v. Smith*, 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441.

§80. — Determination of controversy.

See 2 Cent. Dig. App. & E. §§ 429, 432, 433, 450, 456, 457, 494-509.

A decree in foreclosure, overruling the defense of the mortgagor, and declaring the complainant, and referring the case to a master to find the amount due him and other lien creditors, and fix the relative priorities, and appointing a receiver to take charge of the property, but which does not establish the amount of the debt or order a sale, is not a final judgment from which an appeal will lie.—*Grant v. Phoenix Mut. Life Ins. Co.*, 106 U. S. 429, 1 S. Ct. 414, 27 L. Ed. 237.

When an assignee in bankruptcy filed a bill to set aside a confession of judgment by the bankrupt, and execution sales thereunder, and to restrain the foreclosure of the mortgage given by the bankrupt on the same property upon its reconveyance to him to secure an alleged balance of purchase money, and the court finds the confessed judgment, execution sales, and mortgage valid, and allows the foreclosure to proceed, but orders that any surplus arising therefrom shall be paid to the assignee, the decree terminates the controversy, and is final.—*Ex parte Norton*, 108 U. S. 237, 2 S. Ct. 490, 27 L. Ed. 709.

In a proceeding in equity by a minority of the stockholders of a corporation to set aside a lease to another corporation as made solely in the interest of the majority, and for the appointment of a receiver, a decree canceling the lease and appointing a receiver, and directing the surrender of all the property to him, and providing for an accounting by the defendant directors for the profits and royalties under the lease, but reserving to the court "such further direction as may be necessary to carry the decree into effect, concerning costs, or as may be equitable and just," is a final decree, within Rev. St. § 692, regulating appeals to the supreme court of the United States.—*Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 3 S. Ct. 111, 27 L. Ed. 898.

In an action against an executor to compel him to pay to the legatees property in the District of Columbia belonging to the testator, the defense was made that the legal domicile of the testator, at the time of his death, was in Missouri. The supreme court of the District decided that his domicile was in the "city of Washington," and that it had original jurisdiction in the matter of the estate. *Held* that, this not terminating the litigation on the merits of the case, the decision was not a final judgment, within the meaning of the acts of congress giving jurisdiction to the federal supreme court on appeal and writ of error.—*Benjamin's Heirs v. Dubois*, 118 U. S. 46, 6 S. Ct. 925, 30 L. Ed. 52.

An order of a United States circuit court, to which a case has been removed from a state court, dismissing an appeal taken to the latter court from an assessment of damages for condemnation of land for the use of a railroad company, on the ground that it was not taken within 60 days from the date of the assessment made by the commissioners, determines the suit, and is a final judgment, which may be reviewed.—*Clinton v. Missouri Pac. Ry. Co.*, 122 U. S. 469, 7 S. Ct. 1268, 30 L. Ed. 1214.

A decree setting aside a conveyance as fraudulent, appointing a receiver of all the property which passed to defendants under the conveyance, and ordering defendants to account for such property, together with all proceeds from the sale of any part of it, and the rents and profits, and to deliver possession of the same to the receiver who is ordered to sell it, but which does not specify the particular property to be delivered or its amount, but merely gives its value at the time of the conveyance, is not a final decree, settling the rights between the parties, and no appeal lies therefrom.—*Lodge v. Twell*, 135 U. S. 232, 10 S. Ct. 745, 34 L. Ed. 153.

Under Code Pr. La. arts. 63, 98, 732-734, an act of mortgage passed before a notary public in the presence of two witnesses, with an acknowledgment and identification of the debt thereby secured, imports a confession of judgment, upon which the creditor is entitled to executory process, and to obtain, without previous citation to the debtor, an order for the seizure and sale of the mortgaged property for the payment of the debt. By article 735 the clerk is required to give the debtor notice of this order a specified time before the sale, and the debtor is entitled to

have the sale suspended for certain causes enumerated in articles 738 and 739. *Held*, that this order of seizure and sale is not a final judgment or decree, and hence no appeal will lie to the supreme court of the United States from such an order made by the circuit court, although, under Code Pr. arts. 565, 566, such an order in the state courts is subject to appeal.—*Fleitas v. Richardson*, 147 U. S. 538, 13 S. Ct. 429, 37 L. Ed. 272.

Judgment, in an action for partition, determining the interest of the several parties, settling the principle upon which a partition is to be made, and appointing referees to make a partition and report the same to the court, is interlocutory only.—*Green v. Fisk*, 154 U. S. 668, 14 S. Ct. 1193, 26 L. Ed. 486.

Where, in an action on fidelity bonds of a deceased defaulting officer of a bank, the court decreed that the surety was liable, but that the liability was secondary to that of deceased's estate, and retained the case for the purpose of an accounting of collaterals deposited by deceased for the bank's reimbursement and for the fixing of the surety's ultimate liability, "whatever that may be," such decree is not final, within 26 Stat. 826, 828, c. 517, § 6, and hence no appeal can be prosecuted therefrom to the circuit court of appeals.—*Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 19 S. Ct. 551, 173 U. S. 582, 43 L. Ed. 818.

A decree of a circuit court of the United States in a suit to enjoin the threatened assessment and collection of municipal taxes on shares of stock in a national bank, under Act Ky. March 21, 1900, as discriminating and impairing the obligation of a contract which was res judicata, by which decree the collection of such taxes for the years prior to the passage of that act was enjoined for discrimination, and the cause was expressly retained for future determination as to the right to enjoin the collection of any assessment on such shares for 1900 and subsequent years, is not a final decree for the purpose of an appeal to the supreme court.—*City of Covington v. First Nat. Bank*, 22 S. Ct. 645, 185 U. S. 270, 46 L. Ed. 906.

A decree confirming the report of commissioners appointed in a partition suit is not final for the purpose of appeal, where the plan adopted was dependent upon a sale of a part of the property, which had not taken place, and which required the confirmation of the court. Decree, *Roller v. Clarke*, 19 App. D. C. 539, modified.—*Clark v. Roller*, 26 S. Ct. 141, 199 U. S. 541, 50 L. Ed. 300.

A decree of the federal Circuit Court is not final, for the purpose of an appeal to a Circuit Court of Appeals, where it disposes of a part only of the issues; the court subsequently ordering a reference to take remaining proof.—*Rexford v. Brunswick-Balke-Collender Co.*, 33 S. Ct. 515, 228 U. S. 339, 57 L. Ed. 864, reversing judgment 181 F. 462, 104 C. C. A. 210.

By a decree enjoining a city from interfering with a telephone franchise until such city puts in force an ordinance carrying out a compromise agreement with a telephone company, the decree giving the city the option of permitting the present status to remain or to enact the agreed-upon ordinance, the court reserves the right to make any further order necessary to meet any emergency that may arise and is not final.—*City of Paducah, Ky., v. East Tennessee Tel. Co.*, 33 S. Ct. 818, 229 U. S. 476, 57 L. Ed. 1286.

A judgment of a state court ordering a canal company to deliver its water way to the state and all improvements including the roadways which comprise all the property sued for, and disposing of the federal right asserted by the canal company, is final, though there was reserved for further adjudication a dispute whether a small piece of ground was appurtenant, and an accounting was ordered, and such

judgment authorizes a writ of error from the federal Supreme Court.—*Carondelet Canal & Navigation Co. v. State of Louisiana*, 34 S. Ct. 627, 233 U. S. 362, 58 L. Ed. 1001, reversing judgment *State v. Carondelet Canal & Navigation Co.*, 56 So. 137, 129 La. 279.

The judgment of a state court, awarding mandamus to enforce an order of the state railway commission directing it to relay rails removed from a logging spur and to resume service thereon on execution of an indemnity bond in case the order should be vacated in a pending suit in equity, is final under Judicial Code, § 237.—*Detroit & M. Ry. Co. v. Michigan R. R. Commission*, 36 S. Ct. 424, 240 U. S. 564, 60 L. Ed. 802, affirming judgment *Michigan R. Commission v. Detroit & M. Ry. Co.*, 144 N. W. 696, 178 Mich. 230.

82. Orders after judgment.

See 2 Cent. Dig. App. & E. §§ 379-385, 414, 416, 478, 479, 482, 483, 517-522.

Where, in pursuance of a special act of congress, the court of claims reopened a case in which judgment had been rendered for the claimant, and, as a part of the original judgment, awarded him a further sum, which had been omitted by mistake, the order adjudging the additional sum is merged in the original judgment, an appeal from which was barred by the lapse of time, and is not appealable.—*United States v. Grant*, 110 U. S. 225, 3 S. Ct. 585, 28 L. Ed. 127.

Foreclosure proceedings were instituted against a railroad in the United States circuit court for the Southern district of Illinois, and also in the circuit court for the district of Indiana, through both of which the road ran. A receiver was appointed in Illinois, and decrees of sale were rendered in both courts. On October 6, 1886, the court in Indiana ordered the receiver to surrender the property to the purchaser at the sale. This order was not entered in the Illinois court, but the receiver surrendered the entire property. On August 10, 1887, an intervener in the Illinois court was allowed a claim to be paid by the receiver; and on August 29th the order of the Indiana court discharging the receiver was entered in the Illinois court as of the date of October 6, 1886, and it was ordered that the purchaser of the property pay intervenor's claim. *Held*, that the purchaser could appeal from the order of August 29, 1887, as it was not a party to the proceedings till then.—*Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 S. Ct. 405, 34 L. Ed. 1023.

An order of the court below to quash an execution is not a final judgment, to which a writ of error will lie.—*Loeber v. Schroeder*, 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856.

84. Decisions of intermediate courts.

See 2 Cent. Dig. App. & E. §§ 523-547; 1 Cent. Dig. J. P. § 75L.

A writ of error will not lie to review an order of the highest court of a state that the proceedings in a case be remitted to the trial court, "there to be proceeded with according to law," as the order was not final, in that it did not terminate the litigation between the parties on the merits, so that on appeal the judgment by the United States supreme court would leave the state court nothing to do but to execute the judgment.—*Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 S. Ct. 15, 27 L. Ed. 73.

A judgment of reversal of the highest court of a state deciding that the suit may be sustained in the state courts, with leave for further proceedings in the court below, is not a final judgment, from which a writ of error will lie.—*Id.*

An order of the supreme court of a territory dismissing a writ of error to a district court, because of the failure of the plaintiff in error to file the transcript and have the cause docket-

ed within the time required by law, is not a final judgment or decree, within the meaning of Rev. St. §§ 702, 1911, regulating writs of error and appeals to the supreme court of the United States from the territorial supreme courts, and is therefore not reviewable on writ of error.—*Crawford v. Haller*, 111 U. S. 796, 4 S. Ct. 897, 28 L. Ed. 602.

The judgment of a state supreme court reversing the decision of an inferior court, and directing the latter court to enter a specified judgment, leaving nothing to the judicial discretion of such lower court, is a final judgment for the purposes of a writ of error to the federal supreme court.—*Mower v. Fletcher*, 114 U. S. 127, 5 S. Ct. 799, 29 L. Ed. 117.

Where the judgment of the court below reverses the decision of the inferior court, and awards a new trial, it is not a final judgment from which a writ of error will lie.—*Johnson v. Keith*, 117 U. S. 199, 6 S. Ct. 669, 29 L. Ed. 888.

Where property has been sold under a trust deed executed to secure three promissory notes, and a sale of the trust property having been made by the trustee to the holder of two of the notes, an action is brought by the holder of the remaining note to set aside the sale, and for an account of the rents collected and of the amount due upon the notes held by each, an order of the general term of the supreme court of the District of Columbia, ratifying and confirming the sale, and remanding the cause to the special term "for further proceedings," is not a final order within the meaning of the statute allowing appeals from that court to the supreme court of the United States.—*Dainese v. Kendall*, 119 U. S. 53, 7 S. Ct. 65, 30 L. Ed. 305.

The judgment of a lower state court in a criminal case may, after denial of a writ of error to the supreme court, be considered final, for the purpose of a writ of error from the supreme court of the United States.—*Clark v. Pennsylvania*, 128 U. S. 395, 9 S. Ct. 113, 32 L. Ed. 487.

A judgment of reversal is only final when it enters or directs the entry of a judgment disposing of the case.—*Smith v. Adams*, 130 U. S. 167, 9 S. Ct. 566, 32 L. Ed. 895.

A judgment of an appellate court reversing the judgment of the lower court, and remanding the cause for further proceedings, is not a final judgment, and is not appealable.—*Smith v. Adams*, 130 U. S. 167, 9 S. Ct. 566, 32 L. Ed. 895; *Rice v. Sanger*, 144 U. S. 197, 12 S. Ct. 664, 36 L. Ed. 403; *Union Mut. Life Ins. Co. v. Kirchoff*, 160 U. S. 374, 16 S. Ct. 318, 40 L. Ed. 461.

An order of the general term of the supreme court of the District of Columbia, affirming an order of the same court in special term, admitting a will to probate and record, is a final judgment, within Rev. St. § 705, providing that the final judgment or decree of the Supreme court of the District of Columbia may be re-examined and reversed or affirmed in the supreme court of the United States, upon writ of error or appeal.—*Ormsby v. Webb*, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805.

The judgment of a state supreme court, affirming an interlocutory order overruling a demurrer with permission to plead further, is not an appealable final judgment, however decisive of the merits it may appear to be.—*Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 12 S. Ct. 876, 36 L. Ed. 834.

A judgment of the highest court of a state, reversing a judgment on appeal, affirming it on a cross appeal, and remanding the cause for further proceedings, is not a "final judgment," from which an appeal will lie to the supreme court of the United States.—*Brown v. Marion*

Nat. Bank, 146 U. S. 619, 13 S. Ct. 260, 36 L. Ed. 1106.

Since an order overruling a motion to quash an execution is not a final judgment, within the meaning of the federal judiciary acts, a judgment of the highest court of a state, affirming such an order, is not reviewable in the United States supreme court on writ of error.—*Loeber v. Schroeder*, 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856.

A judgment of a state supreme court affirming a judgment overruling a demurrer to the complaint for want of facts constituting a cause of action is not an appealable final judgment.—*Werner v. City Council of Charleston*, 151 U. S. 360, 14 S. Ct. 356, 38 L. Ed. 192.

A bill against a judgment debtor, his assignee, and a number of preferred creditors, set forth a judgment for \$1,000, and return of execution nulla bona, also a note for \$1,000, and an open account for \$1,846.50. The bill was dismissed; but on appeal this decree was reversed, and a decree entered awarding a recovery of the amount of the judgment, with costs, declaring the assignment void, and remanding the cause, that an account might be taken of the property to be divided among the creditors, and that, on such accounting, complainants might prove the whole of their claim. *Held*, that the latter decree was not final and appealable.—*Hollander v. Fehchheimer*, 162 U. S. 326, 16 S. Ct. 795, 40 L. Ed. 985.

A judgment of a state supreme court reversing an order overruling a demurrer for want of facts sufficient to constitute a cause of action, and remanding the case for further proceedings, is not a final, appealable judgment.—*Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 16 S. Ct. 850, 40 L. Ed. 991.

A decree of affirmance, without specifying the sum for which it is rendered, is a final decree or judgment, from which an appeal or writ of error will lie.—*Texas & P. Ry. Co. v. Gentry*, 163 U. S. 353, 16 S. Ct. 1104, 41 L. Ed. 186.

An order by one of the judges of a superior court, made upon the return to a writ of habeas corpus granted by him, dismissing the writ and remanding the prisoner, is not such a final judgment or decree as is reviewable by the federal supreme court on writ of error.—*Clarke v. McDade*, 17 S. Ct. 284, 165 U. S. 163, 41 L. Ed. 673.

An order of a state supreme court, on the reversal of a decree, fixing the rights and liabilities of the parties, but remanding the cause to the trial court for a judicial purpose, such as stating an account upon which a further decree is to be entered, is not a final order from which a writ of error will lie to the supreme court.—*California Nat. Bank v. Stateler*, 19 S. Ct. 6, 171 U. S. 447, 43 L. Ed. 233.

Where the statute of a state permits the amendment of a petition when a demurrer thereto has been sustained, the judgment of the supreme court of the state reversing the decision of the lower court overruling such a demurrer, and directing that it be sustained, is not a final judgment reviewable by the supreme court on writ of error.—*Clark v. City of Kansas City, Kan.*, 19 S. Ct. 207, 172 U. S. 334, 43 L. Ed. 467.

A decree of the circuit court of appeals, merely determining one of the legal questions involved in an appeal, which results in the reversal of the decree of the circuit court, and remanding the case to that court for further proceedings, as is evident from the record, for lack of sufficient evidence to enable it to dispose of other issues raised by the pleadings, is not a final decree from which an appeal lies to the Supreme Court.—*United States v. Krall*, 19 S. Ct. 712, 174 U. S. 385, 43 L. Ed. 1017.

A judgment of reversal, with costs, for error in overruling a motion for change of venue, on which the case is remanded with directions to grant the change of venue and for further proceedings according to law, is lacking in the finality necessary to sustain a writ of error.—*Cincinnati St. Ry. Co. v. Snell*, 21 S. Ct. 205, 179 U. S. 395, 45 L. Ed. 248, dismissing writ of error *Snell v. Cincinnati St. Ry. Co.*, 54 N. E. 270, 60 Ohio St. 256.

A decision of the court of appeals of the District of Columbia reversing and remanding a case for the restatement of the account of an executrix, and determining who were the next of kin, the proportions they should take, the effect of the death of one or more of them, and any other questions that might arise, was not final, so as to justify an appeal by the executrix therefrom, although the other parties might have appealed had it been a decree of affirmance. Decree, *Sinnott v. Kenaday*, 14 App. D. C. 1, reversed.—*Kenaday v. Sinnott*, 21 S. Ct. 233, 179 U. S. 606, 45 L. Ed. 339.

A judgment reversing a judgment of the trial court granting a recovery of usurious interest under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], upon the ground that the plaintiffs had neither paid nor tendered the principal sum due, and remanding the cause "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered," is not a final judgment to which a writ of error will lie. Writ of error 56 S. W. 895, 155 Mo. 66, dismissed.—*Haseltine v. Central Nat. Bank of Springfield*, 22 S. Ct. 49, 183 U. S. 130, 46 L. Ed. 117.

A writ of error from a judgment of the circuit court of appeals affirming a judgment of a circuit court must, together with a writ of error from a separate and subsequent judgment of the circuit court of appeals on a cross writ of error reversing the same judgment of the circuit court, and remanding the cause for a new trial on the question presented by such cross writ of error, be dismissed, as the judgment of the circuit court of appeals first rendered ceased to be final by the operation of the second judgment, which was itself not final. Writ of error *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 104 F. 664, 44 C. C. A. 120, 56 L. R. A. 725, dismissed.—*Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 22 S. Ct. 744, 186 U. S. 24, 46 L. Ed. 1039.

A decree of the court of appeals of the District of Columbia reversing a decree of the supreme court of the District which dissolved a preliminary injunction and dismissed the complaint in a suit to restrain a telephone company from discontinuing its service, and remanding the cause for the entry of a final injunction in the language of the preliminary injunction, with a proviso that it should operate until such time in the future as the telephone company should voluntarily withdraw from business in the District, is a final decree for the purpose of appeal to the supreme court of the United States. Decree, *Manning v. Chesapeake & P. Tel. Co.*, 18 App. D. C. 191, reversed.—*Chesapeake & Potomac Telephone Co. v. Manning*, 22 S. Ct. 881, 186 U. S. 238, 46 L. Ed. 1144.

A decree of the court of appeals of the District of Columbia, which reversed an order of the supreme court of that District in condemnation proceedings, and remanded the cause to that court, "that proceedings may be taken and a jury of 12 ordered as directed by the statute," is not a final decree, for the purpose of an appeal to the supreme court of the United States.—*Macfarland v. Brown*, 23 S. Ct. 105, 187 U. S. 239, 47 L. Ed. 159.

A decree of the court of appeals of the District of Columbia, which reverses so much of an order of the supreme court of that District as is appealed from, and remands the cause to that court, with directions to vacate that por-

tion of the order, and for such further proceedings in the cause according to law as may be right and just, is not final, so as to be within the appellate jurisdiction of the supreme court of the United States.—*Macfarland v. Byrnes*, 23 S. Ct. 107, 187 U. S. 248, 47 L. Ed. 162.

A decree of a Circuit Court of Appeals which reversed a decree of a Circuit Court sustaining a demurrer to, and dismissing a bill for, specific performance, and dismissed the bill without prejudice to an action at law, is final for the purpose of review in the Supreme Court of the United States. Decree 115 F. 952, 53 C. C. A. 434, affirmed.—*Beasley v. Texas & P. Ry. Co.*, 24 S. Ct. 164, 191 U. S. 492, 48 L. Ed. 274.

A judgment of the highest state court, reversing the decree of the trial court in an equity cause, and remanding the cause for further proceedings in harmony with its opinion, is not final in such a sense as will sustain a writ of error from the Supreme Court of the United States, although equity causes are heard on appeal de novo in the state court, and the successful party is entitled to a decree in that court if he moves for it, where no such decree was applied for or rendered, and, under the state practice, newly discovered evidence may be introduced in the court below, and the pleadings amended after the cause is remanded. Writ of error 90 N. W. 842, 118 Iowa, 452, dismissed.—*Schlosser v. Hemphill*, 25 S. Ct. 654, 198 U. S. 173, 49 L. Ed. 1000.

A decree of the Court of Appeals of the District of Columbia, although involving a decision upon the merits of the case, is not final for the purpose of an appeal to the Supreme Court of the United States, where it contemplates and requires further proceedings not inconsistent with its opinion. Decree, *Roller v. Clarke*, 19 App. D. C. 539, modified.—*Clark v. Roller*, 26 S. Ct. 141, 199 U. S. 541, 50 L. Ed. 300.

A decree of the Court of Appeals of the District of Columbia, directing that two parcels of land separately covered by trust deeds be sold as an entirety or in parts, in the discretion of the trustees, is not final for the purpose of an appeal to the Supreme Court of the United States. Appeal 22 App. D. C. 432, dismissed, and decree 24 App. D. C. 55, modified.—*Warner v. Grayson*, 26 S. Ct. 240, 200 U. S. 257, 50 L. Ed. 470.

A decree which reversed some of the findings and conclusions of law of the court below in an action for an accounting, and directed a new decree to be entered in accordance with the opinion of the court, is not final for the purpose of an appeal to the Supreme Court of the United States. Judgment, *Waggaman v. Earle*, 25 App. D. C. 582, reversed.—*Earle v. Myers*, 28 S. Ct. 86, 207 U. S. 244, 52 L. Ed. 191.

A decree of the court of appeals of the District of Columbia on an appeal from the Commissioner of Patents, which affirms the latter's decision and directs the clerk of the court to "certify this opinion and proceedings in this court in the premises to the Commissioner of Patents, according to law," is not "final" within the meaning of Act Feb. 9, 1893 (27 Stat. 436, c. 74, U. S. Comp. St. 1901, p. 573) § 8, defining the appellate jurisdiction of the federal Supreme Court, since under Rev. St. U. S. §§ 4914, 4915 (U. S. Comp. St. 1901, p. 3392), decisions on such appeals do not preclude any person interested from contesting the validity of the patent in court, and a remedy by bill in equity is given where a patent is refused.—*Frasch v. Moore*, 29 S. Ct. 6, 211 U. S. 1, 53 L. Ed. 65.

A judgment of the Supreme Court of Hawaii on a writ of error, overruling exceptions to a verdict and judgment in ejectment, and affirming the judgment, is final for the purpose

of a review in the Supreme Court of the United States.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

A decision of the Court of Appeals of the District of Columbia on an appeal from a decision of the Commissioner of Patents in proceedings under application made pursuant to Act Feb. 20, 1905, c. 592, § 1, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008), for the registration of a trade-mark, which affirms the latter's decision, and directs the clerk to certify its opinion to the Commissioner, according to law, is not final for the purpose of an appeal to, or writ of error from, the federal Supreme Court, since the proceedings under that act are governed by the same rules of practice and procedure as in patent cases.—*E. C. Atkins & Co. v. Moore*, 29 S. Ct. 390, 212 U. S. 285, 53 L. Ed. 515.

A judgment of the Court of Appeals of the District of Columbia, affirming the decision of the Commissioner of Patents in an interference proceeding, and directing that its own decision be certified to the commissioner, as required by law, is not final for the purpose of a writ of error from the federal Supreme Court.—*Johnson v. Mueser*, 29 S. Ct. 390, 212 U. S. 283, 53 L. Ed. 514.

The judgment of the highest court of a state, affirming, on a third appeal, a judgment entered on a verdict in favor of plaintiff, is the first final judgment in the action which is reviewable in the federal Supreme Court, where the highest state court, on the first appeal, reversed the order of the lower court, granting a petition for the removal of the action to a federal Circuit Court, and remanded the case for trial, and, on the second appeal, reversed a judgment entered on a directed verdict in favor of defendant, although the court, on such third appeal, regarded itself as bound by its prior decision as the law of the case, and declined again to consider the federal question. Judgment (1907) *Maysville & B. S. R. Co. v. McCabe's Adm'r*, 100 S. W. 219, 30 Ky. Law Rep. 1009, reversed.—*Chesapeake & Ohio Ry. Co. v. McCabe*, 29 S. Ct. 430, 213 U. S. 207, 53 L. Ed. 765.

A judgment of the highest court of a state, affirming, without directing a dismissal, the judgment of the court below, which had sustained a demurrer to the petition in a civil suit upon the ground that it did not state facts sufficient to constitute a cause of action, but had not dismissed the suit, lacks the finality requisite to sustain a writ of error from the federal Supreme Court.—(1911) *Missouri & K. I. Ry. Co. v. City of Olathe*, 32 S. Ct. 46, 222 U. S. 185, 56 L. Ed. 155, dismissing appeal (Kan. 1909) *Edson v. Same*, 105 P. 521.

A judgment of the highest court of the state reversing a judgment below, dismissing a petition, and remanding the cause, is not final for the purpose of a writ of error from the federal Supreme Court.—*Louisiana Nav. Co. v. Oyster Commission of Louisiana*, 33 S. Ct. 78, 226 U. S. 99, 57 L. Ed. 138, dismissing writ of error 51 So. 706, 125 La. 740.

The finality of a judgment of the highest court of the state is to be tested by the form of the judgment, and the federal Supreme Court cannot in determining its jurisdiction convert the judgment not on its face final to one final in character.—*Id.*

A judgment of a federal Circuit Court of Appeals reversing the judgment of a District Court in condemnation proceedings and vacating the award and requiring compensation to be ascertained anew by a jury is interlocutory and not the subject of a writ of error from the federal Supreme Court.—*United States v. Beatty*, 34 S. Ct. 392, 232 U. S. 463, 58 L. Ed. 686,

dismissing appeal *Beatty v. United States*, 203 F. 620, 122 C. C. A. 16.

Until judgment by state trial court under mandate from state Supreme Court reversing and remanding for further proceedings had been affirmed on final writ of error, there was no final judgment reviewable by the federal Supreme Court under Judicial Code, § 237.—*Coe v. Armour Fertilizer Works*, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027, reversing judgment *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 58 So. 231, 63 Fla. 64.

The judgment of a state Supreme Court reversing judgment for defendant in a suit by railroad to quiet title to a right of way under Act March 3, 1875, and to which defendants claimed title under a patent for a mining claim, and remanding the cause with directions, held a final judgment within Judicial Code, § 237.—*Rio Grande Western Ry. Co. v. Stringham*, 36 S. Ct. 5, 239 U. S. 44, 60 L. Ed. 136, affirming judgment 110 P. 868, 38 Utah, 113, and dismissing writ of error 115 P. 967, 39 Utah, 236.

Decision of state Supreme Court on a second appeal affirming judgment on the ground that former decision was the law of the case is not reviewable, where the federal question was involved in the first decision which was final within Judicial Code, § 237.—*Id.*

Judgment of highest state court disposing of a writ of prohibition sued out under Code Ala. 1907, §§ 4864-4867, 4872, to prevent inferior court from taking jurisdiction, is a final judgment within Judicial Code, § 237, governing writs of errors to state courts.—*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 36 S. Ct. 234, 240 U. S. 30, 60 L. Ed. 507, affirming judgment *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 65 So. 287, 186 Ala. 622.

(E) NATURE, SCOPE, AND EFFECT OF DECISION.

§ 86. Discretionary action.

See 2 Cent. Dig. App. & E. §§ 559-598.

§ 87. — Matters resting in discretion.

See 2 Cent. Dig. App. & E. §§ 559-569, 577-596; 13 Cent. Dig. Costs, § 327.

An appeal will not lie from a refusal of leave to file a cross bill, when such refusal is clearly within the discretion of the court.—*Indiana South. R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 168, 3 S. Ct. 108, 27 L. Ed. 895.

The granting or refusal of a rehearing in equity rests in the discretion of the court, and is not the subject of appeal.—*Roemer v. Neumann*, 132 U. S. 103, 10 S. Ct. 12, 33 L. Ed. 277.

The granting or refusal of a new trial is a matter within the discretion of the court, and is not a subject of appeal or writ of error.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

The removal or appointment of a receiver is discretionary, and cannot be made the subject of an appeal.—*Milwaukee & M. R. Co. v. Souter*, 154 U. S. 540, 14 S. Ct. 1158, 17 L. Ed. 616.

A statement, in an order denying leave to intervene, that leave is denied, "not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene," does not amount to an adjudication against the rights asserted in the petitions, as if upon demurrer thereto; but the denial is only an exercise of usual discretion in passing upon

the right of intervention, which is not a final decision for the purpose of appeal. Decree 91 F. 570, 34 C. C. A. 12, affirmed.—Credits Commutation Co. v. United States, 20 S. Ct. 636, 177 U. S. 311, 44 L. Ed. 782.

—89. — Abuse of discretion.

See 2 Cent. Dig. App. & E. § 598.

Where an order of a loan which should be a first lien on a railroad was granted after an appeal from foreclosure of a mortgage on the road and supersedeas, the question whether, under the exercise of its discretion, the court has invaded the rights of the mortgagees as established by the decree, is reviewable.—In re Farmers' Loan & Trust Co., 129 U. S. 206, 9 S. Ct. 265, 32 L. Ed. 656.

—90. Involving merits.

See 2 Cent. Dig. App. & E. §§ 599-611.

Section 804 of the Revised Statutes, relating to the District of Columbia, empowering a trial judge, in his discretion, to entertain motions made on his minutes for new trials upon exceptions taken at the trial, for insufficiency of the evidence, or for excessive damages, does not limit the cases in which an appeal may be taken from his decision, on motions for new trials, to the three cases enumerated. Construing that section in connection with section 772, giving an appeal from special to general term from any order, judgment, or decree, "if the same involve the merits of the action or proceedings," rulings on motions for new trials based upon other grounds, such as that the verdict is contrary to law, or against the instructions of the court, or against the weight of evidence, or for newly-discovered evidence, are equally appealable to the general term as are those enumerated in section 804.—Metropolitan R. Co. v. Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022; Inland & Sea-Board Coasting Co. v. Hall, 124 U. S. 121, 8 S. Ct. 397, 31 L. Ed. 369.

On petition to set aside a previous order, made at the same term, confirming a trustee's sale, and to remove the trustee, an order denying the prayers of the petition involves the merits of the whole proceeding.—Kenaday v. Edwards, 134 U. S. 117, 10 S. Ct. 523, 33 L. Ed. 853.

—91. Affecting substantial rights.

See 2 Cent. Dig. App. & E. §§ 612-641.

After foreclosure in a circuit court of a mortgage against a railroad company, and after decree and sale thereunder, appeals were taken to the supreme court. Pending appeal, on application of receivers who had been appointed, a loan of \$120,000 was authorized by the circuit court to be a first lien on the entire property of the road. Held, that the order so changed the relations of the mortgagees to the property as settled by the decree pending on appeal, and would so modify the effect of that decree, if affirmed, that it was a final order, and mandamus would be granted directing the allowance of an appeal therefrom.—In re Farmers' Loan & Trust Co., 129 U. S. 206, 9 S. Ct. 265, 32 L. Ed. 656.

An order reviving a suit in the name of one as executor of the deceased plaintiff for whom a decree was rendered, and investing the substituted plaintiff with all the rights of the original plaintiff to enforce the decree, is appealable.—Terry v. Sharon, 131 U. S. 40, 9 S. Ct. 705, 33 L. Ed. 94.

—96. Relating to provisional remedies.

See 2 Cent. Dig. App. & E. §§ 655-687.

—99. — Attachment and garnishment.

See 2 Cent. Dig. App. & E. §§ 661-669.

Where a proceeding, resulting in a verdict, sustaining an attachment, and a verdict and

judgment on the merits of the cause of action, are separate under the provisions of the state statute, they may be separately considered on error, under sections 914, 915, of the United States Revised Statutes.—Fitzpatrick v. Flanagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. Ed. 211.

—103. On motion relating to pleadings.

See 2 Cent. Dig. App. & E. §§ 699-710.

The plea of another action pending is a plea in abatement, and by Rev. St. § 1011, which expressly so provides, a ruling thereon is not subject to revision by the appellate court.—Stephens v. Monongahela Nat. Bank of Brownsville, Pennsylvania, 111 U. S. 197, 4 S. Ct. 336, 337, 28 L. Ed. 399, 400.

—104. Relating to witnesses, depositions, affidavits, or discovery.

See 2 Cent. Dig. App. & E. §§ 711-716.

Order of federal court, on petition of Interstate Commerce Commission, filed under Act Feb. 4, 1887, § 12, directing officer of corporation to produce documents called for by the Commission, is final, so as to sustain appeal to federal Supreme Court.—Ellis v. Interstate Commerce Commission, 35 S. Ct. 645, 237 U. S. 434, 59 L. Ed. 1036.

—105. Dismissal or nonsuit.

See 2 Cent. Dig. App. & E. §§ 717-723.

No appeal lies to set aside a voluntary nonsuit.—Central Transp. Co. v. Pullman's Palace-Car Co., 189 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55.

The granting of a nonsuit by a federal court in Pennsylvania at the close of plaintiff's evidence, for want of sufficient evidence to maintain his action, being in accordance with the state law and practice, is subject to review by the supreme court on writ of error.—Meehan v. Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. Ed. 835, affirming judgment (C. C.) 29 F. 276.

—110. On motion for new trial.

See 2 Cent. Dig. App. & E. §§ 740-748.

Error does not lie for granting or refusing a new trial.—Terre Haute & I. Ry. Co. v. Struble, 109 U. S. 381, 3 S. Ct. 270, 27 L. Ed. 970; Fishburn v. Chicago, M. & St. P. Ry. Co., 137 U. S. 60, 11 S. Ct. 8, 34 L. Ed. 585; Ayers v. Watson, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 803.

Error in refusing to entertain an appeal from the denial of a motion to set aside a verdict, as against the weight of evidence, cannot be said to have been nonprejudicial, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the trial court in refusing to direct a verdict in appellant's favor. The two questions thus raised are not identical.—Metropolitan R. Co. v. Moore, 7 S. Ct. 1334, 121 U. S. 553, 30 L. Ed. 1022.

The denial of a motion for a new trial on the ground that the verdict is against the weight of evidence, by the special term of the Supreme Court of the District of Columbia, is reviewable on appeal to the general term of that court; and a dismissal of such appeal by the general term, on the ground that the discretionary action of the court below is not reviewable, is erroneous.—Id.

Section 804 of the Revised Statutes, relating to the District of Columbia, empowering a trial judge, in his discretion, to entertain motions made on his minutes for new trials, upon exceptions taken at the trial, for insufficiency of the evidence, or for excessive damages, does not limit the cases in which an appeal may be taken from his decision, on motions for new trials, to the three cases enumerated. Construing that section in connection with section 772, giving an

appeal from special to general term from any order, judgment, or decree, "if the same involve the merits of the action or proceeding," rulings on motions for new trials based upon other grounds, such as that the verdict is contrary to law, or against the instructions of the court, or for newly discovered evidence, are equally appealable to the general term as are those enumerated in section 804.—Id.

An order of the circuit court of the United States requiring a party to remit a portion of the verdict awarded as a condition for refusing a new trial is not subject to review by the supreme court.—*Arkansas Val. Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed. 854.

No appeal lies from an order denying a petition for rehearing. Appeal, *In re Philip Semmer Glass Co.* (1905) 135 F. 77, 67 C. C. A. 551, dismissed.—*Conboy v. First Nat. Bank*, 27 S. Ct. 50, 203 U. S. 141, 51 L. Ed. 128.

112. Void judgment or order.

See 2 Cent. Dig. App. & E. § 749-757.

A decree rendered by a district judge in a circuit court, in a case where he has no vote, is good until vacated, and therefore appealable.—*Baker v. Power*, 124 U. S. 167, 8 S. Ct. 416, 31 L. Ed. 382.

118. In proceedings after decision of appellate court.

See 2 Cent. Dig. App. & E. § 813-822.

Where a circuit court, in a cause remanded to it after affirmance by the supreme court, issues execution in conformity to the mandate of the supreme court, there being no subsequent proceedings not settled by the terms of the mandate, a circuit court of appeals has no jurisdiction to review the judgment of the circuit court in execution of the mandate.—*Texas & P. Ry. Co. v. Anderson*, 149 U. S. 237, 13 S. Ct. 843, 37 L. Ed. 717.

No appeal lies to the supreme court from a decree entered by the circuit court pursuant to a mandate from the circuit court of appeals.—*Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986.

If the circuit court mistakes or misconstrues the decree of the supreme court, and does not give full effect to the mandate, its action may be controlled either upon a new appeal, if a sufficient amount is involved, or by a writ of mandamus to execute the mandate.—*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414.

119. Relating to costs.

See 2 Cent. Dig. App. & E. § 823-839; 13 Cent. Dig. Costs, § 326, 327, 399.

A circuit court, although proceeding under a mandate of the supreme court containing the order of that court as to costs, has power to make, out of a fund in court, an allowance to counsel, on the footing of costs between solicitor and client, and its action in that regard is subject to review in the circuit court of appeals.—*Mason v. Pewabic Min. Co.*, 153 U. S. 361, 14 S. Ct. 847, 38 L. Ed. 745.

120. Decisions of intermediate courts.

See 2 Cent. Dig. App. & E. § 840-862, 864, 865; 31 Cent. Dig. J. P. § 751.

The United States supreme court cannot review a judgment of a state court affirming an order refusing a new trial.—*Beaupre v. Noyes*, 138 U. S. 397, 402, 11 S. Ct. 296, 298, 34 L. Ed. 991, 993.

122. Proceedings for review of part of judgment or order.

See 2 Cent. Dig. App. & E. § 860, 866-874.

The Ohio and Indiana divisions of a railroad were covered by divisional mortgages, and also by subsequent mortgages on the whole road. Proceedings were brought to foreclose one of these latter mortgages, which were conducted concurrently in the federal courts in Ohio and Indiana, and in those proceedings C. set up a lien under a decree obtained by him from the Ohio supreme court declaring certain bonds held by him a lien on the Ohio and Indiana divisions, and awarding him an order of sale of the Ohio division. The two federal courts entered identical orders of foreclosure and sale, reserving C.'s rights for future determination, and providing that, if his lien should be sustained, he should be entitled, on the failure of the purchasers to pay him the amount thereof, to have it enforced by a resale of the property. Both courts subsequently entered decrees sustaining C.'s lien, but limiting his remedy to a right to redeem the prior divisional mortgages. Held, that C. might appeal from the Ohio decree in respect to the property within the jurisdiction of that court without appealing from the Indiana decree, which did not render the questions involved res adjudicata as to the property in Ohio.—*Compton v. Jesup*, 17 S. Ct. 795, 167 U. S. 1, 42 L. Ed. 55, determined on certificate 68 F. 263, 15 C. C. A. 397.

(F) MODE OF RENDITION, FORM, AND ENTRY OF JUDGMENT OR ORDER.

131. On proceedings at chambers or in vacation.

See 2 Cent. Dig. App. & E. § 895.

In habeas corpus, where the judge in chambers ordered that the papers in the case be filed in the United States circuit court, and that his order of discharge be recorded in said court, this did not make the order of the judge an order of the court, so as to be appealable.—*Carper v. Fitzgerald*, 121 U. S. 87, 7 S. Ct. 825, 30 L. Ed. 882.

A case was tried in the circuit court, by consent of parties, before the judge at chambers, under an order providing that it should be so tried, and that, "if it shall appear to the judge upon such trial that there are questions of fact arising upon the issues therein, of such a character that the judge would submit them to the jury if one were present," they should be submitted to a jury at the next term. Held, that such trial was neither a trial by jury, nor a trial by the court, in accordance with the acts of congress regulating the review of judgments of the circuit court by the supreme court, on bills of exceptions and writs of error, but it was a trial by the judge as referee.—*Town of Andes v. Slauson*, 130 U. S. 435, 9 S. Ct. 573, 32 L. Ed. 989; *Davenport v. Paris*, 136 U. S. 580, 10 S. Ct. 1064, 34 L. Ed. 548.

An order, made by a circuit judge at chambers, denying an application for a writ of habeas corpus, is not a judgment from which an appeal will lie.—*Lambert v. Barrett*, 157 U. S. 697, 15 S. Ct. 722, 39 L. Ed. 865.

IV. RIGHT OF REVIEW.

Criminal prosecutions, see Criminal Law, 1024-1026.

(A) PERSONS ENTITLED.

Mandamus proceedings, see Mandamus, 23, 187.

136. Nature and grounds of right.

See 2 Cent. Dig. App. & E. §§ 899-902.

Where the appeal is from a decree sufficient in amount to give this court jurisdiction, a cross-appeal will not be dismissed, although it is from a decree awarding against the defendants below less than that amount, as the appeal opened the whole controversy in this court.—*Walsh v. Mayor*, 4 S. Ct. 260, 111 U. S. 31, 28 L. Ed. 338.

137. Parties of record.

See 2 Cent. Dig. App. & E. §§ 903-906, 908-924.

141. — Representative or official capacity.

See 2 Cent. Dig. App. & E. §§ 908-911.

A personal, and not an official, interest is necessary to entitle one to a writ of error from the United States Supreme Court to review the judgment of a state court. *Appeal, State v. Smith*, 63 N. E. 25, 214, 64 N. E. 18, 158 Ind. 543, 63 L. R. A. 116, dismissed.—*Smith v. State of Indiana*, 24 S. Ct. 51, 191 U. S. 138, 48 L. Ed. 125.

A county auditor does not have a personal interest entitling him to a writ of error from the United States Supreme Court to review the judgment of a state court requiring him to deduct from the assessed valuation of certain real estate the amount of a mortgage thereon, in accordance with a statute of such state, even though a judgment personal in form has been rendered against him for costs, where he did not move for a modification of the judgment in that particular.—*Id.*

A West Virginia county court and its members have no personal interest in a controversy over the validity, under Const. U. S. art. 1, § 10, as affecting county bondholders, of a state statute limiting the amount which may be raised by taxation, so as to sustain a writ of error from the Supreme Court of the United States to review a judgment of the West Virginia Supreme Court of Appeals, awarding a mandamus to compel the county court to change its assessment to conform to the requirements of the statute.—*Braxton County Court v. State of West Virginia* 28 S. Ct. 275, 208 U. S. 192, 52 L. Ed. 450.

Members of a state board of election commissioners and Secretary of State have no such interest as entitles them to a writ of error in federal Supreme Court to review judgment of state court enjoining from submitting proposed constitution to the electors, because the legislative act has been decided to violate the state Constitution.—*Marshall v. Dye*, 34 S. Ct. 92, 231 U. S. 250, 58 L. Ed. 206, dismissing appeal *Ellingham v. Same*, 99 N. E. 1, 178 Ind. 336.

A county treasurer has no such personal interest in the litigation as entitles him to writ of error in the federal Supreme Court to review a judgment of a state court compelling him to account to a city under certain taxing statutes in the state, claimed by him to be unconstitutional.—*Stewart v. Kansas City*, 36 S. Ct. 15, 239 U. S. 14, 60 L. Ed. 120, dismissing writ of error *Kansas City v. Stewart*, 136 P. 241, 90 Kan. 846.

142. — States, political divisions, boards, or officers.

See 2 Cent. Dig. App. & E. §§ 914-919.

Where, in a suit against persons for property which they claim to hold as custodians of the state, the state does not intervene, but expressly refuses to submit its rights to the jurisdiction of the court, it cannot have reviewed the refusal of the court to dismiss the complaint against the defendants on the suggestion of the state that the action was really against the state, brought without its consent, and that the court had no jurisdiction.—*State of South Carolina v. Wesley*, 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254.

143. — Interveners and claimants.

See 2 Cent. Dig. App. & E. § 921.

Upon the foreclosure of a railroad mortgage, the municipal corporation within which the mortgaged property was situate was allowed to intervene and set up a claim for taxes thereon. *Held*, that the order of the circuit court rejecting such claim is binding upon the corporation, and, where the amount of taxes is sufficient to give the supreme court jurisdiction, the corporation is entitled to an appeal.—*City of Savannah v. Jesup*, 106 U. S. 563, 1 S. Ct. 512, 27 L. Ed. 276.

148. Persons other than parties or privies.

See 2 Cent. Dig. App. & E. §§ 926-932; 13 Cent. Dig. Costs, § 801.

One not a party or privy to the record cannot appeal, bring error, or allege exceptions.—*Indiana South. R. Co. v. Liverpool & London & Globe Ins. Co.*, 109 U. S. 163, 3 S. Ct. 108, 27 L. Ed. 895.

Where a conveyance is in form to one A. alone, though for the joint benefit of himself with others, whatever in a decree affects the title so taken not only affects the title of A., but also the title of those having a joint benefit with him; and a remedy which, if applied for by A., would be granted, should be granted on the application of those having such joint interest with him.—*Hunt v. Oliver*, 109 U. S. 177, 3 S. Ct. 114, 27 L. Ed. 897.

Where a purchaser at a foreclosure sale is not concluded by the terms of the decree, any subsequent rulings of the court which determine in what securities, of diverse values, his bid shall be made good, are matters affecting his interests, in which he has a right to be heard in the trial court and on appeal.—*Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

149. Interveners for purpose of appeal.

See 2 Cent. Dig. App. & E. § 933.

A bondholder, who with all other bondholders was represented in a suit in a Circuit Court by the trustee in the mortgage securing the bonds, is not entitled as a matter of right to intervene and become a party for the purpose of taking an appeal from the decree entered, and the court will not be compelled by mandamus to admit him as such party where it has denied his petition therefor in the exercise of its discretion. *Order, Fink v. Bay Shore Terminal Co.*, 144 F. 837, 75 C. C. A. 665, affirmed.—*Zell v. Judges of Circuit Court of United States for Eastern Dist. of Virginia*, 27 S. Ct. 777, 203 U. S. 577, 51 L. Ed. 325.

150. Interest in subject-matter.

See 2 Cent. Dig. App. & E. §§ 934-946; 5 Cent. Dig. Attach. § 898.

Holders of bonds of a railroad company, secured by a mortgage to trustees, on foreclosure of the mortgage, have an interest in the amount of the trustees' compensation, which gives them the right to appeal from an adverse decision on the question.—*Williams v. Morgan*, 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559.

A trustee in a railroad mortgage, who intervenes with leave of the court as a party complainant in a suit by one of the bondholders and certain creditors of the railroad company, claiming superior liens on the mortgaged property, represents all the bondholders, and has such an interest in a decree rendered in such suit that he may appeal to the supreme court therefrom.—*Hassall v. Wilcox*, 115 U. S. 598, 6 S. Ct. 189, 29 L. Ed. 504.

An appeal may be taken by the United States from a decision by the court of private

land claims in favor of a petitioner, although the government may have no interest in the result of the litigation.—*United States v. De la Paz Valdez de Conway*, 20 S. Ct. 13, 175 U. S. 60, 44 L. Ed. 72.

◀151. **Parties or persons injured or aggrieved.**

See 2 Cent. Dig. App. & E. §§ 947-952.

Where a city filed a petition, *pro interesse suo*, to enforce the collection of taxes on property in the hands of receivers, and the court dismissed the petition, and afterwards rendered a decree directing a sale of the property, and payment of various claims, not including the city's, the city is concluded against asserting its right to the property, and may appeal from such decree.—*City of Savannah v. Jesup*, 106 U. S. 563, 1 S. Ct. 512, 27 L. Ed. 276.

(B) **ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT.**

◀153. **Inconsistent position or action in general.**

See 2 Cent. Dig. App. & E. §§ 953-956.

A party who takes to the circuit court of appeals a cause involving more than \$1,000, and not belonging to any of the classes in which the judgment of that court is made final by section 6 of the act creating it, does not waive his right to a review of such judgment by the supreme court, even though he might have taken the cause direct from the circuit court to the supreme court in the first instance. 49 F. 881, 1 C. C. A. 468, 1 U. S. App. 113, affirmed.—*Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 12 S. Ct. 740, 36 L. Ed. 506.

◀156. **Compliance with judgment or order.**

See 2 Cent. Dig. App. & E. §§ 971-973.

◀157. — **In general.**

See 2 Cent. Dig. App. & E. §§ 971, 972, 973.

Compliance by a foreign corporation with a judgment of the highest state court ousting it from doing business in the state until it should satisfy the requirements which the state laws exact of foreign corporations precludes any review of such judgment in the federal Supreme Court, although, in another similar suit pending in the state courts, such judgment is pleaded as decisive of all or some of the issues. Writ of error, *State v. American Book Co.*, 69 P. 563, 65 Kan. 847, dismissed.—*American Book Co. v. State of Kansas ex rel. Nichols*, 24 S. Ct. 394, 193 U. S. 49, 48 L. Ed. 613.

◀158. — **Payment of or on judgment.**

See 2 Cent. Dig. App. & E. §§ 973-975, 977.

In an action brought for the payment of delinquent taxes, it must be dismissed on motion where the taxes sued for have been paid unconditionally.—*San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138, 6 S. Ct. 317, 29 L. Ed. 589.

On motion to dismiss an appeal from a judgment of the court of claims, it was argued that, since the appeal was taken, congress had appropriated the amount necessary to pay the judgment. *Held* that, as the appropriation act provided that none of the judgments herein provided for shall be paid before the right of appeal shall have expired, the appropriation is not applicable to the payment of the judgment till the appeal is disposed of.—*United States v. Jones*, 119 U. S. 477, 7 S. Ct. 283, 30 L. Ed. 440.

After the suing out of a writ of error to a judgment declaring assessments against a railroad company valid, the assessments were, under an act of the legislature, readjusted and re-

duced, and thus paid by the company. No steps had been taken to collect the assessments, and proceedings to enforce them could not have been resorted to for several months after payment was in fact made. *Held*, that the payment was voluntary, and the writ of error should be dismissed on the ground that there was no actual controversy.—*Little v. Bowers*, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016.

While an action brought by the state of California against a railroad company to recover taxes was pending in the United States supreme court on writ of error, the railroad company tendered to the state the amount of the taxes, with penalties, interest, and attorney's fee, and costs of suit. This tender was not accepted, but the company deposited the money in bank, in accordance with Civ. Code Cal. § 1500, which declares that an obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited, in the name of the creditor, with some bank of deposit within the state of good repute, and notice thereof is given to the creditor. *Held*, that the supreme court must dismiss the writ of error when these facts appeared by admission of counsel in open court, as there was no longer any real controversy between the parties.—*People of State of California v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 S. Ct. 876, 37 L. Ed. 747.

◀160. **Acceptance of benefits.**

See 2 Cent. Dig. App. & E. §§ 979-994.

◀161. — **In general.**

See 2 Cent. Dig. App. & E. §§ 979-983.

Where, after the rendition of the judgment sought to be reversed, the matter in controversy has been the subject of a valid compromise between the parties to the litigation, which leaves nothing of the controversy presented by the record in the supreme court to be decided, the writ of error will be dismissed on motion.—*Dakota County v. Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981.

A writ of error will be dismissed where it appears that, after the rendition of the judgment for plaintiff sought to be reversed, a compromise was entered into between the parties, by which the bonds constituting the cause of action were destroyed, and new bonds substituted, bearing a less rate of interest.—*Id.*

◀162. — **Payment of or on judgment.**

See 2 Cent. Dig. App. & E. §§ 179, 981, 982, 984-990.

Where the supreme court of a state enjoined the collection of the judgment of the supreme court of the District of Columbia beyond a certain sum, the plaintiff is not estopped from prosecuting his writ of error to the supreme court of the United States by the fact that he has accepted that sum.—*Embry v. Palmer*, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346.

The accepting of a residue of a fund after certain liens decreed in favor of a party are satisfied, is not an admission that the decree is correct.—*Reynes v. Dumont*, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934.

A decree which determines the rights of the parties in two funds,—one a general and the other a special fund,—which have been kept separate, may be regarded as, in effect, two decrees; and the acceptance by a party of an amount decreed to him out of the special fund will not operate as a waiver of his right to appeal from that part of the decree which disposes of the general fund.—*Gilfillan v. McKee*, 159 U. S. 303, 16 S. Ct. 6, 40 L. Ed. 161.

◀165. **Pursuing other remedy.**

See 2 Cent. Dig. App. & E. §§ 995-1001.

An appeal from a circuit court on the question of jurisdiction will not be dismissed on the

ground that appellant, by taking a stay of execution under a state statute (Act Neb. Feb. 23, 1875) waived that question, as, even if it is waived by a party, it will be considered by this court.—*Parker v. Ormsby*, 141 U. S. 81, 11 S. Ct. 912, 35 L. Ed. 654.

166. Release of errors.

See 2 Cent. Dig. App. & E. §§ 1002-1007.

Where a decree has been entered, and a sale made and confirmed, in a suit to foreclose a first mortgage on a railroad, in which the trustee under a second mortgage was a party, a release of errors in the proceedings, executed by such trustee in good faith and at the instance of a majority of the second mortgage bondholders, will prevent a subsequent appeal in the name of the trustee by others of such bondholders who were not parties to the suit, and declined to contribute to the cost of the litigation.—*Elwell v. Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Bankruptcy proceedings, see Bankruptcy, 458.

Criminal prosecutions, see Criminal Law, 1029-1043.

Practice peculiar to federal courts, see Courts, 356.

Time and manner of raising federal question in state court for purpose of review in United States Supreme Court, see Courts, 396.

(A) ISSUES AND QUESTIONS IN LOWER COURT.

169. Necessity of presentation in general.

See 2 Cent. Dig. App. & E. §§ 1018-1034.

It is too late, on error from the United States supreme court to a state supreme court, to bring in question for the first time, as a basis for federal jurisdiction, the fact that the mining location in question followed in its length the course of the vein, or that the side lines were substantially parallel with, and the end lines at right angles to, the vein.—*Quimby v. Boyd*, 128 U. S. 488, 9 S. Ct. 147, 32 L. Ed. 502.

The question of the incompetency of a plaintiff corporation to do business in the territory of Montana, for want of compliance with a territorial law, cannot be considered on appeal, unless it is set up in the pleadings in the court below.—*Dahl v. Montana Copper Co.*, 132 U. S. 264, 10 S. Ct. 97, 33 L. Ed. 325.

The supreme court has not jurisdiction to review a judgment of the highest court of a state, on the ground that thereby a state statute is so construed as to impair the obligation of a contract, where no objection to the constitutionality of such statute was taken in the courts of the state.—*Morrison v. Watson*, 154 U. S. 111, 14 S. Ct. 995, 38 L. Ed. 927.

A question not raised in the trial court will not be considered on appeal.—*De Rodriguez v. Vivoni*, 26 S. Ct. 475, 201 U. S. 371, 50 L. Ed. 792.

A contention not made in the circuit court will not be reviewed by the federal Supreme Court.—*Virtue v. Creamery Package Mfg. Co.*, 33 S. Ct. 202, 227 U. S. 8, 57 L. Ed. 393, affirming judgment 179 F. 115, 102 C. C. A. 413.

170. Nature or subject-matter of issues or questions.

See 2 Cent. Dig. App. & E. §§ 1035-1052, 1099, 1100.

On a writ of error to reverse a judgment rendered against a collector of customs for the

recovery of duties paid under protest, the question as to whether the articles were subject to some other rate of duty than the one paid cannot be raised in the supreme court, where it was not raised on the trial in the court below.—*Badger v. Ranlett & Co.*, 106 U. S. 255, 1 S. Ct. 348, 27 L. Ed. 194.

The general rule that a judgment will not be reviewed on a ground not presented in the court below does not apply to raising a question as to the repeal of portions of the statute upon which the judgment is based.—*Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 S. Ct. 757, 30 L. Ed. 825.

Whether, under Rev. St. § 2297, providing that proof of abandonment is to be made out to the satisfaction of the register of the land office, the receiver of the land office may validly take part in such inquiry in the land office, will not for the first time be considered on appeal in a suit to set aside the patent for the land in dispute before the land office.—*Carr v. Fife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508.

A judgment dismissing a complaint against an internal revenue collector to recover the amount of a tax alleged to have been unlawfully exacted may be reversed at the cost of the plaintiff in error, although the only contention on his part was that the statute under which the tax was collected was unconstitutional, while the court holds that it was constitutional, where it appears that the tax was computed at an excessive amount by reason of an erroneous construction of the law.—*Murdock v. Ward*, 20 S. Ct. 775, 178 U. S. 139, 44 L. Ed. 1009.

171. Nature and theory of cause.

See 2 Cent. Dig. App. & E. §§ 1053-1063, 1066, 1067, 1161-1165.

The objection that decrees were rendered upon petition only, when they should have been rendered upon a supplemental bill or cross-bill, or a bill in that nature, when not raised until after a decision rendered, is too late.—*Coburn v. Cedar Valley Land & Cattle Co.*, 138 U. S. 196, 11 S. Ct. 258, 34 L. Ed. 876, affirming decrees (C. C.) 29 F. 584.

In an action against a railroad company for damage to cattle during transportation, where both parties at the trial have accepted the value of the cattle at their ultimate destination as the basis upon which the damages are to be computed, defendant cannot contend on appeal that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, modifying judgment *Estill v. New York, L. E. & W. R. Co.* (O. C.) 41 F. 849.

Objection that complaint in an action did not sufficiently charge negligence causing accident is not available on appeal, where the case was tried on the theory that such negligence was within the issues.—*San Juan Light & Transit Co. v. Requena*, 32 S. Ct. 399, 224 U. S. 89, 56 L. Ed. 680.

Directors of a national bank, in action for attesting a false report of its condition, in reliance on which plaintiff purchased stock, cannot urge on appeal that, if the action below had not been based on deceit instead of a violation of the national bank act, they would not have been found liable, where action was tried on the theory that knowledge of falsity of the representations must be shown, and their defense was that the national bank act had not been violated.—*Thomas v. Taylor*, 32 S. Ct. 403, 224 U. S. 73, 56 L. Ed. 673.

A judgment cannot be reversed on suggestion that on some other theory at the trial evidence might have been introduced which might have changed the result.—1d.

The objection by demurrer and later by answer that an adequate remedy can be had at law is available, if well founded, in the Circuit Court of Appeals to prevent a decree against defendants there.—*Singer Sewing Mach. Co. v. Benedict*, 33 S. Ct. 942, 229 U. S. 481, 57 L. Ed. 1288, affirming decree 179 F. 628, 103 C. C. A. 186.

◀172. Grounds of action or relief.

See 2 Cent. Dig. App. & E. §§ 1070-1078.

An objection to a decree, that it was made in the complainant's favor on grounds not stated in his bill, cannot be raised for the first time on appeal.—*Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 13 S. Ct. 600, 37 L. Ed. 454.

A prayer for general relief is abandoned where no right to other than the specific relief prayed for was brought to the attention either of the federal District Court of original jurisdiction or the Circuit Court of Appeals.—*Hull v. Burr*, 34 S. Ct. 892, 234 U. S. 712, 58 L. Ed. 1557, affirming decree 207 F. 543, 125 C. C. A. 221, which denies rehearing 206 F. 1, 124 C. C. A. 135.

◀173. Grounds of defense or opposition.

See 2 Cent. Dig. App. & E. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; 24 Cent. Dig. Fraud. Conv. § 864; 33 Cent. Dig. Lim. of Act. § 737.

A defense cannot be made for the first time in the appellate court.—*Morrill v. Jones*, 106 U. S. 466, 1 S. Ct. 423, 27 L. Ed. 267; *Canal & C. S. R. Co. v. Hart*, 114 U. S. 654, 5 S. Ct. 1127, 29 L. Ed. 226.

Where the objection that the contract sued on was ultra vires was not pleaded, nor in any way brought to the notice of the court below, the defendant is not entitled to avail himself of it upon a writ of error.—*Pullman's Palace-Car Co. v. Central Transp. Co.*, 139 U. S. 62, 11 S. Ct. 489, 35 L. Ed. 69.

Objections that a bill asks a form of relief inconsistent with the terms of the contract alleged, cannot be raised first on appeal.—*Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 13 S. Ct. 600, 37 L. Ed. 454.

Where a partner, who has the legal title to an undivided part of land belonging to the firm, gives a mortgage on such part to secure a firm debt, and all the land is afterwards sold under execution issued on a subsequent judgment against the firm and the other partner, who held title to the other part of the land, in an action by the mortgagee to enjoin the purchaser in possession from cutting timber on the land, and for an accounting for timber cut, the defense that the mortgage was invalid as to creditors of the firm, because it was for a long time withheld from record, cannot be made for the first time in the supreme court.—*McGahan v. National Bank of Rondout*, 156 U. S. 218, 15 S. Ct. 347, 39 L. Ed. 403.

An alleged statutory limitation barring the right to recover under a tax deed cannot be relied on in an appellate court if it was not set up in the answer, or in any way raised in the court below.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree *Land & River Imp. Co. v. Bardon* (C. C.) 45 F. 706.

A judgment was recovered in a federal circuit court upon a note, although the record failed to show diverse citizenship of the parties. Upon this judgment garnishment proceedings were instituted, and the judgment creditor averred therein that she was a citizen of Illinois, and, as such, had obtained the judgment against the defendant, as a citizen of Michigan.

This averment was not traversed. *Held*, that upon an appeal the fact must be deemed conclusively established, and defendant could not then be heard to object, for the first time, that the judgment was void for want of jurisdiction.—*Cutler v. Huston*, 158 U. S. 423, 15 S. Ct. 868, 39 L. Ed. 1040.

The objection that there was an adequate remedy at law where a common carrier refused to accept interstate shipments of intoxicating liquors comes too late when first made on appeal.—(1912) *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 32 S. Ct. 189, 223 U. S. 70, 56 L. Ed. 355, affirming judgment (1909) 172 F. 117, 96 C. C. A. 322, 40 L. R. A. (N. S.) 798.

◀174. Capacity or right to sue or defend.

See 2 Cent. Dig. App. & E. §§ 1093, 1094, 1121-1132; 12 Cent. Dig. Corp. § 2135.

In a suit by the United States to annul a patent to lands granted in aid of a railroad company, on the ground that mineral lands are included thereunder, the objection that there is no sufficient evidence that the suit was instituted under the authority of the attorney general, if not raised below, will not be considered on appeal, where the copy of the order of the attorney general directing the district attorney to bring suit is filed on argument in the supreme court.—*Western Pac. R. Co. v. United States*, 108 U. S. 510, 2 S. Ct. 802, 27 L. Ed. 806.

Where plaintiff sues in a federal court in his individual name, "in his capacity as president" of a national bank, and it appears, on an inspection of the whole record, that the suit was treated by both parties as the suit of the bank, defendant will not be allowed, on appeal, in order to defeat the jurisdiction, to assert for the first time that plaintiff, and not the bank, was the complainant in the cause.—*Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 5 S. Ct. 234, 28 L. Ed. 764.

In a contest as to the ownership of mineral lands, an objection that plaintiffs are not citizens of the United States, if not taken below where it can be met at once, will be held to be waived.—*O'Reilly v. Campbell*, 116 U. S. 418, 6 S. Ct. 421, 29 L. Ed. 669.

The objection that the trustee in bankruptcy had no right to attack the validity of a chattel mortgage given by the bankrupt, because it did not appear that he represented any but simple contract creditors, is too late to be available on a writ of error from the federal Supreme Court to a state court, when the point was not made in the trial court. Judgment. *Vollkommer v. Frank* (1905) 95 N. Y. S. 324, 107 App. Div. 594, affirmed.—*Frank v. Vollkommer*, 27 S. Ct. 596, 205 U. S. 521, 51 L. Ed. 911.

◀176. Facts admitted or conceded in lower court.

See 2 Cent. Dig. App. & E. § 1066; 44 Cent. Dig. Stip. § 62.

A fact assumed as true in the trial court cannot be contested in the appellate court.—*Brown v. Gurney*, 26 S. Ct. 509, 201 U. S. 184, 50 L. Ed. 717.

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

Criminal prosecution, see Criminal Law, ▶ 1029-1039, 1043.
Petition for cancellation of naturalization certificate, see Aliens, ▶ 71½.

181. Necessity of objections in general.

• See 2 Cent. Dig. App. & E. §§ 1141-1151, 1157, 1158, 1160.

Where no objection is made to the proof of a claim as presented to a master in chancery when presented, a decree allowing the claim will not be reviewed on appeal.—*Indiana South. R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 168, 3 S. Ct. 108, 27 L. Ed. 895.

Rulings not objected to at the trial cannot be complained of on appeal.—*Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, 33 S. Ct. 125, 226 U. S. 384, 57 L. Ed. 264.

182. Nature or form of remedy.

See 2 Cent. Dig. App. & E. §§ 1161-1165, 1179-1183.

183. — Objections in general.

See 2 Cent. Dig. App. & E. §§ 1161-1165.

The objection that possession and working of mining claims in the Philippine Islands for the time required under act July 1, 1902 (32 Stat. 703, c. 1369) § 45, to establish a right to patent, will not support a suit to enjoin setting up title or interfering with the same, comes too late after a trial.—*Reavis v. Fianza*, 30 S. Ct. 1, 215 U. S. 16, 54 L. Ed. 72.

184. — Remedy at law or in equity.

See 2 Cent. Dig. App. & E. §§ 1149, 1150, 1179-1183.

Decrees granting injunctions will be reversed where a court of equity had no jurisdiction in the premises, though the question was raised for the first time on appeal.—*Allen v. Pullman's Palace-Car Co.*, 139 U. S. 658, 11 S. Ct. 682, 35 L. Ed. 803.

Where defendant goes to trial before a jury on the facts of a case involving fraud, and lets it proceed to judgment without any attempt to assert the equitable character of the suit, he cannot raise the objection in the supreme court, for the first time, that the matter of plaintiff's demand is one of equitable cognizance in the federal courts.—*Burbank v. Bigelow*, 154 U. S. 558, 14 S. Ct. 1163, 19 L. Ed. 51.

The defense that complainant in a bill to restrain the enforcement of municipal ordinances reducing street railway fares as impairing contract obligations has a plain and adequate remedy at law will not be recognized on appeal, where from the averments of the bill it appears that the enforcement of such ordinances might result in a multiplicity of suits or in harassing or expensive litigation, and might impair complainant's ability to renew or extend its mortgage indebtedness, or so reduce its income as seriously to imperil its solvency,—especially if no objection was taken to the jurisdiction of a court of equity over the subject-matter at any stage of the litigation, or insisted upon at the hearing before the appellate court.—*City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 S. Ct. 410, 184 U. S. 368, 46 L. Ed. 592.

185. Organization and jurisdiction of lower court.

See 2 Cent. Dig. App. & E. §§ 1166-1176, 1375; 30 Cent. Dig. Judgm. § 64.

The absence of averments, in a bill in a Circuit Court of the United States, showing that the jurisdictional amount was in dispute, is not available on an appeal to the Supreme Court of the United States, which raises the question of the jurisdiction of the lower court on another ground, where no objection to the omission of such allegations was made in that court.—*Giles v. Harris*, 23 S. Ct. 639, 189 U. S. 475, 47 L. Ed. 909.

187. Parties.

See 2 Cent. Dig. App. & E. §§ 1184-1189; 24 Cent. Dig. Fraud. Conv. § 993; 37 Cent. Dig. Parties, §§ 167, 169, 170, 171, 175, 177.

Where the joinder of a certain plaintiff was unnecessary, and perhaps improper, but was not

objected to, by demurrer or otherwise, in the court below, it affords no ground for refusing relief.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

A suggestion as to want of parties below, made after final judgment, is not available on appeal when that suggestion conflicts with the issues as made up and upon which the case is tried, and which, if the suggestion be correct, will involve reversing the judgment at the request of appellants because of deceit practiced by them upon the courts below. Judgment (1906) 85 P. 259, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

An objection to joining a prosecuting attorney and the Secretary of State as parties defendant in the same bill will not be considered in an appellate court, where no such objection was specially taken below.—(1910) *Hierdon v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; (1910) *Swanger v. Atchison, T. & S. F. Ry. Co.*, 30 S. Ct. 639, 218 U. S. 159, 54 L. Ed. 978. Affirming decree (C. C. 1908) *Chicago, R. I. & P. Ry. Co. v. Swanger*, 157 F. 783.

An objection that the vendee in a contract for the sale of real property is not made a party to a suit for specific performance by a person to whom she afterwards contracted to sell the land is not available to defeat the suit, especially when first raised on appeal, since such vendee had no real interest in the suit, and the vendor was put in no danger by the decree.—(1911) *Lenman v. Jones*, 32 S. Ct. 18, 222 U. S. 51, 56 L. Ed. 89, affirming decree (1909) 33 App. D. C. 7.

189. Motions and other incidental and collateral proceedings.

See 2 Cent. Dig. App. & E. §§ 1153-1154½, 1205-1215; 1 Cent. Dig. Abate. & R. § 357.

The objection that a federal Circuit Court, on motion to remand a cause to the state court whence it had been removed, should not have determined, upon affidavits, the question of the good faith of the plaintiff in suing jointly in tort a resident employé and his nonresident employer, is not open to the plaintiff in error, who made no objection to the consideration of affidavits in support of the petition for the removal, and himself filed a counter affidavit.—*Wecker v. National Enameling & Stamping Co.*, 27 S. Ct. 184, 204 U. S. 176, 51 L. Ed. 430, 9 Ann. Cas. 757.

191. Pleading.

See 2 Cent. Dig. App. & E. §§ 1221-1247, 1489, 1490; 24 Cent. Dig. Fraud. Conv. § 993.

193. — Objections to declaration, complaint, or petition.

See 2 Cent. Dig. App. & E. §§ 1226-1238, 1240; 13 Cent. Dig. Corp. § 325; 17 Cent. Dig. Eject. §§ 407, 413; 24 Cent. Dig. Fraud. Conv. § 993; 39 Cent. Dig. Plead. §§ 1355-1374.

When the declaration fails to state a cause of action, and clearly shows that, upon the case as stated, the plaintiff cannot recover, the defendant, upon his demurrer being overruled, may answer upon leave, and go to trial, without losing the right of having his demurrer heard on appeal.—*Teal v. Walker*, 111 U. S. 242, 4 S. Ct. 420, 28 L. Ed. 415.

Where the attention of the trial court was not called to any particular in which a declaration was deemed insufficient as against a particular defendant, that point cannot be raised on writ of error.—*George A. Fuller Co. v. McCloskey*, 33 S. Ct. 471, 228 U. S. 194, 57 L. Ed. 795, affirming judgment 35 App. D. C. 595.

Omission from petition in action of debt by the United States to recover penalty for violating Contract Labor Provisions of Act Feb. 20, 1907, § 4, of any allegation that the acts were knowingly done, is not ground for reversal of

judgment in favor of the government, where defect was not pointed out in the trial court.—*Grant Bros. Const. Co. v. United States*, 34 S. Ct. 452, 232 U. S. 647, 58 L. Ed. 776, affirming judgment 114 P. 955, 13 Ariz. 388.

⚡194. — **Objections to plea or answer, or to subsequent pleadings.**

See 2 Cent. Dig. App. & E. §§ 1241-1246; 39 Cent. Dig. Plead. §§ 1375-1394, 1397-1407.

The objection that there was no replication to the answer cannot be raised for the first time in supreme court.—*Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 S. Ct. 1356, 30 L. Ed. 1140.

The objection that plaintiff in his replication failed to plead rescission of the contract would, if demurred to, be curable by amendment, and could not, in a court of error, operate to invalidate the trial below.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 20 P. 583, 1 Wash. St. 549.

An objection that a replication set up matter which was a departure from the original cause of action cannot be taken by defendant on appeal, when he failed to raise the question by demurrer or motion below, but, on the contrary, agreed to a change of venue after the pleadings had been perfected, entered into a stipulation as to the facts, and went to trial on the issues as made up.—*Id.*

Where the answer seeks affirmative relief, and it is treated by the parties and proceeded on by the court as equivalent to a cross-pleading, it cannot be objected for the first time on appeal that defendant should have filed a cross-bill.—*Perego v. Dodge*, 163 U. S. 160, 16 S. Ct. 971, 41 L. Ed. 113.

The objection that a surety should have set up as an affirmative defense by plea or answer, and not by demurrer, the fact that such changes were made in his principal's contract as would release the surety, if made without his consent, cannot be urged on appeal, where the declaration set out the original and supplemental contracts, and contained no averments that the surety had knowledge of or consented to the changes made by the supplemental contract, and no leave to amend was asked when the demurrer was sustained.—*United States v. Freel*, 22 S. Ct. 875, 186 U. S. 309, 46 L. Ed. 1177.

Objection that answer in action on official bond of receiver was an insufficient denial, under *Mills' Ann. Code Colo.* § 56, cannot be first raised on appeal.—(1912) *Campbell v. United States*, 32 S. Ct. 398, 224 U. S. 99, 56 L. Ed. 684, reversing judgment (1909) *United States v. Campbell*, 170 F. 318, 95 C. C. A. 114.

Objection that plaintiff had failed to file replication after plea of *res judicata* was held to be a correct plea cannot be first urged in federal Supreme Court, where such plea was considered and decided by both courts below.—*Troxell v. Delaware, L. & W. R. Co.*, 33 S. Ct. 274, 227 U. S. 434, 57 L. Ed. 586, reversing judgment *Delaware, L. & W. R. Co. v. Troxell*, 200 F. 44, 118 C. C. A. 272.

⚡197. — **Variance.**

See 39 Cent. Dig. Plead. §§ 1428-1441.

In an action to charge the creditor of a mining corporation on his oral promise to pay the salary of its manager, the fact that the count was on an original employment by him, in 1873, while the proof showed that the original employment was by the company, and the promise by the creditor was in 1874, cannot avail the creditor on appeal, when he made no objection on this ground to the testimony at the trial.—*Davis v. Patrick*, 141 U. S. 479, 12 S. Ct. 58, 35 L. Ed. 826.

An objection that evidence of special damages was admitted, notwithstanding there were no allegations of special damage in the declaration, will not be considered on appeal, where such specific objection was not made below.—*Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830, 39 L. Ed. 1006.

⚡198. **Reference of cause or question.**

See 2 Cent. Dig. App. & E. §§ 1248-1250.

Civ. Code, §§ 221, 229, provide for a reference upon the written consent of the parties. *Held* that, where no written consent was given, objection cannot be first made on appeal.—*Dundee Mortgage & Trust Inv. Co. v. Hughes*, 124 U. S. 157, 8 S. Ct. 377, 31 L. Ed. 357.

⚡199. **Proceedings preliminary to trial or hearing.**

See 2 Cent. Dig. App. & E. §§ 1148-1150, 1152, 1155.

Where the defendant was compelled to proceed with the trial, but made no objection to a trial on the ground that the issues were not fully made up, he must be deemed to have waived said objection.—*J. S. Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 S. Ct. 669, 36 L. Ed. 495.

⚡201. **Mode and conduct of trial or hearing.**

See 2 Cent. Dig. App. & E. §§ 1149, 1251-1256; 46 Cent. Dig. Trial, § 84.

On appeal in condemnation proceedings, where, in a colloquy with counsel, the court may have suggested that the prospective profits of the business injured were too remote to be considered, a failure to request a specific charge on that question was a waiver of any possible error therein.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

⚡202. **Evidence and witnesses.**

See 2 Cent. Dig. App. & E. §§ 1064, 1258-1259.

⚡203. — **In general.**

See 2 Cent. Dig. App. & E. § 1064; 16 Cent. Dig. Depositions, § 339; 50 Cent. Dig. Wits. §§ 190, 536, 727, 728.

An exception that the master refused to suppress certain depositions, and treated the testimony as competent, and relied on it in making his findings, is unavailing, where it does not appear by the record that any objection was made before the master to that testimony, or that any motion was made before him to suppress such depositions, or that any motion was made before the court to suppress them.—*Goodwin v. Fox*, 129 U. S. 601, 9 S. Ct. 367, 32 L. Ed. 805.

On appeal from a territorial court in a suit tried without a jury, where no question is made as to the admission or exclusion of evidence, the only question for determination is whether the decree is sustained by the findings of fact. *Decree, De Cordova v. Korte*, 41 P. 526, 7 N. M. (Gild.) 678, affirmed.—*Naeglin v. De Cordoba*, 19 S. Ct. 35, 171 U. S. 638, 43 L. Ed. 315.

⚡204. — **Admission of evidence.**

See 2 Cent. Dig. App. & E. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; 33 Cent. Dig. Mal. Pros. § 177; 46 Cent. Dig. Trial, § 172; 50 Cent. Dig. Wits. § 784.

Evidence not being objected to when offered, an exception afterwards taken to it will not be entertained.—*Teal v. Bilby*, 123 U. S. 572, 8 S. Ct. 239, 31 L. Ed. 263.

Where the admission in evidence of certain copies of executions, instead of the originals, was not objected to at the time, it cannot be objected to on appeal.—*Beebe v. United States*, 161 U. S. 104, 16 S. Ct. 532, 40 L. Ed. 633.

No question is presented to an appellate court with respect to the admissibility of the

testimony of a physician appointed by the trial court in a negligence action to examine the plaintiff in order to ascertain his present condition, where such appointment was made with the consent of counsel, and the witness subsequently testified without objection.—*Herencia v. Guzman*, 31 S. Ct. 135, 219 U. S. 44, 55 L. Ed. 81.

It is too late to object for the first time in the federal Supreme Court to a defect in the documentary evidence which might have been remedied below.—*Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 680, reversing judgment (Tex. Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Same*, 128 S. W. 932.

206. — Reception of evidence and examination of witnesses.

See 2 Cent. Dig. App. & E. §§ 1273, 1283-1289.

If it is intended to raise, on a writ of error, the point that a cross-examination was not responsive to anything elicited on the direct, an objection must have been taken on that ground at the trial.—*Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

The objection cannot be made that certain documents should not be considered, because they were not offered in evidence, where the record does not show that any objection was made to the admission of the evidence, as it must, under rule 13 of the United States supreme court, be deemed to have been admitted by consent.—*Shields v. Hanbury*, 128 U. S. 584, 9 S. Ct. 176, 32 L. Ed. 565.

208. Sufficiency of evidence.

See 2 Cent. Dig. App. & E. §§ 1290-1293; 24 Cent. Dig. Fraud. Conv. § 993.

209. — In general.

See 2 Cent. Dig. App. & E. §§ 1290-1293, 1300, 1303; 24 Cent. Dig. Fraud. Conv. § 993.

The objection that there was no evidence of the particular damage for which alone a recovery was permitted by the trial court, but only evidence as to the total damage, cannot be first raised in an appellate court. Judgment (1906) 27 App. D. C. 210, affirmed.—*Mercantile Trust Co. v. Hensley*, 27 S. Ct. 535, 205 U. S. 298, 51 L. Ed. 811, 10 Ann. Cas. 572.

212. — Direction of verdict.

See 2 Cent. Dig. App. & E. § 1302.

A judgment will not be reversed on appeal, as not sustained by the evidence, where the party against whom it was rendered did not ask a peremptory instruction for a verdict in his behalf, but acquiesced in the submission of the case to the jury, by asking for a charge on certain points.—*Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 12 S. Ct. 671, 36 L. Ed. 496, affirming judgment *Unsell v. Hartford Life & Annuity Ins. Co. (C. C.)* 32 F. 443.

In the absence of any motion at the close of the evidence to direct a verdict, it will be presumed that there was sufficient evidence to warrant the court in submitting the case to the jury.—*Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment *Boyd v. Hanson (C. C.)* 41 F. 174.

214. Instructions.

See 2 Cent. Dig. App. & E. §§ 1309-1314.

215. — Objections in general.

See 2 Cent. Dig. App. & E. §§ 1309-1314; 46 Cent. Dig. Trial, §§ 683-685, 695.

The objection that the trial court erred in giving an instruction, because it assumed a material fact in dispute, is unavailing, where the record does not show that this objection to the instruction was taken in the court below.—*Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

Instructions, the giving or refusal of which was not excepted to on the trial, and where the attention of the court was not called to anything objectionable therein, will not be considered on appeal.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892.

The possibility that an instruction might be misunderstood by the jury is not ground for reversal, where the matter was not called to the attention of the trial court.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

216. — Requests and failure to give instructions.

See 46 Cent. Dig. Trial, §§ 627-641, 660, 662-676.

A charge as to damages, in an action for death, held not open to objection on appeal that it failed to specify particularly what habits of the deceased the jury was authorized to consider where there was no request for a more particular instruction.—*Phoenix Ry. Co. v. Landis*, 34 S. Ct. 179, 231 U. S. 578, 58 L. Ed. 377, affirming judgments 108 P. 247, 13 Ariz. 80, and 112 P. 844, 13 Ariz. 279.

The question of the operation of federal Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, on the doctrine of assumption of risk, held not to arise on the record, where there was nothing in the excepted portion of the charge relevant to the doctrine of assumption of risk, and this question was not presented by any request to charge, or raised on motion for new trial, or referred to in the assignments of error.—*Southern Ry. Co. v. Gadd*, 34 S. Ct. 696, 233 U. S. 572, 58 L. Ed. 1099, affirming judgment 207 F. 277, 125 C. C. A. 21.

An objection to admitting reports of Interstate Commerce Commission in evidence in action under Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, to recover damages awarded by the Interstate Commerce Commission, was waived where the court's attention was not directed to the subject when the jury was charged.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

Charging the jury, in an action under Employers' Liability Act, that on finding plaintiff guilty of contributory negligence they should reduce his damages proportionally, held not reversible error where no correction was asked.—*St. Louis & S. F. R. Co. v. Brown*, 36 S. Ct. 602, 241 U. S. 223, 60 L. Ed. 966, affirming judgment (Okla.) 144 P. 1075.

218. Verdict and findings by jury.

See 2 Cent. Dig. App. & E. §§ 1315-1321, 1323; 46 Cent. Dig. Trial, §§ 818, 875.

An objection to the verdict, that it was rendered generally on plaintiff's declaration, of three counts, which were inconsistent, cannot be raised on appeal, where no objection was made by demurrer, or ruling asked at the trial, and made the ground of an exception.—*National Security Bank v. Butler*, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 632.

221. Amount of recovery or extent of relief.

See 2 Cent. Dig. App. & E. §§ 1353-1356, 1359, 1361-1363, 1365-1367.

In an action on a contract for the payment of money, an objection that plaintiff was allowed to recover more than was claimed in his affidavit, filed under 2 Starr & C. St. p. 1801, par. 37, § 36, cannot be heard for the first time on appeal, it appearing that the recovery was less than the amount claimed in the ad damnum; especially as the only purpose of the affidavit, as held by the Illinois courts, is to entitle plaintiff to judgment, as in case of default, unless defendant shall file an affidavit

of merits with his pleas.—*J. S. Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 S. Ct. 669, 36 L. Ed. 495.

◀227. **Proceedings for review.**

An objection that an appeal in bankruptcy was not claimed and notice given within the time prescribed by the rules is made too late in the supreme court of the United States after a lapse of 16 years, where it does not seem to have been called to the attention of the lower court, in which a motion was made to declare the appeal deserted. Decree 90 F. 690, 33 C. C. A. 236, affirmed.—*Bryar v. Campbell*, 20 S. Ct. 794, 177 U. S. 649, 44 L. Ed. 926.

◀228. **Objections to appeal to intermediate court.**

See 2 Cent. Dig. App. & E. §§ 1374-1381.

On a review by the supreme court of the judgment of a territorial supreme court dismissing an appeal in an attachment suit, wherein third parties intervened, claiming the attached property, the fact that the interveners are not parties to the appeal will not affect the jurisdiction, when their absence was not treated by either party to the appeal as any objection to the jurisdiction of the territorial supreme court. Judgment 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

◀230. **Necessity of timely objection.**

See 46 Cent. Dig. Trial, §§ 183-190, 680-682, 751, 812, 876.

An objection to the form of remedy comes too late to be available in an appellate court when first made on a motion for new trial after verdict. Judgment (1906) 146 F. 375, 76 C. C. A. 647, affirmed.—*American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

◀231. **Necessity of specific objection.**

See 2 Cent. Dig. App. & E. §§ 1299, 1352; 13 Cent. Dig. Costs, § 323; 16 Cent. Dig. Depositions, §§ 326, 327; 29 Cent. Dig. Plead. § 1439; 46 Cent. Dig. Trial, §§ 194-210, 223-227, 689, 690, 694, 696.

A party cannot complain of the admission in evidence of a paper admissible to show a demand in the absence of objections to the time of its delivery, where the only objection was that the paper contained matters irrelevant to the demand.—*Tevis v. Ryan*, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 P. 461, 13 Ariz. 120, and 114 P. 557, 13 Ariz. 282.

Objection that an instruction under Employers' Liability Act did not state as an element appreciation by the employé of the dangers of the situation held not available, where objection made at trial was general one that instruction did not correctly state the common-law doctrine of assumption of risk.—*Jacobs v. Southern Ry. Co.*, 36 S. Ct. 588, 241 U. S. 229, 60 L. Ed. 970.

◀232. **Scope and effect of objection.**

See 2 Cent. Dig. App. & E. §§ 1351, 1368, 1426, 1430, 1431; 45 Cent. Dig. Tax, § 1617; 46 Cent. Dig. Trial, §§ 211-222, 691-693.

Carrier cannot claim that allowance of attorney's fee to a shipper in action under Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, to recover damages awarded by the Interstate Commerce Commission, is excessive where based on a transcript of the proceedings and statement by counsel not a part of the record, and where carrier only filed exception to any fee.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

◀234. **Necessity of motion presenting objection.**

See 2 Cent. Dig. App. & E. §§ 1332-1416.

◀241. **Sufficiency and scope of motion.**

See 2 Cent. Dig. App. & E. §§ 1413-1416.

An objection to the admissibility of telegrams in evidence because they were copies is waived by failure to insist upon a ruling on the objection and reserve the question. Judgment 113 F. 1021, 51 C. C. A. 688, reversed.—*United States v. McCoy*, 24 S. Ct. 528, 193 U. S. 593, 48 L. Ed. 805.

(C) EXCEPTIONS.

Criminal prosecutions, see Criminal Law, ▶ 1047-1054.

◀246. **Necessity in general.**

See 2 Cent. Dig. App. & E. §§ 1432, 1435-1439, 1443, 1447-1452, 1454-1459, 1462, 1464-1468.

The federal Supreme Court will, of its own motion, on a writ of error, inquire into the jurisdiction of the court below, although no special exception was taken.—*Fernandez y Perez v. Perez y Fernandez*, 26 S. Ct. 561, 202 U. S. 80, 50 L. Ed. 942.

◀252. **Review of rulings as to pleadings.**

See 2 Cent. Dig. App. & E. §§ 1486-1493.

◀254. **On demurrer.**

See 2 Cent. Dig. App. & E. §§ 1486, 1487.

No exception is necessary to review a ruling of the federal Circuit Court sustaining a demurrer to a defense in the answer.—*Board of County Com'rs of City & County of Denver v. Home Sav. Bank*, 35 S. Ct. 265, 236 U. S. 101, 59 L. Ed. 485, affirming judgment 200 F. 28, 118 C. C. A. 256.

◀258. **Review of proceedings at trial.**

See 2 Cent. Dig. App. & E. §§ 1498, 1499, 1501-1532, 1582-1595.

◀259. **Mode and conduct of trial in general.**

See 2 Cent. Dig. App. & E. §§ 1496-1502.

Failure to except to remarks by the court regarded as prejudicial is not excused because of the belief of counsel that to make objection would make a bad matter worse. Judgment (1906) 87 F. 311, 17 Okl. 344, affirmed.—*Drum-Flato Commission Co. v. Edmisson*, 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

◀260. **Rulings as to evidence.**

See 2 Cent. Dig. App. & E. §§ 1503-1515.

Where no exceptions appear on the record to the rulings of the trial court upon any questions relating to the evidence upon which a finding of fact by the court was based, and it cannot be claimed that the evidence as stated in the bill of exceptions was not legally sufficient to justify the conclusion reached by the court, error of law cannot be predicated of such finding, although duly excepted to.—*Booth v. Tiernan*, 109 U. S. 205, 3 S. Ct. 122, 27 L. Ed. 907.

Where the objection that there was no proof that a copy of a certain instrument was a copy is not taken in the bill of exceptions, it cannot be availed of on appeal.—*Toplitz v. Hedden*, 146 U. S. 252, 13 S. Ct. 70, 36 L. Ed. 961, affirming judgment (C. C.) 33 F. 617.

◀263. **Instructions, and failure or refusal to give instructions.**

See 2 Cent. Dig. App. & E. §§ 1516-1523, 1525-1532.

The supreme court cannot consider an instruction not excepted to, though appellant's

counsel was not present to except, when the instruction was given in response to a question asked by the jury on coming into court after they had retired.—*Stewart v. Wyoming Cattle Rancho Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439.

Reference by the judge to the Carlisle tables, as enabling the jury to estimate probable length of life, is not ground of reversal, on the ground that the tables were not introduced in evidence, where no exception was taken at the time. In the absence of such exception it will be presumed that the tables were in evidence.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

Instructions to the jury will not be reviewed by the supreme court, unless excepted to by the party complaining of them.—*Lindsay v. Turner*, 156 U. S. 208, 15 S. Ct. 355, 39 L. Ed. 399.

The supreme court will not review a portion of a charge to which no exception was taken, and which was not assigned for error in the circuit court of appeals.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441.

⚡265. Exceptions to decision or findings by court.

See 2 Cent. Dig. App. & E. §§ 1461, 1536-1551.

Rev. St. U. S. § 700, provides that when an issue of fact in a civil cause is tried and determined by the court without a jury, according to section 649, the rulings of the court, if excepted to and duly presented by bill of exceptions, may be reviewed by the supreme court on a writ of error or appeal. *Held*, that there is no question which can be reviewed in such case, where there is no demurrer to the declaration or other exception to the sufficiency of the pleadings, no exceptions to the rulings of the court in the progress of the trial in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, and no motion in arrest of judgment, and the only matter presented by the bill of exceptions is the general finding by the court upon the evidence adduced at the trial.—*Town of Martinton v. Fairbanks*, 5 S. Ct. 321, 112 U. S. 670, 28 L. Ed. 862; *Town of Sheldon v. Day*, 5 S. Ct. 324, 112 U. S. 676, 28 L. Ed. 864.

When an action at law is tried to the court without a jury, and the court makes special findings of fact, no exceptions are necessary to raise the question whether the facts found support the judgment.—*Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 L. Ed. 560, reversing judgment *Schlesinger v. Seeberger* (C. C.) 40 F. 872.

⚡266. Exceptions to rulings, report, or findings of referee, commissioner, or auditor.

See 2 Cent. Dig. App. & E. §§ 1552-1555, 1568-1571; 42 Cent. Dig. Refer. § 213.

Where the matter of the dissolution of a partnership is referred to a master to hear the parties, to report as to all issues of fact, and to take an account of their dealings and transactions and all claims for damages arising out of said transactions, a party who failed to except to the report cannot, in the supreme court, object that the decree of the circuit court, following that report, puts a wrong construction on the partnership articles.—*Burns v. Rosenstein*, 135 U. S. 449, 10 S. Ct. 817, 34 L. Ed. 193.

On an accounting to ascertain the amount owing on certain overdue railway bonds, payment of interest for several years was proved, but there was no proof as to the payment of certain installments due prior to that time. The master, however, did not include such installments in his finding of the sum due. But no exceptions were taken to the report on this

ground, and no reference was made to these installments in either the interlocutory or final decree rendered upon the report. *Held* that, on appeal, the bondholder could not object to the decree for the failure to include such installments.—*Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 S. Ct. 150, 35 L. Ed. 951, affirming decree (C. C.) 32 F. 316.

⚡267. Exceptions to judgment.

See 2 Cent. Dig. App. & E. §§ 1447, 1460, 1573-1578, 1581.

The objection that a judgment of the District Court of the United States for Porto Rico, sustaining a plea of *res judicata*, was erroneous, is not available on appeal to the federal Supreme Court, where no formal exception was taken.—*Gonzales v. Buist*, 32 S. Ct. 463, 224 U. S. 126, 56 L. Ed. 693.

⚡268. Review of sufficiency of evidence to sustain verdict, findings, or judgment.

See 2 Cent. Dig. App. & E. §§ 1596-1604, 1606.

Where the record fails to show that any exception was taken at the trial based upon the lack of any evidence, it is not properly presented to the appellate court for consideration. If the defendant deems that the court below erroneously made no reference in his charge to the jury to the lack of any evidence in the record respecting the existence of any beneficiaries of the suit, it should have called that matter to the attention of the court at that time, and insisted upon a ruling as to that point. Failing to do that, and failing also to have any exception on that point, it must be *held* to have waived any right it may have had in that particular.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co.* (C. C.) 35 F. 178.

Findings of fact by the court of claims must be accepted as conclusive, when no exceptions have been taken thereto, and the evidence is not sent up with the record.—*Kirk v. United States*, 163 U. S. 49, 16 S. Ct. 911, 41 L. Ed. 66.

⚡273. Necessity of specific exception.

See 2 Cent. Dig. App. & E. §§ 1590, 1606, 1620-1622, 1625-1630, 1764; 46 Cent. Dig. Trial, §§ 256, 267, 689, 690, 694-696, 965.

Assignments of error as to the admission of testimony are not reviewable on writ of error from the Supreme Court of the United States, when based upon exceptions general in their character. Judgment 112 F. 888, 50 C. C. A. 591, affirmed.—*Choctaw, O. & G. R. Co. v. McDade*, 24 S. Ct. 24, 191 U. S. 64, 48 L. Ed. 96.

An objection that an instruction justifying a recovery of the agreed commission by a broker employed to find a purchaser for the whole, or any considerable part, of a tract of coal lands, who had found a purchaser for 10,000 acres, where the sale failed through the fault of the owner, did not require or permit the jury to find that any particular land was agreed upon, is not available on appeal, especially upon a mere general exception, the point not having been raised in the trial court. Judgment (1906) 27 App. D. C. 500, affirmed.—*Dotson v. Milliken*, 28 S. Ct. 489, 209 U. S. 237, 52 L. Ed. 768.

An exception taken as an entirety to the ruling of the court upon several requested instructions is not sufficient to raise the correctness of the ruling. Judgment (1906) 87 P. 320, 17 Okl. 355, affirmed.—*McCabe & Steen Const. Co. v. Wilson*, 23 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

An erroneous conclusion of the master in an equity suit that a reorganized company was not liable for unsecured debts of the old corporation could be reversed by the Circuit Court of Ap-

peals on appeal upon the merits, though the exceptions to such conclusion were put upon other grounds.—*Kansas City Southern R. Co. v. Guardian Trust Co.*, 36 S. Ct. 334, 240 U. S. 166, 60 L. Ed. 579, affirming decrees *Central Imp. Co. v. Cambria Street Co.*, 201 F. 811, 120 C. C. A. 121, and 210 F. 696, 127 C. C. A. 184.

—274. Scope and effect.

See 2 Cent. Dig. App. & E. §§ 1591, 1592, 1605-1607, 1624, 1631-1645; 46 Cent. Dig. Trial, §§ 253, 376, 406, 691-693.

Exception to a failure to allow interest on the penalty in a bond from the date of the principal's default does not present the question whether the court erred in overruling claim for interest from time of demand on surety or notice of default.—*United States v. United States Fidelity & Guaranty Co.*, 35 S. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment *United States Fidelity & Guaranty Co. v. United States*, 194 F. 611, 116 C. O. A. 187.

—280. Waiver of exceptions.

See 2 Cent. Dig. App. & E. §§ 1646, 1648, 1649.

Where the record shows a statement by counsel, apparently concurring in the principle on which the court had just based a ruling against him, this will not be considered as a waiver of an exception which he asked and obtained immediately afterwards, as it is manifest that the statement was not understood as an admission, either by the court or by counsel for either party.—*Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 405, reversing judgment 3 Wash. T. 353, 19 P. 25.

An exception to instructions is not waived by subsequently asking the court to repeat them, in connection with certain answers made to questions propounded by the jury, as this merely asks the restatement so as to qualify those answers. Judgment 78 F. 617, 22 C. C. A. 425, reversed.—*Mutual Life Ins. Co. of New York v. Phinney*, 20 S. Ct. 906, 178 U. S. 327, 44 L. Ed. 1088.

(D) MOTIONS FOR NEW TRIAL

—287. Review of proceedings at trial.

See 2 Cent. Dig. App. & E. §§ 1673-1679, 1691-1699, 1707-1712, 1724-1728.

—292. — Instructions, and failure or refusal to give instructions.

See 2 Cent. Dig. App. & E. §§ 1697-1699.

The question of the operation of federal Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, on the doctrine of assumption of risk, held not to arise, where there was nothing in the excepted portion of the charge relevant to doctrine of assumption of risk, and this question was not presented by any request to charge, or raised on motion for new trial, or referred to in the assignments of error.—*Southern Ry. Co. v. Gadd*, 34 S. Ct. 696, 233 U. S. 572, 58 L. Ed. 1099, affirming judgment 207 F. 277, 125 C. C. A. 21.

—293. Review of objections to verdict, findings, or judgment.

See 2 Cent. Dig. App. & E. §§ 1395, 1700-1703, 1705, 1706; 45 Cent. Dig. Tel. & T. § 78.

The question whether a penalty on a delinquent tax was erroneously included in a judgment cannot be reviewed on appeal, where defendant, instead of moving for rehearing, as expressly allowed by Rev. St. Ariz. 1887, § 954, gave notice of intention to appeal, declaring that he excepted only to such portion of the decision and judgment as declared the power of a territory to tax railroads running through an Indian reservation in the territory.—*Maricopa*

& P. R. Co. v. Territory of Arizona, 156 U. S. 347, 15 S. Ct. 391, 39 L. Ed. 447.

—294. Review of sufficiency of evidence to sustain verdict, findings, or judgment.

See 2 Cent. Dig. App. & E. §§ 1724, 1725, 1727-1735; 50 Cent. Dig. Witn. § 784.

If the findings of the jury were against the weight of the evidence, the remedy was by a motion for a new trial, and where that was not done the United States supreme court cannot exercise a function which was that of the jury.—*Hedden v. Iselin*, 142 U. S. 676, 12 S. Ct. 330, 35 L. Ed. 1155.

(E) CASES AND QUESTIONS RESERVED OR CERTIFIED.

—314. Time for reservation or certification.

See 2 Cent. Dig. App. & E. §§ 1785, 1786.

A certificate made by the district judge, at a term subsequent to the entry of final decree, specifying questions of jurisdiction as involved in the case, comes too late, and is entirely unavailing.—*The Bayonne*, 159 U. S. 687, 16 S. Ct. 185, 40 L. Ed. 305.

VI. PARTIES.

Death pending appeal, abatement, see Abatement and Revival, —69.

—321. — Defendants or plaintiffs in error.

See 2 Cent. Dig. App. & E. §§ 1795-1813; 42 Cent. Dig. Refer. § 214.

—322. — Proper or necessary parties in general.

See 2 Cent. Dig. App. & E. §§ 1795-1797.

Those defendants in a suit to enjoin the diversion of water who have defaulted, and against whom a decree pro confesso has been entered, are not necessary parties to an appeal from a decree granting a permanent injunction taken by the answering defendants, who justified by counter rights and submitted those rights for judgment. Decree (1906) 148 F. 684, 78 C. C. A. 546, affirmed.—*Winters v. United States*, 28 S. Ct. 207, 207 U. S. 564, 52 L. Ed. 340.

All the defendants named in a bill to enjoin the diversion of water need not join in an appeal from a decree granting a permanent injunction, where the bill does not necessarily imply concert of action or union of interest, and the answer is joint and several, and in effect avers separate rights, interests, and action on the part of the defendants.—*Id.*

—323. — Separate proceeding by one or more coparties.

See 2 Cent. Dig. App. & E. §§ 1796, 1798-1805; 43 Cent. Dig. Refer. § 214.

Where some of the parties wish to appeal from the decree in the court below, and another party dies pending suit, and his administratrix does not wish to appeal, and the decree is severable in fact and in law, defendants desiring to appeal can do so without joining their co-defendant.—*City Nat. Bank v. Hunter*, 129 U. S. 557, 9 S. Ct. 346, 32 L. Ed. 752.

Where a decree is several, both in form and substance, and the interest of each defendant thereunder is separate and distinct from that of the others, one defendant may appeal alone.—*Gilfillan v. McKee*, 159 U. S. 303, 16 S. Ct. 6, 40 L. Ed. 161.

—324. — Summons and severance.

See 2 Cent. Dig. App. & E. §§ 1806-1809.

Summons and severance is necessary to authorize one partner to bring error in an action

by both partners for damages for the unlawful seizure of firm property.—*Feibelman v. Packard*, 108 U. S. 14, 1 S. Ct. 138, 27 L. Ed. 634.

Where some of the defendants below do not join in bringing the writ of error, they ought to be summoned and severed.—*Estis v. Trabue*, 128 U. S. 225, 9 S. Ct. 58, 32 L. Ed. 437.

An appeal from a judgment affirming a decree against defendants and interveners was taken by certain of the interveners. No application for summons and severance, as to an intervenor not appealing, or any equivalent therefor, nor any order permitting severance, appeared in the record; and no application was made for the issue of citation to defendants, or leave to perfect the appeal as to them, and neither they nor such interveners appeared. *Held*, that the appeal should be dismissed.—*Hardee v. Wilson*, 146 U. S. 179, 13 S. Ct. 39, 36 L. Ed. 933; *Inglehart v. Stansbury*, 151 U. S. 68, 14 S. Ct. 237, 38 L. Ed. 76; *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 S. Ct. 693, 38 L. Ed. 563; *Sipperley v. Smith*, 155 U. S. 86, 15 S. Ct. 15, 39 L. Ed. 79.

An appeal by one of two co-defendants from a joint decree against them will be dismissed, where the record does not show either that the other defendant was notified in writing and failed to appear, or that he appeared and refused to join in the appeal.—*Hardee v. Wilson*, 146 U. S. 179, 13 S. Ct. 39, 36 L. Ed. 933.

In a suit to enforce a trust in lands, a mere naked trustee of the legal title, who is joined as defendant with those claiming the beneficial ownership, cannot maintain a separate appeal without a summons and severance, or some equivalent proceeding.—*Inglehart v. Stansbury*, 151 U. S. 68, 14 S. Ct. 237, 38 L. Ed. 76.

An appeal by one of several parties against whom a joint decree has been rendered, without joining the other parties therein, must be dismissed, when there is nothing in the record to show that his co-defendants were applied to and refused to appeal, or that any order was entered by the court, on notice, granting a separate appeal.—*Beardsley v. Arkansas & L. Ry. Co.*, 158 U. S. 123, 15 S. Ct. 788, 39 L. Ed. 919.

Summons and severance is not necessary where the interest of each defendant is separate and distinct, and the decree is several, both in form and substance.—*Gilfillan v. McKee*, 159 U. S. 303, 16 S. Ct. 6, 40 L. Ed. 161.

An appeal by one of several defendants below will be dismissed by the federal Supreme Court, where the other defendants did not join in the appeal, and there was no summons and severance.—*Monseratte Garcia Maytin v. Vela*, 30 S. Ct. 439, 216 U. S. 598, 54 L. Ed. 632.

325. — Joinder.

See 2 Cent. Dig. App. & E. §§ 1810-1813.

In a suit by partners for damages for the unlawful seizure of firm property, their interest is joint.—*Feibelman v. Packard*, 108 U. S. 14, 1 S. Ct. 138, 27 L. Ed. 634.

326. Appellees, respondents, or defendants in error.

See 2 Cent. Dig. App. & E. §§ 1795, 1814-1835.

327. — Proper or necessary parties.

See 2 Cent. Dig. App. & E. §§ 1795, 1814-1820, 1822-1835; 35 Cent. Dig. Mig. § 1650; 38 Cent. Dig. Partit. § 428.

In a proceeding in equity, where parties in the court below have no interest in maintaining or reversing the decree, the fact that they have not appealed or been cited after severance is not ground for dismissal.—*Basket v. Hassell*, 107 U. S. 602, 2 S. Ct. 415, 27 L. Ed. 500.

Where in trespass to try title to real estate, third persons intervene, setting up a claim of title derived through the plaintiffs, a judgment in favor of plaintiffs, and against interveners

and defendants, although joint in form, is not so in substance, and the interveners, therefore, need not join defendants in a writ of error.—*Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

An action was brought under the Ohio Code, seeking the foreclosure of a mortgage given to secure a note, and also a personal judgment against the maker. The land had been conveyed by the mortgagor to a third person, who was also made a defendant. The cause was thereafter removed to a federal court, and there proceeded merely as a foreclosure suit in equity, and a decree of foreclosure was entered. *Held*, that from this decree the maker of the note could not appeal without joining therein his co-defendant.—*Nash v. Harshman*, 149 U. S. 263, 13 S. Ct. 845, 37 L. Ed. 727.

An appeal from an order confirming a sale on foreclosure of a mortgage given by a railway company to secure its bonds, taken by one permitted to intervene in the foreclosure only for protection of his interests as a holder of such bonds and of stock in the company, and to which only the trustee in the mortgage is made respondent, and the mortgagor, the other defendants, and the purchasers at the sale are not made parties, cannot be maintained.—*Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 S. Ct. 693, 38 L. Ed. 563.

Where a case against several defendants is disposed of by the supreme court of a territory on the respective appeals of the plaintiff from the judgment in favor of some of the defendants, and of the other defendants from the judgment against them, on grounds common to all the parties, all the defendants are necessary parties to an appeal by the plaintiff to the United States supreme court from the judgment rendered on his appeal.—*Wilson v. Kiesel*, 17 S. Ct. 124, 164 U. S. 248, 41 L. Ed. 422.

The state is a proper party defendant in a writ of error sued out to review judgment of state court suspending collection of tolls until the roads were properly repaired, though the state was not a party to the proceeding leading up to the judgment.—*Norfolk & S. Turnpike Co. v. Commonwealth of Virginia*, 32 S. Ct. 828, 225 U. S. 264, 56 L. Ed. 1082.

330. Transfer or devolution of interest.

See 2 Cent. Dig. App. & E. §§ 1837-1841.

The decree of the circuit court, dismissing the bill brought by the receiver of a national bank to enforce the individual liability of a stockholder, was entered after a new receiver had been appointed. An appeal to the supreme court was taken in the name of the old receiver, as plaintiff, the new receiver becoming a surety in the appeal bond. In the supreme court the new receiver moved to be substituted as plaintiff and appellant, without prejudice to the proceedings already had, and the appellees moved to dismiss the appeal on the ground that none was ever lawfully taken. The first motion was granted, and the second motion was denied.—*Bowden v. Johnson*, 107 U. S. 251, 2 S. Ct. 246, 27 L. Ed. 386.

The objection that a writ of error sued out on behalf of a liquidating company to review a judgment for defendant in an action on a policy of insurance could only be prosecuted by the liquidator will not require dismissal of such writ, where to meet the plea that the insured, who was originally named as the sole plaintiff, had no interest in the cause of action, the caption of the declaration was amended to show that the action was brought for the use of such company, and an averment of the assignment of the policy to such company "in liquidation, and of which Pedro Salazar is liquidator," was inserted in the body of the pleading, and no objection in this regard was made below. *Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353,

50 L. Ed. 226, followed.—*Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

Present members of a state board of election commissioners which under *Burns' Ann. St. Ind.* 1908, § 6897, is a continuing board, will be substituted as plaintiffs in error on a writ to review a judgment of a state court against their predecessors.—*Marshall v. Dye*, 34 S. Ct. 92, 231 U. S. 250, 58 L. Ed. 206, dismissing appeal *Ellingham v. Same*, 99 N. E. 1, 178 Ind. 336.

◀ 331. Death.

See 2 Cent. Dig. App. & E. §§ 1842-1863.

◀ 332. — Before appeal or writ of error.

See 2 Cent. Dig. App. & E. §§ 1842-1845.

The death of the insured after judgment in favor of defendant in an action on the policy, in which the insured was originally named as the sole plaintiff, does not require the dismissal of a writ of error sued out to review the judgment without reviving the action, suggesting the death on the record, or giving notice to the succession, where to meet the plea that the plaintiff had no interest in the cause of action, the caption in the declaration was amended to show that the action was brought for the use of a specified corporation, and an averment of an assignment of the policy to such corporation was inserted in the body of the pleading.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed.—*Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

The death of the State Comptroller, against whom in his official capacity mandamus has been brought, precludes a suing out of a writ of error to review a decree denying the writ.—*State of Florida ex rel. Wallis v. Croom*, 33 S. Ct. 109, 226 U. S. 309, 57 L. Ed. 235, dismissing writ of error 57 So. 420, 62 Fla. 284.

◀ 333. — Pending appeal or writ of error.

See 2 Cent. Dig. App. & E. §§ 1846-1850.

A writ of error is abated by the death of both plaintiff and defendant in error.—*State of New Jersey v. Demarest*, 110 U. S. 400, 4 S. Ct. 25, 28 L. Ed. 191.

The death of the State Comptroller held to abate appeals to the federal Supreme Court taken under Judicial Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), from orders of the Circuit Court denying applications before three judges for interlocutory injunction; there being no statutory authority for bringing in his successor, though the State Treasurer was also a party, but no injunction was asked against him.—*Pullman Co. v. Croom*, 34 S. Ct. 182, 231 U. S. 571, 58 L. Ed. 375.

◀ 334. — Continuance or revival of proceedings.

See 2 Cent. Dig. App. & E. §§ 1843, 1851-1863; 1 Cent. Dig. Abate. & R. § 432.

On appeal from a final decree for an injunction in a suit by a partnership, where one of the partners dies, the survivors may, after notice to his legal representatives to appear, and their failure to do so, move that the action abate as to him, and proceed at their suit as survivors.—*Moses v. Wooster*, 115 U. S. 285, 6 S. Ct. 38, 29 L. Ed. 391.

Proceedings to make the representatives of a deceased appellee parties are rightfully taken in the Supreme Court of the United States rather than in the court below, where the appeal had not only been allowed, but the cita-

tion issued and acceptance of service thereon made by the attorney of record of such appellee during his lifetime. Judgment (1906) 85 P. 459, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

An erroneous order of substitution on death of a state official who was the only party appellee may be vacated by the federal Supreme Court at a subsequent term; there being no final judgment in the case.—*Pullman Co. v. Croom*, 34 S. Ct. 182, 231 U. S. 571, 58 L. Ed. 375.

◀ 336. Defects, objections, and amendment.

See 2 Cent. Dig. App. & E. §§ 1868-1876.

Where an appeal from a decree rendered for the appointment of a new receiver was taken in the name of the old receiver, and the new receiver went on the appeal bond, the supreme court, on motion, permitted the new receiver to be substituted as appellant, but denied appellee's counter motion to dismiss the appeal.—*Bowden v. Johnson*, 107 U. S. 251, 2 S. Ct. 246, 27 L. Ed. 386.

One of several defendants in a bill in equity brought in a state circuit court, who allowed a decree pro confesso to be taken against him in such court while the others defended, and appealed to the supreme court of the state, and from thence to the supreme court of the United States, cannot, after the latter appeal, make himself a party to it, against the objection of the other appellants, so as to control the case on such appeal.—*Marsh v. Nichols*, 120 U. S. 598, 7 S. Ct. 704, 30 L. Ed. 796.

In an action against a married woman to which her husband is made a formal party, as required by the law of the state, a writ of error will not be dismissed for failure to make him a party, where the citation has been served on him, and he was not a party to the judgment rendered in favor of the wife.—*Marchand v. Livandais*, 127 U. S. 775, 8 S. Ct. 1389, 32 L. Ed. 324.

The prosecution of an appeal against a firm instead of against the individual partners is a defect which may be cured by amendment in the supreme court.—*Estis v. Trabue*, 128 U. S. 225, 9 S. Ct. 58, 32 L. Ed. 437; *United States v. Schoverling*, 146 U. S. 76, 13 S. Ct. 24, 36 L. Ed. 893, affirming judgment (C. C.) *In re Schoverling*, 45 F. 349.

Where, to a joint judgment against several defendants, two of them sue out a writ of error without joining the others, or without a severance, a motion for leave to amend by joining the other defendants, or by a severance, will be denied.—*Mason v. United States*, 136 U. S. 581, 10 S. Ct. 1062, 34 L. Ed. 545.

On appeal from the special to the general term of the supreme court of the District of Columbia the judgment of the special term against defendant was affirmed, and it was further adjudged that plaintiff recover on his judgment against defendant and its sureties (naming them) on the appeal, and have execution against them, and each of them. The writ of error to the judgment of the general term recited the judgment as against defendant, and in the citation defendant was described as plaintiff in error, no mention being made of the sureties in the citation or supersedeas bond. The writ was dismissed because the sureties were not joined therein with defendant. Held, that a motion to rescind the judgment of dismissal, to restore the cause, and to amend the writ by inserting therein the names of the sureties, as plaintiffs in error, would be granted.—*Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S. 572, 10 S. Ct. 1063, 34 L. Ed. 539.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

Bankruptcy proceedings, see Bankruptcy, —461.
 Condemnation proceedings, see Eminent Domain, —238.
 Criminal prosecutions, see Criminal Law, —1069-1072.

(A) TIME OF TAKING PROCEEDINGS.

Bankruptcy proceedings, see Bankruptcy, —306, 461.
 Computation of time, see Time, —9.
 Condemnation proceedings, see Eminent Domain, —238.
 Criminal prosecutions, see Criminal Law, —1069.

—338. Nature and operation of limitations in general.

See 2 Cent. Dig. App. & E. §§ 1879-1882; 3 Cent. Dig. App. & E. § 3057.

The right of appeal from the court of private land claims on the part of the United States continues to exist, under section 9 of the act creating that court (26 Stat. 853), until six months next after the receipt by the attorney general of a statement of the case and the points decided.—*United States v. Pena*, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

—343. Commencement of period of limitation.

See 2 Cent. Dig. App. & E. §§ 1889-1904; 42 Cent. Dig. Refer. § 216.

—345. — Effect of motion for new trial or rehearing.

See 2 Cent. Dig. App. & E. §§ 1895, 1896.

The time limited for writ of error to the United States supreme court to review a state supreme court judgment, concerning which a rehearing has been requested and refused, runs from the date of such refusal.—*Texas Pac. Ry. Co. v. Murphy*, 111 U. S. 488, 4 S. Ct. 497, 28 L. Ed. 492.

The time that a rehearing was pending in a state supreme court will be deducted in computing the time limited from the rendition of judgment in which to bring error in the supreme court of the United States.—*Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986; *Northern Pac. R. Co. v. Holmes*, 155 U. S. 137, 15 S. Ct. 28, 39 L. Ed. 99.

Where a case is pending in a territorial supreme court on motion for rehearing at the time the territory becomes a state, and is continued in the state court instead of being removed to the United States circuit court, as it might have been, the time that such petition was pending in the territorial court will not be deducted from the time limited for bringing error from the judgment of the territorial court.—*Northern Pac. R. Co. v. Holmes*, 155 U. S. 137, 15 S. Ct. 28, 39 L. Ed. 99.

Judgment of the Court of Claims held not final so as to set in motion the time for taking appeal until motion for new trial has been disposed of.—(1912) *United States v. Ellicott*, 32 S. Ct. 334, 223 U. S. 524, 56 L. Ed. 535, reversing judgment (1908) *Ellicott Machine Co. v. United States*, 43 Ct. Cl. 469.

—347. — Rendition or entry of judgment or order.

See 2 Cent. Dig. App. & E. §§ 1897-1899; 42 Cent. Dig. Refer. § 216.

Under Rev. St. § 1008, providing that writs of error must be brought within two years after the entry of the judgment sought to be reviewed, the statute of limitations begins to run from

the date of the entry, and filing of the judgment in the record of the court's proceedings.—*Polleys v. Black River Imp. Co.*, 113 U. S. 81, 5 S. Ct. 369, 28 L. Ed. 938.

In a suit in equity, the final decree adjudged that a certain sum was due to the administratrix of F., and that, if in 90 days from the date of the decree the court should be satisfied that a certain sum paid for the purchase of incumbrances and notes had inured to the benefit of F. or his estate, that sum should be credited on the amount decreed to be paid. The decree was entered October 10, 1885. *Held*, under Rev. St. § 1008, providing that appeals from decrees in equity must be taken within two years after entry of decree, that the date of the decree was October 10, 1885, and an appeal taken December 30, 1887, was too late.—*Radford v. Folsom*, 131 U. S. 392, 9 S. Ct. 792, 33 L. Ed. 203.

—348. — Service of notice or copy of judgment or order.

See 2 Cent. Dig. App. & E. §§ 1900-1904; 42 Cent. Dig. Refer. § 216.

The sufficiency of the reasons for the delay of the United States attorney in giving a notice to the attorney general of a judgment confirming a private land claim, whereby the time for an appeal by the United States is extended, is shown by an allowance of the appeal by a justice whose attention was called to this question.—*United States v. Pena*, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

—349. Effect of disability or death of party.

See 2 Cent. Dig. App. & E. §§ 1905-1912.

Rev. St. § 1008, declares that an appeal to the supreme court must be taken within two years after entry of the decree appealed from, "provided that, where a party entitled to * * * take an appeal is * * * imprisoned, * * * such appeal may be taken within two years after" the decree, exclusive of the term of such disability. *Held* that, where a decree was entered on April 17, 1878, and the party entitled to appeal therefrom was imprisoned on February 7, 1879, the statute, having commenced to run, was not interrupted by the fact of imprisonment.—*McDonald v. Hovey*, 110 U. S. 619, 4 S. Ct. 142, 28 L. Ed. 269.

The death of a party to a cause does not extend the 20 days' limitation for taking an appeal from the Supreme Court of the District of Columbia to the Court of Appeals of the district, prescribed by rule 10 of the latter court, promulgated under Act Cong. Feb. 9, 1893, § 6.—*Ex parte Dante*, 33 S. Ct. 579, 228 U. S. 429, 57 L. Ed. 905.

—351. Taking and perfecting proceeding in time.

See 2 Cent. Dig. App. & E. §§ 1915-1919.

Under Rev. St. § 1008, providing that no judgment of a state court can be reviewed in the supreme court, unless the writ of error is brought within two years after entry thereof, a writ of error is not brought, in the legal sense, until it is filed in the court which rendered the judgment.—*Scarborough v. Pargoud*, 108 U. S. 567, 2 S. Ct. 877, 27 L. Ed. 824.

An appeal is not "taken," within the two-years limitation (Rev. St. § 1008), until the papers are filed in the court below.—*Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258, 9 S. Ct. 107, 32 L. Ed. 448.

Under Rev. St. § 1008, providing that no decree can be reviewed by the supreme court unless the appeal is taken within two years after the entry of such decree, a cross appeal is not "taken" until the petition and order for the appeal, and the appeal bond, are filed in the court which rendered the decree.—*Farrar*

v. Churchill, 135 U. S. 609, 10 S. Ct. 771, 34 L. Ed. 246.

A writ of error is not brought in the legal meaning of the term until it is filed in the court which rendered the judgment. Judgment (1907) 152 F. 925, 82 C. C. A. 73, affirmed.—Old Nick Williams Co. v. United States, 30 S. Ct. 221, 215 U. S. 541, 54 L. Ed. 318.

◀352. Extension of time.

See 2 Cent. Dig. App. & E. §§ 1920-1923.

◀353. — Judicial authority.

See 2 Cent. Dig. App. & E. §§ 1920-1922.

A final decree was entered in the circuit court January 22, 1883, and on the same day an appeal was allowed, but it was never prosecuted. On January 22, 1885, a justice of the supreme court allowed an appeal in the case, and approved the appeal bond. The papers were presented to the circuit court January 27, 1885. Held, that the appeal was not taken within two years, as required by Rev. St. § 1008, and the defect was not aided by entering the order allowing the appeal, in the circuit court, on January 27th as of January 22d.—Credit Co. v. Arkansas Cent. Ry. Co., 128 U. S. 258, 9 S. Ct. 107, 32 L. Ed. 448.

◀356. Effect of delay or failure to take proceedings.

See 2 Cent. Dig. App. & E. §§ 1926, 1927.

An appeal or writ of error not taken within the time prescribed by law will be dismissed.—Whitsitt v. Union Depot & R. Co., 122 U. S. 363, 7 S. Ct. 1248, 30 L. Ed. 1150.

A decree sustained demurrers to an intervening petition against a receiver, and dismissed the same without prejudice. The record failed to show the specific grounds of dismissal. Held that, even if the court was of opinion that a judgment at law should first have been obtained, and on that ground refused to consider the claim upon its merits, yet the decree should not be reversed if, assuming all the allegations to be true, the petition disclosed no cause for relief.—Pennsylvania R. Co. v. Wabash, St. L. & P. Ry. Co., 157 U. S. 225, 15 S. Ct. 576, 39 L. Ed. 682.

An appeal to the federal Supreme Court, allowed on June 12, 1906, to review a judgment of the Supreme Court of the territory of Oklahoma, rendered on September 7, 1905, will not be dismissed because not docketed until August 10, 1906, for the reason that the counsel who originally forwarded the record were not attorneys of the federal Supreme Court, and hence not qualified to enter their appearance, where no motion to docket and dismiss under rule 9 was made. Judgment (1906) 85 P. 459, 16 Okl. 131, affirmed.—Southern Pine Lumber Co. v. Ward, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

◀357. Relief in case of failure to proceed in time.

See 2 Cent. Dig. App. & E. §§ 1928-1931; 42 Cent. Dig. Refer. § 216.

An appeal to the federal Supreme Court from the Supreme Court of Porto Rico, which was prayed within the statutory time, will not be dismissed because not allowed by the court within that time.—Cardona v. Quinones, 36 S. Ct. 246, 240 U. S. 83, 60 L. Ed. 538.

(B) PETITION OR PRAYER, ALLOWANCE, AND CERTIFICATE OR AFFIDAVIT.

◀358. Necessity of allowance or leave.

See 2 Cent. Dig. App. & E. §§ 1932-1935.

Defendant in the circuit court filed a supersedeas bond, which alleged that defendant had "prosecuted an appeal or writ of error to

the supreme court." No bill of exceptions had been filed in the case, and no writ of error or appeal allowed. Plaintiff's motion to revoke the supersedeas created by the bond was denied. Held, that the cause would be docketed in the supreme court, and dismissed on plaintiff's motion.—Tuskaloosa N. Ry. Co. v. Gude, 141 U. S. 244, 11 S. Ct. 1004, 35 L. Ed. 742.

◀359. Authority of court or judge.

See 2 Cent. Dig. App. & E. §§ 1936-1940; 42 Cent. Dig. Refer. § 215.

The supreme court of the District of Columbia, while sitting in special term, may allow an appeal to the federal supreme court from one of its final decrees rendered at a general term.—Richards v. Mackall, 113 U. S. 539, 5 S. Ct. 535, 28 L. Ed. 1132.

Since Const. Colo. art. 6, § 8, provides that the judge of the supreme court having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead, the allowance of a writ of error by one of the associate justices of that court, wherein he recites the absence of the chief justice, and styles himself the presiding justice, is a sufficient compliance with Rev. St. U. S. § 999, which provides for the issuance of writs of error by the chief justice of the court rendering the judgment, or by a justice of the supreme court of the United States.—Butler v. Gage, 138 U. S. 52, 11 S. Ct. 235, 34 L. Ed. 869.

When an appeal to the supreme court has been granted by a circuit or district court, the case passes beyond the jurisdiction of the latter, and a subsequent order by it, on further hearing, setting aside the allowance of the appeal, is ineffectual.—Rector v. Lipscomb, 141 U. S. 557, 12 S. Ct. 83, 35 L. Ed. 857.

The supreme court will not review the judgment of a state court in error, unless the record shows that the writ has been allowed by a justice either of the supreme court or of the state court.—Northwestern Union Packet Co. v. Home Ins. Co. of New York, 154 U. S. 588, 14 S. Ct. 1168, 20 L. Ed. 463.

An application to the federal supreme court for writ of error to a state court is not entertained, unless at the request of one of the members of the court, concurred in by his associates.—In re Robertson, 156 U. S. 183, 15 S. Ct. 324, 39 L. Ed. 389.

An appeal may be allowed by an associate justice of the court of private land claims, by virtue of section 9 of the act creating that court, which provides for appeals in the same manner and upon the same conditions as appeals from circuit courts of the United States, in which, by Rev. St. U. S. § 999, any judge of such court has the power to act.—United States v. Pena, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

◀360. Prayer and allowance in open court.

See 2 Cent. Dig. App. & E. §§ 1941, 1949, 1953.

An application to the court in session for a writ of error will not be entertained, except when a justice of the court has indorsed on the record a request that counsel be allowed to proceed in that way.—Ex parte Ingalls, 139 U. S. 548, 11 S. Ct. 652, 35 L. Ed. 266.

◀362. Specification of errors.

See 2 Cent. Dig. App. & E. §§ 1960, 1961; 3 Cent. Dig. App. & E. §§ 3282-3284.

Alleged errors of law in the opinion of the court below, which was engaged with a dis-

cussion of evidence and the inferences which might properly be drawn from it, will not be considered by the Supreme Court of the United States on a writ of error if they are not contained in the assignment of errors filed with the petition for the writ, where, on the whole, it is clear that the facts found justify the judgment rendered.—*Behn, Meyer & Co. v. Campbell & Go Taucó*, 27 S. Ct. 502, 205 U. S. 403, 51 L. Ed. 857.

364. Term or day to which appeal may be taken or writ made returnable.

See 2 Cent. Dig. App. & E. §§ 1969-1976.

On appeal from the circuit court to the supreme court, a stipulation of parties extending the time of filing the appeal bond and certificate of evidence is equivalent to an order of the same date renewing the allowance of the appeal in open court in the presence of both parties.—*Goodwin v. Fox*, 120 U. S. 775, 7 S. Ct. 779, 30 L. Ed. 815.

365. Order for appeal or writ of error.

See 2 Cent. Dig. App. & E. §§ 1784, 1977-1983.

Acceptance of an appeal bond more than two years after the decree appealed from was rendered does not have the effect of allowing a new appeal.—*Killian v. Clark*, 111 U. S. 784, 4 S. Ct. 700, 28 L. Ed. 599.

It is no objection that appellees are not individually named in the order allowing an appeal, where the names of all are given in the appeal bond.—*Richardson v. Green*, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

366. Certificate as to grounds.

See 2 Cent. Dig. App. & E. §§ 1774-1776, 1989-1992; 31 Cent. Dig. J. P. § 751.

Where an appeal is taken from the circuit court to the supreme court upon a question of jurisdiction, under section 5 of the judiciary act of March 3, 1891, the certificate of the jurisdictional question must be granted by the court below during the term at which the judgment or decree was entered.—*Colvin v. City of Jacksonville*, 158 U. S. 456, 15 S. Ct. 866, 39 L. Ed. 1053.

(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

Federal courts, see Courts, 356.
In circuit court of appeals, see Courts, 405.

370. Payment of fees on appealing.

See 2 Cent. Dig. App. & E. § 1999.

Where the record on appeal to the supreme court of the United States has been printed by the appellant, the cause may be docketed without securing the payment of the clerk's fee, chargeable under Sup. Ct. Rule 24, § 7, in connection with the printing, but the printed copies cannot be delivered to the justices or the parties for use on the final hearing, or on any motion in the progress of the cause, unless the fee is paid when demanded by the clerk in time to enable him to make his examinations and perform his other duties in connection with the copies.—*Bean v. Patterson*, 110 U. S. 401, 4 S. Ct. 23, 28 L. Ed. 190.

372. Necessity of security to perfect appeal or other proceeding.

See 2 Cent. Dig. App. & E. §§ 2001-2010; 42 Cent. Dig. Refer. §§ 218, 221.

373. — In general.

See 2 Cent. Dig. App. & E. §§ 2001-2004; 42 Cent. Dig. Refer. § 221.

A citation on appeal to the United States supreme court is sufficient, without any taking of security, to constitute the allowance of an appeal such as will give that court jurisdiction.

—*Brown v. McConnell*, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495; *Stewart v. Masterson*, 124 U. S. 493, 8 S. Ct. 561, 31 L. Ed. 507.

374. — Exemptions.

See 2 Cent. Dig. App. & E. §§ 2005-2010; 22 Cent. Dig. Ex. & Ad. § 1932; 42 Cent. Dig. Refer. §§ 218, 219.

No bond for prosecution of the suit or to answer in damages or costs is required, under Rev. St. U. S. § 1001, on bringing to the United States supreme court, on writ of error or appeal, by direction of the comptroller of the currency, a suit against a receiver of a national bank.—*Pacific Nat. Bank of Boston v. Mixer*, 114 U. S. 463, 5 S. Ct. 944, 29 L. Ed. 221.

375. Parties by and to whom security to be given.

See 2 Cent. Dig. App. & E. §§ 2011-2021; 42 Cent. Dig. Refer. § 221.

376. — Obligees.

See 2 Cent. Dig. App. & E. §§ 2011-2016.

It cannot affect the validity of an appeal bond that other parties besides the one in whose favor the decree appealed from was rendered are named in it as obligees.—*Hill v. Chicago & E. R. Co.*, 129 U. S. 170, 9 S. Ct. 269, 32 L. Ed. 651.

377. — Obligors.

See 2 Cent. Dig. App. & E. §§ 2017-2021; 42 Cent. Dig. Refer. § 221.

Where an appeal is allowed to numerous parties, severally, on giving bond in a certain sum, a bond is insufficient when given by only one appellant as principal, although it purports to be in behalf of all appellants and the condition is for the prosecution of the appeal by each.—*Farrell v. West Chicago Park Com'rs*, 21 S. Ct. 609, 645, 181 U. S. 404, 45 L. Ed. 916, 924.

378. Sureties.

See 2 Cent. Dig. App. & E. §§ 2022-2035.

381. — Sufficiency and justification.

See 2 Cent. Dig. App. & E. §§ 2029-2035.

It is in the discretion of a judge to accept an appeal bond in which the sureties are not jointly or severally bound for the full amount of the obligation, but each of them severally for a specified part only.—*New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506, 5 S. Ct. 289, 28 L. Ed. 809.

384. Form and contents of bond or undertaking.

See 2 Cent. Dig. App. & E. §§ 2049-2056; 42 Cent. Dig. Refer. § 221.

The failure of the appeal bond to specify the term at which the judgment appealed from was rendered is no ground for dismissal.—*New Orleans Ins. Co. v. E. D. Albro Co.*, 112 U. S. 506, 5 S. Ct. 289, 28 L. Ed. 809; *Davis v. Wakelee*, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578.

An appeal cannot be entertained where the appeal bond, which is made a prerequisite to appellate jurisdiction, does not provide, as required by Rev. St. 1887, par. 859, that the appeal shall be prosecuted with effect, and mentions no obligee, and is for less than the proper amount.—*Swan v. Hill*, 155 U. S. 304, 15 S. Ct. 178, 39 L. Ed. 197.

386. Approval of bond or undertaking.

See 2 Cent. Dig. App. & E. §§ 2059-2063; 42 Cent. Dig. Refer. § 221.

The right to approve the security on appeal or error rests in the court, and cannot be delegated.—*Haskins v. St. Louis & S. E. Ry. Co.*, 109 U. S. 106, 3 S. Ct. 72, 27 L. Ed. 873.

387. Delivery or filing and service of bond or undertaking.

See 2 Cent. Dig. App. & E. §§ 2064-2070; 42 Cent. Dig. Refer. § 221.

Where a bond or undertaking is not given or filed within the time set by the court or statute, the bill will be dismissed.—Killian v. Clark, 111 U. S. 784, 4 S. Ct. 700, 28 L. Ed. 599.

Where no application for permission to file the appeal bond has been made for nearly four years from the date of the decree appealed from, the appeal will be dismissed.—Beardsley v. Arkansas & L. Ry. Co., 158 U. S. 123, 15 S. Ct. 786, 39 L. Ed. 919.

392. Waiver of security or of defects.

See 2 Cent. Dig. App. & E. §§ 2089-2094; 42 Cent. Dig. Refer. §§ 218, 221.

Failure of appellants to execute an appeal bond, due to a waiver thereof by the guardian ad litem and next friend of an infant appellee, does not deprive the appellate court of jurisdiction.—Kingsbury v. Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

Under Prac. Act, § 69, which forbids the dismissal of an appeal on account of informality or insufficiency of the appeal bond if the appellant shall, within a time fixed by the court, file a good and sufficient bond, a motion to dismiss an appeal will be denied when it is made after the case is submitted for decision by the appellants, and no motion has been made to set aside the order taking the case for decision. Judgment 55 N. E. 325, 182 Ill. 250, affirmed.—Farrell v. West Chicago Park Com'rs, 21 S. Ct. 609, 645, 181 U. S. 404, 45 L. Ed. 916, 924.

395. Effect of failure to give or defects in security.

See 2 Cent. Dig. App. & E. §§ 2058, 2064-2070, 2085, 2086; 3 Cent. Dig. App. & E. § 3127; 42 Cent. Dig. Refer. §§ 221, 224.

The omission of the lower court judge to take security at the time of signing the citation on appeal as required by Rev. St. § 1,000, is a mere irregularity, which may be cured by the supreme court allowing appellant to file the proper bond under penalty of dismissing the appeal.—Brown v. McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495; Stewart v. Masterson, 124 U. S. 493, 8 S. Ct. 561, 31 L. Ed. 507.

(D) WRIT OF ERROR, CITATION, OR NOTICE.

Bankruptcy proceedings, see Bankruptcy, 461.

396. Necessity of appellate process or of notice.

See 2 Cent. Dig. App. & E. §§ 2099, 2102, 2104, 2150; 42 Cent. Dig. Refer. § 215.

Except in cases of appeals allowed in open court during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error is necessary to perfect jurisdiction of the appeal or the writ, unless it has been waived.—Hewitt v. Filbert, 116 U. S. 142, 6 S. Ct. 319, 29 L. Ed. 581; Jacobs v. George, 150 U. S. 415, 14 S. Ct. 159, 37 L. Ed. 1127.

Where the necessary security is not taken until after the term at which the decree was rendered, a citation is required.—Brown v. McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495.

397. Process or notice on appeal in open court.

See 2 Cent. Dig. App. & E. § 2101.

Where an appeal is allowed by the court during the term at which the decree was ren-

dered, and security is taken out of court or after the term, a citation is only necessary to show that the appeal has not been abandoned by the failure to furnish the security before the adjournment.—Dodge v. Knowles, 114 U. S. 436, 5 S. Ct. 1108, 29 L. Ed. 144; Richardson v. Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

On writ of error to a United States circuit court, where no citation has been issued as required by Rev. St. § 999, and defendants do not appear in the supreme court, the case will be dismissed, as notice of a writ of error, given in open court at the same term the judgment is rendered, is not equivalent to such citation, as in the case of an appeal in open court.—United States v. Phillips, 121 U. S. 254, 7 S. Ct. 874, 30 L. Ed. 914.

Where an appeal is taken in open court during the term at which the judgment was rendered, notice or citation is not necessary.—Brown v. McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495.

398. Writ of error.

See 2 Cent. Dig. App. & E. §§ 2103-2119.

399. — Issuance.

See 2 Cent. Dig. App. & E. §§ 2103, 2105, 2106.

A writ of error from the United States supreme court to a state court may be directed to an inferior court, if the supreme court of the state has remitted the whole record, without retaining a copy, to such inferior court, with directions to enter a final judgment in the case.—Polleys v. Black River Imp. Co., 113 U. S. 81, 5 S. Ct. 369, 28 L. Ed. 938.

400. — Form and requisites.

See 2 Cent. Dig. App. & E. §§ 2103, 2107-2112.

It seems that a writ of error to a state court will not be dismissed because it is signed by the clerk of that court only.—Miller v. State of Texas, 153 U. S. 535, 14 S. Ct. 874, 38 L. Ed. 812.

It is error to sue out a writ of error in the firm name or style of a partnership, without stating the names of the persons composing the firm.—Godbe v. Tootle, 154 U. S. 576, 14 S. Ct. 1167, 19 L. Ed. 831.

Writs of error from the supreme court must bear the teste of the chief justice.—Germain v. Mason, 154 U. S. 587, 14 S. Ct. 1170, 20 L. Ed. 689.

When there is no application to amend, the omission of the writ of error to state with certainty the return day is ground for dismissal.—Sea v. Connecticut Mut. Life Ins. Co., 154 U. S. 659, 14 S. Ct. 1191, 25 L. Ed. 772.

402. — Return.

See 2 Cent. Dig. App. & E. § 2114.

The failure of a clerk of the circuit court to indorse a writ of error as filed cannot defeat the transfer of the case, when the judge has done all that is necessary for him to do, and the party has done all that is required of him. Judgment 76 F. 617, 22 C. C. A. 425, reversed.—Mutual Life Ins. Co. of New York v. Phinney, 20 S. Ct. 906, 178 U. S. 327, 44 L. Ed. 1088.

403. — Defects, objections, and amendments.

See 2 Cent. Dig. App. & E. §§ 2115-2119.

Under Rev. St. § 1005, authorizing the supreme court to permit amendments in error which do not prejudice the defendant in error, when the defect can be remedied by reference to the record, it is proper, when a writ is not made returnable to any particular day, to permit the insertion of the proper return day.—

Evans v. Brown, 109 U. S. 180, 3 S. Ct. 83, 27 L. Ed. 898.

Under Rev. St. § 1005, allowing an amendment of a writ of error when there has been a mistake in the teste, or a seal is wanting, or the writ is made returnable on a wrong day, "and in all other particulars of form," a writ of error for review by the United States supreme court of a judgment of a state court, returnable on a wrong day, bearing the teste of the chief justice of the state court, and signed by the chief justice and the clerk, and sealed with the seal of that court, may be amended in those respects, and the seal and signature of the clerk of the supreme court affixed.—*Texas Pac. Ry. Co. v. Kirk*, 111 U. S. 486, 4 S. Ct. 500, 28 L. Ed. 481.

Where a writ of error was only served on one of the defendants, but, such fact not being discovered until after the supreme court had reversed the case thereupon, they entered a rule on the plaintiff in error to show cause why the judgment previously rendered should not be vacated and the writ of error dismissed, after considering the special circumstances of the case the supreme court allowed the writ to be amended, and a new citation issued to all the parties below, and ordering the cause to be restored to the docket for reargument.—*Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 6 S. Ct. 74, 29 L. Ed. 432.

Under Rev. St. § 1005, providing that a writ of error defective in statement of the parties may be amended, if the defect can be remedied by reference to the accompanying record, without prejudice to the defendant in error, a writ taken out in the name of a firm will not be dismissed when the record discloses the names of the partners.—*Estis v. Trabue*, 128 U. S. 225, 9 S. Ct. 58, 32 L. Ed. 437.

Under Act June 1, 1872, c. 255, § 3 (Rev. St. § 1005), where the writ of error describes "W., administrator of B., deceased," as plaintiff in error, and the record shows that the whole controversy was whether E. was legally such administrator in place of W., by whom the original action was brought, and that the exceptions were taken and tendered, and the bond to prosecute the writ was given, by E., the writ will be amended by substituting the name of E. for that of W.—*Walton v. Marietta Chair Co.*, 157 U. S. 342, 15 S. Ct. 626, 39 L. Ed. 725.

404. Citation or other process.

See 2 Cent. Dig. App. & E. §§ 2120-2134.

406. — Form and requisites.

See 2 Cent. Dig. App. & E. §§ 2123-2127.

Under Rev. St. § 705, providing that appeals from the supreme court of the District of Columbia to the United States supreme court shall be taken under the same regulations as appeals from the circuit court, and section 990, providing that, on appeals from the circuit court, a judge of that court may sign the citation, any justice of the supreme court of the District of Columbia may sign the citation on appeal from that court.—*Richards v. Mackall*, 113 U. S. 539, 5 S. Ct. 535, 28 L. Ed. 1132.

Where an appeal is allowed by the court during the term at which the decree was rendered, and security is taken out of court or after the term, a citation is only necessary to show that the appeal has not been abandoned by the failure to furnish the security before the adjournment; and an order on appellee to appear and argue the cause, if he see fit, is the legal equivalent of a citation for all the purposes of such an appeal.—*Dodge v. Knowles*, 5 S. Ct. 1108, 114 U. S. 430, 29 L. Ed. 144.

A citation on appeal from a circuit court or a territorial court must be signed by the judge thereof or by a justice of the supreme court, and, if signed by the clerk, the appeal

will be dismissed.—*Brown v. McConnell*, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495.

Though Rev. St. U. S. § 999, provides that the adverse party shall have at least 30 days' notice, a writ of error will not be dismissed on the ground that the citation was issued and made returnable less than 30 days after the writ was granted.—*Seagrist v. Crabtree*, 127 U. S. 773, 8 S. Ct. 1394, 32 L. Ed. 323.

The fact that on an appeal to the supreme court of the United States the citation, which was signed March 12th, was made returnable on the first day of the ensuing October term, instead of within 60 days, as required by Rule 8, § 5, and Rule 9, § 4, of the supreme court, is an error which is not jurisdictional, and hence will not require a dismissal of the appeal.—*Shute v. Keyser*, 149 U. S. 649, 13 S. Ct. 960, 37 L. Ed. 884.

407. — Service.

See 2 Cent. Dig. App. & E. §§ 2120, 2123-2132.

Upon allowance of an appeal to the supreme court of the United States, and the giving of bond, the filing of the record within the proper time gives the court jurisdiction, though citation is not served on the appellee until afterwards.—*Mendenhall v. Hall*, 134 U. S. 559, 10 S. Ct. 616, 33 L. Ed. 1012.

Under Rev. St. § 999, providing that, in case of writ of error to a state court, "the adverse party shall have at least 30 days' notice," citation must be served on the party or his attorney personally, if not in some manner personally waived by one of them; and the mailing of it to them is not sufficient, though under the laws of the state that would be a proper service.—*Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 12 S. Ct. 655, 36 L. Ed. 371.

409. — Defects, objections, and amendments.

See 2 Cent. Dig. App. & E. § 2134.

Service of a citation of a writ of error from the supreme court of the United States to the highest court of a state, on defendant in error in another state by the marshal of that district, is an irregularity which must be promptly taken advantage of in the court where the writ is returnable, on an appearance limited to that purpose.—*Renaud v. Abbott*, 116 U. S. 277, 6 S. Ct. 1194, 29 L. Ed. 629.

On appeal in a suit by A. and B. against C. the bond was entitled, "A., surviving complainant in A. and B. against C.," and the citation ran to A., surviving complainant, etc. It nowhere appeared that complainants were partners. The proper course of proceedings (Rev. St. § 955; Act March 3, 1875, § 9; 18 Stat. 470; Rule 15), by notifying the representatives of B. of the appeal, was wholly disregarded, and they did not appear voluntarily. *Held*, that four years having elapsed since the entry of final decree, and the supreme court never having had jurisdiction over the representatives of B., the appeal could not be amended, but must be dismissed. (C. C.) 29 F. 861 affirmed.—*Dolan v. Jennings*, 139 U. S. 385, 11 S. Ct. 584, 35 L. Ed. 217.

411. Nature and method of notice in general.

See 2 Cent. Dig. App. & E. § 2100.

An order on appellee to appear and argue the cause if he see fit is the legal equivalent of a citation for all the purposes of the appeal.—*Dodge v. Knowles*, 114 U. S. 436, 5 S. Ct. 1108, 29 L. Ed. 144.

The filing of an appeal bond and its approval in open court afford notice to the appellee of the appeal.—*Goodwin v. Fox*, 120 U. S. 775, 7 S. Ct. 779, 30 L. Ed. 815.

⚡416. **Form and requisites of notice.**
See 2 Cent. Dig. App. & E. §§ 2140-2149; 42 Cent. Dig. Refer. § 215.

⚡417. — **Sufficiency in general.**
See 2 Cent. Dig. App. & E. §§ 2140-2149; 13 Cent. Dig. Costs, § 328; 42 Cent. Dig. Refer. § 215.

Under Code Wash. T. § 454, requiring the appellants, in case a part only of several coparties appeal, to "serve notice thereof" upon the others, if, on the day when the appeal is taken, the appellants serve a notice on their coparties that they "will on this day" appeal, and the coparties accept service of the notice, and decline to join in the appeal, that is sufficient; and the appeal should not be dismissed for want of notice of an appeal already taken.—*Ex parte Parker*, 120 U. S. 737, 7 S. Ct. 767, 30 L. Ed. 818.

⚡422. — **Defects, objections, and amendments.**

See 2 Cent. Dig. App. & E. § 2149.

It is no objection to the notice of appeal that it was given at the chambers of the trial judge while he was without the territorial limits of his district, at the place where the supreme court, of which he was a member, and which he was attending, was in session.—*Ex parte Parker*, 131 U. S. 221, 9 S. Ct. 708, 33 L. Ed. 123.

⚡423. **Service of notice.**

See 2 Cent. Dig. App. & E. §§ 2150-2155.

⚡425. — **Time for service.**

See 2 Cent. Dig. App. & E. §§ 2155-2161.

Act Wash. T. Nov. 23, 1883, provides that any one desiring to remove a cause from the district court "may give notice in open court, or at chambers, that he appeals such cause to the supreme court," and that "such notice shall, by order of the court or judge having jurisdiction of the cause, be entered in the journal of said court, and no other service or notice shall be required." *Held*, that Code Wash. T. § 2140, providing that when a party to an action has appeared in the same he shall be entitled to at least three days' written notice of any application to be made therein, does not apply to a notice of appeal given in accordance with the act of 1883, within the time allowed by law, as the allowance of such appeal is of course.—*Ex parte Parker*, 131 U. S. 221, 9 S. Ct. 708, 33 L. Ed. 123.

⚡430. **Effect of failure to serve process or to give notice.**

See 2 Cent. Dig. App. & E. §§ 2173, 2174; 3 Cent. Dig. App. & E. § 3123.

Where a case is docketed in time, it will not be dismissed for want of the citation until time has been given to cite appellee.—*Brown v. McConnell*, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495.

Where the citation has been accidentally omitted, the appeal will not be dismissed until an opportunity to give required notice has been furnished.—*Richardson v. Green*, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

(E) ENTRY, DOCKETING, AND APPEARANCE.

⚡432. **Time for entry or docketing.**

See 2 Cent. Dig. App. & E. §§ 2177-2181.

Where a writ of error is sued out of the supreme court of the United States, if the transcript is not filed, and the cause docketed at the term to which it is returnable, or a good excuse given for the delay, the writ of error ceases to be operative, and a motion by defendant in error to docket and dismiss the appeal will be granted.—*State of New Jersey v. Demarest*, 110 U. S. 400, 4 S. Ct. 25, 28 L. Ed. 191.

In the absence of a sufficient excuse being shown therefor, the appeal will be dismissed where the cause was not docketed during the term to which the appeal was returnable.—*Killian v. Clark*, 111 U. S. 784, 4 S. Ct. 700, 28 L. Ed. 599.

The docketing of a cause by defendant in error in advance of the return day of the writ of error would not prevent the plaintiff in error from doing what was necessary, while the writ was in life, to give it full effect.—*Davies v. United States*, 113 U. S. 687, 5 S. Ct. 696, 28 L. Ed. 1149; *Gaines v. Same*, 113 U. S. 687, 5 S. Ct. 697, 28 L. Ed. 1150.

Complainant sued to foreclose a mortgage. In April, 1884, the bill was dismissed on its merits as to some of the debts secured by it, and as to the balance was referred to a master. Complainant appealed, but never docketed it in the supreme court. October 10, 1885, the court entered a decree, and allowed an appeal, but did not fix the amount of the bond until February 8, 1886. June 1, 1886, complainant filed an appeal bond, approved by the court, and the case was docketed October, 1886. No citation was ever served. *Held*, that the appeals were inoperative, because not docketed before the end of the next term of the supreme court after appeal allowed.—*Radford v. Folsom*, 123 U. S. 725, 8 S. Ct. 334, 31 L. Ed. 292.

The failure to docket in time is not excused by the fact that the clerk below agreed to file the record with the clerk of the supreme court, and it was left with him for that purpose.—*Fayolle v. Texas Pac. Ry. Co.*, 124 U. S. 519, 8 S. Ct. 588, 31 L. Ed. 533.

Where an appeal was returnable at the term ending May 4, 1885, but was not docketed until January 17, 1886, and the transcript was not lodged in the office of the clerk until after the return term, the appeal will be dismissed.—*Id.*

Where the court of claims dismisses both petition and counterclaim, and both parties appeal, and plaintiff fails to have his appeal docketed during the return term, it will be dismissed for want of due prosecution.—*United States v. Burchard*, 125 U. S. 176, 8 S. Ct. 832, 31 L. Ed. 662.

Where the transcript has been filed during the term next after the time when the appeal was allowed, but the cause has not been docketed during that term because of an omission to comply with the rules as to deposit for costs and entry of appearance, and no motion to dismiss is made during that term, the appeal will not be dismissed for such failure to docket at the proper term.—*Richardson v. Green*, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

Judgment was entered against plaintiff, a member of the bar of the supreme court in a circuit court, July, 1887, and a writ of error was issued October 3d. In May, 1888, he forwarded the record to the supreme court, with a letter to the clerk saying: "Will send you a docket fee and a stipulation to submit under rule 20 in a few days. Please send me two blanks for entering the appearance of attorneys for both parties." The blanks were forwarded. January 7, 1890, plaintiff sent a docket fee of \$25, requesting that the case be docketed at once. On motion to dismiss for failure to docket at the term after taking the appeal, plaintiff made affidavit that he was not familiar with the rules of the supreme court, and supposed he had done everything required to have the case docketed in time, and that he had omitted nothing knowingly. *Held*, that since members of the supreme court bar are bound to know its rules, and as the two years allowed by Rev. St. § 1008, for bringing a writ of error, elapsed before the docketing, plaintiff was guilty of gross laches, and the case must be dismissed.

—Green v. Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. Ed. 792.

An appeal from a decree for the dismissal of the bill and for costs will be dismissed where the papers on appeal were not filed in the circuit court within two years after the decree, as required by Rev. St. § 1008.—Fowler v. Hamill, 139 U. S. 549, 11 S. Ct. 663, 35 L. Ed. 266.

434. Necessity and requisites of appearance.

See 2 Cent. Dig. App. & E. § 2183.

Upon filing the transcript, appearance of appellant's counsel must be filed.—Green v. Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. Ed. 792.

An appeal will not be dismissed because the appearance of R. in the appellate court as counsel for appellant, entered at the time the case was docketed, was unauthorized by him, and made without his knowledge, he having had charge of the case for appellant in the court below, and having taken no steps to sever his connection with the case by substituting other counsel, and his appearance having been entered by other counsel in good faith, and by virtue of a supposed authority from him, and other counsel having appeared, and taken charge of the case.—Davis v. Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578.

435. Effect of appearance.

See 2 Cent. Dig. App. & E. §§ 2184-2190.

That the citation of writ of error was not properly served is waived by an appearance, which, though special in terms, is not limited to any particular purpose.—Renaud v. Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. Ed. 629.

An appearance to move to dismiss the appeal or writ of error does not waive the want of notice or citation.—Radford v. Folsom, 123 U. S. 725, 8 S. Ct. 334, 31 L. Ed. 292.

If the appellee appears and takes part in the proceedings above, he waives notice or citation.—Richardson v. Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

An appearance on appeal waives the objection that the citation was not made returnable to the proper day.—Shute v. Keyser, 149 U. S. 649, 13 S. Ct. 960, 37 L. Ed. 884.

Where appellee or defendant in error moves for a new bond after entry of the case on the docket in the supreme court at the return term, he waives an objection that the case was not docketed in time.—Waldron v. Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

Criminal prosecutions, see Criminal Law, 1083.

(A) POWERS AND PROCEEDINGS OF LOWER COURT.

438. New trial or rehearing.

See 2 Cent. Dig. App. & E. § 2196; 37 Cent. Dig. New Tr. § 7.

Entertaining and considering a motion for rehearing keeps the cause within the court's jurisdiction, notwithstanding a previous entry allowing an appeal; and, when the motion is denied, a new appeal becomes necessary.—Vorhees v. John T. Noye Mfg. Co., 151 U. S. 135, 14 S. Ct. 295, 38 L. Ed. 101.

The Court of Claims did not lose jurisdiction of the case on application for an appeal to the federal Supreme Court so as to prevent it from allowing subsequent motion to withdraw the application and entertain motion for

new trial.—Cherokee Nation v. Whitmire, 32 S. Ct. 200, 223 U. S. 108, 56 L. Ed. 370, reversing decree Whitmire v. United States, 46 Ct. Cl. 227.

440. Amendment of proceedings.

See 2 Cent. Dig. App. & E. §§ 2198-2201; 30 Cent. Dig. Judgm. § 585.

In a suit claiming a lien upon a fund in the hands of a receiver, where a decree was rendered sustaining a demurrer and dismissing the bill, an amendment to the decree directing the receiver to pay over the fund to defendants is a thing of course, and may be made by the trial court for the purpose of perfecting its decree, even after an appeal has been taken.—Hovey v. McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. Ed. 888.

452. Irregular or ineffectual proceedings for review.

See 2 Cent. Dig. App. & E. §§ 2212, 2213.

The mere allowance of an appeal to the supreme court, without any steps taken to perfect the same, does not divest the circuit court of jurisdiction, and it may at the same term vacate the order of allowance, and grant an appeal to the circuit court of appeals.—Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986.

(B) JURISDICTION ACQUIRED BY APPELLATE COURT.

455. Time when jurisdiction attaches.

See 2 Cent. Dig. App. & E. § 2214.

The filing of the transcript of record during the term next after the term at which an appeal is allowed gives the supreme court of the United States jurisdiction of an appeal from the circuit court, though citation is not obtained nor bond given until after the time allowed by law for the appeal has expired.—Evans v. State Nat. Bank of New Orleans, 134 U. S. 330, 10 S. Ct. 493, 33 L. Ed. 917.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

Computation of time for filing supersedeas, see Time, 10.

Review of criminal prosecutions, see Criminal Law, 1084.

459. Taking and perfecting appeal or other proceeding for review as condition.

See 2 Cent. Dig. App. & E. §§ 2218-2221.

A writ of supersedeas issued by the circuit court of appeals to a district court, after an appeal has been allowed, citation signed, and supersedeas bond approved by a judge, cannot be deemed void for lack of jurisdiction merely because the appeal papers are not filed with the clerk of the district court until a subsequent day, when it is attacked by writ of habeas corpus in favor of a person committed for contempt because of disobeying such writ.—In re McKenzie, 21 S. Ct. 468, 180 U. S. 536, 45 L. Ed. 657.

The general provisions of Rev. St. U. S. § 1007 (U. S. Comp. St. 1901, p. 714), limiting the time within which a writ of error must be allowed and lodged in the clerk's office if a supersedeas is desired, would govern writs of error from the federal Supreme Court to the Circuit Courts of Appeals, even under the mistaken hypothesis that writs of error from the Circuit Courts of Appeals to inferior courts, and appeals from such courts to the Circuit Courts of Appeals, were all that were within the purview of the provision of Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), that "all provisions of law now in force regulating the methods and sys-

tem of review, through appeals or writs of error, shall regulate the methods and systems of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."—(1912) Title Guaranty & Surety Company v. United States, 32 S. Ct. 168, 222 U. S. 401, 56 L. Ed. 248, granting motion to vacate supersedeas (1911) 187 F. 98, 109 C. C. A. 106, which affirms (C. C. 1910) United States v. Schofield, 182 F. 240. Writ of certiorari denied (1911) Title Guaranty & Surety Co. v. United States v. U. of General Electric Co., 32 S. Ct. 523, 223 U. S. 720, 56 L. Ed. 629.

The time fixed by Rev. St. U. S. § 1007 (U. S. Comp. St. 1901, p. 714), within which a writ of error from the federal Supreme Court to a circuit court of appeals must be allowed and lodged in the clerk's office if a supersedeas is desired, cannot be extended by a stay granted to afford an opportunity to apply for a writ of certiorari, since there is no power in the federal Supreme Court to allow a certiorari under Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547), in a case where there is authority to review the action of the lower court by writ of error or appeal.—Id.

◄460. **Operation of appeal or writ of error and necessity for security or allowance.**

See 2 Cent. Dig. App. & E. §§ 2217-2226, 2245, 2246; 27 Cent. Dig. Ind. § 442; 42 Cent. Dig. Refer. § 222.

Where, in a proceeding in equity to establish a lien on a fund in the hands of a receiver, a decree is rendered dismissing the bill, and directing the receiver to pay over the fund to defendants, an appeal will not operate as a supersedeas to suspend the decree without an affirmative order, retaining the fund in the receiver's hands pending its determination, and he incurs no liability by paying over the fund in obedience to the decree.—Hovey v. McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. Ed. 888.

A writ of error from the supreme court of the United States to the supreme court of a state does not operate as a supersedeas until it is properly lodged in the clerk's office of the state court.—Foster v. Kansas, 112 U. S. 201, 5 S. Ct. 897, 28 L. Ed. 629.

◄461. **Use of appeal or cost bond as supersedeas bond.**

See 2 Cent. Dig. App. & E. §§ 2235-2238.

Where the decree appealed from is not collectible under ordinary execution, and no personal decree can be rendered, a motion for additional security on a supersedeas bond will not be granted, if the bond on file is sufficient to protect the appellee from loss pending the appeal from sales for taxes, if he avails himself of the remedy by redemption afforded by law.—Johnson v. Waters, 108 U. S. 4, 1 S. Ct. 1, 27 L. Ed. 630.

◄462. **Upon security.**

See 2 Cent. Dig. App. & E. §§ 2227, 2229-2244.

◄468. **Time of giving bond.**

See 2 Cent. Dig. App. & E. § 2229.

Where a court in session, and acting judicially, allows an appeal which is entered of record without taking a bond within 60 days after rendering a decree, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of that time, under Rev. St. U. S. § 1007, which provides that, if a party desires to stay process on the judgment against him, he may, having served his writ of error, give the security required by law within 60 days after rendition of the judgment, or afterwards with the permission of

a judge of the appellate court.—Peugh v. Davis, 110 U. S. 227, 4 S. Ct. 17, 28 L. Ed. 127.

The affidavit filed in support of a motion to vacate a supersedeas alleged that appellees were not served with a citation, or with notice of an application for the allowance of an appeal, within the time required by law; but it also stated that their attorney was informed that an appeal bond had been presented to the court within such time, and that afterwards an order was made allowing the appeal nunc pro tunc as of the date of the presentation of the bond. Appellants filed an affidavit that on the day the bond was presented to the court it was approved and filed in the cause. *Held*, that it was incumbent on appellees to show that the bond was not accepted in time.—The Colonel McLeod, 112 U. S. 710, 5 S. Ct. 361, 28 L. Ed. 825.

Rev. St. U. S. § 1007, provides that, where a writ of error may be a supersedeas, defendant may obtain the supersedeas by serving the writ, by lodging a copy for the adverse party in the clerk's office within 60 days, Sundays exclusive, after judgment rendered, and giving the security required by law; but, if he desires to stay process on the judgment, he may, having served his writ, give the security required by law "within 60 days after the rendition of such judgment." Section 1012 makes the provisions as to writs of error applicable to appeals from the circuit courts. *Held*, that the exclusion of Sundays applies to the time for filing a supersedeas bond, as well as to the time for lodging the writ of error or taking the appeal.—Town of Danville v. Brown, 128 U. S. 503, 9 S. Ct. 149, 32 L. Ed. 507.

◄475. **Additional or new security.**

See 2 Cent. Dig. App. & E. § 2244.

In a suit to subject lands to the payment of the debts of one of appellants, his death will not be ground for increasing the amount of the supersedeas bond, which was sufficient when it was given, where it is not shown that the property is depreciating in value because of neglect of the surviving appellants in its care and management.—Harwood v. Dickert, 117 U. S. 200, 6 S. Ct. 669, 29 L. Ed. 887.

An undertaking to discharge an attachment, signed by only one surety, was accepted by the judge below, and the attachment discharged. Judgment having been rendered against defendant, the latter gave bond, signed by two sureties, to prosecute a writ of error to effect. *Held*, that a motion to compel defendant to furnish additional security, made because another surety should have been required before the attachment was discharged, would be denied.—Mexican Nat. Const. Co. v. Reusens, 118 U. S. 49, 6 S. Ct. 945, 30 L. Ed. 77.

◄476. **Upon allowance by court or judge.**

See 2 Cent. Dig. App. & E. §§ 2245-2253.

◄477. **Authority of court or judge.**

See 2 Cent. Dig. App. & E. §§ 2247-2249.

When a writ of error to the United States supreme court has been allowed, but not issued, an order allowing a supersedeas bond is a nullity for want of jurisdiction, and the same want of jurisdiction prevents the United States supreme court from entertaining a motion to vacate.—Ex parte Ralston, 119 U. S. 613, 7 S. Ct. 317, 30 L. Ed. 506.

Where, on an appeal to the United States supreme court, the bond taken is intended to operate as a stay of the execution of that part of the decree appealed from which was for the payment of money only, and the appeal is taken within 60 days from the rendition of the decree, a motion in the supreme court for supersedeas will be denied, as the justice who is

assigned to the circuit from which the appeal comes may, in his discretion, under Rev. St. § 1007, grant a further stay, if application is made to him.—*Covington Stock-Yards Co. v. Keith*, 121 U. S. 248, 7 S. Ct. 881, 30 L. Ed. 914.

The continuance of a temporary injunction pending an appeal to the federal Supreme Court from a decree of a circuit court, dismissing a bill asking injunctive relief, is within the inherent equity powers of the latter court.—*Merrimack River Savings Bank v. City of Clay Center*, 31 S. Ct. 295, 219 U. S. 527, 55 L. Ed. 320, Ann. Cas. 1912A, 513.

6-479. — Grounds for allowance.

See 2 Cent. Dig. App. & E. §§ 2251-2256.

Upon an appeal to the circuit court of appeals under section 7 of the judiciary act of March 3, 1891, from an interlocutory decree granting or continuing an injunction, defendant is not entitled to a supersedeas as a matter of right, and it is within the discretion of the circuit court to grant or refuse the same. *Société Anonyme du Filtre Chamberland Systeme Pasteur v. Blount*, 51 F. 610, overruled.—*In re Haberman Mfg. Co.*, 147 U. S. 525, 13 S. Ct. 527, 37 L. Ed. 266.

6-482. Modifying or vacating.

See 2 Cent. Dig. App. & E. §§ 2259-2263.

A motion to vacate a supersedeas, or for an order declaring that the appeal bond filed in the case does not operate as a supersedeas, will be denied as unnecessary, where the writ of error was not sued out or served within the time required by the statute in order that the bond operate as a supersedeas.—*Western Air-Line Const. Co. v. McGillis*, 127 U. S. 776, 8 S. Ct. 1390, 32 L. Ed. 324.

6-484. Scope and effect as stay.

See 2 Cent. Dig. App. & E. §§ 2264-2279.

6-485. — Proceeding in cause in general.

See 2 Cent. Dig. App. & E. §§ 2228, 2264-2274; 27 Cent. Dig. Inj. § 442.

Where an action brought in a state court to enforce a remedy given by a state statute is removed to the federal court, the federal court can exercise only the powers that the state court could have exercised had its jurisdiction been retained, and, on appeal to the supreme court of the United States, the supersedeas will be limited to the effect of a supersedeas in case of an appeal to the supreme court of the state.—*East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 5 S. Ct. 168, 28 L. Ed. 746.

6-488. — Injunction.

See 2 Cent. Dig. App. & E. §§ 2277, 2278; 27 Cent. Dig. Inj. § 442.

Where the judge of the circuit court, in allowing an appeal from a decree granting an injunction, fails to exercise the discretion vested in him by equity rule 93, by entering an order modifying or suspending the injunction pending the appeal, it will not be vacated thereby, although the appeal complies with the requirements of a supersedeas.—*Leonard v. Ozark Land Co.*, 115 U. S. 465, 6 S. Ct. 127, 29 L. Ed. 445.

The perfecting of an appeal from a decree dismissing a bill to restrain the collection of a judgment does not operate to supersede such judgment.—*Knox County v. Harshman*, 10 S. Ct. 8, 132 U. S. 14, 33 L. Ed. 249.

6-489. — Appointment and proceedings of receiver.

See 2 Cent. Dig. App. & E. § 2279.

Pending an appeal from a final decree with a supersedeas, a receiver obtained an order from

the court directing the expenditure of funds to repair property to save it from waste. *Held*, no error, since the supersedeas simply suspended action in regard to executing the decree, and the order in question was confined simply to the preservation of the property.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 118, 7 S. Ct. 849, 30 L. Ed. 909.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

Action for divorce, see Divorce, 6-285.

Expenses of record as items of costs, see Costs, 6-253-256.

In admiralty, see Admiralty, 6-115.

Review of criminal prosecutions, see Criminal Law, 6-1085-1122.

Review of decisions of territorial court, see Courts, 6-387(4).

Review on certiorari, see Certiorari, 6-48-54.

(A) MATTERS TO BE SHOWN BY RECORD.

Review of criminal prosecutions, see Criminal Law, 6-1085, 1086.

6-493. Jurisdiction of lower court.

See 3 Cent. Dig. App. & E. §§ 2232-2234.

The supreme court of the United States will not dismiss a bill in the circuit court of the United States, by a railroad company against the auditors of several counties to avoid assessments and taxes levied on its lands, when the record fails to show whether the taxes levied by either of the counties exceeded \$2,000, since by amendment the bill may perhaps be retained as to some of the defendants.—*Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 13 S. Ct. 650, 37 L. Ed. 494.

6-496. Proceedings sustaining judgment or order.

See 3 Cent. Dig. App. & E. §§ 2238-2239.

If a written stipulation waiving a jury is not in some way shown affirmatively in the record, none of the questions decided at the trial can be re-examined in the supreme court on writ of error.—*Madison County v. Warren*, 106 U. S. 622, 2 S. Ct. 86, 27 L. Ed. 311; *Alexander County v. Kimball*, 106 U. S. 623, 2 S. Ct. 86, 27 L. Ed. 311.

The filing of a stipulation in writing, waiving a jury, under Rev. St. § 649, is not sufficiently shown by a statement in the record or in the bill of exceptions, that "the issue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial, by agreement of parties, by the court, without the intervention of a jury."—*Bond v. Dustin*, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835; *Davenport v. Paris*, 136 U. S. 580, 10 S. Ct. 1064, 34 L. Ed. 548.

Where the record alleges that a case was tried by the court without a jury, by agreement of the parties, but does not allege that the stipulation was in writing, as required by the statute, no error in the rulings at the trial can be examined. *Bond v. Dustin*, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835, followed.—*Spalding v. Manasse*, 131 U. S. 65, 9 S. Ct. 649, 33 L. Ed. 86.

On appeal from the court of claims under act of February 25, 1889, relating to Cherokee claims, the findings of fact and conclusions of law should be sent up on appeal.—*United States v. Old Settlers*, 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509, modifying decree *Western Cherokee Indians v. Same*, 27 Ct. Cl. 1.

6-498. Presentation and reservation of grounds of review.

See 3 Cent. Dig. App. & E. §§ 2295-2309.

499. — Questions and objections in general.

See 3 Cent. Dig. App. & E. §§ 2295-2298; 45 Cent. Dig. Tax. § 1617.

In a suit in a territorial district court, motions to suppress a deposition, and to strike out certain parts of it, were made and overruled, and no exception taken. The decree was in favor of the moving party, but on appeal to the territorial supreme court, whether the entire record was transferred, this was reversed, and he thereupon appealed to the supreme court of the United States. The record in the latter court did not show that either motion was renewed in the territorial supreme court, or that any action was there asked or taken before judgment in respect to such deposition. *Held*, that the judgment could not be reversed on the ground that the evidence contained in the deposition was incompetent, and should have been excluded.—*San Pedro & Canon Del Agua Co. v. United States*, 146 U. S. 120, 13 S. Ct. 94, 36 L. Ed. 911, affirming decree *United States v. San Pedro Cañon del Agua Co.*, 17 P. 337, 4 N. M. (Gild.) 405.

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to the supreme court under Act March 3, 1891, § 5 (26 Stat. 827, c. 517).—*Ansburo v. United States*, 159 U. S. 695, 16 S. Ct. 187, 40 L. Ed. 310.

Failure to charge as to assumption of risk in an action for death is not error, where the record does not show that the court was requested to make any charge on that subject, or that any exception was taken to its failure to do so.—*Myers v. Pittsburgh Coal Co.*, 34 S. Ct. 559, 233 U. S. 184, 58 L. Ed. 906, reversing judgment *Pittsburgh Coal Co. v. Myers*, 203 F. 221, 121 C. C. A. 427.

500. — Rulings by lower court.

See 3 Cent. Dig. App. & E. §§ 2295-2298.

Errors in rulings on evidence cannot be reviewed where the record does not show that objection was made below.—*United States v. Carver*, 110 U. S. 51, 3 S. Ct. 424, 28 L. Ed. 67.

501. — Exceptions.

See 3 Cent. Dig. App. & E. §§ 2300-2305.

Bills of exceptions must show affirmatively that the exceptions were taken during the trial, and not after the return of verdict.—*Pacific Exp. Co. v. Malin*, 132 U. S. 531, 10 S. Ct. 166, 33 L. Ed. 450.

When a bill of exceptions set out an instruction given by the court, following it with the words "to which defendant excepted," it will be presumed that the exception was taken at the trial and while the jury were at the bar, although there was no explicit statement to that effect.—*New Orleans & N. E. R. Co. v. Jopes*, 12 S. Ct. 109, 142 U. S. 18, 35 L. Ed. 919.

On appeal in a suit for infringement of copyright, an assignment of error stated that the decree was erroneous, "because it recites that the hearing was upon the master's report, with exceptions thereto, when there was no report or any exceptions thereto before the court at the final hearing." The only special report shown by the record was one in respect to the issuance of a preliminary injunction, which found certain facts showing infringement, and recommended the injunction. The record contained no exceptions thereto, but the final decree, as well as the opinion of the court, recited that the cause was heard upon the bill, answers, etc., and the master's report, with exceptions. *Held*, that these recitals manifestly referred to the report on the preliminary injunction, and that the assignment was of no avail, for want of ex-

ceptions in the record.—*Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

An assignment of error in the allowance of damages for infringement by the master cannot be considered when the record fails to show that any exception was taken to such allowance in the court below.—*Topliff v. Topliff*, 145 U. S. 156, 12 S. Ct. 825, 36 L. Ed. 658.

The admission and exclusion of evidence against objections cannot be considered when the record fails to show that any exceptions were taken to such ruling. *United States v. Breitling*, 61 U. S. (20 How.) 252, 15 L. Ed. 900, followed.—*Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887.

504. Taking and perfecting of appeal or other proceeding for review.

See 3 Cent. Dig. App. & E. §§ 2312-2317.

If it does not appear from the record, or from the proof submitted when issue is joined on that point, that the amount in controversy is sufficient to give jurisdiction to the appellate court, the appeal must be dismissed.—*Parker v. Morrill*, 106 U. S. 1, 1 S. Ct. 14, 27 L. Ed. 72; *Bowman v. Chicago & N. W. Ry. Co.*, 115 U. S. 611, 6 S. Ct. 192, 29 L. Ed. 502; *Wells v. Wilkins*, 116 U. S. 393, 6 S. Ct. 29, L. Ed. 671; (1885) *Goldstucker v. Same*, 116 U. S. 394, 6 S. Ct. 601, 29 L. Ed. 671; *Hunt v. Blackburn*, 127 U. S. 774, 8 S. Ct. 1395, 32 L. Ed. 323.

On appeal to the United States supreme court, motion to dismiss the writ of error for want of jurisdiction was made upon a statement of facts filed as "Plaintiffs' exceptions. Allowed," and which the record entry showed was "the bill of exceptions presented to the plaintiffs, and allowed by the court, before judgment." *Held* that, in ruling upon the motion, the facts therein stated, showing an insufficiency in the jurisdictional amount, could be considered by the court as part of the record.—*United States v. Hill*, 8 S. Ct. 308, 123 U. S. 681, 31 L. Ed. 275.

506. — Sufficiency of proceedings in general.

See 3 Cent. Dig. App. & E. §§ 2312, 2314.

Where the record shows the filing of a petition for an appeal, its allowance, the filing and approval of a bond containing a recital that the appellant had obtained an appeal and filed a copy thereof in the clerk's office, and the service and filing of the citation, it sufficiently shows that the appeal as allowed was duly filed.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

514. Successive appeals or proceedings for review.

See 3 Cent. Dig. App. & E. §§ 2330, 2331.

Where a writ of error to a decree in chancery in a United States circuit court, instead of an appeal from such decree, was sued out, and plaintiff in error consented to a dismissal of the writ of error, the supreme court will permit him, on seasonably taking and prosecuting an appeal from the decree of the circuit court, to file as part of the return the transcript of the record on the writ of error.—*Williams v. Passumpsic Sav. Bank*, 141 U. S. 249, 11 S. Ct. 1005, 35 L. Ed. 740.

515. Incorporating evidence and stenographer's report.

See 3 Cent. Dig. App. & E. §§ 2322-2325.

Where a case was disposed of on demurrer to the bill, the evidence on file is not necessary in a hearing on appeal.—*Missouri, K. & T. Ry. Co. v. Dinsmore*, 108 U. S. 30, 2 S. Ct. 9, 27 L. Ed. 640.

On an appeal from the court of claims under Act Feb. 25, 1889 (25 Stat. p. 694), relating to the Cherokee claims, the evidence should be sent up on appeal. *Harvey v. U. S.*, 105 U. S. 671, 28 L. Ed. 1206, followed.—*United States v. Old Settlers*, 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509, modifying decree *Western Cherokee Indians v. Same*, 27 Ct. Cl. 1.

(B) SCOPE AND CONTENTS OF RECORD.

Review of criminal prosecutions, see Criminal Law, 51088.

Review on certiorari, see Certiorari, 50.

517. Process and appearance.

See 3 Cent. Dig. App. & E. § 2341.

A letter, written by defendant's attorney to plaintiff's attorney, withdrawing his appearance, and filed in the case by plaintiff, though not thereby made a part of the record, may become so by being embodied by defendant in a bill of exceptions. Judgment 48 P. 309, affirmed.—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 19 S. Ct. 761, 174 U. S. 603, 43 L. Ed. 1103.

521. Evidence.

See 3 Cent. Dig. App. & E. §§ 2367-2375.

523. — Depositions and affidavits.

See 3 Cent. Dig. App. & E. §§ 2372-2374; 5 Cent. Dig. Attach. § 898.

A party cannot, by merely filing with the clerk an affidavit not incorporated in any bill of exceptions, bring into the record evidence of what took place at the trial.—*Nelson v. Flint*, 17 S. Ct. 576, 166 U. S. 276, 41 L. Ed. 1002.

524. — Documents.

See 3 Cent. Dig. App. & E. §§ 2371, 2375.

Though depositions taken on behalf of defendants, in an action for infringement of letters patent, contained no express minute that the Weild patent, under which they claimed, was offered in evidence, still, it having been referred to and used in the examination, and marked as an exhibit in the cause by the examiner, and returned and certified as part of the record, it will be received as having been offered in evidence.—*Clark Thread Co. v. Willimantic Lnen Co.*, 140 U. S. 481, 11 S. Ct. 848, 35 L. Ed. 521, reversing decree *Willimantic Thread Co. v. Clark Thread Co.* (C. C.) 27 F. 865.

Papers or documents used at the hearing in the court below cannot, in strictness, be examined on appeal to, or writ of error from, the federal Supreme Court, unless they are made part of the record by bill of exceptions or some other proper mode.—*Bassing v. Cady*, 28 S. Ct. 392, 208 U. S. 386, 52 L. Ed. 540, 13 Ann. Cas. 905.

525. Instructions.

See 3 Cent. Dig. App. & E. §§ 2376-2378.

The transcript contained what purported to be the charge of the court in full, with a memorandum at the close stating that the plaintiff in error excepted to certain portions thereof, but it was not verified or included in any proper bill of exceptions. *Held*, that the charge could not be considered as a part of the record for any purpose.—*Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216.

528. Proceedings on motion in arrest, for new trial, or rehearing.

See 3 Cent. Dig. App. & E. §§ 2374, 2384-2388.

Affidavits in support of a motion for a new trial must be made part of the record by a special order of court, or by a bill of exceptions, or statement of facts.—*Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 9 S. Ct. 101,

32 L. Ed. 439; *Evans v. Stettinisch*, 149 U. S. 605, 13 S. Ct. 931, 37 L. Ed. 866.

532. Record on review of decision of intermediate court.

See 3 Cent. Dig. App. & E. §§ 2399-2401; 31 Cent. Dig. J. P. § 753.

An order of a United States circuit court, to which a case has been removed from a state court, dismissing an appeal taken to the latter court from an assessment of damages for condemnation of land for the use of a railroad company, on the ground that it was not taken within 60 days from the date of the assessment made by the commissioners, may be reviewed on writ of error from the supreme court of the United States, although no bill of exceptions has been prepared, as the record, of which such order is a part, sufficiently presents the question of law involved.—*Clinton v. Missouri Pac. Ry. Co.*, 122 U. S. 469, 7 S. Ct. 1268, 30 L. Ed. 1214.

A petition for a rehearing in the supreme court of a state is no part of the record on appeal to the supreme court of the United States.—*Grame v. Mutual Assur. Soc. of Virginia*, 154 U. S. 676, 14 S. Ct. 1193, 26 L. Ed. 740.

Errors of the court below, committed in sustaining the refusal of the trial court to give certain requested instructions or to set aside an assessment in condemnation proceedings, cannot be considered on writ of error, in the absence of any bill of exceptions, allowed and authenticated by the trial judge, although the transcript contains what purport to be certain instructions asked and refused, marked "Filed" by the clerk, and a petition to make certain testimony of record, and other papers concerning the evidence given before the jury, and an agreement between counsel, reciting that the court allowed the prayer of such petition. Judgment 20 App. D. C. 421, affirmed.—*Metropolitan R. Co. v. MacFarland*, 25 S. Ct. 28, 195 U. S. 322, 49 L. Ed. 219.

533. Opinion of lower court.

See 3 Cent. Dig. App. & E. §§ 2339, 2400.

The opinion of the court below forms no part of the record.—*England v. Gebhardt*, 112 U. S. 502, 5 S. Ct. 287, 28 L. Ed. 811.

535. Bill of exceptions, case, or statement.

See 3 Cent. Dig. App. & E. §§ 2402-2406.

537. — Necessity of time, making and filing in lower court.

See 3 Cent. Dig. App. & E. §§ 2404, 2405.

Under Rev. St. Ariz. §§ 843-845, which provide for a statement of facts to be signed and filed during the term of trial, or within an extended time, not exceeding 30 days from adjournment, and to become a part of the record, a statement, not signed or filed until more than 30 days after the term, does not become a part of the record, nor of a bill of exceptions previously settled, which incorporates the statement by reference.—*Cohn v. Daley*, 19 S. Ct. 802, 174 U. S. 539, 43 L. Ed. 1077.

539. Stipulations as to contents of record.

See 3 Cent. Dig. App. & E. §§ 2357, 2358, 2464.

Matters cannot be brought into a record by an agreement of counsel as to what took place on a trial.—*State of South Carolina v. Wesley*, 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254.

In determining whether error was committed in refusing to remand a case to the state court, a stipulation cannot be considered which was not mentioned in the reasons assigned in the lower court for the motion.—*Carr v. Rife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT OF FACTS.

Making and filing of bill of exceptions, see Exceptions, Bill of.

On writ of error from federal supreme court to a district court, see Courts, 385(4).

Review of criminal prosecutions, see Criminal Law, 1089-1091.

Review of decisions of territorial court, see Courts, 387(4).

544. Decisions not otherwise reviewable.

See 3 Cent. Dig. App. & E. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; 13 Cent. Dig. Costs, § 815.

Where the error appears upon the record, the party aggrieved may, without bill of exceptions, statement, or case, avail himself of it on appeal or writ of error.—*Coughlan v. District of Columbia*, 106 U. S. 7, 1 S. Ct. 37, 27 L. Ed. 74.

Where there is no "statement of the facts of the case in the nature of a special verdict," as required by Act April 7, 1874, c. 80 (1 Supp. Rev. St. 13), in the record on appeal from the judgment of the supreme court of a territory, reversing the district court on the ground that its findings of fact were contrary to the evidence, there is nothing which the court can re-examine, and the judgment will be affirmed.—*Gray v. Howe*, 108 U. S. 12, 1 S. Ct. 136, 27 L. Ed. 634.

Where it appears that a case was determined in the supreme court of a territory on findings of fact and law, together with a statement of evidence prepared for a motion for new trial submitted by stipulation, and, on appeal to the supreme court of the United States, the statement is not embodied in the record, the case will be determined on the sufficiency of the findings in connection with the pleadings to support the judgment.—*O'Reilly v. Campbell*, 116 U. S. 418, 6 S. Ct. 421, 29 L. Ed. 669.

The question whether the facts set forth in special findings of the court, in case of trial by the court without a jury, are sufficient in law to support the judgment, may be reviewed by the United States supreme court on writ of error without any bill of exceptions.—*Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

Under Rev. St. U. S. § 700, a bill of exceptions is necessary to review a case tried by the circuit court without a jury.—*Preston v. Prather*, 137 U. S. 604, 11 S. Ct. 162, 34 L. Ed. 788, affirming judgment (C. C.) *Prather v. Kean*, 29 F. 498.

Where, by stipulation, a case is tried by the circuit court without a jury, but there is no bill of exceptions to rulings of the court during the trial, as required by Rev. St. § 700, the supreme court cannot examine whether the findings are supported by the evidence.—*Id.*

In an action on certain notes, made in Texas, and secured by deed of trust, the defendant pleaded the statute of limitations. The notes and deed were filed with and made a part of the pleadings, and their execution was not denied under oath by the defendant. *Held*, that error in holding the action barred, based solely upon the construction of the notes and deed, was error upon the face of the record, and need not be presented by a bill of exceptions.—*Moline Plow Co. v. Webb*, 141 U. S. 616, 12 S. Ct. 100, 35 L. Ed. 879.

On appeal from a judgment of a territorial supreme court, where the bill of exceptions taken in the district court contains all the evidence, and it appears that such supreme court passed on other questions than those presented

on rulings in the admission of evidence, the case cannot be re-examined in the absence of a statement of facts.—*Bonfield v. Price*, 154 U. S. 672, 14 S. Ct. 1194, 26 L. Ed. 1022.

Where the record on appeal from the supreme court of a territory presents no statement of the facts, showing whether the facts found were sufficient to sustain the judgment rendered, and no exceptions were taken to rulings in the admission or rejection of evidence, there is no question for review.—*Salina Stock Co. v. Salina Creek Irr. Co.*, 163 U. S. 109, 16 S. Ct. 1036, 41 L. Ed. 90.

No bill of exceptions is necessary to review a ruling of the federal Circuit Court sustaining a demurrer to a defense in the answer.—*Board of County Com'rs of City & County of Denver v. Home Sav. Bank*, 35 S. Ct. 265, 236 U. S. 101, 59 L. Ed. 485, affirming judgment 200 F. 28, 118 C. C. A. 256.

552. Scope and sufficiency of case, statement, or certificate of evidence.

See 3 Cent. Dig. App. & E. §§ 2458-2460.

The supreme court of the United States will not review a decision of the circuit court, made on a statement of facts submitted by the parties after trial, which mainly recapitulates the evidence introduced, and on a finding that the parties admitted that, so far as the facts were stated in a certain reported opinion, they were correct, but claimed that there existed additional facts, on which there is no finding, where there is no bill of exceptions, and there were issues of fact, and the facts stated in the reported opinion referred to are scattered through it, intermingled with other things.—*Raimond v. Parish of Terrebonne*, 132 U. S. 192, 10 S. Ct. 57, 33 L. Ed. 309; *Davenport v. Paris*, 136 U. S. 580, 10 S. Ct. 1064, 34 L. Ed. 548.

Unless a statement of facts in the nature of a special verdict is made and certified by a territorial court, where the trial is without a jury, as required by 18 Stat. 27, 28, the supreme court, on appeal, must assume that the evidence supports the judgment. A so-called statement, which merely embodies the evidence, is not such as is contemplated by the statute.—*Cohn v. Daley*, 19 S. Ct. 802, 174 U. S. 539, 43 L. Ed. 1077.

553. Substitutes.

See 3 Cent. Dig. App. & E. §§ 2461, 2462, 2465-2471.

On appeal from the supreme court of Utah territory, the record set forth the pleadings, proceedings, and exceptions had at the trial, and was properly certified by the clerk, who stated in his certificate that a copy of defendant's bill of exceptions was not made part thereof because the bill was in the possession of defendant's attorney, and because as he was informed, there was a stipulation that the original bill should be used in the supreme court. The original bill was signed by the trial judge, indorsed by the clerk as properly filed in the trial court, and by the clerk of the territorial supreme court as properly filed therein. *Held*, that the original bill would be used in the United States supreme court.—*Bassett v. United States*, 137 U. S. 496, 11 S. Ct. 165, 34 L. Ed. 762, reversing judgment *United States v. Bassett*, 5 Utah, 131, 13 P. 237.

554. Effect of failure to make bill, case, or statement.

See 3 Cent. Dig. App. & E. §§ 2472-2477.

In the absence of a bill of exceptions taken during the progress of the trial, the judgment of the trial court will be affirmed.—*Bank of New Orleans v. Caldwell*, 154 U. S. 592, 14 S. Ct. 1171, 21 L. Ed. 305.

(D) CONTENTS, MAKING, AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.

563. Form and arrangement.

See 3 Cent. Dig. App. & E. § 2500.

An agreed statement of facts certified by a territorial supreme court as a statement of facts under the act of April 7, 1874, brings nothing before the supreme court of the United States for consideration, where, instead of stating the ultimate facts, it contains a narrative of facts, transcripts of records, and the testimony which certain witnesses would have given if they had been produced and sworn. Decree 62 P. 987, 10 N. M. 416, affirmed.—United States Trust Co. v. Territory of New Mexico, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

567. Time for settlement.

See 3 Cent. Dig. App. & E. §§ 2515-2522.

Under Rev. St. (relating to District of Columbia) §§ 803-806, providing that on appeal to the general term exceptions in a case stated or bill, if not reduced to writing at the trial, must have been entered on the minutes of the justice, and afterwards settled as required by rules of court; and rule 65, that the bill of exceptions must be settled before the close of the term,—an appeal taken on the last day of the term cannot be entertained where the case stated was not certified by the judge for two months afterwards.—Coughlan v. District of Columbia, 106 U. S. 7, 1 S. Ct. 37, 27 L. Ed. 74.

573. Making and filing agreed case or statement.

See 3 Cent. Dig. App. & E. §§ 2580, 2582-2584, 2586.

A verdict was taken by consent, "subject to the opinion of the court upon a case to be made, with liberty to either party to turn the same into a bill of exceptions." The case made pursuant to the verdict set forth all the evidence adduced at the trial, but was not an agreed statement of facts, a special verdict, or a finding of facts by the court, and it contained no exceptions. Held, that error could not be assigned thereon.—Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. Ed. 109.

An agreed statement of facts in the record on a writ of error, to the effect that either party may rely on all grounds of action or defense and all pleadings and evidence to be found in the records of two equity suits in other courts, attached to such statement as exhibits, where the effect of the evidence is controverted, cannot take the place of a special verdict of a jury or special finding by the court upon which the supreme court of the United States may properly determine the questions of law arising, and, there being in the record no bill of exceptions, the judgment must be affirmed.—Glenn v. Fant, 134 U. S. 398, 10 S. Ct. 583, 33 L. Ed. 969; Davenport v. Paris, 136 U. S. 580, 10 S. Ct. 1064, 34 L. Ed. 548.

(E) ABSTRACTS OF RECORD.

[No paragraphs or references in this Digest. But see 3 Cent. Dig. App. & E. §§ 2573-2620.]

(F) MAKING, FORM, AND REQUISITES OF TRANSCRIPT OR RETURN.

Condemnation proceedings, see Eminent Domain, 238.

592. Effect of failure to make abstract or brief.

See 3 Cent. Dig. App. & E. §§ 2618-2620, 3126.

A case was brought by writ of error to the United States supreme court. There was no assignment of errors in the transcript returned

with the writ, as required by Rev. St. § 997. The brief, in violation of rule 21 of the United States supreme court, contained no specification of errors, no statement of the case presenting the questions involved with reference to the pages of the record in support thereof, and failed to quote the evidence whose rejection or admission was complained of. Held that, in accordance with the discretionary power vested in the court by section 5 of the above rule, the appeal would be dismissed on motion.—Benites v. Hampton, 123 U. S. 519, 8 S. Ct. 254, 31 L. Ed. 260.

597. Record or part thereof included.

See 3 Cent. Dig. App. & E. §§ 2627-2638.

The requirement of Equity Rule 75 (33 Sup. Ct. xi) that the testimony be reduced to narrative form will not be enforced, where the testimony embraces 30 volumes containing more than 12,000 pages, where a part of the testimony was taken before the rule became operative.—United States v. United States Steel Corp., 36 S. Ct. 408, 240 U. S. 442, 60 L. Ed. 731.

608. Sufficiency.

See 3 Cent. Dig. App. & E. §§ 2673-2684.

A referee in an equitable proceeding certified certain depositions, and other papers returned by him to the court, to "constitute the evidence" taken before him. The clerk of court, on appeal, certified that certain documents transmitted by him to the appellate court were all the testimony taken and evidence introduced before the referee, and by him deposited with the clerk; and further certified the transcript to be a full, true, and correct transcript of so much of the record "as I am by statute and directions of attorneys required to transmit." The attorneys' directions (appearing on the notice of appeal) were to transmit all the papers filed in the cause except subpoenas. The decree showed that the cause was finally heard below upon the report of the referee. Held, that it appeared from the certificate of the clerk that the transcript contained all the evidence introduced on the trial in the court below as required by Code Wash. § 451, and that therefore the supreme court had jurisdiction of the appeal.—Ex parte Parker, 120 U. S. 737, 7 S. Ct. 767, 30 L. Ed. 818.

Under Sup. Ct. Rule 8, subd. 1, providing that "the clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record and of the assignment of errors, and of all proceedings in the case," and subdivision 3, providing that "no case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed," a case, the complaint in which was dismissed on the merits by the court below, will not be heard where the pleadings are merely referred to, and not set forth in the transcript of the record.—Redfield v. Parks, 130 U. S. 623, 9 S. Ct. 642, 32 L. Ed. 1053.

609. Supplemental transcript or return.

See 3 Cent. Dig. App. & E. §§ 2685-2687.

A supplemental transcript filed after a case was argued and decided in the Supreme Court of a state, with nothing to show how it came to be filed, when no certiorari has been issued to bring it up, or any motion made for leave to file it, or any order permitting it to be filed, is a mere excrescence on the record, which cannot be considered in the Supreme Court of the United States.—Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co., 20 S. Ct. 245, 175 U. S. 639, 44 L. Ed. 305, dismissing appeal Rio Grande W. Ry. Co. v. Telluride Power-Transmission Co., 51 P. 146, 16 Utah, 125.

(G) AUTHENTICATION AND CERTIFICATION.**613. Bill of exceptions.**

See 3 Cent. Dig. App. & E. §§ 2702-2707.

The statement in the concluding sentence of a bill of exceptions that, at the request of counsel, the judge "did put his seal to this bill of exceptions," shows that his authentication extends to the entire bill, as prepared and presented, although the two preceding sentences would seem to indicate that the only purpose of counsel was to preserve exceptions to the charge.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.

616. Papers included, referred to, or annexed.

See 3 Cent. Dig. App. & E. §§ 2714-2718.

On appeal in a suit brought by the United States to annul for fraud a patent issued pursuant to an old Mexican grant, the record contained a letter written by the attorney general to one who was formerly clerk of the district court in which the cause was pending, stating, in answer to inquiry, that the United States would not pay the costs, because it had no beneficial interest in the litigation, and that the same was instituted at the request of parties claiming a beneficial interest in the land, with the understanding that they were to pay costs. It did not appear that the letter was offered in evidence, or proved in any way, and the court took no notice of it. *Held* that, as there was no proof of its genuineness, it could have no weight on the appeal.—*San Pedro & Cañon del Agua Co. v. United States*, 146 U. S. 120, 13 S. Ct. 94, 36 L. Ed. 911, affirming *decree United States v. San Pedro & Cañon del Agua Co.* 17 P. 337, 4 N. M. (Gild.) 405.

(H) TRANSMISSION, FILING, PRINTING, AND SERVICE OF COPIES.**619. Necessity and duty of filing in appellate court.**

See 3 Cent. Dig. App. & E. §§ 2721, 2722.

When a writ of error has been allowed by the judge of a state supreme court to the United States supreme court, but no writ of error has been issued, the clerk of the state court is not bound to transmit to the United States supreme court a copy of the record.—*Ex parte Ralston*, 119 U. S. 613, 7 S. Ct. 317, 30 L. Ed. 506.

620. Time for transmission and filing.

See 3 Cent. Dig. App. & E. §§ 2724-2742.

621. — Limitations applicable.

See 3 Cent. Dig. App. & E. §§ 2724-2731.

The supreme court has no jurisdiction of a case brought up on writ of error or appeal, unless the transcript is filed during the term next succeeding the allowance of the appeal or writ of error.—*Caillot v. Deetken*, 113 U. S. 215, 5 S. Ct. 432, 28 L. Ed. 983; *Hill v. Chicago & E. R. Co.*, 129 U. S. 170, 9 S. Ct. 269, 32 L. Ed. 651.

624. — Extension of time.

See 3 Cent. Dig. App. & E. §§ 2737-2742.

Federal Supreme Court will extend the time for filing the record in order that an opportunity may be given to conform to the court's views as to what the record should be.—*United States v. United States Steel Corp.*, 36 S. Ct. 408, 240 U. S. 442, 60 L. Ed. 731.

626. Failure to file in time.

See 3 Cent. Dig. App. & E. §§ 2744-2765, 3126.

627. — Effect in general.

See 3 Cent. Dig. App. & E. §§ 2744-2749, 3126.

Failure to file the transcript within the time prescribed by statute, or rule is ground for dismissal, unless cause is shown for the delay.—*Caillot v. Deetken*, 113 U. S. 215, 5 S. Ct. 432, 28 L. Ed. 983; *Norton v. Taxing Dist. of Brownsville*, 129 U. S. 505, 9 S. Ct. 331, 32 L. Ed. 784; *Small v. Northern Pac. R. Co.*, 134 U. S. 514, 10 S. Ct. 614, 33 L. Ed. 1006.

628. — Excuses for delay.

See 3 Cent. Dig. App. & E. §§ 2750-2764.

The fact that the clerk of the circuit court, in preparing transcripts on appeal to the supreme court, labored under a mistake as to the time within which the transcripts were required to be filed, is not a valid excuse for a failure to file them within the time prescribed by the established rules.—*Richardson v. Green*, 130 U. S. 104, 9 S. Ct. 443, 32 L. Ed. 872.

630. Loss, destruction, or withdrawal from files.

See 3 Cent. Dig. App. & E. § 2723.

When a writ of error is dismissed on motion of plaintiff in error, leave will not be granted him to withdraw the transcript, since it has become a part of the records of the court.—*Cheney v. Hughes*, 138 U. S. 403, 11 S. Ct. 303, 34 L. Ed. 993.

631. Printing.

See 3 Cent. Dig. App. & E. §§ 2766-2770.

Where enough of the record is printed to enable the court to act understandingly, and no motion is made requiring the moving party to print any part of the record omitted, it cannot be objected that all of the record is not printed.—*Walston v. Nevin*, 128 U. S. 578, 9 S. Ct. 192, 32 L. Ed. 544, affirming *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

Where it appears that complainants at great expense, printed the record for use in the court below, under the assurance by the judges that it need not be reprinted on appeal, they will be allowed to deposit enough money to print so much of the record as is not already printed, without fees to the clerk for supervising the printing of the entire record, and to file 15 copies (that being the number of copies they have), instead of the 25 copies prescribed by Sup. Ct. Rule 10, § 2.—*Dent v. Ferguson*, 131 U. S. 397, 9 S. Ct. 791.

On motion to dismiss or affirm, it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript.—*Carey v. Houston & T. C. Ry. Co.*, 150 U. S. 170, 14 S. Ct. 63, 37 L. Ed. 1041.

633. Effect of failure to print or serve copies.

See 3 Cent. Dig. App. & E. §§ 2772-2774.

Under rule 10, failure to pay the fee for printing the record when demanded, in time, is a failure to prosecute; and if, through the fault of the party prosecuting, printed copies of the record are not furnished in the due prosecution of the cause, the cause will be dismissed, unless sufficient reason be shown to the contrary.—*Steever v. Rickman*, 109 U. S. 74, 3 S. Ct. 67, 27 L. Ed. 861.

(I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.

Including unnecessary matter in record as affecting costs, see Costs, 6256.
Review of criminal prosecutions, see Criminal Law, 6110.

635. Effect of omissions.

See 3 Cent. Dig. App. & E. §§ 2235, 2776-2782, 2829; 13 Cent. Dig. Costs, § 815.

A writ of error from the federal Supreme Court to the highest court of a state must be dismissed, where the record does not contain final judgment.—*People of State of Illinois ex rel. Gersch v. City of Chicago*, 33 S. Ct. 178, 226 U. S. 451, 57 L. Ed. 295.

641. Defects in authentication or certificate.

See 3 Cent. Dig. App. & E. §§ 2789, 2790.

Authentication of the record is necessary to give the supreme court jurisdiction of an appeal or writ of error, under Rev. St. § 997; but, where there is attached to the record a certificate containing the name and office of the clerk, and the impress of the seal of the court, only the clerk's signature being lacking, the question is not one of authentication, but of irregular or imperfect authentication, and it is within the discretion of the court to allow the defect to be supplied.—*Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hasb.) 239, 10 P. 620.

643. Time to amend or to make objections.

See 3 Cent. Dig. App. & E. §§ 2791-2794.

Defendant in error not having moved within three years to dismiss the case for failure to file a proper return, and the case having been submitted on the merits by printed briefs on both sides, plaintiff in error will be allowed to perfect the record by certiorari.—*Redfield v. Parks*, 130 U. S. 623, 9 S. Ct. 642, 32 L. Ed. 1053.

An application for certiorari must be made within a reasonable time.—*Bein v. Heath*, 142 U. S. 704, 12 S. Ct. 992, 35 L. Ed. 1174.

Where, on appeal from the court of claims in an action to determine the rights of certain Indians, under a treaty, to lands in Kansas, the court finds that the government had received full consideration from the Indians for such lands, and had never accounted for the same, and that they were entitled to judgment, and remands the case, with instructions to the court of claims to enter a new judgment for the net amount actually received by the government for such lands on a sale thereof, on appeal by the United States from the decision of the court of claims, rendered in accordance with the mandate, a motion by appellant for an order to the court of claims to send up the evidence on which it found the fact that certain tribes were parties to the treaty, in order that the court may pass on the sufficiency of the evidence to establish such fact, comes too late, if the finding of this fact was material to the case.—*United States v. New York Indians*, 19 S. Ct. 487, 173 U. S. 464, 43 L. Ed. 769.

645. Defects or errors amendable.

See 3 Cent. Dig. App. & E. §§ 2799-2801.

Under the rule requiring the transcript of the record to be authenticated by the seal of the court below and the signature of the clerk, where the certificate not only begins with setting out the name and office of the clerk as the maker of the certificate, but has appended to it the seal of the court, and lacks only the clerk's signature, and the motion to dismiss the appeal was not made till it was too late to take a new appeal, the court will permit the record to be withdrawn for the purpose of having the certificate of authentication perfected.—*Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hasb.) 239, 10 P. 620.

647. Amendment or correction in lower court.

See 3 Cent. Dig. App. & E. §§ 2803-2815.

650. — Certifying, transmitting and incorporating amendment.

See 2 Cent. Dig. App. & E. §§ 2812-2814.

A letter written by the judge to petitioner's counsel, stating the former's willingness that the record should be amended in a certain way, if it could properly be done, has no place in the record, and its insertion therein does not show such an amendment.—*Whitten v. Tomlinson*, 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed. 406.

652. Amendment in appellate court.

See 3 Cent. Dig. App. & E. §§ 2816-2822.

653. — Authority.

See 3 Cent. Dig. App. & E. §§ 2816-2818.

On appeal from the circuit to the supreme court, the amendment of a record which is defective for not saying affirmatively that the circuit court had jurisdiction cannot be accomplished in the supreme court, but only in the circuit court upon a remand.—*Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380.

On a writ of error to the supreme court of the United States, where the jurisdiction of the federal courts does not affirmatively appear, it is for the court below to determine whether an amendment of the pleadings upon the point of jurisdiction would be proper.—*King Iron Bridge & Manufacturing Co. v. Otoe County*, 120 U. S. 225, 7 S. Ct. 552, 30 L. Ed. 623.

The supreme court of the United States, on appeal from a state court, may supply omissions in the transcript by certiorari, but cannot correct errors actually existing in the record of the state court.—*Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co.*, 154 U. S. 635, 14 S. Ct. 1180, 24 L. Ed. 368.

658. Certiorari or other proceedings to bring up record.

See 3 Cent. Dig. App. & E. §§ 2823, 2829, 2834-2849.

659. — Authority and grounds.

See 3 Cent. Dig. App. & E. §§ 2834-2843.

When the parties on appeal cannot agree as to what is contained in the record before the appellate court, but not yet printed, a certiorari will be granted calling up the evidence adduced below, and all questions thereon will be reserved until return is made.—*Missouri, K. & T. Ry. Co. v. Dinsmore*, 108 U. S. 30, 2 S. Ct. 9, 27 L. Ed. 640.

Where, on reversal of a judgment of the court of claims, the case is remanded, findings of fact on the first trial not made a part of the findings in the second trial are not a part of the record in an appeal from the judgment rendered on such second trial, and certiorari will not issue to bring up an exhibit attached to the petition in the original action, but not made an exhibit to the amended petition on which the case was tried a second time.—*Union Pac. Ry. Co. v. United States*, 116 U. S. 402, 6 S. Ct. 631, 29 L. Ed. 677.

The evidence in a former suit had by stipulation been made admissible in this suit, but appellants failed to incorporate it in the record. *Held* that, if appellees desired the benefit of it, they should have brought up by certiorari any necessary parts of the record which appellants had omitted to bring up.—*Hoskin v. Fisher*, 125 U. S. 217, 8 S. Ct. 834, 31 L. Ed. 759.

If parts of a record below are omitted in the transcript, the Supreme Court may, by certiorari, have the omission supplied, but cannot correct errors which actually exist in the record as it stands in the state court.—*Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe*

Co., 154 U. S. 635, 14 S. Ct. 1180, 24 L. Ed. 368.

660. — Proceedings.

See 3 Cent. Dig. App. & E. §§ 2823, 2844–2847.

A motion for a writ of certiorari for diminution of the record, in not stating that plaintiff filed a certain petition for the allowance of a writ of error, will be denied when the copy of the docket entries submitted with the motion does not show that a writ of error was then allowed or sued out, and it appears that plaintiff in error afterwards obtained the allowance of a writ of error to the circuit court, which he abandoned, obtaining instead thereof a writ of error from the supreme court.—*Chappell v. United States*, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

(J) CONCLUSIVENESS AND EFFECT, IMPEACHING AND CONTRADICTING.

Review of criminal prosecutions, see Criminal Law, 6111, 1112.

666. Impeaching or contradicting.

See 3 Cent. Dig. App. & E. §§ 2861–2866.

670. — Affidavits.

See 3 Cent. Dig. App. & E. §§ 2865, 2866.

An affidavit of an attorney filed in the trial court, that neither he nor his client, who was a party, had notice or opportunity to be present at the trial, is not sufficient on appeal to overcome the recital in the journal entry that the parties came "by their attorneys"; especially when the verity of the entry has been sustained by the judge of the trial court, who may be presumed to have personal knowledge, and when it appears that the complaining party had two attorneys, one of whom may have been present.—*Evans v. Stettinisch*, 149 U. S. 605, 13 S. Ct. 931, 37 L. Ed. 866.

(K) QUESTIONS PRESENTED FOR REVIEW.

Review of criminal prosecutions, see Criminal Law, 6113–1122.

671. Limitation by scope of record in general.

See 3 Cent. Dig. App. & E. §§ 2867–2874.

Neither the assignment of errors nor the plea of "in nullo est erratum" can give the supreme court jurisdiction of errors not appearing on the face of the record.—*Claassen v. United States*, 142 U. S. 140, 12 S. Ct. 169, 35 L. Ed. 966.

Where the only errors assigned depend upon the construction of a contract which does not appear in the record, the judgment will be affirmed.—*Red River Cattle Co. v. Sully*, 144 U. S. 209, 12 S. Ct. 809, 36 L. Ed. 407.

A judgment for defendant cannot be reversed, as against evidence, where the burden was on plaintiff to prove that the land sued for was not within certain exceptions of a grant, and the record, though not purporting to contain all the evidence, fails to show that such proof was made.—*Corinne Mill, Canal & Stock Co. v. Johnson*, 156 U. S. 574, 15 S. Ct. 409, 39 L. Ed. 537, affirming judgment 26 P. 922, 7 Utah, 327.

An appellate court has no means of determining whether reversible error arose from the action of the trial court on any of the subjects referred to in the bill of exceptions, where all such matters depend for their solution upon an examination of the evidence, which is not in the record.—(1911) *United States v. United States Fidelity & Guaranty Co.*, 32 S. Ct. 101, 222 U. S. 283, 56 L. Ed. 200, affirming judgment (1911) 186 F. 477, 108 C. C. A. 455,

which affirmed (C. C. 1910) *Kinney v. United States Fidelity & Guaranty Co.*, 182 F. 1005.

674. Organization and jurisdiction of lower court.

See 3 Cent. Dig. App. & E. § 2874.

A claim that a state court was without jurisdiction to proceed with the case, because of the pendency of a petition for removal to a federal court, cannot be considered by the federal supreme court, when the record neither contains a copy of the petition for removal nor discloses the grounds thereof.—*Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 19 S. Ct. 268, 172 U. S. 474, 43 L. Ed. 520.

689. Admissibility of evidence.

See 3 Cent. Dig. App. & E. §§ 2897–2909.

690. — In general.

See 3 Cent. Dig. App. & E. §§ 2897–2899, 2902–2904, 2906, 2908.

That evidence was improperly admitted should sufficiently appear in the record to be acted upon, where a reversal is asked on that ground.—*New York & C. Min. Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 S. Ct. 665, 32 L. Ed. 1031.

The federal Supreme Court will look only to certified transcript to ascertain what rulings on evidence were made by the trial court.—*San Antonio & A. P. Ry. Co. v. Wagner*, 36 S. Ct. 626, 241 U. S. 476, 60 L. Ed. 1110, affirming judgment (Tex. Civ. App.) 166 S. W. 24.

691. — Necessity of setting forth all the evidence.

See 3 Cent. Dig. App. & E. §§ 2900–2904.

The competency of evidence cannot be passed upon by the appellate court, where its admissibility is dependent on other evidence, which is not in the record.—*Sire v. Ellithorpe Air-Brake Co.*, 137 U. S. 579, 11 S. Ct. 195, 34 L. Ed. 801, affirming judgment *Ellithorpe Air-Brake Co. v. Sire* (C. C.) 41 F. 662.

The admission of evidence will not be reviewed unless the record sets out enough of the evidence in the case to show the materiality and bearing of that admitted.—*Murray v. State of Louisiana*, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

692. — Necessity of setting forth evidence excluded.

See 3 Cent. Dig. App. & E. §§ 2905–2909.

The exclusion of documentary evidence is not assignable as error where the excluded documents are not set forth in the bill of exceptions.—*Thompson v. First Nat. Bank of Toledo, Ohio*, 111 U. S. 529, 4 S. Ct. 689, 28 L. Ed. 507; *Clement v. Packer*, 125 U. S. 309, 8 S. Ct. 907, 31 L. Ed. 721.

A trial court's refusal to permit a model to be shown in evidence by a witness who does not testify as to its correctness, or state that it would illustrate his testimony, but simply says, "I have a model here," will not be held error by the supreme court, which has no copy or description of the model.—*Patrick v. Graham*, 132 U. S. 627, 10 S. Ct. 194, 33 L. Ed. 460.

An assignment of error based on the exclusion, by the trial court, of an answer given in a deposition, will be disregarded, under rule 21 of the supreme court, if the answer, or the full substance of it, is not set forth in the record.—*Shauer v. Alerton*, 151 U. S. 607, 14 S. Ct. 442, 38 L. Ed. 286.

The rule that the substance of excluded answers appearing in depositions must appear in the record does not apply where the witness testifies in person; and the exclusion of the answer will be deemed error or not, according as the

question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded. *Shauer v. Alterton*, 151 U. S. 607, 14 S. Ct. 442, 38 L. Ed. 286, distinguished.—*Buckstaff v. Russell & Co.*, 151 U. S. 626, 14 S. Ct. 448, 38 L. Ed. 292.

The refusal to permit a physician called as an expert to testify in a negligence action is not ground for reversal, where the record does not show what testimony the witness was expected to give, or that he was qualified to give any.—*Herencia v. Guzman*, 31 S. Ct. 135, 219 U. S. 44, 55 L. Ed. 81.

693. **Sufficiency of evidence.**

See 3 Cent. Dig. App. & E. §§ 2910-2927, 2936.

695. — **Necessity of setting forth all the evidence.**

See 3 Cent. Dig. App. & E. §§ 2911-2914.

Where a writ of error is brought under Act Cong. March 3, 1875, c. 137, § 5 (18 Stat. 472), to reverse an order of the circuit court remanding an action at law to the state court from which it had been removed, no question of fact can be considered, unless the evidence is set out in the record.—*England v. Gebhardt*, 112 U. S. 502, 5 S. Ct. 287, 28 L. Ed. 811.

696. — **Necessity of recital or certificate that all the evidence is included.**

See 3 Cent. Dig. App. & E. §§ 2916, 2917.

The sufficiency of the evidence cannot be considered on appeal where the record does not affirmatively show that it contains all the evidence.—*Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

Where the certificate to the bill of exceptions fails to show that it contains all of the evidence, an assignment that the court erred in refusing to order a nonsuit or direct a verdict cannot be passed upon.—*Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment *Boyd v. Hanson* (C. C.) 41 F. 174.

A decision cannot be reversed as not sustained by the evidence where the record does not purport to contain all the evidence.—*Collier v. United States*, 19 S. Ct. 330, 173 U. S. 79, 43 L. Ed. 621.

A decision cannot be reversed as not sustained by the evidence where the record does not purport to contain all the evidence.—*United States v. Copper Queen Consol. Min. Co.*, 22 S. Ct. 761, 185 U. S. 495, 46 L. Ed. 1008.

The failure of the bill of exceptions on appeal to state in express terms that it contains all the evidence does not prevent the appellate court from considering or determining the case upon questions of fact, if the record shows that all the evidence was contained in such bill.—*Crowe v. Trickey*, 27 S. Ct. 275, 204 U. S. 228, 51 L. Ed. 454, affirming judgment *Trickey v. Crowe* (Ariz. 1903) 71 P. 965; *Crowe v. Harmon*, 27 S. Ct. 280, 204 U. S. 241, 51 L. Ed. 461, affirming judgment *Harmon v. Crowe* (Ariz. 1903) 71 P. 1125.

697. — **Sufficiency of recital or certificate that all the evidence is included.**

See 3 Cent. Dig. App. & E. §§ 2918-2927.

The words, "which was all the testimony offered on the trial of the cause," immediately following the evidence in a bill of exceptions, will be treated as meaning all the evidence, where all the recitals in the bill show that the word "testimony" was used as synonymous with "evidence."—*Waldron v. Waldron*, 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453.

A bill of exceptions recited that, after the jury was sworn, "complainants, to sustain the issues on their part, offered the following oral

and documentary evidence." Then followed many pages of testimony, and at the end thereof the entry, "Whereupon complainants rested." Immediately following was the entry, "Thereupon defendants, to sustain the issues herein joined on their part, produced the following evidence." Then followed many pages of evidence for defendant, and the evidence of a witness recalled by defendants, concluding with an entry reciting an adjournment. Then came entries showing the reconvening of the court, some discussions by counsel, and a formal motion for direction of a verdict. *Held*, that these entries sufficiently showed that the bill of exceptions contained all the evidence, though it contained no direct statement to that effect.—*Board of Com'rs of Gunnison County, Colo., v. E. H. Rollins & Sons*, 19 S. Ct. 390, 173 U. S. 255, 43 L. Ed. 689, reversing judgment *E. H. Rollins & Sons v. Board of Com'rs of Gunnison County*, 80 F. 692, 26 C. C. A. 91.

698. **Instructions.**

See 3 Cent. Dig. App. & E. §§ 2928-2932.

699. — **In general.**

See 3 Cent. Dig. App. & E. §§ 2928-2930.

Alleged error in failing to instruct will not be considered unless the bill of exceptions affirmatively shows a request.—*Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 S. Ct. 239, 38 L. Ed. 78.

Error cannot be adjudged of a refusal to give an instruction presented at some time after the court has finished the general charge, when the record does not show at what particular time, or that the matter was not fully covered by the general charge.—*Nelson v. Flint*, 17 S. Ct. 576, 166 U. S. 276, 41 L. Ed. 1002.

701. — **Necessity of setting forth evidence.**

See 3 Cent. Dig. App. & E. §§ 2933-2935.

Refusal of an instruction cannot be reviewed where the evidence on which it is based is not in the record.—*United States v. Stone*, 106 U. S. 525, 1 S. Ct. 287, 27 L. Ed. 163.

Refusal of instructions will not be reviewed unless the record contains enough of the evidence to show their materiality.—*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644.

An exception to an instruction must be accompanied by as much of the evidence as is necessary to show the materiality of the instruction, but it is not necessary to set out all the evidence.—*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644; *New York, L. E. & W. R. Co. v. Madison*, 123 U. S. 524, 8 S. Ct. 246, 31 L. Ed. 258.

702. — **Necessity of setting forth entire charge.**

See 3 Cent. Dig. App. & E. §§ 2936-2938.

A claim of error on the part of the trial court, in that certain instructions set out in the record were not sufficient, and should have been more fully explained to the jury, will not be considered on appeal, where the record does not purport to contain all the instructions given; and it will be assumed that, if others were needed, they were given, especially as it is the duty of a party who thinks an instruction insufficient to request additional instruction.—*Bennett v. Harkrader*, 158 U. S. 441, 15 S. Ct. 863, 39 L. Ed. 1046.

704. **Verdict, findings, or decision.**

See 3 Cent. Dig. App. & E. §§ 2900, 2939-2941; 46 Cent. Dig. Tresp. § 161.

Where an action of law is tried by a circuit court without a jury, and the facts on which, on a writ of error, the plaintiff in error seeks to raise a question of law are not admitted in the pleadings or specially found by the court,

and there is a general finding for the defendant in error on the cause of action which involves such question of law, and there is no exception by the plaintiff in error to any ruling of the court in regard to such question, the supreme court can make no adjudication in regard to it.—*Otoe County v. Baldwin*, 111 U. S. 1, 4 S. Ct. 265, 28 L. Ed. 331.

◀711. Questions in intermediate courts.

See 3 Cent. Dig. App. & E. § 2950; 31 Cent. Dig. J. P. § 753.

Contentions which the record does not show to have been presented, directly or indirectly, to the trial court, by way of pleading or otherwise, before final judgment, and which were not made the subject of complaint in the motion for a new trial, and which were evidently regarded by the Supreme Court of the territory, on writ of error, as an afterthought, and not open under the state of the record, cannot be considered by the federal Supreme Court on an appeal from the Supreme Court of the territory. Judgment (1906) 85 P. 259, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

(L) MATTERS NOT APPARENT OF RECORD.

◀712. Matters not included or shown in general.

See 3 Cent. Dig. App. & E. §§ 2951-2954.

A question of estoppel by judgment cannot be considered in the absence of the record on which such estoppel is predicated. Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 60 P. 1064, 139 Cal. 370, affirmed.—*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

On appeal in an action involving title to realty, a deed introduced in evidence below, but not appearing in the record, or having its contents shown therein, cannot be considered as having any bearing on the case.—*Id.*

◀714. Matters appearing otherwise than by record.

See 3 Cent. Dig. App. & E. §§ 2953-2953.

The case settled by the circuit court for the hearing of a motion for a new trial and in arrest of judgment, in a prosecution for embezzlement, is no part of the record on error to the supreme court, and errors in law therein set forth, though in the form of a bill of exceptions, where the conviction was had prior to the passage of Judiciary Act Cong. March 3, 1891, c. 517, cannot be considered by the supreme court, since on a writ of error no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record, and since, before the passage of said act, the law did not provide for or permit a bill of exceptions in such a case.—*Claassen v. United States*, 142 U. S. 140, 12 S. Ct. 169, 35 L. Ed. 966.

A state appellate court is not required, on a writ of error, to examine a transcript of the record of a federal circuit court, which was no part of the record in the trial court, for the purpose of showing that the cause was in fact removed to the federal court before the trial. *Kanouse v. Martin*, 56 U. S. (15 How.) 193, 14 L. Ed. 660, distinguished.—*Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 S. Ct. 591, 37 L. Ed. 441.

Stipulations of counsel as to the evidence bearing on a finding of fact by the court, in a case in which a jury is waived in writing, cannot be considered on appeal. *Spring-Works Co. v. Spalding*, 116 U. S. 541, 6 S. Ct. 498, 29 L.

Ed. 720, followed.—*Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 S. Ct. 339, 38 L. Ed. 167.

Defects in a record cannot be supplied by reference to a transcript of the record in a case pending in another court.—*State of South Carolina v. Wesley*, 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254.

To sustain the appellate jurisdiction, the bill need not expressly show the jurisdictional amount, but that fact may be made to appear by stipulation or affidavit in the appellate court. Such a stipulation, however, is not controlling, but may be considered in connection with other circumstances.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

Statements by the court in his charge which refer to evidence which does not appear in a bill of exceptions not purporting to contain all the evidence, when not excepted to nor corrected by counsel, will be taken as supplementing the evidence in the record. Judgment *Sharpe v. United States*, 112 F. 893, 50 C. C. A. 597, 57 L. R. A. 932, affirmed.—*Sharp v. United States*, 24 S. Ct. 114, 191 U. S. 341, 48 L. Ed. 211.

Carrier cannot claim that allowance of attorney's fee to a shipper in action under Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, to recover damages awarded by the Interstate Commerce Commission, is excessive where based on a transcript of the proceedings and statement by counsel not a part of the record, and where carrier only filed exception to any fee.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

◀715. Evidence relating to question involved.

See 3 Cent. Dig. App. & E. §§ 2964, 2965, 2973; 42 Cent. Dig. Refer. § 223.

Where, after rendition of a judgment sought to be reversed, it has been compromised, evidence outside the record may be admitted to prove the compromise.—*Dakota County v. Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981.

A release of errors, not being in the transcript, may be brought before the court as evidence dehors the record.—*Elwell v. Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998.

On appeal by certain second mortgage bondholders from a decree and sale of the property under the first mortgage, a release of error by their trustee, at the instance of the majority of them, may be introduced by evidence dehors the record, if not in the transcript, for the purpose of barring the right of the appellants to appeal.—*Id.*

◀717. Opinion of lower court.

See 3 Cent. Dig. App. & E. § 2967.

The supreme court cannot act upon a statement found in the opinion of the lower court as to a fact necessary to support the claim, which is not found in claimant's petition.—*Johnson v. United States*, 160 U. S. 546, 16 S. Ct. 377, 40 L. Ed. 529.

Failure of the Circuit Court of Appeals to make and file findings of fact and conclusions of law, as required by General Order in Bankruptcy 36, cl. 3, when an appeal to the federal Supreme Court is desired, cannot be supplied by reference to the opinion of the Circuit Court of Appeals.—(1907) *Chapman v. Bowen*, 28 S. Ct. 32, 207 U. S. 89, 52 L. Ed. 116, dismissing appeal (1906) *In re McCoy*, 150 F. 106, 80 C. C. A. 60.

XI. ASSIGNMENT OF ERRORS.

Review of criminal prosecutions, see Criminal Law, 1129.

719. Necessity.

See 3 Cent. Dig. App. & E. §§ 2963-2982, 3490; 13 Cent. Dig. Costs, § 814; 15 Cent. Dig. Debt, Action of, § 60.

An error which has not been assigned will not be reviewed.—*Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363.

The admission of evidence is not ground for the reversal of a judgment of the state appellate court, when it is not assigned as error.—*Murray v. State of Louisiana*, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

An assignment of error is not necessary to give the court, on appeal, authority to notice a plain error. Decree 81 F. 544, 26 C. C. A. 499, reversed.—*United States v. Tennessee & C. R. Co.*, 20 S. Ct. 370, 176 U. S. 242, 44 L. Ed. 452.

The option reserved under Supreme Court rules 21 and 35, of examining the transcript of record on writ of error or appeal, in order that the court may be advised as to whether there has occurred any "plain error" which obviously demands correction will be exercised where the defendants in error have made no objection to the failure to assign error, under Rev. St. U. S. §§ 997, 1012 (U. S. Comp. St. 1901, pp. 712, 716), but have submitted the case upon the specifications of error in the brief of the plaintiffs in error.—*Columbia Heights Realty Co. v. Rudolph*, 30 S. Ct. 581, 217 U. S. 547, 54 L. Ed. 877, 19 Ann. Cas. 854, affirming judgment *Columbia Heights Realty Co. v. MacFarland* (1908) 31 App. D. C. 112.

Objections not assigned as error cannot be reviewed.—*Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, 33 S. Ct. 125, 226 U. S. 384, 57 L. Ed. 264.

The question of the operation of federal Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, on the doctrine of assumption of risk, *held* not to arise on the record, where there was nothing in the excepted portion of the charge relevant to doctrine of assumption of risk, and this question was not presented by any request to charge, or raised on motion for new trial, or referred to in the assignments of error.—*Southern Ry. Co. v. Gadd*, 34 S. Ct. 696, 233 U. S. 572, 58 L. Ed. 1099, affirming judgment 207 F. 277, 125 C. C. A. 21.

Failure to plead or prove that plaintiff, in an action under Safety Appliance Acts and the Employers' Liability Act, was employed in interstate commerce when injured, is not a "plain error" which the federal Supreme Court will notice on writ of error under Rule 21, par. 4 (32 Sup. Ct. x), although not assigned.—*San Antonio & A. P. Ry. Co. v. Wagner*, 36 S. Ct. 626, 241 U. S. 476, 60 L. Ed. 1110, affirming judgment (Tex. Civ. App.) 166 S. W. 24.

722. Form and requisites in general.

See 3 Cent. Dig. App. & E. §§ 2990-2996.

Practice of filing large number of assignments of error will not be approved.—*Central Vermont R. Co. v. White*, 35 S. Ct. 865, 233 U. S. 507, 59 L. Ed. 1433, affirming judgment *White v. Central Vermont R. Co.*, 89 A. 618, 87 Vt. 330.

723. Specification of errors.

See 3 Cent. Dig. App. & E. §§ 2997-3027.

727. — Conduct of trial.

See 3 Cent. Dig. App. & E. §§ 2998, 3010-3024.

Assignments that the court erred in overruling a demurrer to evidence, where it is not specified wherein the evidence was improper or irrelevant are too general.—*Van Stone v. Stillwell &*

Bierce Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961.

728. — Rulings as to evidence.

See 3 Cent. Dig. App. & E. §§ 3010-3012.

In an action to enforce a mechanic's lien for the construction of a mill pursuant to a contract alleged, the answer admitted the contract, but denied every other allegation of the petition, and claimed damages for failure to complete the mill within the time specified in the contract, and a replication was filed. *Held*, that an assignment on behalf of defendant that the court erred in admitting any evidence was too general.—*Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961.

729. — Submission of issues or questions to jury.

See 3 Cent. Dig. App. & E. §§ 2998, 3013.

An assignment that the court erred in submitting the case to the jury and entering judgment on the verdict is too vague.—*Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961.

730. — Instructions.

See 3 Cent. Dig. App. & E. §§ 3013-3016.

In an action for wrongful death under *How. St. Mich.* §§ 3391, 3392, which, as construed by the state courts, give a right of action only when decedent leaves some one dependent on him for support, an assignment of error, based on a refusal to charge generally that under the evidence there was no right of recovery, is not sufficiently specific, under Sup. Ct. Rule 21, to raise the question whether there was sufficient evidence that deceased left any one dependent on him, as required by the statute.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co. (C. C.)* 35 F. 176.

An assignment that the court erred in "adopting the theory announced throughout the instructions," that the transaction in question "could not amount to a mortgage unless there was a personal liability on the part of the defendant," is too general.—*Bogk v. Gassert*, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631, affirming judgment *Gassert v. Bogk*, 19 P. 281, 7 Mont. 585.

731. — Verdict, findings, or decision.

See 3 Cent. Dig. App. & E. §§ 3017-3021.

Under Sup. Ct. Rule 21 (3 Sup. Ct. xii), requiring an assignment of errors to "set out separately and particularly each error," merely asserting the nonexistence of any evidence of a certain fact which is necessary to support the judgment is insufficient.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co. (C. C.)* 35 F. 176.

734. — Proceedings after judgment.

See 3 Cent. Dig. App. & E. § 2997; 13 Cent. Dig. Costs, § 814.

On writ of error to a federal circuit court to review a judgment dismissing an appeal from one state court to another in condemnation proceedings, where the error assigned is that "the court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of 60 days after the assessment, deciding that the time commenced to run from the day when the commissioners met and viewed the land, and not from the date of the return of their assessment," such assignment will be *held* sufficient.—*Clinton v. Missouri Pac. Ry. Co.*, 122 U. S. 469, 7 S. Ct. 1268, 30 L. Ed. 1214.

745. Filing and annexing to record.

See 3 Cent. Dig. App. & E. §§ 3039, 3042.

A failure to annex to or return with a writ of error an assignment of errors, as required by Rev. St. § 997, is not ground for dismissal for want of jurisdiction. It may be subsequently filed in accordance with rule 21, par. 4.—Independent School Dist. v. Hall, 106 U. S. 428, 1 S. Ct. 417, 27 L. Ed. 237; Gumbel v. Pitkin, 113 U. S. 545, 5 S. Ct. 616, 28 L. Ed. 1128.

753. Effect of failure to make or file.

See 3 Cent. Dig. App. & E. §§ 3086-3089.

Where no assignment of error is filed, a judgment will be affirmed unless fundamental error appears on the face of the record.—Stevenson v. Barbour, 140 U. S. 48, 11 S. Ct. 690, 35 L. Ed. 338.

A writ of error will be dismissed when there is no assignment of errors, as required by Rev. St. § 997, no "specification of the errors relied upon," as required by rule 21 of the supreme court (3 Sup. Ct. xii), and when there appears no "plain error not assigned or specified."—Rowe v. Phelps, 152 U. S. 87, 14 S. Ct. 632, 38 L. Ed. 365.

An appeal will not be dismissed for want of an assignment of errors, as the court, under rule 21, par. 4, may, at its option, notice a plain error not assigned.—United States v. Pena, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

XII. BRIEFS.**763. Additional or supplemental briefs.**

See 3 Cent. Dig. App. & E. § 3098.

Where the question of citizenship and a plea to the jurisdiction were submitted in the circuit court, but no error was assigned on the ruling thereon, and the question was not argued before the supreme court, that court, on its own motion, will grant leave to counsel to file printed briefs on this point.—Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 116 U. S. 472, 6 S. Ct. 644, 29 L. Ed. 696.

767. Striking out.

See 3 Cent. Dig. App. & E. § 3102.

Where a brief contains scandalous matter affecting the moral character of individuals, wholly aside from the issues in the case, it will be stricken from the files when the case is for any reason dismissed.—Green v. Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. Ed. 792.

Counsel's brief will be stricken from the files when full of unwarranted and impertinent expressions as to opposing counsel.—Supreme Council of the Royal Arcanum v. Green, 35 S. Ct. 724, 237 U. S. 531, 59 L. Ed. 1089, L. R. A. 1916A, 771, reversing decrees Green v. Supreme Council of Royal Arcanum, 129 N. Y. S. 791, 144 App. Div. 761, and Id., 100 N. E. 411, 206 N. Y. 591.

769. Failure to file or serve or to file or serve in time.

See 3 Cent. Dig. App. & E. §§ 3104-3110.

773. — Dismissal or affirmance or reversal.

See 3 Cent. Dig. App. & E. §§ 3104, 3108-3110.

Where no assignment of error accompanies the transcript of record on appeal, and there is no specification of error relied on in appellant's brief, and the record presents no question of law calling for review, the judgment will be affirmed. 32 Fed. 66, affirmed.—Stevenson v. Barbour, 140 U. S. 48, 11 S. Ct. 690, 35 L. Ed. 338.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

Compromise pending appeal, dismissal, see Compromise and Settlement, 717.

Dismissal of writ of error from United States Supreme Court, see Courts, 397.

Mandamus to compel reinstatement, see Mandamus, 57.

Review of criminal prosecutions, see Criminal Law, 1131.

Review of decision of Board of General Appraisers, see Customs Duties, 85.

777. Dismissal on consent.

See 3 Cent. Dig. App. & E. § 3120.

Where parties compromise a suit, and stipulate that plaintiff in error shall dismiss it, the court will dismiss unless cause to the contrary be shown.—Addington v. Burke, 125 U. S. 693, 8 S. Ct. 1391, 31 L. Ed. 853.

779. Grounds for dismissal.

See 2 Cent. Dig. App. & E. § 47; 3 Cent. Dig. App. & E. §§ 2776-2790, 3121-3136, 4382, 4384.

781. — Want of actual controversy.

See 2 Cent. Dig. App. & E. §§ 63-80; 3 Cent. Dig. App. & E. § 3122.

The circuit court ordered that a Chinese woman be returned to China, and, pending the execution of the order, she was placed in jail. Held, that a writ of error to review an order denying an application for bail on behalf of the woman would be dismissed, where it appeared that after such order of denial was made, and before the filing and issuance of the writ, the original order was executed.—Cheong Ah Moy v. United States, 113 U. S. 216, 5 S. Ct. 431, 28 L. Ed. 933.

Where, pending proceedings in error, the same person, by means of purchase, has succeeded to the interests of both plaintiff and defendant, the writ of error should be dismissed, although some third person is interested in the question of costs.—East Tennessee, V. & G. R. Co. v. Southern Tel. Co., 125 U. S. 695, 8 S. Ct. 1391, 31 L. Ed. 853.

After the suing out of a writ of error to a judgment declaring assessments against a railroad company valid, the assessments were, under an act of the legislature, readjusted and reduced, and thus paid by the company. No steps had been taken to collect the assessments, and proceedings to enforce them could not have been resorted to for several months after payment was in fact made. Held, that the payment was voluntary, and the writ of error should be dismissed on the ground that there was no actual controversy.—Little v. Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016.

An appeal from a dismissal of a bill to restrain the selling of certain property on account of certain assessments, and to cancel and annul certain tax-lien certificates, will be dismissed without costs to either party where it appears that such assessments and lien certificates have, pending the appeal, been quashed and annulled at law by the court appealed from, and that the only question remaining is the disposition of costs.—Washington Market Co. v. District of Columbia, 137 U. S. 62, 11 S. Ct. 4, 34 L. Ed. 572.

When a bill to enjoin a state officer from collecting taxes on the ground that the act imposing them is unconstitutional is dismissed, and an appeal is taken, the collection of the taxes pending the appeal leaves nothing for review, and requires the dismissal thereof; and it is immaterial that the taxes are paid under protest, upon the compulsion of writs, and that the party paying them declares his intention to

sue for their recovery.—*Singer Mfg. Co. v. Wright*, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906.

An appeal from a decree dismissing a bill the whole object of which was to secure a right to vote at an election of delegates to a state constitutional convention will be dismissed if, before the appeal was taken, the date fixed for the election had passed, and, before the entry of the appeal, the convention had assembled.—*Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, 16 S. Ct. 132.

Where a bill seeks to dissolve an association alleged to be illegal, and to restrain the parties to it from continuing in or entering into any similar agreement, the dissolution of such association, after a decree dismissing the bill, does not oust the jurisdiction of an appellate court.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

An appeal from a judgment awarding a mandamus commanding officers to sign and execute bonds and deliver them for sale will be dismissed where, in obedience to the writ, the bonds have been executed and sold, and the proceeds applied to the intended use, and the defendants have gone out of office.—*Codlin v. Kohlhausen*, 21 S. Ct. 584, 181 U. S. 151, 45 L. Ed. 793, dismissing appeal *Same v. Kohlhausen*, 58 P. 490, 9 N. M. 565.

A writ of error to review the judgment of a state court in an action for usurpation of public office, instituted under Shannon's Code Tenn. 1896, § 5165 et seq., on the relation of persons superseded therein by a legislative act challenged as unconstitutional, will be dismissed, where the terms of office of all the parties to the suit, both relators and defendants, have expired. Writ of error, *State v. Maloney*, 65 S. W. 871, 108 Tenn. 82, dismissed.—*State of Tennessee v. Condon*, 23 S. Ct. 579, 189 U. S. 64, 47 L. Ed. 709.

A writ of error to review a judgment of a state court refusing to cancel the revocation of a permit to do business in the state, granted, renewable annually, to a foreign insurance company, must be dismissed, where the permit itself has become of no effect by the lapse of one year since it was granted. Writ of error to review judgment, *Prewitt v. Security Mut. Life Ins. Co.*, 83 S. W. 611, 26 Ky. Law Rep. 1239, 119 Ky. 321, 1 L. R. A. (N. S.) 1019, 115 Am. St. Rep. 264, dismissed.—*Security Mut. Life Ins. Co. v. Prewitt*, 26 S. Ct. 314, 200 U. S. 446, 50 L. Ed. 545; *Travelers' Ins. Co. v. Same*, 26 S. Ct. 316, 200 U. S. 450, 50 L. Ed. 549.

A writ of error to review a decree of a state court refusing to require a state official, when certifying the names of nominees for Congress to the clerks of the various county courts, to proceed under the Kentucky congressional apportionment act (Act April 15, 1882), rather than under Act March 12, 1900, which is attacked as invalid, must be dismissed as presenting a moot case, where the election to be affected by the decree has long since been held, and the persons elected have been admitted to their respective seats, and their successors elected according to the same scheme of apportionment.—*Richardson v. McChesney*, 31 S. Ct. 43, 218 U. S. 487, 54 L. Ed. 1121.

An appeal from a decree dismissing a suit to enjoin the enforcement of an order of the Interstate Commerce Commission requiring a carrier to desist from granting a shipper an alleged undue preference over his competitors will not be dismissed as presenting merely a moot case because the time during which such order was by its express terms to continue in force has expired.—*Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 31 S. Ct. 279, 219 U. S. 498, 55 L. Ed. 310.

The lapse of more than two years since an order of the Interstate Commerce Commission setting aside new rates and restoring old ones on the theory of a supposed equitable estoppel became effective does not require that an appeal from a decree of a Federal Circuit Court, refusing to enjoin the enforcement of such order, be dismissed as presenting a moot controversy, especially in view of the possible liability for reparation to which the carriers may be subjected if the legality of the order is not determined, and the influence and effect which the existence of the rate fixed for two years, if legal, will have upon the exercise by the carriers of their authority to fix just and reasonable rates in the future.—(1911) *Southern Pac. Co. v. Interstate Commerce Commission*, 31 S. Ct. 288, 219 U. S. 433, 55 L. Ed. 283, reversing decree (C. C. 1910) 177 F. 963.

Where it appears on argument that the case has been settled by the parties, so that nothing remains but a moot question, the appeal will be dismissed.—*Buck's Stove & Range Co. v. American Federation of Labor*, 31 S. Ct. 472, 219 U. S. 581, 55 L. Ed. 345.

Appeal from decree refusing to enjoin construction of new building by national bank prosecuted for costs only will be dismissed.—(1912) *Wingert v. First Nat. Bank*, 32 S. Ct. 391, 223 U. S. 670, 56 L. Ed. 605, dismissing appeal (1909) 175 F. 739, 99 C. C. A. 315.

The federal Supreme Court having declined to consider the question whether a combination of steamship companies violates the Anti-trust Act because it has become moot owing to the existing European War, the decree below which is adverse to the government will be reversed and the cause remanded, with directions to dismiss the bill without prejudice.—*United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 36 S. Ct. 212, 239 U. S. 466, 60 L. Ed. 387, reversing decree *Same v. Hamburg-American S. S. Line* (D. C.) 216 F. 971.

An appeal from a federal District Court to the Supreme Court on a question of jurisdiction will not be dismissed as moot because, pending the appeal, a state court has dismissed upon the merits a suit between the same parties involving the same subject-matter.—*Male v. Atchison, T. & S. F. R. Co.*, 36 S. Ct. 351, 240 U. S. 97, 60 L. Ed. 544.

6782. — Want of jurisdiction.

See 3 Cent. Dig. App. & E. §§ 3123, 3124.

A motion to dismiss a writ of error to a judgment quashing a writ of certiorari, made on the ground that the proceedings of the justice cannot be reviewed except by appeal, is untenable, as it affects, not the jurisdiction of the United States supreme court to review the judgment quashing the certiorari, but rather the correctness of that judgment.—*Harris v. Barber*, 129 U. S. 366, 9 S. Ct. 314, 32 L. Ed. 697, affirming *Barber v. Harris*, 6 Mackey (D. O.) 586.

When the supreme court finds it unnecessary to decide any federal question, and it appears that the state court based its decision on a local question, the proper course is to dismiss the writ, rather than affirm the judgment.—*Eustis v. Bolles*, 150 U. S. 361, 14 S. Ct. 131, 37 L. Ed. 1111; *Winter v. City Council of Montgomery*, 156 U. S. 385, 15 S. Ct. 649, 39 L. Ed. 460.

An appeal from a decree of a territorial court, which is for more than the jurisdictional amount, will not be dismissed because the decree would have been for less than the jurisdictional amount if the territorial court had not erroneously disregarded a remittitur or release of part of the recovery; but the decree will be reviewed only to the extent of affirming the validity of the release or remittitur, and, thus modified, will be affirmed.—*Simms v.*

Simms, 20 S. Ct. 58, 175 U. S. 162, 44 L. Ed. 115, modifying judgment 81 P. 1128, 5 Ariz. 212.

A motion to dismiss an appeal from the supreme court of a territory on the ground that the amount in controversy is insufficient to give jurisdiction must be denied where there are affidavits showing that the land in question is of greater value than \$5,000, while the record contains an order made by the supreme court of the territory on the application for appeal, stating that more than that amount was involved in the action. Decree 52 P. 917. 6 Okl. 696, reversed.—Potts v. Hollon, 20 S. Ct. 654, 177 U. S. 365, 44 L. Ed. 808.

◀786. — Proceedings frivolous or for delay.

See 3 Cent. Dig. App. & E. § 3128.

The contention that the proceedings taken under Gen. St. Conn. §§ 3694, 3695, by a railway company which is the lessee of another railway, and the owner of three-fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, violate the due process of law clause of Const. U. S. Amend. 14, and impair contract obligations, is not so frivolous as to require the dismissal of a writ of error from the Supreme Court of the United States to a state court. Judgment, New York, N. H. & H. R. Co. v. Offield (1905) 60 A. 740, 78 Conn. 1, affirmed.—Offield v. New York, N. H. & H. R. Co., 27 S. Ct. 72, 203 U. S. 372, 51 L. Ed. 231.

A decree of a federal Circuit Court, dismissing for want of the requisite diversity of citizenship, a bill by which, on the ground of fraud, injunctive relief against the collection of a judgment against a railway company and of a subsequent judgment against the surety on its appeal bond is sought by such surety and by the person who is, by contract, ultimately liable to pay the original judgment, is so plainly correct as to require the dismissal of an appeal to the Supreme Court, where such decree is based upon the proposition that such railway company, although insolvent, is an indispensable party, which must be aligned with the plaintiffs for the purpose of determining the question of jurisdiction.—Steele v. Culver, 29 S. Ct. 9, 211 U. S. 26, 53 L. Ed. 74.

◀792. Dismissal by court on its own motion.

See 3 Cent. Dig. App. & E. §§ 3137-3141.

Cross appeals must be prosecuted like other appeals, and, where there is no appearance of counsel or security for costs within the time required by law, will be dismissed by the court of its own motion.—Hilton v. Dickinson, 108 U. S. 165, 2 S. Ct. 424, 27 L. Ed. 688.

Where one party to the suit has sold out to the other, who is prosecuting it for his own benefit, after failure to show cause to the contrary the court, on its own motion, will dismiss the suit.—East Tennessee, V. & G. R. Co. v. Southern Tel. Co., 125 U. S. 695, 8 S. Ct. 1391, 31 L. Ed. 853.

It is the practice of the supreme court to notice, sua sponte, and without a motion to dismiss, the want of proper parties for a final decree.—Estis v. Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. Ed. 437.

◀793. Dismissal without prejudice.

Motion to dismiss writ of error for want of a bill of exceptions denied without prejudice to right to renew, unless plaintiff in error within a reasonable time applies for settlement of bill of exceptions by the successor in office of the deceased trial judge.—Guardian Assur. Co. of London v. Quintana, 33 S. Ct. 236, 227 U. S. 100, 57 L. Ed. 437.

◀794. Motion for dismissal.

See 3 Cent. Dig. App. & E. §§ 3142-3164.

◀796. — Parties.

See 3 Cent. Dig. App. & E. §§ 3146-3148.

Upon appeal from a circuit court of the United States to the supreme court, in a suit for infringement of a patent, one of several appellants, plaintiffs below, cannot have the appeal dismissed, against the objection of the others, upon the ground that the supreme court of the state, in a suit between the same parties, has enjoined the appellants from making any claim against the appellee for use of the patented invention.—Marsh v. Nichols, 120 U. S. 598, 7 S. Ct. 704, 30 L. Ed. 794.

◀797. — Time for making.

See 3 Cent. Dig. App. & E. §§ 3149-3154.

Laches cannot be urged against a motion to dismiss a writ of error on the ground that there is no actual controversy between the parties.—Little v. Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016.

The omission of one of the adverse parties from the supersedeas bond does not justify the Court of Appeals of the District of Columbia in dismissing on motion an appeal to that court, where such motion was not made within the time prescribed by a court rule for moving to dismiss for want of a bond, and then was not based upon the defect in the bond, but upon a defect of parties to the appeal, which the bond is supposed to disclose, but which could not in fact exist, because the appeal was taken in open court.—(1911) Taylor v. Leesnitzer, 31 S. Ct. 371, 220 U. S. 90, 55 L. Ed. 382, reversing decree (1908) 31 App. D. C. 92.

A motion to dismiss, for want of jurisdiction, an appeal to the federal Supreme Court from a Circuit Court of Appeals, is not premature because the record has not been printed, where the Supreme Court is advised as to the matter from a printed transcript of the proceedings in the District Court.—Lazarus, Michel & Lazarus v. Prentice, 34 S. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305, dismissing appeal Musica v. Prentice, 211 F. 326, 127 C. C. A. 575, which affirmed decree In re A. Musica & Son, 205 F. 413.

◀799. — Affidavits and other proofs.

See 3 Cent. Dig. App. & E. §§ 3158-3160.

On a writ of error to the supreme court of the state, where the records have not been printed, this court can look only to the statements of counsel as they appear in the briefs; and, where the assignments of error have been printed in defendant's brief, and some of such assignments clearly present questions of which the federal court has jurisdiction, motions to dismiss will be denied.—Crane Iron Co. v. Hoagland, 108 U. S. 5, 1 S. Ct. 17, 27 L. Ed. 630.

Where the record on appeal to the supreme court of the United States in a partition suit does not show affirmatively that the amount in controversy is sufficient to give jurisdiction of the appeal, affidavits as to the value of the land may be read on a motion to dismiss the appeal.—Whiteside v. Haselton, 110 U. S. 296, 4 S. Ct. 1, 28 L. Ed. 152.

A motion to vacate, made before the record is printed, must be accompanied by a statement of the facts on which it rests, agreed to by the parties, or supported by printed copies of so much of the record as will enable the court to act understandingly with reference to the transcript on file.—The Colonel McLeod, 112 U. S. 710, 5 S. Ct. 361, 28 L. Ed. 825.

To get a decision on a motion to dismiss a writ of error before printing the record, the

motion papers must present the case in a way that will enable the court to act understandingly without referring to the transcript on file.—*City of Waterville v. Van Slyke*, 115 U. S. 290, 6 S. Ct. 39, 29 L. Ed. 406.

Appellant will not be permitted, on a motion to dismiss the appeal, to file papers stating the grounds on which the motion is made.—*United States v. Griffith*, 141 U. S. 212, 11 S. Ct. 1005, 35 L. Ed. 719.

A bill to declare a trust in land was dismissed by the circuit court, and an appeal was allowed on complainant's affidavit that the property was worth more than \$5,000. After the record was filed in the supreme court, the appellee moved the circuit court to set aside the order allowing the appeal, and filed numerous affidavits that the land was worth less than \$5,000, and upon this evidence the motion was granted. Appellant was present at the hearing, and made no objection to the court's jurisdiction, and was given leave to file counter affidavits. By stipulation these matters, including the affidavits, were brought up by a supplemental record, and a motion was made to dismiss the appeal. *Held* that, although the case had passed from the circuit court's jurisdiction, and its action was without authority, yet the supreme court would consider the additional affidavits on the motion to dismiss.—*Rector v. Lipscomb*, 141 U. S. 557, 12 S. Ct. 63, 35 L. Ed. 857.

§801. — Hearing and determination.

See 3 Cent. Dig. App. & E. §§ 3161-3164.

It is not proper, on motion to dismiss an appeal from a decree to decide whether or not a former decree was final, or to decide what order or decrees prior to the decree appealed from could be decided on such appeal.—*Hill v. Chicago & E. R. Co.*, 129 U. S. 170, 9 S. Ct. 269, 32 L. Ed. 651.

The validity of a settlement and part payment of a judgment, which leaves the amount in dispute insufficient to sustain a writ of error, cannot be contested by the defendant, so as to prevent the dismissal of a writ of error which he has taken, when it is not questioned by either of the judgment creditors, but is ratified by their joining in a motion to dismiss.—*Thorp v. Bonfield*, 20 S. Ct. 533, 177 U. S. 15, 44 L. Ed. 652.

The postponing of the consideration of a motion to dismiss a writ of error until hearing of the merits is not a decision in the affirmative of the question of the power to review.—*Cerecedo v. United States*, 36 S. Ct. 3, 239 U. S. 1, 60 L. Ed. 113.

§802. Order of dismissal.

See 3 Cent. Dig. App. & E. §§ 3167, 3168.

The parties agreed that a writ of error docketed in the supreme court of the United States should be dismissed, and it was so entered by the clerk in vacation. Rule 28 of the supreme court provides that in such a case no mandate shall issue without an order of the court, and in this case no order was made. Prior to the agreement, petitioner purchased the interest of two of the parties in the land in controversy. *Held*, that the entry of dismissal should be amended so as not to prejudice the right of the petitioner.—*Woodman v. Missionary Soc. of M. E. Church*, 124 U. S. 161, 8 S. Ct. 416, 31 L. Ed. 352.

§805. Abandonment.

See 3 Cent. Dig. App. & E. §§ 3174, 3175.

The prosecution of a writ of error sued out apparently on behalf of all the defendants below will be deemed abandoned by those who have furnished no bond for costs and are not represented by counsel, especially where the bill of exceptions does not contain the answers of those defendants nor the pertinent evidence re-

lating to their case. Judgment, *Outcalt v. Jones Nat. Bank (Neb.)* 105 N. W. 287 modified.—*Yates v. Jones Nat. Bank*, 27 S. Ct. 638, 206 U. S. 158, 51 L. Ed. 1002.

§807. Vacating order and reinstatement.

See 3 Cent. Dig. App. & E. §§ 3177-3183.

Where a suit has been dismissed because the plaintiff in error had not shown, either from the record or from affidavits, that the sum in dispute was sufficient to give the supreme court jurisdiction, a motion to reinstate, supported by affidavits showing the jurisdictional amount, made more than three months after entry of the order of dismissal, is too late.—*Johnson v. Wilkins*, 118 U. S. 228, 6 S. Ct. 1048, 30 L. Ed. 210.

Mandamus lies to compel a court to take jurisdiction upon appeal of a cause improperly dismissed by it.—*Ex parte Parker*, 120 U. S. 737, 7 S. Ct. 767, 30 L. Ed. 818; *Ex parte Parker*, 131 U. S. 221, 9 S. Ct. 708, 33 L. Ed. 123.

A motion to reinstate a case dismissed for failure of the record to show the amount in controversy on affidavits as to value will be continued, with leave to file further affidavits, where the appellee has not had sufficient notice, and the affidavits of appellant are not satisfactory.—*Hunt v. Blackburn*, 127 U. S. 774, 8 S. Ct. 1395, 32 L. Ed. 323.

It is no objection to the issuance of mandamus to compel reinstatement of an appeal improperly dismissed that the personnel of the supreme court has changed since the appeal was dismissed, though the writ in such cases is usually directed to the judges by name.—*Ex parte Parker*, 131 U. S. 221, 9 S. Ct. 708, 33 L. Ed. 123.

XIV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING.

§811. Advancement of cause.

See 3 Cent. Dig. App. & E. §§ 3191-3194.

Rule 32 applies only to cases which have been remanded by a circuit court to a state court or dismissed, under Act March 3, 1875, § 5, and a motion to advance an appeal from a decree on the merits, rendered after a motion to remand has been denied, will be overruled.—*Call v. Palmer*, 106 U. S. 39, 1 S. Ct. 2, 27 L. Ed. 61.

A case which does not fall within the provisions of rule 32, or of rule 26, par. 4, or of Rev. St. U. S. § 949, for the advancement of cases on the docket, will not be advanced merely because of great public importance.—*Poin-dexter v. Greenhow*, 109 U. S. 63, 3 S. Ct. 8, 27 L. Ed. 860.

Cases in which the revenue laws of a state have been enjoined will not be advanced on the docket of the supreme court of the United States on the ground that "the operations of the government of the state will be embarrassed by delay," except on motion of the state or party claiming under such laws, and the motion of the opposing party to that effect, though no objection is made, will be overruled.—*Central R. Co. v. Bourbon County*, 116 U. S. 538, 6 S. Ct. 601, 29 L. Ed. 725.

XV. HEARING AND REHEARING.

§818. Continuance or postponement.

See 3 Cent. Dig. App. & E. § 3199.

In an action against a city on the presentation of a stipulation for the dismissal of the appeal signed by the city attorney, a board of liquidation of the city debt, created by legislation pending appeal, appeared to resist the or-

der, alleging that the power of compromise had been transferred to it. *Held*, that the questions presented were too important to be settled summarily on motion, and that the case would be continued for the term to allow the board of liquidation to take appropriate steps to set aside the compromise.—*City of New Orleans v. New Orleans, M. & T. R. Co.*, 108 U. S. 15, 1 S. Ct. 187, 27 L. Ed. 635.

◀822. Arguments of counsel.

See 3 Cent. Dig. App. & E. §§ 3204-3206.

◀824. — Oral arguments.

See 3 Cent. Dig. App. & E. § 3205.

As a general rule, oral argument is not allowed by the supreme court on motion to dismiss appeals or writs of error.—*Carey v. Houston & T. C. Ry. Co.*, 150 U. S. 170, 14 S. Ct. 63, 37 L. Ed. 1041.

◀826. Submission without argument.

See 3 Cent. Dig. App. & E. § 3207.

Stipulations of counsel to submit a case under rule of court cannot be withdrawn by either party without the consent of the other, except by leave of court upon cause shown.—*Aurerecochea v. Bangs*, 110 U. S. 217, 3 S. Ct. 639, 28 L. Ed. 125.

Where parties stipulate to submit a cause without oral argument, and no reference is made to rule 20, Sup. Ct. U. S., which permits the submission of printed arguments within the first 90 days of the term, that rule will not be applied on suggestion by one party, against the protest of the other, since the stipulation will be fulfilled if the submission be made when the case is reached in its order.—*Glenn v. Fant*, 124 U. S. 123, 8 S. Ct. 398, 31 L. Ed. 352.

◀829. Rehearing.

See 3 Cent. Dig. App. & E. §§ 3209-3240.

◀830. — In general.

See 3 Cent. Dig. App. & E. §§ 3209-3211, 3214.

Where a case has been decided by a divided court, a rehearing will not be granted where no important constitutional question is involved.—*City of Shreveport v. Holmes*, 125 U. S. 694, 8 S. Ct. 1389, 31 L. Ed. 854.

A renewal of a motion for a rehearing, which had been once denied, after the close of the term at which the judgment was rendered, and for the same reasons, is not in order, and does not commend itself to the favorable consideration of the court.—*Williams v. Conger*, 131 U. S. 390, 9 S. Ct. 793, 33 L. Ed. 201.

◀832. — Grounds.

See 3 Cent. Dig. App. & E. §§ 3215-3223.

Any error on the part of the federal Supreme Court in holding, when affirming conviction of the murder of an Indian near the edge of the Klamath river, within the extension of the Hoopa Valley Indian reservation, that the title to the bed of the river was in the United States, as riparian owner on a nonnavigable stream, by Acts Cal. April 13, 1850 (St. 1850, p. 219), Feb. 24, 1891 (St. 1891, p. 10), and March 11, 1891 (St. 1891, p. 96), does not require the grant of a rehearing, where the record did not entitle plaintiff in error to a decision on the merits of the question of the navigability of the river and its effect on the jurisdiction over the homicide.—*Donnelly v. United States*, 83 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710, denying rehearing 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

A rehearing will not be granted because of an inadvertent expression in the opinion, which could have no possible influence on the reason stated which rendered it necessary to affirm the judgment.—*Bradford v. United States*, 33 S. Ct.

1026, 57 L. Ed. 1630, denying rehearing 33 S. Ct. 576, 228 U. S. 446, 57 L. Ed. 912.

◀833. — Application.

See 3 Cent. Dig. App. & E. §§ 3214, 3229-3240, 3244-3246.

A case cannot be reargued and reheard after the expiration of the term in which it was decided.—*Bushnell v. Crooke Mining & Smelting Co.*, 150 U. S. 82, 14 S. Ct. 22, 37 L. Ed. 1007.

Equal division of the court on a motion for rehearing of a judgment of reversal previously rendered leaves that judgment in force, and does not result in affirming the judgment of the lower court.—*Carmichael v. Eberle*, 20 S. Ct. 571, 177 U. S. 63, 44 L. Ed. 672.

Leave to file a petition for rehearing will be denied where it is wholly wanting in merit.—*Chapman & Dewey Lumber Co. v. Board of Directors St. Francis Levee Dist.*, 34 S. Ct. 906, 234 U. S. 667, 58 L. Ed. 1526, denying rehearing *Same v. St. Francis Levee District*, 34 S. Ct. 297, 232 U. S. 186, 58 L. Ed. 564.

◀835. — Scope and conduct.

See 3 Cent. Dig. App. & E. §§ 3241-3243.

A rehearing in the United States supreme court can only be had upon the record as it came from the lower court, and not upon evidence discovered after the appeal was taken.—*United States v. Maxwell Land Grant Co.*, 122 U. S. 365, 7 S. Ct. 1271, 30 L. Ed. 1211.

XVI. REVIEW.

Bankruptcy proceedings, see Bankruptcy, ◀467.

Criminal prosecutions, see Criminal Law, ◀1134-1177.

Divorce proceedings, see Divorce, ◀184.

In admiralty, see Admiralty, ◀118.

On certiorari, see Certiorari, ◀63, 64.

Practice peculiar to federal courts, see Courts, ◀356, 382.

(A) SCOPE AND EXTENT IN GENERAL.

Criminal prosecutions, see Criminal Law, ◀1134.

On review in United States Supreme Court of decisions of state courts, see Courts, ◀399.

◀836. Power of appellate court in general.

See 3 Cent. Dig. App. & E. §§ 3247-3261.

Statements, in a printed argument, of facts outside of the record, after stipulating in the court below that the case shall be heard upon a single question, will not be considered by the supreme court of the United States.—*Schley v. Pullman's Palace Car Co.* 120 U. S. 575, 7 S. Ct. 730, 30 L. Ed. 789, affirming judgment (C. C.) 25 Fed. 890.

◀837. Matters or evidence considered in determining question.

See 3 Cent. Dig. App. & E. §§ 3262-3272, 3274-3277, 3289; 10 Cent. Dig. Contin. § 140; 42 Cent. Dig. Refer. § 225.

On appeal to the supreme court of a state from a judgment allowing a mandamus to compel the collection of a tax to pay a judgment against a municipal corporation, the supreme court may authorize an inquiry into the cause of action on which the judgment was rendered, to discover whether or not it was founded upon a contract the obligation of which could not be impaired by subsequent legislation of the state repealing or modifying the taxing power of the corporation; but such an inquiry does not authorize a re-examination of the validity of the contract, or of the propriety of the judgment.—*State of Louisiana v. Police Jury of Parish of*

St. Martin, 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574.

Defective findings of fact made by the court, where a jury is waived, cannot be helped out, in the reviewing court, by reference to the opinion delivered.—*Saltonstall v. Birtwell*, 150 U. S. 417, 14 S. Ct. 169, 37 L. Ed. 1128.

838. Questions considered.

See 3 Cent. Dig. App. & E. §§ 2915, 3279-3301, 3303-3341; 42 Cent. Dig. Refer. § 225.

839. — Scope of inquiry in general.

See 3 Cent. Dig. App. & E. §§ 2915, 3278-3280, 3286-3288, 3290-3293, 3297-3300, 3377.

An appeal granted "of this cause" is an appeal of the whole cause, as far as it had then progressed, although the bond required by the court was made to operate as a supersedeas only of the last order made in the cause.—*Central Trust Co. v. Seasingood*, 130 U. S. 482, 9 S. Ct. 575, 32 L. Ed. 985.

840. — Review of specific questions and particular decisions.

See 3 Cent. Dig. App. & E. §§ 3301, 3303-3314.

Exceptions which are dependent on the construction to be given to findings of the court below, and are not to the findings themselves, are impertinent.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, affirming decree *The City of New York (C. C.)* 35 F. 604.

Act Sept. 27, 1890 (26 Stat. p. 492), authorizing the establishment of a public park in the District of Columbia, provided for the assessment of a proportional part of the cost upon property specially benefited by the improvement, but in the condemnation proceedings held thereunder no special request as to the legal effect of this provision was made to the trial court, and there was no specific assignment of error as to it, nor was any person actually assessed for special benefits a party to the writ of error. *Held*, that the court was not called upon to consider the constitutionality of such provision.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

On appeal from an order denying a motion for a new trial in a suit wherein judgment was rendered in favor of defendants who appeared, only, an order of dismissal as to other defendants was not involved. Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 69 P. 1064, 139 Cal. 370, affirmed.—*United Land Ass'n v. Abrahams*, 28 S. Ct. 369, 208 U. S. 614, 52 L. Ed. 645.

An appellate federal court can and should consider on its own motion the question of the jurisdiction of a federal Circuit Court to which a cause has been removed from the state court, as presenting a separable controversy, although the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the federal court without objection.—(1911) *Chicago, B. & Q. Ry. Co. v. Willard*, 31 S. Ct. 460, 220 U. S. 413, 55 L. Ed. 521, affirming judgment *Willard v. Chicago, B. & Q. R. Co.* (1908) 165 F. 181, 91 C. C. A. 215.

842. — Review dependent on whether questions are of law or of fact.

See 3 Cent. Dig. App. & E. §§ 3316-3330; 25 Cent. Dig. High. § 542; 42 Cent. Dig. Refer. § 225.

A finding by the supreme court of a territory that the notice of the location of a claim to mineral lands contained a sufficient description, by reference to natural and permanent monuments, to identify it, and that the claim was so marked upon the ground that its boundaries could be readily traced, is a finding of fact; and, though styled by the judge a conclusion of law, must, under Act Cong. April 7, 1874 (18 U. S. St. 27, c. 80), be taken by the supreme court to be true.—*Eilers v. Boatman*, 111 U. S. 356, 4 S. Ct. 432, 28 L. Ed. 454.

The appellate court will not review action of the lower court refusing to make findings containing mixed questions of law and fact. 35 Fed. 188 affirmed.—*City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941.

In an action for a royalty a finding on evidence offered by both parties that the patent had not been anticipated is a conclusion of fact, and is not reviewable.—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 S. Ct. 803, 35 L. Ed. 404, affirming judgment *Starling v. St. Paul Plow-Works (C. C.)* 29 F. 790.

The finding of the court of claims as to what is a reasonable royalty for the use of a patented invention is a finding of fact which is binding on the supreme court, in the absence of other findings which satisfy the latter court that the finding as to royalty is erroneous.—*United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 15 S. Ct. 420, 39 L. Ed. 530.

Additional findings of facts, and not mere conclusions of law, are involved in findings by the supreme court of a territory, when that court, after reciting that it adopts the facts found by the trial court as the statement of facts in the cause, also finds that the court below did not err in granting judgment in favor of the validity of county warrants, "notwithstanding the verified answer" denying their execution, nor in refusing to enter judgment, notwithstanding the lack of any evidence to establish the genuineness of the warrant sued on, "because the court finds that the warrants were verity of themselves," and that the verified answer only put defendant in a position to establish the facts set up, and did not put plaintiff on proof of their genuineness, wherefore the court finds as a conclusion that the judgment should be affirmed. Judgment 53 P. 187, 6 Ariz. 13, reversed.—*Apache County v. Barth*, 20 S. Ct. 718, 177 U. S. 538, 44 L. Ed. 878.

Whether the benefit to real property for widening of a street is greater or less than the damage is a question of fact not reviewable on a writ of error from the Supreme Court to a state court.—*Willoughby v. City of Chicago*, 35 S. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error *City of Chicago v. Willoughby*, 94 N. E. 513, 249 Ill. 249.

843. — Matters not necessary to decision on review.

See 3 Cent. Dig. App. & E. §§ 3331-3341.

General counts being sufficient to support the judgment, questions under a special count, become immaterial.—*Town of Santa Anna v. Frank*, 113 U. S. 339, 5 S. Ct. 536, 28 L. Ed. 978.

Contention that denial of application for admission to second-class mail privileges was suspension of existing privilege held a moot question, where, pending suit, a new application was made and granted.—*Lewis Pub. Co. v. Wyman*, 33 S. Ct. 599, 228 U. S. 610, 57 L. Ed. 989, affirming decree 182 F. 13, 104 C. C. A. 453.

844. Review dependent on mode of trial in lower court.

See 3 Cent. Dig. App. & E. §§ 3342-3376.

845. — In general.

See 3 Cent. Dig. App. & E. §§ 3342-3345.

Requests by each party for the direction of a verdict are not equivalent to a submission of the case to the court without a jury, under Rev. St. §§ 649, 700, whereby any review on writ of error would be prevented for want of the written stipulation required by those sections. But such requests are an affirmation by both parties that there is no disputed question of fact which can operate to deflect or control the question of law. They necessarily operate as a request that the court find the facts, and the parties are thus concluded by the finding of the court upon which the resulting instruction of

law is given. A reviewing court is, therefore, necessarily limited to the consideration of the correctness of the finding on the law, and must affirm, if there be any evidence in support thereof.—*Beuttell v. Magone*, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654, reversing judgment (C. C.) 48 F. 157.

◀846. — **Trial by court in general.**

See 3 Cent. Dig. App. & E. §§ 3347-3362, 3366.

In the case of a special finding, with conclusions of law thereon presented to the supreme court on appeal, the question is not whether the statement of facts made by the circuit court might be true as a conclusion of fact, but whether, upon the facts found, it must be true as matter of law.—*Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 S. Ct. 582, 27 L. Ed. 337.

The failure of the circuit court to make a finding on request, if saved in a bill of exceptions, will be reviewed by the supreme court, and is ground for reversal.—*The E. A. Packer*, 140 U. S. 360, 11 S. Ct. 794, 35 L. Ed. 453, reversing decree (D. C.) 20 F. 327.

Mere recital of the testimony in the opinion of the trial court or in the bill of exceptions is not such a special finding of facts as to authorize review under Rev. St. § 700; neither do the words, "T., District Judge, after stating the facts as above," following a statement preliminary to the opinion proper, constitute such statement a finding of facts by the judge.—*Lehnen v. Dickson*, 148 U. S. 71, 13 S. Ct. 481, 37 L. Ed. 373, affirming judgment *Dickson v. Lehnen* (C. C.) 37 F. 319.

In an action at law tried by the court without a jury upon an agreed statement of certain facts, which, though not technically such an agreed statement as is equivalent to a special finding, is yet sufficient to put the court in possession of the material facts, a ruling, at the close of the trial, denying a motion for judgment in favor of plaintiff, presents a question of law reviewable in the supreme court; and it is immaterial that there was also some oral testimony, when it appears from the opinion of the trial court that its ruling was on a proposition of law not at all affected by the testimony, and which, in its judgment, was decisive of the case.—*City of St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 S. Ct. 485, 37 L. Ed. 380, reversing judgment (C. C.) 39 F. 59.

◀847. — **Trial in equitable actions.**

See 3 Cent. Dig. App. & E. §§ 3367-3371.

Where an equity court has submitted certain issues to a jury, and adopted their findings, the appellate court will not consider formal exceptions to rulings on evidence in the course of the jury trial.—*Wilson v. Riddle*, 123 U. S. 608, 8 S. Ct. 255, 31 L. Ed. 280.

◀848. — **Trial by referee.**

See 3 Cent. Dig. App. & E. §§ 3372-3376.

If a cause in the United States court for Vermont is submitted to a referee in accordance with Gen. St. Vt. 1862, c. 30, § 52, the only question presented on error is whether or not the facts found by the referee support the judgment.—*Paine v. Central Vt. R. Co.*, 118 U. S. 152, 6 S. Ct. 1019, 30 L. Ed. 193.

When a case is referred to a referee, and his findings ordered to stand as the findings of the court, the only question open on appeal is the sufficiency of the findings to support the judgment.—*Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 15 S. Ct. 886, 39 L. Ed. 1015.

Where the trial of an action at law is had before a referee, with instructions to report the testimony, with findings of fact, to the court, and the court subsequently makes the findings

of fact its own, and renders judgment thereon, the only question which can be reviewed on a writ of error is whether the facts found sustain the judgment.—*Chicago, M. & St. P. Ry. Co. v. Clark*, 20 S. Ct. 924, 178 U. S. 353, 44 L. Ed. 1099, reversing judgment 92 F. 968, 35 C. C. A. 120.

The question whether the judgment rendered was warranted by the facts found is open for consideration on appeal, where the cause was tried without a jury, after express waiver of jury trial, and a referee duly appointed by written consent, whose findings, rulings, and decisions were made those of the court.—*Id.*

No objection as to what a master has done upon a reference can be taken upon an appeal arising on exceptions to his report, where he has followed the decree ordering the reference and enforced its directions. Decree 101 F. 1005, 41 C. C. A. 676, affirmed.—*City of New Orleans v. Warner*, 21 S. Ct. 353, 180 U. S. 199, 45 L. Ed. 493.

◀849. — **Waiver of jury.**

See 3 Cent. Dig. App. & E. §§ 3363-3365.

Rev. St. § 649, provides that, by stipulation, issues of fact in the Circuit Court may be tried without a jury, and the findings of fact shall have the same effect as the verdict of a jury. Section 700 allows an appeal from the rulings of the court on such a trial when they are duly excepted to, and presented by bill of exceptions. Held that, when the record discloses no findings of fact on such a trial, there is nothing which the Supreme Court can review. Affirming 31 F. 261.—*Lloyd v. McWilliams*, 11 S. Ct. 173, 137 U. S. 576, 34 L. Ed. 788.

◀850. — **General or special findings.**

See 3 Cent. Dig. App. & E. §§ 3346, 3351-3362, 3375, 3376.

Where an ultimate fact is found by the lower court, its refusal to find as to any incidental fact, which is merely evidence of the ultimate fact, will not be reviewed by the supreme court. *Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 87, 7 S. Ct. 821, followed.—*Hathaway v. First Nat. Bank*, 134 U. S. 494, 10 S. Ct. 608, 33 L. Ed. 1004.

Where the trial is without a jury, and there is no special finding of facts, there can be no review of rulings involving matters of fact, nor can a bill of exceptions be used to bring up the whole testimony for review.—*City of St. Louis v. Western Union Tel. Co.*, 17 S. Ct. 608, 166 U. S. 388, 41 L. Ed. 1044.

An agreed statement of facts cannot be taken as the equivalent of a special finding of facts, within the meaning of Rev. St. U. S. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], providing for a waiver of trial by jury and the proceedings on a trial by the court, so that an exception to a general finding of the court upon such statement will bring up a question for review, where such agreed statement contains, in addition to certain ultimate facts, other evidential facts from which a material ultimate fact might be inferred, but which is not agreed upon or found. Judgment 98 F. 688, 39 C. C. A. 231, affirmed.—*Wilson v. Merchants' Loan & Trust Co.*, 22 S. Ct. 55, 183 U. S. 121, 46 L. Ed. 113.

◀851. **Theory and grounds of decision of lower court.**

See 3 Cent. Dig. App. & E. §§ 3402-3434.

◀854. — **Reasons for decision.**

See 3 Cent. Dig. App. & E. §§ 3403, 3404, 3408-3424, 3427-3430.

Inaccuracy of statement by court of last resort that assumption of risk was of no effect

in an action under Employers' Liability Act furnishes no ground for reversing its affirmance of the judgment, where correctness of charge is not attacked.—*St. Louis & S. F. R. Co. v. Brown*, 36 S. Ct. 602, 241 U. S. 223, 60 L. Ed. 966, affirming judgment (Okl.) 144 P. 1075.

857. **Extent of review dependent on mode of review.**

See 3 Cent. Dig. App. & E. §§ 3435-3445, 3447-3449.

859. **Writ of error.**

See 3 Cent. Dig. App. & E. §§ 3441-3445.

Whether the Supreme Court of the Philippine Islands, acting under the authority of Code Proc. P. I. § 497, subd. 3, erred in setting aside the conclusion of the court of first instance as being plainly and manifestly against the weight of evidence, is a question which is not open on a writ of error from the federal Supreme Court.—*Behn, Meyer & Co. v. Campbell & Go Tauco*, 27 S. Ct. 502, 205 U. S. 403, 51 L. Ed. 857.

Only questions of law apparent on the record can be considered by the Supreme Court of the United States on a writ of error, and there can be no inquiry whether there was error below in dealing with questions of fact.—*Id.*

862. **Extent of review dependent on nature of decision appealed from.**

See 2 Cent. Dig. App. & E. §§ 1765-1767; 3 Cent. Dig. App. & E. §§ 2450-2486.

863. **In general.**

See 2 Cent. Dig. App. & E. §§ 1765, 1766; 3 Cent. Dig. App. & E. §§ 3450-3455; 5 Cent. Dig. Attach. § 898.

If a decree foreclosing a railroad mortgage declares construction claims in general to be liens superior to that of the mortgage, but does not find who are the holders of such claims, and what the amounts are, and, after sale, and a reference to determine those matters, another decree is entered accordingly, the holder of the mortgage can raise the question of priority by appeal from the latter decree alone, without appealing from the former.—*Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 7 S. Ct. 741, 30 L. Ed. 830.

865. **On appeal from judgment by confession or default or from orders relating thereto.**

See 3 Cent. Dig. App. & E. §§ 3482-3486.

Under Eq. Rule 18 of the United States courts, providing that, where the bill is taken pro confesso, the case is proceeded with ex parte, "and the matter of the bill may be decreed by the court," defendant is not precluded on appeal from contesting the sufficiency of the bill, or from insisting that the averments in it do not justify the decree, though he cannot question the evidence.—*Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83, 10 S. Ct. 235, 33 L. Ed. 561.

866. **On appeal from decision on motion for dismissal or non-suit or direction of verdict.**

See 3 Cent. Dig. App. & E. §§ 3467-3475.

A judgment entered on a verdict directed by the court after both parties had moved for such direction must stand unless the court's ruling is wrong as a matter of law.—(1911) *Sena v. American Turquoise Co.*, 31 S. Ct. 488, 220 U. S. 497, 55 L. Ed. 559, affirming judgment (1908) 98 P. 170, 14 N. M. 511.

(B) **INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.**

869. **On appeal from final judgment.**

See 3 Cent. Dig. App. & E. §§ 3451, 3460, 3461, 3487-3529; 13 Cent. Dig. Costs, § 796.

870. **Interlocutory proceedings brought up in general.**

See 3 Cent. Dig. App. & E. §§ 3451, 3487-3489, 3491-3512; 13 Cent. Dig. Costs, § 796.

Though a judgment on a plea in abatement is not final and appealable, yet it may be reviewed where a writ of error was taken upon a final judgment.—*Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 S. Ct. 369, 27 L. Ed. 211.

It is not necessary to appeal from an order sustaining the demurrer of one of two defendants, and dismissing the suit as to him, until the suit is finally disposed of; and an appeal taken "in the cause," after entry of a final order against the remaining defendant, the appeal bond being made to run "to the defendants," brings both orders up for review.—*Mendenhall v. Hall*, 134 U. S. 559, 10 S. Ct. 616, 33 L. Ed. 1012.

A bill against several defendants was dismissed as to all but one of them, and plaintiff denied relief upon all but one item, to determine the amount of which the case was referred to a master. An appeal was taken from this decree, which was afterwards dismissed for failure to file the transcript in time. The master filed his report, which was confirmed, and plaintiff again appealed. Held, that on this second appeal the matters adjudicated by the first decree cannot be considered.—*Hill v. Chicago & E. R. Co.*, 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331.

The defendant having answered over by leave and order of the court reserving his objection to the overruling of the demurrer, the question whether the demurrer was rightly overruled is open on a writ of error sued out after final judgment against him.—*Bauserman v. Blunt*, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316.

875. **On appeal from order made after judgment.**

See 3 Cent. Dig. App. & E. §§ 3541-3548.

Where a suit in which a decree has been rendered has been revived, the jurisdiction of the court in the original suit, to render the original decree, is not reviewable on appeal from the order of revivor.—*Terry v. Sharon*, 131 U. S. 40, 9 S. Ct. 705, 33 L. Ed. 94.

An appeal from an order directing the payment of the money from a foreclosure sale into court does not bring up former orders made during the foreclosure for review.—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97.

876. **On appeal from order enforcing, vacating, or refusing to vacate previous judgment or order.**

See 3 Cent. Dig. App. & E. §§ 3549-3559.

In a suit for foreclosure, commenced in a state court, and removed to the circuit court of the United States, a motion to remand the cause was made and overruled. Subsequently a final decree of sale was passed. Upon appeal merely from the order confirming the sale, the final decree not disclosing affirmatively a want of jurisdiction, the supreme court of the United States will not examine the record prior to such final decree to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction, by reason of the presence in the suit of a controversy between citizens of different states; but, assuming that the final decree was within the power of the circuit court to render, will only examine the de-

creed to ascertain whether the sale was had in conformity with its provisions.—*Turner v. Farmers' Loan & Trust Co.*, 106 U. S. 552, 1 S. Ct. 519, 27 L. Ed. 273.

(C) PARTIES ENTITLED TO ALLEGE ERROR.

Criminal prosecutions, see Criminal Law, 888-1135-1137.

878. Appellee, respondent, or defendant in error.

See 3 Cent. Dig. App. & E. §§ 3572-3580.

Exceptions taken by appellee or respondent will not be considered in the absence of separate or cross appeal.—*United States v. Blackfeather*, 155 U. S. 180, 15 S. Ct. 64, 39 L. Ed. 114.

A defendant who did not take out a writ of error cannot be heard to complain of any adverse rulings in the court below, on writ of error taken by the plaintiff. Judgment 77 F. 966, 23 C. C. A. 594, 46 L. R. A. 712, affirmed.—*Bolles v. Outing Co.*, 20 S. Ct. 94, 175 U. S. 262, 44 L. Ed. 156.

One who succeeds, on a bill of review, in having upheld as to her alone a trust declared void by the original decree, cannot, on appeal, where she does not herself appeal, go beyond supporting the modified decree and opposing every assignment of error. Decree (1905) 25 App. D. C. 291, affirmed.—*Landram v. Jordan*, 27 S. Ct. 17, 203 U. S. 56, 51 L. Ed. 88.

Parties who have not appealed from the judgment below cannot object, on an appeal sued out by their adversaries, to the failure of the court below to sustain a motion to dismiss the cause. Judgment (1906) 85 P. 459, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

Counsel for the executors has no right to appear and be heard against the decree below in an action involving the validity and construction of a testamentary trust where his clients have not appealed.—*Fitchie v. Brown*, 29 S. Ct. 106, 211 U. S. 321, 53 L. Ed. 202.

879. Persons not parties in appellate court.

See 3 Cent. Dig. App. & E. §§ 3581-3583.

Persons not parties can be heard originally in the federal Supreme Court as to the settlement of a decree entered on a mandate from the Supreme Court directing decree for reorganization of railroad terminal facilities violating Anti-Trust Act July 2, 1890, so far as it operates prejudicially to their rights.—*United States v. Terminal R. Ass'n of St. Louis*, 35 S. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

881. Estoppel to allege error.

See 3 Cent. Dig. App. & E. §§ 3591-3616.

882. — Error committed or invited by party complaining.

See 3 Cent. Dig. App. & E. §§ 3591-3610; 39 Cent. Dig. Plead. § 1145½.

A party cannot object on appeal to the admission on the trial of evidence introduced by himself.—*McGillin v. Bennett*, 132 U. S. 445, 10 S. Ct. 122, 33 L. Ed. 422, affirming *Bennett v. McGillin* (C. C.) 28 F. 411.

A defendant in error is not entitled to claim that the judgment should be affirmed because an instruction given at his own request was not sufficiently favorable to him.—*Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

One who voluntarily invokes the equity jurisdiction of the court cannot urge on appeal that his complaint should have been dismissed because of adequacy of remedy at law.—*Perego v. Dodge*, 163 U. S. 100, 16 S. Ct. 971, 41 L. Ed. 113.

Concessions that assessment of railway property by the state board of assessors was on the basis of one-third of what the board regarded as its value, and the use of estimates based thereon in calculations submitted on issue of reasonableness of state rates, do not prevent the state from objecting on appeal to valuation based on such assessments.—*Knott v. Chicago, B. & Q. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, modifying decree *St. Louis & S. F. R. Co. v. Hadley* (D. C.) 168 F. 317.

Complainants in a suit to enjoin trespass on land cannot complain that the court without cross-bill made a decree quieting title, where they amended their bill so as to constitute it a bill to quiet title.—*Mercelis v. Wilson*, 35 S. Ct. 150, 235 U. S. 579, 59 L. Ed. 370.

884. — Recognition of validity of proceeding.

See 3 Cent. Dig. App. & E. §§ 3612-3616.

If a defendant, after moving the court, at the close of plaintiff's evidence, to instruct the jury that plaintiff is not entitled to recover, and, after the overruling of the motion, puts in his case, he cannot avail himself of error, if any, in the overruling of his motion.—*Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740, affirming judgment *Crandal v. Accident Ins. Co.* (C. C.) 27 F. 40.

When, in a suit to set aside certain tax deeds, a plea in bar is overruled, and afterwards an answer is filed setting out and relying on the same facts, but no objection is made on this ground in the trial court, the supreme court will not consider whether the plea was properly overruled.—*Gage v. Bani*, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776.

The law of Utah requires those against whom the judgment is rendered in the trial court to specify, on motion for a new trial, what particular findings of fact are objected to as unsupported by the evidence, and also requires the trial court to certify to the supreme territorial court only so much of the evidence as may be necessary to explain the particular errors or grounds specified. *Held*, that the defendants below, after failing in the trial court to object to a finding as unsupported by the evidence, and thereby securing the omission from the record of all testimony supporting such finding, cannot, on appeal, avail themselves of the absence of such testimony by contending that the finding was not supported by the evidence.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 S. Ct. 282, 40 L. Ed. 436.

(D) AMENDMENTS, ADDITIONAL PROOFS, AND TRIAL OF CAUSE ANEW.

In admiralty, see Admiralty, 888-117.

885. Amendment of proceedings of lower court.

See 3 Cent. Dig. App. & E. §§ 3617-3620.

888. — As to pleadings.

See 3 Cent. Dig. App. & E. §§ 3617-3619.

An amendment of the pleadings may be allowed even on appeal, if justice appears to require it.—*Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

(E) PRESUMPTIONS.

Decisions of Board of General Appraisers, see Customs Duties, 85.
In admiralty, see Admiralty, 118.
Review of criminal prosecutions, see Criminal Law, 1140-1144.

901. Burden of showing error.

See 2 Cent. Dig. App. & E. § 1771; 3 Cent. Dig. App. & E. § 3670.

The burden is on the party alleging error to show it affirmatively by the record.—*Earle v. Myers*, 28 S. Ct. 86, 207 U. S. 244, 52 L. Ed. 191.

905. Proceedings not included in record.

See 3 Cent. Dig. App. & E. § 3672.

An appellate court cannot assume that an amended instruction was not taken out by the jury when it retired, in the absence of any statement to that effect in the record. Judgment (N. M. 1905) 82 P. 232, affirmed.—*Cunningham v. Springer*, 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662, 9 Ann. Cas. 897.

906. Facts or evidence not shown by record.

See 3 Cent. Dig. App. & E. §§ 2911-2916, 3673-3678; 24 Cent. Dig. Fraud. Conv. § 938.

907. — In general.

See 3 Cent. Dig. App. & E. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678.

Act April 7, 1874, c. 80, § 2 (18 Stat. 27, 28), provides that the appellate jurisdiction of the supreme court over judgments and decrees of territorial courts shall be exercised by appeal, except in cases of trial by jury, and that "on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict" shall be made by the court below, and transmitted with the transcript of the record. Held that, in the absence of a finding of facts, the court will assume that a judgment rendered by a territorial court on a trial without a jury was justified by the evidence.—*Marshall v. Burtis*, 19 S. Ct. 290, 172 U. S. 630, 43 L. Ed. 579.

The evidence will be assumed to sustain the judgment, and the judgment will be affirmed by the supreme court of the United States, on appeal from the judgment of a territorial court, in the absence of any errors assigned on exceptions to rulings on the admission or rejection of testimony, where the supreme court of the territory merely sets forth in its opinion the facts on which it proceeds, but there are no specific findings as such. Judgment 56 P. 741, 6 Ariz. 301, affirmed.—*Thompson v. Ferry*, 21 S. Ct. 453, 180 U. S. 484, 45 L. Ed. 633.

In the absence of a bill of exceptions or statement of facts in the record on appeal showing the evidence introduced, the verdict, findings, or judgment will be presumed to have been warranted by the evidence.—*Clipper Min. Co. v. Eli Mining & Land Co.*, 24 S. Ct. 632, 194 U. S. 220, 48 L. Ed. 944.

Where on appeal the evidence is not brought up, the court will presume that it supports the verdict, finding, judgment or decree.—*Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

A decree, so far as it stands on questions of fact, will be presumed to be supported by the evidence not objected to, where the record does not contain all the evidence.—*Zimmerman v. Harding*, 33 S. Ct. 387, 227 U. S. 489, 57 L. Ed. 608.

909. — Particular facts necessary to sustain decision.

See 3 Cent. Dig. App. & E. § 3675; 24 Cent. Dig. Fraud. Conv. § 938.

Though the supplies, for which priority of lien was granted over the mortgage bondholders, were furnished while the entire system of roads was under one control, and the fund from which they were ordered to be paid arose from the sale of the main line only, it will, in the absence of anything in the record to the contrary, be presumed that the order of the court was in accordance with the law and the facts of the case.—*Kneeland v. Bass Foundry & Machine Works*, 11 S. Ct. 857, 140 U. S. 592, 35 L. Ed. 543.

The existence of the certificate of the attorney general, in accordance with Rev. St. § 365, which is a prerequisite to the recovery of extra compensation by a district attorney, may be presumed on appeal, though the record does not show that it was ever given, when it appears that the claim was allowed by the attorney general, and there is no suggestion in the assignments of error that the certificate was lacking or deficient.—*United States v. Winston*, 18 S. Ct. 701, 170 U. S. 522, 42 L. Ed. 1130, affirming judgment 73 F. 149, 19 C. C. A. 419.

911. Organization and jurisdiction of lower court.

See 3 Cent. Dig. App. & E. §§ 3682-3688; 5 Cent. Dig. Attach. § 898.

The supreme court must, from its own inspection of the record in a case coming from a circuit court, determine whether the case is of a class excluded by statute from the cognizance of the circuit courts, even though the question of jurisdiction is not raised by the parties; the presumption being that the circuit court is without jurisdiction, unless the contrary appears from the record.—*Bors v. Preston*, 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419.

In an appeal to the United States supreme court which involved conflicting claims of receivers appointed by state and federal courts, it was contended that the original order appointing a temporary receiver in the state court was made by a judge of a criminal court, who had no authority to make it. It appeared, however, that his action was recognized by the state chancery court, having full jurisdiction over such matters, as having been made by proper authority. Held, that the supreme court must assume that the appointment of a temporary receiver by such judge was authorized by the laws and practice of the state.—*Shields v. Coleman*, 157 U. S. 108, 15 S. Ct. 570, 39 L. Ed. 660.

921. Right to trial by jury, and waiver thereof.

See 3 Cent. Dig. App. & E. § 3722.

Where the court found a part of the facts of a case, and the jury by special verdict found the other facts, and no stipulation of waiver of a trial by jury of the facts found by the court appears in the record, a judgment for plaintiff will be reversed, as every reasonable presumption will be indulged against such waiver.—*Hodges v. Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. Ed. 169.

926. Admissibility and reception of evidence.

See 2 Cent. Dig. App. & E. § 1279; 3 Cent. Dig. App. & E. §§ 2899, 3729, 3730, 3735-3747.

Where an offer of proof is made, and a bill of exceptions taken, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made.—*Scotland County v. Hill*, 112 U. S. 183, 5 S. Ct. 93, 28 L. Ed. 692.

Where the record does not show that any objection was made to the admission of certain

evidence, it must, under rule 13 of the United States supreme court, be deemed to have been admitted by consent.—*Shields v. Hanbury*, 128 U. S. 584, 9 S. Ct. 176, 32 L. Ed. 565.

—927. **Dismissal, nonsuit, demurrer to evidence, or direction of verdict.**

See 3 Cent. Dig. App. & E. §§ 2912, 2917, 3748, 3753, 4024.

On review of a decree dismissing a bill for want of equity, the allegations of the bill will be taken as true, although denied by the answer. Decree 51 P. 674, 9 N. M. 292, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 19 S. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136.

—933. **Order granting or refusing new trial.**

See 3 Cent. Dig. App. & E. §§ 3425, 3426, 3772-3776; 17 Cent. Dig. Eject. § 413.

A transcript on appeal showed that on the entry of the decree a motion was made for a rehearing, but failed to show any disposition thereof at the same term; that at the next term an order was made setting the cause for hearing; and that shortly afterwards an order was entered nunc pro tunc granting the rehearing. Held, that it must be presumed that this order was made in accordance with the fact, and that a rehearing was actually granted at the trial term.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786.

Where the order refusing a new trial recites that "it was heard upon the record and statement, and upon the affidavits filed by the defendants in support of their motion," it cannot be contended that the trial court did not consider the affidavits as to newly discovered evidence presented on the motion.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 S. Ct. 282, 40 L. Ed. 436.

The grounds for refusing a new trial for newly discovered evidence will be presumed to have been sufficient, where they do not appear on the record.—*Santos v. Holy Roman Catholic and Apostolic Church, Parish of Tambobong*, 29 S. Ct. 338, 212 U. S. 463, 53 L. Ed. 549.

—934. **Judgment.**

See 3 Cent. Dig. App. & E. §§ 3777-3782.

In ejectment, the appellate court will assume that the premises awarded in the judgment are embraced in the description given in the complaint, unless the contrary distinctly appears.—*Morgan v. Eggers*, 127 U. S. 63, 8 S. Ct. 1041, 32 L. Ed. 56, affirming judgment (C. C.) 20 F. 666.

Presumptions unfavorable to the judgment will not be indulged in for the purpose of reversing it, unless they are natural and probable, and such as ought to be drawn from the facts actually found by the court below.—*Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 17 S. Ct. 7, 164 U. S. 1, 41 L. Ed. 327.

—937. **Taking and perfecting appeal or other proceeding for review.**

See 3 Cent. Dig. App. & E. §§ 3783-3794.

When a writ of error gives all the names of the parties as they are found in the record of the case in the circuit court, and when there is nothing to show that any other person was a party than such as are so named, the supreme court is not at liberty to indulge the presumption that there were others who were parties, although the defendants in error were designated as "D. & Co.," "C. & Co.," etc.—*Gumbel v. Pitkin*, 113 U. S. 545, 5 S. Ct. 616, 28 L. Ed. 1128.

Where the record states that, after rendition of judgment, plaintiff presented to the court a writ of error, a citation, and a bond; that the court allowed the writ; that the citation was signed by the judge; and that the bond was ordered to be filed as part of the record,—an objection that the writ of error was brought, the citation signed, and the bond given, before the rendition of the judgment, cannot be sustained, though they are dated the day previous; the supreme court assuming that this is a clerical error.—*Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing judgment (C. C.) *Same v. Priest*, 28 F. 907.

—938. **Making and contents of bill of exceptions, case, or statement of facts.**

See 3 Cent. Dig. App. & E. §§ 3795-3803.

In an action for wrongful death, under *How. St. Mich.* §§ 3391, 3392, which, as construed by the Michigan courts, give a right of action only when decedent leaves some one dependent upon him for support, the supreme court cannot consider whether there was sufficient evidence of that fact, in the absence of an exception at the trial based upon that particular point, since to do so would require it to presume that all the evidence is contained in the bill of exceptions, contrary to the rule that only so much thereof shall be included as is necessary to explain the rulings below.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment (C. C.) *Ives v. Grand Trunk R. Co.*, 35 F. 176.

It is not for the United States supreme court to say that the entire evidence in a case is set forth in the bill of exceptions, for that would be to presume a direct violation of a settled rule of practice as regards bills of exception, viz. that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the hearing of the rules of the court upon matters of law in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial.—*Id.*

Under Rev. St. § 953, requiring bills of exceptions to be authenticated by the judge of the trial court, or by the presiding judge thereof, if more than one judge sat at the trial, the authentication of a bill of exceptions from the circuit court by the district judge raises a presumption that he alone sat at the trial, although the placita shows that both the circuit judge and circuit justice were also present at the opening of court, prior to the trial.—*Cooke v. Avery*, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

(F) **DISCRETION OF LOWER COURT.**

Criminal prosecutions, see Criminal Law, —1148-1158.

Federal supreme court, see Courts, —387(4).
In admiralty, see Admiralty, —118.

—949. **Allowance of remedy and matters of procedure in general.**

See 3 Cent. Dig. App. & E. § 3835.

Where plaintiff gives testimony which defendant claims tends to show that he is not a citizen of the district in which he sues, it is within the discretion of the court to refuse to allow defendant to file a plea to that effect, and to raise an issue as to the jurisdiction of the court on the ground of citizenship, and its action in this regard will not be reviewed by the supreme court.—*Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699.

957. Opening default.

See 3 Cent. Dig. App. & E. § 3323.

An application to set aside a default judgment is addressed to the discretion of the court, and unless such discretion has been abused the order will not be disturbed on appeal.—*Copper King of Arizona v. Johnson*, 25 S. Ct. 793, 195 U. S. 627, 49 L. Ed. 351, affirming judgment (*Ariz.*) 76 P. 594.

958. Amendment in general.

See 3 Cent. Dig. App. & E. § 3324.

The discretion of the court below in refusing to allow an amendment to an application for remanding a cause to the state court, by making additional allegations as to the amount in controversy and the citizenship of the parties, etc., will not be reviewed.—*Ayers v. Watson*, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 808.

959. Amended and supplemental pleadings.

See 3 Cent. Dig. App. & E. §§ 3325-3331.

Allowance or refusal to allow amendment to a pleading cannot be reviewed on appeal.—*Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800; *Bullitt County v. Washer*, 130 U. S. 142, 9 S. Ct. 490, 32 L. Ed. 885.

Where plaintiff gives testimony which defendant claims tends to show that he is not a citizen of the district in which he sues, it is within the discretion of the court to refuse to allow defendant to file a plea to the jurisdiction of the court on the ground of citizenship, and its action in this regard will not be reviewed by the supreme court.—*Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699.

Abuse of discretion which may be reviewed on appeal is committed by the trial court when it refuses to permit an amendment to the bill in a suit by the federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested, where such amendment is germane to the original cause of action, and was not foreclosed by the decision of the federal Supreme Court, which on appeal had reversed a prior decree of dismissal founded upon the alleged unconstitutionality of the statute upon which the suit was based, and had remanded the cause for further proceedings.—*United States v. Lehigh Valley R. Co.*, 31 S. Ct. 387, 220 U. S. 257, 55 L. Ed. 458.

960. Rulings on motions relating to pleadings.

See 3 Cent. Dig. App. & E. §§ 3325, 3332-3334.

An exception to the refusal of the trial court to reconsider its order, made on defendant's motion, permitting the withdrawal of a plea in abatement and the filing of a plea in bar, and to allow the trial of the issue joined on the plea in abatement, is not available in the federal Supreme Court. Judgment (1904) 23 App. D. C. 551, reversed.—*Chunn v. City & Suburban Ry. of Washington*, 28 S. Ct. 63, 207 U. S. 302, 52 L. Ed. 219.

963. Proceedings preliminary to trial.

See 3 Cent. Dig. App. & E. §§ 3334, 3336, 3337.

964. — In general.

See 3 Cent. Dig. App. & E. § 3334.

The question whether two cases shall be consolidated in the court below is a matter in the discretion of the court, and will not be disturbed on appeal except for palpable abuse of discretion.—*District of Columbia v. Bailey*, 18 S. Ct. 868, 171 U. S. 161, 43 L. Ed. 118, reversing judgment *Bailey v. District of Columbia*, 9 App. D. C. 860.

965. — Change of venue.

See 3 Cent. Dig. App. & E. § 3336.

The action of the trial court in denying an application for change of venue will not be reviewed on appeal.—*Kennon v. Gilmer*, 131 U. S. 22, 9 S. Ct. 696, 32 L. Ed. 110.

966. — Continuance.

See 3 Cent. Dig. App. & E. § 3337.

The action of the trial court on an application for a continuance will not be reviewed on error.—*Cox v. Hart*, 145 U. S. 376, 12 S. Ct. 962, 36 L. Ed. 741.

Granting or refusing a continuance is discretionary, and will not be reviewed except in cases of an abuse of discretion.—*Means v. Bank of Randall*, 146 U. S. 620, 13 S. Ct. 186, 36 L. Ed. 1107; *Texas & P. Ry. Co. v. Humble*, 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747, affirming 97 F. 837, 38 C. C. A. 502.

Denial of a motion for the continuance of a cause does not constitute a ground for the reversal of a final decree. Decree 65 P. 276, reversed.—*United States v. Rio Grante Dam & Irrigation Co.*, 22 S. Ct. 428, 184 U. S. 416, 46 L. Ed. 619.

970. Reception of evidence.

See 3 Cent. Dig. App. & E. §§ 3340-3351.

Where offers of proof are not specific, or are so broad as to embrace irrelevant and immaterial matter, the discretion of the trial court in rejecting them is not reviewable.—*Central Pac. R. Co. v. People of State of California*, 162 U. S. 91, 16 S. Ct. 766, 40 L. Ed. 903.

The admission of testimony out of its regular order is within the sound discretion of the trial court, whose action in that respect will not be reviewed except in case of abuse.—*Throckmorton v. Holt*, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663; *Raub v. Carpenter*, 23 S. Ct. 72, 187 U. S. 159, 47 L. Ed. 119.

971. Examination of witnesses.

See 3 Cent. Dig. App. & E. §§ 3352-3357.

The extent and manner of the cross-examination of a witness, which may be made with regard to matters not inquired about on the direct examination, is largely subject to the control of the court, in the exercise of a sound discretion, and the exercise of such discretion is not reviewable on appeal or writ of error.—*Davis v. Coblenz*, 19 S. Ct. 832, 174 U. S. 719, 43 L. Ed. 1147; (*Kan.*) *Fourth Nat. Bank v. Albaugh*, 23 S. Ct. 450, 188 U. S. 734, 47 L. Ed. 673, affirming decree 107 F. 819, 46 C. C. A. 655.

The discretion of the trial judge in determining whether a given nonexpert witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of mental capacity, should not be reviewed on appeal unless the decision is clearly erroneous. Decree (1907) 29 App. D. C. 460, affirmed.—*Turner v. American Security & Trust Co.*, 29 S. Ct. 420, 213 U. S. 257, 53 L. Ed. 788.

The discretion of the trial court in allowing leading questions will not be reviewed where the witness was of foreign birth and did not readily understand the questions put.—*Southwestern Brewery & Ice Co. v. Schmidt*, 33 S. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment *Schmidt v. Southwestern Brewery & Ice Co.*, 107 F. 677, 15 N. M. 232.

973. Dismissal, nonsuit, demurrer to evidence, or direction of verdict.

See 3 Cent. Dig. App. & E. § 3346.

A demurrer to evidence is addressed more to the discretion of the court than to the merits, and the action of the trial court thereon is not assignable for error.—*Van Stone v. Still-*

well & Bierce Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961.

◀974. **Submission of issues or questions to jury.**

See 3 Cent. Dig. App. & E. §§ 2853, 2859.

Since a suit for the foreclosure of mechanics' liens is one of equitable jurisdiction, and the court is not bound to submit issues to the jury, where it has done so it is at liberty to disregard their findings; and hence its action in setting aside the general verdict, and substituting its own findings for the special findings of the jury, is not reviewable.—*Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 493, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hast.) 239, 10 P. 620.

◀976. **New trial or rehearing.**

See 3 Cent. Dig. App. & E. §§ 3360-3373.

◀977. — **In general.**

See 3 Cent. Dig. App. & E. §§ 3360-3365.

The denial of a new trial will not be reviewed.—*Missouri Pac. Ry. Co. v. Chicago & A. R. Co.*, 132 U. S. 191, 10 S. Ct. 65, 33 L. Ed. 309; *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961; *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71.

The ruling on a motion for new trial is discretionary, and not reviewable in the federal courts.—*Ward v. Joslin*, 22 S. Ct. 807, 186 U. S. 142, 46 L. Ed. 1093, affirming judgment 105 F. 224, 44 O. C. A. 458.

◀979. — **For insufficiency of evidence.**

See 3 Cent. Dig. App. & E. §§ 3371-3373, 3377; 24 Cent. Dig. Fraud. Conv. § 999.

An order of the circuit court of the United States requiring a party to remit a portion of the verdict awarded as a condition for refusing a new trial is not subject to review by the supreme court.—*Arkansas Val. Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed. 854.

Where a motion for a new trial on the ground of excessive damages is refused by the trial court, such refusal will not be reviewed on appeal to the supreme court.—*New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71.

◀985. **Allowance and perfecting of appeal or other proceeding for review.**

See 3 Cent. Dig. App. & E. §§ 3389-3391.

The discretion of the trial judge as to the sufficiency of the appeal bond is not reviewable on appeal.—*New Orleans Ins. Co. v. E. D. Albro Co.*, 112 U. S. 506, 5 S. Ct. 289, 28 L. Ed. 809.

◀986. **Allowance of supersedeas or stay.**

See 3 Cent. Dig. App. & E. § 3392.

The amount of a supersedeas bond as well as the security are matters to be determined by the judge below, and this discretion will not be interfered with by the supreme court.—*Mexican Nat. Const. Co. v. Reusens*, 118 U. S. 49, 6 S. Ct. 945, 30 L. Ed. 77.

(G) **QUESTIONS OF FACT, VERDICTS, AND FINDINGS.**

Action for divorce, see Divorce, ▶184.

Court of claims, see Courts, ▶389.

Decisions of Board of General Appraisers, see

Customs Duties, ▶85.

Deportation proceedings, see Aliens, ▶32.

Federal Supreme Court, see Courts, ▶399.

Findings of interstate commerce commission, see Commerce, ▶98.

In admiralty, see Admiralty, ▶118.

Review of criminal prosecutions, see Criminal Law, ▶1157-1159.

◀987. **Power and duty to review.**

See 3 Cent. Dig. App. & E. §§ 3393-3396; 13 Cent. Dig. Costs, § 327.

A suit by the United States to bar and foreclose all claims in law and equity on the part of one who has fraudulently obtained an award against another country, under a statute authorizing the court to render such interlocutory and final decrees as the evidence may warrant, according to the principles of equity and justice, and to enforce the same by injunction, is a suit in equity, which on appeal is to be re-examined on both law and facts. *Decree United States v. La Abra Silver Min. Co.*, 32 Ct. Cl. 462, affirmed.—*La Abra Silver Min. Co. v. United States*, 20 S. Ct. 168, 175 U. S. 423, 44 L. Ed. 223.

◀988. **Extent of review.**

See 3 Cent. Dig. App. & E. §§ 3397-3399.

◀989. — **In general.**

See 3 Cent. Dig. App. & E. § 3397.

The decision of a jury as to the fact of the navigability of water is not binding upon the appellate court, so as to preclude a consideration of the instructions and definitions under which the jury found the verdict. Judgment 92 F. 344, 34 C. C. A. 392, reversed.—*Leovy v. United States*, 20 S. Ct. 797, 177 U. S. 621, 44 L. Ed. 914.

◀992. **Questions preliminary to admission of evidence.**

See 3 Cent. Dig. App. & E. § 3350.

The finding of a trial judge on a preliminary question of fact on which the admissibility of certain evidence depends is not subject to reversal if fairly supported by the evidence.—*Gila Valley, G. & N. Ry. Co. v. Hall*, 34 S. Ct. 229, 232 U. S. 94, 58 L. Ed. 521, affirming judgment 112 P. 845, 13 Ariz. 270.

◀997. **Dismissal, nonsuit, demurrer to evidence, or direction of verdict.**

See 3 Cent. Dig. App. & E. §§ 4023, 4024.

The refusal of the trial court to direct a verdict for the defendant in an action on a life insurance policy on the ground of a violation of the policy by suicide will not be ground of reversal after verdict and judgment for the plaintiff on the policy, where the facts do not show beyond dispute that suicide was committed. Judgment 94 F. 751, 36 C. C. A. 467, affirmed.—*Supreme Lodge, K. P. of the World, v. Beck*, 21 S. Ct. 532, 181 U. S. 49, 45 L. Ed. 741.

The review by an appellate court of the action of the trial court in giving a peremptory instruction in favor of the defendant after denying plaintiffs' request for a peremptory instruction in their favor, and their subsequent special requests, is not confined to determining whether there was any support in the evidence for the inferences drawn by the trial court, but extends to determining whether the special instructions asked were rightly refused either because of their inherent unsoundness, or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. Judgments (1906) *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 147 F. 457, 77 C. C. A. 601, and *Minnesota & D. Cattle Co. v. Same*, 147 F. 463, 77 C. C. A. 607, affirmed.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 28 S. Ct. 607, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70.

—998. Verdicts.

See 3 Cent. Dig. App. & E. §§ 3912-3954; 24 Cent. Dig. Fraud. Conv. § 1000, 1001.

—999. — Conclusiveness in general.

See 3 Cent. Dig. App. & E. §§ 3912-3921, 3923, 3924; 24 Cent. Dig. Fraud. Conv. § 1000.

A verdict upon a question of fact on the evidence submitted is, in general, conclusive.—*Cunningham v. Springer*, 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662, 9 Ann. Cas. 897.

—1001. — Sufficiency of evidence in support.

See 3 Cent. Dig. App. & E. §§ 3922, 3923-3934; 24 Cent. Dig. Fraud. Conv. § 1000.

Evidence is insufficient in law only where there is a total absence of such proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of a fact sought to be proved, e. g., where the law requires written evidence, or two witnesses, and only oral evidence or one witness is produced. Insufficiency in point of fact may exist where there is none in law, as where there is some evidence to sustain every element of the case, competent, both in quantity and in quality, in law, to sustain it, but met by countervailing proof sufficiently potent to lead to the opposite conclusion. In such cases, the verdict is not supported by sufficient evidence, because it is against the weight of evidence.—*Metropolitan R. Co. v. Moore*, 7 S. Ct. 1334, 121 U. S. 558, 30 L. Ed. 1022.

Under *Prince's Laws N. M. c. 16, § 7* (Comp. St. § 2190), providing that the supreme court shall reverse or affirm the judgment of the district court on the facts in the record alone, the court may affirm a judgment rendered on a general verdict for plaintiffs, if the facts support any count in the declaration.—*Hopkins v. Orr*, 124 U. S. 510, 8 S. Ct. 590, 31 L. Ed. 523.

The verdict is conclusive if there is any evidence to sustain it, or the evidence tends to sustain it.—*United States v. Copper Queen Consol. Min. Co.*, 22 S. Ct. 761, 185 U. S. 495, 46 L. Ed. 1008, affirming 60 P. 885, 7 Ariz. 80.

The court cannot reverse a judgment because of insufficient evidence to support a finding of fact by the jury based on the evidence and an ocular inspection of machinery the knowledge of the defects of which is in issue.—*Choctaw, O. & G. R. Co. v. Holloway*, 24 S. Ct. 102, 191 U. S. 334, 48 L. Ed. 207, affirming judgment 114 F. 458, 52 C. C. A. 260.

Whether there was credible evidence to sustain a verdict was for the jury and not for the appellate court.—*Southwestern Brewery & Ice Co. v. Schmidt*, 33 S. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment *Schmidt v. Southwestern Brewery & Ice Co.*, 107 P. 677, 15 N. M. 232.

A verdict for plaintiff in an action for death should not be set aside on appeal for lack of evidence, unless under the testimony no recovery could be had on the facts shown in any view which could properly be taken of them.—*Myers v. Pittsburgh Coal Co.*, 34 S. Ct. 559, 233 U. S. 184, 58 L. Ed. 906, reversing judgment *Pittsburgh Coal Co. v. Myers*, 203 F. 221, 121 C. C. A. 427.

—1002. — On conflicting evidence.

See 3 Cent. Dig. App. & E. §§ 3935-3937; 24 Cent. Dig. Fraud. Conv. § 1001; 41 Cent. Dig. R. R. § 1655.

A verdict on conflicting evidence will not be disturbed.—*Etna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371; *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71.

Conflicting testimony will not be weighed by the Supreme Court, and it will only determine whether there is evidence adequate to sustain

the verdict.—*Troxell v. Delaware, L. & W. R. Co.*, 33 S. Ct. 274, 227 U. S. 434, 57 L. Ed. 586, reversing judgment *Delaware, L. & W. R. Co. v. Troxell*, 200 F. 44, 118 C. C. A. 272.

—1003. — Against weight of evidence.

See 3 Cent. Dig. App. & E. §§ 3938-3943; 5 Cent. Dig. Attach. § 925; 24 Cent. Dig. Fraud. Conv. § 1000.

The objection that the verdict in a negligence action was against the weight of evidence cannot be considered by the federal Supreme Court on a writ of error, where there is evidence proper for the consideration of the jury.—*Herencia v. Guzman*, 31 S. Ct. 135, 219 U. S. 44, 55 L. Ed. 81.

—1004. — Amount of recovery.

See 3 Cent. Dig. App. & E. §§ 3944-3947; 43 Cent. Dig. Sales, § 1320.

On appeal the verdict is conclusive as to the amount of damages.—*Wabash Ry. Co. v. McDaniel*, 107 U. S. 454, 2 S. Ct. 932, 27 L. Ed. 605; *City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

An allowance for counsel fees out of funds in court will not be disturbed as excessive, where the two lower courts have concurred in the amount allowed as reasonable. Decree (1909) 172 F. 1, 96 C. C. A. 587, affirmed.—*United States v. Carter*, 30 S. Ct. 515, 217 U. S. 286, 54 L. Ed. 769, 19 Ann. Cas. 594.

The objection that the damages allowed in a negligence action were excessive cannot be considered by the federal Supreme Court on a writ of error where there is evidence proper for the consideration of the jury.—*Herencia v. Guzman*, 31 S. Ct. 135, 219 U. S. 44, 55 L. Ed. 81.

A case of mere excessive verdict on the evidence does not present a question for re-examination in the Supreme Court on writ of error.—*Southern Ry.-Carolina Division v. Bennett*, 34 S. Ct. 566, 233 U. S. 80, 58 L. Ed. 800, affirming judgment (S. C.) *Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

Refusal to direct remittitur because of assumed excessive amount of verdict is not reviewable in federal Supreme Court on writ of error.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918.

—1005. — Approval of trial court.

See 3 Cent. Dig. App. & E. §§ 3860-3876, 3948-3950.

The determination of the jury, approved by the trial court and by the Circuit Court of Appeals, respecting the negligence of the captain of a steamer in running into and injuring an uncompleted extension of a government breakwater in a harbor, and respecting the contributory negligence of the government, cannot be disturbed by the federal Supreme Court if there is any evidence upon which it can be rested. Judgment (1905) 142 F. 315, 73 C. C. A. 425, affirmed.—*Davidson S. S. Co. v. United States*, 27 S. Ct. 480, 205 U. S. 187, 51 L. Ed. 764.

A verdict finding that a construction company was guilty of negligence toward a locomotive fireman in its employ who was injured by the giving way of a pile bridge during high water will not be disturbed by the federal Supreme Court, where it has been approved by both the trial and territorial Supreme Courts, and there was evidence that the bridge had once before given way in time of high water, and was rebuilt without change of plan. Judgment (1906) 87 P. 320, 17 Okl. 355, affirmed.—*McCabe & Steen Const. Co. v. Wilson*, 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

—1007. Findings of court.

See 3 Cent. Dig. App. & E. §§ 3860-3876, 3955-3955½; 24 Cent. Dig. Fraud. Conv. § 1000; 42 Cent. Dig. Refer. § 225.

1008. — Conclusiveness in general.

See 3 Cent. Dig. App. & E. §§ 3965-3969, 3962-3969; 42 Cent. Dig. Refer. § 226.

Findings of fact by the court without a jury are not subject to exception or review.—*Town of Santa Anna v. Frank*, 118 U. S. 339, 5 S. Ct. 536, 28 L. Ed. 978; *Durand v. Martin*, 120 U. S. 366, 7 S. Ct. 587, 30 L. Ed. 675; *Hathaway v. First Nat. Bank*, 134 U. S. 494, 10 S. Ct. 608, 33 L. Ed. 1004; *Betts v. Murgidge*, 154 U. S. 644, 14 S. Ct. 1188, 25 L. Ed. 157.

Where a case is tried before the court without a jury, and there is a general finding only, and no special findings of facts, the appellate court is precluded from inquiring into the special facts and conclusions of law on which that finding rests, and can review only the rulings of the court on the evidence on the trial.—*Boardman v. Toffey*, 117 U. S. 271, 6 S. Ct. 734, 29 L. Ed. 898.

A finding of fact by the court sitting without a jury is equivalent to a verdict, and hence will be disturbed only when it is clearly erroneous, or shows that the judge was influenced by improper motives, or misunderstood the evidence.—*Donnelly v. District of Columbia*, 119 U. S. 339, 7 S. Ct. 276, 30 L. Ed. 465; *Zeckendorf v. Johnson*, 123 U. S. 617, 8 S. Ct. 261, 31 L. Ed. 277; *Lehnen v. Dickson*, 148 U. S. 71, 13 S. Ct. 481, 37 L. Ed. 373, affirming judgment (C. C.) *Dickson v. Lehnen*, 37 F. 319; *Dower v. Richards*, 151 U. S. 658, 14 S. Ct. 452, 38 L. Ed. 305.

Where a case is tried by the circuit court of the United States without a jury, the findings of the court upon questions of fact are final, and not open to review in the supreme court on a writ of error. Rev. St. § 700.—*Stanley v. Albany County*, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000.

Where a cause, by stipulation, is tried by the circuit court without a jury, the supreme court cannot review its action in finding certain facts from the evidence.—*City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941, affirming judgment (C. C.) *Rutz v. Seeger*, 35 F. 188.

Laws N. M. 1889, c. 1, § 4, making it the duty of the supreme court to pass on all rulings apparent on the record or bill of exceptions, and in case of error to grant a new trial, or render such judgment as may be proper, and, if the case was tried without a jury, to review it to the same extent as if it had been tried by the jury, does not affect the general rule that, when a jury is waived, the findings of fact have the same force as the verdict of a jury, and the court will not order a trial for the admission of incompetent evidence if there be other evidence to support the conclusion.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230, affirming *Lynch v. Grayson*, 32 P. 149, 7 N. M. (Gild.) 26.

The findings of a court on questions of fact, where a jury has been waived, are conclusive in the courts of review.—(Sup., III.) *Dooley v. Pease*, 21 S. Ct. 329, 180 U. S. 126, 45 L. Ed. 457, affirming judgment 88 F. 446, 31 C. C. A. 582.

The concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. Judgment 16 App. D. C. 595, affirmed.—*Brainard v. Buck*, 22 S. Ct. 458, 184 U. S. 99, 46 L. Ed. 449.

The findings of fact in a creditors' suit, which are not reviewable in the federal Supreme Court, embrace a statement accompanying the findings, to the effect that certain conversations between an attorney and client were excluded because the plan outlined by the latter did not tend to establish a fraud on creditors so as to

exclude the claim of privilege, since such statement really shows that, instead of rejecting the testimony, the court weighed and considered it, and its finding that the conversation did not tend to show the fraud which it was asserted it did show, and which was the same fraud charged in the bill, was but an expression of the conclusion of the court upon the facts involved in the merits of the controversy.—*Will v. Tornabelli*, 30 S. Ct. 424, 217 U. S. 47, 54 L. Ed. 660.

Findings of the court under Rev. St. § 649, have the same effect as a verdict of a jury.—*United States v. United States Fidelity & Guaranty Co.*, 35 S. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment *United States Fidelity & Guaranty Co. v. United States*, 194 F. 611, 116 C. C. A. 187.

1009. — Effect in equitable actions.

See 3 Cent. Dig. App. & E. §§ 3970-3978; 24 Cent. Dig. Fraud. Conv. § 1000.

In an action by a cestui que trust against a trustee, where, upon the evidence, a majority of the court is of opinion that the proofs do not make out the breach of trust alleged, and that plaintiff's view of defendant's obligations is inconsistent with the previous conduct and mutual dealings of the parties, the decree in favor of defendant will be affirmed.—*Tyler v. Campbell*, 106 U. S. 322, 1 S. Ct. 293, 27 L. Ed. 162.

In equity a finding of the judge or chancellor on conflicting evidence will not be disturbed unless it is clearly wrong.—*Gumaer v. Colorado Oil Co.*, 152 U. S. 88, 14 S. Ct. 480, 38 L. Ed. 365.

The rule that successive and concurrent decisions of two courts in the same case, on a mere question of fact, will not be reversed by the supreme court, unless clearly shown to be erroneous, is applicable to appeals in equity as well as in admiralty.—*Towson v. Moore*, 19 S. Ct. 332, 173 U. S. 17, 43 L. Ed. 597.

Concurrent findings of facts of the courts below in a suit in equity will not be disturbed by the federal Supreme Court on appeal unless clearly erroneous. Judgment (1906) 144 F. 83, 75 C. C. A. 241, affirmed.—*Dun v. Lumbermen's Credit Ass'n*, 28 S. Ct. 335, 209 U. S. 20, 52 L. Ed. 663, 14 Ann. Cas. 501.

1010. — Sufficiency of evidence in support.

See 3 Cent. Dig. App. & E. §§ 3979-3982, 4024; 24 Cent. Dig. Fraud. Conv. § 1000.

Where an ultimate fact is found by the lower court, its finding or refusing to find as to any incidental fact which is merely evidence as to the ultimate fact will not be reviewed by the supreme court.—*Hathaway v. First Nat. Bank*, 134 U. S. 494, 10 S. Ct. 608, 33 L. Ed. 1004.

The supreme court will not review the finding of fact of the circuit court except to establish whether such court found any facts which were wholly unsupported by testimony, or refused to find any fact material to the issue, when such fact was proven by uncontradicted evidence.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, affirming decree (C. C.) *The City of New York*, 35 F. 604.

Under Rev. St. § 700, allowing a review of the rulings of a court sitting without a jury, and a determination as to whether facts specifically found support the judgment, in the absence of special findings, there can be no inquiry as to whether the facts were sufficient to sustain the conclusion.—*Lehnen v. Dickson*, 148 U. S. 71, 13 S. Ct. 481, 37 L. Ed. 373, affirming judgment (C. C.) *Dickson v. Lehnen*, 37 F. 319.

A finding or judgment by the court on the facts will not be disturbed if sustained by sufficient evidence, or substantially supported by the

evidence.—*Mellon v. Delaware, L. & W. R. Co.*, 154 U. S. 673, 14 S. Ct. 1194, 28 L. Ed. 929.

Where a case is tried by the court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court.—*Young v. Amy*, 18 S. Ct. 802, 171 U. S. 179, 43 L. Ed. 127.

A finding by the trial court will not be disturbed by the court on appeal, when there is any evidence to support it, or the evidence tends to support it.—*Dooley v. Pease*, 21 S. Ct. 329, 180 U. S. 126, 45 L. Ed. 457, affirming judgment 88 F. 446, 31 C. C. A. 582.

The supreme court of the United States, though bound by an agreed statement of facts when reviewing the judgment of a state court, may inquire whether the facts agreed upon support the judgment. Judgment 63 P. 935, 9 Wyo. 352, 87 Am. St. Rep. 959, reversed.—*Kelley v. Rhoads*, 23 S. Ct. 259, 188 U. S. 1, 47 L. Ed. 359.

A finding of the court of private land claims, that "the evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of the existence in the community or by the oldest inhabitants now living is so vague, contradictory, and uncertain as to be almost wholly wanting," will, in the absence of clear evidence to the contrary, be adopted on appeal by the Supreme Court of the United States.—*Sena v. United States*, 23 S. Ct. 596, 189 U. S. 233, 47 L. Ed. 787, decree modified 23 S. Ct. 857, 189 U. S. 504, 47 L. Ed. 787.

The action of the trial court in disregarding uncontradicted testimony tending to show the absence of a necessary party will not be disturbed on an appeal from a territorial Supreme Court to the Supreme Court of the United States, where such testimony squarely conflicts with an averment in a pleading to which the witness is a party, and upon the truth of which averment the whole controversy proceeds. Judgment 85 P. 259, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

A finding of a federal Circuit Court that a foreign insurance company was not induced by fraud to send its medical representative into the state, clothed with authority to settle a loss, so as to permit service of process on him in an action against the company, will not be set aside by the federal Supreme Court as erroneous, where the lower court might have found on the testimony that there was a bona fide attempt to settle the controversy, and that it was only upon failure to reach a settlement that service of summons was made.—*Commercial Mut. Accident Co. v. Davis*, 29 S. Ct. 445, 213 U. S. 245, 53 L. Ed. 782.

The federal Supreme Court reviewing on error a judgment of the state appellate court reversing a judgment holding directors of a national bank liable under Rev. St. § 5239 (Comp. St. 1913, § 9831), for deposits received under false representations as to the bank's financial condition, will inquire into the facts to determine whether there is substantial evidence to support the findings.—*Jones Nat. Bank v. Yates*, 36 S. Ct. 429, 240 U. S. 541, 60 L. Ed. 788, reversing judgment 139 N. W. 844, 1135, 93 Neb. 121.

1011. — On conflicting evidence.

See 3 Cent. Dig. App. & E. §§ 2953-2959; 24 Cent. Dig. Fraud. Conv. § 1001.

A finding by the court on conflicting evidence has the force of a verdict, and will not be disturbed on appeal.—*Hewitt v. Campbell*, 109 U. S. 103, 3 S. Ct. 68, 27 L. Ed. 871; *Jeffries v. Mutual Life Ins. Co. of New York*, 110 U. S. 306, 4 S. Ct. 8, 28 L. Ed. 156; *Mc-*

Kinley Creek Min. Co. v. Alaska United Min. Co., 22 S. Ct. 84, 183 U. S. 563, 46 L. Ed. 331; *Hill v. McCord*, 195 U. S. 395, 25 S. Ct. 96, 49 L. Ed. 251, affirming *McCord v. Hill*, 94 N. W. 65, 117 Wis. 306.

The finding of a trial court, on conflicting evidence, that an assessment did not include the federal franchise of defendant railroad, is not open to review on the theory that the court did not consider all the evidence, merely because it stated that if the parol evidence offered had not weighed in plaintiff's favor, and if defendant, by preponderance of such evidence, could have shown that the board intended to include a federal franchise, the court would have had to disregard it as incompetent. Judgment 105 Cal. 576, 38 Pac. 905, affirmed.—*Central Pac. R. Co. v. People of State of California*, 162 U. S. 91, 16 S. Ct. 766, 40 L. Ed. 903.

1012. — Against weight of evidence.

See 3 Cent. Dig. App. & E. §§ 3390-3392.

The question whether a finding is against the weight of evidence cannot be considered.—*Dooley v. Pease*, 21 S. Ct. 329, 180 U. S. 126, 45 L. Ed. 457, affirming 88 F. 446, 31 C. C. A. 582.

A finding of the trial court, not clearly against the weight of the evidence, will not be disturbed.—*Howard v. Perrin*, 26 S. Ct. 195, 200 U. S. 71, 50 L. Ed. 374.

1015. — Decision on motion for new trial.

See 3 Cent. Dig. App. & E. §§ 3360-3376.

Where a motion for a new trial, based on the alleged intoxication of a jurymen during the trial, is contested, and the trial court, after a full consideration of affidavits and counter affidavits and a searching oral investigation, finds as matter of fact that the charge is not sustained, and overrules the motion, a judgment on the verdict will not be disturbed on appeal.—*Keely v. Moore*, 25 S. Ct. 169, 196 U. S. 38, 49 L. Ed. 376, affirming *Kelly v. Same*, 22 App. D. C. 9.

The trial judge, to whom a suit to enjoin an assessment was submitted on both the law and the facts, having found that the evidence did not disclose any discrimination in the assessment and levy of the taxes on the stock in controversy as compared with other property in the state, and that the value placed on the stock by the Comptroller General is not excessive, and having also found generally in favor of the defendant on all of the issues of fact in the case, and there being evidence to authorize each finding, and the trial judge having, upon motion for a new trial, declined to disturb the findings made by him at the final hearing, the judgment will not be reversed on the ground that the findings were contrary to the evidence and without evidence to support them.—*Central of Georgia R. Co. v. Wright*, 28 S. Ct. 47, 207 U. S. 127, 52 L. Ed. 134, 12 Ann. Cas. 463, reversing 54 S. E. 52, 125 Ga. 589.

1016. Findings of referee, master, commissioner, or auditor.

See 3 Cent. Dig. App. & E. §§ 3396-4018; 24 Cent. Dig. Fraud. Conv. § 1000.

1017. — Conclusiveness in general.

See 3 Cent. Dig. App. & E. §§ 3311, 3361, 3396-4005; 24 Cent. Dig. Fraud. Conv. § 1000.

Where a cause has been tried in the circuit court by a referee, without any waiver in writing of trial by jury, the supreme court cannot, upon writ of error, review exceptions to the admission or exclusion of evidence, nor to the findings of fact by the referee, nor his refusal to find facts as requested.—*Roberts v. Benjamin*, 124 U. S. 64, 8 S. Ct. 393, 31 L. Ed. 334.

Where the parties consent that a referee or master shall hear and decide all the issues, and report his findings both of fact and law, and such reference is entered as a rule of the court, his findings are to be taken as presumptively correct, and subject only to be reviewed under the reservation in the consent and order of the court, when there has been manifest error in the consideration given to evidence, or in the application of the law.—*Kimberly v. Arms*, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764; *Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289.

When a trial in a United States circuit court is, by consent of parties, before a referee or arbitrator, no question of law can be reviewed on error, except whether the facts, as found, support the judgment.—*Town of Andes v. Slauson*, 130 U. S. 435, 9 S. Ct. 573, 32 L. Ed. 989.

Exceptions to findings of fact of a referee cannot be reviewed in the federal Supreme Court on writ of error to a state court.—*David Lupton's Sons Co. v. Automobile Club of America*, 32 S. Ct. 711, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, 609.

⇐1018. — Sufficiency of evidence in support.

See 3 Cent. Dig. App. & E. §§ 4006, 4007; 24 Cent. Dig. Fraud. Conv. § 1000.

A finding by a referee, fairly sustained by the evidence, or sustained by substantial evidence, will not be disturbed.—*Citizens' Nat. Bank of Kansas City v. Donnell*, 25 S. Ct. 49, 195 U. S. 369, 49 L. Ed. 238, affirming 72 S. W. 925, 172 Mo. 384.

Findings of facts made by an auditor to whom a cause is referred to ascertain the damages resulting from the wrongful suing out of a temporary restraining order will not be set aside on appeal unless it is shown that there has been an error in law or a conclusion of fact unwarranted by the evidence. Decree 28 App. D. C. 271, affirmed.—*Hutchins v. Munn*, 28 S. Ct. 504, 209 U. S. 246, 52 L. Ed. 776.

⇐1019. — On conflicting evidence.

See 3 Cent. Dig. App. & E. §§ 4008-4010; 35 Cent. Dig. Mig. § 108.

A finding on conflicting evidence has the force of a verdict, and will be set aside only when clearly erroneous, or against the weight of evidence.—*Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664; *Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547.

⇐1021. — Amount of recovery.

See 3 Cent. Dig. App. & E. §§ 4013, 4014.

On the question of the compensation allowed the receiver of the furniture, etc., of an hotel, he being authorized by the court to continue the business pending the suit, it appeared that while the receiver employed a manager, and gave but little personal attention to the business, the position was attended with much anxiety, the hotel being kept open at a loss, and the receiver required to raise money each month to meet the deficiency, and that he retained the position against his will, at request of the parties in interest. Held, that an allowance of 10 per cent. on the receipts, and 5 per cent. on the disbursements, of the business, amounting to nearly \$2,800 for the term of seven months, having been allowed by the auditor and approved by the trial and appellate courts, would not be disturbed as excessive, though, had the question been an original one, the compensation would have been fixed at a much smaller amount.—*Cake v. Mohun*, 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447.

⇐1022. — Approval or disapproval of trial court.

See 3 Cent. Dig. App. & E. §§ 4015-4018; 24 Cent. Dig. Fraud. Conv. § 1000.

A finding of fact which has been approved or confirmed by the judge or chancellor will not be disturbed unless there is no evidence to sustain it, or it is clearly against the weight of evidence, or based on manifest error or mistake.—*Crawford v. Neal*, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552; *Furrer v. Ferris*, 145 U. S. 132, 12 S. Ct. 821, 36 L. Ed. 649.

A master's finding that a receiver maintained a reasonably safe railroad crossing, and was guilty of no negligence in respect thereto, being mainly a finding of fact, is, when approved by the trial court, presumptively, though not conclusively, correct on appeal.—*Furrer v. Ferris*, 145 U. S. 132, 12 S. Ct. 821, 36 L. Ed. 649.

Findings on conflicting evidence, approved by the lower court, will not be disturbed.—*Warren v. Keep*, 155 U. S. 265, 15 S. Ct. 83, 39 L. Ed. 144.

Findings of fact made by an auditor to whom a case is referred to state the account, and confirmed by the courts below, will be affirmed by the Supreme Court of the United States, unless clearly erroneous. Judgment, *Waggaman v. Earle* (1905) 25 App. D. C. 582; *Earle v. Waggaman, Id.*, reversed.—*Earle v. Myers*, 28 S. Ct. 86, 207 U. S. 244, 52 L. Ed. 191.

(H) HARMLESS ERROR.

Criminal prosecutions, see Criminal Law, ⇐1161-1177.

⇐1025. Prejudice to rights of party as ground of review.

See 3 Cent. Dig. App. & E. §§ 4029-4037.

⇐1026. — In general.

See 3 Cent. Dig. App. & E. §§ 4029, 4030.

No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made.—*Lancaster v. Collins*, 115 U. S. 222, 6 S. Ct. 33, 29 L. Ed. 878.

Error committed by the trial court either in admitting evidence or in the legal effect given to the evidence admitted concerning acts which were held adequate to interrupt the course of prescription is not ground for reversal, where the appellate court decides that a longer period of prescription controlled, concerning which the acts of interruption were wholly irrelevant, although the defeated party, relying on the certainty of a reversal because of such errors, may have neglected to make a full defense, or to assign other substantial errors in the appellate court.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 189 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

Holdings of a Circuit Court of Appeals affirming a judgment in an action for personal injuries to the effect that the Federal Employer's Liability Act abolished the defense of assumption of risk, and that an injured railroad employé could avail himself of the statute, though he was not actually engaged in interstate commerce, held no ground for reversal where the defense of assumption of risk was accorded to the railroad company at the trial, and the right of the employé to recover was based on his actual engagement in interstate commerce.—*Seaboard Air Line Ry. v. Moore*, 33 S. Ct. 580, 228 U. S. 433, 57 L. Ed. 907, affirming judgment 193 F. 1022, 118 C. C. A. 668.

1027. — Errors not affecting result.

See 3 Cent. Dig. App. & E. § 4033; 46 Cent. Dig. Trial, § 124.

Adoption by master of an erroneous measure of recovery, if suit is one of unfair competition without trade-mark infringement, does not require reversal of a decree for complainant where claim of trade-mark right was asserted and proofs made, and his findings are applicable to such claim.—*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629, affirming decree *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 206 F. 611, 124 C. C. A. 409.

1028. — Errors in cases of decisions correct on merits.

See 3 Cent. Dig. App. & E. § 4034.

The supreme court of the United States will not reverse a decision of a lower court, if correct upon the merits, simply because the lower court may not have sufficiently recognized the doctrine of comity. Decree, *Stover Mfg. Co. v. Mast, Foos & Co.*, 89 F. 333, 32 C. C. A. 231, affirmed.—*Mast, Foos & Co. v. Stover Mfg. Co.*, 20 S. Ct. 708, 177 U. S. 485, 44 L. Ed. 856.

1030. — Irregularities in procedure.

See 3 Cent. Dig. App. & E. § 4037.

Where defendant claims the right to go to the jury on a question of fact, after his plea of the statute of limitations has been improperly overruled, and there is a peremptory charge to find for plaintiff for a less amount than he claims, to which plaintiff excepts and brings error, the judgment entered on the verdict must be affirmed, as no error was committed to plaintiff's prejudice.—*Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 10 S. Ct. 223, 33 L. Ed. 473.

1031. Presumption as to effect of error.

See 3 Cent. Dig. App. & E. §§ 4038-4046.

Where error is shown, it is presumed to have worked injury to the party against whom it was committed, unless the contrary affirmatively appears from the record.—*Gilmer v. Higley*, 110 U. S. 47, 3 S. Ct. 471, 28 L. Ed. 62; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 S. Ct. 118, 30 L. Ed. 299.

The exclusion of proper evidence is presumed to have been prejudicial unless the contrary be shown.—*Pullman's Palace-Car Co. v. Central Transp. Co.*, 139 U. S. 62, 11 S. Ct. 489, 35 L. Ed. 69.

Where evidence is shown to have been erroneously admitted, over objection, it is presumed to have been injurious in its effects, unless the contrary be shown.—*Mexia v. Oliver*, 148 U. S. 664, 13 S. Ct. 754, 37 L. Ed. 602.

1033. Errors favorable to party complaining.

See 3 Cent. Dig. App. & E. §§ 4052-4062; 46 Cent. Dig. Trial, § 587.

Error in submitting a case on the theory that the state Employers' Liability Act, rather than the federal Employers' Liability Act, controlled, is harmless, where the state act is more favorable to the employer against whom the judgment was rendered than is the act of Congress.—*Chicago, R. I. & P. Ry. Co. v. Wright*, 36 S. Ct. 185, 239 U. S. 548, 60 L. Ed. 431, affirming judgment *Wright v. Chicago, R. I. & P. R. Co.*, 143 N. W. 220, 94 Neb. 317, and 146 N. W. 1024, 96 Neb. 87.

1035. Nature or form of remedy.

See 3 Cent. Dig. App. & E. § 4031.

An appellant cannot complain that a decree for a resale was rendered upon a rule to show cause, where it does not appear that he was prejudiced by the summary nature of the procedure.—*Stuart v. Gay*, 127 U. S. 518, 8 S. Ct. 1279, 32 L. Ed. 191.

1036. Parties.

See 3 Cent. Dig. App. & E. §§ 4069-4074; 7 Cent. Dig. Bills & N. § 1955.

Joining executor of one judgment debtor as a party defendant when suing on a judgment as a joint judgment is harmless error.—*Kalaniana'ole v. Smithies*, 33 S. Ct. 169, 226 U. S. 462, 57 L. Ed. 303.

1038. Pleading.

See 3 Cent. Dig. App. & E. §§ 4075-4114; 39 Cent. Dig. Paymt. § 252.

1040. — Demurrers or exceptions.

See 3 Cent. Dig. App. & E. §§ 4089-4105; 9 Cent. Dig. Carr. § 570; 17 Cent. Dig. Eject. § 415; 33 Cent. Dig. Land. & Ten. § 1280; 39 Cent. Dig. Plead. §§ 284, 400, 423, 450, 490, 567, 568; 41 Cent. Dig. Quiet. T. § 104.

Defendant is not prejudiced by the sustaining of a demurrer to the plea or answer, if he has other pleas or answers under which he could introduce any evidence that would have been admissible under that demurred to.—*Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 9 S. Ct. 119, 32 L. Ed. 474.

Defendant is not injured by sustaining a demurrer to a cross bill, where it appeared that the court treated the allegations thereof as before it, applied the evidence to them, and held that they were not sustained.—*Lloyd v. Preston*, 146 U. S. 630, 13 S. Ct. 131, 36 L. Ed. 1111.

Where, in a suit on a guaranty of a note, defendant pleads specially the statute of frauds, his right to a review of a ruling sustaining a demurrer to such pleas is not prejudiced by the fact that he might have availed himself of the same defense under the general issue, which he did not plead; for under Code, § 2675, he had the right to rely on his special pleas.—*Moses v. National Bank*, 149 U. S. 298, 13 S. Ct. 900, 37 L. Ed. 743.

A ruling, in a suit on a policy of life insurance, sustaining demurrers to pleas of breach of warranty with respect to the insured's use of intoxicating liquors, is not prejudicial, even though erroneous, where the jury found for plaintiff under instructions that, if they found the insured's answers on that subject to be untrue, they should find for defendant.—*Home Life Ins. Co. v. Fisher*, 23 S. Ct. 380, 188 U. S. 720, 47 L. Ed. 667.

The overruling of the exceptions taken on the ground of impertinence to so much of the bill filed by the United States under Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), to restrain violations of that act, as counted upon facts occurring prior to its enactment, cannot be regarded as prejudicial error, where the court gave no weight to the testimony adduced under the averments complained of, except in so far as it tended to throw light upon the acts done after the passage of the statute, the results of which, it was charged, were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

1042. — Striking out or dismissing.

See 3 Cent. Dig. App. & E. §§ 4110-4114; 32 Cent. Dig. Libel, § 381; 39 Cent. Dig. Plead. §§ 1144, 1172.

The order striking the cross bill of appellant from the files reserved leave to him to apply to the court for leave to file a cross bill. He never made any such application, but, after replication filed to the answers of himself and of the other defendants, suffered proof to be taken upon the issues so made up, and the case to proceed to a final decree; and the final decree is expressed to be made without prejudice to his right as receiver. Held that, under these

circumstances, there was nothing in the proceedings of the court below prejudicial to those rights, or which entitled him to a reversal of the final decree and to a reopening of the whole case.—*Close v. Glenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

Where an answer has been stricken out, but defendant has been permitted to put in his evidence as if it remained even if the order striking out the answer was erroneous, it was harmless error.—*County of Nemaha v. Frank*, 120 U. S. 41, 7 S. Ct. 395, 30 L. Ed. 584.

Defendant is not injured by striking certain allegations from his answer, where it appeared that the court treated those allegations as before it, applied the evidence to them, and held that they were not sustained.—*Lloyd v. Preston*, 146 U. S. 630, 13 S. Ct. 131, 36 L. Ed. 1111.

Permitting the jury, over objections raised by a motion to strike, to take into consideration, in reaching the verdict, counts in a declaration which had not been supported by any evidence, is prejudicial error, where it is impossible from the record to say upon which counts of the declaration the verdict was based, notwithstanding the provision of Prac. Act III. (Rev. St. 1899, c. 110) § 57, that when an entire verdict is given on several counts it will not be set aside or reversed because of any defective count, if one or more of the counts be sufficient to sustain the verdict.—*Wilmington Star Min. Co. v. Fulton*, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

Refusal to strike from complaint paragraph as to exemplary damages, if erroneous, is harmless, where the jury are instructed that there can be no recovery of exemplary damages.—*San Juan Light & Transit Co. v. Requena*, 32 S. Ct. 399, 224 U. S. 89, 56 L. Ed. 680.

⚡1045. Selection and impaneling of jurors.

See 3 Cent. Dig. App. & E. §§ 4124-4127.

The objection that plaintiff, on the trial of two consolidated cases, was allowed six, instead of three, peremptory challenges, is not available to a defendant who used but two of the three peremptory challenges to which, under Rev. St. U. S. § 819 [U. S. Comp. St. 1901, p. 629], it was entitled. Judgment 107 F. 834, 46 C. C. A. 668, reversed.—*Connecticut Mut. Life Ins. Co. v. Hillmon*, 23 S. Ct. 294, 188 U. S. 206, 47 L. Ed. 446.

⚡1046. Conduct of trial or hearing in general.

See 3 Cent. Dig. App. & E. §§ 4128-4131, 4134.

Forcing to trial a consolidated case arising from financial difficulties of a corporation in the hands of a receiver, without allowing corporation time to plead allowed by equity rules, is not reversible error, where the appointment of receiver was with the assent of the corporation, and steps taken to bring case to a speedy trial were acquiesced in by all the parties.—*Valdes v. Central Altargracia*, 32 S. Ct. 664, 225 U. S. 58, 56 L. Ed. 980.

⚡1049. Admission of evidence.

See 3 Cent. Dig. App. & E. §§ 4153-4156; 18 Cent. Dig. Em. Dom. § 810.

⚡1050. — Prejudicial effect in general.

See 3 Cent. Dig. App. & E. §§ 1068, 1069; 3 Cent. Dig. App. & E. §§ 4153-4157, 4166; 32 Cent. Dig. Label, § 381; 34 Cent. Dig. Mech. Liens, § 649.

Error in admitting testimony is harmless unless it appears to have been prejudicial to the party complaining.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373.

Where all the facts in a case are before the reviewing court, and show that the party in

whose favor judgment was rendered is entitled to recover, the judgment will not be reversed because of the admission of improper evidence.—*Holmes v. Goldsmith*, 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118, affirming judgment (C. C.) *Goldsmith v. Holmes*, 36 F. 484, 1 L. R. A. 816.

Error in the admission of evidence is not ground for reversal if not prejudicial to the rights of the complaining party.—*Fidelity Mut. Life Ass'n v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

Admission in evidence in suit by a shipper against a carrier under Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, of a finding by commission that rate charged was excessive and declaring a reasonable rate, held not reversible error.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 337, 236 U. S. 434, 59 L. Ed. 659, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

⚡1052. — Defect supplied or objection removed subsequently.

See 3 Cent. Dig. App. & E. §§ 4171-4177; 18 Cent. Dig. Em. Dom. § 810; 43 Cent. Dig. Sheriffs, § 421.

Permitting the deposition of a witness to be read, when the witness is actually in court and his presence is known, is not prejudicial error, where he is subsequently called by the objecting party, and gives fully his explanation of the deposition and his testimony as to the subject to which it related. Judgment 112 F. 402, 50 C. C. A. 230, affirmed.—*Texas & P. Ry. Co. v. Watson*, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

Error, if any, in refusing to strike out expert testimony as to the reasonable value of legal services, because, on cross-examination, it appeared that such testimony was based upon an assumption of fact not disclosed to the jury, is not prejudicial, where the jury, by its verdict, finds that the amount of compensation to be paid for such services was fixed by contract, and each witness testified upon the assumption that the compensation was not so fixed, and it was upon that assumption alone that their testimony was submitted to the jury. Judgment (N. M. 1905) 82 P. 232, affirmed.—*Cunningham v. Springer*, 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662, 9 Ann. Cas. 897.

Presence of irrelevant matter in report of Interstate Commerce Commission admitted in evidence in a reparation suit under Act Feb. 4, 1887, as amended by Act June 29, 1906, is harmless error, where the evidence clearly entitled the shipper to a verdict for the amount claimed.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 337, 236 U. S. 434, 59 L. Ed. 659, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

⚡1053. — Error cured by withdrawal, striking out, or instructions to jury.

See 3 Cent. Dig. App. & E. §§ 4178-4184; 15 Cent. Dig. Damag. § 561; 18 Cent. Dig. Em. Dom. § 810; 46 Cent. Dig. Trial, § 977.

Error in the admission of improper evidence is cured where it is afterwards withdrawn, and the jury instructed to disregard it.—*New York, L. E. & W. R. Co. v. Madison*, 123 U. S. 524, 8 S. Ct. 246, 31 L. Ed. 258.

A charge covering fully the single question involved, and instructing the jury that there is no other question in the case, cures error in the admission of evidence bearing on other points.—*Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 12 S. Ct. 671, 36 L. Ed. 496, affirming judgment (C. C.) *Unsell v. Hartford Life & Annuity Ins. Co.*, 32 F. 443.

Alleged error in permitting the averment and proof of exemplary damages is immaterial

when the court subsequently withdraws the consideration of such damages from the jury, and the verdict is returned for "actual damages."—*Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 S. Ct. 239, 38 L. Ed. 78.

In an action in which a corporation and individuals are joined as defendants, error in admitting evidence as to the wealth of the corporation is not cured by an instruction that, under the evidence, no punitive damages are recoverable against either defendant, where on the admission of such evidence it was not expressly limited to the question of punitive damages, and is not withdrawn from the jury by such instruction.—*Washington Gas-Light Co. v. Lansden*, 19 S. Ct. 296, 172 U. S. 534, 43 L. Ed. 543.

An attempted withdrawal from the jury, by an instruction, of all opinions of witnesses as to the genuineness of the testator's signature, in so far as they are based, in whole or in part, upon the composition of the paper, the expressions contained in it, the legal or literary attainments of the testator, or anything else but the handwriting, but stating that all other evidence admitted bearing upon his legal attainments and literary style may be considered with other evidence, is too uncertain to cure the erroneous admission of opinions of witnesses upon those matters, where in a long trial some witnesses to handwriting have given opinions based upon that matter only, while others have based their opinions, not only upon the handwriting, but upon their familiarity with the legal attainments of the testator and his characteristics of style and composition. Judgment 12 App. D. C. 552, reversed.—*Throckmorton v. Holt*, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

Error in permitting an improper use of a letter on the cross-examination of the addressee is cured by instructing the jury that such letter is not to be taken as evidence of the truth of any of its statements, or even allowed to be used for the purpose of cross-examination. Decree (1907) 29 App. D. C. 460, affirmed.—*Turner v. American Security & Trust Co.*, 29 S. Ct. 420, 213 U. S. 257, 53 L. Ed. 788.

1054. — On trial without a jury.

See 3 Cent. Dig. App. & E. §§ 4185, 4186.

The admission of improper evidence on a trial to the court without a jury is harmless where there is sufficient proper evidence on which to base the decision.—*Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 S. Ct. 875, 30 L. Ed. 987; *Mammoth Min. Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 14 S. Ct. 384, 38 L. Ed. 229, affirming decree *Salt Lake Foundry & Machine Co. v. Mammoth Min. Co.*, 6 Utah, 351, 23 P. 760.

The admission in evidence in a suit in equity to cancel a patent for fraud in procuring and commuting a homestead entry of a statement made by the entryman to a government agent, and made the basis of the latter's report to the land office, is not prejudicial error, where the attention of the entryman, when testifying, was drawn to such statement, and he himself testified that it was made at his home, and was signed by him, and the facts were testified to by the agent to whom the statement was made.—*J. J. McCaskill Co. v. United States*, 30 S. Ct. 386, 216 U. S. 504, 54 L. Ed. 590.

Prejudicial error is not committed in admitting in evidence, in a suit in equity to cancel a patent and the deeds founded thereon, for the fraud of the homestead entryman, testimony showing the purchase of other homestead claims by the grantee, because it was not accompanied by evidence showing that such other transactions were false and fraudulent, since it will be presumed that, under such circumstances, the court gave to the tes-

timony admitted no value or probative strength.—*Id.*

1055. Exclusion of evidence.

See 3 Cent. Dig. App. & E. §§ 4187-4208; 24 Cent. Dig. Fraud. Conv. § 1002.

1056. — Prejudicial effect in general.

See 3 Cent. Dig. App. & E. §§ 4187-4193, 4207; 23 Cent. Dig. False Imp. § 121.

After the admission in evidence of a decree, it is erroneous to exclude the pleadings upon which that decree was based; but, if it appear that such exclusion did not prejudice the case of those offering the evidence, the error is harmless.—*Hornbuckle v. Stafford*, 111 U. S. 389, 4 S. Ct. 515, 28 L. Ed. 468.

The exclusion of admissible evidence which could not, if received, have changed the result, is harmless error.—*Ivinson v. Hutton*, 7 S. Ct. 403, 119 U. S. 604, 30 L. Ed. 509.

A debt was secured by both real and chattel mortgages, and subsequently the chattels were attached at suit of other creditors. The real estate was sold, and the proceeds applied to the debt, but failed to satisfy it, and the mortgagees brought action against the marshal and his bondsmen to recover the value of the attached chattels. Held, that the fact that, when the instrument was offered in evidence, the court said its validity depended entirely on whether the mortgagor was insolvent or contemplating insolvency when he made it, cannot avail defendants, whether the opinion was correct or not, because the verdict for plaintiff negated the existence of the facts suggested.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892.

The refusal, based upon the state of the pleadings, to permit a corporate defendant to prove facts tending to show that the partnership out of which it grew was the real party in interest, does not affect "substantial rights" within the meaning of Wilson's Rev. & Ann. St. Okl. 1903, c. 66, art. 8, § 146, governing the reversal of judgments, where no testimony on that point was offered after the pleadings were amended, and the incorporation was evidently merely for business convenience, the partners taking nearly all the stock in their own names, and was followed by no change in the manner of doing business. Judgment (1906) 87 P. 320, 17 Okl. 355, affirmed.—*McCabe & Steen Const. Co. v. Wilson*, 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

The exclusion of evidence in an equity cause, even if erroneous, is not ground for reversal, where, if admitted, it could not have affected the result.—*Reavis v. Fianza*, 30 S. Ct. 1, 215 U. S. 18, 54 L. Ed. 72.

The error, if any, in rejecting testimony in a creditors' suit, offered only as against the widow of the alleged fraudulent grantor and her children, and not against the other defendants, is not prejudicial, where the court decrees that the claimants are not entitled to any relief under their bill.—*Will v. Tornabelli*, 30 S. Ct. 424, 217 U. S. 47, 54 L. Ed. 600.

The errors, if any, on the part of the court of claims, in excluding ex parte affidavits which counsel had agreed might be given the effect of depositions, does not call for the reversal of a judgment dismissing the petition of Indian claimants for their alleged proportionate shares of appropriations to fulfil treaty obligations, where the admission of the evidence could not have changed the result.—(1911) *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma*, 31 S. Ct. 473, 220 U. S. 481, 55 L. Ed. 552, affirming judgment (1910) 45 Ct. Cl. 287.

Rejection of evidence as to interstate character of railway in order to make Employers' Liability Act of April 22, 1908, applicable, does

not require reversal of judgment for employé, where the railroad's position was made no worse because case was tried on theory that the state law governed.—*Chicago & N. W. Ry. Co. v. Gray*, 35 S. Ct. 620, 237 U. S. 399, 59 L. Ed. 1018, affirming judgment *Gray v. Chicago & N. W. Ry. Co.*, 142 N. W. 506, 153 Wis. 637.

◀1057. — Facts otherwise established.

See 3 Cent. Dig. App. & E. §§ 4194-4199, 4205; 33 Cent. Dig. Mal. Procs. § 173.

The error, if any, in rejecting telegrams offered for the purpose of showing revocation of a certain power of attorney, is harmless, where such telegrams merely call for a confirmation and amplification of the existing power.—*Runkle v. Burnham*, 153 U. S. 216, 14 S. Ct. 837, 38 L. Ed. 694, affirming judgment (*C. C.*) *Burnham v. Runkle*, 40 F. 408.

Error, if any, in excluding copies of books of account, is harmless where all persons from whose reports the books are made up were permitted to testify. Judgment (1906) 87 P. 311, 17 Okl. 344, affirmed.—*Drumm-Flato Commission Co. v. Edmisson*, 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

◀1059. — Error cured by instructions to jury.

See 3 Cent. Dig. App. & E. § 4208.

Error in excluding, in an action on the indemnity bond of a bank president, a certificate of the cashier, made in answer to an inquiry by the surety company, that the president "has performed his duty in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued," together with evidence tending to establish that the giving of the certificate was an act done in the course of the business of the bank, will not require reversal of a judgment against the surety company on such bond, where the jury were charged that, if they could deduce from the evidence knowledge on the part of the bank of the fraud of the president, the surety company would not be liable, and the transactions of the president were not of such a character as to preclude, as a matter of law, the possibility of a belief by the directors and other officers in the sufficiency of his explanations. Judgment 103 F. 599, 43 C. C. A. 331, affirmed.—*Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 342, 46 L. Ed. 1193.

◀1060. Arguments and conduct of counsel.

See 3 Cent. Dig. App. & E. § 4135.

In an action for commissions agreed to be paid brokers in a sale of property, instructions relating to plaintiff's claim to the excess of the purchase money above a named sum cannot have prejudiced defendant, where the jury expressly found that no purchase money was received in excess of that sum.—*Wilson v. Everett*, 189 U. S. 616, 11 S. Ct. 664, 35 L. Ed. 286.

◀1062. Submission of issues or questions to jury.

See 3 Cent. Dig. App. & E. §§ 4212-4218.

Submitting the question of the existence of a custom to use coal oil in kindling fires is harmless error, where the custom in the community is so universal as to justify the court in taking judicial notice thereof. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed.—*Waters-Pierce Oil Co. v. Deselms*, 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

No reversible error is committed in leaving to the jury an action for personal injuries to an employé from falling timber, while dig-

ging a post hole, with instructions that if the injury was due to the negligence of the master in sending men to work above the employé, the master was liable, but not if the injury was due only to the negligence of the fellow servants in their way of doing the work.—(1912) *Texas & P. R. Co. v. Howell*, 32 S. Ct. 601, 224 U. S. 577, 58 L. Ed. 892, affirming judgment (1911) 191 F. 1006, 111 C. C. A. 674.

◀1063. Instructions to jury.

See 3 Cent. Dig. App. & E. §§ 3371, 4219-4230; 34 Cent. Dig. Fraud. Conv. § 1002; 39 Cent. Dig. Paymt. § 252; 46 Cent. Dig. Trial, §§ 475, 525.

◀1064. — Prejudicial effect in general.

See 3 Cent. Dig. App. & E. §§ 4219, 4221-4224; 34 Cent. Dig. Fraud. Conv. § 1002; 46 Cent. Dig. Trial, §§ 475, 525, 528, 553.

Where an attachment was based on two separate and distinct grounds, on each of which issue was taken, and a special finding was made in favor of plaintiff, it is immaterial that error may have been committed in the instructions as to one, there being no error assigned as to the other.—*Holloway v. Dunham*, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165.

Errors in instructions will not be cause for reversal, where the interests of the complaining party have not been prejudiced thereby.—*City of San Juan v. St. John's Gas Co.*, 25 S. Ct. 108, 195 U. S. 510, 49 L. Ed. 299, 1 Ann. Cas. 796.

A verdict for plaintiff in ejectment will not be disturbed for error in instructing to find against defendants on the defense of adverse possession, unless satisfied, by preponderance of evidence, that they have "clearly" proved such defense.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 478.

Substituting the word "would" for "could" in a requested instruction to the effect that an employé assumed the ordinary risks not only actually known to him, but so far as they could have been known to him by the exercise of ordinary care on his part, and that if he knew, or by the exercise of care and prudence could have known, of the defect, he could not recover, is not reversible error.—(1910) *Standard Oil Co. v. Brown*, 30 S. Ct. 669, 218 U. S. 78, 54 L. Ed. 939, affirming judgment (1908) 81 App. D. C. 371.

Instructing the jury to estimate from their own experience the financial value of a widow's loss of a husband's care and advice requires reversal of a judgment against a carrier in an action under Employers' Liability Act April 22, 1908.—*Michigan Cent. R. Co. v. Vreeland*, 33 S. Ct. 192, 227 U. S. 59, 57 L. Ed. 417, Ann. Cas. 1914C, 176, reversing judgment (*C. C.*) *Vreeland v. Michigan Cent. R. Co.*, 189 F. 495.

Modifying a requested instruction on contributory negligence is not prejudicial error where in other portions of the charge the court correctly instructed the jury on such subject and there is no room for doubt as to the court's meaning.—*George A. Fuller Co. v. McCloskey*, 33 S. Ct. 471, 228 U. S. 194, 57 L. Ed. 795, affirming judgment 35 App. D. C. 595.

It is reversible error to instruct on the question of damages in an action under Employers' Liability Act April 22, 1908, for the benefit of a widow and infant children, that the pecuniary injury is much greater than when the beneficiaries are adults or dependents who are next of kin.—*Norfolk & W. R. Co. v. Holbrook*, 35 S. Ct. 143, 235 U. S. 625, 59 L. Ed. 392, reversing judgment 215 F. 637, 131 C. C. A. 621, writ of error to Supreme Court allowed 215 F. 1007, 131 C. C. A. 666.

No injustice was done in an action under Sherman Anti-Trust Act July 2, 1890, against

members of labor organizations to recover damages to the interstate trade of manufacturers by a combination compelling them to unionize their factory through the use of the boycott, because the court spoke to the jury of "proof" of unlawful means, where the context shows that the word was used in the popular way for evidence.—*Lawlor v. Loewe*, 35 S. Ct. 170, 235 U. S. 522, 59 L. Ed. 341, affirming judgment 209 F. 721, 126 C. C. A. 445.

It is reversible error to instruct that, in fixing damages under federal Employers' Liability Act, the age, health, occupation, and earning capacity should be considered, and that from that amount the personal expenses should be deducted, and the remainder should be the amount of recovery.—*Kansas City Southern R. Co. v. Leslie*, 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment 167 S. W. 83, 112 Ark. 305.

Where, if testimony for plaintiff was true, the carrier did not observe ordinary care toward a passenger, and, if that for defendant is true, the company was not liable, any error in instructions as to degree of care required was harmless.—*Texas & P. Ry. Co. v. Bigger*, 36 S. Ct. 127, 239 U. S. 330, 60 L. Ed. 310, affirming judgment 218 F. 990, 133 C. C. A. 673.

Master has no valid cause for complaint because requested instruction was modified to exclude assumption of risk of extraordinary danger created by customary methods, and ignored question of knowledge of such methods, unless customary method was one that reasonably careful employer would have adopted.—*Chesapeake & O. Ry. Co. v. Proffitt*, 36 S. Ct. 620, 241 U. S. 462, 60 L. Ed. 1102, affirming judgment 218 F. 23, 134 C. C. A. 37.

1065. — In equitable actions.

See 3 Cent. Dig. App. & E. § 4219; 24 Cent. Dig. Fraud. Conv. § 1002; 32 Cent. Dig. Libel, § 382.

Since the findings of the jury in a cause in equity are merely advisory, errors in instructions are harmless.—*McKinley Creek Min. Co. v. Alaska United Min. Co.*, 22 S. Ct. 84, 183 U. S. 563, 46 L. Ed. 331.

1066. — Applicability to issues and evidence.

See 3 Cent. Dig. App. & E. § 4220; 29 Cent. Dig. Paymt. § 252; 43 Cent. Dig. Seduct. § 52; 46 Cent. Dig. Trial, § 558.

Where it was claimed that injuries to one of a railroad section gang, while going to their work on a hand car, resulted from the insufficiency of a temporary brake used on the car, and also from the negligence of the section boss in running the car at too high a speed, *held*, that an error in submitting to the jury the matter of excessive speed was not to be regarded as harmless, on the theory that the excessive speed and the defectiveness of the brake were inseparably connected, when in fact the evidence was such that the jury might have taken the view that the temporary brake was sufficient for the time being.—*Northern Pac. R. Co. v. Charles*, 162 U. S. 359, 16 S. Ct. 848, 40 L. Ed. 999, reversing judgment 51 F. 562, 2 C. C. A. 380.

An instruction not based on the evidence is not ground for reversal, when no prejudice is shown.—*City & S. Ry. of Washington v. Svedborg*, 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

A defendant setting up another contract in defense of an action to enforce payment for property sold and delivered, which plaintiff alleges to be void for duress, is not prejudiced by an instruction limiting a definition of duress to a kind as to which there is no pretense that it exists in the case. Judgment, *Snyder v. Stribling* (1907) 89 P. 222, 18 Okl. 168, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

1067. — Failure or refusal to charge.

See 3 Cent. Dig. App. & E. § 4229; 46 Cent. Dig. Trial, § 475.

The refusal to give a proper instruction which would have availed the party nothing, the justice of the case not being affected thereby, does not afford sufficient ground for the reversal of a judgment.—*Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527; *Hartranft v. Langfeld*, 125 U. S. 128, 8 S. Ct. 732, 31 L. Ed. 672.

A judgment on a verdict will not be reversed because of the refusal to instruct the jury that the personal interest of a party exercising his statutory privilege to testify in his own behalf should be considered as affecting his credibility.—(1910) *Standard Oil Co. v. Brown*, 30 S. Ct. 669, 218 U. S. 78, 54 L. Ed. 939, affirming judgment (1908) 31 App. D. C. 371.

Error in refusing to instruct that misstatements in answers in an application for life insurance avoided the policy was ground for reversal; the evidence being conflicting, and the verdict being general.—*Etina Life Ins. Co. v. Moore*, 34 S. Ct. 186, 231 U. S. 543, 58 L. Ed. 356.

Failure to give an instruction requested by defendant is not reversible error where it would only have served to confuse the jury on a point immaterial to the plaintiff's recovery.—*Myers v. Pittsburgh Coal Co.*, 34 S. Ct. 559, 233 U. S. 184, 58 L. Ed. 906, reversing judgment *Pittsburgh Coal Co. v. Myers*, 203 F. 221, 121 C. C. A. 427.

1068. — Error cured by verdict or judgment.

See 3 Cent. Dig. App. & E. §§ 4225-4228, 4230; 24 Cent. Dig. Fraud. Conv. § 1002; 32 Cent. Dig. Libel, § 382; 41 Cent. Dig. Quiet. T. § 104; 46 Cent. Dig. Trial, §§ 475, 480, 525, 526, 553, 558.

Where the verdict is right on the merits, the judgment will not be reversed on account of errors in the instructions.—*Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 S. Ct. 184, 28 L. Ed. 787; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934.

The fact that the court told the jury to allow interest on the value of the hay burned is not ground for reversal, if the jury did not allow interest.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441.

Where an attachment was based on two separate and distinct grounds, on each of which issue was taken, and a special finding was made in favor of plaintiff, it is immaterial that error may have been committed in the instructions as to one, there being no error assigned as to the other.—*Holloway v. Dunham*, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165.

Where the court rightly charges that on the conceded facts the master was negligent as a matter of law, an erroneous charge as to the degree of care required of the master is harmless error.—*Choctaw, O. & G. R. Co. v. Holloway*, 24 S. Ct. 102, 191 U. S. 334, 48 L. Ed. 207, affirming judgment 114 F. 458, 52 C. C. A. 260.

Error in refusing a requested instruction does not require reversal, where specific findings distinctly negative the hypothesis upon which alone the instruction was based.—*Kanawha & M. Ry. Co. v. Kerse*, 36 S. Ct. 174, 239 U. S. 576, 60 L. Ed. 448.

Judgment of highest state court affirming judgment against carrier for damages by decline in market value from unreasonable delay in interstate shipment, will not be reversed because the instructions erroneously permitted damages to the amount of such decline without

reference to limitation in bill of lading and published tariff as to damages in such case which limitation was not exceeded.—*New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 36 S. Ct. 230, 240 U. S. 34, 60 L. Ed. 511, affirming judgment 89 A. 433, 122 Md. 215.

◀1071. Findings by court or referee.

See 3 Cent. Dig. App. & E. §§ 4234-4239; 24 Cent. Dig. Fraud. Conv. § 1002; 46 Cent. Dig. Trial, §§ 940, 942.

Where there is a general finding for defendants on all the issues of fact, an assignment that the special findings are fatally defective will not be considered.—*Meath v. Board of Mississippi Levee Com'rs*, 109 U. S. 268, 3 S. Ct. 284, 27 L. Ed. 930.

Where an ultimate fact is found by the court below, its finding or refusal to find as to any incidental fact, which is merely evidence of the ultimate fact, will not be reviewed. Hence, where the court found that a vessel was seaworthy, its refusal to find that, prior to her last voyage, she was run aground, and became so leaky that in the storm that wrecked her when she was thrown on her beam ends she could not right herself, and that she leaked four inches an hour, and the leak could have been discovered only by putting her in a dry dock, which was not done, will not be investigated by the supreme court.—*Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67, 7 S. Ct. 821, 30 L. Ed. 858.

◀1072. Decisions on motion for new trial or rehearing.

See 3 Cent. Dig. App. & E. § 4233½.

Error in refusing to entertain an appeal from the denial of a motion to set aside a verdict as against the weight of evidence cannot be said to have been nonprejudicial because the court necessarily passed upon the same matter in sustaining the ruling of the trial court in refusing to direct a verdict in appellant's favor.—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022.

Where the court, in passing upon a motion for a new trial, based its finding as to the amount of damages which plaintiff was entitled to recover, solely upon the evidence of defendant, and required a remittitur of a part of the judgment which was in excess of this amount, held, that its refusal to consider certain affidavits filed by defendant, and relating to newly-discovered evidence, which tended to impeach plaintiff's testimony as to larger damages, was immaterial.—*Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889.

The error, if any, in admitting affidavits of jurors, to show that they were not influenced by newspapers, is immaterial, where the order overruling the motion is right on other grounds.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

◀1073. Judgment or order.

See 3 Cent. Dig. App. & E. §§ 4240-4247; 22 Cent. Dig. Ex. & Ad. § 863.

The denial of a motion for judgment because of the insufficiency of an affidavit of defense, without passing upon the merits of the motion, cannot possibly constitute reversible error, where the defendant afterwards filed formal pleas to the statement of plaintiff's claim, and joined issue thereon; the effect of the ruling being simply to postpone consideration of the subject until the trial.—(1911) *United States v. United States Fidelity & Guaranty Co.*, 32 S. Ct. 101, 222 U. S. 283, 56 L. Ed. 200, affirming judgment (1911) 186 F. 477, 108 C. C. A. 455, which affirms (C. C. 1910) *Kinney v. Same*, 182 F. 1005.

◀1074. Proceedings after judgment.

See 3 Cent. Dig. App. & E. §§ 4248-4252; 31 Cent. Dig. J. P. § 756.

Error, if any, committed by a court in declining jurisdiction of an appeal from an order overruling a motion to vacate a judgment dismissing the case for want of prosecution, does not require reversal or modification in the Supreme Court of the United States, where, if the court had entertained jurisdiction, it must have affirmed the order appealed from. Judgment 20 App. D. C. 541, affirmed.—*Pubman v. Baltimore & O. R. Co.*, 23 S. Ct. 777, 190 U. S. 38, 47 L. Ed. 946.

(I) ERROR WAIVED IN APPELLATE COURT.

◀1078. Failure to urge objections.

See 3 Cent. Dig. App. & E. §§ 4256-4261.

Where, in a suit on letters patent, the circuit court states that it considered only two claims, and holds those claims valid, and infringed, and the final decree applies only to those claims, and plaintiff does not contend in his brief that any other claim is infringed, the supreme court will consider only those two claims, though in the proofs plaintiff attempted to show that three others were infringed.—*Crawford v. Heysinger*, 123 U. S. 589, 8 S. Ct. 399, 31 L. Ed. 269.

Where there are numerous alleged errors set forth in the assignment of errors filed in the court below, yet, if the brief of the plaintiff in error relies on but few of them, the supreme court will confine its attention to those thus relied on.—*Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160, affirming judgment (C. C.) *Sargent v. Home Ben. Ass'n*, 35 F. 711.

(J) DECISIONS OF INTERMEDIATE COURTS.

In bankruptcy proceedings, see Bankruptcy, ▶468.

◀1081. Questions considered.

See 2 Cent. Dig. App. & E. §§ 1133-1136; 3 Cent. Dig. App. & E. §§ 4270, 4273-4280, 4289-4292, 4345-4347; 31 Cent. Dig. J. P. §§ 752, 753.

◀1082. — Scope of inquiry in general.

See 2 Cent. Dig. App. & E. §§ 1133-1136; 3 Cent. Dig. App. & E. §§ 4270, 4281-4284, 4289-4292; 31 Cent. Dig. J. P. §§ 752, 753.

On error to the general term of the supreme court of the District of Columbia, an objection that a paper involved in the case is not properly a part of the record will not be considered, unless it was raised before the general term below.—*Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531.

An order of the general term of the supreme court of the District of Columbia, affirming an order of the same court, in special term, admitting a will to probate and record, is a final judgment, within Rev. St. § 705, providing that the final judgment or decree of the supreme court of the District of Columbia may be re-examined and reversed or affirmed in the supreme court of the United States, upon writ of error or appeal, and on appeal from or error to such order the supreme court of the United States can examine into and pass upon all questions presented in a bill of exceptions taken at the trial, as to the validity of the will.—*Ormsby v. Webb*, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805.

Where the territorial supreme court, on appeal, considers only a part of the errors assigned, the federal supreme court, on proceedings in error, is limited to the review of the errors considered by the territorial court, and it cannot consider the other assignments. Judgment 6 Mont. 275, 12 Pac. 641, affirmed.—*Montana Ry. Co. v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. Ed. 681.

Though the decision of the supreme court revises the decree of the circuit court in reviewing the action of the court of appeals thereon, and, under the statute, the mandate goes to the circuit court only, it is the judgment of the circuit court of appeals that is to be revised, and hence such judgment will not, ordinarily, be re-examined on the suggestion of error in that court, in that it did not hold as erroneous an action on the part of the circuit court which was not complained of.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174, 10 U. S. App. 98.

The contention that an action brought by a married woman cannot be maintained, because the husband alone has the right to bring the action, cannot be regarded in the supreme court of the United States, when the point was not presented in the court below. Judgment 97 F. 837, 38 C. C. A. 502, affirmed.—*Texas & P. Ry. Co. v. Humble*, 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

An objection that there was no evidence to support a joint action against all the defendants, or that, if there was evidence on this question, it should have been submitted to the jury, is not available in the supreme court of the United States on writ of error to a circuit court of appeals, where it was not raised either in that court or in the trial court. Judgment 105 F. 1004, 44 C. C. A. 685, affirmed.—*Pine River Logging & Improvement Co. v. United States*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

Objections to the validity of an assignment for the benefit of creditors for want of acceptance, and to the form of the judgment, cannot be raised for the first time in the supreme court of the United States. Judgment 100 F. 718, 40 C. C. A. 664, affirmed.—*J. M. Robinson & Co. v. Belt*, 23 S. Ct. 16, 187 U. S. 41, 47 L. Ed. 65.

Error, if any, committed by a trial court in the admission of proof is not reviewable in the Supreme Court of the United States on writ of error to a Circuit Court of Appeals, where no error concerning the admission or rejection of testimony was assigned in the latter court, which considered the case upon the assumption that the correctness of the rulings of the lower court in this regard was unchallenged. Judgment 115 F. 85, 53 C. C. A. 508, affirmed.—*McLoughlin v. Raphael Tuck & Sons Co.*, 24 S. Ct. 105, 191 U. S. 267, 48 L. Ed. 178.

A contention not made in the Circuit Court of Appeals will not be reviewed by the federal Supreme Court.—*Virtue v. Creamery Package Mfg. Co.*, 33 S. Ct. 202, 227 U. S. 8, 57 L. Ed. 393, affirming judgment 179 F. 115, 102 C. C. A. 413.

A contention not urged upon the highest state court will not be considered in the federal Supreme Court on writ of error to the state court.—*Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 35 S. Ct. 560, 237 U. S. 220, 59 L. Ed. 926, reversing judgment 140 N. W. 296, 152 Wis. 654.

Errors not assigned on appeal to the highest state court will not be considered by the federal Supreme Court on error.—*Bullen v. State of Wisconsin*, 36 S. Ct. 473, 240 U. S. 625, 60 L. Ed. 830, affirming judgment in re Bullen's Estate, 128 N. W. 100, 143 Wis. 512, 139 Am. St. Rep. 1114.

1083. — Review dependent on whether questions are of law or of fact.

See 3 Cent. Dig. App. & E. §§ 4273-4279, 4345-4347, 4348.

The concurrent findings of the two lower courts that a purchaser of timber lands had no actual knowledge or notice of the original frauds of the entrymen will be adopted by the Supreme Court of the United States on appeal, unless clearly erroneous. Decree 138 F. 294, 70 C. C. A. 584, affirmed.—*United States v. Clark*, 26 S. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

A finding of a magistrate as to amount of damages, affirmed by the circuit court, cannot be reviewed on appeal, if there is any evidence to support it.—*Seaboard Air Line Ry. v. Seegers*, 28 S. Ct. 28, 207 U. S. 73, 52 L. Ed. 108.

1085. Review of errors of trial court.

See 3 Cent. Dig. App. & E. §§ 4271, 4272.

A decree of a territorial Supreme Court setting aside attachment proceedings will not be reversed for errors committed by the trial court in its finding concerning the jurisdictional insufficiency of the affidavits for publication and attachment in the attachment suit, where the conclusion of the Supreme Court of the territory, based on the findings below as to the fraud in bringing the attachment suit, and the absence of a party plaintiff therein, are ample to sustain the judgment, irrespective of the affidavits for publication and attachment. Judgment (1906) 85 P. 259, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

1089. Nature and grounds of decision of intermediate court.

See 3 Cent. Dig. App. & E. §§ 4293-4301.

Judgment cannot be reversed in federal Supreme Court on writ of error to Circuit Court of Appeals because it affirmed judgment without opinion.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918.

1090. Cross-appeal.

See 3 Cent. Dig. App. & E. § 4285.

A party to a suit in a territorial court, who did not appeal from the decree of the trial court, cannot have a provision thereof reviewed by the supreme court of the United States, by taking a cross appeal from a decree of the territorial supreme court, which affirmed the decree of the trial court. Decree 41 P. 529, 7 N. M. (Gild.) 666, reversed.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

Where a territorial supreme court, in affirming a decree for the recovery by an administrator of funds of the estate which had been converted by the defendant, modified such decree by charging the cost against the fund recovered, instead of against the defendant personally, held that, on a cross appeal by the administrator, this modification, being against his interest, was subject to review by the federal supreme court.—Id.

1091. Presumptions.

See 3 Cent. Dig. App. & E. §§ 4302-4311, 4331; 31 Cent. Dig. J. P. § 754.

Where a motion for a rehearing is entertained and decided on the merits by the state supreme court, the presumption is that it was made in time to give that court jurisdiction, nothing appearing to the contrary.—*Texas Pac. Ry. Co. v. Murphy*, 111 U. S. 488, 4 S. Ct. 497, 28 L. Ed. 492.

The testimony contained in a certificate from a Circuit Court of Appeals of the United States, and recited to have been given on the trial of an action at law in the court below, will be assumed to have been preserved in a bill of

exceptions which formed part of the transcript of record filed in the Circuit Court of Appeals on the writ of error from that court to the court below.—*Sun Printing & Publishing Ass'n v. Edwards*, 24 S. Ct. 696, 194 U. S. 377, 48 L. Ed. 1027.

Where the Appellate Court reversed the circuit court, but its judgment did not recite any findings of facts different from the facts found by the circuit court, it will be presumed on appeal to the Supreme Court that the Appellate Court found the same facts as the circuit court but differed only in the application of the law.—*West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago*, 26 S. Ct. 518, 201 U. S. 506, 50 L. Ed. 845, affirming 73 N. E. 395, 214 Ill. 9, which affirmed *People v. West Chicago St. R. Co.*, 115 Ill. App. 172.

The federal Supreme Court will assume that a state Supreme Court, when reversing, with directions to dismiss, a decree entered after demurrer to the answer had been sustained, and by which an order restraining enforcement of ordinance making it unlawful to conduct a livery stable business within a certain area was made perpetual, acted on the facts set up in the answer, that the restricted area was in a densely populated part of the city and the stables were so conducted as to be productive of disease.—*Reinman v. City of Little Rock*, 35 S. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment *City of Little Rock v. Reinman*, 155 S. W. 105, 107 Ark. 174.

1092. Discretion of intermediate court.

See 3 Cent. Dig. App. & E. §§ 4312-4321; 31 Cent. Dig. J. P. § 756.

Where a territorial supreme court, in affirming a decree for the recovery, by an administrator, of his intestate's estate from one who had converted it to his own use, allowed 6 per cent. interest on the amount of the decree of the trial court, held that, on an appeal to the supreme court of the United States, the rate of interest would not be increased, the rate being to some extent a matter of discretion with the territorial supreme court. Decree 41 P. 529, 7 N. M. (Gild.) 666, reversed.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

A motion to set aside a judgment, if made within the law and rules, is addressed to the discretion of the trial court; and where the exercise of that discretion by a territorial court has been approved by the supreme court of the territory, those courts will not be overruled by the supreme court, unless an abuse of discretion should clearly appear. Judgment 48 P. 309, 9 N. M. 12, affirmed.—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 19 S. Ct. 761, 174 U. S. 603, 43 L. Ed. 1103.

1093. Review of questions of fact.

See 3 Cent. Dig. App. & E. §§ 4368, 4322-4352; 31 Cent. Dig. J. P. § 753.

1094. — In general.

See 3 Cent. Dig. App. & E. §§ 4322-4352; 13 Cent. Dig. Courts, § 760; 31 Cent. Dig. J. P. § 753.

On an appeal from a territorial supreme court, the sufficiency of the evidence to support the findings of facts in the trial court cannot be reviewed. *Idaho & O. Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433, followed.—*Smith v. Gale*, 144 U. S. 509, 12 S. Ct. 674, 36 L. Ed. 521, affirming judgment *Gale v. Shillock*, 29 N. W. 661, 4 Dak. 182, and *Same v. Frazier*, 30 N. W. 138, 4 Dak. 196.

The finding of an intermediate Appellate Court on a controverted question of fact is binding on further appeal.—*Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 17 S. Ct. 7, 164 U. S. 1, 41 L. Ed. 327.

The supreme court cannot, on appeal from the supreme court of a territory, determine questions of conflicting evidence.—*Karrick v. Hannaman*, 18 S. Ct. 135, 168 U. S. 328, 42 L. Ed. 484.

When the circuit court and circuit court of appeals have agreed as to the ultimate facts established by the evidence, their finding will be accepted by this court, unless it clearly appears that they have erred as to the effect of the evidence. 72 F. 402, 18 C. C. A. 618 affirmed.—*Stuart v. Hayden*, 18 S. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

The United States supreme court, on appeal or error from the supreme court of a territory, cannot review its findings of fact.—*Holloway v. Dunham*, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165; *Young v. Amy*, 18 S. Ct. 802, 171 U. S. 179, 43 L. Ed. 127.

Questions of fact, depending on the evidence, cannot be re-examined by the Supreme Court of the United States on appeal from a territorial court.—*Simms v. Simms*, 20 S. Ct. 58, 175 U. S. 162, 44 L. Ed. 115, modifying judgment 81 P. 1128, 5 Ariz. 212.

On an appeal from a territorial supreme court which, in addition to adopting the facts found by the trial court, made an additional finding of facts, the supreme court of the United States may consider the latter findings, as well as the former, in determining the question of the sufficiency of the facts found to authorize the judgment. Judgment 53 P. 187, 6 Ariz. 13, reversed.—*Apache County v. Barth*, 20 S. Ct. 718, 177 U. S. 538, 44 L. Ed. 878.

A finding by the trial court, in a proceeding to establish a tax lien upon railroad property, as to the number of miles of railroad subject to taxation, when approved by the supreme court of the territory, is conclusive upon the supreme court of the United States as to such fact. Decree 62 P. 987, 10 N. M. 416, affirmed.—*United States Trust Co. v. Territory of New Mexico*, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

The concurrent findings of the two lower courts that piers, docks, and wharves erected in Lake Michigan by a railroad company by virtue of its riparian proprietorship, do not extend into the lake beyond the point of practicable navigability will not be disturbed, unless clearly in conflict with the evidence. Decree 91 F. 955, 34 C. C. A. 138, affirmed.—*People of State of Illinois v. Illinois Cent. R. Co.*, 22 S. Ct. 300, 184 U. S. 77, 46 L. Ed. 440.

The findings of fact made in a state court in a suit in equity are conclusive upon the supreme court of the United States on writ of error to that court.—*E. Bement & Sons v. National Harrow Co.*, 22 S. Ct. 747, 186 U. S. 70, 46 L. Ed. 1058.

The disputed facts involved in concurrent findings of a master and both the circuit court and the circuit court of appeals that a society had not been dissolved, either by the consent of its members or by the abandonment of the purpose for which it was founded, will not be reviewed by the supreme court of the United States. Judgment 93 F. 528, and 103 F. 561, 43 C. C. A. 323, affirmed.—*Schwartz v. Duss*, 23 S. Ct. 4, 187 U. S. 8, 47 L. Ed. 53.

A judgment of the trial court, affirmed by the intermediate appellate court, conclusively settles all controverted questions of fact.—*Minneapolis & St. L. R. Co. v. State of Minnesota, ex rel. Railroad & Warehouse Commission*, 24 S. Ct. 396, 193 U. S. 53, 48 L. Ed. 614, affirming judgment *State v. Minneapolis & St. L. R. Co.*, 91 N. W. 465, 87 Minn. 195.

A judgment of a state court will be affirmed by the United States Supreme Court on a writ of error, if there is evidence sufficient to sustain it, although there may be other conflicting testimony, where no special findings of fact were made, and the proceedings in the trial court were approved by the highest state court without an opinion.—*Gleason v. White*, 25 S. Ct. 782, 199 U. S. 54, 50 L. Ed. 87.

The sufficiency of the evidence to support the findings of fact is not open to consideration on appeal from a territorial Supreme Court to the Supreme Court of the United States, in the absence of any exception duly taken to rulings on the admission or rejection of evidence. Judgments, *Curtis v. Boquillas Land & Cattle Co.*, 71 P. 924, 8 Ariz. 258, and 76 P. 612, affirmed.—*Herrick v. Boquillas Land & Cattle Co.*, 26 S. Ct. 192, 200 U. S. 96, 50 L. Ed. 388.

The concurrent findings of the two lower courts that a purchaser of timber lands had no actual knowledge or notice of the original frauds of the entrymen will be adopted by the Supreme Court of the United States on appeal unless clearly erroneous. Decree 138 F. 294, 70 C. C. A. 584, affirmed.—*United States v. Clark*, 26 S. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

The concurrent findings of the two lower courts that a vessel was inspected at the beginning of a voyage, and found to be seaworthy and fit to carry the cargo which she had undertaken to transport, will ordinarily not be disturbed by the federal Supreme Court on appeal. Decree *The Wildcroft*, 130 F. 521, 65 C. C. A. 145, affirmed.—*W. J. McCahan Sugar Refining Co. v. The Wildcroft*, 26 S. Ct. 467, 201 U. S. 378, 50 L. Ed. 794.

The sufficiency of the evidence on which a divorce to the wife was refused is open for review in the Supreme Court of the United States on an appeal from the Supreme Court of the Philippine Islands, taken under Act July 1, 1902, c. 1369, § 10, 32 Stat. 691-695 [U. S. Comp. St. Supp. 1905, p. 154], allowing such appeals, to be governed by the rules applicable to appeals from circuit courts, in all cases in which the jurisdictional amount is involved, where the correctness of the denial of alimony pendente lite and of a separation of the conjugal property cannot be determined without passing upon the weight of such evidence, and the appeal was taken from the whole decree.—*De La Rama v. De La Rama*, 26 S. Ct. 485, 201 U. S. 303, 50 L. Ed. 765.

A judgment of the Supreme Court of the territory of Oklahoma, affirming the judgment of the court of first instance, which, after hearing the evidence, found the issues in a suit for specific performance in favor of the defendants, must be affirmed on appeal, where there is evidence which would sustain a finding in favor of the defendants upon an issue in the pleadings as to whether the property covered by the agreement had been conveyed to a third person for value and without notice. Judgment 78 P. 118, 14 Okl. 674, affirmed.—*Halsell v. Renfrow*, 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189.

On an appeal from a judgment of a territorial Supreme Court affirming the judgment of the court of first instance, which, after hearing the evidence, found all the issues in a suit for specific performance in favor of the defendants, the Supreme Court of the United States will ordinarily, in reviewing the facts, confine itself to questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached, where such is the practice in the territorial court.—*Id.*

In reviewing a decree of a territorial Supreme Court, which reversed the decree of the trial court in a suit to cancel a corporate lease, the federal Supreme Court is confined, as was

the court below, to determining whether there was some evidence supporting the findings of the trial court, and whether the facts found were adequate to sustain the legal conclusions. Judgment, *Anderson v. Shawnee Compress Co.* (1906) 87 P. 315, 17 Okl. 231, affirmed.—*Shawnee Compress Co. v. Anderson*, 28 S. Ct. 572, 209 U. S. 423, 52 L. Ed. 865.

Concurrent findings of the courts below in a suit to restrain the sale of copyrighted publications at less than the fixed price, that there was no satisfactory proof that the defendant had induced and persuaded sundry jobbers and dealers, who had obtained copyrighted books from the complainants, to deliver the same to the defendant for sale at retail at less than the prices fixed by the complainants, and in violation of the agreement upon which the books were obtained, will not be disturbed by the federal Supreme Court, on appeal, if not clearly erroneous. Judgment (1906) 147 F. 28, 78 C. C. A. 122, affirmed.—*Scribner v. Straus*, 28 S. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094; *Charles Scribner's Sons v. Same*, *Id.*

Concurrent findings of facts of the two courts below in a suit in equity will be accepted by the federal Supreme Court on appeal, unless error is clearly shown. Decree (1906) 149 F. 194, 79 C. C. A. 153, reversed.—*Page v. Rogers*, 29 S. Ct. 159, 211 U. S. 575, 53 L. Ed. 332.

A verdict approved by the Appellate Court is conclusive in the Supreme Court.—*El Paso & S. W. R. Co. v. Vizard*, 29 S. Ct. 210, 211 U. S. 608, 53 L. Ed. 348.

Concurrent findings of the two lower courts on the question as to what is the correct English translation of a will written in the Hawaiian language will be followed by the Supreme Court on appeal from the Hawaiian Supreme Court.—*Gray v. Noholoa*, 29 S. Ct. 571, 214 U. S. 108, 53 L. Ed. 931.

Concurrent findings of fact by the two lower courts in support of a claim of certain natives of the Philippine Islands to have held possession of certain mines, and to have worked them to the exclusion of all others down to the bringing of suit, will not be disturbed by the Supreme Court of the United States on appeal from the Supreme Court of the Philippine Islands, if there is some evidence of the facts found.—*Reavis v. Fianza*, 30 S. Ct. 1, 215 U. S. 16, 54 L. Ed. 72.

Concurrent findings of fact by the two lower courts on the question of infringement of a patent will ordinarily not be revised by the federal Supreme Court. Decrees (1907) 154 F. 65, 83 C. C. A. 177, affirmed, and (1908) 159 F. 436, 86 C. C. A. 416, reversed.—*Rumford Chemical Works v. Hygienic Chemical Co. of New Jersey*, 30 S. Ct. 45, 215 U. S. 156, 54 L. Ed. 137.

Concurrent findings of fact by the two lower courts in a suit to set aside a conveyance as in fraud of creditors will ordinarily be accepted by the federal Supreme Court on appeal.—(1911) *Merillat v. Hensley*, 31 S. Ct. 575, 221 U. S. 333, 55 L. Ed. 758, 36 L. R. A. (N. S.) 370, Ann. Cas. 1912D, 497, affirming decree (1908) 32 App. D. C. 64.

The concurrent findings of two lower courts on questions of fact will not be disturbed by the federal Supreme Court on appeal, where not manifestly erroneous.—*First Nat. Bank of Princeton, Ill., v. Littlefield*, 33 S. Ct. 78, 226 U. S. 110, 57 L. Ed. 145, affirming judgment *In re Brown*, 193 F. 24, 113 C. C. A. 348.

Findings of fact by the trial court, accepted by a territorial supreme court on appeal, are conclusive on the federal Supreme Court.—*Brooklyn Min. & Mill. Co. v. Miller*, 33 S. Ct.

251, 227 U. S. 194, 57 L. Ed. 478, affirming judgment 108 P. 471, 13 Ariz. 217.

Facts found by the lower court and adopted by the highest court of the state when supported by competent evidence will not ordinarily be examined in the Supreme Court on writ of error to the state court.—*Portland Ry., Light & Power Co. v. Railroad Commission of Oregon*, 33 S. Ct. 820, 229 U. S. 397, 57 L. Ed. 1248, affirming judgment 105 P. 709, 56 Or. 468; *Id.*, 33 S. Ct. 827, 229 U. S. 414, 57 L. Ed. 1259.

Findings of facts by the master and two lower courts as to the insolvency and knowledge of the parties in the dispute between an assignee of the bankrupt's accounts and the trustee in bankruptcy over the ownership of the proceeds thereof will be accepted on appeal.—*Greay v. Dockendorff*, 34 S. Ct. 166, 231 U. S. 513, 58 L. Ed. 339, affirming decree *In re Schwab-Kepner Co.*, 203 F. 475, 121 C. C. A. 597.

The federal Supreme Court will not go behind the well-warranted concurrent findings of fact by two lower courts.—*Piza Hermanos v. Caldentey*, 34 S. Ct. 253, 231 U. S. 690, 58 L. Ed. 439.

A master's finding followed by the District Court and the Circuit Court of Appeals will not be disturbed where there is evidence authorizing same.—*Hobbs v. Head & Dowst Co.*, 34 S. Ct. 253, 231 U. S. 692, 58 L. Ed. 440, affirming decree 184 F. 409, 106 C. C. A. 519, and 185 F. 1006, 107 C. C. A. 663.

A concurrent finding of the two lower courts that certain advances by a stockholder in a mining corporation to get the company out of bankruptcy were made in consideration of receiving 50 per cent. of the capital stock, and not by way of loan, will not be disturbed by the federal Supreme Court unless clearly wrong.—*Texas & P. R. Co. v. Railroad Commission of Louisiana*, 34 S. Ct. 438, 232 U. S. 338, 58 L. Ed. 631, affirming decree 192 F. 280, 112 C. C. A. 538; *Paine v. Copper Belle Min. Co.*, 34 S. Ct. 440, 232 U. S. 595, 58 L. Ed. 746, affirming judgment 114 P. 964, 13 Ariz. 406; *Washington Securities Co. v. United States*, 34 S. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220.

Findings of fact concurred in by two lower courts, will not be disturbed by the federal Supreme Court unless clearly erroneous.—*Washington Securities Co. v. United States*, 34 S. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree 194 F. 59, 114 C. C. A. 79.

The rule that the concurrent findings of two courts upon a question of fact will not be disturbed by the federal Supreme Court unless clearly shown to be erroneous is applicable though the evidence was taken before an examiner.—*Gilson v. United States*, 34 S. Ct. 778, 234 U. S. 380, 58 L. Ed. 1361, affirming decree 185 F. 484, 107 C. C. A. 584.

Conclusions of two courts that an extension of an original plan of a viaduct at a street crossing which a city has ordered a railroad to construct at its own expense was for the purpose of making grades, and not to make a crossing for a proposed boulevard, will not be disturbed.—*Missouri Pac. R. Co. v. City of Omaha*, 35 S. Ct. 82, 235 U. S. 121, 59 L. Ed. 157, affirming decree 197 F. 516, 117 C. C. A. 12.

The federal Supreme Court will not lightly disturb the conclusions of two courts that the plans of a viaduct at a street crossing which a city has ordered a railroad to construct at its own expense were sufficient to enable the railroad to make the structure required.—*Id.*

Concurrent conclusions of two courts below on the facts will not ordinarily be disturbed in the federal Supreme Court.—*L. E. Waterman Co. v. Modern Pen Co.*, 35 S. Ct. 91, 235 U. S.

88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.

The principle that the Supreme Court will not disturb, unless clearly erroneous, concurrent findings of fact of two courts below, will be applied to a suit in which the Circuit Court of Appeals affirmed for fraud five separate decrees of the District Court rendered without opinion, canceling in each case a homestead patent.—*Wright-Blodgett Co. v. United States*, 35 S. Ct. 339, 236 U. S. 397, 59 L. Ed. 637, affirming decree *Wright, Blodgett & Co. v. Same*, 203 F. 263, 121 C. C. A. 461.

Concurrent findings of two lower courts as to a matter of fact will not be disturbed unless clearly erroneous.—*National Bank of Athens v. Shackelford*, 36 S. Ct. 17, 239 U. S. 81, 60 L. Ed. 158, affirming judgment 208 F. 677, 125 C. C. A. 575.

Concurrent findings of fact by two lower courts will be accepted by the federal Supreme Court on appeal from the Philippine Supreme Court.—*De Villanueva v. Villanueva*, 36 S. Ct. 109, 239 U. S. 203, 60 L. Ed. 293.

Conclusions of two lower courts that evidence was insufficient to carry to the jury the question of negligence in an action for death under the Employers' Liability Act, will not be disturbed by the federal Supreme Court.—*Reese v. Philadelphia & R. Ry. Co.*, 36 S. Ct. 134, 239 U. S. 463, 60 L. Ed. 384, affirming judgment 225 F. 518, 140 C. C. A. 660.

Concurrent findings by master and two lower courts, as to entryman's agreement that title should inure to the benefit of another, held, not to be disturbed unless plainly erroneous.—*Causey v. United States*, 36 S. Ct. 365, 240 U. S. 399, 60 L. Ed. 711, affirming decree 203 F. 1022, 121 C. C. A. 663.

A decree of the Circuit Court of Appeals will be affirmed where the essential question is one of fact and the evidence, though sharply conflicting, sustains the conclusion reached.—*Varner v. New Hampshire Sav. Bank*, 36 S. Ct. 409, 240 U. S. 617, 60 L. Ed. 828, affirming judgment *New Hampshire Savings Bank v. Varner*, 216 F. 721, 132 C. C. A. 631.

Concurrent determination of state trial and appellate courts that deceased railway employé assumed risk of danger causing death will not be disturbed on writ of error in the federal Supreme Court unless clearly erroneous.—*Baughman v. New York, P. & N. R. Co.*, 36 S. Ct. 592, 241 U. S. 237, 60 L. Ed. 977.

Concurrent views of two lower courts that certain contracts created an agency will not be disturbed by federal Supreme Court on appeal from Supreme Court of Philippine Islands unless clearly erroneous.—*Montelibano v. La Compania General De Tabacos De Filipinas*, 36 S. Ct. 617, 241 U. S. 455, 60 L. Ed. 1099.

(K) SUBSEQUENT APPEALS.

1096. Scope and extent of review.

See 2 Cent. Dig. App. & E. § 1177; 3 Cent. Dig. App. & E. §§ 4353-4357.

When a mandate of the supreme court of the United States, made after hearing and deciding an appeal in equity, directed such further proceedings to be had in the court below as would be consistent with right and justice, and that court thereafter made a decree which prejudiced the substantial rights of a party to the suit in respect of matters not concluded by the mandate or by the original decree, its action touching such matters is subject to review on a second appeal.—*Mackall v. Richards*, 112 U. S. 369, 5 S. Ct. 170, 28 L. Ed. 737.

An appellate court, having reversed a judgment and remanded the cause with special di-

rections to the trial court to enter a certain judgment, may, on writ of error, examine the question whether the mandate has been obeyed, but will not review its former judgment.—*Mackall v. Richards*, 118 U. S. 45, 6 S. Ct. 234, 29 L. Ed. 558.

Though the decision on appeal becomes the law of the case, and is not open to reconsideration on the second appeal, this is not true of inadvertent expressions in the opinion which are not essential to the decision.—*Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858, reversing (C. C.) 24 F. 889.

The supreme court takes notice of its own opinions; and, although its judgment and mandate express the decision of the court, yet it may properly examine its opinion on a prior appeal or writ of error, in order to determine what matters were considered, upon what grounds the judgment was entered, and what was settled for the future disposition of the case.—*Thompson v. Maxwell Land-Grant & Railway Co.*, 18 S. Ct. 121, 168 U. S. 451, 42 L. Ed. 539.

An appeal from a decree entered in proceedings taken in pursuance of the mandate of the supreme court of the United States on a prior appeal brings up for review no other question than whether such decree was reached in due pursuance of the previous opinion and mandate of the appellate court.—*United States v. Camou*, 22 S. Ct. 605, 184 U. S. 572, 46 L. Ed. 694.

The doctrine of "law of the case" extends only to the questions presented and distinctly passed upon on the former appeal.—*Mutual Life Ins. Co. of New York v. Hill*, 24 S. Ct. 538, 193 U. S. 551, 48 L. Ed. 788, reversing judgment 118 F. 708, 55 C. C. A. 536, which affirmed *Hill v. Mutual Life Ins. Co. of New York*, 113 F. 44.

On reviewing a judgment entered on a mandate of the federal Supreme Court on a former appeal for proceedings consistent with its opinion, the only question is whether the judgment below is inconsistent.—*Steinfeld v. Zeckendorf*, 36 S. Ct. 14, 239 U. S. 26, 60 L. Ed. 125, affirming judgment *Zeckendorf v. Steinfeld*, 138 P. 1044, 15 Ariz. 335.

1097. Former decision as law of the case in general.

See 3 Cent. Dig. App. & E. §§ 4353-4363, 4427.

Questions decided on appeal are res judicata on a subsequent appeal, and throughout all subsequent stages of the action.—*Ames v. Quimby*, 106 U. S. 342, 1 S. Ct. 116, 27 L. Ed. 100; *Clark v. Keith*, 106 U. S. 464, 1 S. Ct. 568, 27 L. Ed. 302; *Chaffin v. Taylor*, 118 U. S. 567, 6 S. Ct. 518, 29 L. Ed. 727.

The decision of a question on a former appeal is the law of the case on a subsequent appeal in the same case.—*Thompson v. Maxwell Land Grant & Railway Co.*, 18 S. Ct. 121, 168 U. S. 451, 42 L. Ed. 539, affirmed 21 S. Ct. 275, 179 U. S. 658, 45 L. Ed. 361; *People of State of Illinois v. Illinois Cent. R. Co.*, 22 S. Ct. 300, 184 U. S. 77, 46 L. Ed. 440, affirming decree 91 F. 955, 34 C. C. A. 138; *Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

A judgment or order of the trial court according to the intimation and direction of the appellate court on a former appeal will not be disturbed.—*United States v. New York Indians*, 19 S. Ct. 487, 173 U. S. 464, 43 L. Ed. 769.

The phrase "law of the case," as applied to a former decision of an appellate court, merely expresses practice of courts to refuse to reopen what has been decided.—(1912) *Messinger v. Anderson*, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152 (1909) reversing judgment 171 F. 785, 96 C. C. A. 445.

1099. Questions concluded.

See 3 Cent. Dig. App. & E. §§ 4370-4378.

The reversal by the supreme court of the United States of an order which dismissed a petition claiming a lien for taxes, on the ground that it presented no claim against the property or the parties, is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such prima facie validity, not only as against objections which were in fact made, but also as against those which might have been made. Decree 62 P. 987, 10 N. M. 416, affirmed.—*United States Trust Co. v. Territory of New Mexico*, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

The decision of the federal Supreme Court on a former appeal that the lower court had jurisdiction of the case is conclusive on a second appeal.—(1910) *Richardson v. Ainsa*, 31 S. Ct. 23, 218 U. S. 289, 54 L. Ed. 1044, affirming decree (1908) 95 P. 103, 11 Ariz. 359.

A decree of the Hawaiian Supreme Court overruling a demurrer to the bill in a suit over the title to real property does not preclude that court from adopting a contrary principle when the controversy again comes before it.—*Lewers & Cooke v. Atcherly*, 32 S. Ct. 94, 222 U. S. 285, 56 L. Ed. 202.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

Bankruptcy proceedings, see Bankruptcy, 1046.

Review of criminal prosecutions, see Criminal Law, 1183-1193.

Review on certiorari, see Certiorari, 69.

(A) DECISION IN GENERAL.

Affirmance by divided court as affecting right to certify case to Federal Supreme Court, see Courts, 384.

1106. Remand without decision.

See 3 Cent. Dig. App. & E. §§ 4336-4391, 4535.

The especial importance of a full and clear finding of facts by the trial court on an issue as to the reasonableness of a schedule of maximum rates for a railroad company makes it proper for the court, on appeal, when there is no finding of the cost of doing the business, to remand the case, with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require, in order that the benefit of the services of a competent master and an approval of his findings by the trial court may be had in the determination of the question. Decree 90 F. 363, reversed.—*Chicago, M. & St. P. Ry. Co. v. Tompkins*, 20 S. Ct. 336, 176 U. S. 167, 44 L. Ed. 417.

1107. Effect of change in law.

See 3 Cent. Dig. App. & E. §§ 4399-4404.

A judgment of a territorial court on a question of practice should not be reversed by the supreme court of the United States because of the decision of the state courts in subsequent cases while the former cases are pending on appeal in the supreme court, the territory having been in the meantime admitted to the Union.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 20 P. 583, 1 Wash. 549.

An appeal from a decree enjoining public officers or agents from enforcing a certain act of legislature will be dismissed when it appears that the act has been repealed before the hearing of the appeal.—*Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *Board of Flour Inspectors for Port of New Orleans v. Glover*, 160 U. S. 170, 16 S. Ct. 321, 40 L. Ed. 382.

◀1109. Effect of death or change of parties.

See 3 Cent. Dig. App. & E. §§ 4405-4409.

A final decree in the supreme court of the United States will be made absolute against the heirs, etc., of a deceased appellee when counsel for appellees undertakes to appear for such parties, waives publication, and fails to appear, and the cause proceeds to final hearing.—*Hunt v. Blackburn*, 131 U. S. 403, 9 S. Ct. 793, 33 L. Ed. 215.

A judgment of a circuit court of the United States sustaining a demurrer to a declaration in an action which must be treated as one of tort, and not in assumpsit, in order to involve a sufficient amount to give that court jurisdiction, will, on the death of defendant after the cause has reached the appellate court, be reversed, and the cause remanded to the circuit court with instructions to set aside its judgment and enter one abating the action by reason of defendant's death.—*Bark of Iron Gate v. Brady*, 22 S. Ct. 529, 184 U. S. 665, 46 L. Ed. 739.

◀1115. Scope and extent of relief.

See 3 Cent. Dig. App. & E. §§ 4411-4419.

◀1121. — Leave to apply to lower court for relief.

See 3 Cent. Dig. App. & E. §§ 4418, 4419.

A. filed a bill against B. for infringement of patent, and obtained a decree for damages. B. appealed to the supreme court, but gave no supersedeas bond, and A. issued execution, levied on certain property which had been conveyed to C., and also filed a bill against C. in aid of his execution, to have the conveyance declared fraudulent as to creditors. The conveyance was declared void, and C. appealed to this court. Pending that appeal, the court reversed the decree rendered against B., and directed the bill to be dismissed, which was done. *Held* that the case in which C. had appealed would be remanded, with instructions to allow C. to file such supplemental bill as he may be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree, upon the new matter arising from the reversal of the decree against B.—*Ballard v. Searls*, 130 U. S. 50, 9 S. Ct. 418, 32 L. Ed. 846.

An affirmance of a judgment sustaining the constitutionality of the war revenue act of June 30, 1898, when no other question was raised by the plaintiff in error, may be made without prejudice to his right to relief as to so much of the tax, if any, as may have arisen from the wrong interpretation of the statute, where the officers charged with its administration have adopted and enforced an unsound interpretation of the statute, by which an excessive amount of tax has been imposed.—*Fidelity Insurance, Trust & Safe-Deposit Co. v. McClain*, 20 S. Ct. 774, 178 U. S. 113, 44 L. Ed. 983.

(B) AFFIRMANCE.

◀1124. On motion.

See 3 Cent. Dig. App. & E. §§ 4423-4440.

◀1126. — Grounds.

See 3 Cent. Dig. App. & E. §§ 3144, 4429-4431.

Where, on writ of error from the United States supreme court, no assignments of error are returned with the writ as required by *Rev. St. § 997*, no counsel appears for plaintiff in error, and the case is submitted by defendant in error on briefs, without any specification of errors by plaintiff, as required by *Sup. Ct. Rule 21, § 2*, the judgment will be affirmed, under section 4 of the same rule, for want of prosecution.—*Dugger v. Tayloe*, 121 U. S. 286, 7 S. Ct. 895, 30 L. Ed. 946.

Under amended rule 6 of the supreme court, plaintiff in error or appellant may, with a mo-

tion to dismiss the writ of error or the appeal, unite a motion to affirm the judgment or the decree; but where there is no color of right to a dismissal, the case being clearly within the jurisdiction of the court, a motion to affirm, merely, will not be sustained.—*City of New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 9 S. Ct. 223, 32 L. Ed. 607.

Plaintiff, having procured a judgment against a city in the United States circuit court, sued out a writ of mandamus to compel the levy of a tax to pay the same. Defendant took a writ of error on the ground that the judgment was void, alleging that the payee of the bonds on which it was rendered was a citizen of the same state with the debtor, and hence that neither he nor plaintiff could sue in the circuit court; in fact, the bonds were payable, both principal and interest, to bearer. Plaintiff moved to dismiss the writ of error, and to affirm the judgment granting the mandamus. *Held*, that such mandamus, being in the nature of an execution, and there being no real ground for the writ of error, the judgment will be affirmed, though there be no color of right to a dismissal of the writ of error, as required for an affirmation, under *Sup. Ct. Rule 6, subd. 5*.—*City of Chanute v. Trader*, 132 U. S. 210, 10 S. Ct. 67, 33 L. Ed. 345.

On motions to dismiss or affirm a decree by which a bill was dismissed for lack of jurisdiction, which was not error, there being color for the motion to dismiss, the motion to affirm will be sustained. Decree 95 F. 539, affirmed.—*Bienville Water-Supply Co. v. City of Mobile*, 20 S. Ct. 40, 175 U. S. 109, 44 L. Ed. 92; *Id.*, 22 S. Ct. 820, 186 U. S. 212, 46 L. Ed. 1132.

A motion to affirm a judgment on writ of error to a state court should be granted by the supreme court of the United States, where the assignments of error are frivolous and the court is convinced that the writ was taken only for delay.—*Blythe v. Hinckley*, 21 S. Ct. 390, 180 U. S. 333, 45 L. Ed. 557.

Writ of error based on refusal of defendant's request to continue a cause set for trial on the fourth day after a mistrial, defendant claiming it was physically impossible to bring back the witnesses in time is not so frivolous as to require affirmance of the judgment on motion, but presents a substantial question of abuse of the court's discretion.—*Guardian Assur. Co. of London v. Quintana*, 33 S. Ct. 236, 227 U. S. 100, 57 L. Ed. 437.

Judgment of a state court will be affirmed on motion in the federal Supreme Court, where the proposition on which the contention as to jurisdiction rests is entirely without foundation.—*Cornell Steamboat Co. v. Phoenix Const. Co.*, 34 S. Ct. 701, 233 U. S. 593, 58 L. Ed. 1107, affirming judgment *Phoenix Const. Co. v. Cornell Steamboat Co.*, 103 N. E. 891, 210 N. Y. 113.

◀1127. — Proceedings and determination.

See 3 Cent. Dig. App. & E. §§ 4432-4440.

Unless there appears on the record some color of right for the dismissal of an appeal, a motion to affirm will be denied.—*Davies v. United States ex rel. Corbin*, 113 U. S. 687, 5 S. Ct. 696, 28 L. Ed. 1149; *Gaines v. Same*, 113 U. S. 687, 5 S. Ct. 697, 28 L. Ed. 1150.

◀1128. On hearing in general.

See 3 Cent. Dig. App. & E. §§ 4441-4443, 4445, 4447.

◀1129. — Determination on merits.

See 3 Cent. Dig. App. & E. §§ 4441, 4442.

Where contention on appeal is clearly frivolous, the judgment will be affirmed, where such contention is the sole error asserted.—*Pennsylvania Co. v. Donat*, 36 S. Ct. 4, 239 U. S. 50, 60 L. Ed. 139, affirming judgment 224 F. 1021, 139 C. C. A. 665.

1133. **Insufficient presentation of case or questions.**

See 3 Cent. Dig. App. & E. §§ 4450-4453.

Where the record fails to present in proper form any of the questions argued for plaintiff in error, the judgment will be affirmed.—*Greenhood v. Randall*, 111 U. S. 775, 4 S. Ct. 699, 28 L. Ed. 596.

In the absence of an assignment of errors annexed to or returned with the writ of error, as required by Rev. St. § 997, where counsel for plaintiff in error has been permitted to withdraw, and no appearance has been made in his place, the judgment will be affirmed, without examination of the record.—*Boston Hydraulic Gold Min. Co. v. Eagle Copper & Silver Min. Co.*, 115 U. S. 221, 6 S. Ct. 33, 29 L. Ed. 392.

1137. **Defects or errors on part of appellant or plaintiff in error.**

See 3 Cent. Dig. App. & E. § 4446.

A judgment cannot be affirmed on a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. And therefore the failure of plaintiff to prove a fact which a preliminary ruling of the court made it useless for him to prove is not ground for affirmance of a judgment for defendant.—*Peck v. Heurich*, 17 S. Ct. 927, 167 U. S. 624, 42 L. Ed. 302.

1138. **Reversal ineffectual or not beneficial.**

See 3 Cent. Dig. App. & E. §§ 4456-4461.

Where a judgment of a state court that was a bar to another suit in a United States circuit court has been reversed on appeal pending the decision of an appeal to the United States supreme court, it will not obviate the erroneous ruling at the trial in the lower court that the judgment was not an estoppel.—*Milne v. Deen*, 121 U. S. 525, 7 S. Ct. 1004, 30 L. Ed. 980.

Where a bill for an injunction has been dismissed, the dismissal will not be set aside on appeal, where the reason for granting it has long since ceased to exist.—*Texas & P. Ry. Co. v. Interstate Transp. Co.*, 15 S. Ct. 228, 155 U. S. 585, 39 L. Ed. 271, modifying decree 45 Fed. 5.

By bill in a territorial court, plaintiff sought to have its title to land declared paramount, and to restrain defendant from trespassing, but the final decree was for defendant. On appeal the supreme territorial court adjudged that plaintiff had an adequate remedy at law, and affirmed the decree. Plaintiff brought an action at law, and this, after the admission of the territory as a state, was transferred to the federal court. A final judgment there rendered for defendant was affirmed by the court of appeals and the supreme court. *Held*, that the judgment of the supreme territorial court in the equity suit should be affirmed.—*Washington & I. R. Co. v. Creur D'Alene Ry. & Nav. Co.*, 160 U. S. 101, 16 S. Ct. 239, 40 L. Ed. 355.

1140. **Remission of part of recovery.**

See 3 Cent. Dig. App. & E. §§ 4462-4476; 13 Cent. Dig. Costs, § 796.

Where the only error in a judgment is the allowance of interest on the amount thereof, the supreme court will not necessarily reverse, but will affirm, if at the same term there is filed therein a certified copy of a remittitur of interest filed in the court below.—*Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

A judgment erroneous only in allowing excessive interest should, on remission of such interest, be affirmed.—*Id.*

An ascertainable excess in the judgment of the lower court may be remitted on appeal, and the judgment be then affirmed.—*Hansen v. Boyd*,

161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment *Boyd v. Hanson*, 41 F. 174.

1144. **Ordering new trial and directing further proceedings in lower court.**

See 3 Cent. Dig. App. & E. § 4479.

Uncertainties which have confronted plaintiff in an action against an interstate carrier under Act April 22, 1908, by parents of an employé dying from the injuries received in interstate commerce will not justify the federal Supreme Court to remand the cause for new trial on the declaration being amended to allege pecuniary loss, lack of which caused judgment to go against the plaintiff below.—*Garrett v. Louisville & N. R. Co.*, 35 S. Ct. 32, 235 U. S. 308, 59 L. Ed. 242, affirming judgment 197 F. 715, 117 C. C. A. 109.

1145. **Effect of affirmance.**

See 3 Cent. Dig. App. & E. §§ 4444, 4451.

The affirmance of a decree sustaining the constitutionality of the provisions of the war revenue act of 1898, relating to legacy taxes, is made without prejudice to the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute, although the only questions raised by the assignments of error related to the constitutionality of the act, where the officers charged with the administration of the law have adopted and enforced an erroneous interpretation of it, by which an excessive tax is imposed. Decree (*C. C.*) 93 F. 450, affirmed.—*High v. Coyne*, 20 S. Ct. 747, 178 U. S. 111, 44 L. Ed. 997.

(C) MODIFICATION.

In mandamus proceedings, see *Mandamus*, 187.

Review of criminal prosecutions, see *Criminal Law*, 1184.

1149. **Amendment of defects and correction of errors.**

See 3 Cent. Dig. App. & E. §§ 4483-4496.

Where the decree of the circuit court is irregular, in that it directs payment to be made to one P. as treasurer of a certain institution, instead of to him as executor, it will be amended in that particular, and, so amended, confirmed.—*Hayes v. Pratt*, 13 S. Ct. 503, 147 U. S. 557, 37 L. Ed. 279.

1151. **Modification as to amount of recovery.**

See 3 Cent. Dig. App. & E. §§ 4498-4506.

Code Civ. Proc. §§ 285, 408, authorize the trial court, or the supreme court of the territory, to set aside a verdict and grant a new trial for excessive damages given under the influence of prejudice, or for insufficiency of the evidence to sustain the verdict. By section 428 the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and may, if necessary or proper, order a new trial. *Held*, that the appellate court is not authorized, upon determining that the verdict is not supported by evidence and is excessive, to reduce it, and affirm the judgment for the reduced amount, as that would be a denial of the right to jury trial guaranteed by Const. U. S. Amend. 7.—*Kennon v. Gilmer*, 131 U. S. 22, 9 S. Ct. 696, 33 L. Ed. 110.

(D) REVERSAL

Award of costs on reversal, see *Costs*, 235, 236.

Invasion of right to jury trial, see *Jury*, 34, 37.

Review of criminal prosecutions, see *Criminal Law*, 1185-1190.

1166. Jurisdictional defects.

See 3 Cent. Dig. App. & E. §§ 4527-4530.

Where the diverse citizenship of the parties, necessary to support federal jurisdiction, is put in issue by the pleadings, and the record shows no evidence bearing on such issue, the judgment must be reversed, with costs, but it may be left to the discretion of the trial court to dismiss the action for want of jurisdiction, or to permit the introduction of evidence as to the citizenship of the parties.—*Roberts v. Lewis*, 144 U. S. 653, 12 S. Ct. 781, 36 L. Ed. 579.

1170. Technical, formal, or trivial defects or errors.

See 3 Cent. Dig. App. & E. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; 37 Cent. Dig. Parties, § 155.

Where an interlocutory judgment by default is rendered against defendant, and the record does not show that such judgment was set aside, and subsequently a judgment in favor of such defendants was rendered on the trial, plaintiff is not entitled to the judgment on the record, on the ground that the interlocutory judgment was not set aside, as, under Rev. St. 1889, § 2100, the court is directed to disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.—*Pim v. City of St. Louis*, 165 U. S. 273, 17 S. Ct. 322, 41 L. Ed. 714, dismissing appeal 27 S. W. 525, 122 Mo. 654.

Pub. St. c. 187, § 3, provides that judgment in a civil action shall not be arrested or reversed for a defect or imperfection of form which might have been amended, nor for mistake in the venue, nor because the judgment does not conform to the pleadings, if it does to the verdict, and that no error in a civil action in which defendant appeared and verdict was rendered may be assigned in a writ of error unless it affects the jurisdiction of the court or occurs after verdict. *Held* that, as a writ of error cannot be maintained apart from the statute, amendable imperfections in the declaration, not sufficient to invalidate the judgment, are not ground for reversal.—*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573, affirming 57 N. E. 337, 176 Mass. 48.

Error in the denial of an application for a rehearing does not constitute a ground for the reversal of a final decree. Decree 65 P. 276, 10 N. M. 617, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 22 S. Ct. 428, 184 U. S. 416, 46 L. Ed. 619.

1172. Reversal in part.

See 3 Cent. Dig. App. & E. §§ 4555-4561.

If an appeal be taken from a decree on the merits, and such decree is affirmed on the merits, it will not be reversed on the question of costs.—*Du Bois v. Kirk*, 158 U. S. 58, 15 S. Ct. 729, 39 L. Ed. 895, affirming decree *Kirk v. Du Bois*, 33 F. 252 and 46 F. 486.

1173. Reversal as to one or more co-parties.

See 3 Cent. Dig. App. & E. §§ 4562-4572, 4556; 13 Cent. Dig. Costs, § 802.

In an action for libel, in which the damages are so largely within the discretion of the jury, where a judgment against three defendants, one of whom is a wealthy corporation and the others individuals, is reversed as against the corporation and one other of the defendants for insufficiency of evidence, it should be reversed in toto, and a new trial awarded as to the remaining defendant, though for compensating damages only, as it cannot be fairly assumed as a matter of fact that the jury would have awarded the same amount of damages against the remaining defendant alone.—*Washington*

Gas-Light Co. v. Lansden, 19 S. Ct. 296, 172 U. S. 534, 43 L. Ed. 543.

1175. Rendering final judgment.

See 3 Cent. Dig. App. & E. §§ 4573-4587.

When all the facts have been ascertained by special findings of the court below, upon reversal of the decision of that court a new trial will not be awarded, but judgment ordered.—*Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

Where it appears that, in every view of the facts disclosed, plaintiff has no right of action whatever, it is proper to reverse a judgment for him, without remanding the cause for new trial.—*Cleveland Rolling-Mill Co. v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. Ed. 920.

On appeal from an order granting a temporary injunction, the court may properly order the dismissal of the bill before the filing of an answer or the taking of proofs, where the bill is obviously devoid of equity upon its face, and its invalidity cannot be cured by amendment. Decree, *Stover Mfg. Co. v. Mast, Foos & Co.*, 89 F. 333, 32 C. C. A. 231, affirmed.—*Mast, Foos & Co. v. Stover Mfg. Co.*, 20 S. Ct. 708, 177 U. S. 485, 44 L. Ed. 856.

A final decree dismissing a bill for an injunction may be directed by a circuit court of appeals in reversing a decree for a temporary injunction, where the bill is devoid of equity upon its face, and no supplementary evidence can be offered which will change the result. Decree, *Coffman v. Castner*, 87 F. 457, 31 C. C. A. 55, affirmed.—*Castner v. Coffman*, 20 S. Ct. 842, 178 U. S. 168, 44 L. Ed. 1021.

Final judgment for plaintiff in error may be entered where the findings of the court below are full and adequate, and protect every substantial right of the party in whose favor the judgment originally was entered. Judgment (C. C. A. 1908) *Thomas v. Green County*, 159 F. 339, 89 C. C. A. 405, affirmed.—*Green County v. Thomas' Ex'r*, 29 S. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

1176. Directing judgment in lower court.

See 3 Cent. Dig. App. & E. §§ 4588-4596.

A decree of the circuit court, dismissing upon the merits a bill of which the supreme court on appeal holds that there is no jurisdiction in equity, will be reversed, and the cause remanded, with directions to dismiss the bill without prejudice to an action at law, and with costs in the court below, and each party to pay his own costs on the appeal.—*Rogers v. Durant*, 106 U. S. 644, 1 S. Ct. 623, 27 L. Ed. 303.

Where, in a suit to recover back internal revenue taxes, the circuit court held that the taxes were illegally exacted, but that the suit was barred by a statute of limitation, and rendered a judgment for the defendant, but, on a writ of error, the record does not show that the question of limitations was raised by the pleadings, or on the trial, or before judgment, and the conclusion of law as to the illegality of the taxes is correct, the supreme court will reverse the judgment, and direct a judgment for the plaintiff to be entered below.—*Retzer v. Wood*, 109 U. S. 185, 3 S. Ct. 164, 27 L. Ed. 900.

Where a circuit court of the United States, on the trial of an action at law before it, on the waiver of a jury, makes a special finding of facts on all the issues raised by the pleadings, and gives an erroneous judgment thereon, which the supreme court reverses, it is proper, under Rev. St. U. S. § 701, providing that the supreme court, in a case brought before it for review, may direct such judgment to be rendered as the justice of the case may require,

for the supreme court to direct judgment to be entered by the circuit court in the special finding.—*City of Ft. Scott v. Hickman*, 112 U. S. 150, 5 S. Ct. 56, 28 L. Ed. 638.

A decree of a federal Circuit Court of Appeals which, after correctly deciding that the court below was without jurisdiction, inadvertently affirmed the decree, dismissing the bill on the merits, will be reversed by the federal Supreme Court, and the case remanded, with directions to set aside the decree on the merits and sustain the demurrer for want of jurisdiction, and, on that ground, dismiss the suit. Decree (1908) 164 F. 604, 90 C. C. A. 398, reversed.—*McGilvra v. Ross*, 30 S. Ct. 27, 215 U. S. 70, 54 L. Ed. 95.

A decree of a federal Circuit Court dismissing, apparently on the merits, a bill which, on its face, shows that the court had no jurisdiction, will be reversed by the Federal Supreme Court, and the case remanded to the Circuit Court with directions to sustain the demurrer for want of jurisdiction, and on that ground dismiss the suit.—*Shawnee Sewerage & Drainage Co. v. Stearns*, 31 S. Ct. 452, 220 U. S. 462, 55 L. Ed. 544.

1177. Necessity of new trial.

See 3 Cent. Dig. App. & E. §§ 4597-4604, 4606-4610.

Where there is uncertainty in the findings of fact of the court below, on which the judgment, in accordance with the principles of law as fixed by the decision of the supreme court, must be based, it is proper for the latter to remand the cause, under Rev. St. § 701, for "such further proceedings as the justice of the case may require."—*Little Miami & C. & X. R. Co. v. United States*, 108 U. S. 277, 2 S. Ct. 627, 27 L. Ed. 724.

The circuit court having, on a trial before it without a jury, made a finding of facts which did not cover the issue as to damages, and given a judgment for the defendant, the supreme court, on reversing that judgment, will remand the case for a new trial, being unable to render a judgment for plaintiff for any specific amount of damages.—*Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 S. Ct. 141, 28 L. Ed. 722.

The special term in a foreclosure proceeding rendered a decree adverse to defendant on the report of the auditor, without a trial of the issues raised by the pleadings, which the general term reversed, and remanded the cause for further proceedings, directing the plaintiff to apply to the special term for such order as it might be advised in regard to its replication. It was objected by the defendant that plaintiff having gone to hearing without a trial of the issues, the decree of the special term was final, and, being reversed at the general term, the general term was bound to enter a decree on the merits in favor of defendant, and dismissing the bill. *Held* no error in decree of general term. The error of the special term consisting in making a decree on a report of the auditor, without a trial of the issues, it was proper for the general term to remand the cause for a trial of the issues, with permission to the parties to apply for leave to amend their pleadings.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 S. Ct. 841, 30 L. Ed. 905.

While it is true that in cases tried to the court without a jury, when all the facts are specifically found or agreed to, the supreme court of the United States may, in reversing, direct what judgment shall be entered, yet, when the agreed statement is defective, or when for any reason justice seems to require it, the court may simply reverse, and direct a new trial.—*City of St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 S. Ct. 485, 37 L. Ed. 380, reversing judgment 39 F. 59.

When the findings are so defective as not to support the judgment, or enable the court to enter judgment for either party, the case will

be remanded for a new trial.—*Saltonstall v. Birtwell*, 150 U. S. 417, 14 S. Ct. 169, 37 L. Ed. 1128.

A decree dismissing a suit by the United States, under Act Cong. Sept. 19, 1890, c. 907 (26 Stat. 428, 454) § 10, to enjoin the creation of an obstruction of a navigable stream, will be reversed in the exercise of the power, on an appeal in equity, to render such a decree as under all the circumstances may seem proper, and the cause will be remanded for further hearing, where material evidence is absent from the record because of the action of the trial court in not giving sufficient time to the government to prepare its case for the inquiry directed on a prior appeal to be made on the question whether the navigability of the stream would be substantially diminished by the creation of such obstruction. Decree 65 P. 276, 10 N. M. 617, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 22 S. Ct. 428, 184 U. S. 416, 46 L. Ed. 619.

1178. Ordering new trial, and directing further proceedings in lower court.

See 3 Cent. Dig. App. & E. §§ 4604-4620.

An order of reversal cannot be accompanied by a direction to the court below to restrict the next trial to such issues as are not covered by the answers of the jury to special questions, where the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law.—*Hodges v. Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. Ed. 169.

In an equitable action to obtain compensation for the use and occupation of plaintiff's lands in the Mississippi river opposite St. Louis by defendant railroad company for terminal facilities it appeared that defendant had obtained possession of the lands, with the tacit consent of plaintiff, from a company whose property and franchises it had purchased, and which had occupied the land under a contract with plaintiff, in which said company had agreed to give plaintiff all its ferry business between such terminal station and St. Louis, and that defendant had for years treated such contract as binding. The complaint alleged breaches of such contract, in diverting traffic from plaintiff's ferry. *Held*, that while the action could not be sustained as one for use and occupation, the relation of landlord and tenant not existing, the supreme court, upon broad principles of justice, would remand the cause to enable plaintiff to recover for breaches of such contract.—*Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 S. Ct. 188, 35 L. Ed. 1055.

A case cannot be remanded by an appellate court for the purpose of allowing the complainant to amend a bill, in order to assert a new and distinct ground of relief, if the defendants are deprived by such mandate of all opportunity to interpose any defense. Decree 17 App. D. C. 102, reversed.—*Warner v. Godfrey*, 22 S. Ct. 852, 186 U. S. 365, 46 L. Ed. 1203.

A bill seeking to enjoin, as confiscatory and unreasonable, the enforcement of telephone rates established by a state commission, will not be dismissed, even without prejudice, on reversing the decree below, granting an injunction, because of complainant's failure to show the disposition of its so-called depreciation fund, but the cause will be remanded for a new trial where the inquiry has been founded upon the actual effect of rates higher than those in question, and hence it is not merely conjecture as to what will be the result of lower rates. Decree (C. C. 1907) *Cumberland Telephone & Telegraph Co. v. Railroad Commission of Louisiana*, 156 F. 823, reversed.—*Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co.*, 29 S. Ct. 357, 212 U. S. 414, 53 L. Ed. 577.

Absence of specific findings of fact to which objection could be made requires that a decree dismissing the bill of lighting company assailing rates of gas fixed by ordinance be reversed, with instructions that the case be referred to a master, to report on all questions raised by either party.—(1912) *Lincoln Gas & Electric Light Co. v. City of Lincoln*, 32 S. Ct. 271, 223 U. S. 349, 56 L. Ed. 466, reversing decree (C. C. 1909) 182 F. 926.

A decree of a federal Supreme Court construing Act June 20, 1906, reversing a decree fining a vessel for violating the statute, will be accompanied with directions to permit the government to amend the libel.—*The Abby Dodge v. United States*, 32 S. Ct. 310, 223 U. S. 168, 56 L. Ed. 380.

1180. Effect of reversal.

See 3 Cent. Dig. App. & E. §§ 4624–4631, 4633, 4635.

If a decree for foreclosure and sale is reversed, a dependent decree for the deficiency between the debt and the proceeds of the sale will not be dismissed, according to the general rule in such cases, for lack of subject-matter, but will also be reversed, if the parties to be benefited by it were not parties to the prior decree.—*Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 S. Ct. 10, 27 L. Ed. 47.

An appeal from a dependent decree, rendered for the purpose of executing a prior decree in the same suit, will be dismissed for lack of subject-matter, if such prior decree is reversed, as such reversal vacates the dependent decree.—*Id.*

Where the court of final resort in a state issued a mandamus to a circuit court of the state requiring it to proceed with the trial of a cause, which had been removed to a federal court, and a writ of error was taken to the supreme court of the United States, the supreme court will affirm or reverse the judgment of the state court, but will not enjoin the prosecution of the suit in the circuit court of the state. A reversal of the judgment awarding a mandamus would merely prevent the use of the mandamus, and not the accomplishment by other means of the object contemplated by the mandamus.—*Chesapeake & O. R. Co. v. White*, 111 U. S. 134, 4 S. Ct. 353, 28 L. Ed. 378.

While, in an action in a United States circuit court by the receiver of a national bank to recover the 100 per cent. for which a stockholder is liable, under Rev. St. § 5151, a judgment of the supreme court of the state, in an action by defendant against the bank to recover the money paid for said stock, that defendant was not bound by her subscription, is admissible in bar of the receiver's title to recover, when the judgment of the state court is reversed by the United States supreme court on error, the judgment of the circuit court, based thereon, will also be reversed.—*Butler v. Eaton*, 141 U. S. 240, 11 S. Ct. 985, 35 L. Ed. 713.

A proceeding to establish a tax lien is reinstated in the trial court as of the date of an order therein dismissing the petition, on the ground that it presented no claim against the property or the parties, by the reversal of such order by the supreme court of the United States. Decree 62 P. 987, affirmed.—*United States Trust Co. v. Territory of New Mexico*, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

(E) RENDITION, FORM, AND ENTRY OF JUDGMENT.

1184. Entry nunc pro tunc.

See 3 Cent. Dig. App. & E. §§ 4407, 4635.

A decree of reversal for further proceedings is properly entered nunc pro tunc as of the date of the submission of the cause on appeal, where one of the parties has died since the

case was submitted. Decree, *Behlmer v. Louisville & N. R. Co.*, 83 F. 898, 28 C. O. A. 229, reversed.—*Louisville & N. R. Co. v. Behlmer*, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

1185. Amendment, modification, or setting aside.

See 3 Cent. Dig. App. & E. §§ 4634–4641.

After the term has passed, and a cause has been finally disposed of by the dismissal of a writ of error, the supreme court has no power to alter its judgment to one of affirmance, although, had the judgment been affirmed, interest would have been allowed to the defendant in error, on the amount of the judgment below, during the pendency of the writ, and in the judgment of dismissal no interest was allowed.—*Schell v. Dodge*, 107 U. S. 629, 2 S. Ct. 830, 27 L. Ed. 601.

On appeal from a decree for an amount sufficient to give the Supreme Court jurisdiction, the appellee, after notice by order of court, declined to appear on the ground that no appeal had been perfected. *Held* that, after a reversal, he should not be permitted to show that the actual value of the property involved was insufficient to give jurisdiction.—*Dodge v. Knowles*, 5 S. Ct. 1108, 114 U. S. 430, 29 L. Ed. 144.

Where there is no appearance for plaintiff in error when the case is regularly reached on the docket, but judgment is not entered until a month thereafter, and the court continues in session two days longer, and up to the time of adjournment no appearance is entered for plaintiff in error, a motion thereafter to open the judgment, and for leave to file a brief, will be overruled.—*Watterson v. Payne*, 154 U. S. 534, 14 S. Ct. 1157, 15 L. Ed. 899.

(F) MANDATE AND PROCEEDINGS IN LOWER COURT.

Amendment of pleading in circuit court after remand as affecting appellate jurisdiction of federal Supreme Court, see Courts, 1185(1). Bankruptcy proceedings, see Bankruptcy, 468.

Due process of law as applied to amendment of pleading after remand, see Constitutional Law, 316.

1186. Mandate, remittitur, or order of remand.

See 3 Cent. Dig. App. & E. §§ 4642–4647.

1188. — Making and issuance.

See 3 Cent. Dig. App. & E. § 4648.

Where an appeal has been dismissed, without opposition, for want of jurisdiction, a mandate will issue, though no notice of application for mandate has been given.—*Pacific Exp. Co. v. Malin*, 131 U. S. 394, 9 S. Ct. 792, 33 L. Ed. 204.

An application for a mandate in a case which has been disposed of will be denied where no notice was served on the opposite party, and there was no agreement of the parties.—*Means v. Dowd*, 128 U. S. 583, 9 S. Ct. 793, 32 L. Ed. 578.

1191. — Transmission and filing in lower court.

See 3 Cent. Dig. App. & E. § 4646.

The supreme court, on reversing a judgment of the supreme court of a territory, which has been admitted as a state pending the appeal, will remand the case to the supreme court of the state, no federal question being involved.—*Teague v. Maddox*, 150 U. S. 128, 14 S. Ct. 46, 37 L. Ed. 1025.

Where a territory is divided and admitted as two states pending an appeal from its supreme court to the supreme court of the United

States, the latter court will, on remanding the cause, send it to the supreme court of that state in which is located the county of trial.—*Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 245, 14 S. Ct. 85, 37 L. Ed. 1068.

1193. Effect in lower court of decision of appellate court.

See 3 Cent. Dig. App. & E. §§ 4648-4665.

1194. — Construction and operation in general.

See 3 Cent. Dig. App. & E. §§ 4648-4656, 4660.

On appeal from a decree sustaining a petitioner's exceptions to an auditor's report recommending the denial of the petition, and directing a conveyance of realty, the decree of the supreme court, reversing the former, and remanding the cause for further proceedings, is not a final adjudication of the petitioner's right to some relief in accordance with the prayer of the petition.—*District of Columbia v. McBlair*, 124 U. S. 320, 8 S. Ct. 547, 31 L. Ed. 449.

A circuit court entered a decree that complainant recover possession of certain land, and have an accounting. On appeal the supreme court held that there was no error in the proceedings below in respect to the title and possession of the lands, but reversed the decree for error in certain items of the accounting, and remanded the cause for further proceedings in conformity with the opinion. *Held*, that the decree on appeal amounted to an affirmance on all questions except the accounting, and that its construction was not a matter for the discretion of the circuit court, which should enter a decree accordingly.—*Gaines v. Caldwell*, 148 U. S. 228, 13 S. Ct. 611, 37 L. Ed. 432.

A judgment for \$8,000, rendered at a special term upon a declaration claiming \$10,000, was by mistake affirmed at the general term, "as in the declaration claimed." *Held*, that the judgment of the special term was not affected by the mistake.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

A mandate from the Supreme Court of the United States, which directs the entry of a decree in conformity with its opinion dividing the damages caused in a collision between vessels held in fault, but leaving undisturbed a judgment obtained by the owners of the cargo against one of such vessels for the full amount of their damages, does not require that such decree provide for the recoupment by the latter vessel of one-half of the damages to such cargo from the moiety of damages awarded to the other vessel. Decree, *The New York*, 108 F. 102, 47 C. C. A. 232, affirmed.—*Union Steamboat Co. v. Erie & W. Transp. Co.*, 23 S. Ct. 504, 189 U. S. 363, 47 L. Ed. 854.

Parties to an unlawful combination, and not parties to the suit, were meant by the word "parties" in mandate from the Supreme Court remanding a suit to enforce Anti-Trust Act July 2, 1890, against combination of railway terminal facilities, with directions to enter decree requiring the parties to submit plan for reorganization.—*United States v. Terminal R. Ass'n of St. Louis*, 35 S. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

1195. — As law of the case.

See 3 Cent. Dig. App. & E. §§ 4661-4665.

A circuit court has no power to modify its decree, when the cause is remanded after an appeal to the supreme court, otherwise than is provided for by the opinion and mandate so remanding the cause, although subsequent cases in the supreme court may have established principles inconsistent with those on which such opinion and mandate were founded.—*Gaines v. Caldwell*, 148 U. S. 228, 13 S. Ct. 611, 37 L. Ed. 432.

Where a decree as to rents and improvements, based upon a master's report, was revers-

ed for error in taking the accounting back of the filing of the bill, it seems that there should have been merely a restatement of the account, and that the circuit court had no power to again go into the questions of rental rate and value of improvements; but, whether so or not, the values fixed by the first report and decree, being correct on all the evidence, should be made the basis of the account.—*Latta v. Granger*, 17 S. Ct. 746, 167 U. S. 81, 42 L. Ed. 85, reversing decree 68 F. 69, 15 C. C. A. 228.

A question as to the recoupment of one-half the damages to a cargo from a moiety of damages awarded to one of the vessels in collision, if not raised or passed upon on an appeal which directs a decree for a division of the damages between the vessels which are held to be in fault, remains open for determination by the lower court under a mandate to enter a decree in conformity to the opinion on appeal.—*Ex parte Union Steamboat Co.*, 20 S. Ct. 904, 178 U. S. 317, 44 L. Ed. 1084.

Where decree of Court of Claims, as affirmed on appeal by Supreme Court, has determined every question as to the right of attorneys therein to have their fees paid out of the award, such right cannot be challenged.—(1912) *Eastern Cherokees v. United States*, 32 S. Ct. 707, 225 U. S. 572, 56 L. Ed. 1212, affirming decree (1910) 45 Ct. Cl. 104.

1196. Powers and duties of lower court.

See 3 Cent. Dig. App. & E. §§ 4666-4683.

1197. — Jurisdiction of lower court after remand.

See 3 Cent. Dig. App. & E. §§ 4666, 4667, 4669-4671.

Where a decree in an accounting has been reversed on appeal, with instructions, the lower court cannot again open up the accounts, and base the decree on new findings as to items allowed on appeal.—*Kneeland v. American Loan & Trust Co.*, 138 U. S. 509, 11 S. Ct. 426, 34 L. Ed. 1052.

When a jury is waived, and special findings of fact made, and the cause is reversed, with directions to enter a specified judgment, a petition to the trial court for a new trial for errors in findings of fact, and to amend the record by additional findings, was properly denied.—*Hickman v. City of Ft. Scott*, 141 U. S. 415, 12 S. Ct. 9, 35 L. Ed. 775.

1198. — Compliance with mandate or directions.

See 3 Cent. Dig. App. & E. § 4668.

Right of combination of railway terminal facilities found to violate Anti-Trust Act July 2, 1890, to carry on such transportation business as originates and terminates on its own lines, must be recognized in the decree giving effect to a mandate of the Supreme Court under which the combination is to be reorganized.—*United States v. Terminal R. Ass'n of St. Louis*, 35 S. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

A District Court under a mandate of the Supreme Court remanding cause for entry of a decree for reorganization of railway terminal facilities so as to escape condemnation of Anti-Trust Act July 2, 1890, should not insert in such decree a provision controlling for the future the charges which the terminal company may make.—*Id.*

1199. — Opening, vacating, modification, or amendment of judgment or order.

See 3 Cent. Dig. App. & E. §§ 4674-4676.

After an affirmance by the supreme court of all of a decree of the circuit court except matters relating to an accounting between the parties, the circuit court cannot change its decree

in respect to a matter of costs.—*Gaines v. Caldwell*, 148 U. S. 228, 13 S. Ct. 611, 37 L. Ed. 432.

⇐1200. — **Errors in decision of appellate court.**

See 3 Cent. Dig. App. & E. § 4672.

A circuit court cannot refuse to enter a decree, in obedience to a mandate from the circuit court of appeals, on the ground of want of jurisdiction in itself or in the appellate court.—*Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 983.

⇐1201. — **Amendments as to pleadings and parties.**

See 3 Cent. Dig. App. & E. §§ 4673, 4677-4683.

After a decree on appeal, leave to file a "supplemental bill," setting up new defenses growing out of matters occurring after the mandate was sent down, is properly denied.—*Mackail v. Richards*, 116 U. S. 45, 6 S. Ct. 234, 29 L. Ed. 558.

Where the decree of the circuit court of the United States is reversed, and the cause remanded because the citizenship of the parties is not sufficiently shown to give the court jurisdiction, it is for the court below to determine whether an amendment of the pleadings should be allowed to cure the defect.—*Everhart v. Huntsville Female College*, 120 U. S. 223, 7 S. Ct. 555, 30 L. Ed. 623.

If only the exceptions to the answer were set down for hearing and heard and passed upon by the circuit court, the supreme court, on reversing a decree which sustained the exceptions, and which, on defendant's refusal to plead further, granted the relief prayed for in the bill, cannot, without any consent or neglect by plaintiffs, deprive them of their right, under the general rules in equity, to file a replication.—*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414.

On an appeal in a suit where the ultimate relief sought was the quieting of title to certain lands against minors, the supreme court held that the bill was technically a bill to review a consent decree previously entered pursuant to a settlement, and, as such, could not be maintained, but that, if certain allegations were stricken out, the bill would become one to more effectually carry the decree into execution; that the proofs already taken would justify the relief sought; that, while these proofs did not establish one of the principal facts alleged in the bill, they did establish that the consent decree was in consequence of a settlement made by the mother and guardian of the minors, and was so considered and accepted by the trial court. The appellate court therefore reversed the decree, but authorized plaintiffs to amend their bill as they should be advised, and gave defendants leave to answer any new matter that should be introduced. Plaintiffs amended by simply striking out certain parts of the bill, without introducing any new matter. *Held*, that defendants were not entitled thereafter to file answers containing new matter and introduce new proofs, so as to reopen the case in its entirety, as this would be to ignore what was considered and determined on the former appeal.—*Thompson v. Maxwell Land-Grant & Railway Co.*, 18 S. Ct. 121, 168 U. S. 451, 42 L. Ed. 539.

Parties who, with knowledge of all the facts, sue to set aside a conveyance for actual fraud, cannot be permitted by the mandate of an appellate court, after a determination by it against them of every issue actually litigated, to amend their bill by asserting constructive fraud as a new and distinct ground for relief, with a prayer for a reconveyance upon payment to defendants of such sums as have been expended by them for and on account of the

property, especially where such complainants have persistently declined to accept from the defendants an offer to reconvey upon these very terms. Decree 17 App. D. C. 102, reversed.—*Warner v. Godfrey*, 22 S. Ct. 852, 186 U. S. 365, 46 L. Ed. 1203.

Permitting the filing of a supplemental bill after the case has been remanded by an appellate court for the production of further evidence cannot be deemed an abuse of the trial court's discretion, where the facts set forth in such bill grew out of and were connected with the same transaction out of which the litigation arose, and were germane to the object of the suit, and where all the grounds of relief, even if not existing when the original bill was filed, were alleged to exist when the supplemental bill was tendered—especially in view of the provisions of Comp. Laws N. M. 1897, § 2685 (Code Civ. Proc. subsec. 87), that a party may be allowed, on motion, to make a supplemental complaint, answer, or reply alleging facts material to the cause, or praying for any other or different relief, order, or judgment. Decree, *United States v. Rio Grande Dam & Irrigation Co.* (1906) 85 P. 393, 13 N. M. 386, affirmed.—*Rio Grande Dam & Irrigation Co. v. United States*, 30 S. Ct. 97, 215 U. S. 266, 54 L. Ed. 190.

A federal District Court cannot permit persons not parties to intervene after final decree on mandate of Supreme Court by decree reorganizing combination in violation of Anti-Trust Act July 2, 1890, after appeal from such decree has been taken.—*Evens & Howard Fire Brick Co. v. United States*, 35 S. Ct. 415, 236 U. S. 210, 59 L. Ed. 542.

⇐1202. — **Granting new trial or rehearing.**

See 3 Cent. Dig. App. & E. § 4669; 37 Cent. Dig. New Tr. § 7.

An affirmance of a decree in a suit for an accounting on suggestion that it charges some items twice will be without prejudice to the reopening of the account to correct errors of calculation, if permitted by the court below.—*Piza Hermanos v. Caldentey*, 34 S. Ct. 253, 231 U. S. 690, 58 L. Ed. 439.

⇐1203. **Proceedings after remand.**

See 3 Cent. Dig. App. & E. §§ 4666, 4684-4691, 4693.

In an equitable proceeding for an accounting against an executor de son tort, it is not reversible error, upon the filing of a mandate of the supreme court in the court below, to permit a new complainant to become a party to the record, and set up rights not embraced in the former decree, where it appears that all the other parties to the record consented thereto.—*Hawkins v. Blake*, 108 U. S. 422, 2 S. Ct. 804, 27 L. Ed. 775.

A judgment for plaintiff obtained in a state court was reversed by the supreme court, on the ground that the state court had lost its jurisdiction by the filing of a petition and bond for removal. *Held*, that it was competent for the federal court to permit plaintiff to go on with the case before payment of the costs taxed by the state court on the reversal of the judgment, and, plaintiff having obtained a judgment in the federal court, defendant could not complain, there being no injury. Judgment 30 Fed. 802, affirmed.—*National S. S. Co. v. Tugman*, 143 U. S. 28, 12 S. Ct. 361, 36 L. Ed. 63.

Where a decree construing a treaty with Indians, finding that certain tribes were parties thereto, was affirmed, but the case was remanded, not to determine who were parties to the treaty, or in any way to reduce the extent of the grant to the Indians thereunder, but to render judgment for the amount received by the government on sale of such lands in

violation of the treaty, the court of claims was not at liberty to redetermine who were the parties to the treaty and entitled to the benefit of its provisions.—*United States v. New York Indians*, 19 S. Ct. 487, 173 U. S. 464, 43 L. Ed. 769.

1204. Enforcement of judgment or order affirmed.

See 2 Cent. Dig. App. & E. §§ 4671, 4693-4695.

Judgment was had against the receiver of a railroad company, and pending a writ of error the receiver was discharged, and thereafter died. In accordance with written stipulation of counsel the railroad company was substituted, this change "not to affect any of the questions or controversies presented by the record," and the judgment was subsequently affirmed. *Held*, that the trial court, upon the remand of the cause, should issue execution directly against the company.—*Texas & P. Ry. Co. v. Anderson*, 149 U. S. 237, 13 S. Ct. 843, 37 L. Ed. 717.

1205. Interest on judgment affirmed.

See 2 Cent. Dig. App. & E. § 4692.

Plaintiff had judgment in the supreme court of the District of Columbia for damages and costs, but nothing was said of interest. On appeal the supreme court of the United States affirmed the judgment, and its mandate directed "that such execution and proceedings be had as, according to right and justice and the laws of the United States, ought to be had." On motion of plaintiff in the court below, judgment was entered up for interest on the original judgment from its date. *Held*, that the court was without jurisdiction to give the judgment for interest.—*Ex parte Washington & G. R. Co.*, 140 U. S. 91, 11 S. Ct. 673, 35 L. Ed. 339.

The supreme court, having determined the amounts which should form the basis for pro rata distribution of a fund, remanded the cause for further proceedings. A bank, which was one of the distributees, held the fund pending the litigation as a general deposit, and used the money as such. This fact having appeared by stipulation after the cause was remanded, the circuit court allowed interest to the other distributee on the amount awarded to him. *Held*, that the matter of interest was necessarily left open by the former decree, and the action of the circuit court was not a disobedience of the mandate, and therefore, whether erroneous or not, could not be corrected by mandamus.—*In re City Nat. Bank*, 153 U. S. 246, 14 S. Ct. 804, 38 L. Ed. 705.

The proper construction of a decree of the federal Supreme Court "reversing" a decree of a Circuit Court which had confirmed in part an award in arbitration proceedings, and had ordered interest to be paid on the remainder from the date fixed by the award for payment and remanding the cause with directions to confirm the award for and up to a lesser and specified sum, does not prohibit the Circuit Court in entering its decree pursuant to this decision from allowing interest on that sum from the date so fixed, where, in the opinion of the Supreme Court, the items of the award were treated as separate matters, some of which, it was said, might be disallowed without affecting the rest.—*Ex parte Republic of Colombia*, 25 S. Ct. 107, 195 U. S. 604, 49 L. Ed. 338.

1207. Rendition and entry of judgment or order as directed.

See 2 Cent. Dig. App. & E. §§ 4696-4699.

On appeal by a railroad company from the court of claims, the supreme court held that under the land grant to such company, providing that its road should be a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of its property and troops, the government was entitled only to the free use of the road, and that compensation must be made for

the transportation, and the case was remanded for an award in accordance with its judgment. The war department had deemed a deduction of one-third from the ordinary rates to be the equivalent of any toll or charge for such use, and the services were rendered on that basis. *Held*, that a judgment by the court of claims in favor of the company for the amount found according to the ordinary tariff rates, less one-third, complied with the mandate of the supreme court, in the absence of evidence showing that the reduction was not a fair one.—*United States v. Atchison, T. & S. F. R. Co.*, 154 U. S. 637, 14 S. Ct. 1185, 24 L. Ed. 757.

Decrees for the absolute dismissal of suits by the federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they have an interest were in conformity with the mandate of the federal Supreme Court, which had reversed prior decrees of dismissal founded upon the alleged unconstitutionality of the statute upon which the suits were based, and had remanded the causes for further proceedings, where leave to amend was not asked, and upon the facts appearing and admitted upon the record, no violation of the statute was shown.—*United States v. Erie R. Co.*, 31 S. Ct. 392, 220 U. S. 275, 55 L. Ed. 464.

An appeal by defendants from a refusal to modify final decree entered under mandate from the federal Supreme Court directing a decree for reorganization of railroad terminal facilities violating Anti-Trust Act July 2, 1890, will not be dismissed because the United States had appealed from the decree before petitions for modification were filed.—*United States v. Terminal R. Ass'n of St. Louis*, 35 S. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

1208. Making or compelling restitution.

See 3 Cent. Dig. App. & E. §§ 4701-4709.

The reversal by the supreme court of a judgment of the circuit court for want of jurisdiction in the latter court because the diverse citizenship of the parties is not shown does not deprive that court of the right to retain the cause for the purpose of making restitution to appellants of the amount collected on the judgment pending the appeal, though the mandate of reversal fails to provide for such restitution.—*Northwestern Fuel Co. v. Brock*, 189 U. S. 216, 11 S. Ct. 523, 35 L. Ed. 151.

1209. New trial.

See 3 Cent. Dig. App. & E. §§ 4670, 4710-4716.

1212. — Scope of issues.

See 3 Cent. Dig. App. & E. § 4712.

Where a defendant has been decreed to pay the complainant the amount due on certain judgments against third persons, which judgments are also binding on the defendant, and the case is remanded merely for the purpose of ascertaining the amounts that have been paid on account of such judgments, the judgments are not thereby opened for examination as to errors or irregularities. Judgment 43 F. 215, modified.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree *Whitney v. City of New Orleans*, 43 F. 215.

Where the mandate directed the circuit court to ascertain whether structures complained of extended beyond practicable navigability, having reference to the manner in which commerce is conducted on the lake, such court, to which the cause is remanded for further investigation of the facts on which such question depends, is not confined to the consideration of the size and capacity of vessels habitually employed on the lake at the commencement of the litigation, or at the date of its original decree. Decree 91 F. 955, 34 C. C. A. 138, affirmed.—

People of State of Illinois v. Illinois Cent. R. Co., 22 S. Ct. 300, 184 U. S. 77, 46 L. Ed. 440.

◀1216. Failure to obey mandate or follow decision of appellate court.

See 3 Cent. Dig. App. & E. § 4700.

A motion to cause a judgment of a state court to be reversed in accordance with a mandate of the supreme court will be denied, it not appearing that an application had been made to the highest court of the state to carry the mandate into effect.—In re Royall, 125 U. S. 698, 8 S. Ct. 1392, 31 L. Ed. 855.

Where a case is sent to the lower court by mandate from the United States supreme court, and the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time bring the errors or omissions of the lower court before the supreme court for correction.—In re Sanford Fork & Tool Co., 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414.

(G) JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND.

◀1218. Recall or return of cause from lower court.

See 3 Cent. Dig. App. & E. § 4719.

In entitling a cause on taking an appeal the name of one party was stated incorrectly, and differently from the title in the court appealed from; and under such incorrect title the appeal proceeded to judgment, and a mandate to the court below was issued. *Held*, that such mandate might be recalled, and a new mandate issued, describing the cause by its title in the court below.—Killian v. Ebbinghaus, 111 U. S. 798, 4 S. Ct. 698, 28 L. Ed. 593.

◀1220. Allowance of further appeal.

See 3 Cent. Dig. App. & E. § 4721.

A circuit court of appeals reversed a decree of a circuit court, with specific directions as to the decree to be entered. The mandate went down, and a decree was entered in accordance therewith, before an appeal was taken from the decree of the circuit court of appeals. From the decree so entered in the circuit court an appeal was again taken, which was dismissed, and appeals taken in both cases to the supreme court. *Held*, that the right of appeal from the first decree of the circuit court of appeals was not cut off by its promptness in sending down the mandate, and that any difficulty in dealing with the cause in the circuit court was obviated by the second appeal, which brought before the supreme court the record of the subsequent proceedings. Decrees, *Merrill v. First Nat. Bank* (1896) 75 F. 148, 21 C. C. A. 282, and *Same v. National Bank of Jacksonville* (1896) 78 F. 208, 24 C. C. A. 63, affirmed.—*Merrill v. National Bank of Jacksonville*, 19 S. Ct. 360, 173 U. S. 131, 43 L. Ed. 640.

◀1222. Amendment or correction of mandate or remittitur.

See 3 Cent. Dig. App. & E. § 4723.

A mandate, ordering remand of cause with directions to enter a decree canceling every percentage coal contract referred to in the pleadings, modified so as to exclude from cancellation the contracts described in the petition praying for such modification.—*United States v. Reading Co.*, 33 S. Ct. 509, 228 U. S. 158, 57 L. Ed. 779, modifying mandate 33 S. Ct. 90, 226 U. S. 324, 57 L. Ed. 243.

XVIII LIABILITIES ON BONDS AND UNDERTAKINGS.

See Election of Remedies, ▶3.

Accord and satisfaction of judgment as defense, see Accord and Satisfaction, ▶4.

Jurisdiction, federal courts, see Courts, ▶284.

Reimbursement of sureties by principals, see Principal and Surety, ▶185.

◀1228. Accrual or release of liability by breach or fulfillment of conditions.

See 3 Cent. Dig. App. & E. §§ 4740-4757.

◀1232. — Affirmance or reversal of judgment or order.

See 3 Cent. Dig. App. & E. §§ 4763-4767.

Under Prince's Laws N. M. c. 45, § 5 (Comp. St. N. M. § 2206), providing that the judgment of the appellate court, if against appellant, shall be rendered against him and his sureties on his appeal bond, a judgment of the supreme court affirming that of the district court as to the principal sum due, and also as to part of the interest, plaintiffs remitting the excess, may be tendered against appellant's sureties as well as himself.—*Hopkins v. Orr*, 124 U. S. 510, 8 S. Ct. 590, 31 L. Ed. 523.

A party who, on appeal from a decree for the recovery of possession of real property unless the balance of the purchase price should be paid before January 1, 1899, secures an extension of the time for such payment until November 1, 1899, has so prosecuted his appeal to effect, within the meaning of a supersedeas bond to secure the adverse party from loss in the use and possession of the premises, as to preclude any recovery on such bond for the use and occupation of the property between those dates. Judgment (1905) 138 F. 22, 70 C. C. A. 452, affirmed.—*Crane v. Buckley*, 27 S. Ct. 56, 203 U. S. 441, 51 L. Ed. 260.

◀1234. Extent of liability.

See 3 Cent. Dig. App. & E. §§ 4761-4777.

Under Rev. St. § 1000, regulating appeals, and requiring a bond conditioned "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs," a supersedeas bond on appeal from a decree foreclosing a mortgage will not operate as security for the amount of the decree, or interest pending appeal, or the balance after applying the proceeds of the mortgage sale, or damages for the detention of the property pending appeal, but only for costs, and against waste, and nonpayment of taxes, and loss by fire, if not properly insured. The addition to the statutory condition of a provision that the appellants shall "pay for the use and detention of the property covered by the mortgage, during the pendency of the appeal," will not vary or extend its legal effect.—*Omaha Hotel Co. v. Kountze*, 107 U. S. 378, 2 S. Ct. 911, 27 L. Ed. 609.

The obligee in a bond which supersedes an order of a circuit court of the United States confirming a sale on foreclosure of real property in Nebraska and directing the immediate execution of a deed and delivery and possession thereof to the purchaser is entitled, on affirmance of the order and execution of the deed, to recover on such bond the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale.—*Woodworth v. Northwestern Mut. Life Ins. Co.*, 22 S. Ct. 676, 185 U. S. 354, 46 L. Ed. 945.

APPEARANCE.

Scope-Note.

[INCLUDES acts or proceedings by which parties to civil actions in general place themselves before the court, personally or by representation; nature, requisites, and validity of entry or notice of appearance, and filing and service thereof; withdrawal of or setting aside appearance; what constitutes general or special appearance, and operation and effect thereof as a submission to the jurisdiction and waiver of objections thereto, or of objections to defects, irregularities, etc., in process or service thereof; and effect of failure to appear.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 7. Proceedings constituting appearance.
 - 9. — General or special appearance.
 - 10. — General appearance after special appearance.
 - 11. Operation and effect in general.
 - 12. — Relation of party to cause in general.
 - 16. Jurisdiction acquired.
 - 19. — Of the person.
 - 20. Waiver of process or notice.
 - 21. Waiver of objections.
 - 22. — In general.
 - 23. — Venue or change of venue.
 - 24. — Defects in process or service.

Cross-References.

In federal court after removal of cause from state court, see Removal of Causes, ¶106.
On appeal or writ of error, see Appeal and Error, ¶434, 435.
Practice peculiar to federal courts, see Courts, ¶345.

Ratification of appearance by attorney, see Attorney and Client, ¶103.
Record for purpose of review, see Appeal and Error, ¶517.
Rules of federal circuit courts, see Courts, ¶413.

7. Proceedings constituting appearance.

See 3 Cent. Dig. Appear. §§ 23-54; 19 Cent. Dig. Equity, § 306.

9. — General or special appearance.

See 3 Cent. Dig. Appear. §§ 42-52.

A defendant in a suit in a state court does not, by a special appearance for the sole purpose of removing the cause to a federal circuit court, before service of summons, submit himself to the jurisdiction of the state court, nor, upon removal to the federal court, deprive himself of the right to object to the manner of service upon him in that court. Judgment, Wells v. Clark (C. C. 1905) 136 F. 462, modified.—Clark v. Wells, 27 S. Ct. 43, 203 U. S. 164, 51 L. Ed. 138.

The exercise of the right of removing a cause from a state to a federal circuit court before service of summons by a defendant who appeared specially for that sole purpose does not amount to a general appearance.—Id.

An appearance to raise the question of jurisdiction and remove the case to a federal court does not amount to a general appearance.—Commercial Mut. Accident Co. v. Davis, 29 S. Ct. 445, 213 U. S. 245, 53 L. Ed. 782.

A nonresident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in a federal Circuit Court for the sole purpose of moving to

quash the service of writs of attachment and garnishment upon its property in the district, on the ground that such property was not subject to attachment or garnishment.—Davis v. Cleveland, C., C. & St. L. Ry. Co., 30 S. Ct. 463, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

10. — General appearance after special appearance.

See 3 Cent. Dig. Appear. §§ 53, 54.

The provisions of the Texas statute that a special appearance for the purpose of objecting to the service of process constitutes a general appearance at the next term of the court, do not control a United States circuit court sitting in that state.—Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699; Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 14 S. Ct. 401, 38 L. Ed. 248.

The benefit of the qualified appearance by defendants at the time of filing pleas to the jurisdiction is not waived by arguing the merits of the case as disclosed by the bill on the hearing as to the sufficiency of such pleas, where there was no motion for the dismissal of the bill for want of equity, and the discussion of the merits was permitted or invited by the court in order that it might be informed on that question if it concluded to consider the merits along with the question of the sufficiency of the pleas.—Citizens' Savings & Trust Co., v. Illinois Cent. R. Co., 27 S. Ct. 425, 205 U. S. 46, 51 L. Ed. 703.

11. Operation and effect in general.

See 3 Cent. Dig. Appeal. §§ 55-59; 17 Cent. Dig. Divorce, §§ 266, 267; 19 Cent. Dig. Equity, § 306.

12. — Relation of party to cause in general.

See 3 Cent. Dig. Appeal. §§ 55-64, 66; 17 Cent. Dig. Divorce, §§ 266, 267.

The husband of a defendant, who has not been made a party to a foreclosure suit, but who joins his wife in an answer, will be bound by the decree.—*Anderson v. Watts*, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078.

16. Jurisdiction acquired.

See 3 Cent. Dig. Appeal. §§ 70-90; 17 Cent. Dig. Divorce, §§ 266, 267.

19. — Of the person.

See 3 Cent. Dig. Appeal. §§ 79-82, 84-90; 17 Cent. Dig. Divorce, §§ 266, 267.

Since the provision of the Texas statutes that a special appearance for the purpose of objecting to the service of process becomes a general appearance to the next term of the court, does not apply to the United States circuit court sitting in that state, whose jurisdiction is defined by acts of congress, a party sued therein, who appears specially to object to the jurisdiction, and, when his objection is overruled, pleads to the merits, does not thereby submit himself to the jurisdiction of the court, or waive his right to a review of its action thereupon.—*Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 14 S. Ct. 401, 38 L. Ed. 248.

A nonresident defendant not served in attachment does not submit to the jurisdiction of the court by personally appearing for the purpose of objecting to the jurisdiction, because the property was not subject to the attachment or garnishment.—*Big Vein Coal Co. of West Virginia v. Read*, 33 S. Ct. 694, 229 U. S. 81, 57 L. Ed. 1053.

20. Waiver of process or notice.

See 3 Cent. Dig. Appeal. §§ 91-102; 1 Cent. Dig. Abate. & R. § 466.

Appearance and pleading to the merits waive the absence of process and service thereof.—*Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 S. Ct. 691, 35 L. Ed. 332.

21. Waiver of objections.

See 3 Cent. Dig. Appeal. §§ 103-153; 30 Cent. Dig. Judgm. §§ 688, 748.

22. — In general.

See 3 Cent. Dig. Appeal. §§ 103-110.

A nonresident partner having challenged a judgment against the firm on the merits, and the decision having been against him, which was affirmed by the state supreme court, there is color for a motion to dismiss his writ of error on the ground that there is no federal question properly presented, as by such an appearance the nonresident partner is precluded from questioning the judgment on constitutional grounds.—*Sugg v. Thornton*, 132 U. S. 524, 10 S. Ct. 163, 33 L. Ed. 447.

23. — Venue or change of venue.

See 3 Cent. Dig. Appeal. §§ 111-117.

The exemption of national banks from suits in state courts elsewhere than in the county or city where the bank is located is waived where the bank appears and defends the action without claiming the immunity.—*First Nat. Bank v. Morgan*, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282.

Where circuit courts have jurisdiction of a controversy by reason of the amount involved and the diverse citizenship of the parties, defendant, by demurring on its first appearance,

not only on the ground that the court had no jurisdiction, but also on the ground that the complaint did not state facts sufficient to constitute a cause of action, waives the provision that no civil suit shall be brought by original process in any other district than that whereof he is an inhabitant.—*St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659.

A general appearance by defendant in a suit in a United States court waives objections to jurisdiction founded on his residence in another district.—*Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

A special appearance by defendant for the purpose of objecting to the jurisdiction of the circuit court on account of nonresidence in the district in which suit was brought is no waiver of objection to the jurisdiction of the court on that ground.—*Ex parte Shaw*, 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768.

Rev. St. Tex. 1879, arts. 1241-1244, providing that any appearance in behalf of defendant, though in terms limited to the purpose of objecting to the jurisdiction, shall constitute a waiver of objection to the jurisdiction on the ground of nonresidence, are not rendered applicable to the federal courts by Rev. St. U. S. § 914, which requires the forms of procedure to conform "as nearly as may be" to the state practice, and such an appearance in a federal court constitutes no waiver of the jurisdictional question.—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942.

An objection that the suit is brought in the wrong district comes too late after the filing of a plea in bar.—*Texas & P. Ry. Co. v. Saunders*, 151 U. S. 105, 14 S. Ct. 257, 38 L. Ed. 90.

24. — Defects in process or service.

See 3 Cent. Dig. Appeal. §§ 118-143; 17 Cent. Dig. Divorce, §§ 267, 353; 17 Cent. Dig. Equity, § 306; 30 Cent. Dig. Judgm. § 688.

A defect in a subpoena, in the description of the representative capacity of a defendant, is cured by his appearance without objection.—*Johnson v. Waters*, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

Where service was obtained by a fraudulent device, defendant, by appearing, demurring, answering, and petitioning to remove the cause to the federal court, and participating in the trial there, waived all question of the service of process, and cannot attack the jurisdiction of the court on that ground by motion for nonsuit, motion to dismiss, or request for an instruction.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

Irregularity in the service of the summons is not waived by special appearance, after removal of the cause, for an order setting aside the summons and service thereof.—*Goldsey v. Morning News of New Haven*, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517, affirming judgment *Golden v. Same*, 42 F. 112.

Caveators who appear and go to trial in a proceeding to probate a will, without seeking further time for the purpose of securing additional testimony or preparing for the hearing cannot claim to have been prejudiced by a defect in a notice of publication. Judgment 17 App. D. C. 128, affirmed.—*Leach v. Burr*, 23 S. Ct. 393, 188 U. S. 510, 47 L. Ed. 567.

APPLIANCES.

Application of Safety Appliance Act in territory acquired by United States, see Territories, 8.

Defective and dangerous appliances, see Master and Servant, 101-129, 207-210, 228, 233-236.

For transportation of passengers, sufficiency and safety, see Carriers, ¶288-291.
Safety Appliance Act, regulation of railroads in general, see Railroads, ¶229.
Safety appliances on cars used in interstate commerce, see Commerce, ¶27.

APPLICATION.

See Motions.

APPOINTMENT.

Agents, officers, receivers, etc., see Principal and Agent, ¶7-10; Corporations, ¶283-292; Receivers, ¶32-62, and titles relating to particular officers, agents and other persons.

APPORTIONMENT.

Costs, see Costs, ¶59, 80, 241.
Damages, see Collision, ¶144-146.
Excise taxes among states, see Internal Revenue, ¶2.
Expenses and benefits, public improvements, see Municipal Corporations, ¶464-466.
Prize money, see War, ¶28.
Representatives to Congress, see United States, ¶10.

APPRAISAL.

See—
Insurance, ¶578.

APPRAISERS.

See—
Customs Duties, ¶59.
Eminent Domain, ¶225-239.

APPRENTICES.

[No paragraphs or references in this Digest. But see 3 Cent. Dig. Apprent.]

APPROPRIATION.

See—
Eminent Domain.
United States, ¶85.
Waters and Water Courses, ¶3, 128-130.

APPROVAL.

Account of marshals, see United States Marshals, ¶25.
Bond or undertaking, see Appeal and Error, ¶386.
Sentence of court martial by President, see Army and Navy, ¶48, 49.
Verdict or findings, see Appeal and Error, ¶1005, 1022.
Work done under contract, see—
Contracts, ¶283-287.
United States, ¶70.

APPURTENANCES.

See Easements.

ARBITRATION AND AWARD.

Scope-Note.

[INCLUDES submission of controversies, by agreement of the parties thereto, to persons chosen by themselves, for determination; rights, powers, duties, and proceedings of arbitrators so chosen, umpires, etc.; requisites, validity, operation, and effect of such submission and the award thereon; pleading arbitration and award as a defense; and enforcing or setting aside award.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Submission.

- ¶1. Nature of proceeding.
- 5. Agreements to arbitrate.
- 9. — Condition precedent to action.
- 17. Construction and operation.
- 20. — Scope of submission.
- 24. Failure to arbitrate.

II. Arbitrators and Proceedings.

- ¶35. Concurrence of arbitrators in proceedings and decision.

III. Award.

- ¶64. Fraud, partiality, or misconduct.

Cross-References.

Adjustment of loss under insurance policy, see Insurance, ¶578.
Approval or certificate of architects, arbitrators, or others of performance of contract, see Contracts, ¶283-287.
International arbitration, see International Law, ¶13.

Pendency of arbitration as affecting limitation of actions, see Limitation of Actions, ¶103.
Power of commissioners of District of Columbia to arbitrate, see District of Columbia, ¶9, 35.

I. SUBMISSION.**1. Nature of proceeding.**

See 4 Cent. Dig. Arb. & Aw. §§ 1-6.

An agreement for a common-law submission to arbitrate is a contract in the meaning of the acts restricting the power of the commissioners of the District of Columbia to bind the District, by contract, to the payment of money.—*District of Columbia v. Bailey*, 18 S. Ct. 868, 171 U. S. 161, 43 L. Ed. 118, reversing judgment *Bayley v. District of Columbia*, 9 App. D. C. 360.

5. Agreements to arbitrate.

See 4 Cent. Dig. Arb. & Aw. §§ 27-31.

9. — Condition precedent to action.

See 4 Cent. Dig. Arb. & Aw. § 30.

An agreement between the owner of a sunken vessel and a salvor at the time of the service, to submit the amount to be paid for salvage service to arbitration in case they could not agree, does not affect an action for salvage.—*Potomac Steamboat Co. v. Baker Salvage Co.*, 123 U. S. 40, 8 S. Ct. 33, 31 L. Ed. 75.

Where an agreement inserted in a contract that the parties will refer any dispute arising thereunder to arbitration stipulates that the arbitration is to be a condition precedent to the right to sue upon the contract, or this may be inferred upon construction, no suit can be maintained unless the plaintiff has made all reasonable effort to comply with the condition.—*Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419.

Where a contract for the payment of money provides for its submission to arbitrators, whose award shall be final as to amount, but shall not determine the question of liability, and further provides that no action upon the contract can be maintained until after such award, a compliance with the provision is a condition precedent to a right of action. But when no such condition is expressed in the contract, nor is to be implied from its terms, the agreement for submission is collateral and independent, and a breach of the agreement does not bar an action on the principal contract.—*Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 S. Ct. 133, 34 L. Ed. 708.

17. Construction and operation.

See 4 Cent. Dig. Arb. & Aw. §§ 77-104.

20. — Scope of submission.

See 4 Cent. Dig. Arb. & Aw. §§ 87-96.

The salaries and traveling expenses of executive officers of a railway construction company devoting itself solely to the business of building a railroad in the Republic of Colombia, and the office expenses of its New York office, are elements of the indemnity which that republic agreed, in exchange for the surrender of the concession and the railroad, to pay to the assignee of such concession for the works and labors ("las obras y trabajos") executed by it, and its expenditures on the works and labors executed by it in the construction of such railroad. Decree 113 F. 1020, 51 C. C. A. 604, reversed.—*Republic of Colombia v. Cauca Co.*, 23 S. Ct. 704, 190 U. S. 524, 47 L. Ed. 1159.

Cash paid by a railway construction company for the purchase of a railway concession granted by the Republic of Colombia, and sums voted by that company to its officers for services in securing an agreement to submit to ar-

bitration the question of the amount of the indemnity to be paid by such republic to the assignee of the concession in exchange for the latter's surrender of the concession and railroad, for the works and labors ("las obras y trabajos") executed by it, and expenditures on works and labors executed by it in the construction of the railroad, are not properly allowed as elements of such indemnity.—Id.

24. Failure to arbitrate.

See 4 Cent. Dig. Arb. & Aw. §§ 109-114.

A board of levee commissioners made a settlement with contractors employed by the board, under which the board paid a certain amount, taking a receipt in full of all demands. Subsequently, on complaint by the contractors, an agreement was entered into stipulating that the work should be remeasured, and all differences submitted to arbitration. The arbitration failed, through the refusal of the arbitrators to consider certain evidence. Held that, upon such failure, the settlement and receipt bound the contractors as an accord and satisfaction.—*Hemingway v. Stansell*, 106 U. S. 399, 1 S. Ct. 473, 27 L. Ed. 245.

II. ARBITRATORS AND PROCEEDINGS.**35. Concurrence of arbitrators in proceedings and decision.**

See 4 Cent. Dig. Arb. & Aw. §§ 124-130, 204.

An award signed by two of the three members of a commission appointed to determine the amount of the indemnity to be paid by the Republic of Colombia to the assignee of a railroad concession in exchange for the surrender of the concession and railroad cannot be defeated by that government because its commissioner resigned after the discussions were closed, where the commission had at the outset resolved, under the power given to it by the submission agreement to determine the procedure to be followed, that a majority vote should govern, especially where possession of the railroad was surrendered to the government pursuant to the terms of the submission. Decree 113 F. 1020, 51 C. C. A. 604, reversed.—*Republic of Colombia v. Cauca Co.*, 23 S. Ct. 704, 190 U. S. 524, 47 L. Ed. 1159.

III. AWARD.**64. Fraud, partiality, or misconduct.**

See 4 Cent. Dig. Arb. & Aw. §§ 321-327.

It was part of a contract for fattening cattle that they should be of a certain average condition, to be ascertained by an arbitrator. It was urged that the arbitrator had been misled, and was partial towards the plaintiffs, the owners. Held, that the acts of the arbitrator could not be questioned unless he had been deceived by the plaintiffs, who were bound, if they knew of any disease affecting the cattle, to disclose it.—*Teal v. Bilby*, 123 U. S. 572, 8 S. Ct. 239, 31 L. Ed. 263.

The fact that one of the arbitrators between a railroad and its contractors had been employed by the chief engineer of the company when the contracts were made, but left before they were performed, and, under a private arrangement with one interested in the contracts, had received a share of the profits, not being otherwise interested, is not sufficient ground for setting aside the judgment rendered on the award.—*Union R. Co. v. Dull*, 124 U. S. 173, 8 S. Ct. 433, 31 L. Ed. 417.

ARCHITECTS.

Approval or certificate of architects, arbitrators, or others of performance of contract, see Contracts, ¶283-287.
Competitive designs for public buildings, see United States, ¶64.

ARGUMENT OF COUNSEL.

See—
Appeal and Error, ¶824.
Criminal Law, ¶708-730.
Trial, ¶109-133.

ARMOR PLATE.

Contracts, see United States, ¶73.

ARMY AND NAVY.*Scope-Note.*

[INCLUDES the land and naval forces of the general government, militia called into its service, and volunteers, as well as the regular army and navy; constitutional and statutory provisions relating thereto; organization and discipline thereof; appointment, discharge, resignation, and dismissal of officers of the army or navy, and their rank, rights, powers, duties and liabilities; enlistment, conscription, and discharge of soldiers, sailors, marines, etc., their pay and other rights, their duties and liabilities, and aid or relief to them after discharge, and to their families, etc.; relation of the military forces to the civil authorities in general; and offenses against military law or regulations governing the service, and courts of inquiry, courts-martial, and other courts administering such laws or regulations.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶ 5. Persons in military or naval service in general.
- 6. Officers.
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¶5. Persons in military or naval service in general.

See 4 Cent. Dig. Army & N. § 4.

Paymaster's clerks are not "officers of the navy."—*United States v. Mouat*, 124 U. S. 303, 8 S. Ct. 505, 31 L. Ed. 463, reversing judgment *Mouat v. United States*, 22 Ct. Cl. 293.

¶6. Officers.

See 4 Cent. Dig. Army & N. §§ 7-36.

¶7. — Appointment and promotion.

See 4 Cent. Dig. Army & N. §§ 7-9.

Though, under navy regulations in force in 1867 (section 264), a first assistant engineer, who had served two years at sea on a naval steamer, became eligible for promotion to the grade of chief engineer, he did not thereby acquire a right to be examined for promotion, irrespective of the existence of a vacancy to which he could be promoted; and upon his subsequent promotion he acquired no right to the pay for the higher grade from the time he became eligible, under Act Cong. July 16, 1862 (12 Stat. 586, c. 183), providing that any officer of the navy, subject to examination for promotion, who shall have been absent on duty at the time he should have been examined, shall, if found qualified at a subsequent examination, be entitled to the increased rate of pay from the time he would have received it had he been found qualified at the time his examination should have taken place.—*Hunt v. United States*, 116 U. S. 394, 6 S. Ct. 406, 29 L. Ed. 674.

Under Const. art. 2, § 2, all officers must be appointed by the president, by and with the consent of the senate, or by a court of law, or the head of a department, and as there is no statute authorizing the secretary of the navy to appoint a paymaster's clerk, nor any act requiring his approval of such appointment, and the regulations of the navy not requiring any such appointment or approval for the holding of that position, the appointment did not make one so appointed an officer of the United States.—*United States v. Mouat*, 124 U. S. 303, 8 S. Ct. 505, 31 L. Ed. 463, reversing judgment *Mouat v. United States*, 22 Ct. Cl. 293.

The terms of a commission cannot change the effect of the appointment of an officer in the navy, as defined by a statute authorizing it. Judgment 33 Ct. Cl. 355, affirmed.—*Quackenbush v. United States*, 20 S. Ct. 530, 177 U. S. 20, 44 L. Ed. 654.

¶8. — Rank and grade.

See 4 Cent. Dig. Army & N. § 10.

The fact that mates are appointed by the secretary of the navy does not render them warrant officers.—*United States v. Fuller*, 160 U. S. 593, 16 S. Ct. 386, 40 L. Ed. 549.

¶10. — Retirement.

See 4 Cent. Dig. Army & N. § 12.

Congress may retire an officer from active service and place him on the retired list upon a rank different from that which attaches to his office by general laws, and may change the mere rank of an officer on the active or retired list at pleasure. 15 Ct. Cl. 151 affirmed.—*Wood v. United States*, 107 U. S. 414, 2 S. Ct. 551, 27 L. Ed. 542.

After a retired naval officer has, during the remainder of his life, acquiesced in the proceedings of the retiring board, it does not lie with his administratrix to object to them for a mere irregularity.—*Brown v. United States*, 113 U. S. 568, 5 S. Ct. 648, 28 L. Ed. 1079.

Act Cong. Aug. 3, 1861, provides that, "whenever any officer of the navy, on being or-

dered to perform the duties appropriate to his commission, shall report himself unable to comply with such order, or whenever, in the judgment of the president of the United States, an officer of the navy shall be in any manner incapacitated from performing the duties of his office," such officer may, upon certain findings as to the cause of the incapacity, be placed upon the list of retired officers. *Held*, that such statute would be held to apply to warrant officers as well as to commissioned officers, such construction having been uniformly given to it by the executive department.—*Id.*

¶11. — Discharge or dismissal.

See 4 Cent. Dig. Army & N. § 13.

Act Cong. July 13, 1866, c. 176 (14 Stat. 92), providing that no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial, did not withdraw from the president the power, with the advice and consent of the senate, to supersede an officer by the appointment of some one in his place.—*Keves v. United States*, 109 U. S. 336, 3 S. Ct. 202, 27 L. Ed. 954; *Mullan v. United States*, 140 U. S. 240, 11 S. Ct. 788, 35 L. Ed. 489, affirming judgment 23 Ct. Cl. 34.

An unwarranted dismissal from the naval service of an officer by the secretary of the navy is ineffective.—*United States v. Perkins*, 116 U. S. 483, 6 S. Ct. 449, 29 L. Ed. 700.

Act Cong. July 15, 1870, § 11 (16 Stat. 315), provided that, on the recommendation of a board therein provided for, the president should muster out of the military service any officers deemed by such board unfit, for certain reasons, to discharge their duties, and that such officers should have a hearing before the board to show cause against being mustered out. Section 12 authorized the president to transfer officers to the list of supernumeraries, and declared that, "if any supernumerary officers shall remain after the first day of January next, they shall be honorably mustered out of the service." *Held* that, by the commencement of proceedings against an officer under section 11, the government was not prevented from discontinuing them without an adjudication by the board, and could thereafter muster the officer out of the service, under section 12.—*Street v. United States*, 133 U. S. 299, 10 S. Ct. 309, 33 L. Ed. 631.

An order transferring an officer to the supernumerary list, and mustering him out, under section 12, on January 2, 1871, sufficiently complied with the act in point of time, especially as January 1, 1871, was Sunday, and as section 12 placed no limitation on the time within which officers might be transferred to the supernumerary list.—*Id.*

The validity of such order having been recognized by several acts of congress, the question whether it was in technical compliance with the act cannot be considered.—*Id.*

An officer in the naval service of the United States, appointed for a definite time, or during good behavior, has no vested contract right in the office of which congress cannot deprive him; and it is immaterial that Rev. St. § 1229, provides that no officer in the naval service shall in time of peace be dismissed from service except in pursuance of a sentence of a court-martial.—*Crenshaw v. United States*, 134 U. S. 99, 10 S. Ct. 431, 33 L. Ed. 825.

Where an officer is appointed by the president in place of one who has been sentenced by a court-martial to dismissal from the navy, it is immaterial whether the court-martial was a legal body.—*Mullan v. United States*, 140 U. S. 240, 11 S. Ct. 788, 35 L. Ed. 489, affirming judgment 23 Ct. Cl. 34.

Errors and injustice done in the proceedings before the examining board convened under the authority of act Oct. 1, 1890, c. 1241, 26 Stat. 562 (U. S. Comp. St. 1901, p. 849), enacted to provide for the promotion or retirement of army officers which resulted in the discharge of an officer with one year's pay, by an order made by the President, in the exercise of his reserved power to review the proceedings and decisions of such board, cannot be corrected by the courts of certiorari.—(1911) *Reaves v. Ainsworth*, 31 S. Ct. 230, 219 U. S. 296, 55 L. Ed. 225, affirming judgment (1906) 28 App. D. C. 157.

12. — Reinstatement.

See 4 Cent. Dig. Army & N. § 14.

Where an army officer is dismissed from the service by order of the president, he does not regain his position by a subsequent revocation of that order. A vacancy is created, which can be filled only by a new appointment.—*United States v. Corson*, 114 U. S. 619, 5 S. Ct. 1158, 29 L. Ed. 254, overruling *Corson v. United States*, 17 Ct. Cl. 344.

13. — Pay and allowances.

See 4 Cent. Dig. Army & N. §§ 15-29.

Under Act Cong. July 28, 1866 (14 Stat. 337, c. 299), a colonel of cavalry was retired, with the rank and pay of a major general. By Act March 3, 1875 (18 Stat. 512, c. 173), his retired rank and pay were reduced to those of a brigadier general. *Held*, that his retired rank of major general did not confer on him the office of a major general, and that congress had power to change his retired rank and pay.—*Wood v. United States*, 107 U. S. 414, 2 S. Ct. 551, 27 L. Ed. 542.

Act Cong. March 3, 1835 (4 Stat. 757), providing officers of the navy shall be allowed a mileage "for traveling expenses under orders," applies to travel within as well as without the United States. *Graham v. United States*, 18 Ct. Cl. 83, affirmed.—*United States v. Graham*, 110 U. S. 219, 3 S. Ct. 582, 28 L. Ed. 126.

Rev. St. § 1262, provides that each commissioned officer below the rank of brigadier general shall be allowed 10 per centum of his current yearly pay "for each term of five years' service." Acts Cong. Feb. 24, 1881, and June 20, 1882 (21 Stat. 346; 22 Stat. 118), making appropriations "for the pay of the army," provide for "additional pay to officers for length of service," "the actual time of service in the army" to be allowed in computing such pay. *Held*, that the time of service of an officer as a cadet in the military academy at West Point is to be regarded as "actual time of service in the army," in computing his increase of pay "for each term of five years of service."—*United States v. Morton*, 112 U. S. 1, 5 S. Ct. 1, 28 L. Ed. 613.

Act Cong. July 19, 1848 (9 Stat. 248), provided that officers, etc., "engaged in the military service of the United States in the war with Mexico, * * * shall be entitled to receive three months' extra pay." Act Cong. Feb. 19, 1879, directed payment of said extra pay, and provided that "this act shall include also the officers * * * of the United States navy, * * * and the officers and soldiers of the United States army employed in the prosecution of said war." *Held*, that a lieutenant in the regular army, who served in the war with Mexico as a lieutenant colonel of volunteers, was entitled to three months' extra pay, according to the rank with which he served.—*United States v. North*, 112 U. S. 510, 5 S. Ct. 285, 28 L. Ed. 808.

An officer of the United States navy, who served in the Mexican war until his vessel was ordered out of that service, is entitled to three months' extra pay, according to his rank at the time of such service.—*Id.*

Rev. St. § 1588, providing that the pay of retired officers of the navy shall, when not on active duty, be equal to 75 per centum of the sea pay provided for the grade or rank which they held at the time of their retirement, does not entitle a retired navy officer to longevity pay.—*Thornley v. United States*, 118 U. S. 310, 5 S. Ct. 491, 28 L. Ed. 999; *Brown v. Same*, 113 U. S. 568, 5 S. Ct. 648, 28 L. Ed. 1079.

Congress having for the last 30 years preserved a distinction between naval officers "on the retired list" and such officers "on the retired list on furlough pay," Act July 15, 1870, § 5, providing for the pay of naval officers on the "retired list," will not be held to abolish the furlough pay list.—*Brown v. United States*, 113 U. S. 568, 5 S. Ct. 648, 28 L. Ed. 1079.

Act Cong. March 3, 1883, provides that all officers of the navy shall be credited with the actual time they may have served in the regular or volunteer army or navy, the same as if said service had been continuous in the regular navy, in the lowest grade having graduated pay held by such officers since last entering the service. Plaintiff re-entered the service as master, and then became lieutenant and lieutenant commander. The pay of masters and lieutenants was not graduated till after he became lieutenant. *Held*, that he should be credited with his time of service as if he had been lieutenant, that being the lowest grade having graduated pay he had held since his re-enlistment. 21 Ct. Cl. 332 affirmed.—*United States v. Rockwell*, 120 U. S. 60, 7 S. Ct. 367, 30 L. Ed. 561.

The secretary of the navy has no power to declare a particular service to be shore service, if, in fact, it was performed by the officer under circumstances bringing it within the language of Rev. St. § 1571, defining sea services.—*United States v. Symonds*, 120 U. S. 43, 7 S. Ct. 411, 30 L. Ed. 557; *Same v. Bishop*, 120 U. S. 51, 7 S. Ct. 413, 30 L. Ed. 558.

Services performed by a naval officer on a training ship, while at anchor in an arm of the sea, are "sea services," within Rev. St. § 1571, providing that "no services shall be regarded as sea services except such as shall be performed at sea, under orders of a department, and in vessels employed by authority of law," if the ship is, during the time, under the general regulations that are incident to service on the high sea, although it is not during that time in such condition as to be safely taken out to sea beyond the mainland.—*Id.*

Previous to the act of congress of March 3, 1835, it had been customary to make allowances to naval officers in addition to their regular pay, and this custom was known to congress. That act prohibited such extra allowances. The act of April 17, 1868, repealed so much of the act of 1835 as prohibited such allowance. *Held*, that thereafter, and before the passage of other laws affecting the subject, the secretary of the navy could lawfully order certain allowances to be made.—*United States v. Philbrick*, 120 U. S. 52, 7 S. Ct. 413, 30 L. Ed. 559.

Service in the marine corps is service in the army or navy, and should be treated as such in calculating a naval officer's longevity pay, under a statute entitling him to credit for service in the army or navy. 21 Ct. Cl. 20, affirmed.—*United States v. Dunn*, 120 U. S. 249, 7 S. Ct. 507, 30 L. Ed. 667.

Plaintiff who had served in the navy continuously since 1860, presented a claim under the provisions of Act March 3, 1883, which declares: "And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous, and in the regular

navy, in the lowest grade having graduated pay, held by such officer since last entering the service." *Held*, that the benefits of the act are to be received where the service has been continuous in the regular navy.—*United States v. Mullan*, 123 U. S. 186, 8 S. Ct. 79, 31 L. Ed. 140.

A paymaster in the navy, having served in that capacity since February 1, 1868, in the adjustment of his claim for the benefits of the longevity act of March 3, 1883 (22 Stat. 473), claimed the application of its provisions to "longevity increment of his 33½ per cent. of salary allowed in lieu of fuel, quarters, etc., under Navy General Order No. 75, of May 23, 1866." Should such claim be allowed, said increment would be larger, as the salaries under said act were increased. *Held*, that the statute of March 3, 1883, could not be so interpreted. The allowances provided for in the general order of 1866 constituted no part of the pay proper of the officers, and were designed to meet certain expenses which they would necessarily incur in the discharge of their duties; they could not be increased by the additional compensation allowed by the act of 1883.—*United States v. Allen*, 123 U. S. 345, 8 S. Ct. 163, 31 L. Ed. 147.

19 Stat. 65, provides: "And so much of the act of June 16, 1874, * * * as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses." *Held*, that a paymaster's clerks are not "officers of the navy," and cannot be compensated except for actual traveling expenses.—*United States v. Mouat*, 124 U. S. 303, 8 S. Ct. 505, 31 L. Ed. 463, reversing judgment *Mouat v. United States*, 22 Ct. Cl. 293.

Plaintiff sued for compensation as paymaster in the navy. Act. Cong. March 3, 1883 (22 Stat. 473), providing for increase of pay to officers of the navy according to length of service, enacts that: "All officers of the navy shall be credited with the actual time they may have served as officers or enlisted men." *Held*, that the word "officer" is used in a sense which includes a paymaster's clerk, and that the time of plaintiff's service as such should be counted for the purpose of increasing his salary.—*United States v. Hendee*, 124 U. S. 309, 8 S. Ct. 507, 31 L. Ed. 465.

Under Rev. St. §§ 1267, 1274, a retired officer of the rank of colonel is entitled to receive only 75 per cent. of the maximum pay of a colonel, regardless of length of service. 20 Ct. Cl. 370, affirmed.—*Marshall v. United States*, 124 U. S. 391, 8 S. Ct. 520, 31 L. Ed. 475; *Id.*, 131 U. S. 391, 9 S. Ct. 794, 33 L. Ed. 215.

A naval officer was reported by the naval retiring board to be incapacitated from active service, and that his incapacity did not originate in the line of duty. The president concurred in this report, and he was retired on furlough pay, pursuant to Rev. St. §§ 1454, 1593. Subsequently, the president nominated him, and he was confirmed by the senate, for transfer from the furlough to the retired pay list, under section 1594, authorizing such transfer by and with the advice and consent of the senate. *Held*, that such transfer was not a reversal of the finding of the retiring board, and that, upon being transferred to the retired pay list, he was not entitled to three-quarters sea pay, under section 1588, allowing such pay to naval officers retired on account of incapacity originating in the line of duty.—*Potts v. United States*, 125 U. S. 173, 8 S. Ct. 830, 31 L. Ed. 661.

Under Rev. St. § 1594, authorizing the president, by and with the advice and consent of the senate, to transfer any naval officer on the re-

tired list from the furlough to the retired pay list, the president may antedate the transfer, so as to make it relate back to the date of the officer's retirement. *Burchard v. United States*, 19 Ct. Cl. 137, reversed.—*United States v. Burchard*, 125 U. S. 176, 8 S. Ct. 832, 31 L. Ed. 662.

A naval officer ordered to duty upon a ship which has been anchored in a navy yard for 12 years past, and used as a naval recruiting station, which communicates with the shore by a rope and a boat running along the same, and which is capable of going to sea, but not with safety, is entitled to sea pay, where the regulations require him to quarter and mess on board, to wear uniform, and to live apart from his family, and his duties are similar to those prescribed in cruising, but more exacting. *Strong v. United States*, 23 Ct. Cl. 10, affirmed.—*United States v. Strong*, 125 U. S. 656, 8 S. Ct. 1021, 31 L. Ed. 823.

Under Act March 3, 1883, c. 97, providing that, in calculating longevity pay, "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men," midshipmen appointed under Act July 16, 1862, c. 183, and cadet midshipmen appointed under Act July 15, 1870, c. 295, are to be included as officers.—*United States v. Baker*, 125 U. S. 646, 8 S. Ct. 1022, 31 L. Ed. 824; *United States v. Cook*, 128 U. S. 254, 9 S. Ct. 106, 32 L. Ed. 464.

Under the longevity act of 1883 (22 Stat. 284, 287, c. 391, and *Id.* 473, c. 97), a man who, after serving in the regular navy, first as enlisted man and then as gunner, and receiving during the time of service as gunner the full compensation to which he was entitled under the laws then in force, resigns, and is afterwards reappointed gunner, receiving on his second warrant credit for the actual time of his former service, both as gunner and enlisted man, counting such service as if it had been continuous as gunner, is not entitled to compensation as if he had been allowed on his first warrant as gunner for his previous service as enlisted man. 23 Ct. Cl. 90, reversed.—*United States v. Foster*, 128 U. S. 435, 9 S. Ct. 116, 32 L. Ed. 486.

Act June 30, 1876, allowing naval officers mileage in lieu of actual expenses, and repealing, as to such officers, the act of June 16, 1874, determines the compensation for so much of a journey undertaken under an order made before June 30, 1876, as was performed after that date, and the previous law applies to the preceding part of the journey.—*United States v. McDonald*, 128 U. S. 471, 9 S. Ct. 117, 32 L. Ed. 506.

Act Cong. March 3, 1883, provides that all officers of the navy shall be credited with the actual time they have served as officers or enlisted men in the regular or volunteer army or navy, or both, the same as if the service had been continuous in the regular navy, in the lowest grade, having graduated pay held by such officer since last entering the service, but that nothing therein shall be construed to give additional pay during service in the volunteer navy. Plaintiff entered the volunteer navy as acting assistant paymaster, and was promoted to assistant paymaster (which entitled him to receive graduated pay), and was afterwards appointed paymaster in the regular army. *Held*, that he is not entitled to the pay of the several grades he might have reached had he entered the regular navy when he entered the volunteer navy, and been promoted according to the rules of promotion.—*Barton v. United States*, 129 U. S. 249, 9 S. Ct. 286, 32 L. Ed. 663.

In computing longevity pay, the words "for every five years he may have served, or shall serve, in the army of the United States," occurring in Act Cong. July 5, 1838, § 15, include

cadet service at West Point; and such service should be computed in reckoning longevity pay before as well as after Act Feb. 24, 1881, which provides that "additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the army or navy, or both, shall be allowed all officers in computing their pay."—United States v. Watson, 130 U. S. 80, 9 S. Ct. 430, 32 L. Ed. 852.

Act Cong. March 3, 1875, provided that officers of 25 years' service, or who had lost or been disabled in an arm or leg, or in both eyes, were not to be considered as retired on the rank actually held by them when wounded, and such of these as were already on the retired list should be continued thereon, notwithstanding Act March 30, 1868, c. 38, § 2 (Rev. St. § 1223), which declares that an army officer who accepts a consular or diplomatic post shall be considered as having resigned his commission. *Held*, that such an officer, though entitled to be continued on the retired list during the time he holds a consular or diplomatic post, is subject to be deprived of his retired pay for such time, under Rev. St. § 1763, providing that no person holding an office worth \$2,500 per annum shall receive pay for discharging the duties of any other office, unless expressly authorized by law.—*Badeau v. United States*, 130 U. S. 439, 9 S. Ct. 579, 32 L. Ed. 997.

The resolution of congress of March 22, 1783, provided that "such officers as are now in service, and shall continue therein until the end of the war, shall be entitled to receive the amount of five years' full pay in money or securities, * * * instead of half-pay promised for life, by the resolution of the 21st day of October, 1780; * * * that the commutation shall extend to the corps not belonging to the lines of particular states, and who are entitled to half-pay for life as aforesaid," etc. The resolution of October 21, 1780, was supplemental to a resolution of October 3, 1780, providing for a reorganization of the Continental army by consolidation of regiments and transfers of men and officers, and that such officers as necessarily became supernumerary thereby should from that time become entitled to half-pay for seven years. The resolution of October 21st provided that all the troops should be enlisted during the war; that the officers of the various states should agree as to which of them should remain in service, or, in case of disagreement, the order of seniority to determine, and make return of those who are to remain, "together with the names of the officers reduced, who are to be allowed half-pay for life." *Held*, that these latter resolutions did not apply to the battalion of 600 men, known as the "Albemarle Guards," raised by Virginia under resolution of congress of January 9, 1779, for the special purpose of guarding the captured army of Gen. Burgoyne; and therefore the commander thereof, Col. Francis Taylor, could not have become an "officer reduced," entitled to half-pay, and as such entitled to the commutation of five years' full pay. 22 Ct. Cl. 116, affirmed.—*Williams v. United States*, 137 U. S. 113, 11 S. Ct. 43, 34 L. Ed. 590.

Col. Taylor, being a major of the Continental army, in the Virginia line, was thrown out of command, and became "supernumerary major," by the reorganization of the army at White Plains in 1778, and as such was entitled to half pay for life, under prior resolutions of congress. The resolution for raising the Albemarle Guards provided that the regiment should be stationed at the barracks in Albemarle county "as guards over the convention troops," and should not be removed therefrom except as their duties as such guards required, and authorized the governor of Virginia to appoint the officers from among those of the Virginia line left out by the late arrangement at White Plains. *Held*, that the appointment of Col. Taylor, and his acceptance, amounted to a revocation of his prior

commission, and upon the disbandment of the guards at the end of their special service in June, 1781, he did not become a "reduced officer," and was not entitled to the commutation.—*Id.*

T. was commissioned captain in May, 1776, and was promoted to major in July, 1778, and became supernumerary major in September, 1778. He was in command of a regiment as lieutenant colonel from January to March, 1779, and thereafter was in command as colonel until June, 1781, when his battalion was disbanded, but he did not resign his commission. *Held*, that he was not an officer in the continental service on March 22, 1783.—*Id.*

Act March 3, 1883 (22 Stat. 473, c. 97), provides that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service * * * in the same manner as if all of said service had been continuous, and in the regular navy, in the lowest grade having graduated pay held by such officer since last entering the service." Act July 15, 1870, § 3 (16 Stat. 321, 330, 332, c. 295), provides what the annual pay of navy officers from June 30, 1870, shall be, and that their pay shall be graduated from that date, and repeals all prior inconsistent acts. Under Act July 16, 1862 (12 Stat. 583, 586), in force up to June 30, 1870, the pay of lieutenants was not graduated. On July 3, 1870, claimant was promoted from lieutenant to lieutenant commander. *Held*, that under the act of March 3, 1883, he was only entitled to graduated pay as lieutenant, that being the grade he held when the act of July 15, 1870, took effect. *Green v. United States*, 25 Ct. Cl. 300, reversed.—*United States v. Green*, 138 U. S. 293, 11 S. Ct. 299, 34 L. Ed. 960.

An officer in the navy, who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than 75 per centum of the pay of the grade or rank which he held at the time of retirement. 24 Ct. Cl. 165, affirmed.—*Roget v. United States*, 148 U. S. 167, 13 S. Ct. 555, 37 L. Ed. 406.

The service of an officer must be regarded as "continuous," although he has resigned his commission as ensign, when he is appointed a professor of mathematics on the next day, and the longevity pay to which he is entitled is that of an ensign, that being "the lowest grade, having graduated pay, held by such officer since last entering the service." 22 Stat. 473.—*United States v. Alger*, 151 U. S. 362, 14 S. Ct. 346, 38 L. Ed. 192, rehearing denied 152 U. S. 384, 14 S. Ct. 635, 38 L. Ed. 488.

The service of an officer who resigns his position of assistant engineer on one day, and is appointed assistant naval constructor on the next, must be regarded as "continuous," and, for the purposes of longevity pay, he is entitled to credit only upon his commission as assistant engineer. *United States v. Alger*, 151 U. S. 362, 14 S. Ct. 346, 38 L. Ed. 192, followed.—*United States v. Stahl*, 151 U. S. 366, 14 S. Ct. 347, 38 L. Ed. 194, rehearing denied *Same v. Alger*, 152 U. S. 384, 14 S. Ct. 635, 38 L. Ed. 488.

In determining whether a given journey by a naval officer constitutes traveling "in the United States," so as to entitle him to mileage (Rev. St. § 1566, and 19 Stat. 65), or "abroad," so as to restrict him to his actual expenses (22 Stat. 286), the termini of the journey are controlling; and, if both are in the United States, he is entitled to mileage by the nearest traveled route, although his trip takes him on the high seas, or through a foreign country.—*United States v.*

Hutchins, 151 U. S. 542, 14 S. Ct. 421, 38 L. Ed. 264.

A person employed by the council of administration at an army post, prior to the act of March 2, 1867, to officiate as chaplain, was in the "service"; and, if afterwards regularly commissioned under that act, the period of his service under the prior appointment should be included, in computing his longevity pay.—*United States v. La Tourette*, 151 U. S. 572, 14 S. Ct. 422, 38 L. Ed. 274, overruling *La Tourette v. United States*, 26 Ct. Cl. 296.

An officer who was commissioned in the regular army after serving during the Mexican war in the volunteer forces raised under the act of May 13, 1846 (9 Stat. 9), was not entitled to have the time of such service included in the computation which determined his right to longevity pay under the act of July 5, 1838 (5 Stat. 258), as the latter act applied only to the regular army.—*United States v. Sweeny*, 157 U. S. 281, 15 S. Ct. 608, 39 L. Ed. 702.

Mates are "petty officers," within the exception in Rev. St. § 1579, prohibiting the allowance of rations to persons not actually on duty on seagoing vessels. *Lippitt v. United States*, 14 Ct. Cl. 148, affirmed.—*United States v. Fuller*, 160 U. S. 593, 16 S. Ct. 386, 40 L. Ed. 549.

The right of a naval officer to claim pay as such while serving on board a nautical school ship, under order of the secretary of the navy, is not affected by the fact that during the same time he was paid as an instructor by the state maintaining the school.—*United States v. Barnette*, 17 S. Ct. 286, 165 U. S. 174, 41 L. Ed. 675.

That the order of the secretary of the navy assigning an officer to duty on board a ship calls the employment "shore duty" does not affect the officer's right to claim sea pay, where the services required are in fact sea services.—*Id.*

A naval officer, assigned by the secretary of the navy to duty as executive on board a nautical school ship furnished by the department to a state under Act Cong. June 20, 1874, was, under Rev. St. U. S. §§ 1556, 1571, entitled to sea pay while the vessel was lying at the dock, where, during that time, he lived on board, performing the same duties, and under the same regulations, as when the vessel was cruising on the high seas.—*Id.*

The reappointment of a naval commander who had been dismissed or suspended from the service, under the act of congress of February 16, 1897, suspending for his benefit only the provisions as to appointments in the navy, and authorizing the president to appoint him, "late a commander in the navy," to the same grade and rank as of a certain date, and to place him on the retired list as of a later date, but providing "that he shall receive no pay or emoluments except from the date of such reappointment," precludes any claim by him to leave or waiting orders pay, or pay as a retired officer, for any time preceding the date of his reappointment, or the substitution for the actual date thereof of the date to which the appointment related. Judgment 33 Ct. Cl. 355, affirmed.—*Quackenbush v. United States*, 20 S. Ct. 530, 177 U. S. 20, 44 L. Ed. 654.

Payments made to a late commander in the navy after he is lawfully out of the service cannot be recovered back by the government, but are ratified when congress subsequently passes an act for his relief, providing for his reappointment to his original rank, but providing that he shall receive no pay except from the date of his reappointment.—*Id.*

The rear admirals embraced in the nine lower numbers of that grade, who were advanced to that rank by Act March 3, 1899, c. 413, § 7, 30 Stat. 1004 [U. S. Comp. St. 1901,

p. 983], which in effect abolished the rank of commodore, and lifted those in that rank to that of rear admiral, with a special provision that each of such nine officers should have their pay increased to that allowed brigadier generals in the army, are not entitled to the pay and allowances of major generals in the army, by the provision of section 13 (30 Stat. 1007 [U. S. Comp. St. 1901, p. 1072]), after June 30, 1899, commissioned officers of the line of the navy shall receive the same pay and allowances as officers of corresponding rank in the army, as this general rule for salaries of naval officers cannot be understood as repealing the special provision in section 7 for the pay of the nine lower numbers of the grade of rear admiral thereby created. Judgment 36 Ct. Cl. 266, affirmed.—*Rodgers v. United States*, 22 S. Ct. 582, 185 U. S. 83, 46 L. Ed. 816.

The pay of the rear admirals embraced in the nine lower numbers of that grade, which by Act March 3, 1899, c. 413, § 7, 30 Stat. 1004 [U. S. Comp. St. 1901, p. 983], was fixed at the same amount as that allowed brigadier generals in the army, is subject to the long established rule in respect to naval service, of a difference between the pay of naval officers on shore duty and those at sea, which rule is expressly recognized and continued in section 13 of that act (30 Stat. 1007 [U. S. Comp. St. 1901, p. 1072]). Judgment 36 Ct. Cl. 266, affirmed.—*Id.*

The settled practice of the War Department to deny an officer discharged at his own request the travel pay and commutation of subsistence from the place of discharge to the place of enrollment, allowable by Rev. St. U. S. § 1289 [U. S. Comp. St. 1901, p. 915], as amended by Act Feb. 27, 1877, c. 69 (19 Stat. 243, 244), "when an officer is discharged from the service except by way of punishment for an offense," is not so clearly erroneous as to justify the courts in construing such provision as including a discharge on resignation.—*United States v. Sweet*, 23 S. Ct. 638, 189 U. S. 471, 47 L. Ed. 907.

A credit of service for the purpose of computing future pay only, and not for the readjustment of past compensation, must be deemed intended by the proviso in Navy Personnel Act March 3, 1899, c. 413, § 13, 30 Stat. 1004 [U. S. Comp. St. 1901, p. 1072], that all officers who have been or may be appointed to the navy from civil life shall, on the date of appointment, be credited, "for computing their pay" with five years' service, in view of the declared purpose for which such credit is given, and of the provision in the first clause of the statute, which makes increased pay begin with the next fiscal year. Judgment 37 Ct. Cl. 365, affirmed.—*White v. United States*, 24 S. Ct. 171, 191 U. S. 545, 48 L. Ed. 295.

The allowance to naval officers for sea rations, provided for by Rev. St. U. S. §§ 1578, 1585 [U. S. Comp. St. 1901, pp. 1083, 1085], was impliedly repealed by the provisions of Navy Personnel Act March 3, 1899, c. 413, § 13, 30 Stat. 1007 [U. S. Comp. St. 1901, p. 1072], that officers of the navy shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army.—*Gibson v. United States*, 24 S. Ct. 613, 194 U. S. 182, 48 L. Ed. 926, affirming judgment 38 Ct. Cl. 752; *Lowe v. Same*, 24 S. Ct. 617, 194 U. S. 193, 48 L. Ed. 931, affirming judgment 38 Ct. Cl. 170.

A naval officer is not entitled to sea pay while occupied in traveling on duty partly on a merchant steamer and partly on land, and in reporting to the Navy Department, since this is not sea service within the meaning of Rev. St. U. S. § 1571 [U. S. Comp. St. 1901, p.

1079), declaring that "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law." Decree 38 Ct. Cl. 113, reversed.—United States v. Thomas, 25 S. Ct. 102, 196 U. S. 418, 49 L. Ed. 259.

The allowances of increased pay to army officers serving in certain insular possessions of the United States and in Alaska, and to such officers serving beyond the limits of the United States, which are given respectively by the army appropriation bills of May 26, 1900 (31 Stat. 211, c. 586), and March 2, 1901 (31 Stat. 903, c. 803 [U. S. Comp. St. 1901, p. 896]), do not inure to naval officers discharging their ordinary sea duties, by reason of Navy Personnel Act March 3, 1899, c. 413, 30 Stat. 1007 [U. S. Comp. St. 1901, p. 1072], equalizing the pay of army and navy officers, since to hold otherwise would render meaningless the proviso of section 13 of that act, that naval officers when "detailed for shore duty beyond seas" shall receive the same pay as army officers detailed for the same duties.—Id.

Mounted pay cannot be given to an aid to a rear admiral, although Navy Personnel Act, c. 413, § 13, 30 Stat. 1004 [U. S. Comp. St. 1901, p. 1072], equalizes his compensation with that of an aid to a major general, who is entitled to mounted pay under Army Regulations 1895, § 1301, since this section and the two immediately following, when read in the light of Rev. St. U. S. § 1270 [U. S. Comp. St. 1901, p. 899], giving to army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give mounted pay to army officers only when their duties are such as may require them to be actually mounted, or are such as may at any time subject them to the necessity of rendering mounted service, which obviously could not be required of an aid to a rear admiral. Judgment, *Crosley v. United States*, 38 Ct. Cl. 82, modified.—United States v. *Crosley*, 25 S. Ct. 261, 196 U. S. 327, 49 L. Ed. 497.

An aid to a rear admiral is entitled, in addition to the regular pay of his rank, to the same compensation for the additional service as is allowed an aid to a major general, in view of the provision of Navy Personnel Act, c. 413, § 13, 30 Stat. 1004 [U. S. Comp. St. 1901, p. 1072], that officers of the navy shall receive the same pay and allowances, except for forage, as are or may be provided by law for officers of the army of corresponding rank.—Id.

Shore duty performed by a naval officer in obedience to an order of the Navy Department which expressly imposed upon him the continued discharge of his sea duty, and qualified the shore duty as merely temporary and ancillary to such sea duty, will be presumed not to be so incompatible with his permanent sea assignment as to cause the latter to terminate and defeat his right to sea pay while engaged on such shore duty. Judgment, *Engard v. United States*, 38 Ct. Cl. 712, affirmed.—United States v. *Engard*, 25 S. Ct. 322, 196 U. S. 511, 49 L. Ed. 575.

The "pay proper" on which the percentage of increased pay to an army officer serving in the Philippine Islands is to be computed, under Act May 26, 1900, c. 586, 31 Stat. 211, and Act March 2, 1901, c. 803, 31 Stat. 903 [U. S. Comp. St. 1901, p. 896], includes the longevity pay to which he is entitled, under Rev. St. U. S. § 1262 [U. S. Comp. St. 1901, p. 896], as well as the minimum pay prescribed by section 1261 [U. S. Comp. St. 1901, p. 893] for his grade. Judgment, *Irwin v. United States*, 38 Ct. Cl. 87, affirmed.—United States v. *Mills*, 25 S. Ct. 434, 197 U. S. 223, 49 L. Ed. 732.

The two months' extra pay provided for by Act March 3, 1899, c. 427, 30 Stat. 1214, in favor of "officers and enlisted men compris-

ing the temporary force of the navy during the war with Spain who served credibly beyond the limits of the United States, and who have been or may hereafter be discharged," should be computed, when awarded to a naval officer appointed under Act May 4, 1898, c. 234, 30 Stat. 369 [U. S. Comp. St. 1901, p. 1050], to serve only during the continuance of the exigency under which his services were required in the existing war, on the basis of the pay he was receiving when he was detached from duty, after the treaty of peace was signed, and was ordered home preliminary to his discharge.—United States v. *Hite*, 27 S. Ct. 386, 204 U. S. 343, 51 L. Ed. 514.

Sums improvidently paid to an army officer by the auditor for the War Department cannot be deducted from the extra pay sued for in the court of claims, where the United States filed no set-off or counterclaim. Judgment, *Mitchell v. United States* (1905) 41 Ct. Cl. 36, reversed.—United States v. *Mitchell*, 27 S. Ct. 463, 205 U. S. 161, 51 L. Ed. 752.

Special orders purporting to appoint and to confirm the appointment to the command of a cavalry troop, in the absence of its captain, of the senior subaltern present, on whom such command would regularly devolve, "unless otherwise specially directed," under Army Regulations 1895, § 253, can give such officer no right to the increased pay provided for by Act April 26, 1898, c. 191, § 7, 30 Stat. 365 [U. S. Comp. St. 1901, p. 895], when an officer is exercising, "under assignment in orders issued by competent authority," a command above that pertaining to his grade.—Id.

A volunteer officer who has been given the two months' extra pay for service outside the United States allowed by Act Jan. 12, 1899, c. 46, 30 Stat. 784, on muster out and discharge, is not entitled to the one month's extra pay authorized by that act for service within the United States. Judgment (1906) 41 Ct. Cl. 275, affirmed.—United States v. *Brown*, 27 S. Ct. 620, 206 U. S. 240, 51 L. Ed. 1046.

The refusal of a certificate of honorable discharge to a volunteer officer as of the date when his regiment was mustered out, on the mistaken ground that he had already legally been dishonorably discharged, cannot be regarded as an active retention of such officer in the service, so as to entitle him to pay after that date, in view of the provision of Act March 2, 1899, c. 352, § 15, 30 Stat. 977, 981, for the mustering out of officers and men of the volunteer army, and of the requirement of Act Jan. 12, 1899, c. 46, 30 Stat. 784, that, as far as practicable, the discharge of officers and men should take effect at the muster out of the organization to which they belonged.—Id.

A passed assistant surgeon in the navy, with the rank of lieutenant, is entitled to the pay of a captain in the army, mounted, in view of the respective provisions of Rev. St. U. S. § 1466 [U. S. Comp. St. 1901, p. 1029], assimilating in rank lieutenants in the navy with captains in the army, of Navy Personnel Act March 3, 1899, c. 413, § 13, 30 Stat. 1007 [U. S. Comp. St. 1901, p. 1072], entitling commissioned officers of the line of the navy to the same pay and allowance as officers of corresponding rank in the army, and of Act June 7, 1900, c. 859, 31 Stat. 697 [U. S. Comp. St. 1901, p. 990], declaring that assistant surgeons shall rank with assistant surgeons in the army, who are mounted, since Congress must have used the words "assistant surgeons" as descriptive of the whole class of assistant surgeons, passed as well as those not passed. Judgment (1906) 41 Ct. Cl. 517, affirmed.—United States v. *Farenholt*, 27 S. Ct. 629, 206 U. S. 226, 51 L. Ed. 1036, affirming judgment *Farenholt v. United States*, 42 Ct. Cl. 114.

A lieutenant in the navy, assigned to duty on the personal staff of a rear admiral as flag

lieutenant, is entitled to the extra pay due an aid of the rear admiral, although he is not technically designated as an aid in the provisions of the Navy Regulations, 1896, §§ 343-345, authorizing such selection, and although such regulations expressly provide for the selection of juniors to the flag lieutenant to serve as aids. Judgment, *Miller v. United States* (1906) 41 Ct. Cl. 400, affirmed.—*United States v. Miller*, 28 S. Ct. 199, 208 U. S. 32, 52 L. Ed. 876, modifying judgment *Miller v. United States* (1907) 42 Ct. Cl. 121.

Longevity pay of a naval lieutenant is not to be based upon his increased allowance as an aid to a rear admiral, under Act June 30, 1882, c. 254, 22 Stat. 118 [U. S. Comp. St. 1901, p. 896], providing that such pay shall be computed on the yearly pay of the grade.—*Id.*

The revival of the office of General of the Army under Act June 1, 1888, which grade ceased on the death of Gen. Sheridan, did not continue after his death the provisions of Rev. St. § 1096, relating to aides to the general and their pay, so that on the recreation of the office of admiral by Act March 2, 1899, such provisions should operate on Navy Personnel Act March 3, 1899, § 13, in favor of aides to the admiral.—(1912) *Wood v. United States*, 32 S. Ct. 461, 224 U. S. 132, 56 L. Ed. 696, affirming judgment (1909) 44 Ct. Cl. 611.

Changes in the rank and pay of an assistant surgeon in the navy made by Navy Personnel Act March 3, 1899, § 13, and Acts June 7, 1900, March 2, 1907, and May 13, 1908, inured to the benefit of acting assistant surgeons appointed under Act May 4, 1898.—(1912) *Plummer v. United States*, 32 S. Ct. 467, 224 U. S. 137, 56 L. Ed. 697, reversing judgment (1909) 45 Ct. Cl. 614.

Congress, in using the words "current yearly pay" in computing longevity provided for by Act May 13, 1908, adopted the construction of those words as used in Rev. St. § 1262 (U. S. Comp. St. 1901, p. 896), giving 10 per cent. longevity increase on current yearly pay, which it declared by Act June 30, 1882, will be computed on the yearly pay of the grade.—*Id.*

Commutation for forage for two horses, kept by an ex-army officer after his resignation from the army, and servants' pay for not more than two servants, are embraced in the private relief act of February 24, 1905, directing settlement with widow for back pay and emoluments, since these are emoluments to which he would have been entitled under Acts March 30, 1814, April 24, 1816, July 17, 1862, and March 3, 1865, had he remained in actual service.—*McLean v. United States*, 33 S. Ct. 122, 226 U. S. 374, 57 L. Ed. 260, reversing judgment 45 Ct. Cl. 95.

The assimilative provisions of Navy Personnel Act March 3, 1899, § 13, equalizing the pay and allowances of officers in the line of the navy and those of corresponding rank in the army, do not repeal Rev. St. §§ 1454, 1593 (U. S. Comp. St. 1901, pp. 1023, 1087), in view of sections 8, 9, 11. Navy Personnel Act March 3, 1899, retaining and adding to the standards of retirement fixed for naval officers, some differing from those fixed for the army.—*Hannum v. United States*, 33 S. Ct. 172, 226 U. S. 436, 57 L. Ed. 287, affirming judgment 43 Ct. Cl. 320.

The grade which the officer had in the revenue cutter when he was retired, and not the grade to which he had afterwards or before Act April 16, 1908, been advanced without additional pay, is the basis on which the advance in grade and pay is to be made under section 5 of that act.—*United States v. Mason*, 33 S. Ct. 374, 227 U. S. 486, 57 L. Ed. 607, reversing decree *Mason v. United States*, 47 Ct. Cl. 31.

A naval officer retired for incapacity not originating in service was not brought within Act June 29, 1906, providing for an increase

in rank and pay, by the special act of June 10, 1902, passed for the relief of such officer, authorizing his transfer from the half-pay retired list to the three-quarters pay list.—*Morse v. United States*, 33 S. Ct. 624, 229 U. S. 208, 57 L. Ed. 1152, affirming judgment 46 Ct. Cl. 361.

The words "shall be as now provided by law," in provision of act May 11, 1908, to increase the pay for army service beyond the states comprising the Union and the territories contiguous, refer to the proviso in act of June 30, 1902, that the pay proper of all commissioned officers and enlisted men serving shall be increased 10 per cent. and 20 per cent. respectively, and a commissioned officer serving in Porto Rico from June, 1908, until November, 1909, is entitled to such 10 per cent. increase, notwithstanding the specific exception of Porto Rico and Hawaii in acts of June 12, 1906, and March 2, 1907, making appropriations for such increase.—*United States v. Vulte*, 34 S. Ct. 664, 233 U. S. 509, 58 L. Ed. 1071, affirming judgment *Vulte v. United States*, 47 Ct. Cl. 324.

Officers of the navy transferred to retired list with increase in rank are not entitled to pay and allowances of a higher grade during active service after retirement under Act March 4, 1913.—*White v. United States*, 36 S. Ct. 224, 239 U. S. 608, 60 L. Ed. 464, affirming judgment 49 Ct. Cl. 702; *Ford v. Same*, 36 S. Ct. 224, 239 U. S. 608, 60 L. Ed. 464, affirming judgment 49 Ct. Cl. 702.

The right of an army officer to half pay while on leave of absence, as conferred by Rev. St. § 1265 (Comp. St. 1913, § 2104), cannot be defeated by the affixing of a condition to the leave of absence that the leave shall be without pay.—*United States v. Andrews*, 36 S. Ct. 349, 240 U. S. 90, 60 L. Ed. 541, affirming judgment *Andrews v. United States*, 49 Ct. Cl. 391.

An army officer is not bound by acceptance of a leave of absence without protest against the affixing of a condition that the leave shall be without pay, as such condition violates Rev. St. § 1265 (Comp. St. 1913, § 2104), allowing him half pay during leave.—*Id.*

The absence of an army officer, based on a leave of absence to which was affixed a condition, contrary to Rev. St. § 1265 (Comp. St. 1913, § 2104), that the leave should be without pay, cannot be treated as absent without leave, so as not to be entitled to pay.—*Id.*

◀15. — Authority and duties.

See 4 Cent. Dig. Army & N. §§ 30-38.

Under Rev. St. § 1541, providing that the secretary of the navy is authorized to sell, at public sale, such vessels and materials of the United States navy as, in his judgment, cannot be advantageously used, repaired, or fitted out, an officer of the navy has no authority to deliver materials arising from the breaking up of a war vessel to a contractor for the repair of another war vessel in payment for the work of the latter, where such materials are not used in the repairs, but are sold by the contractor for his private benefit.—*Steele v. United States*, 113 U. S. 128, 5 S. Ct. 396, 28 L. Ed. 952.

◀16. Military and naval academies and cadets.

See 4 Cent. Dig. Army & N. §§ 37-39.

The act of August 5, 1882, providing for the discharge of graduates of the Naval Academy in excess of the number required for service, and abolishing the distinction between cadet engineers and cadet midshipmen by calling both classes "naval cadets," and changing the rate of compensation, was intended to be wholly prospective, and does not touch the case of a cadet engineer who had graduated at the date of the act; that is, who had successfully com-

pleted his four-years course of study at the academy.—*United States v. Redgrave*, 116 U. S. 474, 6 S. Ct. 444, 29 L. Ed. 697.

The further provisions of the act limiting the number of appointments to the number of vacancies occurring during the preceding year, and providing for the discharge of the surplus graduates, equally refer to those who became graduates after the year 1882 under this act, which now requires for graduation a full course of six years for all naval cadets, including the two years of service on board a naval steamer, which before had constituted the service of a cadet engineer after graduation.—*Id.*

A naval cadet engineer not deficient in any examination, and not dismissed for misconduct under Rev. St. § 1525, nor under sentence of court-martial under Rev. St. § 1229, is still in office, notwithstanding an honorable discharge by the secretary of the navy, against his will, and is entitled to the pay attached to the same.—*United States v. Perkins*, 116 U. S. 483, 6 S. Ct. 449, 29 L. Ed. 700.

A cadet engineer is an "officer in the naval service," within the meaning of Rev. St. § 1229, prohibiting dismissals in times of peace, except after sentence of a court-martial.—*Id.*

Act Cong. Aug. 5, 1882, changing the official designation of persons appointed to the naval academy, and providing for the mode of appointment of graduates to the naval service, was within the power of congress and was not an assumption of the power of appointment belonging to the executive.—*Crenshaw v. United States*, 134 U. S. 99, 10 S. Ct. 431, 33 L. Ed. 825.

Rev. St. § 1520, provides that "the academic course of cadet midshipmen shall be six years." The navy department arranged for a two-years course afloat as part of the academic course, and required a preliminary examination before beginning such two-years course, and a final examination for graduation after the expiration thereof. *Held*, that a cadet afloat was still a member of the academy, and subject to the provisions of Act Cong. Aug. 5, 1882, passed while he was afloat, for the appointment to the naval service, "from the graduates of the year, at the conclusion of their six-years course," and the discharge of graduates for whom there were no vacancies.—*Id.*

Rev. St. § 1229 [U. S. Comp. St. 1901, p. 868], provides that no officer in time of peace shall be dismissed from the service except upon and in pursuance of the sentence of a court martial. A cadet is not an officer, within the intent of the statute, and the President has power to dismiss him summarily.—*Hartigan v. United States*, 25 S. Ct. 204, 196 U. S. 169, 49 L. Ed. 434, affirming 38 Ct. Cl. 346.

Rev. St. § 1342, art. 99 [U. S. Comp. St. 1901, p. 967], declare that the word "officer" shall be understood to designate commissioned officers, and the word "soldier" noncommissioned officers, musicians, artificers, and privates. A cadet is uncommissioned, and is neither an officer nor a soldier, though in the military service.—*Id.*

A cadet in the United States Military Academy at West Point is not an officer in the army, within the meaning of Rev. St. U. S. § 1229 [U. S. Comp. St. 1901, p. 868], prohibiting dismissals from service in time of peace, except after trial and conviction by court-martial.—*Id.*

17. Enlistment.

See 4 Cent. Dig. Army & N. §§ 40-50.

18. — In general.

See 4 Cent. Dig. Army & N. §§ 40-44.

Though Rev. St. § 1116, requires persons to be between the ages of 16 and 35 to be proper subjects for enlistment, one over 35 years of age who was enlisted on his representation

that he was under such age cannot avoid his contract.—*United States v. Grimley*, 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636, reversing decree (C. C.) in re *Grimley*, 38 F. 84.

Under Rev. St. § 1342, art. 2, which provides that the articles of war shall be read to every enlisted man within six days after his enlistment, and that he shall thereupon take the oath of allegiance, the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of a soldier; and the fact that the 128 articles of war, many of which do not concern the duty of a soldier, were not all read to a recruit before he took the oath, will not vitiate his enlistment.—*Id.*

19. — Minors.

See 4 Cent. Dig. Army & N. §§ 45-50.

Rev. St. § 1117, which provides that "no person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians," gives the parent or guardian the right to invoke the aid of the courts to secure the restoration of the minor to his or her control, but it gives no privilege to the minor; and a minor over 16 years of age (which is declared by Rev. St. § 1116, the period when minors may enter the military service), who represented himself to be over 21 years when he enlisted, and whose parents are not insisting on their rights of control, is not entitled to his discharge from the service.—*Morrissey v. Perry*, 137 U. S. 157, 11 S. Ct. 57, 34 L. Ed. 644.

The fact that the minor deserted, and concealed himself for over five years, and until after he had arrived at majority, does not relieve him from his obligation as a soldier, or his liability to military control.—*Id.*

21. Enlisted men.

See 4 Cent. Dig. Army & N. §§ 31, 62-68.

23. — Pay and allowances.

See 4 Cent. Dig. Army & N. §§ 63-66, 68.

One who has enlisted as a private in the United States marine corps, and has, since enlistment, performed duty with the marine band, on the capitol grounds or the president's grounds, under proper order, is entitled to four dollars a month in addition to his pay as private, as provided by Rev. St. U. S. § 1613, though he may not have been rated as a musician.—*United States v. Bond*, 124 U. S. 301, 8 S. Ct. 501, 31 L. Ed. 473.

Under the longevity act of 1883 (22 Stat. 284, 287, c. 391, and *Id.* 473, c. 97), a man who, after serving in the regular navy, first as enlisted man and then as gunner, and receiving during the time of service as gunner the full compensation to which he was entitled under the laws then in force, resigns, and is afterwards reappointed gunner, receiving on his second warrant credit for the actual time of his former service, both as gunner and as enlisted man, counting such service as if it had been continuous as gunner, is not entitled to compensation as if he had been allowed on his first warrant as gunner for his previous service as enlisted man.—*United States v. Foster*, 128 U. S. 435, 9 S. Ct. 116, 32 L. Ed. 486.

A private in the marine corps, discharged without court-martial "as unfit for service," and of bad character, is not entitled to the retained pay allowed by Rev. St. § 1281, to a soldier upon his discharge, but which "shall be forfeited unless he serves honestly and faithfully to the date of his discharge." 24 Ct. Cl. 219 reversed.—*United States v. Kingsley*, 138 U. S. 87, 11 S. Ct. 286, 34 L. Ed. 896.

He is entitled to transportation and subsistence from the place of his discharge to that of his enlistment, allowed by section 1290 to

soldiers discharged from service "except by way of punishment for an offense."—*Id.*

Rev. St. § 1290, as amended by Act Feb. 27, 1877, provides that "when a soldier is discharged from the service, except by way of punishment for an offense, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service." *Held* that, where a soldier's first discharge is followed by his re-enlistment within a few days, so that his service is practically continuous, and his second discharge occurs at the place of his original enlistment, he is not entitled to commutation for travel and subsistence to the place of his second enlistment.—*United States v. Thornton*, 160 U. S. 654, 16 S. Ct. 415, 40 L. Ed. 570.

An enlisted man in the volunteer army of the United States, who has been discharged on his own application, is not entitled to recover the travel pay and commutation of subsistence from the place of his discharge to the place of his enrollment, which are allowable by Rev. St. U. S. § 1290 [U. S. Comp. St. 1901, p. 916], when discharged from the service, except by way of punishment for an offense.—*United States v. Barnett*, 23 S. Ct. 639, 189 U. S. 474, 47 L. Ed. 908.

A private in the Hospital Corps of the army, whose duties are defined by Act March 1, 1887, § 5, *held* not entitled to extra pay for performance of duties in the telegraph and telephone office in the general hospital at the Presidio of San Francisco, under verbal orders of the surgeon commanding.—*United States v. Ross*, 36 S. Ct. 198, 239 U. S. 530, 60 L. Ed. 422, reversing judgment *Ross v. United States*, 49 Ct. Cl. 55.

27. Civilian employes and contractors.

See 4 Cent. Dig. Army & N. §§ 74, 75.

Since a naval constructor has no authority to turn over old material to a contractor, the latter takes no title thereto, and must account to the government for the proceeds. 19 Ct. Cl. 181 affirmed.—*Steele v. United States*, 113 U. S. 128, 5 S. Ct. 396, 28 L. Ed. 952.

35. Offenses by persons in military or naval service.

See 4 Cent. Dig. Army & N. §§ 79-82.

36. — In general.

See 4 Cent. Dig. Army & N. § 79.

An army officer in charge of river and harbor improvements, who pays out the money subject to his order, and control on false accounts, represented by false and fraudulently certified vouchers purporting to be issued as against the appropriation for the improvements, which moneys, to his knowledge, are not due or owing from the United States to the parties paid, or to any one else, applies to a purpose not prescribed by law public moneys of the United States, within the meaning of Rev. St. U. S. § 5488 [U. S. Comp. St. 1901, p. 3703], relating to the improper disposition of public moneys by a disbursing officer of the United States. Order 105 F. 614 affirmed.—*Carter v. McClaughry*, 22 S. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

An army officer who applies to a purpose not prescribed by law public moneys intrusted to him for river and harbor purposes, by causing them to be paid out by checks on false accounts, in violation of Rev. St. U. S. § 5488 [U. S. Comp. St. 1901, p. 3703], relating to the improper disposition of public moneys by a disbursing officer of the United States, may be convicted by an army court-martial of a violation of the sixty-second article of war [Id. p.

957], which provides for the punishment of all crimes prejudicial to good order and military discipline "not mentioned in the foregoing articles of war," although the sixtieth article [Id. p. 955] provides for the punishment of any person in the military service who causes false or fraudulent claims to be made against the United States, or who, for the purpose of obtaining payment of any claim against the United States, makes or procures the making of any writing or other paper, knowing it to contain any false or fraudulent statement.—*Id.*

The embezzlement by an army officer of moneys appropriated for river and harbor improvements, with whose disbursement he is intrusted, in violation of Rev. St. U. S. § 5488 [U. S. Comp. St. 1901, p. 3703], relating to the improper disposition of public money by any disbursing officer of the United States, is not the embezzlement of money "furnished or intended for the military service," within the meaning of Article of War 60, subd. 9 [Id. p. 956].—*Id.*

38. — Desertion.

See 4 Cent. Dig. Army & N. §§ 81, 82.

A police officer of a state, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the army of the United States.—*Kurtz v. Moffitt*, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458.

42. Courts-martial.

See 4 Cent. Dig. Army & N. §§ 89-97.

43. — Creation, constitution, and organization.

See 4 Cent. Dig. Army & N. § 89.

A rear admiral of the navy, in charge of the Asiatic squadron at Hong Kong, ordered a general court-martial consisting of seven officers, five of whom were inferior in rank to appellant, who was tried and dismissed from the navy. At the time there were on waiting orders in Washington 12 officers superior in rank to appellant; and he contended that under article 39 (Rev. St. § 1624) of the articles for the government of the navy, providing that in no case where it can be avoided without injury to the service shall more than one-half of the members of a court-martial, exclusive of the president, be junior to the officer to be tried, the court-martial was illegal. *Held*, that it was in the discretion of the officer to say whether a court-martial consisting one-half of officers superior to appellant in rank could be convened "without injury to the service," and, in the absence of a showing to the contrary, the courts will assume that his discretion was properly exercised.—*Mullan v. United States*, 140 U. S. 240, 11 S. Ct. 788, 35 L. Ed. 489, affirming judgment 23 Ct. Cl. 34.

The fact that on a previous occasion officers were sent from Washington to Panama to make up a court-martial with members superior in rank to the person to be tried cannot affect the legality of the court-martial at Hong Kong.—*Id.*

The power of the president to appoint a general court-martial does not depend only on the seventy-second article of war (Rev. St. § 1342), and is not restricted to the single case therein mentioned, but is necessarily vested in him by virtue of his office as commander in chief.—*Swaim v. United States*, 17 S. Ct. 448, 165 U. S. 553, 41 L. Ed. 823.

The volunteer army of the United States, raised under Act Cong. March 2, 1899, c. 352, (30 Stat. 977), is "other forces," within the meaning of the seventy-seventh article of war [U. S. Comp. St. 1901, p. 959] declaring that "officers of the regular army shall not be com-

petent to sit on courts-martial to try the officers or soldiers of other forces," although the volunteer troops organized under that act were mustered directly into the service of the United States, without regard to state or territorial lines. Order, *Deming v. McClaughry*, 113 F. 639, 51 C. C. A. 349, affirmed.—*McClaughry v. Deming*, 22 S. Ct. 786, 186 U. S. 49, 46 L. Ed. 1049.

A court-martial entirely composed of officers in the regular army of the United States, who by the seventy-seventh article of war are "not competent to sit on courts-martial to try the officers or soldiers of other forces," is without jurisdiction to try an officer or soldier of such other forces when convened for that sole purpose.—Id.

The prohibition against the convocation of a general court-martial by the commander of a fleet or squadron without the previous authorization of the President, which is made by Rev. St. U. S. § 1624, art. 38 [U. S. Comp. St. 1901, p. 1116], when such fleet or squadron is in the waters of the United States, applies only to those waters which are within what was termed by Act March 3, 1901, c. 852, 31 Stat. 1108 [U. S. Comp. St. 1901, p. 1040], the continental limits of the United States. Judgment, *Smith v. United States*, 38 Ct. Cl. 257, reversed.—*United States v. Smith*, 25 S. Ct. 489, 197 U. S. 386, 49 L. Ed. 801.

An officer of the regular army is within the provisions of Rev. St. U. S. § 1342, art. 77 [U. S. Comp. St. 1901, p. 959], that "officers of the regular army shall not be competent to sit on courts-martial to try officers or soldiers of other forces," although such officer has been granted an indefinite leave of absence from the regular army in order to enable him to accept a commission in the volunteer forces. Judgment, 41 Ct. Cl. 275, affirmed.—*United States v. Brown*, 27 S. Ct. 620, 206 U. S. 240, 51 L. Ed. 1046.

44. — Jurisdiction.

See 4 Cent. Dig. Army & N. §§ 90-92.

A writ of prohibition will not lie to prevent the trial of an officer of the navy, who, while serving by appointment of the president as chief of a bureau in the navy department, makes contracts or payments in violation of law and disregard of the interests of the government, to promote the interests of contractors, by a court-martial of naval officers, for "scandalous conduct, tending to the destruction of good morals," and "culpable inefficiency in the performance of duty," under Rev. St. § 1624, on the theory that the offense was committed in a civil capacity, and that, therefore, the court-martial has no jurisdiction of it.—*Smith v. Whitney*, 116 U. S. 167, 6 S. Ct. 570, 29 L. Ed. 601.

A recruit, who was enlisted on his representation that he was only 28 years of age, is estopped, on his trial for desertion, to plead that he was never properly enlisted because he in fact was then over 35 years of age, which is fixed by Rev. St. § 1116, as the limit of the age for enlistment, and, hence, that he is not amenable to court-martial. 38 Fed. 84 reversed.—*United States v. Grimley*, 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636.

In the fifth amendment to the constitution, providing that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, "except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger," the clause, "when in actual service in time of war or public danger," applies only to the militia; and therefore congress has power to provide for the trial by court-martial of all crimes committed by persons in the army or navy, regardless of the fact of peace or war.—*Johnson v. Sayre*, 158 U. S. 109, 15 S. Ct. 773, 39 L. Ed. 914.

A paymaster's clerk is a person in the naval service, and subject to the jurisdiction of a

naval court-martial for offenses prohibited by statutes relating to persons in such service.—Id.

Consent can confer no jurisdiction on a court-martial composed entirely of officers of the regular army of the United States in direct violation of the seventy-seventh article of war, which declares that such officers shall not be competent to sit on courts-martial to try the officers or soldiers of other forces. Order, *Deming v. McClaughry*, 113 F. 639, 51 C. C. A. 349, affirmed.—*McClaughry v. Deming*, 22 S. Ct. 786, 186 U. S. 49, 46 L. Ed. 1049.

A general court-martial has jurisdiction, under the sixty-second article of war, as of a crime not capital, to try a soldier for a homicide punishable, under Pen. Code P. I., art. 404, by imprisonment.—*Grafton v. United States*, 27 S. Ct. 749, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

A court-martial convened at a naval officer's request to investigate charges against him is not without jurisdiction because he was required, as a condition precedent, to waive protection of Rev. St. U. S. § 1624, art. 60 [U. S. Comp. St. 1901, p. 1119], by consenting to admission in evidence of the record of testimony introduced before a prior court of inquiry, with right to call additional witnesses. Judgment (1907) 42 Ct. Cl. 157, affirmed.—*Mullan v. United States*, 29 S. Ct. 330, 212 U. S. 516, 53 L. Ed. 632.

46. — Former punishment for same offense.

The suspension of a naval officer, charged with drunkenness and neglect of duty, from morning until evening of the same day, when he was restored to duty to give "time to investigate the case," is not such a punishment for the offense as precludes, under Navy Regulations 1865, par. 1206, further proceedings against him by court-martial, but must be deemed simply a temporary precaution for the preservation of good order and discipline. Judgment 38 Ct. Cl. 473, affirmed.—*Bishop v. United States*, 25 S. Ct. 440, 197 U. S. 334, 49 L. Ed. 780.

47. — Proceedings and review.

See 4 Cent. Dig. Army & N. §§ 93-95.

Article 43 of the articles for the government of the navy (Rev. St. § 1624, art. 43), providing that a person accused shall be furnished with a true copy of the charges, with the specifications at the time he is put under arrest, refers to the time he is arrested for trial by court-martial, and not to the time of a previous arrest to await the action of a court of inquiry; and one in custody to await the result of a court of inquiry cannot be considered as put under arrest for trial by court-martial until the secretary of the navy has informed him of the report of the court of inquiry, and ordered a court-martial to convene to try him.—*Johnson v. Sayre*, 158 U. S. 109, 15 S. Ct. 773, 39 L. Ed. 914.

It seems that section 923 of the army regulations of 1881, having superseded the provisions of the British mutiny act on the subject, if the same were ever in force in this country, authorizes the president to return the proceedings of a court-martial, submitted to him for review, either once or oftener, with a recommendation that a more severe sentence be imposed.—*Swaim v. United States*, 17 S. Ct. 448, 165 U. S. 553, 41 L. Ed. 823.

The president does not become the accuser or prosecutor of a defendant before a court-martial because, in consequence of an accusation made by a private person to the secretary of war, he has convened a court of inquiry, and, upon its report, the necessary routine steps have been taken by the war department to bring the defendant to trial.—Id.

It is peculiarly for an army court-martial to determine whether the crime of embezzlement

charged is "to the prejudice of good order and military discipline," within the meaning of the sixty-second article of war, providing for the punishment of such crimes. Order 105 F. 614, affirmed.—Carter v. McClaughry, 22 S. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

The expressed satisfaction of the accused with the court-martial as constituted, precludes collateral attack on its judgment on the ground that as many officers as could be convened without injury to the service were not summoned as act July 17, 1862, c. 204, art. 11, 12 Stat. 603, requires. Judgment 38 Ct. Cl. 473, affirmed.—Bishop v. United States, 25 S. Ct. 440, 197 U. S. 334, 49 L. Ed. 780.

The copy of charges against a naval officer, which, together with the specifications, must be served, under Navy Regulation Act April 23, 1800, c. 33, art. 38, 2 Stat. 50, 51, on a person sought to be court-martialed, at the time he is put under arrest, need not be served when he is placed under arrest as a temporary precaution for the preservation of good order and for further investigation, but the service is in time where he had been released from such arrest and returned to duty, conformably to Navy Regulations 1865, par. 1202, when made on the day of his rearrest.—Id.

The arrest referred to in Rev. St. U. S. § 1624, art. 43 [U. S. Comp. St. 1901, p. 1117], as the time when the person accused is to be furnished with a copy of the charges and specifications on which he is to be tried by a naval court-martial, is not the preliminary arrest or detention while awaiting the action of higher authority to frame charges and specifications and order the court-martial, but is the arrest resulting from the preferring of the charges by the proper authority and the convening of the court-martial. Judgment, Smith v. United States 38 Ct. Cl. 257, reversed.—United States v. Smith, 25 S. Ct. 489, 197 U. S. 386, 49 L. Ed. 801.

Civil courts cannot review proceedings and sentences of courts-martial, where they are legally organized and have jurisdiction of the offense and of the person of accused, and have complied with statutory requirements governing their proceedings. Judgment (1907) 42 Ct. Cl. 157, affirmed.—Mullan v. United States, 29 S. Ct. 330, 212 U. S. 516, 53 L. Ed. 632.

The decision of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.—(1911) Reaves v. Ainsworth, 31 S. Ct. 230, 219 U. S. 296, 55 L. Ed. 225, affirming judgment (1906) 28 App. D. C. 157.

48. — Sentence, approval, and execution.

See 4 Cent. Dig. Army & N. §§ 96, 97.

Under the sixty-fifth article of war (2 Stat. 367, c. 20), the sentence of a general court-martial, in time of peace, that a commissioned officer be dismissed from service, is inoperative until approved by the president; and an order of the president approving the proceedings and sentence will not be sufficient, unless it is authenticated in a way to show, otherwise than by inference, that it is the result of the judgment of the president himself, and that it is not a mere departmental order, signed by the secretary of war alone, which might or might not have attracted his personal attention. 19 Ct. Cl. 396, reversed.—Runkle v. United States, 122 U. S. 543, 7 S. Ct. 1141, 30 L. Ed. 1167.

Article 65, Articles of War (Act April 10, 1806; 2 Stat. p. 367), provides that "no sentence of a court-martial shall be carried into execution * * * until after the whole proceedings shall have been transmitted to the secretary of war, to be laid before the president of the United States for his confirmation or dis-

approval." Held, that an indorsement by the secretary of war upon the record of such proceedings, that, "in conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general court-martial in the foregoing case have been forwarded to the secretary of war for the action of the president. The proceedings, findings, and sentence are approved, and the sentence will be duly executed,"—is presumptively a personal approval by the president, for it is not necessary that such approval shall be evidenced by his own hand.—United States v. Page, 137 U. S. 673, 11 S. Ct. 219, 34 L. Ed. 828, overruling Page v. United States, 25 Ct. Cl. 254; United States v. Fletcher, 148 U. S. 84, 13 S. Ct. 552, 37 L. Ed. 378, overruling Fletcher v. United States, 26 Ct. Cl. 541; Ide v. United States, 150 U. S. 517, 14 S. Ct. 188, 37 L. Ed. 1166.

Punishments of fine and imprisonment imposed by the sentence of an army court-martial are not illegal on the theory that, because by such sentence the accused was also dismissed from the army, such punishments were inflicted after the accused had ceased to be an officer of the army, since, having been proceeded against as such, jurisdiction attached, which included not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law, and, having been sentenced, the status of the accused was that of a military prisoner held by the authority of the United States as an offender against its laws. Order 105 F. 614, affirmed.—Carter v. McClaughry, 22 S. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

A sentence of an army court-martial convened by orders issued by the president does not cease to be the sentence of such court-martial, on the theory that the punishment fixed thereby must be regarded as increased, because the president, acting as the reviewing authority under Act July 27, 1892 (27 Stat. 277, c. 272), disapproved the findings of guilty of some of the specifications under two of the charges, and approved findings of guilty of one or more specifications under each of the charges, and of the findings of guilty of all of the charges, and approved the sentence.—Id.

A sentence of an army court-martial imposed upon a commissioned officer is not illegal on the ground that the punishment prescribed is in excess of the maximum punishment fixed by the president under Act Sept. 27, 1890, c. 998, 26 Stat. 491 [U. S. Comp. St. 1901, p. 969], since all the executive orders made under such act relate to cases of enlisted men.—Id.

Reducing sentence of a court-martial, dismissing a naval officer from service, to suspension for five years on half sea pay, with a reduction in rank to the foot of the list of his grade, is a mitigation of sentence, within the provision of Rev. St. U. S. § 1624, art. 54 (U. S. Comp. St. 1901, p. 1119), that every officer authorized to convene a general court-martial shall have power, on revision of its proceedings, to "remit or mitigate," but not to "commute," the sentence of any such court which he is authorized to approve and confirm. Judgment (1907) 42 Ct. Cl. 157, affirmed.—Mullan v. United States, 29 S. Ct. 330, 212 U. S. 516, 53 L. Ed. 632.

49. — Conclusiveness of sentence.

See 4 Cent. Dig. Army & N. § 95.

Where a general court-martial has cognizance of the charges made, and jurisdiction of the person of the defendant, its sentence dismissing defendant from the army cannot be collaterally questioned, in a proceeding by the defendant in the court of claims against the United States for salary, on the ground that one of the officers composing the court had preferred one of the charges against him, and testified as

a witness in the proceedings. 15 Ct. Cl. 532 affirmed.—*Keyes v. United States*, 109 U. S. 336, 3 S. Ct. 202, 27 L. Ed. 954.

Within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they cannot be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction.—*United States v. Grimley*, 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636, reversing decree (C. C.) in re *Grimley*, 38 F. 84.

Specifications of a charge tried by a court-martial, not objected to for insufficiency on the trial, will not be held on their face incapable of sustaining the charge, upon review of proceedings by an army officer claiming arrears of pay, on the ground of the illegality of his dismissal from the service.—*United States v. Fletcher*, 148 U. S. 84, 13 S. Ct. 552, 37 L. Ed. 378.

Where a court-martial has jurisdiction, error in its exercise cannot be reviewed in a proceeding by an army officer, sentenced by such court to be dismissed from the service, to recover arrears of pay, on the ground that he never was dismissed in fact, by reason of the failure of the president of the United States to approve the sentence.—*Id.*

The decision of a court-martial in determining the validity of a challenge to one of its members cannot be reviewed in a collateral action.—*Swaim v. United States*, 17 S. Ct. 448, 165 U. S. 553, 41 L. Ed. 823.

The conclusions of a court-martial in respect to matters falling within its province cannot be controlled or reviewed by the civil courts.—*Id.*

The proceedings and sentence of a court-martial, having jurisdiction of the person accused, and of the offense charged, and acting within the scope of its lawful powers, cannot be reviewed or set aside by the civil courts for errors in the admission or rejection of evidence or other matters of procedure.—*Id.*

The action of a court-martial in revising at the suggestion of the reviewing authority a sentence imposed by it, and imposing a more severe sentence, being within the sphere of its authority, cannot be collaterally impeached for any error or irregularity.—*Id.*

The question whether the appointment upon a general court-martial of officers inferior in rank to the defendant to be tried can be avoid-

ed, as required by the seventy-ninth article of war, is committed to the discretion of the appointing officer, who must be presumed to have acted in pursuance of law; and the sentence of a court-martial cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.—*Id.*

Confirmation of the sentence of a court-martial by the officer convening it was not required by Act July 17, 1862, c. 204, arts. 19, 20, 12 Stat. 605, where the sentence extended to dismissal from the service, since under the first of such articles such a sentence must be approved by the President. Judgment 38 Ct. Cl. 473, affirmed.—*Bishop v. United States*, 25 S. Ct. 440, 197 U. S. 334, 49 L. Ed. 780.

The confirmation by the President of the sentence of a court-martial sufficiently appears from the statement to that effect in a letter from the Secretary of the Navy notifying the accused that he was dismissed from the service, and the President's signed approval of the brief of the findings of the court-martial submitted to him by the Navy Department for his action.—*Id.*

Civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier for mere errors, or for any reason not affecting the jurisdiction of the military court, even though the civil court, if it had first taken hold of the case, might have tried the accused for the same offense, or even for one of higher grade arising out of the same facts.—*Grafton v. United States*, 27 S. Ct. 749, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

52. Soldiers' homes.

See 4 Cent. Dig. Army & N. §§ 100-102.

The exemption of the United States from recovery of interest on its contracts, unless there is a stipulation to pay interest or a statute permitting its recovery, does not extend to the Mountain Branch of the National Home for Disabled Volunteer Soldiers, created by Rev. St. § 4825 et seq. (U. S. Comp. St. 1901, p. 3337 et seq.), as a government agency and invested with various powers, including the right and liability to sue and be sued.—*National Home for Disabled Volunteer Soldiers v. Parrish*, 33 S. Ct. 944, 229 U. S. 494, 57 L. Ed. 1296, affirming decree 194 F. 940, 114 C. C. A. 576.

ARRAIGNMENT.

See Criminal Law, 261-302.

ARREST.

Scope-Note.

[INCLUDES taking and keeping persons in legal custody to answer demands in civil actions or charges of crime, or to prevent commission of crime; nature and scope of the remedy in both civil and criminal cases in general; in what cases and to and against whom it is allowed, and privilege from arrest; grounds of arrest and jurisdiction over and proceedings to obtain arrest; issuance, requisites, and validity of writs, warrants, orders of arrest, etc., in civil actions, and amendment thereof; authority to arrest, making arrests, and service of writs, warrants, etc.; quashing, vacating, or setting aside process or orders for arrest, discharge from custody of poor debtors, etc., and other relief against arrest; return of process for arrest; liabilities on and enforcement of securities given to obtain arrests; and liabilities of persons other than officers for wrongfully procuring or making arrests.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. In Civil Actions.

⌚ 3. Statutory provisions.

II. On Criminal Charges.

⌚ 61. Authority to arrest without warrant.

62. — In general.

Cross-References.

See—
Bail.

False Imprisonment.

Treaties relating to arrest of deserters, see
Treaties, ⌚ 8.

I. IN CIVIL ACTIONS.

⌚ 3. Statutory provisions.

See 4 Cent. Dig. Arrest, § 1.

Imprisonment for debt, contrary to Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, is not provided by the Philippine Penal Code, under which a person convicted of embezzlement may be made to suffer a subsidiary imprisonment for a term not exceeding one-third of the principal penalty, in lieu of the restoration of the sum found to be embezzled, with the right to be released from such subsidiary punishment upon payment of the money wrongfully converted.—*Freeman v. United States*, 30 S. Ct. 592, 217 U. S. 539, 54 L. Ed. 874, 19 Ann. Cas. 755.

II. ON CRIMINAL CHARGES.

Due process of law, see Constitutional Law, ⌚ 262.

Illegal arrest as depriving court of jurisdiction, see Criminal Law, ⌚ 99.

Privilege of Congressmen from arrest, see United States, ⌚ 12.

⌚ 61. Authority to arrest without warrant.

See 4 Cent. Dig. Arrest, §§ 144-160.

⌚ 62. — In general.

See 4 Cent. Dig. Arrest, § 144.

A police officer of a state or a private citizen has no authority as such, without any warrant or military order, to arrest and detain a deserter from the United States army.—*Kurtz v. Moffitt*, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458.

ARREST OF JUDGMENT.

See Judgment, ⌚ 263-266.

ARSON.

See 4 Cent. Dig. Arson.

Acquittal, bar to civil action, see Judgment, ⌚ 559.

ART.

See Patents, ⌚ 4-8.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 175]

ASSAULT AND BATTERY.

Scope-Note.

[INCLUDES acts of violence towards the person of another, either with or without actual touching or striking, not constituting an element in, or attempt to commit, any other specific injury or offense; justification or excuse for such acts; circumstances of aggravation; and liabilities and remedies therefor, civil or criminal.

Analysis.

I. Civil Liability.

(A) ACTS CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.

8. Defenses.

9. — In general.

(B) ACTIONS.

II. Criminal Responsibility.

I. CIVIL LIABILITY.

Action by wife against husband, see Husband and Wife, 206.

Ejection of passenger or intruder from train, see Carriers, 354-384.

On passenger, liability of carrier, see Carriers, 283, 284.

(A) ACTS CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.

8. Defenses.

See 4 Cent. Dig. Assault, §§ 5-16.

9. — In general.

See 4 Cent. Dig. Assault, .

Plaintiff in an action for injuries to his person was the employé of a company in actual and peaceable possession of a line of railroad. Defendant railroad company, with an armed body of men, attempted to drive away the agents

and servants of the former company, and in the attempt plaintiff received his injuries. Plaintiff had armed to protect himself and the property of which he and his co-employees were in possession. *Held*, that defendant railroad company was liable, without reference to the question of legal title or right of possession.—*Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 S. Ct. 1286, 30 L. Ed. 1146.

(B) ACTIONS.

See 4 Cent. Dig. Assault, §§ 19-67.

Limitations applicable in federal court in action for assault to prevent voting, see Courts, 375.

II. CRIMINAL RESPONSIBILITY.

See 4 Cent. Dig. Assault, §§ 68-170.

Assault with intent to kill, see Homicide, 292.

Former jeopardy, see Criminal Law, 195.

ASSENT.

See cross-references under Consent.

ASSESSMENT.

By irrigation district, see Waters and Water Courses, 231.

Compensation for property taken for public use, see Eminent Domain, 167-245.

Damages, see Damages, 206-216.

Expenses of public improvements, see—

District of Columbia, 16.

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Levees, 21-28.

Municipal Corporations, 406-523, 534-579.

Members of mutual benefit insurance association, see Insurance, 749-753.

Members of mutual insurance companies, see Insurance, 349-366.

On stock, see—

Banks and Banking, 248.

Corporations, 89, 175.

Taxes, see Taxation, 265-285, 301-500.

ASSESSMENT WORK.

See Mines and Minerals, 23.

ASSETS.

See—

Assignments for Benefit of Creditors, 227.

Bankruptcy, 250.

Marshaling Assets and Securities.

Estate of decedent, see Executors and Administrators, 48-63.

Insolvent bank, see—

Banks and Banking, 77.

Corporations, 561.

Partnership, see Partnership, 177-183.

ASSIGNMENT OF DOWER.

See Dower, 70-72.

ASSIGNMENT OF ERRORS.

See—

Appeal and Error, 719-753.

Criminal Law, 1129.

ASSIGNMENTS.

Scope-Note.

[INCLUDES transfers of title to property or estates or interests therein or of other valuable rights in general, and more particularly transfers of debts or other rights in action; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; instruments in writing by which such transfers are made, and delivery, acceptance, recording or registration, and construction thereof; and rights, duties, and liabilities of the parties between themselves and as to others.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity.

(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.

- ⚡ 10. Money due or to become due.
- 17. Executory contracts.
- 19. — Personal nature.

(B) MODE AND SUFFICIENCY OF ASSIGNMENT.

- ⚡ 31. Nature and essentials in general.
- 33. Agreements to assign.
- 40. Assignments in writing.
- 41. — Form and contents.
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Transfers of particular species of property, rights, or instruments.

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Bills and Notes, 311-326.
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I. REQUISITES AND VALIDITY.

(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.

Denial of equal protection of law, see Constitutional Law, 230, 240.
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10. Money due or to become due.

See 4 Cent. Dig. Assign. 17, 18.

An assignment of a claim against a foreign government is valid in equity, though made before the claim is established.—*Peugh v. Porter*, 112 U. S. 737, 5 S. Ct. 361, 28 L. Ed. 859.

17. Executory contracts.

See 4 Cent. Dig. Assign. 25-31.

19. — Personal nature.

See 4 Cent. Dig. Assign. 23-31; 5 Cent. Dig. Atty. & C. 151.

Where a contract is founded in personal trust and confidence, the assignee thereof cannot recover upon it without the consent of the party contracting with his assignor to the assignment.—*Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 S. Ct. 1308, 32 L. Ed. 246.

(B) MODE AND SUFFICIENCY OF ASSIGNMENT.

31. Nature and essentials in general.

See 4 Cent. Dig. Assign. 61.

Practice of employer, consented to by employees, to deduct from their wages advances made by the superintendent, is, to the extent of such deductions, an assignment to the superintendent of the wage claims.—*United States Fidelity & Guaranty Co. v. United States*, 34 S. Ct. 88, 231 U. S. 237, 58 L. Ed. 200, affirming judgment 189 F. 339, 111 C. C. A. 71.

33. Agreements to assign.

See 4 Cent. Dig. Assign. 64.

S., by an absolute assignment, transferred, for a certain consideration, title to a patent, and on the following day he and the assignee entered into a contract; reciting that, instead of the consideration mentioned in the assignment, the assignee should pay certain sums on future dates, and if he should fail to do so the title to the patents should return to S. *Held*, that the transaction was not an executory contract to assign, but an absolute assignment, and vested the legal title to the patent in the assignee.—*Boesch v. Graff*, 133 U. S. 697, 10 S. Ct. 378, 33 L. Ed. 787, reversing decree (C. C.) *Graff v. Boesch*, 33 F. 279.

40. Assignments in writing.

See 4 Cent. Dig. Assign. 76-84.

41. — Form and contents.

See 4 Cent. Dig. Assign. 76, 77.

A deed of trust, in the nature of a mortgage, set out in full a contract between the mortgagor and certain parties for the conveyance of several parcels of land to him, and then conveyed to the mortgagee all the right, title, and interest which he (the mortgagor) had, or might thereafter acquire, "in and to" the lands embraced in the contract. *Held*, that the con-

veyance was in legal effect an assignment of the contract.—*Shoecraft v. Trustees of the Internal Imp. Fund of the State of Florida*, 124 U. S. 730, 8 S. Ct. 686, 31 L. Ed. 574.

46. — Filing, recording, and registration.

See 4 Cent. Dig. Assign. 82, 84.

The filing for record in a county clerk's office of assignments of interests in a contract by parties claiming thereunder does not make the subsequent record in that office of other assignments of an interest in the same contract notice to such parties, where there is no statute providing for such record or making it notice.—*Burck v. Taylor*, 152 U. S. 634, 14 S. Ct. 696, 38 L. Ed. 578.

47. Equitable assignments.

See 4 Cent. Dig. Assign. 85-111, 133; 6 Cent. Dig. Banks, 334.

49. — Bill of exchange, check, or order.

See 4 Cent. Dig. Assign. 85-98; 6 Cent. Dig. Banks, 334.

A check on a bank, given by a depositor, does not bind the fund against which it is drawn until the bank has notice thereof; and, therefore, where a general assignment is made by such drawer, and notice of the assignment is received by the bank before it has notice of the prior check, it is not liable to the holder for such fund.—*Laclede Bank v. Schuler*, 120 U. S. 511, 7 S. Ct. 644, 30 L. Ed. 704, affirming decree (C. C.) *Schuler v. Laclede Bank*, 27 F. 424.

Without deciding whether a check or draft of a person on a bank in which he has deposits operates as an equitable assignment of the fund so on deposit to the holder of the check, to the amount of it, it is clear that such check or draft does not bind the fund in the hands of the bank until it has notice of the draft or check by presentation for payment or otherwise. Until then, other checks drawn afterwards may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice.—*Id.*

Checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer, but containing only the usual request, directed to the bank, to pay to the order of the payee a certain sum of money, are not, in the absence of acceptance, an assignment of the funds of the drawer.—*Florence Min. Co. v. Brown*, 124 U. S. 385, 8 S. Ct. 531, 31 L. Ed. 424.

While the mere giving of a bank check or draft in the ordinary course of business does not operate as an equitable assignment of the fund, it is yet competent for the parties to create such an assignment by a clear agreement or understanding, oral or otherwise, in addition to the check, that such shall be the effect of the transaction.—*Fourth Street Nat. Bank v. Yardley*, 17 S. Ct. 439, 165 U. S. 634, 41 L. Ed. 855, determining and certifying question (C. C.) 55 F. 850.

The president of a Philadelphia bank asked another bank in the same city to give his bank \$25,000 in clearing-house certificates. He

also exhibited a memorandum showing that his bank had a reserve fund of about \$27,000 in a certain New York bank, and proposed to give a draft thereon for the amount of the certificates. In reliance upon these representations and the memorandum, the certificates were delivered, and the draft accepted. *Held*, that this was an equitable assignment of the fund, which would enable the drawee to claim it as against the receiver of the drawer, which failed on the following day; and that the assignment operated both upon cash actually owing by the New York bank at the time and upon money or drafts of the drawer in course of transmission or collection by it.—*Id.*

650. — Order or draft on particular fund.

See 4 Cent. Dig. Assign. §§ 99-105.

An order drawn for the whole of a particular fund amounts to an equitable assignment of that fund, and, after notice to the drawee, it binds the fund in his hands.—*Laclede Bank v. Schuler*, 120 U. S. 511, 7 S. Ct. 644, 30 L. Ed. 704, affirming decree (C. C.) *Schuler v. Laclede Bank*, 27 F. 424.

652. — Agreement to appropriate or pay.

See 4 Cent. Dig. Assign. §§ 107-111.

Any order, writing, or act which makes an appropriation of a debt amounts to an equitable assignment thereof.—*Laclede Bank v. Schuler*, 120 U. S. 511, 7 S. Ct. 644, 30 L. Ed. 704, affirming decree (C. C.) *Schuler v. Laclede Bank*, 27 F. 424.

657. Notice to debtor.

See 4 Cent. Dig. Assign. §§ 116-120.

Plaintiff, to whom certificates of the board of public works of the District of Columbia were issued for work done, indorsed them in blank to a third party, but subsequently directed a letter to the treasurer of the board requesting that payment be withheld. Subsequently, by Act Cong. June 20, 1874, c. 337 (18 Stat. 116), the board of public works was abolished, and a board of audit was appointed to examine and audit for settlement debts evidenced by such certificates, among others, with right of access to all the books, papers, vouchers, etc., of the board of public works. Plaintiff took no steps to notify the board of audit not to pay the certificates, and they were presented by the holder, and paid. *Held*, that the notice to the treasurer of the board of public works, on file with the papers of the board, was not notice to the board of audit; and that payment to the person vested with apparent authority, without notice of a want of actual authority, discharged the debt.—*Laughlin v. District of Columbia*, 116 U. S. 485, 6 S. Ct. 472, 29 L. Ed. 701.

In order to protect the title of one claiming as assignee by an order appropriating a fund, the assignee should give notice to the debtor of the assignment.—*Laclede Bank v. Schuler*, 120 U. S. 511, 7 S. Ct. 644, 30 L. Ed. 704, affirming decree (C. C.) *Schuler v. Laclede Bank*, 27 F. 424.

658. Consent of debtor.

See 4 Cent. Dig. Assign. §§ 121-123; 6 Cent. Dig. Banks, § 334.

By a contract with a state for the erection of a capitol the contractor agreed not to assign the contract, in whole or in part, without the state's consent in writing. With such consent he assigned a three-fourths interest therein to four others, who composed a firm, on an agreement that they should furnish the money needed for the performance of the contract, and that the profits should be divided among the parties, "their heirs or assigns"; that he should have the superintendence of the work at a

certain salary, and be responsible to them for any loss or damage by reason of his neglect or mistakes. He also, without consent of the state, assigned to each of three others one-fourth of his remaining one-fourth interest. He afterwards, before any work was done under the contract, assigned to the firm all his rights and interest under the contract, and thereafter the firm assigned the entire contract to defendant, a member of the firm, who accepted the assignment in a writing containing a covenant to the state to perform the contract, adopting it as his own, and the state in writing consented to both said assignments and to said acceptance, and recognized defendant as the contractor. Subsequently one of the three to whom the original contractor had assigned one-sixteenth interest assigned one-half of said interest to plaintiff, and thereafter assigned all his rights and interest under the contract to defendant and another. *Held*, that by the nature of the contract, as well as its express stipulation, the original contractor could not transfer an interest therein without the state's consent; that the attempted transfers without such consent by him and by his transferee to plaintiff created simply a personal obligation, which could be enforced against him alone; that the assignments with such consent vested the sole interest in the contract in defendant; and that defendant, taking without notice of plaintiff's claim, was not liable to plaintiff for a share of the profits of his performance of the contract. *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940, distinguished.—*Burck v. Taylor*, 152 U. S. 634, 14 S. Ct. 696, 38 L. Ed. 578.

(C) VALIDITY.

668. Estoppel or waiver as to defects or objections.

See 4 Cent. Dig. Assign. § 127.

The obligor of a contract with a partnership does not, by recognizing a transfer of the contract from one partner to the other upon a dissolution of the firm, estop himself from setting up the invalidity of a subsequent assignment thereof to a stranger, on the claim that such contract is not transferable.—*Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 S. Ct. 1308, 32 L. Ed. 246.

A corporation having a contract right to be furnished with a patented article to be sold by it, exclusively, within a prescribed territory, cannot set up, in defense to an action brought by an assignee of the contract for articles furnished by him, a claim that the contract was not assignable without its consent, and that it had refused to recognize the assignee, when in fact, although sending its orders to the assignor, it received and used the articles furnished by the assignee. *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 S. Ct. 1308, 32 L. Ed. 246, distinguished.—*Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 S. Ct. 523, 38 L. Ed. 411.

II. OPERATION AND EFFECT.

671. Effect of transfer in general.

See 4 Cent. Dig. Assign. §§ 130-133; 43 Cent. Dig. Salv. § 107.

An acceptance by a city of an order drawn on it by a city contractor, directing the payment of a specified sum to the payees on the completion of the work, to be charged to the contract price, constitutes a new contract between the city and the payees, and is not the assignment of a negotiable instrument or chose in action. 41 F. 113 affirmed.—*City of Superior v. Ripley*, 138 U. S. 93, 11 S. Ct. 288, 34 L. Ed. 914.

73. **Property or interest transferred.**
See 4 Cent. Dig. Assign. §§ 139-142; 6 Cent. Dig. Banks, § 324.

Where the trustee of a bankrupt estate, having been induced by fraudulent devices to sell certain stock among the assets to defendant for a price much less than its real value, subsequently, regarding the transaction as void for fraud, assigned to plaintiff all his "claims and demands of every name, nature, and description," "on account of the fifty shares of capital stock," etc., such second assignment is an assignment of the stock, and is not invalid, as being merely the transfer of the right to sue defendant.—*Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 L. Ed. 467, affirming (*Iowa*) *Clews v. Traer*, 10 N. W. 838.

75. **Rights passing as incidents.**
See 4 Cent. Dig. Assign. §§ 143-147.

78. **— Collateral securities, liens, and preferences.**

See 4 Cent. Dig. Assign. § 145; 43 Cent. Dig. Salv. § 107.

An equitable lien, for labor and supplies, on the property subject to a railroad mortgage, passes with an assignment of the debt to which it attaches.—*Union Trust Co. v. Walker*, 107 U. S. 596, 2 S. Ct. 299, 27 L. Ed. 490.

The assignment of a claim for current expenses of a railroad company in the hands of a receiver carries with it the right to claim payment out of the fund on which it is a charge.—*Burnham v. Rowen*, 111 U. S. 776, 4 S. Ct. 675, 28 L. Ed. 596.

83. **Priorities.**

See 4 Cent. Dig. Assign. §§ 148-155; 6 Cent. Dig. Banks, § 324.

85. **— As between assignees.**
See 4 Cent. Dig. Assign. §§ 149-151.

An assignee of a contract, without notice of any claim to an interest therein under an assignment to another, does not, by taking from such other a quitclaim of his interest, become chargeable with notice of a previous assignment by such other assignee of part of that interest.—*Burck v. Taylor*, 152 U. S. 634, 14 S. Ct. 696, 38 L. Ed. 578.

III. **RIGHTS AND LIABILITIES OF PARTIES.**

92. **Compromise or release of claim assigned.**

See 4 Cent. Dig. Assign. § 153.

Rev. St. Ind. §§ 4244, 4247, forbid county commissioners to contract for the construction of any building whose cost exceeds \$500, except after public advertisement for bids, and with the lowest responsible bidder, after taking from him a bond, with sureties, to perform the work according to the contract, and to pay all debts incurred by him in its prosecution, including those for labor and materials, upon which bond any labor or materialman having a claim against the contractor may sue. Defendant board contracted with M. & S. to build and complete a jail for a certain sum, and within a certain time, with a forfeit if the contractors failed in the latter respect. M. & S. assigned to plaintiff so much of the contract as related to the iron work, agreeing that plaintiff should receive a specified sum therefor, to be paid by defendant, as provided by its contract with M. & S. Held, that this assignment, unless assented to by defendant, will not render it liable to plaintiff for the amount to be received under it by the latter, or prevent defendant from making a settlement in good faith with the original contractors, without retaining enough to pay plaintiff's claim.—*Board of Com'rs of Delaware*

County v. Diebold Safe & Lock Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674.

93. **Payment of debt assigned.**

See 4 Cent. Dig. Assign. § 159.

Payment to the person vested with apparent authority without notice of a want of actual authority discharges the debt.—*Laughlin v. District of Columbia*, 116 U. S. 485, 6 S. Ct. 472, 29 L. Ed. 701.

99. **Equities and defenses between original parties.**

See 4 Cent. Dig. Assign. §§ 177-180, 182.

100. **— In general.**

See 4 Cent. Dig. Assign. §§ 177, 180.

An assignee of a chose in action takes the same subject to all defenses against it in the hands of the assignor at the time of the assignment.—*North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565, reversing judgment *Olyphant v. St. Louis Ore & Steel Co.* (C. C.) 39 F. 308.

105. **Liabilities of assignee.**

See 4 Cent. Dig. Assign. §§ 184-185.

106. **— To assignor.**

See 4 Cent. Dig. Assign. § 184.

In an action against the assignees of an exclusive right to manufacture and sell a medicinal compound for selling the preparation in other territory in which the exclusive right had been assigned to complainants, and for selling in territory in which defendants had assigned all their right to complainants, with covenants not to sell there, one defendant, as a witness for complainants, admitted several shipments to places in complainants' territory, and there was evidence of other shipments by defendants to places in such territory for the general purposes of sale there. For several years defendants had shipped the article to a place in complainants' territory on the order of a correspondent in defendants' territory, and deducted from the price the amount of the freight to the place of destination. One of the defendants testified that they kept the article in stock for sale on account of the correspondent, and that he did not know whether, when charged to the correspondent, the article was shipped to him or to others. Witness identified the entry of one shipment; knew the average amount of freight which, when deducted from the price, left substantially the amount received by the correspondent on the shipments, and by him paid to defendants; and witness admitted several charges against the correspondent in defendants' books, agreeing in dates and amounts with the shipments. Complainants made objection to the sales in their territory, but defendants paid no attention to it. No testimony was given for defendants. Held sufficient evidence of sales, or the promotion of sales, by defendants in complainants' territory, or of sales to those by whom it was to be sold there to defendants' knowledge.—*Fowle v. Park*, 131 U. S. 88, 9 S. Ct. 658, 33 L. Ed. 67.

An agreement by the assignees of a contract to construct a railroad, to save the assignor harmless from all liability by reason of subcontracts previously let by him, is a personal agreement on the part of the assignees, though the assignment is made to them in trust for the company for which the road is being constructed, and they accept the conditions thereof as trustee.—*Mills v. Allen*, 133 U. S. 423, 10 S. Ct. 413, 33 L. Ed. 717.

Where the assignees of a contract to construct a railroad agree to save the assignor harmless from all liability by reason of subcontracts previously let by him, a failure to pay the amounts due on such subcontracts is a breach by the assignees, for which the assignor

may recover without first showing payment by himself.—Id.

In an action by an assignor of a contract to construct a railroad, for breach of an agreement by the assignees to save the assignor harmless from all liability by reason of subcontracts previously let by him, parol evidence is admissible to show that the assignees agreed to assume the liability of the assignor on such subcontracts as part consideration for the assignment.—Id.

It is also competent to show by parol evidence that, after the subcontractors had finished their work, they stated their account to the assignor, and demanded payment from him, that he notified the assignees, and made demand on them; and that they neglected to pay.—Id.

⚡109. — On contract assigned.

See 4 Cent. Dig. Assign. § 188.

One executing a contract undertaken by another upon public work in the District of Columbia is bound by the terms of the contract in regard to the compensation for the work.—Campbell v. District of Columbia, 117 U. S. 615, 6 S. Ct. 922, 29 L. Ed. 1007.

IV. ACTIONS.

Abatement of action, see Abatement and Revival, ⚡27.

Effect of adequacy of remedy on jurisdiction in equity, see Equity, ⚡47.

Jurisdiction of federal courts as affected by citizenship of assignee, see Courts, ⚡312.

⚡117. By assignor.

See 4 Cent. Dig. Assign. §§ 189-191; 37 Cent. Dig. Parties, § 8.

A creditor who receives from his debtor a nonnegotiable certificate in writing of the amount of his debt, and sells the certificate to a third person for value less than its face, cannot, after the debtor has paid the amount of the certificate to the purchaser, maintain any action against the debtor.—Looney v. District of Columbia, 113 U. S. 258, 5 S. Ct. 463, 28 L. Ed. 974; Donnelly v. District of Columbia, 119 U. S. 339, 7 S. Ct. 276, 30 L. Ed. 465.

⚡118. By assignee.

See 4 Cent. Dig. Assign. §§ 199-212; 11 Cent. Dig. Contracts, § 1596.

⚡121. — In name of assignee.

See 4 Cent. Dig. Assign. §§ 200-205.

The assignee of a chose in action cannot proceed by bill in equity to enforce for his own use the legal right of his assignor, merely on the ground that he cannot sue at law in his own name.—Hayward v. Andrews, 106 U. S. 672, 1 S. Ct. 544, 27 L. Ed. 271.

An assignee of a chose in action on which an adequate remedy exists at law cannot, because as such assignee his interest is an equitable one, bring a suit in equity for the recovery of the demand. He must bring an action at law in the name of his assignor for his use.—New York Guaranty & Indemnity Co. v. Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. Ed. 484.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Scope-Note.

[INCLUDES voluntary transfers of property in trust to pay or to apply to debts of the assignor, whether made expressly for such purpose or construed in law as operating for the benefit of creditors; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; instruments in writing by which such transfers are made, and delivery, acceptance, recording or registration, and construction thereof; effect of reservations and of preferences of creditors; rights, duties, liabilities, and remedies of such assignors, their assignees and their creditors; and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity.

(A) NATURE AND ESSENTIALS OF TRUSTS FOR CREDITORS.

⚡2. Conveyances and transactions creating trust.

8. — Assignments as distinguished from mortgages or pledges.

10. Constructive assignments.

14. — Mortgages or other transfers as security.

17. — Several instruments or transactions.

18. What law governs.

19. — In general.

21. — Foreign assignments.

24. Right to make assignment.

27. — Partners.

29. Property to be included.

31. Partial assignments, or special assignments for particular creditors.

I. Requisites and Validity—Continued.

(A) NATURE AND ESSENTIALS OF TRUSTS FOR CREDITORS—Continued.

- ⌘ 34. Illegality of provisions in general.
- 35. Provisions as to powers, rights, and liabilities of assignee.
- 42. Partial invalidity.

(B) FORM AND REQUISITES OF INSTRUMENTS.

- ⌘ 56. Recitals of grounds for assignment.
- 76. Schedule or list of debts.
- 78. — Sufficiency.

(C) RESERVATIONS.

- ⌘ 87. Transactions before assignment.
- 98. Reservation of possession or control of property.
- 99. Reservation of surplus.

(D) PREFERENCES.

- ⌘ 104. Right of debtor to prefer creditor.
- 109. Preference of husband, wife, or other relatives.
- 111. Preferences not contained in assignment.
- 114. — Payments to creditors.
- 116. — Mortgages and other transfers as security.
- 118. Preferences in assignment in general.
- 126. Preferences between classes of creditors.
- 128. Preferences by firms or partners.
- 132. — Assignment by firm and partners.

(E) FRAUD.

- ⌘ 142. Intent, motive, and good faith of parties and beneficiaries.
- 146. — Knowledge, intent, and good faith of assignee and beneficiaries.
- 147. Transactions before assignment.
- 148. — In general.
- 151. Fraud in provisions of assignment in general.

(F) FILING, RECORDING, AND REGISTRATION.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. f. B. C. §§ 462-483.]

II. Construction and Operation in General.

- ⌘ 173. Property conveyed.
- 175. — Property included in description.
- 177. — Assignments by firms or partners.
- 181. — Property omitted from assignment or inventory.
- 199. Foreign assignments and extraterritorial effect of assignments.

III. Appointment, Qualification, and Tenure of Assignee or Trustee.

- ⌘ 201. Competency.

IV. Administration of Assigned Estate.

- ⌘ 223. Discovery and collection of assets.
- 227. — Collection and protection of assets.

V. Rights and Remedies of Creditors.

(A) IN AID OF ASSIGNMENT.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. f. B. C. §§ 840-867.]

(B) PRESENTATION, PROOF, AND PAYMENT OF CLAIMS.

- ⌘ 297. Estoppel to claim under assignment.
- 309. Preferences in assignment.
- 317. Interest.

(C) CLAIMS AND LIENS PRIOR OR SUPERIOR TO ASSIGNMENT.

- ⌘ 332. Rights to specific property or its proceeds.
- 338. Prior claims or liens as constituting illegal preferences.

(D) SETTING ASIDE ASSIGNMENT.

- ⌘ 341. Right to have assignment set aside.

VI. Rights and Remedies of Assignor.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. f. B. C. §§ 1084-1103.]

VII. Accounting, Settlement, and Discharge of Assignee.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. f. B. C. §§ 1104-1184.]

VIII. Liabilities on Assignees' Bonds.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. f. B. C. §§ 1185-1195.]

Cross-References.

See—

Bankruptcy, ¶60, 136-364.

Insolvency, ¶54-105.

Partnership, ¶151, 373.

Assignment as bar to dower, see Dower, ¶45.
Impairing obligation of contract, see Constitutional Law, ¶163.

I. REQUISITES AND VALIDITY.**(A) NATURE AND ESSENTIALS OF TRUSTS FOR CREDITORS.****¶2. Conveyances and transactions creating trust.**

See 4 Cent. Dig. Assign. f. B. C. §§ 1-13; 43 Cent. Dig. Sales, § 15.

¶8. — Assignments as distinguished from mortgages or pledges.

See 4 Cent. Dig. Assign. f. B. C. §§ 7, 8, 10.

A deed of trust executed by a partnership, conveying all its property to a trustee, who is given immediate possession, to secure the payment of debts therein named, to the exclusion of others, and reserving a right of redemption by providing that, if the grantors shall pay the debts secured, the deed shall be void, and authorizing the trustee, in case of their failure to pay, to sell the property, is a mortgage only, and not within the meaning of Rev. St. Mo. 1879, § 354, providing that every voluntary "assignment" made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor.—*Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 10 S. Ct. 1013, 34 L. Ed. 341.

An instrument recited that the maker does "bargain, sell, and deliver" to W. certain personal property, "to have and hold the same unto the said P., and his successors in this trust, forever," provided that, if the maker should, within 60 days, pay certain creditors named the specified amount of his indebtedness to them, the conveyance should be void, and the property restored to him, and that, in case of his failure so to pay, it should be the duty of W. or his successors to sell the property. *Held*, a deed of trust in the nature of a mortgage, and not an assignment for the benefit of creditors.—*W. B. Grimes Dry-Goods Co. v. Malcolm*, 17 S. Ct. 158, 164 U. S. 483, 41 L. Ed. 524.

¶10. Constructive assignments.

See 4 Cent. Dig. Assign. f. B. C. §§ 14-31; 43 Cent. Dig. Sales, § 15.

¶14. — Mortgages or other transfers as security.

See 4 Cent. Dig. Assign. f. B. C. §§ 21-25.

In Ohio a bill in equity alleging that defendant corporation made an assignment of its property for the benefit of its creditors, and that in contemplation of the assignment, and as part of the same transaction, it executed mortgages of all its property to the other defendants, with a fraudulent intent to prefer them as creditors of the company, and in fraud of complainant and other creditors, and asking that the mortgage property be decreed to inure to the benefit of the general creditors, is not

demurrable, since Rev. St. Ohio 1880, § 6343, provides that "all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors." *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 22 N. E. 293, followed.—*George T. Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 10 S. Ct. 1017, 34 L. Ed. 346.

An instrument was in scope and form a chattel mortgage, and recited that it was "intended as a chattel mortgage to secure the debts therein mentioned"; and that it was made to three creditors mentioned, in behalf of themselves and the other creditors named, because, on account of their great number, it would be inconvenient for all to act in its execution. It contained no condition of defeasance, and directed the mortgagees to sell all mortgaged property. *Held*, that this was a chattel mortgage, and not an assignment for benefit of creditors, with preferences, within Act Tex. March 24, 1879, as construed by the court of that state.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892.

The maker of certain notes executed a written instrument, in form a chattel mortgage, to the indorsers of the notes, conveying to them a stock of goods and fixtures described in it, which recited that the notes were all due, and that the indorsers had assumed the payment thereof to the holder, and provided that the indorsers should sell such stock and fixtures, and out of the proceeds pay the amount due on the notes, with interest and costs of sale, rendering any surplus to the maker; and by a clause providing for a defeasance on payment, by the maker to the indorsers, of said amount due and expenses or the balance due thereon, the goods unsold were to be delivered to the maker. *Held*, that the instrument was a chattel mortgage, securing preferred bona fide creditors, valid under the laws of Colorado, and was not a general assignment for the benefit of creditors, within Laws Colo. 1885, p. 43 (*Mills' Ann. St. p. 453*), authorizing such assignments of all a debtor's property, but providing (section 3) that no such deed of assignment shall be valid unless in terms for the benefit of all his creditors, and (section 18) that nothing in the act shall invalidate any conveyance or mortgage by the debtor, before the assignment, made in good faith, for a valid and valuable consideration. *White v. Cotzhausen*, 129 U. S. 329, 9 S. Ct. 309, 32 L. Ed. 677, distinguished.—*May v. Tenney*, 148 U. S. 60, 13 S. Ct. 491, 37 L. Ed. 368.

A mortgage of a part only of an insolvent debtor's property directly to the creditor is not an assignment for creditors, with preferences.—*Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 280.

17. — Several instruments or transactions.

See 4 Cent. Dig. Assign. 2. B. C. §§ 29-31.

Under the Illinois voluntary assignment act (1 Starr & C. St. 1303), which declares (section 13) that all preferences "in any assignment hereafter made" shall be void, when an insolvent debtor, realizing that he can no longer continue business, determines to yield the dominion of his entire estate, and, in execution of that purpose, executes in favor of certain of his creditors, who understand his purpose, confessions of judgment, conveyances, bills of sale, etc., at short intervals, and as parts of one transaction, such instruments constitute an assignment, within the meaning of the statute, and the preferences are void.—*White v. Cotzhausen*, 129 U. S. 329, 9 S. Ct. 309, 32 L. Ed. 877.

Where mortgages should be construed as executed simultaneously, and parts of one transaction, and as equivalent to a general assignment for the benefit of creditors, and such mortgages contain preferences as to certain creditors, they are void under the laws of Iowa respecting assignments.—*Etheridge v. Sperry*, 189 U. S. 266, 11 S. Ct. 565, 35 L. Ed. 171, affirming judgment *Sperry v. Ethridge*, 63 Iowa, 543, 19 N. W. 667.

Under Code Iowa 1873, § 2115, providing that no general assignment for the benefit of creditors shall be valid unless made for the benefit of all creditors in proportion to their respective claims, several instruments, executed by a debtor at about the same time, may be considered as parts of one transaction, and in law forming but one instrument; and if, as thus construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136, following *Burrows v. Lehn-dorf*, 8 Iowa (8 Clarke) 96.

But, although several such instruments are executed at about the same time, they are not necessarily to be considered as constituting but one transaction and one instrument; and whether they do or not, and whether they are in contravention of the statute, depends upon the circumstances of each case and the intent of the parties.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136, following *Van Patten v. Burr*, 55 Iowa, 224, 7 N. W. 522.

18. What law governs.

See 4 Cent. Dig. Assign. 2. B. C. §§ 75-86.

19. — In general.

See 4 Cent. Dig. Assign. 2. B. C. §§ 75-79, 81.

Act Minn. March 7, 1881, c. 148, providing that when a debtor's property is attached he may assign all his property for benefit of all his creditors who shall file releases, and that thereupon his property shall be equally distributed, is not invalid as to an attaching creditor who is a citizen of another state.—*Denny v. Bennett*, 128 U. S. 489, 9 S. Ct. 134, 32 L. Ed. 491, affirming *Bennett v. Denny*, 33 Minn. 530, 24 N. W. 193.

21. — Foreign assignments.

See 4 Cent. Dig. Assign. 2. B. C. §§ 32-36.

The insolvency laws of Idaho (Rev. St. Idaho T. §§ 5875-5932, forbidding preferences in favor of any creditor, refer only to domestic insolvents; and an assignment for the benefit of creditors, with preferences, made in Utah, and valid there, is good in Idaho, in respect to certain personal property there situated, as against the claims of a citizen of Minnesota.—*Barnett v. Kinney*, 147 U. S. 476, 13 S. Ct. 403, 37 L. Ed. 247, reversing judgment 2 Idaho, 706, 23 P. 922.

24. Right to make assignment.

See 4 Cent. Dig. Assign. 2. B. C. §§ 87, 89-92, 97.

27. — Partners.

See 4 Cent. Dig. Assign. 2. B. C. §§ 92, 93.

Act Tex. March 24, 1879, providing that any debtor "may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto," gives a limited partnership the right to make such assignment, and modifies, so far as such an assignment is prohibited thereby, Rev. St. Tex. art. 3460, declaring that every assignment by a limited partnership, when insolvent, or in contemplation of an insolvency, with intent of giving a preference to any creditor, shall be void as against the other creditors.—*Tracy v. Tuffy*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879.

29. Property to be included.

See 4 Cent. Dig. Assign. 2. B. C. §§ 107-111.

Sayles' Civ. St. p. 61, art. 65a, provides that every assignment for the benefit of creditors shall provide for the distribution of all the debtor's real and personal property other than that which is exempt by law from execution, among all his creditors, in proportion to their claims, and shall have that effect, "however made or expressed," and "shall be construed to pass all such estate, whether specified therein or not." Held that, when an assignment by a firm purports to convey firm property only, the statute does not act upon it so as to carry the title to individual property of the members; and hence such an assignment is void as to creditors who do not accept it, and the property is subject to attachment by them.—*Kennedy v. McKee*, 142 U. S. 606, 12 S. Ct. 303, 35 L. Ed. 1131, following *Donoho v. Fish*, 58 Tex. 164.

31. Partial assignments, or special assignments for particular creditors.

See 4 Cent. Dig. Assign. 2. B. C. §§ 112-118.

Code Iowa 1873, § 2115, providing that no general assignment for the benefit of creditors shall be valid unless made for the benefit of all creditors in proportion to their respective claims, does not prevent partial assignments with preferences, or sales or mortgages of any or all of the debtor's property in payment or security for indebtedness. Its operation is limited to general assignments, and does not destroy the *jus disponendi* which is incident to title.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136, following *Cowles v. Ricketts*, 1 Iowa (1 Clarke) 582.

34. Illegality of provisions in general.

See 4 Cent. Dig. Assign. 2. B. C. §§ 32, 34-61.

An assignment is not void because made to two assignees, while the statute speaks only of an "assignee," as Rev. St. Tex. 1879, art. 3183, § 4, declares that "the singular and plural number shall each include the other, unless otherwise expressly provided."—*Muller v. Norton*, 132 U. S. 501, 10 S. Ct. 147, 33 L. Ed. 397.

35. Provisions as to powers, rights, and liabilities of assignee.

See 4 Cent. Dig. Assign. 2. B. C. §§ 119-142.

The provisions of Gantt, Dig. Ark. pp. 207, 208, §§ 385, 387, requiring an assignee for benefit of creditors to file an inventory and execute a bond before the estate shall vest, and to sell the property assigned at public auction within 120 days after execution of the bond, on 30 days' notice of time and place of sale, are mandatory; and a deed of assignment authorizing the assignee to sell for cash as he may "deem

advisable and right, and to this end to use his own discretion, subject to the supervision of the creditors, * * * and to conduct and transact all of the business as he may deem proper in the exercise of a sound discretion," is void on its face.—*Jaffray v. McGehee*, 107 U. S. 361, 2 S. Ct. 367, 27 L. Ed. 495.

An assignment for the benefit of creditors which authorizes a sale by the assignees on credit, in violation of the Texas assignment laws, is not thereby rendered void.—*Muller v. Norton*, 132 U. S. 501, 10 S. Ct. 147, 33 L. Ed. 397, following *Cunningham v. Norton*, 125 U. S. 77, 8 S. Ct. 804, 31 L. Ed. 624.

A deed of assignment for the benefit of creditors "authorized and directed the assignees to take possession at once of all the property above conveyed, and convert the same into cash as soon and upon the best terms possible for the best interest of our creditors." *Held*, that the assignees were not given discretionary power to sell on credit.—*Muller v. Norton*, 132 U. S. 501, 10 S. Ct. 147, 33 L. Ed. 397.

◀42. Partial invalidity.

See 4 Cent. Dig. Assign. f. B. C. § 73, 74.

If a provision in an assignment is void, which directs that the surplus, after payment in full of the creditors who shall execute releases, shall be paid to the assignor, such provision may be rejected; but the assignment is none the less valid.—*Denny v. Bennett*, 128 U. S. 489, 9 S. Ct. 134, 32 L. Ed. 491, affirming *Bennett v. Denny*, 33 Minn. 530, 24 N. W. 193.

(B) FORM AND REQUISITES OF INSTRUMENTS.

◀56. Recitals of grounds for assignment.

See 4 Cent. Dig. Assign. f. B. C. § 219, 220.

A statement in an assignment under Act Tex. March 24, 1879, § 3, for the benefit of consenting creditors only, that the debtor "is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full," warrants the conclusion that the assignor was then insolvent, or contemplating insolvency.—*Cunningham v. Norton*, 125 U. S. 77, 8 S. Ct. 804, 31 L. Ed. 624.

◀76. Schedule or list of debts.

See 4 Cent. Dig. Assign. f. B. C. § 271-283, 286-288.

◀78. — Sufficiency.

See 4 Cent. Dig. Assign. f. B. C. § 275-286.

An assignment under the Texas statute is not void because the verified schedule of the names of the creditors and their respective debts, attached to it, under Gen. Laws Tex. 1879, p. 57, § 2, embraces a debt which the law provides cannot be paid until all other creditors are paid, since the assignee can disregard it, and administer the trust as if it were not mentioned.—*Tracy v. Tuffy*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879.

(C) RESERVATIONS.

◀87. Transactions before assignment.

See 4 Cent. Dig. Assign. f. B. C. § 305.

An insolvent debtor kept a store, from which it was customary for his residence to draw its supplies. His wife was one of his clerks, and she was privileged to take money from the cash drawer in the course of business. *Held*, that the continuance of these things during the time immediately preceding the assignment did not operate to invalidate it.—*Estes v. Gunter*, 122 U. S. 450, 7 S. Ct. 1275, 30 L. Ed. 1228.

◀98. Reservation of possession or control of property.

See 4 Cent. Dig. Assign. f. B. C. § 336-331.

An insolvent debtor, just before he made and recorded his general assignment, executed and put of record a mortgage of certain real estate included in the assignment, in which he secured sureties on his notes. Until default, the debtor was to remain in possession of the real estate conveyed. *Held*, that the assignment was not rendered invalid by the reservation of the possession of the land mortgaged to the debtor.—*Estes v. Gunter*, 122 U. S. 450, 7 S. Ct. 1275, 30 L. Ed. 1228.

A preferential assignment by an insolvent firm of a stock of goods for the benefit of creditors, which provides that the assignors shall remain in possession and continue the business, which is not recorded or made known to third parties until an unpreferred creditor is about to obtain judgment, and under which the assignors are allowed to continue the business the same as before until they are declared bankrupts, is void, as being intended to hinder and delay creditors, though no actual fraudulent intent is shown.—*Means v. Dowd*, 128 U. S. 273, 9 S. Ct. 65, 32 L. Ed. 429.

◀99. Reservation of surplus.

See 4 Cent. Dig. Assign. f. B. C. § 332-334.

The fact that an assignment under Act Tex. March 24, 1879, § 3, for the benefit of such creditors as consent to accept their proportionate shares of the estate in full of their respective claims, provides that the surplus, if any, remaining after paying such consenting creditors in full, shall be turned over to the debtor, does not render the assignment void, as tending to hinder and delay nonconsenting creditors, the rights of such creditors in the surplus, being preserved by the remedy of garnishment provided by section 8.—*Cunningham v. Norton*, 125 U. S. 77, 8 S. Ct. 804, 31 L. Ed. 624.

An assignment is not invalid because it provides that the surplus, if any, shall be turned over to the debtor, instead of being paid into the district court, as provided in Act Tex. March 24, 1879, § 16.—*Id.*

If a provision in an assignment is void which directs that the surplus after payment in full of the creditors who shall execute releases shall be paid to the assignor, such provision may be rejected.—*Denny v. Bennett*, 128 U. S. 489, 9 S. Ct. 134, 32 L. Ed. 491, affirming *Bennett v. Denny*, 33 Minn. 530, 24 N. W. 193.

Though an assignment, made under Act Minn. March 7, 1881, permitting a debtor whose property is levied on to assign for the equal benefit of his creditors who shall file releases, goes beyond the requirement of the law, and requires the surplus, if any, after paying the claims of creditors who have filed releases, to be paid over to the assignors, it is not thereby invalid, as the fund may still be reached by the nonreleasing creditors.—*Id.*

(D) PREFERENCES.

◀104. Right of debtor to prefer creditor.

In Mississippi a general assignment by an insolvent debtor is not invalid because it contains preferences.—*Estes v. Gunter*, 122 U. S. 450, 7 S. Ct. 1275, 30 L. Ed. 1228.

◀109. Preference of husband, wife, or other relatives.

See 4 Cent. Dig. Assign. f. B. C. § 347, 399-401.

The fact that during the period immediately preceding the assignment which the insolvent debtor knew was impending, and for which he was getting ready, he paid money to his wife in settlement of a bona fide loan which she

had made him, does not impair the subsequent assignment.—*Estes v. Gunter*, 122 U. S. 450, 7 S. Ct. 1275, 30 L. Ed. 1228.

111. Preferences not contained in assignment.

See 4 Cent. Dig. Assign. f. B. C. §§ 337-352.

114. — Payments to creditors.

See 4 Cent. Dig. Assign. f. B. C. §§ 338, 348.

On the day before making an assignment a merchant gave two creditors certain drafts in part payment of their claims, and on the morning of the assignment he wrote a letter authorizing a railroad company to hold certain freight as security for moneys due it. This letter was in pursuance of a long standing agreement to always leave enough goods on the track to secure freights due. The debtor testified that when making the first two payments he knew that he would probably have to stop business soon, but positively stated that the assignment was not determined on until the morning it was made. The payments were not more than were ordinarily made in the course of business. The debtor had money in the bank that he might have drawn out and pocketed, or used in paying a mortgage on his homestead, but he did neither. *Held*, that while these payments operated to prefer creditors, and constituted such evidence as would probably sustain a finding by a jury that they were made with intent to evade the statute against preferences, yet they would not be held as a matter of law to render the assignment void.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136.

116. — Mortgages and other transfers as security.

See 4 Cent. Dig. Assign. f. B. C. §§ 339, 345.

The fact that about two months before making an assignment, and when there were no signs of interference from his creditors, a debtors made two chattel mortgages,—one to secure an indorser, and the other, by order of the probate court, to secure his minor granddaughter, of whose estate he was guardian, for property used in his business,—does not shown a purpose to prefer these persons as creditors in contemplation of an assignment, so as to require that the mortgages should be considered as part of the same transaction with the subsequent assignment, and thus render it void because of the preferences.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136.

118. Preferences in assignment in general.

See 4 Cent. Dig. Assign. f. B. C. §§ 353, 356, 357, 370-372, 375, 378-382, 384, 389, 390, 392, 395, 398.

An assignment by members of a private banking firm, with preferences in favor of their own depositors, is not invalid because one of the assignors orally promised a creditor, when making an advancement to him in reduction of their indebtedness, that they would make no assignment giving preferences against him.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

126. Preferences between classes of creditors.

See 4 Cent. Dig. Assign. f. B. C. §§ 391, 403.

Where an assignment for the benefit of creditors is made by members of a private banking firm, who are also officers of a national bank, and as such have misappropriated its funds, the bank cannot complain of certain preferences in the deed in favor of the firm's own depositors, the object of which was to equalize as between what they owed their own depositors and what they owed the bank, taking into consideration a large advancement of securities made to the bank before the general assignment, in reduction of their debt to the bank.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

128. Preferences by firms or partners.

See 4 Cent. Dig. Assign. f. B. C. §§ 403-411.

132. — Assignment by firm and partners.

See 4 Cent. Dig. Assign. f. B. C. §§ 404-411.

An assignment for benefit of creditors, made by the members of a private banking firm in Virginia, and conveying all their individual and firm property for both individual and firm debts, will not be held fraudulent on its face because it appropriates partnership assets to pay individual debts in preference to partnership debts, where the state court has decided that such deeds should be construed distributively, and the partnership assets should be applied to partnership debts, and individual assets to individual debts; and also where both the assets and the debts were so mixed that it was impossible, at the time of the assignment, to distinguish between them.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

(E) FRAUD.

142. Intent, motive, and good faith of parties and beneficiaries.

See 4 Cent. Dig. Assign. f. B. C. §§ 40-42, 421-434.

146. — Knowledge, intent, and good faith of assignee and beneficiaries.

See 4 Cent. Dig. Assign. f. B. C. §§ 427-434.

An assignment for the benefit of creditors is not invalidated by the fact that the grantor fraudulently omitted certain property from the assignment, where such omission was not known to the assignee or the beneficiaries of the trust at the time they accepted the conveyance.—*Emerson v. Senter*, 118 U. S. 3, 6 S. Ct. 981, 30 L. Ed. 49.

147. Transactions before assignment.

See 4 Cent. Dig. Assign. f. B. C. §§ 415½, 428-440.

148. — In general.

See 4 Cent. Dig. Assign. f. B. C. §§ 433, 439.

The assignors, who assigned as individuals, and as members of a private banking firm which was largely indebted to depositors, were also the officers of a national bank, and as such had misappropriated the funds of the bank, and had given themselves large unsecured credit. No proper accounts were kept, and the funds were mixed, and large speculations were indulged in, both with the money of the bank and with that of the depositors of the private firm. *Held*, that the violation by the assignors of their fiduciary relations with the bank, or their treatment of their depositors, did not render the assignment fraudulent.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

The fact that a debt was fraudulently contracted does not of itself prove that a subsequent assignment for the benefit of creditors is in violation of the statute, and void.—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136.

151. Fraud in provisions of assignment in general.

See 4 Cent. Dig. Assign. f. B. C. §§ 412, 413.

A deed of assignment executed in Virginia, after preferring certain creditors, and authorizing the assignees to sell the property either at public auction or private sale, provided that at any auction sale any creditor of the second class might purchase any property and pay at its full face value the amount found due such creditor, or so much thereof as might enable him to complete the payment of his purchase money, and that the assignees might divide the land to be thus sold into lots, in order to enable as many creditors as possible to become bidders on these

terms. *Held*, that the provision was not necessarily fraudulent, and therefore, under the Virginia decisions, did not avoid the assignment.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

(F) FILING, RECORDING, AND REGISTRATION.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. f. B. C. §§ 462-483.]

II. CONSTRUCTION AND OPERATION IN GENERAL.

◀173. Property conveyed.

See 4 Cent. Dig. Assign. f. B. C. §§ 512-554.

◀175. — Property included in description.

See 4 Cent. Dig. Assign. f. B. C. §§ 512-554; 43 Cent. Dig. Sales, §§ 538, 591, 835.

A conveyance of "all the real, personal, and mixed property" of the grantor not exempt from execution, specifically describing certain real and personal property, in trust "to sell and have sold all the foregoing property, and any and all other property" belonging to him not exempt from execution, "which by any oversight may have been omitted in the foregoing list," and apply the proceeds in payment of his debts, passes all the estates and interests in property which at its date the grantor held, which he could alien, and which were liable at law or in equity for the payment of his debts, including property not described in it, held in trust for him under a will.—*Spindle v. Shreve*, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512.

An assignment for the benefit of consenting creditors only, under Act Tex. March 24, 1879, § 3, conveyed all the assignor's "lands, tenements, hereditaments, goods, chattels, property, and choses in action of every name, nature, and description, wheresoever the same may be, except such property as may be, by the constitution and laws of the state, exempt from forced sale." *Held*, under section 1 of the act, which provides that the assignment, however expressed, shall be construed to pass all the debtor's estate, whether specified or not, that the description was sufficient to convey all his property.—*Cunningham v. Norton*, 125 U. S. 77, 8 S. Ct. 804, 31 L. Ed. 624.

As under the insolvency laws of Louisiana, as construed by the supreme court of that state, when a *cessio bonorum* has been made by a debtor for the benefit of the creditors, and accepted by the court under the creditors, a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors represented by the syndic as their trustees, and pass to the creditors by the *cessio*, whether included in the debtor's schedule or not, the creditors' right to certain property of the debtor cannot be affected by the fact that he did not intend to surrender it, or that the *cessio*, as accepted, recited that it was the property of his wife.—*Geillinger v. Philippi*, 133 U. S. 246, 10 S. Ct. 266, 33 L. Ed. 614.

Where a debtor makes an assignment of a portion of his estate, it is not affected by the provision of *McClain's Ann. St. Iowa*, § 2117, that the schedule attached to a general assignment shall not be conclusive, but the assignment shall vest in the assignee title to any other property owned by the assignor.—*Bock v. Perkins*, 139 U. S. 628, 11 S. Ct. 677, 35 L. Ed. 314, affirming judgment (C. C.) 28 F. 123.

◀177. — Assignments by firms or partners.

See 4 Cent. Dig. Assign. f. B. C. §§ 548, 549.

An assignment for the benefit of creditors of a limited partnership, conveying all the prop-

erty of the general partner real and personal, which he may own as copartner or individually, is sufficient to convey all the property owned by the partnership, and the members thereof, in their separate rights, not exempted from a forced sale, including the interest of the special partner. It is not necessary to set out the individual property of the latter, for under the statute it cannot be taken for the firm debts.—*Tracy v. Tuffy*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879.

◀181. — Property omitted from assignment or inventory.

See 4 Cent. Dig. Assign. f. B. C. §§ 550-552.

A debtor made an assignment for the benefit of his creditors of "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed * * * or intended so to be." The schedule, which was verified by the oath of the assignor, made no mention of his stock of merchandise. *Held*, that title to such stock did not pass to the assignee, but it remained subject to attachments against the assignor.—*Bock v. Perkins*, 139 U. S. 628, 11 S. Ct. 677, 35 L. Ed. 314, affirming judgment (C. C.) 28 F. 123.

◀199. Foreign assignments and extra-territorial effect of assignments.

See 4 Cent. Dig. Assign. f. B. C. §§ 642-657.

While a voluntary or common-law assignment of a debtor's property will in general be respected by the courts of other states, except so far as they conflict with the rights of local creditors, a statutory assignment under a state insolvent law does not transfer title to property located in another state, as against attaching creditors, but is operative only so far as the courts of that state see fit to respect it.—*Security Trust Co. v. Dodd*, 19 S. Ct. 545, 173 U. S. 624, 43 L. Ed. 835.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE OR TRUSTEE.

◀201. Competency.

See 4 Cent. Dig. Assign. f. B. C. §§ 661-667.

In the absence of statutory requirement, the assignee of an insolvent debtor need not reside in the state where the debtor resides, or the property is situated; and no such requirement will be implied from a statute providing that he shall execute a bond, which shall be "filed with the county clerk of his county."—*Bachrack v. Norton*, 132 U. S. 337, 10 S. Ct. 106, 33 L. Ed. 377.

IV. ADMINISTRATION OF ASSIGNED ESTATE.

Trade-mark as property passing to assignee, see Trade-Marks and Trade-Names, ▶37.

◀223. Discovery and collection of assets.

See 4 Cent. Dig. Assign. f. B. C. §§ 747-756.

◀227. — Collection and protection of assets.

See 4 Cent. Dig. Assign. f. B. C. §§ 748-750.

An assignee for the benefit of creditors of a corporation has no better standing than his assignor to recover securities alleged to have been pledged to the assignor to secure it as indorser of certain notes, the holders of which have proved their claims as creditors. Decree 22 C. A. 606, 76 F. 905, affirmed.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

V. RIGHTS AND REMEDIES OF CREDITORS.

(A) IN AID OF ASSIGNMENT.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. 2. B. C. §§ 840-867.]

(B) PRESENTATION, PROOF, AND PAYMENT OF CLAIMS.

327. Estoppel to claim under assignment.

See 4 Cent. Dig. Assign. 2. B. C. §§ 871-874.

Where an assignment for the benefit of creditors is made by members of a private banking firm, who are also officers of a national bank, and as such have misappropriated its funds, the receiver of the bank is entitled to a surrender by the assignee of such property purchased by the assignors with the funds of the bank as he elects to take, but is not entitled to any preference as to the mass of property, which cannot be distinguished as belonging to any particular fund; and the receiver, by electing to take property to which he is thus entitled, is not estopped from receiving the full benefit of the deed of assignment.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

309. Preferences in assignment.

See 4 Cent. Dig. Assign. 2. B. C. §§ 903-906.

Creditors whom the debtor has attempted to prefer, but whose preferences are void under the insolvent act, are entitled to share pro rata with all the other creditors.—*White v. Cotzhausen*, 129 U. S. 829, 9 S. Ct. 309, 32 L. Ed. 677.

317. Interest.

See 4 Cent. Dig. Assign. 2. B. C. § 927.

A decree against an estate in the hands of a trustee for creditors for unpaid stock subscriptions is not objectionable because allowing interest after the date of the assignment, in the absence of anything showing that the assigned estate was insufficient to pay the assignor's debts in full.—*Lloyd v. Preston*, 146 U. S. 630, 13 S. Ct. 131, 36 L. Ed. 1111.

(C) CLAIMS AND LIENS PRIOR OR SUPERIOR TO ASSIGNMENT.

332. Rights to specific property or its proceeds.

See 4 Cent. Dig. Assign. 2. B. C. §§ 961-963.

Several members of a private banking firm were also officers of a national bank with which the firm carried on most of its business. While acting as such officers, the members of the firm

appropriated large sums from the bank. A receiver was appointed for the bank, and the firm immediately assigned to several trustees, one of whom had been counsel for the firm, and knew of its indebtedness. *Held*, that the trustees were chargeable with notice that certain property was purchased with funds of the bank, though, from the disordered condition of the firm's books, it was difficult to distinguish such property from the rest.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

338. Prior claims or liens as constituting illegal preferences.

See 4 Cent. Dig. Assign. 2. B. C. §§ 1000-1012.

Previous to the amendment of Code Ala. § 1787, by Act Feb. 21, 1893, a valid preferential sale made by a debtor to one of his creditors was not affected by the making of a general assignment on the same day.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

(D) SETTING ASIDE ASSIGNMENT.

Laches in suit to set aside, see Equity, 72.

341. Right to have assignment set aside.

See 4 Cent. Dig. Assign. 2. B. C. §§ 1036-1041.

Simple contract creditors, who have reduced their claims to judgment, have no standing in the United States circuit court, sitting as a court of equity, on a trial to vacate a fraudulent assignment for the benefit of creditors, though by Code Miss. 1880, §§ 1843, 1845, the state courts of chancery are given prosecution of appeals of creditors who have obtained judgments at law to vacate such assignment, and subject the property to their demands.—*Cates v. Allen*, 149 U. S. 451, 13 S. Ct. 883, 37 L. Ed. 904.

VI. RIGHTS AND REMEDIES OF ASSIGNOR.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. 2. B. C. §§ 1064-1106.]

VII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. 2. B. C. §§ 1104-1184.]

VIII. LIABILITIES ON ASSIGNEES' BONDS.

[No paragraphs or references in this Digest. But see 4 Cent. Dig. Assign. 2. B. C. §§ 1186-1196.]

ASSISTANCE, WRIT OF.

Scope-Note.

[INCLUDES putting in possession of real property persons adjudged to be entitled thereto or purchasers thereof under orders or decrees in equitable actions; nature and scope of the remedy in general; in what cases, and to and against whom, and as to what property, it is allowed; issuance, requisites, and validity of writs of assistance; and execution and effect thereof.

7. Jurisdiction to issue.

See 4 Cent. Dig. Assist. § 6.

A court of equity has power to issue writs of assistance or possession for the purpose of

enforcing its orders and decrees.—*Gormley v. Clark*, 134 U. S. 338, 10 S. Ct. 554, 33 L. Ed. 909.

ASSOCIATIONS.

Scope-Note.

[INCLUDES unincorporated associations in general; their nature, formation, and dissolution; rights, powers, duties, and liabilities of such bodies, their members and officers, as among themselves and as to others, incident to the existence of the association, and legal proceedings for enforcement thereof.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ◄15. Property and funds of association.
- 25. Dissolution.

Cross-References.

See—

Building and Loan Associations.
Colleges and Universities, ◄2.
Exchanges.

Mutual benefit insurance associations, see Insurance, ◄700-759.

Regulation of trade associations as interference with commerce, see Commerce, ◄29.

◄15. Property and funds of association.

See 4 Cent. Dig. Assoc. §§ 19-25.

A communistic society will be presumed so to have discharged its obligation to deceased members who contributed no property to the society, but in consideration of support dedicated their labor and services, as to leave no undischarged obligations or rights for distant relatives of such deceased members to assert or claim against the community or its property. Judgment 103 F. 561, 43 C. C. A. 323, affirmed. —Schwartz v. Duss, 23 S. Ct. 4, 187 U. S. 8, 47 L. Ed. 53.

Any claim which, as a matter of right, could have been made on a communistic society under a provision of its plan that members who contributed no property to the society should, on withdrawing, receive such sum as the leaders of the society should determine, will from long

lapse of time be presumed to have been demanded and the demand satisfied.—Id.

◄25. Dissolution.

See 4 Cent. Dig. Assoc. § 47; 12 Cent. Dig. Corp. § 2386.

The adoption by the members of a communistic society of a plan by which all property contributed to the use and benefit of the community was to be "joint and indivisible stock," and all contributions were to be irrevocable, was not the creation by the members of a trust in the property for the benefit of the society, as such, which, on the doctrine of resulting trusts conferred on the descendants of members who contributed no property to the society any such proprietary right or interest as entitled them on the dissolution of the society to share in its property or assets, or to have an accounting. Judgment 103 F. 561, 43 C. C. A. 323, affirmed. —Schwartz v. Duss, 23 S. Ct. 4, 187 U. S. 8, 47 L. Ed. 53.

ASSUMPSIT, ACTION OF.

Scope-Note.

[INCLUDES actions of assumpsit, as distinguished from other forms of action; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom they may be maintained, proceedings therein; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ◄14. Time to sue and limitations.
- 17. Pleading.
- 21. — Replication and subsequent pleadings.
- 23. — Issues, proof, and variance.

Cross-References.

Application of instructions to evidence, see Trial, ◄252.

See—

Account Stated.
Money Received.

See—

Work and Labor.

Statutory limitations, see Limitation of Actions, ◄18.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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14. Time to sue and limitations.

See 5 Cent. Dig. Assumpsit, §§ 70-75.

An action arising out of defendant's failure to perform a certain duty, in consequence of which plaintiff was compelled to perform it, is based on an implied assumpsit, to which the statute of limitations concerning actions on simple contracts is applicable, and is not based on the statute, though the duty which defendant failed to perform was statutory.—*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 S. Ct. 19, 33 L. Ed. 231; *Washington & G. Ry. Co. v. District of Columbia*, 136 U. S. 653, 10 S. Ct. 1075, 34 L. Ed. 549.

17. Pleading.

See 5 Cent. Dig. Assumpsit, §§ 79-152.

21. — Replication and subsequent pleadings.

See 5 Cent. Dig. Assumpsit, §§ 117-120.

Plaintiff declared in assumpsit for the value of a quantity of wheat. The answer set up a note, and chattel mortgage to secure the same, and alleged that the wheat was delivered and received in payment for such note. The replication stated a contract, by the terms of which defendant was to convey certain land to plaintiff, who was to pay for the same by such note; that the wheat had been delivered, but that, by reason of defendant's inability to make title to the land, plaintiff had rescinded the contract. *Held*, that plaintiff might recover upon the complaint; the new matter in the replication not constituting a departure from the cause of action set forth in the complaint, within the provisions of the Code of Washington Territory.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 1 Wash. St. 549, 20 P. 583, distinguishing *Distler v. Dabney*, 3 Wash. St. 200, 28 P. 335.

23. — Issues, proof, and variance.

See 5 Cent. Dig. Assumpsit, §§ 130-152; 39 Cent. Dig. Plead. § 1342.

In an action of indebitatus assumpsit by a steamship company, the declaration alleged that defendant was indebted to plaintiff for moneys

illegally exacted under color of certain laws in the state of New York concerning passengers in vessels coming to the state, and concerning the powers and duties of commissioners of emigration, and for the regulation of marine hospitals, and further averred a promise in consideration of such indebtedness. An answer was filed, setting up as a defense an act of congress to legalize the collection of head moneys already paid, approved June 19, 1878. *Held*, that a judgment for defendant on the pleadings was error, because it did not appear from the record that the money sued for was within the description of the act of congress.—*Liverpool, N. Y. & P. S. S. Co. v. Emigration Com'rs*, 113 U. S. 83, 5 S. Ct. 352, 28 L. Ed. 899.

In assumpsit, under a declaration containing a special count on a note, and also the common counts, a note varying from one specially pleaded is admissible, under the common counts, as evidence of money had and received, in connection with evidence that defendant admitted his indebtedness on the note.—*Hopkins v. Orr*, 124 U. S. 510, 8 S. Ct. 590, 31 L. Ed. 523.

Where, in a suit by executors, the declaration consists of a special count on a note described as made by defendant payable to his own order, and by him indorsed and delivered to plaintiff's testator, and the common counts alleging an indebtedness to the testator, a note corresponding to the one specially counted on, except that it is indorsed to the executors, is admissible in evidence under the common counts.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

ASSUMPTION.

As to facts by trial court, see—

Criminal Law, 761.

Trial, 190-192.

Indebtedness on division of state, see States, 15.

Of debt, see Mortgages, 279-283.

Of risk, see Master and Servant, 204-223, 273, 288.

ASYLUMS.

Scope-Note.

[INCLUDES institutions for protection or relief of afflicted or unfortunate persons, whether founded or maintained by private means or in part or wholly by government; establishment, maintenance, regulation, and management of such institutions; and rights, powers, duties, and liabilities of managers and other officers, etc., thereof.]

3. Regulation and supervision.

See 5 Cent. Dig. Asyl. § 2.

While Act Cong. Jan. 21, 1871 (16 Stat. 399, c. 25), ceding back to the state of Ohio jurisdiction over property theretofore ceded to the United States for a soldiers' home, conferred jurisdiction on the state over the place

or ground where the institution was located, it conferred no jurisdiction on the state's authorities, under its police power, to regulate or prohibit the furnishing of any article of food to the inmates of the home by the federal authorities. Order. In re Thomas, 87 F. 453, 31 C. C. A. 80, affirmed.—*State of Ohio v. Thomas*, 19 S. Ct. 453, 173 U. S. 276, 43 L. Ed. 699.

ATTACHMENT.

Scope-Note.

[INCLUDES taking and keeping in legal custody property of defendants in civil actions as security for payment of judgments that may be recovered against them therein; nature and scope of the remedy in general; in what cases and to and against whom it is allowed, and property subject thereto; grounds of attachment, and jurisdiction over and proceedings to obtain attachments; issuance, requisites, and validity of writs, warrants, etc., of attachment, and amendment thereof; levy or service, and proceedings incident thereto, and lien of attachments; quashing, vacating, or setting aside writs, warrants, etc., of attachment, dissolution thereof, or discharge of property from levy on giving security, and abandonment of attachment or of levy; claims of third persons to property levied on, interventions, and trial of right of property; return of warrants, writs, etc.; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., attachments; and liabilities of persons other than officers for wrongfully procuring issuance, levy, etc., of attachments.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds.

(A) NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES.

- ⌘ 2. Constitutional and statutory provisions.
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- 4. — In general.
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(B) GROUNDS OF ATTACHMENT.

- ⌘ 39. Fraudulent Transfer or other disposition of property.
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II. Property Subject to Attachment.

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(A) JURISDICTION AND VENUE.

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(C) SECURITY.

IV. Writ or Warrant.

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- 164. — Personal property in general.
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VI. Proceedings to Support or Enforce.

- 205. Process in action and service on defendant.
- 209. — Publication or other notice.

VII. Quashing, Vacating, Dissolution, or Abandonment.

VIII. Claims by Third Persons.

- 290. Intervention to contest attachment.
- 291. — Right to intervene.
- 301. Proceedings for establishment and determination of claims to property.
- 308. — Evidence.

IX. Return.

[No paragraphs or references in this Digest. But see 5 Cent. Dig. Attach. §§ 1148-1179.]

X. Liabilities on Bonds or Undertakings.

- 330. Accrual or release of liability by breach or fulfillment of conditions.
- 334. — Bonds or undertakings to discharge attachment.
- 341. Actions.
- 351. — Damages.

XI. Wrongful Attachment.

- 367. Actions.
- 368. — Nature and form.

Cross-References.

See—
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Fraudulent Conveyances, 228.
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Sequestration.
Against national banks, see Banks and Banking, 278.
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Due process of law, see Constitutional Law, 312.

Exemptions, see—
Exemptions.
Homestead.
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Practice in admiralty, see Admiralty, 47.
Restraining prosecution as denying privileges and immunities of citizens, see Constitutional Law, 207.
Review of decisions, see Appeal and Error, 71, 99.

I. NATURE AND GROUNDS.

(A) NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES.

2. Constitutional and statutory provisions.

See 5 Cent. Dig. Attach. §§ 5-7.

Act Ariz. March 6, 1891, amending Rev. St. Ariz. 1887, c. 1, tit. 4, relating to attachments and garnishments and providing that plaintiff, "at the time of issuing summons, or at any time afterwards, may have the property of the defendant attached," etc., was inconsistent with, and by implication repealed, paragraph 42 of the amendment act, which provided that an attachment "may be issued * * * either at the commencement of the suit or at any time during its progress."—*Henrietta Min. & Mill. Co. v. Gardner*, 19 S. Ct. 327, 173 U. S. 123, 43 L. Ed. 637, reversing judgment 81 P. 1126, 5 Ariz. 211.

3. Actions in which attachment is authorized.

See 5 Cent. Dig. Attach. §§ 8-23.

4. — In general.

See 5 Cent. Dig. Attach. §§ 8-10.

The right to an attachment in an action to recover the value of goods which have been

conveyed to the defendant in fraud of creditors is not to be denied on the ground that the action is not for a debt, but to recover a penalty. Judgment 57 N. E. 337, 176 Mass. 48, affirmed. —*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573.

(B) GROUNDS OF ATTACHMENT.

39. Fraudulent transfer or other disposition of property.

See 5 Cent. Dig. Attach. §§ 22-119.

44. — Preferences to creditors.

See 5 Cent. Dig. Attach. § 110.

Code Miss. 1871, § 1420, enumerates, as one of the grounds of attachment, a disposition of his property by the debtor "with an intent to defraud his creditors, or give an unfair preference to some of them." *Held*, that no preference can be "unfair" which is legal; that to be illegal it must be fraudulent; and the provision is therefore surplusage. It was therefore error to instruct the jury that a preference given to the exclusion of some of the creditors, when the debtor was insolvent and knew that he would be unable for a great length of time to pay all his debts, was an "unfair preference, within the statute."—*Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 S. Ct. 369, 27 L. Ed. 211.

II. PROPERTY SUBJECT TO ATTACHMENT.

Cars of foreign carrier, interference with interstate commerce, see Commerce, ¶81.

Exemptions, see—
Exemptions.
Homestead.

¶63. Ownership or possession of property.

See 5 Cent. Dig. Attach. §§ 167-180.

The owner of land conveyed it to his nephew for the purpose of defrauding creditors, and it was afterwards conveyed to one I. without consideration. I. executed a mortgage on the land to secure a loan, which was afterwards foreclosed, and the land was purchased by the mortgagee. Shortly after the original owner had conveyed the land, a creditor, whom the conveyance was intended to defraud, attached it, and in the action judgment was rendered for the amount of the debt, and foreclosure of the attachment lien, which was had, and the land was purchased by the attaching creditor. This was after the conveyance to I., and the execution of the mortgage by him. *Held* that, as the laws of Texas declare conveyances in fraud of creditors absolutely void, there was nothing to affect the creditor's right to attach the land as he did, and title thereto vests in him under the attachment sale; for I.'s mortgagee, having purchased the land pendente lite, took it subject to the attachment lien.—*Thompson v. Baker*, 141 U. S. 648, 12 S. Ct. 89, 35 L. Ed. 889.

III. PROCEEDINGS TO PROCURE.

(A) JURISDICTION AND VENUE.

See Appearance, ¶19.

¶69. Jurisdiction of particular courts.

See 5 Cent. Dig. Attach. § 196; 13 Cent. Dig. Courts, § 412.

The provision in the organic act of Oklahoma conferring on the supreme and district courts "chancery as well as common-law jurisdiction" does not give such courts exclusive jurisdiction to issue attachments, so as to render void an act of the legislature authorizing the probate judge to issue attachments; for the issuance of attachments under the territorial statutes (St. Okl. 1893, §§ 4120, 4121), which are merely a reproduction of the Kansas law, is a ministerial, and not a judicial, act. Judgment (Okl.) 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

¶70. Authority of judges and judicial officers.

See 5 Cent. Dig. Attach. § 197.

Under statutes containing particular requirements as to what shall be stated in an affidavit for attachment, so that the grounds of attachment may be alleged in the language of the statute, the authority to grant the writ is ministerial, and not judicial, in its nature. Judgment 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

¶72. Jurisdiction of person of defendant.

See 5 Cent. Dig. Attach. § 199.

The provision in the organic act of Oklahoma territory requiring all civil actions to be brought in the county where the defendant resides or can be found does not prevent the courts from acquiring, by means of foreign attachment, jurisdiction of nonresident defendants, to the extent of the property levied upon.

Judgment 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

¶75. Change of venue.

See 5 Cent. Dig. Attach. § 202.

The fact that in changing the venue of an action the transcript was not certified by the seal of the court in which the suit was brought will not render the writ of attachment and the proceedings thereunder void.—*Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

(B) AFFIDAVITS.

¶102. Averments as to cause of action.

See 5 Cent. Dig. Attach. §§ 263-272.

The fact that a petition for attachment described the judgment sued on as having been rendered on May 12th, when in fact it was not rendered until September 12th following, will not affect the writ and the proceedings thereunder.—*Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

¶110. Averments as to grounds of attachment.

See 5 Cent. Dig. Attach. §§ 292-322.

¶115. — Alternative or disjunctive statements.

See 5 Cent. Dig. Attach. §§ 315-322.

Rev. St. Tex. art. 152, gives as a ground for commencing suit by attachment "that the defendant is not a resident of the state, or is a foreign corporation, or is acting as such." *Held*, that an affidavit for attachment alleging that defendant "is not a resident corporation, or is a foreign corporation, or is acting as such," was not objectionable as alleging in the disjunctive one or the other of two distinct causes of action, there being but the single cause of nonresidence.—*Société Foncière et Agricole des Etats Unis v. Milliken*, 135 U. S. 304, 10 S. Ct. 823, 34 L. Ed. 208.

¶125. Defects, objections, and waiver.

See 5 Cent. Dig. Attach. §§ 244-250.

In an action of trespass by one claiming property against a marshal levying thereon under a writ of attachment issued by a United States circuit court, such writ will not be considered void because of a defect in the affidavit on which it was issued, though it might be avoided in a proper proceeding.—*Mathews v. Densmore*, 109 U. S. 216, 3 S. Ct. 126, 27 L. Ed. 912.

(C) SECURITY.

See 5 Cent. Dig. Attach. §§ 351-387.

Due process of law, see Constitutional Law, ¶312.

Equal protection of laws, see Constitutional Law, ¶249.

IV. WRIT OR WARRANT.

¶145. Form and requisites in general.

See 5 Cent. Dig. Attach. §§ 403-410.

A writ of attachment, though not impressed with such a court seal as the law required, is not void where the clerk affixed a private seal or scroll, with the statement that no seal had yet been secured.—*Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

¶153. Directions for service and return.

See 5 Cent. Dig. Attach. §§ 428-431.

Where a writ of attachment was made returnable on a day which had not yet been fixed

as the first day of the next term, but it was subsequently fixed on that day, the writ and proceedings thereunder were valid.—Wehrman v. Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

155. **Alias writs.**

See 5 Cent. Dig. Attach. §§ 52, 53.

An alias attachment, even if authorized by the New Mexico statutes, cannot support a judgment, where such attachment did not precede publication, as is required by the scheme provided by those statutes for the commencement of actions by attachment. Judgment, Dye v. Crary (N. M. 1906) 85 P. 1038, 9 L. R. A. (N. S.) 1136, affirmed.—Crary v. Dye, 28 S. Ct. 360, 208 U. S. 515, 52 L. Ed. 595.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

Due process of law, see Constitutional Law, 300.

Lis pendens, affecting rights of purchaser, see Lis Pendens, 8.

Preference of attachment lien in insolvency, see Insolvency, 68.

Validity of lien as against trustee in bankruptcy, see Bankruptcy, 207.

162. **Mode and sufficiency of levy.**

See 5 Cent. Dig. Attach. §§ 460-485.

164. **— Personal property in general.**

See 5 Cent. Dig. Attach. §§ 464-479.

In Louisiana, a levy on chattels of a writ issued from a state court is invalid without actual seizure, and the wrongful acts of an officer of a federal court, in preventing the attaching officer from taking possession, are no excuse.—Gumbel v. Pitkin, 124 U. S. 131, 8 S. Ct. 379, 31 L. Ed. 374.

170. **Service of writ or warrant.**

See 5 Cent. Dig. Attach. §§ 210, 453, 492-504.

Where there was nothing in the record to show that a defendant foreign corporation was engaged in business in the state where service was made on its agent, and the return of the officer gave no information, and it did not appear, even prima facie, that the agent stood in any such representative character to the company as would justify the service of a writ of attachment on him, the record is properly excluded as evidence.—St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222.

When service is made within the state on an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the state court to render a personal judgment, that it should appear in the record that the corporation was engaged in business in the state.—Id.

The division superintendent of a non-resident railroad company is a "known agent" of such company within the meaning of V. S. 1109, providing for the service of attachment, although he may not be a person upon whom, pursuant to section 3948, service of process generally upon such corporation may be made. Judgment (1906) 149 F. 42, 79 C. C. A. 64, 9 Ann. Cas. 384, affirmed.—Boston & M. R. R. v. Gokey, 28 S. Ct. 657, 210 U. S. 155, 52 L. Ed. 1002.

179. **Priorities between attachments.**

See 5 Cent. Dig. Attach. §§ 535-549.

One who has actual possession of the goods of a debtor under an unfounded claim of title is not precluded from obtaining a lien by attachment thereon which shall have priority over an attachment subsequently levied by other creditors whose attachment was first issued by the fact that he has put the goods in the nominal possession of his attorney, in a place known

only to himself, so as to prevent the levy of attachments by other parties until after he has perfected his own attachment. Decree 93 F. 728, 35 C. C. A. 554, reversed.—Dooley v. Hadden, 21 S. Ct. 259, 179 U. S. 648, 45 L. Ed. 357.

194. **Sale or other disposition of property.**

See 5 Cent. Dig. Attach. §§ 642-655, 657.

195. **— In general.**

See 5 Cent. Dig. Attach. §§ 644, 653.

Where, on application and consent of all creditors who have sued out attachments, and with the consent of the debtors and their assignee, the attached effects have been sold by order of the court, and the proceeds paid, pursuant to that order, to the clerk, creditors who did not obtain judgments until after such order was made cannot object to the manner in which the writ was executed.—Walter v. Bickham, 122 U. S. 320, 7 S. Ct. 1197, 30 L. Ed. 1185.

202. **Disposition of proceeds.**

See 5 Cent. Dig. Attach. §§ 655-657.

Where, in attachment in a state court, the sheriff cannot actually seize the property, it being in possession of the United States marshal under an attachment from a federal court, the creditor, though residing in the same state with defendant, may, on service of notice of his claim on the marshal, intervene in the federal court, and, on showing a properly adjudicated claim, share, in his proper order, the proceeds of the sale.—Gumbel v. Pitkin, 124 U. S. 131, 8 S. Ct. 379, 31 L. Ed. 374.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

205. **Process in action and service on defendant.**

See 5 Cent. Dig. Attach. §§ 684-691.

209. **— Publication or other notice.**

See 5 Cent. Dig. Attach. §§ 675-687, 690, 691.

The change in the law by Act Aug. 13, 1888, permitting suits in the federal courts in the district of the residence of either plaintiff or defendant, did not abrogate the settled rule that no attachment can issue out of a federal court where a nonresident defendant could not be personally served and did not appear.—Big Vein Coal Co. of West Virginia v. Read, 33 S. Ct. 694, 229 U. S. 31, 57 L. Ed. 1053.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

See 5 Cent. Dig. Attach. §§ 779-985.

Dissolution on bankruptcy, see Bankruptcy, 200.

Laches, application in proceeding to vacate attachment, see Equity, 67.

Review of order vacating attachment, see Appeal and Error, 1085.

Special appearance for purpose of quashing writ, see Appearance, 9.

VIII. CLAIMS BY THIRD PERSONS.

290. **Intervention to contest attachment.**

See 5 Cent. Dig. Attach. §§ 1023-1047.

291. **— Right to intervene.**

See 5 Cent. Dig. Attach. §§ 1023-1033.

In attachment in a state court, the sheriff attempted to levy, but could not take actual possession, by reason of the wrongful acts of the United States marshal, who held possession under an illegal writ issued from the United States circuit court. Plaintiff served the marshal with notice of his claim, and intervened in the federal court, making the marshal and the creditors in that action defendants. Held, that the marshal

was liable as garnishee.—*Gumbel v. Pitkin*, 124 U. S. 131, 8 S. Ct. 379, 31 L. Ed. 374.

⚡301. **Proceedings for establishment and determination of claims to property.**

See 5 Cent. Dig. Attach. §§ 1073-1133.

⚡308. — **Evidence.**

See 5 Cent. Dig. Attach. §§ 1102-1109, 1111-1113.

Plaintiffs, in an action against R. and C., as partners, attached goods of defendant in the possession of H. Bros., on the ground that defendants were fraudulently disposing of this property to hinder their creditors. H. Bros. interpleaded under Rev. St. Mo. 1879, § 449, and claimed title to the goods under a chattel mortgage from defendant. The issue of the validity of the attachment was tried on a plea in abatement filed by defendant R. under Rev. St. Mo. §§ 438, 439, and found against defendant. The interpleaders not being parties to that issue, *held*, that the papers in the attachment proceedings were inadmissible as evidence of the fraudulent character of the conveyance.—*Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 S. Ct. 899, 30 L. Ed. 971, reversing judgment *Moline Wagon Co. v. Rum-mell* (C. C.) 14 F. 155.

IX. RETURN.

[No paragraphs or references in this Digest. But see 5 Cent. Dig. Attach. §§ 1148-1179.]

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

Federal court practice, see Courts, ⚡346.

⚡330. **Accrual or release of liability by breach or fulfillment of conditions.**

See 5 Cent. Dig. Attach. §§ 1180-1208.

⚡334. — **Bonds or undertakings to discharge attachment.**

See 5 Cent. Dig. Attach. §§ 1198-1204.

Under Rev. St. § 5242, prohibiting seizure of property of national banks by attachment before final judgment, such a seizure is void, and a bond given to dissolve the attachment is also void.—*Butler v. Coleman*, 124 U. S. 721, 8 S. Ct. 718, 31 L. Ed. 567.

⚡341. **Actions.**

See 5 Cent. Dig. Attach. §§ 1223-1206.

⚡351. — **Damages.**

See 5 Cent. Dig. Attach. §§ 1290-1303.

The injury to a vendee's credit, resulting from the bringing of actions by his vendor for

a breach of contract and for a balance due thereunder, and any loss of profits because of the vendor's refusal to make further deliveries under the contract, are not elements of damages recoverable in a suit on the attachment bonds issued in such actions.—*Fidelity & Deposit Co. of Maryland v. L. Bucki & Son Lumber Co.*, 23 S. Ct. 582, 189 U. S. 135, 47 L. Ed. 744, affirming judgment *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland*, 109 F. 393, 48 C. C. A. 436.

XI. WRONGFUL ATTACHMENT.

⚡367. **Actions.**

See 5 Cent. Dig. Attach. §§ 1244-1402.

⚡368. — **Nature and form.**

See 5 Cent. Dig. Attach. §§ 1244, 1245; 1 Cent. Dig. Action on Case, § 22.

The procedure for the recovery and assessment of damages where attachments have wrongfully been issued, prescribed by Code Civ. Proc. Porto Rico, arts. 1409-1415, is applicable where the attachment was caused to be issued by a person claiming to act under a power of attorney from the plaintiff in the attachment suit, although the statute provides that the cost of the attachment and damages, shall be assessed against the plaintiff in such suit, since there is nothing to prevent making such person a party to the attachment proceeding if damages are to be assessed against him alone, and, if his action was authorized by the real plaintiff, the latter would be liable for the acts of his agent on his behalf.—*Fernandez Y Perez v. Perez Y Fernandez*, 26 S. Ct. 561, 202 U. S. 80, 50 L. Ed. 942.

The general provisions of Civ. Code, Porto Rico, art. 1902, giving a right of action for acts of fault or negligence, cannot be deemed to authorize an action to recover damages for a wrongful attachment, in view of the comprehensive method specially provided by Code Civ. Proc. Porto Rico, arts. 1409-1415, for the recovery and assessment of damages in cases where attachments are wrongfully issued and vacated for any cause.—*Id.*

ATTENDANCE.

See Witnesses, ⚡2-16.

ATTESTATION.

See—

Acknowledgment.
Wills, ⚡113-123.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

ATTORNEY AND CLIENT.

Scope-Note.

[INCLUDES the practice of law in any rank or branch of the profession; admission to practice, and privileges, disabilities, and liabilities incident to the office conferred; licenses and license fees and privilege and occupation taxes; regulation of professional conduct; and the relation between attorney and client, and their mutual rights, duties, and liabilities.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. The Office of Attorney.

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(B) PRIVILEGES, DISABILITIES, AND LIABILITIES.

⇒ 30. Partnership of attorneys.

(C) SUSPENSION AND DISBARMENT.

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39. — Criminal offenses and conviction thereof.

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(B) LIEN.

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Attorney General.
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Competency of attorney as witness in action by or against client, see Witnesses, ⚡67.
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Representation by attorney at preliminary examination, see Criminal Law, ⚡232.
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I. THE OFFICE OF ATTORNEY.

(A) ADMISSION TO PRACTICE.

⚡4. Capacity and qualifications.

See 5 Cent. Dig. Atty. & C. § 4-9.

Code 1887 provides that "any person duly authorized and practicing as attorney at law in any state or territory of the United States, or in the District of Columbia, may practice as such in the courts of this state" (section 3192); and that every such person shall produce satisfactory evidence of his being so authorized, and take a prescribed oath (section 3193). *Held*, that the question whether women shall be admitted to practice under these provisions is for the determination of the Virginia courts alone, for the right to practice law in state courts is not such a privilege or immunity of a citizen of the United States as is guaranteed by the fourteenth amendment.—*Ex parte Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929.

A Spanish lawyer may be denied permission to practice by the Supreme Court of the Philippine Islands because he did not possess the political qualifications required by law, although this is not one of the grounds recognized by Code Civ. Proc. Philippine Islands, § 13, for depriving a lawyer of the right to practice, since these grounds relate solely to the removal or suspension from the bar of attorneys already practicing.—*Bosque v. United States*, 28 S. Ct. 501, 209 U. S. 91, 52 L. Ed. 698.

A Spanish lawyer who had previously been denied permission to practice law by the Supreme Court of the Philippine Islands, upon the ground that he did not possess the political qualifications required by law, was not entitled to such permission by virtue of the provisions of Code Civ. Proc. Philippine Islands, § 13, for the admission to practice of those "not specially declared ineligible," who have been duly licensed under the laws and orders of the islands, under the sovereignty of Spain or of the United States, and are "in good and regular standing as members of the bar of the Philippine Islands at the time of the adoption of this Code."—*Id.*

(B) PRIVILEGES, DISABILITIES, AND LIABILITIES.

Liability for contempt of court, see Contempt, ⚡10.

⚡30. Partnership of attorneys.

See 5 Cent. Dig. Atty. & C. § 43.

One of two law partners has no authority to accept for the firm an agency for the mere sale of real estate.—*Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 502.

The surviving member of a special partnership between lawyers for the prosecution of a number of claims against the United States in Congress and before the court of claims, the compensation for which service was contingent on success, and was to be paid in solido and divided between the partners in the same manner, cannot claim, on an accounting, to be entitled to compensation for such services rendered by him after the dissolution, in the prosecution and collection of the claims, as he had agreed in the partnership agreement to render.—(1911) *Consaul v. Cummings*, 32 S. Ct. 83, 222 U. S. 262, 56 L. Ed. 192, affirming decree (1909) 33 App. D. C. 132.

The interest of the estate of a deceased member of a special partnership between lawyers for the prosecution of certain claims against the United States in Congress and before the court of claims, in the fees earned under the partnership agreement, cannot be diminished on the theory that the contract of employment by the clients was revoked by his insanity or death, where they made no such objection, and apparently acquiesced in the arrangement by which the claims were put in the hands of the other partner.—*Id.*

The surviving partner is properly charged with interest on the balance found, on an accounting, to be due to the personal representatives of the deceased partner, from the date when the bill was filed, where, in response to a demand for settlement, he at first promised to make a statement, and then contended, without substantial support, that the partnership was dissolved because the deceased partner had transferred his interest in the fees, and also resisted the accounting, and failed to produce the proper books, vouchers, and statements, especially, where he did not except to this method of calculating interest, but, on the contrary, obtained a ruling that, on the same basis, he should be allowed interest on advances made by him to the deceased partner.—*Id.*

The delay in filing the bill will not bar a suit for an accounting from the surviving partner in a special partnership between lawyers

for the prosecution of a number of claims against the United States in Congress and before the court of claims, the fees for which services were contingent upon success, and were to be paid in solido, and divided between the partners in the same manner, where such bill, though not filed until eight years after the other partner had been adjudged a lunatic, and three years after his death, was filed within four months after the fees were collected.—Id.

(C) SUSPENSION AND DISBARMENT.

Due process of law, see Constitutional Law, ¶ 306.

Right to trial by jury in disbarment proceedings, see Jury, ¶ 19.

¶ 37. Grounds for suspension or for striking from roll.

See 5 Cent. Dig. Att'y. & C. ¶ 50-63.

¶ 39. — Criminal offenses and conviction thereof.

See 5 Cent. Dig. Att'y. & C. ¶ 52.

The name of an attorney was properly stricken from the roll for assisting a mob in taking a prisoner from the jail and hanging him in the court-house yard during the noon recess of the court.—Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

¶ 45. — Misconduct in other than professional capacity.

See 5 Cent. Dig. Att'y. & C. ¶ 63.

That an attorney participated in a lynching as leader of the mob which took a prisoner from the jail, and hung him, is such a violation of his oath as an officer of the court, and so in defiance and contempt of all law and justice, as to furnish abundant ground for striking his name from the roll.—Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

¶ 47. Proceedings.

See 5 Cent. Dig. Att'y. & C. ¶ 48, 64-70, 72-82.

¶ 48. — Notice and preliminary proceedings.

See 5 Cent. Dig. Att'y. & C. ¶ 64, 65, 68.

Though not strictly regular to grant a rule against an attorney to show cause why his name should not be stricken from the roll, without an affidavit making charges against him, yet where it appears that a prisoner was taken from the jail and hung by a mob during recess of the court for dinner, and that the judge saw the body hanging there upon his return, and was informed by the marshal of the court, who was an eyewitness of the transaction, but who, on account of the excited state of the public mind, declined to make any charge or affidavit, that the respondent actively participated in the crime, and was one of the leaders of the mob, and that other information of like import was received from reliable sources, and that, upon the hearing, abundant evidence of the truth of the charge was adduced, and respondent, having every opportunity to explain his connection with the affair, if innocent, made no attempt to do so, the want of such affidavit will not render the proceeding void as coram non iudice.—Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

During the noon recess of the court, an attorney assisted a mob in taking a prisoner from the jail, and hanging him in the court-house yard. Owing to excitement of the people, no one was willing to testify against the attorney, or make an affidavit charging him with the offense. Held, that an order of the judge to the attorney to appear and show cause why his name should not be stricken from the roll, and reciting the offense with which he stood charged, was suffi-

cient, under the special circumstances of the case, though the charge was not made on affidavit.—Id.

¶ 49. — Nature and form in general.

See 5 Cent. Dig. Att'y. & C. ¶ 48, 66; 1 Cent. Dig. Action, ¶ 101.

A proceeding to disbar an attorney is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provisions which require an indictment and trial by jury in criminal cases, as it is not a criminal proceeding to punish the attorney, but intended to protect the court from the ministrations of persons unfit to practice as attorneys.—Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

¶ 50. — Conditions precedent.

See 5 Cent. Dig. Att'y. & C. ¶ 64, 65.

Though ordinarily, where an attorney, outside of his character as an attorney, commits an indictable offense, and does not admit the charge, the courts will not disbar him until he has been regularly indicted and convicted, yet where an attorney, during the noon recess of the court, assisted a mob in taking a prisoner from the jail and hanging him in the court-house yard, and only made an evasive denial of the charge, and the proof of his guilt was clear, the court properly exercised its summary powers in striking his name from the roll.—Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

It is not improper for the court to exercise its summary powers without waiting until the respondent had been regularly tried and convicted, although the offense charged was an indictable crime.—Id.

II. RETAINER AND AUTHORITY.

Appointment for infant, see Infants, ¶ 90.

¶ 76. Termination of relation.

See 5 Cent. Dig. Att'y. & C. ¶ 120-131; 40 Cent. Dig. Princ. & A. ¶ 75.

The court of commissioners of Alabama claims gave judgment for a person who had previously been declared an insolvent debtor under the Massachusetts law. A draft in satisfaction of this judgment, payable to the debtor's order, was received in Boston by his attorney. A few days thereafter the debtor died intestate. Held, that the debtor's death extinguished the authority he had given the attorney, who therefore had no right to withdraw the draft from administration in Massachusetts, and transfer its proceeds to the District of Columbia for ancillary administration.—Butler v. Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. Ed. 981, affirming judgment Goreley v. Butler, 16 N. E. 734, 147 Mass. 8.

¶ 86. Stipulations and admissions.

See 5 Cent. Dig. Att'y. & C. ¶ 155-160.

An attorney retained by an individual client, or acting under a general employment for a municipal corporation, has authority to act for his client in all matters properly connected with a pending suit, and may make a valid agreement that one suit shall abide the event of another to which his client is a party; but in order that the relationship of attorney and client shall exist with reference to a particular suit, which will give the attorney such implied power to bind his client, the suit must be actually pending, and not merely in contemplation.—Stone v. Bank of Commerce, 19 S. Ct. 747, 174 U. S. 412, 43 L. Ed. 1028.

¶ 87. Commencement and conduct of litigation.

See 5 Cent. Dig. Att'y. & C. ¶ 133-135, 139, 140, 161-162.

⇐88. — In general.

See 5 Cent. Dig. Att'y. & C. §§ 161-163.

It is within the scope of an attorney's authority to agree that, if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court, subject to be disposed of pursuant to the decision and mandate of the appellate court.—*Halliday v. Stuart*, 151 U. S. 229, 14 S. Ct. 302, 38 L. Ed. 141.

⇐103. Ratification by client.

See 5 Cent. Dig. Att'y. & C. § 154.

Where a sheriff selling property under a chattel mortgage receives, by direction of the mortgagee's attorney, a deposit of money as security for certain bids, and thereafter transfers such deposit to the mortgagee, the latter's acceptance thereof is a ratification in toto of the attorney's action, even if originally beyond his authority, and estops the mortgagee from thereafter holding the sheriff liable for the amount of the bid; the purchaser having failed to pay the same. *Maddox v. Rader*, 22 P. 386, 9 Mont. 126, reversed.—*Teague v. Maddox*, 14 S. Ct. 46, 150 U. S. 128, 37 L. Ed. 1025.

In proceedings by an administrator of a deceased attorney to sell land, deceased's former partner filed an answer setting up a mortgage on the land, given by deceased to secure money due, and also to secure him against loss by reason of their prior partnership, and alleging that certain persons, as trustees, claimed that such partnership was indebted to them on account of such transactions with deceased, and that such transactions were concealed from him by deceased, and that such trustees were necessary parties. The trustees filed an answer and cross petition, in which they alleged that certain land was conveyed to them as security for a loan of trust funds; that, in an action against the grantor to subject his interest to claims of creditors, deceased entered an unauthorized and fraudulent appearance as attorneys for them, consented to a decree that the land be sold devoted of their interest, and afterwards converted the proceeds of the sale; and they asked to be adjudged creditors of deceased's firm, and that their claim be paid out of the proceeds of sale of the land sought to be sold by the administrator. By leave of court, they afterwards withdrew such answer and cross petition, and demurred on the ground that they were necessary parties. The demurrer was sustained, and they were discharged, with their costs. *Held*, in an action by such trustees to establish a lien on the land so conveyed to them and sold under such decree, that their voluntary appearance in the proceedings to sell real estate was a ratification of the appearance and acts of deceased in the prior action.—*Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52.

An attorney appeared without authority for trustees in an action against them, consented to a decree that land in which they were interested be sold devoted of their interest, and converted the proceeds of the sale. Afterwards the trustees sought to recover against the firm of which the attorney was a member, on securities given to the firm by the attorney to secure them against liability for his acts. *Held*, in an action by the trustees to establish a lien on the land sold under the decree, that the attorney's appearance was ratified by the trustees seeking to recover on the securities.—*Id.*

⇐104. Notice to attorney.

See 5 Cent. Dig. Att'y. & C. §§ 92, 93; 12 Cent. Dig. Costs, § 1029; 21 Cent. Dig. Execution, § 789.

The law imputes to an attorney knowledge of defects in legal proceedings for the sale of property taken under his direction.—*Gay v. Farpart*, 106 U. S. 679, 1 S. Ct. 456, 27 L. Ed. 256.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

⇐105. Negligence or malpractice.

See 5 Cent. Dig. Att'y. & C. §§ 214-251.

⇐114. — Fraud.

See 5 Cent. Dig. Att'y. & C. § 228.

Where an attorney is employed to probate a will, and obtain a decree construing it, and authorizing a sale of real property under its provisions, but does not undertake to negotiate the sale, his expression of willingness to assist in finding a purchaser, and advising acceptance of an offer, do not render him liable for fraud or bad faith.—*Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 592.

⇐129. Actions for negligence or wrongful acts.

See 5 Cent. Dig. Att'y. & C. §§ 234-291.

Where an attorney enters an unauthorized and fraudulent appearance for trustees in an action against them and their grantor to subject the interest of the grantor to claims of creditors, consents to a decree that the land be sold devoted of their interest, and afterwards converts the proceeds of sale, a court of equity is the proper tribunal to afford the trustees effectual relief.—*Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52.

IV. COMPENSATION AND LIEN OF ATTORNEY.

See Bankruptcy, ⇐426.

(A) FEES AND OTHER REMUNERATION.

See Accord and Satisfaction, ⇐3.

Allowance of fees by court commissioners of Alabama claims, see Treaties, ⇐13.

Allowance on refusal of railroad to pay for killing stock, see Railroads, ⇐444.

As items of costs, see Costs, ⇐171-173.

Authority of state court to allow attorney's fees for services in United States Supreme Court, see Courts, ⇐400.

Champtuous agreements, see Champerty and Maintenance, ⇐5.

Costs, constitutionality of statute imposing fee, see Costs, ⇐4.

Due process of law, see Constitutional Law, ⇐303, 317.

Equal protection of laws, see Constitutional Law, ⇐248.

Implied contract with United States for compensation, see United States, ⇐69.

Joint or several action for fees, see Action, ⇐50.

Persons entitled to question validity of statute, see Constitutional Law, ⇐42.

Practice peculiar to federal courts, see Courts, ⇐357.

Preferred claim in bankruptcy, see Bankruptcy, ⇐347.

Regulation of amount of fee as denial of liberty to contract, see Constitutional Law, ⇐89.

State laws providing for attorneys' fees as affecting interstate commerce, see Commerce, ⇐8, 10.

Recovery in particular actions or proceedings.

See—

Injunction, ⇐252.

Interpleader, ⇐35.

Mandamus, ⇐190.

Monopolies, ⇐28.

Mortgages, ⇐581.

⇐133. Employment of attorney.

See 5 Cent. Dig. Att'y. & C. §§ 305, 317-327.

Several insurance companies, against whom suits arising out of the same cause had been

brought, agreed to appoint a committee to defend, with power to employ attorneys, etc., and that each company should pay its pro rata share of the expense. *Held*, not to create a joint liability, and that an attorney employed by the committee could not recover for his services against one of the companies, but that each was liable only for its pro rata share.—*Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 2 S. Ct. 772, 27 L. Ed. 754.

An attorney at law is not entitled to recover a retainer for services in suits that were never brought, in the absence of an express agreement to that effect, since an agreement to pay a retainer for services which are never performed cannot be implied. 36 F. 838, affirmed.—*Windett v. Union Mut. Life Ins. Co.*, 144 U. S. 581, 12 S. Ct. 751, 36 L. Ed. 551, affirming judgment (C. C.) *Union Mut. Life Ins. Co. v. Windett*, 36 F. 838.

134. Premature termination of relation.

See 5 Cent. Dig. Att'y. & C. §§ 301-304.

Where an administrator contracted with an attorney to sue on a claim owing the estate, giving such attorney an interest in the proceeds of the claim, with authority to compromise it, the contract was not impaired by the death of the first administrator, and his successor was bound by the contract.—*Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 4 S. Ct. 8, 28 L. Ed. 156.

135. Performance of services.

See 5 Cent. Dig. Att'y. & C. § 303.

Failure of attorneys, who rendered services in prosecution of claim against the United States under contract for percentage of the award, to make tender of services to claimant's executrix, *held* not to defeat their right of compensation.—*McGowan v. Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parish v. McGowan*, 39 App. D. C. 184.

139. Value of services.

See 5 Cent. Dig. Att'y. & C. §§ 326-350.

142. Contracts for compensation.

See 5 Cent. Dig. Att'y. & C. §§ 328-335.

144.—Construction and operation.

See 5 Cent. Dig. Att'y. & C. §§ 332, 333.

By the terms of the appointment which plaintiff accepted as attorney and law agent for a mortgage loan company, he was required "to be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged, and to grant certificates to that effect." The only compensation provided consisted of fees from borrowers, and the appointment fixed a scale of his "professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages." *Held*, that these fees were also intended to cover the prescribed certificates of title, and he is not entitled to any additional compensation therefor.—*Hughes v. Dundee Mortgage & Trust Inv. Co.*, 140 U. S. 98, 11 S. Ct. 727, 35 L. Ed. 354.

146. Contingent fees.

See 5 Cent. Dig. Att'y. & C. §§ 351-357.

147.—Requisites and validity of contract.

See 5 Cent. Dig. Att'y. & C. § 351.

A contract by an attorney for the prosecution of a claim against the United States for a contingent fee is not void, unless it appears that the agreement was clearly extortionate, or that the attorney has taken an undue advantage of his client.—*Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 L. Ed. 64.

148.—Construction and operation of contract.

See 5 Cent. Dig. Att'y. & C. §§ 352, 353.

Defendant cannot avail himself of a champertous contract between plaintiff and his counsel for the prosecution of an action on a promissory note as a defense.—*Burnes v. Scott*, 117 U. S. 582, 6 S. Ct. 865, 29 L. Ed. 991.

150.—Effect of premature termination or settlement of action.

See 5 Cent. Dig. Att'y. & C. §§ 354-357.

The condition in a contract to pay an attorney in a will contest a stipulated fee "in case the will is defeated and our clients get their shares" is satisfied where the contest and the attorney's services result in a compromise agreement by which the will, which, as propounded, disinherited such clients, was so qualified in probate that they received a larger proportion of the estate than if the testator had died intestate.—Decree, *Coram v. Ingersoll* (1906) 148 F. 169, 78 C. C. A. 303, reversed.—*Ingersoll v. Coram*, 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208.

151. Contracts for division between attorneys, and apportionment.

See 5 Cent. Dig. Att'y. & C. §§ 312, 313.

The fees of the attorney of record for the Eastern Cherokees were provided for by law, within the meaning of a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, upon collection thereof, provided that, "in the contingency of the fees not being provided for by legislation * * * but upon proof of services," each party should look out for himself, where his fees were allowed in full by the court of claims, under the authority of the subsequent act (Act March 3, 1903, c. 994, 32 Stat. 996), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof, under Rev. St. U. S. §§ 2103, 2106, before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties.—*Owen v. Dudley*, 30 S. Ct. 602, 217 U. S. 488, 54 L. Ed. 851, affirming judgment *Dudley v. Owen* (1908) 31 App. D. C. 177.

A sum allowed by the Court of Claims under Act of Congress to lawyers for services in prosecution of an Indian claim *held* within an agreement between two of such lawyers to share in moneys appropriated by Congress or allowed by the Interior Department as attorney's fees.—*Robertson v. Gordon*, 33 S. Ct. 105, 226 U. S. 311, 57 L. Ed. 236, reversing decree 34 App. D. C. 539.

An agreement between two of several attorneys interested in a prosecution of an Indian claim to share in attorney's fees appropriated by Congress, or allowed by the Interior Department, *held* not superseded by subsequent contracts with other attorneys with reference to the distribution of such fees on contingencies which never happened.—*Id.*

An adjudication by the Court of Claims on a quantum meruit under a subsequent act of Congress *held* not to satisfy conditions of an agreement between attorneys interested in an Indian claim to abide by an award of a reference committee of the Senate and House of Representatives.—*Id.*

155. Allowance and payment from funds in court.

See 5 Cent. Dig. Att'y. & C. § 316.

Where one brings adversary proceedings to take possession of trust property from those entitled to it, in order that he may dispose of it to those who claim adversely, and fails in his purpose, he cannot claim a right to be reimbursed for his expenses and attorney's fees out of the

trust fund.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

On the recovery by an administrator of the estate of his intestate from one who has wrongfully converted it, the fee of his solicitor is properly chargeable against the fund recovered, to an amount to be fixed in the discretion of the trial court.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

157. Actions for compensation.

See 5 Cent. Dig. Att'y. & C. §§ 352-377; 5 Cent. Dig. Assumpsit, § 139.

166. — Evidence.

See 5 Cent. Dig. Att'y. & C. §§ 363-372.

Contracts with attorneys to prosecute a claim against the United States for a percentage of award may be resorted to as a basis for calculating compensation of attorneys, irrespective of any question, under Rev. St. § 3477 (Comp. St. 1913, § 6383), of their effect as assignments of a claim against the United States.—*McGowan v. Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parish v. McGowan*, 39 App. D. C. 184.

(B) LIEN.

Conflicting jurisdiction of courts in proceedings to enforce, see Courts, 493.

173. Right to lien.

See 5 Cent. Dig. Att'y. & C. §§ 378-382, 386, 394-398.

174. — In general.

See 5 Cent. Dig. Att'y. & C. §§ 378-380, 382, 385.

Certain unsecured creditors of a railroad company in Alabama instituted proceedings in equity, in a court of that state, on behalf of themselves and of all other creditors of the same class who should come in and contribute to the expenses of the suit, to establish a lien upon the property of that company in the hands of other railroad corporations which had purchased and had possession of it. The suit was successful, and the court allowed all unsecured creditors to prove their claims before a register. Pending the reference before the register, the defendant corporations bought up the claims of complainants, and other unsecured creditors. *Held*, that the solicitors of complainants were entitled to reasonable compensation in respect of the demands of unsecured creditors (other than their immediate clients), who filed their claims under the decree, and to have a lien declared therefor on the property reclaimed for the benefit of such creditors.—*Central Railroad & Banking Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915.

175. — Nature of services or fees.

See 5 Cent. Dig. Att'y. & C. §§ 394-398.

M., being plaintiff in suit No. 8,118, against R., and defendant in suit No. 2,373, brought by R., agreed with W., his attorney in both suits, to pay him for his services, in addition to what he had received, a sum equal to 50 per cent. of such money as might be adjudged "by way of mesne profits, damages, and costs" in suit No. 8,118, W., in any event, to have as much as \$5,000, and to have a lien therefor upon "said judgment and property as may be recovered" against R. The bill in No. 8,118 was dismissed for laches, but, as a result of the judgment in No. 2,373, R. abandoned his claim to the property involved in No. 8,118, and M. took and has retained possession. *Held* that,

within the meaning of the contract, M. "recovered" the property through W.'s services, and W. was entitled to a lien thereon for \$5,000, which was a certain, and not a contingent, fee.—*Mackall v. Willoughby*, 17 S. Ct. 954, 167 U. S. 681, 42 L. Ed. 323.

176. — Effect of contracts.

See 5 Cent. Dig. Att'y. & C. § 381.

An agreement to pay a stipulated fee for legal services to be rendered in a will contest, contingent upon success, which agreement, by way of exception in favor of one of the signers, stipulated against any other liability on his part than to pay such fee "out of the funds secured from the estate," gives the attorney, in case his efforts are successful, an equitable lien on such funds for his fee. *Decree, Coram v. Ingersoll* (1906) 148 F. 169, 78 C. O. A. 303, reversed.—*Ingersoll v. Coram*, 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208.

An agreement by a lawyer prosecuting a case for one-fourth of the amount recovered to give certain lawyers one-third of such fee if they would do certain work creates a lien on the fund received by him in favor of such attorneys who perform their agreement.—*Barnes v. Alexander*, 34 S. Ct. 276, 232 U. S. 117, 58 L. Ed. 530, affirming judgment 114 P. 952, 13 Ariz. 338.

184. Priorities.

See 5 Cent. Dig. Att'y. & C. § 383.

A claimant of a part of a fund in the hands of the government gave M. a power of attorney authorizing him to prosecute the claim, and also agreed to pay him for his services half the amount recovered. The power of attorney contained a provision for substitution; and M., by indorsement on the instrument, substituted plaintiff as attorney, under an agreement that plaintiff should advance money for the expenses of prosecuting the claim, and receive half the compensation. The claimant afterwards revoked the power of attorney, and assigned half the claim, after it had been awarded, to M. and another, and they assigned it to defendant. *Held*, that defendant took the moiety of the award free of all claim thereto by plaintiff, the latter never having had any written assignment of the claim, or written instrument giving him a lien upon it.—*Porter v. White*, 127 U. S. 235, 8 S. Ct. 1217, 32 L. Ed. 112.

192. Enforcement.

See 5 Cent. Dig. Att'y. & C. §§ 425-427.

Attorneys prosecuting claim against the United States for percentage of the award may invoke jurisdiction of equity to establish their lien on the fund to pay the claim where the claimant's representatives are insolvent.—*McGowan v. Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parish v. McGowan*, 39 App. D. C. 184.

Consent decree, in suit by attorneys against United States under contracts for percentage of award to enforce lien on the fund, a portion of which was paid into court to determine amount due the attorneys, renders irrelevant all questions as to effect of contracts in creating a lien, and the effect of Rev. St. § 3477 (Comp. St. 1913, § 6383), as an obstacle to such lien, and the right to an injunction.—*Id.*

Ascertainment as to amount due complainants was within prayer for general relief in suit by attorneys prosecuting claim against the United States under contracts for a percentage of the award to establish their lien.—*Id.*

ATTORNEY GENERAL.

Scope-Note.

[INCLUDES the chief law officer in the government of the United States and of each state; his appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of the attorney general, his assistants, deputies, etc., in general.

Analysis.

- ⑤. Powers and duties.
- 6. — In general.
- 9. Actions and other proceedings.

⑤. Powers and duties.

See 5 Cent. Dig. Atty. Gen. §§ 5-10.

⑥. — In general.

See 5 Cent. Dig. Atty. Gen. §§ 5-7.

The attorney general is not authorized under Rev. St. § 368, providing that "the attorney general shall exercise general supervisory powers over the accounts of district attorneys," to reduce fees of district attorneys which have been fixed by the court within the prescribed limit by virtue of Rev. St. § 824, providing that, for a conviction upon an indictment, "the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars."—United States v. Waters, 133 U. S. 208, 10 S. Ct. 249, 33 L. Ed. 594, affirming Waters v. United States, 21 Ct. Cl. 30.

⑨. Actions and other proceedings.

See 5 Cent. Dig. Atty. Gen. §§ 12-17.

A certified copy of an order of the attorney general, directing the United States attorney for the district of California to proceed in a certain suit in equity, is an abundant proof that the bill was filed by authority of

the attorney general.—Mullan v. United States, 118 U. S. 271, 6 S. Ct. 1041, 30 L. Ed. 170, affirming United States v. Mullan (C. C.) 10 F. 785, 7 Sawy. 466.

The initiation and control of a suit in the name of the United States to annul a patent for land lies with the attorney general, as head of an executive department.—United States v. San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. Ed. 747, affirming decree (C. C.) 23 F. 279, 10 Sawy. 639.

The attorney general is not authorized to waive the exemption of the United States from judicial process, or to submit the United States or its property to the jurisdiction of the court in a suit brought against its officers.—Stanley v. Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment United States v. Schwalby, 8 Tex. Civ. App. 679, 29 S. W. 90.

Where suit by the United States was argued on appeal by Assistant Attorney General, who filed certified copy of letter from Attorney General authorizing its institution, held, that sanction of Attorney General sufficiently appeared.—Causey v. United States, 36 S. Ct. 365, 240 U. S. 399, 60 L. Ed. 711, affirming decree 203 F. 1022, 121 C. C. A. 663.

ATTORNEYS IN FACT.

See Principal and Agent.

AUCTIONS AND AUCTIONEERS.

[No paragraphs or references in this Digest. But see 5 Cent. Dig. Auctions.]

AUDITA QUERELA.

See 5 Cent. Dig. Aud. Quer.

See—

Equity, ④443-464.
Execution, ④169-171.
Judgment, ④339-399, 428-460.
Supersedeas.

AUDITORS.

See Reference.

Delegation of judicial powers, see Constitutional Law, ④80.
Territory, see Territories, ④23.

AUTHENTICATION.

Documents as evidence, see—

Criminal Law, ④444.
Evidence, ④369-380.
Record on appeal, see Appeal and Error, ④613-616, 641.

AUTHORITY.

See Principal and Agent, ④66-79, 98-136;
Receivers, ④90-106, and other specific topics.

AUTHORS.

See—

Copyrights.
Literary Property.

AUTOMATIC COUPLERS.

On railroad trains, see—

Master and Servant, ④111, 228, 265.
Railroads, ④229.

AUTOMOBILES.

See District of Columbia, ④22.

Excise taxes, see Internal Revenue, ④9.
Interstate commerce regulation, see Commerce, ④10, 63.
Persons entitled to question constitutionality of laws, see Constitutional Law, ④42.

AVERAGE.

General average, see Shipping, ④186-195.

AVOIDANCE.

Compromise and settlement, see Compromise and Settlement, ¶18.
 Contract, see Contracts, ¶257-261.
 Contract or conveyance of infant, see Infants, ¶31, 58.
 Insurance policy, see Insurance, ¶229-246, 250-300.
 Pleading matter in avoidance, see Pleading, ¶131.

AWARD.

See Arbitration and Award, ¶64.

BAGGAGE.

See—
 Carriers, ¶394-405.
 Shipping, ¶167.

BAIL.*Scope-Note.*

[INCLUDES release of persons under arrest, in civil actions or on charges of crime, from such custody, on giving security to appear and answer; right to be admitted to bail; authority to take bail; proceedings in giving and taking bail, and requisites and sufficiency of recognizances, bonds, or undertakings of bail or deposit of money in lieu of bail; rights and liabilities of bail; their discharge or exoneration; breach and forfeiture of recognizances, bonds, etc.; and proceedings to enforce liabilities of bail.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. In Civil Actions.**

[No paragraphs or references in this Digest. But see 5 Cent. Dig. Bail, §§ 1-137.]

II. In Criminal Prosecutions.

- ¶41. Right to release on bail.
- 44. — Pending appeal or other proceeding for review.
- 46. Jurisdiction and authority to admit to bail.
- 47. — Courts and judicial officers.
- 49. Proceedings to admit to bail.
- 75. Breach or fulfillment of condition of bond, undertaking, or recognizance.

Cross-References.

Fees for admitting to bail, see United States Commissioners, ¶3. In extradition proceedings, see Extradition, ¶13.

I. IN CIVIL ACTIONS.

[No paragraphs or references in this Digest. But see 5 Cent. Dig. Bail, §§ 1-137.]

II. IN CRIMINAL PROSECUTIONS.

Authority of Supreme Court judges, see Courts, ¶380.
 Due process of law, see Constitutional Law, ¶262.
 Effect of admission of territory as state, see Courts, ¶431.
 Excessive bail ground for habeas corpus, see Habeas Corpus, ¶10.
 Privileges and immunities of citizens, see Constitutional Law, ¶207.
 Public policy, indemnity, see Contracts, ¶108.
 ¶41. Right to release on bail.
 See 5 Cent. Dig. Bail, §§ 139-164.

¶44. — Pending appeal or other proceeding for review.

See 5 Cent. Dig. Bail, § 145.

Laws 1878 provide that an appeal by a defendant in a criminal action from a final judg-

ment of conviction shall stay execution upon filing with the clerk a certificate of a judge that there is probable cause for the appeal; and that, after conviction, a defendant who has appealed may be admitted to bail as of right, when the judgment is for the payment of a fine only, and as matter of discretion in other cases. *Held*, that a defendant, who has been sentenced to pay a fine, and also to imprisonment, is not entitled, after appeal, to be admitted to bail as matter of right, though a certificate of probable cause is filed.—*Clawson v. United States*, 113 U. S. 143, 5 S. Ct. 393, 28 L. Ed. 957.

¶46. Jurisdiction and authority to admit to bail.

See 5 Cent. Dig. Bail, §§ 165-194.

¶47. — Courts and judicial officers.

See 5 Cent. Dig. Bail, §§ 165-183, 257.

In view of Rev. St. §§ 1014-1016, providing that before trial bail "may be admitted" on all arrests in capital cases, and "shall be admitted" on all arrests in other criminal cases, and designating the courts and judges, including the justices of the supreme court, who may take the bail; and Act March 3, 1879, c. 176, pro-

viding that on review by the circuit court of judgments in the district court in criminal cases the circuit justice or the circuit judge may take bail; and Rev. St. § 1017, providing that on writ of error from the supreme court to a state court bail may be taken; and Act Feb. 6, 1889, c. 113, § 6, providing for review by the supreme court on writ of error, under such rules and regulations as it may prescribe, of judgments of inferior courts of the United States in capital cases, such writ of error to be allowed as of right, and without the requirement of any security for prosecution of the same, or for costs, and to operate during its pendency as a stay of proceedings on the judgment,—it will be held that congress intended that under Act March 3, 1891, c. 517, establishing the court of appeals, allowing appeals and writs of error from the circuit and district courts direct to the supreme court "in cases of conviction of capital or otherwise infamous crimes," as well as in certain other classes of cases, and declaring that "all provisions of law, now in force, regulating the methods and system of review * * * shall regulate the methods and system of appeals and writ of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other security," in cases of crimes not capital, at least, bail might be taken on writ of error by order of the proper court, justice, or judge. Mr. Justice Brewer and Mr. Justice Brown dissenting, agreeing, however, that the supreme court has, in criminal cases pending proceedings

in error, power to admit to bail, but deducing this solely from the grant of jurisdiction over the proceedings in error.—*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450, 39 L. Ed. 424.

49. Proceedings to admit to bail.

See 5 Cent. Dig. Bail, §§ 195-208, 241, 244.

An order by a justice of the supreme court as follows: "Writ of error, to operate as a supersedeas, allowed, returnable according to law, the defendant to furnish bond in the sum of \$5,000, conditioned according to law, subject to the approval of the district judge"—is not a mere supersedeas, with reference of the matter of bail to the trial judge, but is a command to admit the prisoner to bail.—*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450, 39 L. Ed. 424.

75. Breach or fulfillment of condition of bond, undertaking, or recognizance.

See 5 Cent. Dig. Bail, §§ 309-312, 315-321.

Where a criminal prosecution is begun in a state court, and defendant is admitted to bail, and the case is subsequently transferred to a United States court, the failure of defendant to appear in the state court for trial after such removal does not forfeit the bond, and all proceedings in the state court to render judgment thereon are coram non judice and void.—*Davis v. South Carolina*, 107 U. S. 597, 2 S. Ct. 636, 27 L. Ed. 574.

BAILMENT.

Scope-Note.

[INCLUDES contracts for transfer of possession of personal property without transfer of ownership in general; rights, duties, and liabilities of the parties; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 1. Nature and elements in general.
- 10. Care and use of property, and negligence of bailee.
- 14. — Bailments for mutual benefit.
- 21. Rights and liabilities as to third persons.
- 24. Actions between bailor and bailee.
- 31. — Evidence.

Cross-References.

Bankruptcy of consignee of bailee, effect on right of bailor to recover goods, see Bankruptcy, 140.

Particular species of bailments, and bailments incident to particular occupations.

See—
Banks and Banking, 153.

See—
Carriers, 45-201.
Depositaries.
Factors.
Pledges.
Shipping, 37-58, 102-145.
Warehousemen.

1. Nature and elements in general.

See 6 Cent. Dig. Bailm. §§ 1-12; 32 Cent. Dig. Land. & Ten. § 4.

A contract stipulated that the contractor should "provide and furnish to" the government, whenever called upon during a specified year, "such vessels of the descriptions herein-after given as may be required to take the place of the vessels now performing service," and that, in case of his failure so to do, the government should have "the power to hire

vessels elsewhere in open market" at his "sole expense and charge." *Held*, that this was a contract for hiring, and not for service, and that the government was therefore bound to pay rent for a vessel furnished and accepted thereunder until final return to the contractor, although such vessel had been injured and laid up for repairs during part of the time it was in the service of the government.—*United States v. Shea*, 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403.

④10. Care and use of property, and negligence of bailee.

See 6 Cent. Dig. Bailm. §§ 33-54.

④14. — Bailments for mutual benefit.

See 6 Cent. Dig. Bailm. §§ 45-55.

Where one bank deposits bonds with another, with which it has an account, without hire, but subsequently pledges them to it as security for money borrowed, and after payment thereof instructs it to hold them as security for overdrafts which it desires to, and subsequently does, at various times, make, in large amounts, the gratuitous bailment is converted into one for mutual benefit, and the bailee is required to care for the bonds as a prudent owner would for his own.—*Preston v. Prather*, 137 U. S. 604, 11 S. Ct. 162, 34 L. Ed. 788, affirming judgment *Prather v. Kean* (C. C.) 29 F. 498.

Under a contract between a sleeping-car company and a railroad company, by which the latter assumed responsibility for damage, by "accident or casualty," to drawing-room or sleeping cars used by it under the contract, the railroad company is liable for the loss of such cars by a fire occurring from a cause unknown.—*Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 S. Ct. 490, 35 L. Ed. 97.

Under a contract, by which a sleeping-car company was to place a designated number of its cars at the disposal of a railroad company, and by which the latter was to become responsible for damages while such cars were on its road, or in its shops undergoing repairs, the railroad company is liable for the destruction by fire of a car which had a few hours before come from active service on the road, and which had been placed in the railroad company's yard for the purpose of being cleansed and resupplied for another trip on the following day.—*Id.*

Where a sleeping-car company became dissatisfied with the manner in which repairs were made on its cars by a railroad company to which it had leased them, and undertook itself to make such repairs in a shop set apart to it by the railroad company for that purpose, over which it was given exclusive control, and to which the railroad company's agents had no access, a car which for six months has been undergoing repairs in such repair shop is not in the possession or under the control of the railroad company; and the latter is not liable for its loss by an accidental fire while therein, under an agreement to be responsible for damages from accident or casualty.—*Id.*

The fact that a sleeping-car company had insured cars destroyed by fire while in the possession of a railroad company which had contracted for their use, and had collected the insurance money, does not affect its right to maintain an action on the contract of the railroad

company, to be responsible for damages by casualty; nor will the recovery be limited by the amount collected from the insurance companies, as the excess above a just indemnity will be held by the sleeping-car company in trust for the insurance companies.—*Id.*

④21. Rights and liabilities as to third persons.

See 6 Cent. Dig. Bailm. §§ 91-102.

Where an action in detinue is brought against a bailee and his two bailors, recovery cannot be had against the bailee as a wrongful possessor, unless the possession of both bailors was wrongful.—*Van Winkle v. Crowell*, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880.

④24. Actions between bailor and bailee.

See 6 Cent. Dig. Bailm. §§ 29, 117-133.

④31. — Evidence.

See 6 Cent. Dig. Bailm. §§ 124-131; 47 Cent. Dig. Trover, § 215.

Plaintiff corporation leased its cars to defendant, and transferred contracts with railroad companies for their hire and use, covenanting that if any company should refuse to use them, and defendant's profits be thereby diminished, defendant should have the right "either" to declare the lease void, "or" to pay such part of the profits from the remaining roads as might be agreed upon. *Held*, in an action for the rent, a new contract, reciting refusal of railroad companies to use the cars, and consequent diminution of profits, and agreeing to a less rent, executed under plaintiff's corporate seal by its president and secretary, though for some reason it may not have been binding on plaintiff, was admissible against it to show diminution of profits.—*Pullman's Palace-Car Co. v. Central Transp. Co.*, 139 U. S. 62, 11 S. Ct. 489, 35 L. Ed. 69.

Plaintiff corporation leased its cars to defendant, and transferred contracts with railroad companies for their hire and use covenanting that if any company should refuse to use them, and defendant's profits be thereby diminished, defendant should have the right "either" to declare the lease void, "or" to pay such part of the profits from the remaining roads as might be agreed upon. *Held* that, in an action for the rent, evidence of diminution of the profits as contemplated was admissible, though defendant had not elected to declare the lease void, and no new agreement was made, since in such case, under the covenant, plaintiff would only be entitled to recover on a quantum meruit.—*Id.*

BAKERIES.

Hours of labor law as denying due process, see Constitutional Law, §275.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

BANKRUPTCY.

Scope-Note.

[INCLUDES administration of estates of bankrupts under general bankrupt laws for the purpose of distribution of the assets among creditors, and discharge of the bankrupts from liability for their debts; constitutional and statutory provisions relating thereto; what constitutes bankruptcy; nature, grounds, limits, and subjects of jurisdiction in bankruptcy cases; and procedure therein.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Constitutional and Statutory Provisions.

- 2. Bankruptcy acts.
- 3. — Constitutional.
- 6. — Retroactive operation.
- 9. Effect of bankruptcy acts on state insolvency laws and proceedings.

II. Petition, Adjudication, Warrant, and Custody of Property.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

- 181½ [New, vol. 8 Key-No. Series]. Conflicting jurisdiction of courts of bankruptcy and other United States Courts.
- 20. Conflicting jurisdiction of courts of bankruptcy and state courts.
- 22. Rules, forms, and orders as to procedure.

(B) VOLUNTARY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 38-49.]

(C) INVOLUNTARY PROCEEDINGS.

- 54. Insolvency of debtor.
- 55. Acts of bankruptcy.
- 59. — Preference through legal proceedings against insolvent.
- 60. — Assignment for benefit of creditors, trust, or receivership.
- 65. Defenses and grounds for opposition.
- 66. Persons who may be adjudged bankrupt.
- 72. — Nature of corporate business.
- 75. Petitioning creditors.
- 76. — Persons entitled to file or join in petition.
- 80. Petition.
- 84. — Amendment.
- 88. Parties.
- 89. Answer and other pleadings.
- 100. Adjudication.

(D) WARRANT AND CUSTODY OF PROPERTY.

- 101. Possession and control pending proceedings in general.
- 103. Restraining interference by third persons.
- 105. — Proceedings in state courts.
- 106. Warrant and seizure pending proceedings.
- 111. — Execution of warrant.
- 114. Appointment and authority of receiver or marshal pending proceedings.
- 116. Claims by third persons.
- 117. Sale or other disposition of property pending proceedings.

III. Assignment, Administration, and Distribution of Bankrupt's Estate.**(A) APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.**

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 168-192.]

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.

- ☞136. Transfers by bankrupt to trustee under order of court or referee.
- 137. Property and rights vesting in trustee.
- 138. — Personal property in general.
- 139. — Real property and interests therein.
- 140. — Ownership or possession of property.
- 142. — Property fraudulently conveyed.
- 143. — Property capable of transfer or subject to process.
- 149. — Partnership and individual property.
- 150. Failure to take possession, or abandonment of property by trustee.
- 152. Time of vesting of title or right.
- 155. Equities of third persons.
- 156. Rights as to pending actions.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

- ☞158. Preferences voidable.
- 159. — In general.
- 161. — Time of giving preference.
- 163. — Transfers of property.
- 164. — Payments by debtor.
- 165. — Effect of transaction to give preference.
- 166. — Knowledge and intent of parties.
- 169. Set-off of amount of new credit by creditor preferred.
- 171. Transfers in general.
- 172. — Validity as against trustee.
- 174. Fraudulent transfers.
- 178. — Nature and form of transaction.
- 180. — Intent of debtor.
- 184. Transfers void under state laws.
- 185. Rights of trustee as to transfers.
- 187. Liens in general.
- 188. — Validity as against trustee.
- 190. Statutory liens.
- 191. — In general.
- 197. Dissolution of liens of attachments and other proceedings by adjudication.
- 200. — Time of proceeding.
- 204. Rights of trustee as to property affected by lien.
- 205. — In general.
- 207. Subrogation of trustee to rights under lien.
- 208. Remedies to establish or enforce rights or liens.
- 211. — Conflicting jurisdiction of courts of bankruptcy and state courts.
- 212. Determination of claims to property.
- 213. — Foreclosure of mortgages.
- 214. — Enforcement of liens in general.
- 215. — Enforcement of statutory liens.
- 217. — Restraining proceedings in state courts.
- 218. — Vacating or nullifying decisions of state courts.

(D) ADMINISTRATION OF ESTATE.

- ☞220. Referees.
- 224. — Jurisdiction, powers, and duties in general.
- 229. — Contempts.

III. Assignment, Administration, and Distribution of Bankrupt's Estate—Continued.

(D) ADMINISTRATION OF ESTATE—Continued.

- ⇒ 233. Examination of bankrupt or others.
- 236. — Place and time.
- 242. — Scope and extent of inquiry.
- 250. Collection of assets.
- 256. Sale of property.
- 257. — In general.
- 260. — Order of court.
- 261. — Notice.
- 262. — Manner and terms.
- 268. — Rights of purchasers.
- 270. — Collateral attack.
- 273. Deposits and payments.

(E) ACTIONS BY OR AGAINST TRUSTEE.

- ⇒ 277. Actions by trustee.
- 279. — Relating to property or proceeds thereof.
- 284. Conditions precedent in general.
- 287. Nature and form of remedy.
- 288. — Summary proceedings.
- 291. Jurisdiction.
- 292. — United States courts in general.
- 293. — Courts of bankruptcy.
- 294. — United States Circuit Courts.
- 295. — State courts.
- 296. — Concurrent and conflicting jurisdiction of United States courts and state courts.
- 298. Time to sue, and limitations.
- 300. Process, notice of suit, and appearance.
- 301. Injunction and receiver.
- 302. Pleading.
- 303. Evidence.
- 304. Trial.
- 305. Judgment.
- 306. Appeal and error.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

- ⇒ 307. Creditors entitled to prove claims.
- 311. — Effect of preference and surrender thereof.
- 313. Claims provable.
- 314. — In general.
- 315. — Judgment before filing of petition.
- 317. — Costs incurred before filing of petition.
- 318. — Contracts.
- 321. Amount of claims.
- 323. — Secured claims.
- 326. Set-offs and counterclaims.
- 328. Time for proof of claims.
- 329. Proof of claims.
- 336. — Amendment or withdrawal of proof.
- 338. Objections to claims and proceedings thereon.
- 340. — Evidence.
- 341. Allowance or disallowance of claims.
- 343. Filing claims proved.
- 344. Priorities.
- 346. — Taxes.
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I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Bankruptcy act, construction as binding United States, see Statutes, —233.

—2. Bankruptcy acts.

See 6 Cent. Dig. Bankr. §§ 1-6.

—3. — Constitutionality.

See 6 Cent. Dig. Bankr. §§ 1, 654.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], is not unconstitutional because it provides that others than traders may be adjudged bankrupts, and that this may be done on voluntary petition.—*Hanover Nat. Bank v. Moyses*, 22 S. Ct. 857, 186 U. S. 181, 46 L. Ed. 1113.

The constitutional requirement that bankruptcy laws be uniform throughout the United States is not violated by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], because by the sixth section of that act (30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), bankrupts are allowed the exemptions prescribed by the state law in force at the time of the filing of the petition in bankruptcy.—*Id.*

—6. — Retroactive operation.

See 6 Cent. Dig. Bankr. § 2.

A retrospective effect will not be given to Act June 25, 1910, § 8, amending Bankrupt Act, § 47a, subd. 2, by giving trustee in bankruptcy the rights of a creditor holding a lien so as to defeat title of conditional vendor under a contract of sale, which because unregistered was, under Code Va. 1904, § 2462, void as to lien creditors without notice.—*Holt v. Henley*, 34 S. Ct. 459, 232 U. S. 637, 58 L. Ed. 767, reversing decree 193 F. 1020, 113 C. O. A. 87.

—9. Effect of bankruptcy acts on state insolvency laws and proceedings.

See 6 Cent. Dig. Bankr. §§ 7-9; 4 Cent. Dig. Assign. f. B. C. § 88; 27 Cent. Dig. Insolv. § 6.

Except as against proceedings under the bankrupt act, an assignment for the benefit of creditors under a state insolvent law (Act N. J. April 16, 1846) is valid, for the purpose of securing an equal distribution of the estate; and a receiver appointed in supplementary proceedings in New York cannot claim a priority in the proceeds of the assigned estate deposited in a bank in New York City for the benefit of the judgment creditor, because of any conflict between the New Jersey insolvency law and the bankrupt act.—*Boese v. King*, 108 U. S. 379, 2 S. Ct. 765, 27 L. Ed. 760.

The insolvent law of Louisiana (Voorhies, Rev. Laws La. 1884, pp. 279-288), which was

originally enacted before the bankrupt act of 1867, was suspended by that act, but became operative again upon its repeal.—*Tua v. Carriere*, 117 U. S. 201, 6 S. Ct. 565, 29 L. Ed. 855, affirming *Lafolys v. Same* (C. C.) 24 F. 346.

The insolvency law of Massachusetts is constitutional, and after the repeal of the federal bankruptcy act became operative without reenactment.—*Butler v. Goreley*, 146 U. S. 303, 13 S. Ct. 84, 36 L. Ed. 981, affirming judgment *Goreley v. Butler*, 16 N. E. 734, 147 Mass. 8.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

—18½ [New, vol. 8 Key-No. Series]. Conflicting jurisdiction of courts of bankruptcy and other United States courts.

Pendency of bankruptcy proceedings, unknown to any of the parties concerned or to the court, does not prevent a territorial court having custody of perishable property under an attachment from ordering a sale on a finding under Comp. Laws N. M. 1897, § 2716, where the interests of the parties to the action required the sale.—*Jones v. Springer*, 33 S. Ct. 64, 226 U. S. 148, 57 L. Ed. 161, affirming decree 103 P. 265, 15 N. M. 98.

—20. Conflicting jurisdiction of courts of bankruptcy and state courts.

See 6 Cent. Dig. Bankr. § 23; 13 Cent. Dig. Courts, §§ 119, 1331.

Goods in actual possession of a bankrupt at the time of his adjudication as such, and at the time of the reference of the case to a referee, who directs them to be locked in a store, are in custody of the United States court, from which they cannot be taken upon any process from a state court.—*White v. Schloerb*, 20 S. Ct. 1007, 178 U. S. 542, 44 L. Ed. 1183.

Goods in the possession of a receiver in bankruptcy cannot be seized on replevin from a state court on the theory that the receiver is holding them as an individual, where the only circumstance tending to support such theory is that, pending the settlement of a dispute over the title, and for no other reason than that the dispute existed, the goods in question were not included in the schedule of the property of the bankrupt filed by the receiver. Judgment (1907) *John Hofman Co. v. Murphy*, 80 N. E. 1111, 187 N. Y. 548, reversed.—*Mur-*

phy v. John Hofman Co., 29 S. Ct. 154, 211 U. S. 562, 53 L. Ed. 327.

22. Rules, forms, and orders as to procedure.

See 6 Cent. Dig. Bankr. § 11.

The Supreme Court of the United States was empowered by the provision of Bankr. Act July 1, 1898, c. 541, § 30, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], that all necessary rules, forms, and orders as to procedure and for carrying the act into force and effect shall be prescribed, and may be amended from time to time, by that court, to provide by general orders in bankruptcy No. 21, that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. Order, *In re Ingalls Bros.* (1905) 137 F. 517, 70 C. C. A. 101, reversed.—*J. B. Orcutt Co. v. Green*, 27 S. Ct. 195, 204 U. S. 96, 51 L. Ed. 390.

(B) VOLUNTARY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 38-49.]

(C) INVOLUNTARY PROCEEDINGS.

54. Insolvency of debtor.

See 6 Cent. Dig. Bankr. §§ 54, 84, 85.

The bankruptcy act of 1898 (30 Stat. 544) does not make insolvency an essential prerequisite in every case to an adjudication in involuntary bankruptcy.—*George M. West Co. v. Lea*, 19 S. Ct. 836, 174 U. S. 590, 43 L. Ed. 1098.

55. Acts of bankruptcy.

See 6 Cent. Dig. Bankr. §§ 57, 61-83, 86-97.

59. — Preference through legal proceedings against insolvent.

See 6 Cent. Dig. Bankr. §§ 81, 82.

The failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him upon an irrevocable power of attorney given years before constitutes the suffering or permitting of the creditor to obtain a preference, which amounts to an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], though the judgment is entered without the knowledge or consent of the debtor, and he is unable to prevent its enforcement in any other way than by filing his petition in bankruptcy.—*Wilson Bros. v. Nelson*, 22 S. Ct. 74, 183 U. S. 191, 46 L. Ed. 147.

Failure of an insolvent judgment debtor for one day less than four months after the levy of execution to discharge it is not final disposition of the property levied on within Bankruptcy Act July 1, 1898, § 3a(3), declaring acts of bankruptcy shall consist of suffering, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before final disposition of any property affected by such preference, vacated or discharged the preference.—*Citizens' Banking Co. v. Ravenna Nat. Bank*, 34 S. Ct. 806, 234 U. S. 360, 58 L. Ed. 1352, answering certified questions 202 F. 892, 121 C. C. A. 250.

An insolvent debtor does not commit an act of bankruptcy under Bankruptcy Act July 1, 1898, by inaction for four months after levy of execution, in view of section 3a(3), providing that a person commits an act of bankruptcy when he has suffered, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before final disposition of any property affected by such preference, vacated or discharged the preference, which means that it would be suf-

ficient to avoid an act of bankruptcy if the lien is lifted five days before final disposition of any property affected; such meaning not being affected by section 3b, limiting to four months after the act of bankruptcy the time for filing petitions in bankruptcy, and sections 67c and 67f, dealing with the retrospective effect of adjudications in bankruptcy.—*Id.*

60. — Assignment for benefit of creditors, trust, or receivership.

See 6 Cent. Dig. Bankr. § 80.

Under Bankruptcy Act 1898, § 3, declaring that it shall be an act of bankruptcy if a person shall have "made a general assignment for the benefit of his creditors," the making of such an assignment is an act of bankruptcy per se, without reference to the debtor's solvency or insolvency at the time of the assignments or of the filing of the petition.—*George M. West Co. v. Lea*, 19 S. Ct. 836, 174 U. S. 590, 43 L. Ed. 1098.

65. Defenses and grounds for opposition.

See 6 Cent. Dig. Bankr. §§ 54, 121.

In paragraph c of section 3 of the bankruptcy act of 1898 (30 Stat. 546), providing that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him," the words "under the first subdivision of this section" do not refer to paragraph a of the section, defining acts of bankruptcy, as a whole, but to subdivision 1 of such paragraph, which makes the conveyance, transfer, concealment, or removal of property with intent to hinder, delay, or defraud creditors an act of bankruptcy.—*George M. West Co. v. Lea*, 19 S. Ct. 836, 174 U. S. 590, 43 L. Ed. 1098.

66. Persons who may be adjudged bankrupt.

See 6 Cent. Dig. Bankr. §§ 17, 18, 51-53, 56, 86, 87, 108.

72. — Nature of corporate business.

See 6 Cent. Dig. Bankr. § 17.

A corporation whose principal business is making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete, in carrying on which business it buys and combines together raw materials, and supplies the necessary labor, machinery, and appliances, is a "corporation engaged principally in manufacturing," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1309], defining the persons or corporations which may be adjudged involuntary bankrupts, although such company makes its product, and gives it form and shape, at the place where it is to remain. Judgment, *Hall & Kaul Co. v. Friday* (1907) 158 F. 593, 87 C. C. A. 23, reversed.—*Friday v. Hall & Kaul Co.*, 30 S. Ct. 261, 216 U. S. 449, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475.

A corporation engaged in conducting hotels at various points is not engaged principally in trading or mercantile pursuits, so as to be liable to an involuntary adjudication in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1309], although it also maintains two country stores, largely as an incident to the location of its hotels in a thinly settled mountainous region.—*Toxaway Hotel Co. v. J. L. Smathers & Co.*, 30 S. Ct. 263, 216 U. S. 439, 54 L. Ed.

558; *Nollman & Co. v. Wentworth Lunch Co.*, 30 S. Ct. 694, 217 U. S. 591, 54 L. Ed. 895, affirming judgment (1908) *In re Wentworth Lunch Co.*, 159 F. 413, 86 C. C. A. 393.

75. **Petitioning creditors.**

See 6 Cent. Dig. Bankr. §§ 50, 55, 99-103, 105, 106.

76. — **Persons entitled to file or join in petition.**

See 6 Cent. Dig. Bankr. §§ 50, 56, 97, 99, 100.

An involuntary petition may be based on a claim for unliquidated damages arising out of a breach of warranty on sale of personalty, although by the provision of Bankr. Act July 1, 1898, c. 541, § 59b, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), such petitions may be filed only by creditors who have provable claims, since, if the claim is of a provable kind, this provision is satisfied; and the claim in question is provable under section 63a of that act, as founded on a contract, even if, in case of fraud, there may be an independent claim purely in tort. Judgment (*D. C.* 1903) *In re Frederic L. Grant Shoe Co.*, 125 F. 576, affirmed. — *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 29 S. Ct. 332, 212 U. S. 445, 53 L. Ed. 591.

80. **Petition.**

See 6 Cent. Dig. Bankr. §§ 59, 113-119, 123, 125-129.

84. — **Amendment.**

See 6 Cent. Dig. Bankr. §§ 126-129.

A court of bankruptcy does not abuse its discretion by permitting a defective verification of an involuntary petition to be cured by amendment, or by allowing an amendment to such petition to show that the alleged bankrupt does not come within the excepted classes of persons who may not be declared bankrupt. — *Armstrong v. Fernandez*, 28 S. Ct. 419, 208 U. S. 324, 52 L. Ed. 514.

88. **Parties.**

See 6 Cent. Dig. Bankr. §§ 53, 93, 104, 109-112.

Where a partner files a voluntary petition in bankruptcy, alleging that his partner will not join him, but making him a party, and praying that he be adjudged a bankrupt, and afterwards the other partner comes in, confesses himself a bankrupt, and is so adjudged, it is a case of involuntary bankruptcy, within Act U. S. June 22, 1874 (18 Stat. c. 390, § 10). — *Metsker v. Bonebrake*, 106 U. S. 66, 2 S. Ct. 351, 27 L. Ed. 654.

Because a general assignee was joined with his assignors in a petition in bankruptcy against the latter, which set up no cause of action and prayed no special relief against such assignee, he does not therefore continue to be subject to the orders of the court without other process. — *Louisville Trust Co. v. Comings*, 22 S. Ct. 298, 184 U. S. 18, 46 L. Ed. 413, affirming decree *Sinsheimer v. Simonson*, 107 F. 898, 47 C. C. A. 51.

89. **Answer and other pleadings.**

See 6 Cent. Dig. Bankr. §§ 120-122.

The rules in bankruptcy promulgated by the supreme court were only intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms provide for an issue as to insolvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant because the particular act relied on conclusively imports a right to the adjudication in bankruptcy, if established, the allegation of insolvency in the petition becomes superfluous, or, if made, need not be traversed. — *George M. West Co. v. Lea*, 19 S. Ct. 836, 174 U. S. 590, 43 L. Ed. 1098.

100. **Adjudication.**

See 6 Cent. Dig. Bankr. §§ 60, 131, 141-144.

An adjudication in bankruptcy proceedings against a corporation, made by a district court having jurisdiction of the bankrupt, cannot be impeached collaterally by a stockholder, who, as such, was a party to the bankruptcy proceedings. — *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 S. Ct. 1009, 30 L. Ed. 196.

An adjudication against two brothers as partners is not conclusive as to the existence of the partnership and the title to the assets as against the trustees in bankruptcy of one of the brothers, who were not heard, although they had filed a denial and answer. Decree (1907) 153 F. 525, 82 C. C. A. 475, affirmed. — *Manson v. Williams*, 29 S. Ct. 519, 213 U. S. 453, 53 L. Ed. 869.

An adjudication of bankruptcy is not open to collateral attack. — *Fairbanks Steam Shovel Co. v. Wills*, 36 S. Ct. 466, 240 U. S. 642, 60 L. Ed. 841, affirming decree *In re Federal Contracting Co.*, 212 F. 688, 129 C. C. A. 224.

(D) **WARRANT AND CUSTODY OF PROPERTY.**

101. **Possession and control pending proceedings in general.**

See 6 Cent. Dig. Bankr. § 163.

The filing of a bankruptcy petition is notice to the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property, and as an injunction restraining all persons from intermeddling therewith. — *Mueller v. Nugent*, 22 S. Ct. 269, 184 U. S. 1, 46 L. Ed. 405, reversing decree *In re Nugent*, 105 F. 581, 44 C. C. A. 620.

103. **Restraining interference by third persons.**

See 6 Cent. Dig. Bankr. §§ 156-162.

105. — **Proceedings in state courts.**

See 6 Cent. Dig. Bankr. §§ 156-158, 162.

Vacation by a bankruptcy court of its order enjoining any interference under process from a state court with property then in the possession of its receiver is not an abandonment of its possession of the property, and a turning over of such property to be dealt with by the state court, where, in the meantime, there had been various dealings with the property by the bankruptcy court, including sale by the trustee. Judgment (1907) *John Hofman Co. v. Murphy*, 80 N. E. 1111, 187 N. Y. 548, reversed. — *Murphy v. John Hofman Co.*, 29 S. Ct. 154, 211 U. S. 562, 53 L. Ed. 327.

106. **Warrant and seizure pending proceedings.**

See 6 Cent. Dig. Bankr. §§ 148-151, 153-155.

111. — **Execution of warrant.**

See 6 Cent. Dig. Bankr. §§ 149, 151, 153-155.

Under the bankrupt act of 1867, the district court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in the possession of another, notwithstanding by the law of the state the possession of personal property under a claim of title cannot be disturbed by a seizure under judicial process running against another person; and, in a subsequent action against the officer for obedience to such an order, he may justify the seizure by proof that the title to the property was at the time in the bankrupt. — *Feibelman v. Packard*, 109 U. S. 421, 3 S. Ct. 289, 27 L. Ed. 984.

114. Appointment and authority of receiver or marshal pending proceedings.

See 6 Cent. Dig. Bankr. §§ 164-166.

A trustee in bankruptcy is bound by the stipulation of the receiver in bankruptcy, approved by the referee, on the faith of which the bankrupt's conditional vendor surrendered possession, that all the property in dispute should be deemed to have been that delivered under the conditional contract or to be the proceeds of the resale of property so delivered. Judgment, (1907) In re E. M. Newton & Co., 153 F. 841, 33 C. C. A. 23; Swofford Bros. Dry Goods Co. v. Bryant, Id. affirmed.—Bryant v. Swofford Bros. Dry Goods Co., 29 S. Ct. 614, 214 U. S. 279, 53 L. Ed. 997.

116. Claims by third persons.

Property of a bankrupt in the hands of third persons is included within the provision of Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], giving the court of bankruptcy authority to appoint receivers or the marshals to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified, when that is absolutely necessary for the preservation of estates. Judgment, In re Abraham, 93 F. 767, 35 C. C. A. 592, reversed.—Bryan v. Bernheimer, 21 S. Ct. 557, 181 U. S. 188, 45 L. Ed. 814.

A purchaser from an assignee in insolvency who holds the property under a general assignment which is itself an act of bankruptcy, when the sale is made before any trustee has been appointed, but after and with knowledge of a petition in bankruptcy, has no title superior to the title of the bankrupt's estate; but his equities in respect to the goods, or to the money that he has paid for them, may depend upon many circumstances, and can be settled in the district court as a court of bankruptcy, which has authority under Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], to bring in the assignee for creditors, if necessary for the complete determination of the matter.—Id.

The failure of adverse claimants to abandon their claims to property not in the possession of the receiver in bankruptcy, after their objections to the jurisdiction of a court of bankruptcy to act on the receiver's petition for directions respecting a sale have been overruled, does not amount to a waiver of their objections or a consent to an exercise of this jurisdiction. Decree In re Rodgers, 125 F. 169, 60 C. C. A. 567, reversed.—First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 693, 198 U. S. 280, 49 L. Ed. 1051.

117. Sale or other disposition of property pending proceedings.

See 6 Cent. Dig. Bankr. §§ 167, 624.

A court of bankruptcy, after adjudging, in a proceeding begun by the receiver's petition for directions respecting a sale, that the receiver was not in possession of the property, has no jurisdiction to decree the sale, and determine the rights of adverse claimants to the proceeds. Decree In re Rodgers, 125 F. 169, 60 C. C. A. 567, reversed.—First Nat. Bank v. Chicago Title & Trust Co., 25 S. Ct. 693, 198 U. S. 280, 49 L. Ed. 1051.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 168-192.]

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.

Following local law by bankruptcy court in determining validity of contract of sale to bankrupts, see Courts, 359.

136. Transfers by bankrupt to trustee under order of court or referee.

See 6 Cent. Dig. Bankr. §§ 233, 235.

Where a transfer by a bankrupt of bills against a company, and other securities, is void under the bankrupt law, an order of court directing an assignment by the transferee to the trustees in bankruptcy of a judgment on such bills against the company is proper, though such bills may not be good against the company in the hands of the bankrupt or his assignees.—First Nat. Bank v. Cook, 154 U. S. 628, 14 S. Ct. 1181, 24 L. Ed. 916.

A court of bankruptcy has power upon a petition and rule to show cause, there being no adverse holding, to compel delivery to the trustee of the records and stock books of the corporate bankrupt.—Babbitt v. Dutcher, 39 S. Ct. 372, 216 U. S. 102, 54 L. Ed. 402, 17 Ann. Cas. 969.

A federal District Court has jurisdiction to entertain proceedings instituted by a trustee in bankruptcy, duly appointed in a bankruptcy proceeding pending in another district, to compel the officers of the bankrupt to deliver to such trustee the documents in their possession relating to the business of the bankrupt, since the general jurisdiction conferred on bankruptcy courts by Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], is not cut down, so far as summary jurisdiction is concerned, by the provisions of section 23a (30 Stat. 552, c. 541, U. S. Comp. St. 1901, p. 3431) and 23b (Act 1898, as amended by Act Feb. 5, 1903, 32 Stat. 798, c. 487 [U. S. Comp. St. Supp. 1909, p. 1312]), section 60, subd. "b," or section 67, subd. "c," (32 Stat. 800, c. 487 [U. S. Comp. St. Supp. 1909, pp. 1315, 1316]), which affect only those cases where there is a claim of adverse title based upon a transfer antedating the bankruptcy.—Id.

137. Property and rights vesting in trustee.

See 6 Cent. Dig. Bankr. §§ 193-227, 229-232, 234, 237, 625, 656-673.

138. — Personal property in general.

See 6 Cent. Dig. Bankr. §§ 193-204, 206-209.

Act Cong. June 5, 1882, providing for "the distribution of the unappropriated moneys of the Geneva award," directed the examination and allowance of claims for the "payment of premiums for war risks * * * after the sailing of any Confederate cruiser." Held, that these claims, even before congress had made any provision for their payment, were property, and as such passed, under Rev. St. U. S. § 5044, to the assignee in bankruptcy of the claimant, who accordingly is entitled to the amount ultimately awarded thereon.—Williams v. Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. Ed. 550, reversing judgment Heard v. Sturgis, 146 Mass. 545, 16 N. E. 437, overruling Kingsbury v. Mattocks, 81 Me. 310, 17 Atl. 126.

The corporate records and stock books passed on an adjudication in bankruptcy against the corporation to the trustee, by virtue of the provisions of Bankr. Act July 1, 1898, c. 541, § 1, subd. 13, section 70, 30 Stat. 544, 565 [U. S. Comp. St. 1901, pp. 3419, 3451], vesting in such trustee the title of the bankrupt to all documents relating to his property, and section 1, subd. 13, providing that the word "documents,"

shall include any book, deed, or instrument in writing.—*Babbitt v. Dutcher*, 30 S. Ct. 372, 216 U. S. 102, 54 L. Ed. 402, 17 Ann. Cas. 969.

Physical possession of a crop, first by the bankrupts and later by the trustee, brought the property within the exclusive jurisdiction of the bankruptcy court as assets of the estate.—*Hebert v. Crawford*, 33 S. Ct. 484, 228 U. S. 204, 57 L. Ed. 800.

—139. — Real property and interests therein.

See 6 Cent. Dig. Bankr. §§ 198, 199, 210-219.

The question of the liability of the equitable interest in the real estate of a bankrupt to the payment of his debts is to be determined according to the local laws in the state wherein such real estate is situated.—*Spindle v. Shreve*, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512.

A power of appointment does not pass to the assignee in bankruptcy of the person in whom the power resides.—*Brandies v. Cochrane*, 112 U. S. 344, 5 S. Ct. 194, 28 L. Ed. 760.

—140. — Ownership or possession of property.

See 6 Cent. Dig. Bankr. §§ 198, 199, 219, 225.

An assignee takes only the rights that the bankrupt has at the time of his petition, and, in the absence of fraud, acquires no title to land, the contract for which the bankrupt has forfeited before the assignment for failure of performance on his part, though he acquire title by purchase after his discharge.—*Norton v. Hood*, 124 U. S. 20, 8 S. Ct. 357, 31 L. Ed. 364.

Securities held by stockbrokers as collateral to their customers' accounts may, where the latter are not indebted to the brokers, be recovered by such customers from the trustees in bankruptcy of the brokers' estates. Judgment, *In re Jacob Berry & Co.* (1906) 149 F. 176, 79 C. C. A. 124, affirmed.—*Thomas v. Taggart*, 28 S. Ct. 519, 209 U. S. 385, 52 L. Ed. 845.

A title which is good as against a bankrupt and his creditors at the time the trustee's title accrues does not pass to the trustee, and such property or its proceeds, if sold, should be restored to the true owner.—*Id.*

A trustee in bankruptcy has no higher rights than the bankrupts themselves in property delivered to the bankrupts under a contract of conditional sale. Judgment, *In re E. M. Newton & Co.*, 153 F. 841, 83 C. C. A. 23; *Swofford Bros. Dry Goods Co. v. Bryant*, *Id.* (1907) affirmed.—*Bryant v. Swofford Bros. Dry Goods Co.*, 29 S. Ct. 614, 214 U. S. 279, 53 L. Ed. 997.

Shares of stock in a certain corporation indorsed in blank and in the possession of a bankrupt firm of stock brokers in an amount greater than should be on hand for a customer for whom shares had been bought to be paid for in full, there being a credit balance with the firm in the customer's favor sufficient for such payment, are not, up to the amount of such purchase, a part of the bankrupt estate, but should be turned over to the customer.—*Gorman v. Littlefield*, 33 S. Ct. 690, 229 U. S. 19, 57 L. Ed. 1047, reversing judgment *In re Brown*, 184 F. 454, 106 C. C. A. 536.

An agreement between woolen manufacturers and a corporation representing a firm of dealers in woolens held a bailment in the nature of a consignment arrangement with the net proceeds to be accounted for by the consignor and with a right to return the unsold goods, which agreement is good as against creditors in the event of the bankruptcy of the firm.—*Ludvig v. American Woolen Co. of New York*, 34 S. Ct. 161, 231 U. S. 522, 58 L. Ed. 345, affirming decree 188 F. 30, 110 C. C. A. 180.

Persons seeking to recover trust funds in the possession of the trustee's trustee in bankruptcy

must prove title, and if the identification is doubtful that doubt must be resolved in favor of the trustee in bankruptcy.—*Schuyler v. Littlefield*, 34 S. Ct. 466, 232 U. S. 707, 58 L. Ed. 806, affirming decrees *In re Brown*, 193 F. 24, 113 C. C. A. 348, and *In re A. O. Brown & Co.*, 193 F. 30, 113 C. C. A. 354.

Shares represented by stock in a corporation found in possession of bankrupt firm of stockbrokers, though insufficient to satisfy its customers, should be allotted to them pro rata.—*Duel v. Hollins*, 36 S. Ct. 615, 241 U. S. 523, 60 L. Ed. 1143, reversing decree *In re Hollins*, 219 F. 544, 135 C. C. A. 312.

—142. — Property fraudulently conveyed.

See 6 Cent. Dig. Bankr. § 223.

Existence prior to bankruptcy proceedings of right of antecedent creditors, under Ky. St. § 1907, to set aside fraudulent conveyances, does not prevent application of provisions of Bankr. Act July 1, 1898, § 67f, avoiding liens obtained within four months of bankruptcy proceedings.—*Globe Bank & Trust Co. of Paducah, Ky. v. Martin*, 35 S. Ct. 377, 236 U. S. 288, 59 L. Ed. 583, denying certiorari *In re Martin*, 193 F. 841, 113 C. C. A. 627.

—143. — Property capable of transfer or subject to process.

See 6 Cent. Dig. Bankr. §§ 194, 201, 202, 213-217, 223, 224.

Though under the Pennsylvania statutes (Acts 1705; 1 Dall. Laws Pa. 67-71; *Id.* App. 43-45) land is a chattel for the payment of debts, and a sale under execution against the husband bars the wife's right of dower, an assignment under the bankrupt act will not pass the title free from dower.—*Porter v. Lazear*, 109 U. S. 84, 3 S. Ct. 58, 27 L. Ed. 865.

A membership in a stock exchange is in its nature a personal privilege, subject to the restrictions imposed by the rules of the exchange, and a right to the property therein passes by an assignment in bankruptcy; and if by reason of the restrictions it is doubtful whether the membership possesses any value to the estate, the assignees must, within a reasonable time, elect whether they will accept or reject it.—*Sparhawk v. Yerkes*, 142 U. S. 1, 12 S. Ct. 104, 35 L. Ed. 915.

The membership of a bankrupt in the Philadelphia Stock Exchange, which has a considerable vendible value, the purchaser taking it subject to his election by the exchange and certain other conditions, is property of the bankrupt within the meaning of Bankr. Act 1898, § 70, 30 Stat. 566, c. 541 [U. S. Comp. St. 1901, p. 3451], vesting the trustee with the title of the bankrupt to "property which, prior to the filing of the petition, he could by any means have transferred." Judgment (D. C.) 102 F. 746, and *In re Page*, 107 F. 89, 46 C. C. A. 160, 59 L. R. A. 94, affirmed.—*Page v. Edmunds*, 23 S. Ct. 200, 187 U. S. 596, 47 L. Ed. 318.

The exemption of policies of life insurance under Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], where they are exempted from execution by the state law, is not qualified by the proviso in section 70a [U. S. Comp. St. 1901, p. 3451], which vests the trustee with the title of the bankrupt, except in so far as it is to property which is exempt, "to certain enumerated classes of property, that a bankrupt having an insurance policy which has a cash surrender value payable to himself, his estate, or his personal representatives may prevent the policy from passing to the trustee by paying such surrender value. Judgment, *In re Holden*, 113 F. 141, 51 C. C. A. 97, reversed.—*Holden v. Stratton*, 25 S. Ct. 656, 198 U. S. 202, 49 L. Ed. 1018.

Policies of life insurance on the life of the bankrupt which do not have a cash surrender value at the time of the bankruptcy, available as a cash asset, do not pass to the trustee in bankruptcy under Bankr. Act, § 70a, subd. 5.—*Burlingham v. Crouse*, 33 S. Ct. 564, 228 U. S. 459, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, affirming judgment 181 F. 479, 104 O. C. A. 227.

The absolute assignment by a bankrupt of life insurance policies does not exclude them from the operation of the proviso in Bankr. Act, § 70a, subd. 5, that a bankrupt may pay the surrender value of policies having such a value to the trustee and continue to hold them free from the claims of creditors.—*Id.*

The time when the petition in bankruptcy is filed fixes the cash surrender value of insurance policies mentioned in the proviso in Bankr. Act, § 70a, subd. 5, authorizing a bankrupt to pay the cash surrender value of policies to the trustee and continue to hold them free from claims of creditors, so that the death of the bankrupt between the filing of the petition and the adjudication does not make the proceeds of the policies above the cash surrender value assets in the hands of the trustee.—*Everett v. Judson*, 33 S. Ct. 568, 228 U. S. 474, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154, affirming judgment in re Judson, 192 F. 834, 113 C. C. A. 158.

The right of a bankrupt under Bankr. Act, § 70a, subd. 5, to pay the trustee the cash surrender value of insurance policies and to hold them free from the claims of creditors was not extinguished by his death after filing the petition and before adjudication, and the right may be exercised by his executors.—*Andrews v. Partridge*, 33 S. Ct. 570, 228 U. S. 479, 57 L. Ed. 929, reversing judgment *Partridge v. Andrews*, 191 F. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123.

Under trust to pay net income to beneficiary for life, free from interference of creditors, beneficiary's interest held not to pass to trustee under Bankr. Act, § 70a, (5), where local law treated such restrictions against interference as limiting character of the equitable property and inherent in it.—*Eaton v. Boston Safe Deposit & Trust Co.*, 36 S. Ct. 391, 240 U. S. 427, 60 L. Ed. 723, affirming decree *Boston Safe Deposit & Trust Co. v. Luke*, 108 N. E. 64, 220 Mass. 484.

149. — Partnership and individual property.

See 6 Cent. Dig. Bankr. § 229.

Policies insuring the life of one member of a bankrupt partnership, payable, one to him or his legal representatives, and the other to his wife or children or to him, in the event of their death before his, which have been individually pledged by him, do not belong to the partnership estate, although the partnership may have pledged the policies in connection with his separate individual pledge. Judgment (1906) in re Mertens, 144 F. 818, 75 C. C. A. 548, affirmed.—*Hiscock v. Varick Bank of New York*, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

An individual partner not adjudged a bankrupt may be required to turn over his separate estate to the trustee of the firm in bankruptcy, where the partnership and individual estate was not enough to pay the partnership debts, where the partner had not objected that he should have been put into bankruptcy, and where assuming that the case is within Bankrupt Act July 1, 1898, § 5h, providing that the partnership property may be administered by the partners not adjudged bankrupt, such partner has never objected to the administration of the firm property by the trustee.—*Francis v. McNeal*, 33 S. Ct. 701, 228 U. S. 695, 57 L. Ed. 1029, L. R. A.

1915E, 706, affirming decree 186 F. 481, 108 C. C. A. 459.

150. Failure to take possession or abandonment of property by trustee.

See 6 Cent. Dig. Bankr. § 228.

A member of the New York and Philadelphia stock boards was declared a bankrupt, and by the rules thereof his seats became subject to sale to satisfy the claims of certain fellow members. These claims exceeded by large amounts the value of the seats, respectively, and his assignees, considering them of no present value to the estate, refused to pay dues upon them, and took no steps to have them sold. A percentage was paid on the debts proved, including those due the fellow members, and the bankrupt was discharged. Meanwhile he induced those members to refrain from selling his seats, paid all dues thereon out of his personal earnings, and, in the 10 years following his discharge, paid the remainder of his stock-board debts, and was then re-elected to membership. The value of the seats had greatly increased in the meantime, and the assignees then sued to compel their sale for the benefit of the estate, or, if this were refused, to require the bankrupt to pay over an amount equal to the sums paid as dividends to his fellow members. *Held*, that the assignees were guilty of laches, and had lost both remedies.—*Sparhawk v. Yerkes*, 142 U. S. 1, 12 S. Ct. 104, 35 L. Ed. 915.

A bankrupt failed to include in his schedule of assets a patent owned by him, and the assignee never made any claim thereto. Some time after both had been discharged a third person sought to buy the patent from the assignee; but the assignee said he could do nothing in the matter, and that the discharged bankrupt was the only one who could give a good title. Thereupon a purchase was made from the latter. *Held*, that the assignee's conduct showed an election not to accept the property, and an alleged infringer could not deny the purchaser's title on the ground that the patent was vested in the assignee.—*Sessions v. Romadka*, 145 U. S. 29, 12 S. Ct. 799, 36 L. Ed. 609, reversing decree 21 F. 124.

Where the assignee in bankruptcy of a patent owner elects to abandon the property in the patent before the expiration of two years from the accrual in his favor of a cause of action for infringement, such abandonment relates back to the date of the assignment; and the bankrupt receives back the right of action, unaffected by the two-years limitation prescribed by Rev. St. § 5057, as to actions by assignees.—*Id.*

The fact that the assignee failed for a number of years to prosecute a claim belonging to the bankrupt does not show an abandonment of the claim, in the absence of evidence that the assignee had knowledge, or sufficient means of knowledge, of the existence of the claim.—*Dushane v. Beall*, 161 U. S. 513, 16 S. Ct. 637, 40 L. Ed. 791.

Assignees in bankruptcy cannot be deemed to have abandoned the interest in remainder of the bankrupt under a testamentary trust because they did not sell such interest, where, apparently as soon as they learned of the existence of the trust fund and of the fact that creditors of the bankrupt were seeking to reach and apply this interest in satisfaction of his debts, they brought a bill in equity in the nature of a bill quia timet to compel the transfer to them of the bankrupt's interest, and to enjoin the trustee from paying any part of the trust fund to the bankrupt or those claiming under him. Judgment, *Whittridge v. Sweetser* (1905) 75 N. E. 222, 189 Mass. 45, affirmed.—

Hammond v. Whittredge, 27 S. Ct. 396, 204 U. S. 538, 51 L. Ed. 606.

152. Time of vesting of title or right.
See 6 Cent. Dig. Bankr. § 194.

The power of sale may be exercised by a pledgee conformably to the contract of pledge during the time between the filing of the petition in bankruptcy against his pledgor and the adjudication in bankruptcy, since the title of the bankrupt is, by Act July 1, 1898, c. 541, §§ 70a, 70c, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], vested in the trustee by operation of law only as of the date of the adjudication. Judgment (1906) In re Mertens, 144 F. 818, 75 C. C. A. 548, affirmed.—Hiscock v. Varick Bank of New York, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

Trustee in bankruptcy takes the status of a creditor holding a lien as of the time when the petition in bankruptcy is filed under Bankr. Act, § 47a, cl. 2, as amended by Act June 25, 1910, § 8.—Bailey v. Baker Ice Mach. Co., 36 S. Ct. 50, 239 U. S. 263, 60 L. Ed. 275, affirming decree Baker Ice Mach. Co. v. Bailey, 209 F. 603, 126 C. C. A. 425.

A chattel mortgagee, whose mortgage is not recorded, cannot perfect his title as against a trustee in bankruptcy by taking possession of the chattels, in view of Act July 1, 1898, § 47a2, as amended by Act June 25, 1910, § 8, since the title of the trustee relates back to the filing of the petition in bankruptcy.—Fairbanks Steam Shovel Co. v. Wills, 36 S. Ct. 466, 240 U. S. 642, 60 L. Ed. 841, affirming decree In re Federal Contracting Co., 212 F. 688, 129 C. C. A. 224.

155. Equities of third persons.

Only when the collateral held by secured creditors of the bankrupt has not been disposed of by the creditor in accordance with the contract of pledge can a court of bankruptcy exercise its power, under Bankr. Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], to determine the value of such securities, and to direct their disposition. Judgment (1906) In re Mertens, 144 F. 818, 75 C. C. A. 548, affirmed.—Hiscock v. Varick Bank of New York, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

The advantage derived from a mistake made by a bankrupt when reducing to writing a contract made by him is not an asset in the hands of the trustee in bankruptcy, as part of the bankrupt estate. Judgment, First Nat. Bank v. Zartman (1907) 82 N. E. 1126, 189 N. Y. 533, affirmed.—Zartman v. First Nat. Bank of Waterloo, 30 S. Ct. 368, 216 U. S. 134, 54 L. Ed. 418.

The trustee in bankruptcy is not a bona fide purchaser for value, so as to bar the reformation in equity, for mistake, of a contract made by the bankrupt, but he takes the property of the bankrupt as the latter held it at the time of the petition, subject to all valid claims, liens, and equities.—Id.

156. Rights as to pending actions.
See 6 Cent. Dig. Bankr. §§ 240-246.

A pending action brought by creditors of an insolvent partnership to avoid, as an unlawful preference, a sale by an individual partner of his individual property, may be prosecuted to final judgment by the trustee in bankruptcy, though the cause of action arose from the state law, and the application of that law is essential to secure the relief sought, provided only that such trustee is properly authorized, conformably to the Bankr. Act July 1, 1898, c. 541, § 67, subd. "f," 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], empowering a court of bankruptcy to direct the trustee to preserve liens for the benefit of the bankrupt estate. Judgment (1906) New Orleans Acid & Fertilizer Co. v. O. Guillory & Co., 42 So. 329, 117

La. 821, affirmed.—Miller v. New Orleans Acid & Fertilizer Co., 29 S. Ct. 176, 211 U. S. 496, 53 L. Ed. 300.

Establishing the existence of other individual creditors is not essential to the prosecution by the trustee of a bankrupt partnership of a pending suit to avoid a sale by an individual partner of his individual property, where, under such law, partnership and individual creditors have a coequal right to payment out of his individual estate, although, if the preferred creditor proves to be the only individual creditor, he will be entitled, by way of distribution under Bankr. Act July 1, 1898, c. 541, § 5, subd. "f," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424], to have the full amount paid in by him returned.—Id.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

158. Preferences voidable.
See 6 Cent. Dig. Bankr. §§ 247-251.

159. — In general.

See 6 Cent. Dig. Bankr. §§ 247, 248, 251, 253-251.

A voluntary conveyance, made to a daughter on her marriage as an advancement, by her father, who was then in prosperous circumstances, but who afterwards became a bankrupt by reason of the failure of a firm of which he was a member, where no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, is alleged in the bill, cannot be set aside at a suit of the assignee in bankruptcy, under Rev. St. §§ 5046, 5047, as being a deed of "property conveyed by the bankrupt in fraud of his creditors," even though such conveyance would be void as to creditors named in the bill, because it was a voluntary conveyance, under the statute of the state, where it was executed.—Warren v. Moody, 122 U. S. 132, 7 S. Ct. 1063, 30 L. Ed. 1108.

The facts that a father who made a voluntary conveyance to his children was insolvent at the time, and that the land so conveyed constituted more, in value, of his estate than he could rightfully withdraw from the reach of creditors, do not give his assignee in bankruptcy, where there was no fraud in the transaction, any standing in a court of equity to impeach the conveyance.—Adams v. Riley, 122 U. S. 382, 7 S. Ct. 1208, 30 L. Ed. 1207.

As between the assignee and the children of the bankrupt, where at the time of a gift of his property to them the father was in such a condition as to property that he could without injustice to his creditors make the gift, the fact that he continued in possession of the land conveyed down to the filing of his petition, and that he included it in his schedule, is immaterial, where the whole transaction was in good faith, and the deed was delivered, and his possession was under and for the children.—Id.

No preferential transfer, forbidden by Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031], results from the action of a stockbroker who has pledged certain stocks with the consent of the customer for whom he was carrying them on margin in redeeming the stocks and turning them over to such customer on demand when insolvent, even if the theory be adopted that the broker is the owner, carrying the shares upon a conditional contract of sale. Judgment (1906) 147 F. 659, 77 C. C. A. 643, affirmed.—Richardson v. Shaw, 28 S. Ct. 512, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981.

The return of excessive margins by an insolvent stockbroker to a customer does not constitute a preference, forbidden by Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S.

Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1031), where the customer had demanded settlement, and, on the following day, the sum paid over was taken into account in the settlement before turning over to the customer stock belonging to him, according to the understanding of the parties.—Id.

A bank which had issued margin certificates to a depositor to secure performance of dealings on the Board of Trade did not receive a preference within Bankr. Act July 1, 1898, §§ 60a, 60b, where the depositor afterwards transferred his open trades to a corporation which carried them out, substituting its own securities for his and turning over the margin certificates thus secured to the bank within four months of proceedings in bankruptcy against the original depositor, whereupon the bank applied the depositor's balance to his debt to the bank.—Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 33 S. Ct. 829, 229 U. S. 435, 57 L. Ed. 1268, reversing decree 199 F. 704, 118 C. C. A. 142.

A claim against a bankrupt for use by way of set-off held not acquired contrary to Bankr. Act July 1, 1898, § 68b, where a bank, having issued margin certificates evidencing deposits to secure trades on the Board of Trade and having come into possession of such certificates, where the depositor had transferred his open trades to a corporation, which substituted its own securities for the margin certificates, applied the deposits to the debt to the bank within four months of bankruptcy proceedings against him.—Id.

Bankr. Act, § 60b, as amended by Act June 25, 1910, § 11, declaring that transfer by bankrupt of any of his property within four months before petition in bankruptcy shall be void, applies to an act by which bankrupt surrenders his property for the benefit of a particular creditor.—Bailey v. Baker Ice Mach. Co., 36 S. Ct. 50, 239 U. S. 268, 60 L. Ed. 275, affirming decree Baker Ice Mach. Co. v. Bailey, 209 F. 603, 126 C. C. A. 425.

—161. — Time of giving preference. See 6 Cent. Dig. Bankr. §§ 261-263.

Taking possession of the mortgaged property under an unrecorded chattel mortgage does not amount to a preference voidable by the mortgagor's trustee in bankruptcy, although such action was taken within four months of the bankruptcy proceedings, if a possession so acquired is good as against the trustee under the state laws. Judgment Tatman v. Humphrey, 68 N. E. 844, 184 Mass. 361, 63 L. R. A. 738, 100 Am. St. Rep. 562, reversed.—Humphrey v. Tatman, 25 S. Ct. 567, 198 U. S. 91, 49 L. Ed. 956.

—163. — Transfers of property. See 6 Cent. Dig. Bankr. §§ 247, 248.

Insolvents, by depositing money in a bank upon an open account, subject to check, do not thereby make a transfer of property amounting to a preference, which, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], will deprive the bank of its right under section 68a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], to set off the amount of such deposit remaining to the depositors' credit on the date of their adjudication in bankruptcy and to prove its claim against the bankrupt estate for the balance.—New York County Nat. Bank v. Massey, 24 S. Ct. 199, 192 U. S. 138, 48 L. Ed. 380, reversing judgment in re Stege, 116 F. 342, 54 C. C. A. 116.

A sum retained by a corporate creditor with knowledge of the debtor's insolvency, and within four months of the filing of the petition in

bankruptcy, which sum was due and owing the bankrupt under an agreement by which the corporation, in paying its employes, was to deduct from their wages the amounts due from such employes to the bankrupt for supplies furnished them by him, and was to remit to him the amount so deducted, irrespective of any indebtedness otherwise due by him to the corporation, is not a voidable preference under Bankr. Act July 1, 1898, c. 541, §§ 57g, 60b, 30 Stat. 553 [U. S. Comp. St. 1901, pp. 3443, 3445], which must be surrendered before the corporation can prove its claim against the bankrupt's debtor's estate. Decree 129 F. 728, 64 C. C. A. 256, reversed.—Western Tie & Timber Co. v. Brown, 25 S. Ct. 339, 196 U. S. 502, 49 L. Ed. 571.

The avoidance, as an unlawful preference, of a conveyance by an insolvent debtor to a creditor in satisfaction of the debts due the latter, or those for which he is liable, cannot be defeated on the theory that such conveyance was in performance of an agreement between the parties, antedating the bankruptcy proceedings by more than four months, where the contract in fact was merely an agreement on the part of the bankrupt and his co-owner to sell, and, on the part of the creditor and another, to buy, at a named price, and such contract and a deed drawn in pursuance of its terms were never delivered, but were deposited in escrow. Decree (1906) 149 F. 194, 79 C. C. A. 153, reversed.—Page v. Rogers, 29 S. Ct. 159, 211 U. S. 575, 53 L. Ed. 332.

To constitute a preference voidable under Bankruptcy Act July 1, 1898, § 60, as amended by Act Feb. 5, 1903, § 13, it is sufficient if transfer is made to another for creditor's benefit.—(1912) National Bank of Newport v. National Herkimer County Bank of Little Falls, 32 S. Ct. 633, 225 U. S. 178, 56 L. Ed. 1042, affirming decree (1909) Mason v. National Herkimer County Bank of Little Falls, 172 F. 529, 97 C. C. A. 155, which reverses (D. C. 1908) 163 F. 920.

A creditor of a bankrupt cannot be charged with receiving a voidable preference within Bankruptcy Act July 1, 1898, § 60, as amended by Act Feb. 5, 1903, § 13, unless he takes by disposition by the bankrupt of his property for the creditor's benefit.—Id.

A defaulting trustee, who four months before bankruptcy transferred his individual property to one of such trusts and to himself as a trustee thereof, to make good a shortage, giving that trust a larger share of its debt than other trusts, created a preference within Bankr. Act, § 60a, as amended by Act Cong. Feb. 5, 1903, § 13.—Clarke v. Rogers, 33 S. Ct. 587, 228 U. S. 534, 57 L. Ed. 953, affirming decree 183 F. 518, 106 C. C. A. 64.

Contract of conditional sale not recorded until purchasers had become insolvent held not a preferential transfer by them within Bankr. Act, § 60b, as amended by Act June 25, 1910, § 11.—Bailey v. Baker Ice Mach. Co., 36 S. Ct. 50, 239 U. S. 268, 60 L. Ed. 275, affirming decree Baker Ice Mach. Co. v. Bailey, 209 F. 603, 126 C. C. A. 425.

—164. — Payments by debtor. See 6 Cent. Dig. Bankr. § 267.

Payment of a debt in money is a transfer of property, within the purview of Bankr. Act 1898, § 60a, providing that a debtor shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.—(Sup., Ill.) Pirie v. Chicago Title & Trust Co., 21 S.

Ct. 906, 182 U. S. 438, 45 L. Ed. 1171, affirming judgment 102 F. 1005, 41 C. C. A. 681.

A trust deed never delivered as a subsisting obligation cannot excuse a payment by the grantor on the indebtedness covered thereby, which payment otherwise would be invalid as an unlawful preference. Decree (1906) 149 F. 194, 79 C. C. A. 153, reversed.—Page v. Rogers, 29 S. Ct. 159, 211 U. S. 575, 53 L. Ed. 332.

A balance left on deposit subject to check for specific purposes may be applied to the payment of the depositor's indebtedness to the bank without violating Bankr. Act July 1, 1898, §§ 60a, 60b.—Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 33 S. Ct. 829, 229 U. S. 435, 57 L. Ed. 1268, reversing decree 199 F. 704, 118 C. C. A. 142.

Contract between railroad company, a construction company, and the latter's sureties, held to create an equitable lien in favor of all liens which the parties should deem to have color of right, and the fund set apart therefor more than four months before bankruptcy of construction company was not a preference as to a specific beneficiary to whom payment was made within the four months.—Johnson v. Root Mfg. Co., 36 S. Ct. 520, 241 U. S. 160, 60 L. Ed. 934, affirming decree Root Mfg. Co. v. Johnson, 219 F. 397, 135 C. C. A. 139.

—165. — Effect of transaction to give preference.

See 6 Cent. Dig. Bankr. §§ 259, 260, 266.

A bank which, in payment of a clearing house check drawn in its favor on another member, and held as a result of the day's clearings, receives the proceeds of checks presented by such other member for clearing on the next morning, shortly before suspending payment, must account therefor to the bankrupt estate of such defaulting member, where the clearing house, in the revision of the clearings made necessary by such suspension, eliminated and returned the checks which had been debited against the defaulting member, and which were subsequently dishonored; and this is no less true because the clearing house, under its rules, might have called on its other members to pay pro rata the amount of the checks drawn, upon the defaulting member, and might have treated the credits in favor of the defaulting member as belonging proportionally to the contributing members, since, even under these rules, a check which was a result of the clearings of the previous day would not be entitled to participation.—Rector v. City Deposit Bank Co., 26 S. Ct. 289, 200 U. S. 405, 50 L. Ed. 527.

A bank which receives from a clearing house association the proceeds of checks presented for clearing by a member shortly before suspending payment cannot escape liability to account to the estate in bankruptcy of the defaulting member, where the clearing house, in revising the day's clearings because of such suspension, eliminated and returned the checks which had been debited against the defaulting member, on the theory that, under the doctrine of rescission and following of trust funds, the bank had the right to appropriate any property of the defaulting member and apply it to the reduction of an advance of currency made on that day, especially where such currency was paid out by such defaulting member over its counters to its customers.—Rector v. Commercial Nat. Bank, 26 S. Ct. 294, 200 U. S. 420, 50 L. Ed. 533.

A bank which credits to the deposit account of certain stock brokers the amount of a clearance loan to be used to clear securities and to be repaid later in the day, and which does not require a separate account to be kept of money received from deliveries of the stock so released, obtains a preference voidable on the sub-

sequent bankruptcy of the brokers, where after their suspension it receives securities to make good the brokers' obligation to the bank.—National City Bank of New York v. Hotchkiss, 34 S. Ct. 20, 231 U. S. 50, 58 L. Ed. 115, affirming decree Ernst v. Mechanics' & Metals Nat. Bank of City of New York, 201 F. 664, 120 C. C. A. 92.

—166. — Knowledge and intent of parties.

See 6 Cent. Dig. Bankr. §§ 250-253, 255-258.

Creditor suspecting his debtor to be in failing circumstances, but having no sufficient evidence of it, may accept payment or security without violating the statute.—Stucky v. Masonic Sav. Bank, 108 U. S. 74, 2 S. Ct. 219, 27 L. Ed. 640.

The enforcement in Vermont of the inchoate lien of a valid recorded chattel mortgage covering after-acquired property, by taking possession of such property with the mortgagor's consent after condition broken, as authorized by the mortgage, without fraud, but with knowledge of the mortgagor's insolvency and contemplated bankruptcy, and with the intent to make the lien available for the payment of the mortgage debt before other complications by way of attachment or bankruptcy should arise, does not amount to a preference voidable by the trustee in bankruptcy, although such action was taken within four months of the filing of the petition in bankruptcy, where the mortgage was executed long before that time. Judgment 56 A. 11, 75 Vt. 361, affirmed.—Thompson v. Fairbanks, 25 S. Ct. 306, 196 U. S. 516, 49 L. Ed. 577.

Knowledge that money loaned to an insolvent firm on security of book accounts was to be used to pay an existing debt does not charge the transferee with knowledge of any intent of the borrower to defraud so as to entitle the trustee in bankruptcy to set the transfer aside as fraudulent.—Van Iderstine v. National Discount Co., 33 S. Ct. 343, 227 U. S. 575, 57 L. Ed. 652, affirming decree 174 F. 518, 98 C. C. A. 300.

Payment of a depositor's notes given to a bank by checks drawn on his deposit account within four months before bankruptcy of the depositor is not a preference forbidden by Bankr. Act July 1, 1898.—Studley v. Boylston Nat. Bank of Boston, 33 S. Ct. 806, 229 U. S. 523, 57 L. Ed. 1313, affirming decree 200 F. 249, 118 C. C. A. 435.

Enforcement by a bank of its right of set-off by applying deposits in due course of business to the payment of depositor's notes in the bank's favor on maturity within four months of bankruptcy of the depositor does not constitute a preference forbidden by Bankr. Act July 1, 1898, § 68a.—Id.

Foreign bankers, having paid in good faith drafts with forged bills of lading covering alleged through shipments to a foreign port, held not chargeable with knowledge that preference was intended, within Bankr. Act July 1, 1898, §§ 60a, 60b, as amended by Act Feb. 5, 1903, where bankrupt consignors substituted genuine bills of lading covering cotton subsequently shipped.—Pyle v. Texas Transport & Terminal Co., 35 S. Ct. 667, 238 U. S. 90, 59 L. Ed. 1215, affirming decree 203 F. 1023, 121 C. C. A. 664.

—169. Set-off of amount of new credit by creditor preferred.

See 6 Cent. Dig. Bankr. § 269.

To secure the set-off in favor of a creditor who, after receiving a preference, in good faith extends further credit, without security, of property which becomes part of the debtor's estate, which is allowed by Bankr. Act July 1, 1898, c. 541, § 60c, 30 Stat. 544, 564 [U. S. Comp. St. 1901, p. 3445], to the extent of "the amount of such new credit remaining unpaid at

the time of the adjudication in bankruptcy," it is not necessary that such property should remain a part of the debtor's estate until his adjudication in bankruptcy, or that it should be used in payment of preferred debts.—*Kaufman v. Tredway*, 25 S. Ct. 33, 195 U. S. 271, 49 L. Ed. 190.

Deposits of an insolvent customer after the bank cashier has forbidden payment of checks against the deposit, and but a few hours before an involuntary petition in bankruptcy against the customer, constitute a voidable preference, and cannot be allowed by way of set-off against the customer's debt to the bank.—*Mechanics' & Metals Nat. Bank of City of New York v. Ernst*, 34 S. Ct. 22, 231 U. S. 60, 58 L. Ed. 121, affirming decree *Ernst v. Mechanics' & Metals Nat. Bank of City of New York*, 201 F. 664, 120 C. C. A. 92.

171. Transfers in general.

See 6 Cent. Dig. Bankr. § 220.

172. — Validity as against trustee.

See 6 Cent. Dig. Bankr. § 220.

A creditor of a bankrupt partnership may apply the proceeds of the sale of collateral in his hands, the property of one of the partners, to the extinction of the individual indebtedness of such partner. Judgment in *re Mertens* (1906) 144 F. 818, 75 C. C. A. 548, affirmed.—*Hiscock v. Varick Bank of New York*, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

A sale of collateral security at public auction, without notice, and the purchase thereof by the pledgee, are not void as against the trustee in bankruptcy of the pledgor, in the absence of fraud, where the contract of pledge permits such action, and is valid under the law of the state where such contract was made and executed and was to be performed.—*Id.*

Assignments as collateral security for a loan of unallowed claims against the United States on account of contracts for furnishing materials to the various departments of the government, being in direct opposition to Rev. St. U. S. § 3477 (U. S. Comp. St. 1901, p. 2320), making absolutely null and void voluntary transfers of claims against the United States before their allowance, can confer no interest in the assignees, as against the trustee in bankruptcy of the assignors.—(1910) *National Bank of Commerce of Seattle v. Downie*, 31 S. Ct. 89, 218 U. S. 345, 54 L. Ed. 1065, 20 Ann. Cas. 1116, affirming judgment (1908) 161 F. 839, 88 C. C. A. 657.

174. Fraudulent transfers.

See 6 Cent. Dig. Bankr. §§ 221, 247-249, 252, 254-274, 283, 284.

178. — Nature and form of transaction.

See 6 Cent. Dig. Bankr. §§ 221, 264-274, 283, 284.

A general deed of assignment is so far avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment as to defeat the right of any claim against the bankrupt's estate to the preference given by such deed.—*Randolph & Randolph v. Scruggs*, 23 S. Ct. 710, 190 U. S. 533, 47 L. Ed. 1165.

An assignee in a general deed of assignment which has been avoided by an adjudication in bankruptcy against his assignor on a petition filed within four months after the making of the assignment has a lien on the bankrupt's estate for the sums paid by him for such services rendered to him prior to such adjudication as were beneficial to the estate.—*Id.*

Successive assignments of accounts by way of security under contract for advances to enable the assignor to get the goods without knowl-

edge of the assignor's insolvency and without fraudulent intent, were good as against the bankrupt assignor's general creditors.—*Greey v. Dockendorff*, 34 S. Ct. 166, 231 U. S. 513, 58 L. Ed. 339, affirming decree in *re Schwab-Kepner Co.*, 203 F. 475, 121 C. C. A. 597.

180. — Intent of debtor.

See 6 Cent. Dig. Bankr. §§ 252, 253.

The necessary effect upon other creditors of a mortgage by an insolvent within four months of the filing of a petition in bankruptcy to secure a pre-existing debt does not dispense with the necessity of showing an actual intent on his part to hinder, delay, or defraud creditors, which is essential under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), in order to avoid such mortgage, where the mortgagee was ignorant of the insolvency of the mortgagor, and had no reason to believe that a preference was intended. Judgment (1907) *Coder v. Arts*, 152 F. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; in *re Arts*, *Id.*; in *re Coder*, *Id.*, affirmed.—*Coder v. Arts*, 29 S. Ct. 436, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

184. Transfers void under state laws.

See 6 Cent. Dig. Bankr. §§ 275-277.

A trustee in bankruptcy does not occupy the position of a subsequent purchaser, pledgee, or mortgagee in good faith, within the meaning of Laws N. Y. 1897, c. 418, § 112, avoiding conditional sales as against such persons, where the sale is accompanied by a change in possession, unless a copy of the contract is filed, although such trustee is vested, under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], with the title of the bankrupt to all property which he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Judgment in *re Kellogg*, 118 F. 1017, 56 C. C. A. 383, affirmed.—*Hewitt v. Berlin Mach. Works*, 24 S. Ct. 690, 194 U. S. 296, 48 L. Ed. 986.

An adjudication in bankruptcy is not the equivalent of a judgment or attachment, so as to operate as a lien in favor of the trustee as against the conditional vendor of property sold to the bankrupt, because of noncompliance with the requirement as to filing made by Rev. St. Ohio, § 4155, which, if given the construction placed by the highest state court upon a similar provision respecting chattel mortgages, renders an unfiled contract of conditional sale void only as to those creditors who have fastened upon the property by some specific lien. Decree *Dolle v. Cassell*, 135 F. 52, 67 C. C. A. 526, reversed.—*York Mfg. Co. v. Cassell*, 26 S. Ct. 481, 201 U. S. 344, 50 L. Ed. 782.

A chattel mortgage which, under the Wisconsin laws and decisions, is void as to the creditors of the mortgagor for want of change of possession, is invalid as to the trustee in bankruptcy of such mortgagor, since, under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), the trustee in bankruptcy takes title to the property of the bankrupt which could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy. Judgment (1908) 162 F. 675, 89 C. C. A. 467, affirmed.—*Knapp v. Milwaukee Trust Co.*, 30 S. Ct. 412, 216 U. S. 545, 54 L. Ed. 610.

The effect to be given in bankruptcy to an unrecorded chattel mortgage as against subsequent creditors, without notice, must be determined by the recording law of the state, in view of Bankruptcy Act July 1, 1898, § 67a.—(1912) *Holt v. Crucible Steel Co. of America*, 32 S. Ct. 414, 224 U. S. 262, 56 L. Ed. 756,

affirming decree (1909) Crucible Steel Co. of America v. Holt, 174 F. 127, 98 C. C. A. 101.

Recording of conveyance held not "required" by law within Bankr. Act, § 60a, as amended by Act Feb. 5, 1903, and section 60b as amended by Act June 25, 1910, as to avoidance of preferential transfers recorded within four months, where under Gen. Code Ohio, § 8543, failure to record does not render it invalid as to creditors.—Carey v. Donohue, 36 S. Ct. 386, 240 U. S. 430, 60 L. Ed. 726, reversing decree 213 F. 1021, 129 C. C. A. 664.

185. Rights of trustee as to transfers.
See 6 Cent. Dig. Bankr. §§ 234, 235, 273.

The possibility that the trustee in bankruptcy may recover against directors and officers of the bankrupt corporation for dereliction of duty, and against stockholders for unpaid subscriptions and additional liability, does not prevent the trustee from successfully resisting an attempt to establish a lien upon all the bankrupt's property in his hands under a chattel mortgage void as to creditors at the time of the adjudication in bankruptcy, even conceding that ordinarily the trustee seeking to set aside a fraudulent conveyance must aver and prove that the estate has not sufficient assets in his hands to satisfy the claims filed against the bankrupt. Judgment (1908) 162 F. 675, 89 C. C. A. 467, affirmed.—Knapp v. Milwaukee Trust Co., 30 S. Ct. 412, 216 U. S. 545, 54 L. Ed. 610.

187. Liens in general.
See 6 Cent. Dig. Bankr. §§ 270, 286-295.

188. — Validity as against trustee.
See 6 Cent. Dig. Bankr. §§ 270, 286-289, 291-295.

Holders of so-called warehouse receipts under a pledge which was invalid for want of a change of possession have no equitable lien which takes precedence of the title of the trustee in bankruptcy of the pledgor, by virtue of the special provisions of Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], vesting in the trustee the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him, and of section 70e, giving the trustee power to avoid transfers by the bankrupt which a creditor of the latter might avoid, and to recover the property so transferred or its value. Decree (1906) 143 F. 32, 74 C. C. A. 186, affirmed.—Security Warehousing Co. v. Hand, 27 S. Ct. 720, 206 U. S. 415, 51 L. Ed. 1117, 11 Ann. Cas. 789.

Advances made by a railway company to enable a coal company under contract to supply the railway company with coal to meet its pay rolls amount to a pledge, enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued performance of the contract, of such a quantity of coal when mined as the moneys so advanced would pay for according to the original contract. Judgment (1907) Atchison, T. & S. F. Ry. Co. v. Hurley, 153 F. 503, 82 C. C. A. 453, affirmed.—Hurley v. Atchison, T. & S. F. Ry. Co., 29 S. Ct. 466, 213 U. S. 126, 53 L. Ed. 729.

A physical change of possession is not essential in Ohio to validate, as against the creditors of a distiller in bankruptcy, a pledge of a specific number of barrels of whisky stored in his own warehouse, accompanied by the issuance and transfer, according to trade usage, of the distiller's warehouse receipts.—Dale v. Pattison, 34 S. Ct. 785, 234 U. S. 399, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754, affirming decree 199 F. 987, 117 C. C. A. 663.

The Bankruptcy Act as it existed in February, 1903, did not create lien in favor of credi-

tors becoming such after giving of chattel mortgage by bankrupt, and before filing of same.—Detroit Trust Co., v. Pontiac Sav. Bank, 35 S. Ct. 509, 237 U. S. 186, 59 L. Ed. 907, affirming decree 196 F. 29, 115 C. C. A. 663.

That assignee under statutory assignment for benefit of creditors is given a lien on the property not before existing does not give such a lien to a trustee in bankruptcy.—Id.

190. Statutory liens.
See 6 Cent. Dig. Bankr. §§ 286-294, 351.

191. — In general.
See 6 Cent. Dig. Bankr. §§ 284, 287, 290, 351.

The general lien of a landlord for rent, under Civ. Code Ga. 1895, § 2795, is not created by judgment or obtained through legal proceedings within Bankruptcy Act July 1, 1898, § 67f, though levy was made within four months of filing of petition in bankruptcy.—Henderson v. Mayer, 32 S. Ct. 699, 225 U. S. 631, 56 L. Ed. 1238.

197. Dissolution of liens of attachments and other proceedings by adjudication.
See 6 Cent. Dig. Bankr. §§ 289, 294-314.

200. — Time of proceeding.
See 6 Cent. Dig. Bankr. §§ 289, 294-300, 306-314.

Attachments in state courts of the property of the bankrupt, brought within four months of the commencement of proceedings in bankruptcy, under Act 1867, are dissolved by the decree in bankruptcy as from the date of the petition.—Chapman v. Brewer, 114 U. S. 158, 5 S. Ct. 799, 29 L. Ed. 83.

Judgment creditors of a bankrupt, by commencing a judgment creditors' action more than four months before the petition in bankruptcy is filed, acquire a lien on the property of the bankrupt, of which they are not deprived by Bankr. Act July 1, 1898, § 67f [U. S. Comp. St. 1901, p. 3450], because the judgment enforcing the lien is recovered less than four months prior to the filing of such petition, although by that section all judgments obtained against a bankrupt within that period are avoided, as this provision must be regarded as referring only to judgments creating liens, and not to judgments which enforce an otherwise valid pre-existing lien.—Metcalf Bros. & Co. v. Barker, 23 S. Ct. 67, 187 U. S. 165, 47 L. Ed. 122.

204. Rights of trustee as to property affected by lien.
See 6 Cent. Dig. Bankr. §§ 234, 303.

205. — In general.
See 6 Cent. Dig. Bankr. §§ 234, 303.

After the trustee in bankruptcy has asserted, under the sanction of the court with the assent of a debtor to the bankrupt estate, the power to take legal possession of the debtor's stock which he had agreed to hold as security for the debt, it is too late for the creditors of the bankrupt under an agreement with such debtor thereafter made to raise the question whether the original agreement between the debtor and the bankrupt was ineffective to operate as a lien as to creditors for want of delivery.—Merchants' Nat. Bank of the City of New York v. Sexton, 33 S. Ct. 725, 228 U. S. 634, 57 L. Ed. 998, affirming decree In re Kessler, 186 F. 127, 108 C. C. A. 239.

207. Subrogation of trustee to rights under lien.

The trustee in bankruptcy has no greater rights as against the bankrupt's chattel mortgagee, who has taken possession of after-acquired property under the mortgage, than he otherwise would have, because of the existence, at the time of the taking such possession, of an attachment and second chattel mortgage which were both dissolved by the bankruptcy proceed-

ings, being respectively levied and given within four months of the filing of the petition in bankruptcy. Judgment, 56 A. 11, 75 Vt. 361, affirmed.—*Thompson v. Fairbanks*, 25 S. Ct. 306, 196 U. S. 516, 49 L. Ed. 577.

Liens acquired by attaching creditors on real property which, but for such attachments, would have passed to a subsequent purchaser under an unrecorded deed, may be preserved for the benefit of the estate of the bankrupt debtor by a court of bankruptcy in the exercise of its discretionary power under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450] to preserve for the benefit of the estate rights under liens obtained against an insolvent within four months prior to the filing of a petition in bankruptcy against him, since to construe this provision as referring only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, would restrict its application to a contingency already provided for by a prior clause in that section, annulling all such liens, and providing that property affected thereby shall pass to the trustee as a part of the estate. *Order Receivers of Virginia Iron, Coal & Coke Co. v. Staake*, 133 F. 717, 66 C. C. A. 547, affirmed.—*First Nat. Bank v. Staake*, 26 S. Ct. 580, 202 U. S. 141, 50 L. Ed. 967, and *McHarg v. Same*, 26 S. Ct. 584, 202 U. S. 150, 50 L. Ed. 971.

The liens of execution creditors on property held by the insolvent judgment debtor under a contract of conditional sale, as they existed when a petition in involuntary bankruptcy was filed, could not be subsequently destroyed so as to prevent a court of bankruptcy from preserving them for the benefit of the estate by the act of the conditional vendor in retaking the property.—(1912) *Rock Island Plow Co. v. Reardon*, 32 S. Ct. 164, 222 U. S. 354, 56 L. Ed. 231, affirming decree (1909) *Reardon v. Rock Island Plow Co.*, 168 F. 654, 94 C. C. A. 118.

The trustee in bankruptcy, whose bankrupts had assigned to their creditors to secure loans certain notes held by the bankrupts, secured by the stock in trade and accounts, is entitled under the rule of subrogation and under Bankruptcy Act July 1, 1898, § 67, subds. "c," "f," to participate in the collaterals to the extent that the funds of the bankrupt estate have been used to discharge a secured debt and acquire the collateral notes, including a deposit to the bankrupt's credit which the secured creditor set off against the debt.—*Merchants' Nat. Bank of the City of New York v. Sexton*, 33 S. Ct. 725, 228 U. S. 634, 57 L. Ed. 998, affirming decree *In re Kessler*, 186 F. 127, 108 C. C. A. 239.

208. Remedies to establish or enforce rights or liens.

See 6 Cent. Dig. Bankr. §§ 317-344; 13 Cent. Dig. Courts, §§ 1331, 1424.

211. — Conflicting jurisdiction of courts of bankruptcy and state courts.

See 6 Cent. Dig. Bankr. §§ 321, 323; 13 Cent. Dig. Courts, § 1331.

After an adjudication in bankruptcy an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun.—*White v. Schloerb*, 20 S. Ct. 1007, 178 U. S. 542, 44 L. Ed. 1183.

The pendency of bankruptcy proceedings in a federal court when an attachment suit of a single creditor was begun in a state court precludes that court, when that fact is made to appear, from proceeding in such suit to judg-

ment and appropriation of the property.—(1911) *Acme Harvester Co. v. Beekman Lumber Co.*, 32 S. Ct. 96, 222 U. S. 300, 53 L. Ed. 208, affirming judgment (1908) *Beekman Lumber Co. v. Acme Harvester Co.*, 114 S. W. 1087, 215 Mo. 221.

A state court is justified in proceeding to judgment on the attachment suit of a single creditor, notwithstanding the suggestion of the pendency of bankruptcy proceedings, where the bankruptcy court, finding an outstanding creditors' committee under which it was proposed to administer and distribute the debtor's estate, declined to appoint a receiver, recognizing the propriety of the proceedings of the creditors' committee, and received the reports of such committee, and allowed it for years to operate the property and to mature a plan for the settlement of the debts outside of the court, and not contemplated in the bankruptcy act, the creditors in large numbers having signified a purpose to take stock in a reorganization, and for more than five years after the filing of the petition in bankruptcy, having made no attempt to adjudicate the debtor a bankrupt, or proceed to the settlement of the estate under the requirements of the act, since, under the circumstances, the state court was justified in determining that the bankruptcy court had lost its jurisdiction.—*Id.*

Bankruptcy proceedings against a corporation do not stand in the way of a resort to a method prescribed by Rev. Laws Minn. 1905, §§ 3184-3190, of enforcing the liability of a stockholder for corporate debts.—*Selig v. Hamilton*, 34 S. Ct. 926, 234 U. S. 652, 53 L. Ed. 1518, affirming judgment (D. C.) *Hamilton v. Selig*, 195 F. 153.

Jurisdiction of state courts to foreclose vendor's lien under Act La. No. 63 of 1890, on agricultural products in hands of a third person, was lost on dissolution of attachment under Bankr. Act July 1, 1898, § 67f, where bankruptcy proceedings were begun within four months of the attachment.—*Lehman, Stern & Co. v. S. Gumbel & Co.*, 35 S. Ct. 307, 236 U. S. 448, 59 L. Ed. 666, affirming judgment *Same v. E. Martin & Co.*, 61 So. 212, 132 La. 231.

212. — Determination of claims to property.

See 6 Cent. Dig. Bankr. § 236; 13 Cent. Dig. Courts, § 1331.

The immunity or privilege given an assignee in bankruptcy by Rev. St. § 5057, from being sued by any person claiming adversely to him touching any property or interests vested in him, unless such suit is brought within two years from the accrual of the cause of action, can only be set up by the assignee himself, or by a person claiming under him, and not by a person claiming under a conveyance from the bankrupt before the bankruptcy.—*Ludeling v. Chaffe*, 143 U. S. 301, 12 S. Ct. 439, 36 L. Ed. 313.

213. — Foreclosure of mortgages.

See 6 Cent. Dig. Bankr. §§ 334-342; 13 Cent. Dig. Courts, § 1331.

A petitioner in bankruptcy filed with his petition a list of his creditors, stating the name and residence of the holder of a trust deed on certain of his property, the existence of the trust deed, and the amount and date of the debt secured thereby, a description of the property, and the name of the trustee. Plaintiffs, who were judgment creditors of the bankrupt, filed a petition in the bankruptcy court more than nine months before the appointment of the assignee, wherein they referred to the schedules in bankruptcy, and the property covered by the trust deed, as part of the assets set forth in the schedules. Two days thereafter the trustee sold the property on foreclosure of the trust deed to the

beneficiary. *Held*, that there was no fraudulent concealment of the trust deed, or the sale thereunder, from plaintiffs.—*Greene v. Taylor*, 132 U. S. 415, 10 S. Ct. 138, 33 L. Ed. 411.

214. — Enforcement of liens in general.

See 6 Cent. Dig. Bankr. §§ 320, 324-327, 343, 344.

A nonresident creditor of a bankrupt brought garnishment suits against him in other states within four months prior to the beginning of proceedings in bankruptcy, and obtained judgments, which he collected from the garnishees in the belief that the garnishments were valid. At the time of such payment both he and the garnishees knew of the bankruptcy, but it did not appear that the creditor knew that the bankruptcy proceedings were commenced within four months after his garnishments. Thereafter the seat of the bankrupt in a stock exchange was sold, upon the proceeds of which, under the rules of the exchange, the creditor had a lien for his debt; but in the belief that he had received payment he waived his lien by an informal letter, and the proceeds were paid over by the exchange to the trustee in bankruptcy. The trustee having brought suits against the garnishees, they made demand on the creditor on his bond of indemnity, which he had given them, and he subsequently settled such suits by paying over to the trustee the amounts he had received. He then proved his claim against the estate in bankruptcy, and asked to be restored to his lien on the fund received from the stock exchange. *Held*, that having acted apparently under a mistake of fact, by which no one had been prejudiced, he was equitably entitled to such relief.—*Hutchinson v. Otis, Wilcox & Co.*, 23 S. Ct. 778, 190 U. S. 552, 47 L. Ed. 1179, affirming decree *Same v. Otis*, 115 F. 937, 53 C. C. A. 419 which affirms (D. C.) *In re Swift*, 111 F. 503.

Creditors of a bankrupt who fail to insist upon a lien on proceeds of a seat in a stock exchange which had formerly belonged to the bankrupt, because they have collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, are entitled to have such lien allowed in the bankruptcy court, where no one has changed his position on the faith of their waiver.—*Id.*

215. — Enforcement of statutory liens.

See 6 Cent. Dig. Bankr. §§ 324-326.

Sales for taxes and special assessments of property belonging to a bankrupt estate were invalid when made without leave of bankruptcy court.—*Dayton v. Stanard*, 36 S. Ct. 695, 241 U. S. 588, 60 L. Ed. 1190, modifying decree *Stanard v. Dayton*, 220 F. 441, 137 C. C. A. 35.

217. — Restraining proceedings in state courts.

See 6 Cent. Dig. Bankr. §§ 323, 330, 340; 12 Cent. Dig. Courts, § 1424.

A court of bankruptcy is without jurisdiction to enjoin further proceedings under the judgment of a state court in a judgment creditors' action commenced before the passage of the bankruptcy act, which set aside as fraudulent certain transfers of property made by the bankrupt, and directed the payment of the amount of the judgment out of the proceeds of a sale of the judgment debtor's property under an order of the state court.—*Metcalf Bros. & Co. v. Barker*, 23 S. Ct. 87, 187 U. S. 165, 47 L. Ed. 122.

A suit to enjoin the further prosecution in a state court of a long pending suit by a judgment creditor to have a deed set aside as fraudulent, and the property described therein sold and the proceeds applied to the payment of the judgment and the satisfaction of the liens existing against the property, is not within the jurisdiction of a court of bankruptcy, especially

where instituted by the bankrupt himself. *Decree Pickens v. Dent*, 106 F. 653, 45 C. C. A. 522, affirmed.—*Pickens v. Roy*, 23 S. Ct. 78, 187 U. S. 177, 47 L. Ed. 123.

The jurisdiction of a state court over a suit by a judgment creditor to set aside a deed as fraudulent is not lost by the action of the complainant in proving up her judgment as a preferred debt before the referee in bankruptcy proceedings; nor does such action amount to her consent to the exercise by a court of bankruptcy of jurisdiction to enjoin further proceedings in the state court.—*Id.*

A court of bankruptcy is without jurisdiction to enjoin the plaintiffs in suits against the bankrupt in the state courts from collecting their judgments from the surety on the bankrupt's bail bond.—*Jaquith v. Rowley*, 23 S. Ct. 369, 188 U. S. 620, 47 L. Ed. 620.

218. — Vacating or nullifying decisions of state courts.

Failure to take proper steps to secure a hearing on the merits in the highest state court of the exceptions to a judgment enforcing a mechanics' lien against a bankrupt's estate is not ground for going behind the state court's judgment at the instance of the trustee in bankruptcy to defeat the lien, where the failure to get the exceptions considered was due solely to the conduct of those then representing the estate.—*Hobbs v. Head & Dowst Co.*, 34 S. Ct. 253, 231 U. S. 692, 58 L. Ed. 440, affirming decrees 184 F. 409, 106 C. C. A. 519, and 185 F. 1006, 107 C. C. A. 663.

(D) ADMINISTRATION OF ESTATE.

Per diem compensation of clerk of federal court, see *Clerks of Court*, 255.

Perjury on examination of bankrupt, see *Perjury*, 15, 32.

Title acquired by purchaser at sale by trustee as involving federal question so as to sustain writ of error from Supreme Court, see *Courts*, 394(20).

220. Referees.

See 6 Cent. Dig. Bankr. §§ 381-383, 383-394.

224. — Jurisdiction, powers, and duties in general.

See 6 Cent. Dig. Bankr. § 333.

A referee in bankruptcy has power in the first instance to enter an order to show cause why a person should not be required to pay over to the trustee in bankruptcy money in his hands belonging to the bankrupt's estate, and, upon the hearing, to enter an order directing the payment of such money by a certain date. Decree *In re Nugent*, 105 F. 581, 44 C. C. A. 620, reversed.—*Mueller v. Nugent*, 22 S. Ct. 269, 184 U. S. 1, 46 L. Ed. 405.

229. — Contempts.

See 6 Cent. Dig. Bankr. § 385.

An order of commitment of a bankruptcy court, directing that a person be imprisoned until he complies with an order made in a proceeding in equity under the bankrupt act, is not invalid because it does not run in the name of the United States. Decree *In re Nugent*, 105 F. 581, 44 C. C. A. 620, reversed.—*Mueller v. Nugent*, 22 S. Ct. 269, 184 U. S. 1, 46 L. Ed. 405.

233. Examination of bankrupt or others.

See 6 Cent. Dig. Bankr. §§ 389-409.

236. — Place and time.

See 6 Cent. Dig. Bankr. §§ 393, 394.

The examination of a bankrupt under oath could be ordered by a bankruptcy court on application of the receiver, where adjudication in bankruptcy had not been made, as the estate

must be regarded as in "process of administration" within Bankruptcy Act July 1, 1898, § 7, subd. 9, and section 21a.—*Cameron v. United States*, 34 S. Ct. 244, 231 U. S. 710, 58 L. Ed. 448.

◀ 242. — **Scope and extent of inquiry.**

See 6 Cent. Dig. Bankr. §§ 399-401.

Requiring the bankrupt to deposit his books of account in the office of the receiver, there to remain in the custody of the bankrupt, who is to afford the receiver free opportunity to inspect them, the receiver to use and permit them to be used only for the purpose of the civil administration of the bankrupt estate, and not for any criminal proceeding, is a proper exercise of the authority of the bankruptcy court, and does not compel the bankrupt to be a witness against himself in a criminal case in the constitutional sense, although the knowledge gained from the books may be used to procure other evidence for use against him in a criminal prosecution.—*In re Harris*, 31 S. Ct. 557, 221 U. S. 274, 55 L. Ed. 732.

Protection afforded a bankrupt under Bankruptcy Act July 1, 1898, § 7, cl. 9, against offering in evidence against him in any criminal proceeding the testimony given by him, extends only to an examination under that clause of the section, and does not include schedules filed by him in the bankruptcy proceeding, or testimony of an accountant based on an examination of his books, which had been turned over to the trustee.—*Ensign v. Commonwealth of Pennsylvania*, 33 S. Ct. 321, 227 U. S. 592, 57 L. Ed. 658, affirming judgments Commonwealth v. Ensign, 77 A. 657, 228 Pa. 400, which affirms judgment 40 Pa. Super. Ct. 157, 163.

◀ 250. **Collection of assets.**

See 6 Cent. Dig. Bankr. §§ 235, 350.

The mere designation of a person as "special master," in the order of appointment in bankruptcy proceedings, does not deprive him of the express authority conferred by such order to sue to collect all the assets of the bankrupt estate.—*Royal Ins. Co. v. Miller*, 28 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

◀ 256. **Sale of property.**

See 6 Cent. Dig. Bankr. §§ 146, 356-380.

◀ 257. — **In general.**

See 6 Cent. Dig. Bankr. §§ 356, 357.

A court of bankruptcy, when selling bankrupt's equitable interest in land in another state represented by certificates of purchase of school lands, is not governed by Act March 3, 1893, regulating generally the sale of real estate by federal courts.—*Robertson v. Howard*, 33 S. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174, reversing judgments 109 P. 696, 82 Kan. 588, 112 P. 162, 83 Kan. 453.

◀ 260. — **Order of court.**

See 6 Cent. Dig. Bankr. § 360.

The court of bankruptcy has jurisdiction in proceedings pending in that court to order the trustee to sell certificates of purchase of school lands owned by the bankrupt, though the land is situated in another state.—*Robertson v. Howard*, 33 S. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174, reversing judgments 109 P. 696, 82 Kan. 588, 112 P. 162, 83 Kan. 453.

◀ 261. — **Notice.**

See 6 Cent. Dig. Bankr. §§ 361, 362.

A sale, by order of court in bankruptcy, of real estate as free from all incumbrances, does not bind the holder of a lien against the proper-

ty who is not shown by the record to have been served with process, or otherwise notified of the proceedings.—*Factors' & Traders' Ins. Co. v. Murphy*, 4 S. Ct. 679, 111 U. S. 738, 28 L. Ed. 582.

◀ 262. — **Manner and terms.**

See 6 Cent. Dig. Bankr. §§ 363-365.

Under Rev. St. § 5062, authorizing the sale of unincumbered property of a bankrupt estate on such terms as are most for the interest of the creditors, a sale on credit is not invalid.—*Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 L. Ed. 467, affirming (*Iowa*) *Clews v. Traer*, 10 N. W. 838.

◀ 268. — **Rights of purchasers.**

See 6 Cent. Dig. Bankr. §§ 372-379.

Property was sold to H, by order of a court of bankruptcy. He not paying for it, the court, without notice to him, vacated the order of sale, and made an order selling it to C, who paid for it, and went into possession of it. Afterwards, on review, the sale to C was set aside, and the sale to H reinstated. H, having paid for the property, received possession of it, and afterwards the money paid by C was repaid to him. *Held*, that C was not liable to pay H the profits derived by him from the use of the property while he had it.—*Conro v. Crane*, 110 U. S. 403, 4 S. Ct. 102, 28 L. Ed. 191.

The power of the federal courts under Rev. St. U. S. §§ 4979, 5024, to restrain by injunction the levy of process from a state court upon the property of a bankrupt debtor, is only allowed to aid the assignee in the discharge of his duty, and to protect the bankrupt estate for distribution among the creditors, and cannot be invoked by the purchaser of lands at a bankruptcy sale, who has been put in possession, and who, long after the estate is fully administered, is threatened with executions issued by the state court on judgments against the bankrupt.—*Sargent v. Helton*, 115 U. S. 348, 6 S. Ct. 78, 29 L. Ed. 412.

A bankrupt, after his adjudication and the surrender of his property, is not disqualified from purchasing, before his discharge, any part of the assets of his estate that he may be able to pay for out of his exempt property, earnings, or subsequent acquisitions.—*Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 L. Ed. 467, affirming (*Iowa*) *Clews v. Traer*, 10 N. W. 838.

An assignee in bankruptcy appointed February, 15, 1873, on the 5th April, 1880, attempted to convey lands claimed by the bankrupt at the time of filing his petition in bankruptcy, but which were then and ever since held adversely under tax sales made by the auditor general of Michigan, of which adverse claim the assignee had notice at the time of the conveyance. *Held* that, as the assignee was precluded from bringing an action for the lands after the expiration of two years from the date of his appointment, by Rev. St. U. S. § 5057, he could not, by selling the property to a third person, enable the latter to maintain an action therefor.—*Wisner v. Brown*, 122 U. S. 214, 7 S. Ct. 1156, 30 L. Ed. 1205.

The plaintiffs, judgment creditors of a bankrupt, having purchased certain property on which the bankrupt had given a trust deed from the assignee in bankruptcy, have such right to redeem from the foreclosure sale as they acquired by the purchase only, and none under their previous judgment against the bankrupt.—*Greene v. Taylor*, 132 U. S. 415, 10 S. Ct. 138, 33 L. Ed. 411.

By petitioning the bankruptcy court, and procuring the sale of the property and the application of the proceeds to their judgment,

they waived whatever right to redeem they may have acquired by their judgment.—Id.

When Rev. St. U. S. § 5057, providing that no suit shall be maintained between an assignee in bankruptcy and an adverse claimant touching property or rights vested in the assignee, "unless brought within two years from the time when the cause of action accrued for or against such assignee," has begun to run against the assignee, it continues to run against a purchaser from him.—Id.

A person holding the legal title to lands, but bound under a deed of trust to account to third persons for specific interests therein, conveyed the same to his assignee in bankruptcy. No issues were framed or determined in the bankruptcy court as between the assignee and such third persons, and at the assignee's sale the bankrupt repurchased the lands. *Held*, that the sale did not divest the interests of the third persons, but the bankrupt took the lands still burdened with the trust.—*Roby v. Colehour*, 146 U. S. 153, 13 S. Ct. 47, 36 L. Ed. 922.

270. — Collateral attack.

An order of the referee in bankruptcy, made under the discretionary power conferred by Bankr. Act July 1, 1898, § 70b, confirming a trustee's sale of the bankrupt's interest in real estate, validates the sale as against collateral attack for alleged lack of appraisal and error in description.—*Robertson v. Howard*, 33 S. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174, reversing judgments 109 P. 696, 82 Kan. 588, 112 P. 162, 83 Kan. 453.

273. Deposits and payments.

See 6 Cent. Dig. Bankr. § 447.

Under rule 28 in bankruptcy, providing that all money received on account of any bankrupt's estate shall be deposited with one designated depository, and requiring any check therefor to specify "the account for which it is drawn," the depository is not bound to keep a separate account for each bankrupt's estate, but checks so drawn must be paid out of any funds then to the credit of the court.—*State Nat. Bank v. Dodge*, 124 U. S. 333, 8 S. Ct. 521, 31 L. Ed. 458.

(E) ACTIONS BY OR AGAINST TRUSTEE.

See Limitation of Actions, 104.
Appellate jurisdiction of United States Supreme Court, see Courts, 382.
Election of remedy, see Election of Remedies, 3.

277. Actions by trustee.

See 6 Cent. Dig. Bankr. §§ 418-423.

279. — Relating to property or proceeds thereof.

See 6 Cent. Dig. Bankr. §§ 419-424.

An assignee in bankruptcy may bring suit to set aside an assignment made by the bankrupt, which, though not declared void by the provisions of the bankruptcy law, has been made with intent to hinder and delay creditors.—*Means v. Dowd*, 128 U. S. 273, 9 S. Ct. 65, 32 L. Ed. 429.

284. Conditions precedent in general.

A demand for the surrender of alleged preferences given by a bankrupt to certain of his creditors by the bankrupt's trustee is not a condition precedent to the trustee's right to recover such preferences, as authorized by Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].—(1907) *Eau Claire Nat. Bank v. Jackman*, 27 S. Ct. 391, 204 U. S. 522, 51 L. Ed. 596, affirming *Jackman v. Eau Claire Nat. Bank* (1905) 104 N. W. 98, 125 Wis. 465, 115 Am. St. Rep. 955.

287. Nature and form of remedy.

See 6 Cent. Dig. Bankr. §§ 444-447.

288. — Summary proceedings.

See 6 Cent. Dig. Bankr. § 447.

A judge of a United States bankruptcy court has authority to compel persons who have forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property to restore that property to its custody by summary proceedings.—*White v. Schloerb*, 20 S. Ct. 1007, 178 U. S. 542, 44 L. Ed. 1183.

A bankruptcy court has power by summary proceedings to compel the surrender to the trustee in bankruptcy, duly appointed, of property of the bankrupt which has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim. Decree, *In re Nugent*, 105 F. 581, 44 C. C. A. 620, reversed.—*Mueller v. Nugent*, 22 S. Ct. 269, 184 U. S. 1, 46 L. Ed. 405.

An application to amend a response to an order to show cause why respondent should not be required to pay over to a trustee in bankruptcy money belonging to the bankrupt's estate, in which he had denied jurisdiction on the ground that he had not received the money after the petition in bankruptcy was filed by asserting that whatever money belonging to the bankrupt came to his hands was held adversely to the bankrupt, may, in the discretion of the district court, to which the question of the validity of the referee's order directing the payment of such money had been certified at the respondent's request, be denied as too late, where first made after the decision by such court had been announced and a written opinion filed, and judgment was about to be entered.—Id.

Finding in summary proceedings in bankruptcy that the trustee had received, as such, certain property as assets, was conclusive against him and not subject to collateral attack by third persons.—*Hebert v. Crawford*, 33 S. Ct. 484, 228 U. S. 204, 57 L. Ed. 800.

291. Jurisdiction.

See 6 Cent. Dig. Bankr. §§ 410-417.

292. — United States courts in general.

See 6 Cent. Dig. Bankr. §§ 410, 413, 415, 416.

Consent of defendant is essential to jurisdiction of a federal District Court of a suit by trustee in bankruptcy to recover property in defendant's possession under a conveyance not preferential nor made within four months notwithstanding changes made by act February 5, 1903, in the bankruptcy act of July 1, 1898, by adding to section 23b, requiring such consent, "except suits under section 67, subd. e," and amending section 70e so as to give bankruptcy court concurrent jurisdiction with state courts of such suits.—*Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, 33 S. Ct. 125, 226 U. S. 384, 57 L. Ed. 264.

293. — Courts of bankruptcy.

See 6 Cent. Dig. Bankr. §§ 411, 417.

United States district courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendant; such jurisdiction being denied to them by section 23 of the bankruptcy act of 1898.—*Bardes v. First Nat. Bank*, 20 S. Ct. 1000, 178 U. S. 524, 44 L. Ed. 1175.

Jurisdiction of civil actions at law and plenary suits in equity to determine title to and reduce to possession alleged assets of a bankrupt is not included in the clauses of section 2 of the bankruptcy act of 1898, which

confer upon district courts of the United States power to bring in and substitute additional parties in proceedings in bankruptcy; to make orders, issue process, and enter judgments necessary for the enforcement of the "provisions of this act"; and "to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided,"—since section 23 of the act is intended to define the jurisdiction of such courts over such suits.—Id.

Under the bankruptcy act of 1898 (30 Stat. 552), a federal district court has no jurisdiction of an action of replevin, brought by a receiver or trustee in bankruptcy, to recover the possession of personal property alleged to belong to the bankrupt, but held adversely by the defendant under a claim of title thereto. Judgment (D. C.) 91 F. 621, affirmed.—*Mitchell v. McClure*, 20 S. Ct. 1000, 178 U. S. 539, 44 L. Ed. 1182.

United States district courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property, as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendants, since such jurisdiction is denied them by Bankr. Act 1898, § 23.—*Wall v. Cox*, 21 S. Ct. 642, 181 U. S. 244, 45 L. Ed. 845, answering certified questions 101 F. 403, 41 C. C. A. 408.

An order of the court of bankruptcy rejecting a claim, and, in addition thereto, requiring the creditor to repay to the trustee the amount of a dividend theretofore received, is not made in a suit, within the meaning of Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], relating to suits by the trustee. Judgment, 102 F. 1005, 41 C. C. A. 681, affirmed.—*Pirie v. Chicago Title & Trust Co.*, 21 S. Ct. 908, 182 U. S. 438, 45 L. Ed. 1171.

A court of bankruptcy has no jurisdiction to adjudicate the merits of the claim of a general assignee of the bankrupt to retain out of the bankrupt's estate money disbursed by him or claimed on account of his commission as such assignee before the bankruptcy proceedings were begun, unless such assignee consents to the exercise of such jurisdiction. *Decree, Sinsheimer v. Simonson*, 107 F. 898, 47 C. C. A. 51, affirmed.—*Louisville Trust Co. v. Cominger*, 22 S. Ct. 293, 184 U. S. 18, 46 L. Ed. 413.

An assignee of a bankrupt cannot be deemed to have consented to the jurisdiction of the bankruptcy court to compel him by summary proceedings to pay over to the trustee in bankruptcy money of the bankrupt's estate which he had disbursed or which he had retained on account of his commissions, as such assignee, before the bankruptcy proceedings were commenced, because he participated in the proceedings before the referee, where he pleaded such claims at the outset, and made formal protest to the exercise of such jurisdiction before the final order was entered.—Id.

The surety on a bankrupt's bail bond, in whose hands property was deposited by the bankrupt to indemnify him for his liability, is an adverse claimant within the meaning of Bankr. Act July 1, 1898, §§ 23a, 23b, 30 Stat. 552, c. 541 [U. S. Comp. St. 1901, p. 3431], and cannot be proceeded against in the bankruptcy court, unless by his consent, as provided for therein.—*Jaquith v. Rowley*, 23 S. Ct. 369, 188 U. S. 620, 47 L. Ed. 620.

Jurisdiction of a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine rights in or liens upon property, which,

under the facts as admitted by demurrer to the bill, came into possession of a court of bankruptcy as property of the bankrupt, whether held by him or for him, was conferred on such court by Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy; and such jurisdiction is not ousted by an unauthorized surrender of the property by the receiver in bankruptcy.—*Whitney v. Wenman*, 25 S. Ct. 778, 198 U. S. 539, 49 L. Ed. 1157.

A trustee in bankruptcy cannot maintain a plenary suit in a court of bankruptcy to recover in another jurisdiction excessive payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, where that court has made no order in the proceeding authorized by Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), to re-examine and reduce such payments or transfers.—*In re Wood*, 28 S. Ct. 621, 210 U. S. 246, 52 L. Ed. 1046.

Jurisdiction of a court of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), to re-examine and reduce, on petition of the trustee, payments and transfers made by a bankrupt to counsel, in contemplation of bankruptcy, for services to be rendered, extends to a case where such counsel are nonresidents of the state and district, and where the transactions occurred and the notice of the proceeding was served outside the district.—Id.

A suit by the trustee in bankruptcy to recover property held by a third person, which, if the allegations of the petition are true, belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate, is not made justifiable in the bankruptcy court by the provision of Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3452), as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (U. S. Comp. St. Supp. 1909, p. 1316), conferring concurrent jurisdiction on courts of bankruptcy of suits by the trustee to avoid any transfer of the bankrupt's property which his creditors might have avoided, and to recover such property, or its value, from persons who are not bona fide holders for value.—*Harris v. First Nat. Bank of Mt. Pleasant*, 30 S. Ct. 296, 216 U. S. 382, 54 L. Ed. 528.

A federal District Court has jurisdiction to grant an order for the examination of witnesses who are residents of the district, on the application of a trustee in bankruptcy, appointed in proceedings in bankruptcy pending in another district.—*In re Elkus*, 30 S. Ct. 377, 216 U. S. 115, 54 L. Ed. 407.

The District Courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district court of another district.—Id.

Suit by trustee in bankruptcy against directors of bankrupt corporation held justifiable in a court of bankruptcy under Bankr. Act, §§ 23b, 70e, under allegations that the officers by false pretenses have withdrawn its funds.—*Park v. Cameron*, 35 S. Ct. 719, 237 U. S. 616, 59 L. Ed. 1147.

A chattel mortgagee of a bankrupt corporation, by answering to the merits, consents to the jurisdiction of a federal bankruptcy court other than that of the bankrupt's residence to

entertain a petition to determine the validity of the mortgage on the ground that it was not recorded in the county where the bankrupt resides.—*Fairbanks Steam Shovel Co. v. Wills*, 36 S. Ct. 466, 240 U. S. 642, 60 L. Ed. 841, affirming decree *In re Federal Contracting Co.*, 212 F. 688, 129 C. C. A. 224.

294. — United States Circuit Courts.

See 6 Cent. Dig. Bankr. § 412.

Where goods have been seized under a provisional order in bankruptcy, and turned over to the assignee as a part of the bankrupt estate after adjudication, and the person in whose hands they were seized abandons all pursuit of the goods themselves, and brings his action against the marshal for trespass, a bill in equity by the assignee, to enjoin the prosecution of such action, is not a suit "at law or in equity" against a person claiming an adverse interest, "touching any property or rights of the bankrupt, transferable to or vested in the assignee," within Rev. St. U. S. § 4979, giving jurisdiction in such cases to the United States circuit court.—*Leroux v. Hudson*, 109 U. S. 468, 3 S. Ct. 309, 27 L. Ed. 1000; *Schott v. Same*, 109 U. S. 477, 3 S. Ct. 314, 27 L. Ed. 1003.

Under the bankruptcy act of March 2, 1867, § 2 (Rev. St. § 4979), providing that the circuit court has jurisdiction of all suits in equity brought by an assignee in bankruptcy against any person claiming an adverse interest touching any property of the bankrupt transferable to or vested in the assignee, such an assignee, in possession of land of the bankrupt, may maintain a suit in equity in such court to have declared void, as a cloud upon his title, a levy upon said land of an execution rendered inoperative by the bankruptcy proceedings, but which was levied before the assignment, and is not void upon its face.—*Chapman v. Brewer*, 114 U. S. 158, 5 S. Ct. 799, 29 L. Ed. 83.

Diversity of citizenship between the trustees in bankruptcy and the defendant is not necessary to the exercise by a federal circuit court of its jurisdiction under Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], of a suit brought by such trustees upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where the citizenship of the bankrupt and the defendant is such that the former might have sued in the federal court but for the bankruptcy proceedings.—*Bush v. Elliott*, 26 S. Ct. 668, 202 U. S. 477, 50 L. Ed. 1114.

Exclusiveness of jurisdiction of the bankruptcy court of proceedings in bankruptcy precludes maintenance in a federal circuit court of a suit in equity by surety of bankrupt public contractor, involving matters with which creditors of the bankrupt have no concern, for the purpose of controlling distribution of funds in the trustee's possession.—(1912) *United States Fidelity & Guaranty Co. v. Bray*, 32 S. Ct. 620, 225 U. S. 205, 56 L. Ed. 1055, affirming decree (1909) *Bray v. United States Fidelity & Guaranty Co.*, 170 F. 689, 96 C. C. A. 9.

The consent of defendant provided for by Bankrupt Act July 1, 1898, § 23b, governing the jurisdiction of suits by trustee in bankruptcy, did not confer jurisdiction on the federal Circuit Courts which they would not have because of diverse citizenship and amount in controversy, or by reason of a cause of action arising under the Constitution or laws of the United States.—*Lovell v. Isidore Newman & Son*, 33 S. Ct. 375, 227 U. S. 412, 57 L. Ed. 577.

295. — State courts.

See 6 Cent. Dig. Bankr. §§ 414, 417.

An assignee in bankruptcy has authority to appear in a suit brought against him in the state court, and litigate his rights there; and,

when he does so, the judgment in such an action is binding upon him, and those he represents, although, by section 711, Rev. St., the United States courts have exclusive jurisdiction "in all matters and proceedings in bankruptcy."—*Winchester v. Heiskell*, 119 U. S. 450, 7 S. Ct. 281, 30 L. Ed. 462; *Id.*, 120 U. S. 273, 7 S. Ct. 582, 30 L. Ed. 464.

Under the bankrupt acts of 1841 and 1867, the assignee in bankruptcy could sue in the state courts to collect assets vesting in him by the assignment, and to set aside payments, or transfers fraudulent under the bankruptcy laws or under the state laws or at common law.—*Wilson v. Goodrich*, 154 U. S. 640, 14 S. Ct. 1186, 25 L. Ed. 111.

The validity of all other claims against the bankrupt, and the question whether others have received voidable preferences and have not been required to surrender them, cannot be litigated in a suit in a state court to avoid an alleged unlawful preference, since this would, in effect, transfer the administration of the bankrupt's estate from the federal District Court to the state court. Judgment, *Jackman v. Eau Claire Nat. Bank* (1905) 104 N. W. 98, 125 Wis. 465, affirmed.—*Eau Claire Nat. Bank v. Jackman*, 27 S. Ct. 391, 204 U. S. 522, 51 L. Ed. 596.

296. — Concurrent and conflicting jurisdiction of United States courts and state courts.

See 6 Cent. Dig. Bankr. § 414; 12 Cent. Dig. Courts. § 1332.

The possession by a court of bankruptcy of the proceeds of a sale of the chattels covered by a mortgage given by the bankrupt, which sale was had pursuant to an agreement, approved by that court, providing for the deposit of the net proceeds by a temporary receiver as a special fund to which the lien, if any, of the chattel mortgage, was transferred, does not deprive a state court of its jurisdiction, under Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3431], of a suit by the trustee in bankruptcy to set aside the mortgage as in fraud of creditors. Judgment, *Vollkommer v. Frank* (1905) 95 N. Y. S. 324, 107 App. Div. 594, affirmed.—*Frank v. Vollkommer*, 27 S. Ct. 596, 205 U. S. 521, 51 L. Ed. 911.

A trustee in bankruptcy charged with the value of certain property which had come into his possession as an asset and improperly delivered to a firm of which he was a member may be enjoined by a state court at the instance of the other partners from using the partnership assets to satisfy the judgment in summary proceedings against himself.—*Hebert v. Crawford*, 33 S. Ct. 484, 228 U. S. 204, 57 L. Ed. 800.

A state court, enjoining a trustee in bankruptcy from using assets of a firm of which he is a member to satisfy a judgment in bankruptcy charging him with value of assets of bankrupt which he improperly delivered to his firm, may determine liability of his successor who received the money of the firm knowing that it had been taken in violation of the injunction.—*Id.*

298. Time to sue, and limitations.

See 6 Cent. Dig. Bankr. §§ 430-442.

A suit to recover a simple debt is within the limitation contained in Rev. St. § 5057, and a writ of error sued out by an assignee to review a judgment against his bankrupt, in an action for a money demand, more than two years after its rendition, is barred thereby.—*Jenkins v. International Bank*, 106 U. S. 571, 2 S. Ct. 1, 27 L. Ed. 304.

The two-years limitation provided by Bankrupt Act 1867, § 2 (Rev. St. § 5057), providing that "no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court what-

soever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee," applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.—Id.

The bar of Rev. St. § 5057, does not begin to run when the fraudulent transfer has been concealed until the discovery of the fraud.—*Rosenthal v. Walker*, 111 U. S. 185, 4 S. Ct. 382, 28 L. Ed. 395.

Knowledge of the assignee that the bankrupt refused, at a judicial examination, to answer certain questions regarding his property, on the ground that his answers would incriminate him with respect to an indictment then pending against him for a criminal offense under the bankrupt laws, does not show that the assignee had constructive knowledge of a secret transfer by the bankrupt in fraud of the bankrupt law. His knowledge is a question for the jury, on all the evidence.—Id.

An assignee in bankruptcy sued a creditor of the bankrupt to obtain the delivery of two securities held by the latter for his debt, plaintiff alleging that defendant had unlawfully possessed himself of the same. The creditor delivered up one of the securities, and the litigation was dropped. Afterwards, in a suit by the assignee against the creditor to recover the other security, it was decided that the creditor was entitled to it. *Held*, that the statute of limitations began to run, against an action by the creditor against the assignee to have the security surrendered to the assignee applied to plaintiff's debt, from the time of such surrender.—*Doe v. Hyde*, 114 U. S. 247, 5 S. Ct. 841, 29 L. Ed. 142.

A right of action by the holders of the equitable title to land to restrain the execution of a judgment in ejectment obtained by an assignee in bankruptcy, in whom is the legal title, does not accrue, within the limitation of actions against assignees in bankruptcy, under Rev. St. U. S. § 5057, until the rendition of the judgment.—*Webb v. Barnwall*, 116 U. S. 193, 6 S. Ct. 350, 29 L. Ed. 595.

Where a partnership is formed between a party to whom the government has given a contract and other persons whose means are required to carry it out, and the contractor becomes bankrupt before payment is received from the government, the partners' right of action against the assignee for the interest in the claim does not accrue, within Rev. St. § 5057, until after payment of the claim to the assignee.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

An assignee in bankruptcy proceeded in the district court by petition, under Rev. St. § 5063, to have canceled a voluntary conveyance by the bankrupt to his children, which they answered, denying fraud, and claiming title by way of advancement from the father, and asking for an account from the assignee, who had taken possession. The assignee subsequently, without notice, had his petition dismissed "without prejudice," etc. Nearly three years after the filing of the petition, he brought suit in the circuit court for the same purpose, and set up, as a defense to a cross bill, the two-years bar of section 5057. *Held*, that that suit, and the proceedings in the district court, having substantially the same object, were to be regarded, for the purposes of the limitation prescribed by that section, as one and the same suit.—*Adams v. Riley*, 122 U. S. 382, 7 S. Ct. 1208, 30 L. Ed. 1207.

In 1875 a bill was filed against W. for a decree on his notes held by complainant bank, and a sale of collaterals for their satisfaction. W. set up usury, and, by cross bill, prayed an account, and the application of the usurious

interest, and for a surrender of the collaterals. Pending the suit, on July 31, 1878, J. was appointed W.'s assignee. In 1874 G. and others filed a bill against W., the bank, and others, alleging that they had purchased of W. certain land on which one of defendants held a mortgage (one of the collaterals mentioned in the first suit, transferred by the bank), but that there was nothing due on it, and praying to have it canceled. Said defendant and the bank filed cross bills, alleging the collateral agreement with the bank; and W. filed a cross bill setting up usury as in the first-mentioned suit. February 28, 1878, a decree was entered in the G. suit, sustaining the validity of the collateral agreement. November 20, 1883, more than five years after the appointment of the assignee, the bank filed a supplemental bill in its suit against W., setting up the decree in the G. suit as a former adjudication and bar to any further proceedings by the assignee for an account under his cross bill. *Held*, that the filing of the supplemental bill was not a new suit against the assignee by one claiming an adverse interest touching rights vested in him, but was new matter arising after the filing of the original bill, in support of the relief originally prayed for, and therefore not affected by the two-years limitations prescribed by Rev. St. U. S. § 5057, relating to suits between an assignee in bankruptcy and persons claiming an adverse interest.—*Jenkins v. International Bank of Chicago*, 127 U. S. 484, 8 S. Ct. 1190, 32 L. Ed. 189.

An action by the assignee of a deceased bankrupt against the bankrupt's administrator, to recover the proceeds of insurance policies on the bankrupt's life, which the bankrupt had assigned to defendant in trust for his daughters, is an action between "an assignee in bankruptcy and a person claiming an adverse interest," within the meaning of Rev. St. § 5057, as the administrator represents the daughters' interests.—*Avery v. Cleary*, 132 U. S. 604, 10 S. Ct. 220, 33 L. Ed. 469.

The failure of decedent to include the policies in his schedule of assets filed in the bankruptcy proceedings, and the fact that neither he, his children, nor his administrator gave notice of the policies to the assignee, could not be imputed as fraud to take the case out of the statute of limitations; the policies having been transferred long before the petition in bankruptcy was filed.—Id.

Where an assignee in bankruptcy knows that the bankrupt has been carrying considerable life insurance, and can learn by inquiry whether the policies have been assigned or canceled, but fails for nearly four years to do so, he is guilty of laches, and is thereby estopped to plead a fraud as to such policies, so as to bring an action for their recovery within the statute of limitations.—Id.

An assignee in bankruptcy, appointed in 1879, brought suit in 1886 to set aside, as fraudulent, certain conveyances made by the bankrupt in 1874. It appeared that in 1875 certain creditors had brought an action in a New York court to set aside these conveyances, and had filed a lis pendens therein, and that a judgment was rendered in their favor in 1885. The plaintiff alleged that he had no knowledge of the conveyances in question, or any facts relating thereto, until he was informed of this decree, which was in July, 1886; but he failed to show how he came to be so long ignorant of his rights, or the means, if any, used by defendants fraudulently to keep him in ignorance, or how or when he obtained knowledge of the matters alleged in the bill. *Held*, that the claim was barred, both by the two-years limitation in the bankruptcy statute of 1867, and by the six-years limitation prescribed by the New York statute. Code Civ. Proc. N. Y. § 382, subd. 5.—*Pearsall v. Smith*, 149 U. S. 231, 13 S. Ct. 833, 37 L. Ed. 713, affirming decree 38 F. 380.

Rev. St. § 5057, applies only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, which adverse claims existed while in the hands of the bankrupt, and before assignment.—*Dushane v. Beall*, 161 U. S. 513, 16 S. Ct. 637, 40 L. Ed. 791.

The two years' limitation prescribed by Rev. St. U. S. § 5057, for suits between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee, is not applicable to adverse claims arising out of an equitable attachment and an assignment of the bankrupt's interest under a testamentary trust, where both attachment and assignment were subsequent to the assignment in bankruptcy. *Judgment, Whittredge v. Sweetser* (1905) 75 N. E. 222, 189 Mass. 45, affirmed.—*Hammond v. Whittredge*, 27 S. Ct. 396, 204 U. S. 538, 51 L. Ed. 606.

The trustee in bankruptcy is not barred, on the ground of laches, from asserting rights under the liens of execution creditors upon property held by the bankrupt under a contract of conditional sale, which had been preserved for the benefit of the estate by an order of the bankruptcy court because the first based his right to relief solely upon the claim that an unlawful preference was created through the payment of an indebtedness by the transfer of the property to the vendor by the bankrupt when insolvent.—(1912) *Rock Island Plow Co. v. Reardon*, 32 S. Ct. 164, 222 U. S. 354, 56 L. Ed. 231, affirming decree (1909) *Reardon v. Rock Island Plow Co.*, 168 F. 654, 94 C. C. A. 118.

The two years' limitation after the closing of an estate prescribed by Bankruptcy Act July 1, 1898, § 11d, of suits by or against trustees in bankruptcy, bars an action by a former trustee to set aside a conveyance as in fraud of creditors after the bankruptcy proceedings had been reopened for that purpose, on the ground that he had just discovered the facts, where pending the original proceedings the trustee made some inquiries but dropped the matter.—*Kinder v. Scharff*, 34 S. Ct. 164, 231 U. S. 517, 58 L. Ed. 343, affirming judgment 55 So. 769, 129 La. 218.

300. Process, notice of suit, and appearance.

See 6 Cent. Dig. Bankr. §§ 416, 449.

Such notice, by mail or otherwise, as the court shall direct, of the proceeding taken under Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), to re-examine and reduce payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, is sufficient, provided that an opportunity is given to appear and contest the reasonableness of the charges.—*In re Wood*, 28 S. Ct. 621, 210 U. S. 246, 52 L. Ed. 1046.

301. Injunction and receiver.

See 6 Cent. Dig. Bankr. § 464.

Rev. St. § 720, provides that an injunction shall not be granted by any federal court, to stay proceedings in any state court, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The bankruptcy act of March 2, 1867, § 40 (Rev. St. § 5024), provides that, where a petition in involuntary bankruptcy is filed, the court of bankruptcy may restrain all persons by injunction from interfering with the debtor's property. By section 2 of the latter act, the circuit court has jurisdiction of all suits in equity brought by an assignee in bankruptcy against any person claiming an adverse interest in the property assigned. *Held*, that the circuit court, in a proceeding by such an assignee to have the levy of an execution, issued

by a state court against lands assigned, declared void, may issue an injunction restraining sale under such execution.—*Chapman v. Brewer*, 114 U. S. 158, 5 S. Ct. 799, 29 L. Ed. 83.

302. Pleading.

See 6 Cent. Dig. Bankr. §§ 456, 457.

A bill in equity cannot be maintained, by an assignee in bankruptcy, against the wife of the bankrupt, alleging the transfer to her by him, in contemplation of bankruptcy, and without consideration, of a large amount of property, if no description is given of any particular property or fund transferred, or arising out of any property or fund transferred, and if no discovery is sought in relation thereto, but defendant's oath is expressly waived.—*Huntington v. Saunders*, 120 U. S. 78, 7 S. Ct. 356, 30 L. Ed. 580.

303. Evidence.

See 6 Cent. Dig. Bankr. §§ 458-462.

In proof of an averment that a sale was fraudulently made in contemplation of insolvency, it may be shown that, eight days after another sale made a month before the sale in question, a secret agreement was entered into between the parties, whereby the vendor was reinvested with an interest in the property sold.—*Rosenthal v. Walker*, 111 U. S. 185, 4 S. Ct. 382, 28 L. Ed. 395.

A decree, in bankruptcy proceedings by the district court, that the facts set forth in the petition are true, is conclusive in a suit brought by the assignee against a person claiming an adverse interest in property of the bankrupt; the district court having had jurisdiction of the subject-matter, and the bankrupt having voluntarily appeared, and the adjudication having been correct in form.—*Chapman v. Brewer*, 114 U. S. 158, 5 S. Ct. 799, 29 L. Ed. 83.

Testimony of dealings between debtor and creditor some six or seven months prior to a transaction alleged to constitute a preference under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 544, 564 [U. S. Comp. St. 1901, p. 3445], is admissible on the question of knowledge, in an action by the trustee to recover the amount of the preference. *Judgment, Tredway v. Kaufman* 21 Pa. Super. Ct. 256, reversed.—*Kaufman v. Tredway*, 25 S. Ct. 33, 195 U. S. 271, 49 L. Ed. 190.

The burden of proving that a sale by a pledgee of the property of a bankrupt, made conformably to the contract of pledge, was unfair, is on the trustee in bankruptcy of the pledgor, who seeks to avoid the sale. Decree, *in re Mertens* (1906) 144 F. 818, 75 C. C. A. 548, affirmed.—*Hiscock v. Varick Bank of New York*, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

304. Trial.

See 6 Cent. Dig. Bankr. § 463.

The verdict of jury in favor of a trustee in bankruptcy to set aside a transfer of book accounts as fraudulent cannot be treated as a finding of intent to defraud of which the transferee had notice.—*Van Iderstine v. National Discount Co.*, 33 S. Ct. 343, 227 U. S. 575, 57 L. Ed. 652, affirming decree 174 F. 518, 98 C. C. A. 300.

305. Judgment.

See 6 Cent. Dig. Bankr. §§ 466-468.

In a suit by an assignee against his assignor and a codefendant, alleging the fraudulent withholding of assets, and seeking to affect the goods in codefendant's possession with a trust in favor of the assignor's creditors, *held*, upon failure of proof connecting the codefendant with the fraud, that the bill was rightly dismissed, but, as to the assignor, without prejudice to the assignee's right to recover damages against him in an action at law.—*Cramer v. Cohn*, 119 U. S. 355, 7 S. Ct. 277, 30 L. Ed. 439.

⚡306. Appeal and error.

An appeal to the federal Supreme Court from a decree of a Circuit Court of Appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt in fraud of creditors need not be taken within the 30 days prescribed by General Orders in Bankruptcy No. 36, for appeals under the bankrupt act, but the appellate jurisdiction being under, or the same as that under, the Circuit Courts of Appeals act (Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), the appeal is in time if taken within a year.—(1910) *Thomas v. Sugarman*, 30 S. Ct. 650, 218 U. S. 129, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250, reversing decree *Same v. Sugarman* (1907) 157 F. 669, 85 C. C. A. 337, 15 L. R. A. (N. S.) 1267.

The contention that the Circuit Court of Appeals should not have ordered dismissal of the complaint in a suit by trustee to set aside fraudulent conveyance when it found that the transferee had no knowledge of any fraud held not well founded, where error was assigned on refusal to set aside the verdict against it and failure to enter decree in its favor.—*Van Iderstine v. National Discount Co.*, 33 S. Ct. 343, 227 U. S. 575, 57 L. Ed. 652, affirming decree 174 F. 518, 98 C. C. A. 300.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

⚡307. Creditors entitled to prove claims.

See 6 Cent. Dig. Bankr. §§ 496-507, 555-564.

⚡311. — Effect of preference and surrender thereof.

See 6 Cent. Dig. Bankr. §§ 497-500.

A creditor who has received payments of money from an insolvent debtor within four months before petition in bankruptcy was filed for the debtor, but who did not know or have reasonable cause to believe that the payments were intended to give him a preference, the debtor not intending to give a preference, cannot be compelled, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], to repay the money to the trustee in bankruptcy; but under section 57g (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), he must surrender the preference that he has received before any claim by him against the estate can be allowed.—*Pirie v. Chicago Title & Trust Co.*, 21 S. Ct. 906, 182 U. S. 438, 45 L. Ed. 1171, affirming judgment 102 F. 1005, 41 C. C. A. 681.

The provision of Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], for the surrender of preferences as a condition of proving claims, is not a personal requirement, to be strictly construed.—*Id.*

Payments by the vendees on a running account for goods which were sold and delivered after they had become insolvent, when received by the vendor in the regular course of business and without idea or intention on his part of obtaining a preference thereby, are not, though made within four months before the petition in bankruptcy was filed for such vendees, preferences within the meaning of Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], which must be surrendered, under section 57g, before the vendor's claim for the balance due can be allowed. Judgment 118 F. 270, 55 C. C. A. 364, affirmed.—*Jaquith v. Alden*, 23 S. Ct. 649, 189 U. S. 78, 47 L. Ed. 717.

Creditors of a bankrupt, who had collected their claim by attachments in suits begun less than four months before the filing of the petition in bankruptcy, are, notwithstanding the

entry of satisfaction of record in such suits, entitled to have the proof of their claim against the bankrupt's estate allowed, where on demand of the trustee in bankruptcy they subsequently paid over to him the full amount of the debts, although the payment, for convenience of counsel, was delayed for a day or two beyond one year after the adjudication in bankruptcy. Decree, *Hutchinson v. Otis*, 115 F. 937, 53 C. C. A. 419, affirmed.—*Hutchinson v. Otis, Wilcox & Co.*, 23 S. Ct. 778, 190 U. S. 552, 47 L. Ed. 1179.

Payments made on an open account, within four months of the debtor's adjudication in bankruptcy, which are received in good faith, without the creditor's knowledge of the debtor's insolvency, and are less in amount than the credit sales made by such creditor to the debtor during that period, do not constitute a preference which must be surrendered before the claim for the balance can be allowed under the bankrupt act.—*Yaple v. Dahl-Millikan Grocery Co.*, 24 S. Ct. 552, 193 U. S. 526, 48 L. Ed. 776.

A creditor of a bankrupt, who has in good faith received a preference, voidable under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3449], solely because given within four months prior to the filing of the petition in bankruptcy, and who has, in good faith, retained the preference until deprived thereof by the judgment of a court in a suit by the trustee, still may prove the debt so voidably preferred, notwithstanding the provision of section 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."—*Keppel v. Tiffin Sav. Bank*, 25 S. Ct. 443, 197 U. S. 356, 49 L. Ed. 790.

A creditor compelled to surrender an unlawful preference may prove his claim, and receive a dividend upon an equality with the other creditors. Decree (1906) 149 F. 194, 79 C. C. A. 153, reversed.—*Page v. Rogers*, 29 S. Ct. 159, 211 U. S. 575, 53 L. Ed. 332.

A court of bankruptcy, in compelling a surrender of an unlawful preference, should permit the creditor to prove his claim against the bankrupt estate, and deduct from the amount of the preference which he is required to surrender the dividend which the court finds is coming to him.—*Id.*

Payments made on an open account for goods sold and delivered within four months prior to an adjudication in bankruptcy, which are received in good faith, without the creditor's knowledge of the debtor's insolvency, the account being made up of debits and credits, leaving a net amount due from the bankrupt's estate, do not constitute preferences which the creditor is bound to surrender before proving his claim. Judgment (1907) 153 F. 562, 82 C. C. A. 516, reversed.—*Joseph Wild & Co. v. Provident Life & Trust Co.*, 29 S. Ct. 619, 214 U. S. 292, 53 L. Ed. 1003.

⚡313. Claims provable.

See 6 Cent. Dig. Bankr. §§ 469-495.

⚡314. — In general.

See 6 Cent. Dig. Bankr. §§ 469-473, 473, 483-487, 489, 490.

The individual liability of a stockholder does not descend upon his assignee in bankruptcy, nor attach to the assets in his hands, where the assignee has not accepted the stock or consented to become a stockholder in the corporation.—*American File Co. v. Garrett*, 110 U. S. 288, 4 S. Ct. 90, 28 L. Ed. 149.

A husband's debt to his wife for paraphernal property (created by the Louisiana Code) is provable, under Rev. St. § 5067, against the husband in bankruptcy, and is therefore ex-

tinguished by his discharge.—*Fleitas v. Richardson*, 147 U. S. 550, 13 S. Ct. 495, 37 L. Ed. 276, affirming judgment (C. C.) *Same v. Meller*, 39 F. 129.

Debts provable under Bankrupt Act July 1, 1898, § 63a, cl. 4, include only such as existed at the time of the filing of the petition in bankruptcy.—*Zavelo v. Reeves*, 33 S. Ct. 365, 227 U. S. 625, 57 L. Ed. 676, Ann. Cas. 1914D, 664, affirming judgment *Same v. J. S. Reeves & Co.*, 54 So. 654, 171 Ala. 401.

Purchasers of realty belonging to a bankrupt sold for taxes and special assessments are entitled to be reimbursed out of general assets of bankrupt on cancellation of their certificates under Bankr. Act, § 64a.—*Dayton v. Stanard*, 36 S. Ct. 695, 241 U. S. 588, 60 L. Ed. 1190, modifying decree *Stanard v. Dayton*, 220 F. 441, 137 C. C. A. 35.

315. — Judgment before filing of petition.

See 6 Cent. Dig. Bankr. §§ 488, 491.

A claim for alimony, whether for arrears accrued prior to an adjudication in bankruptcy or for installments accruing thereafter, not constituting a provable debt under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418] is not barred by the bankrupt's discharge.—*Audubon v. Shufeldt*, 21 S. Ct. 735, 181 U. S. 575, 45 L. Ed. 1009; (*D. C.*) *Turner v. Turner*, 108 F. 785.

Judgment for damages for plaintiff in trover to recover goods purchased when insolvent, where no fraudulent misrepresentations are shown, is a provable debt, within Bankr. Act July 1, 1898, § 63a(4).—*Kreitlein v. Ferger*, 35 S. Ct. 685, 238 U. S. 21, 59 L. Ed. 1184, reversing judgments 97 N. E. 819, 52 Ind. App. 109, and 98 N. E. 1005, 52 Ind. App. 190.

317. — Costs incurred before filing of petition.

See 6 Cent. Dig. Bankr. §§ 493-495.

A charge for the preparation of a general deed of assignment which is avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment may be proved as an unsecured claim against the bankrupt's estate.—*Randolph & Randolph v. Scruggs*, 23 S. Ct. 710, 190 U. S. 533, 47 L. Ed. 1165.

A claim for legal services rendered to the assignee in a general deed of assignment in unsuccessfully resisting an adjudication of bankruptcy against his assignor on a petition filed within four months after the making of the assignment is not provable against the bankrupt's estate.—*Id.*

318. — Contracts.

See 6 Cent. Dig. Bankr. §§ 481, 482.

A claim arising out of the conversion by stockbrokers of shares purchased and held by them on a customer's account, charging him with commission and interest, and crediting him with amounts received as margins, is provable under Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1910, p. 3447], as a debt "founded upon an open account, or upon a contract, express or implied." Judgment 66 N. E. 833, 201 Ill. 581, reversed.—*Crawford v. Burke*, 25 S. Ct. 9, 195 U. S. 176, 49 L. Ed. 147.

A creditor, by electing to bring an action in trover, as for a fraudulent conversion, does not deprive his debt of its provable character under Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], where it is "founded upon an open account or upon a contract, express or implied," in view of the recognition of the provable character of claims for fraud in general, inferable from the exception from the operation of a discharge in bankruptcy which section 17 of that act makes in favor of claims for fraud which have been

reduced to judgment, or which originated in the bankrupt's acts while acting as an officer or in a fiduciary capacity.—*Id.*

Independently of liability on his bond, there is a contractual liability resting on a defaulting testamentary trustee to restore to the trust estate assets embezzled, which obligation is provable in bankruptcy under Bankr. Act, § 63a, subd. 4, as a debt founded on an open account or a contract.—*Clarke v. Rogers*, 33 S. Ct. 587, 228 U. S. 534, 57 L. Ed. 953, affirming decree 183 F. 518, 106 C. C. A. 64.

The filing of an involuntary petition in bankruptcy held an anticipatory breach of an executory contract, where the trustee does not elect to assume performance, permitting a claim thereon to be provable in bankruptcy as one "founded," within Act July 1, 1898, § 63a-4, "upon a contract, express or implied."—*Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, 36 S. Ct. 412, 240 U. S. 581, 60 L. Ed. 811, affirming decree in re *Frank E. Scott Transfer Co.*, 216 F. 308, 132 C. C. A. 522.

A bankruptcy court, in allowing a claim for damages for an anticipatory breach of an executory contract, should not limit the damages to six months following the breach, although the contract was revocable by the other party thereto on six months' notice.—*Id.*

321. Amount of claims.

See 6 Cent. Dig. Bankr. §§ 503, 505, 508-512.

323. — Secured claims.

See 6 Cent. Dig. Bankr. §§ 503, 505, 513.

A creditor of a bankrupt who has taken a mortgage to secure his debt, which is not voidable under the bankrupt act, is entitled to interest on the mortgage debt, where the estate is ample for that purpose. Judgment (1907) *Coder v. Arts*, 152 F. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; in re *Coder*, *Id.*; in re *Arts*, *Id.*; *Arts v. Coder*, *Id.*, affirmed.—*Coder v. Arts*, 29 S. Ct. 436, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

Secured creditors of a bankrupt, selling their security after the filing of the petition in bankruptcy, and finding the proceeds insufficient to pay the whole amount of their claims, are not entitled to apply such proceeds first to interest accrued since the filing of the petition, then to the principal debt, and then prove for the balance, although, by Bankr. Act July 1, 1898, c. 541, §§ 57h, 67d, 30 Stat. 500, 565 (U. S. Comp. St. 1901, pp. 3443, 3449) § 67d, liens remain unaffected by that statute, and the value of securities is, by section 57h, to be determined by converting them into money, "according to the terms of the agreement."—(1911) *Sexton v. Dreyfus*, 31 S. Ct. 256, 219 U. S. 339, 55 L. Ed. 244, reversing decree (C. C. A. 1910) in re *Kessler*, 180 F. 979, 103 C. C. A. 582.

Interest and dividends accruing upon pledged securities after the filing of a petition in bankruptcy against the pledgor may be first applied by the pledgees to the after-accruing interest upon the debt.—*Id.*

326. Set-offs and counterclaims.

See 6 Cent. Dig. Bankr. § 514.

A corporate creditor is not entitled to set off, in proving its claim against the bankrupt debtor's estate, a sum retained by it with knowledge of the debtor's insolvency, and within four months of the filing of the petition in bankruptcy, which sum was due and owing the bankrupt under an agreement by which, in paying its employees, the corporation was to deduct from their wages the amount due from such employees to the bankrupt for supplies sold them by him, and to remit to him the amount thus deducted, irrespective of any indebtedness otherwise due from him to the corporation. Decree 129 F. 728, 64 C. C. A. 256, reversed.—*Western Tie & Timber Co. v. Brown*, 25 S. Cr. 339, 196 U. S. 502, 49 L. Ed. 571.

Object of provision of Bankr. Act July 1, 1898, § 68a, is to give the bankruptcy court the right to apply the principles of set-off to mutual credits when its action is invoked for that purpose.—*Cumberland Glass Mfg. Co. v. De Witt*, 35 S. Ct. 636, 237 U. S. 447, 59 L. Ed. 1042, affirming judgment 87 A. 927, 120 Md. 381, Ann. Cas. 1915A, 702.

—328. Time for proof of claims.

See 6 Cent. Dig. Bankr. § 518.

The presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication is a sufficient filing, within the meaning of Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], when read in connection with general orders in bankruptcy No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. Order, *In re Ingalls Bros.* (1905) 137 F. 517, 70 C. C. A. 101, reversed.—*J. B. Orcutt Co. v. Green*, 27 S. Ct. 195, 204 U. S. 96, 51 L. Ed. 390.

—329. Proof of claims.

See 6 Cent. Dig. Bankr. §§ 501-507, 517, 519-521, 523, 524.

—336. — Amendment or withdrawal of proof.

See 6 Cent. Dig. Bankr. §§ 523, 524.

A court of bankruptcy may allow an amended proof of claim against a bankrupt's estate, filed with the trustee's consent, to be substituted for the defective original proof, although an appeal has been taken by the trustee to the Circuit Court of Appeals from a decree of such court permitting the owners of the claim to prove as creditors. Decree *Hutchinson v. Otis*, 115 F. 937, 53 C. C. A. 419, affirmed.—*Hutchinson v. Otis, Wilcox & Co.*, 23 S. Ct. 778, 190 U. S. 552, 47 L. Ed. 1179.

An amended proof of claim against a bankrupt's estate, filed with the trustee's consent more than a year after adjudication, may be substituted for the defective original proof, although by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], proofs subsequent to one year after adjudication are forbidden.—Id.

—338. Objections to claims and proceedings thereon.

See 6 Cent. Dig. Bankr. §§ 525-527.

—340. — Evidence.

See 6 Cent. Dig. Bankr. § 537.

The sworn proof of a claim against a bankrupt's estate is prima facie evidence of its allegations, although objection is made under Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3418], to its allowance. Order *In re Dresser*, 135 F. 495, 68 C. C. A. 207, affirmed.—*Whitney v. Dresser*, 26 S. Ct. 316, 200 U. S. 532, 50 L. Ed. 584.

—341. Allowance or disallowance of claims.

See 6 Cent. Dig. Bankr. §§ 516, 528.

The finding of the state board of assessors as to the amount of outstanding capital stock of a corporation, made for the purpose of fixing the amount of the annual license fee or franchise tax imposed by Gen. St. N. J. 1895, §§ 251, 252, 257, 258, 260, is not conclusive on the bankruptcy court, in view of the provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447] § 64a, that in case any question arises as to the amount or legality of any tax entitled to priority of payment under that section, the same shall be heard and determined by the court. Judgment *In re Cosmopolitan Power Co.*, 137 F. 858, 70 C. C.

A. 388, reversed.—*State of New Jersey v. Anderson*, 27 S. Ct. 137, 203 U. S. 483, 51 L. Ed. 284.

—343. Filing claims proved.

See 6 Cent. Dig. Bankr. § 522.

A trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee, be deemed the equivalent of a delivery to such referee. Order, *In re Ingalls Bros.* (1905) 137 F. 517, 70 C. C. A. 101, reversed.—*J. B. Orcutt Co. v. Green*, 27 S. Ct. 195, 204 U. S. 96, 51 L. Ed. 390.

—344. Priorities.

See 6 Cent. Dig. Bankr. §§ 531-540, 563, 564.

—346. — Taxes.

See 6 Cent. Dig. Bankr. § 535.

The claim of the state of New Jersey against the estate of a bankrupt corporation organized under the laws of that state, but doing no business and having no property there, for the "annual license fee or franchise tax" on its outstanding capital stock, imposed under Gen. St. N. J. 1895, §§ 251, 252, 257, 258, 260, is for a tax legally due and owing to the state, which, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], § 64a, must be paid in advance of dividends to creditors. Judgment, *In re Cosmopolitan Power Co.* (1905) 137 F. 858, 70 C. C. A. 388, reversed.—*State of New Jersey v. Anderson*, 27 S. Ct. 137, 203 U. S. 483, 51 L. Ed. 284.

The franchise tax assessed under Gen. St. N. J. 1895, §§ 251, 252, 257, 258, 260, on the basis of the capital stock of a corporation issued and outstanding on the 1st of January preceding the making of the return, is "legally due and owing" within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], § 64a, providing that taxes must be paid in advance of the payment of dividends to creditors, although such tax may not have been collectible until after the corporation was adjudged a bankrupt.—Id.

—347. — Costs, fees, and expenses.

See 6 Cent. Dig. Bankr. § 538.

Assignees of a corporation, who never receive possession of its assets because the same have been placed in the hands of receivers of another court in foreclosure proceedings, but who conceive it to be their duty to defend the foreclosure suits, and file a cross bill looking to the administration of the entire assets, are entitled to have the compensation for themselves and their attorneys made a direct charge on the property prior to the claims of creditors and stockholders.—*Meddaugh v. Wilson*, 151 U. S. 333, 14 S. Ct. 356, 38 L. Ed. 183.

Claims for services rendered to the assignee in a general deed of assignment prior to an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment are preferred claims against the bankrupt's estate to the same extent as if the assignee had paid the claims.—*Randolph & Randolph v. Scruggs*, 23 S. Ct. 710, 190 U. S. 533, 47 L. Ed. 1165.

—348. — Wages.

See 6 Cent. Dig. Bankr. § 536.

The priority of payment of wages "due to workmen, clerks, or servants," given by Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], when earned within three months before the commencement of the bankruptcy proceedings, extends to claims which had been assigned before the bankruptcy proceedings were begun.—*Shropshire, Woodliff*

& Co. v. Bush, 27 S. Ct. 178, 204 U. S. 186, 51 L. Ed. 436.

349. — Under laws of United States.

See 6 Cent. Dig. Bankr. § 533.

The priority over claims for labor against a bankrupt estate which the United States possessed under Rev. St. § 3466 (U. S. Comp. St. 1901, p. 2314), and the like priority given by section 3468 to a surety which had paid to the United States money from a bankrupt, does not exist since the passage of Bankruptcy Act July 1, 1898, § 64.—(1912) Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 32 S. Ct. 457, 224 U. S. 152, 56 L. Ed. 706, reversing judgment (1909) Title Guaranty & Surety Co. v. Guarantee Title & Trust Co., 174 F. 385, 98 C. C. A. 603.

350. — Under laws of state.

See 6 Cent. Dig. Bankr. § 537.

Right of antecedent creditors under Ky. St. § 1907, to set aside a conveyance valid as to subsequent creditors, is not a debt given priority by state law, within Bankr. Act July 1, 1898, § 64b, subsec. 5.—Globe Bank & Trust Co. of Paducah, Ky., v. Martin, 35 S. Ct. 377, 236 U. S. 288, 59 L. Ed. 583, denying certiorari in re Martin, 193 F. 841, 113 C. C. A. 627.

351. — Partnership and individual creditors.

See 6 Cent. Dig. Bankr. §§ 563, 564.

The fact that there are no partnership assets and no solvent partner held not to preclude a creditor of an individual partner from claiming payment to the exclusion of the partnership creditors, in view of Bankr. Act, July 1, 1898, § 5.—Farmers' & Mechanics' Nat. Bank of Philadelphia v. Ridge Avenue Bank, 36 S. Ct. 461, 240 U. S. 498, 60 L. Ed. 767.

352. Mode of distribution.

See 6 Cent. Dig. Bankr. §§ 501-507, 541-544, 548, 555-564.

353. — In general.

See 6 Cent. Dig. Bankr. §§ 541-544.

Preservation by the bankruptcy court under Act July 1, 1898, § 67f, of lien of attachments in state court to set aside fraudulent conveyance, entitles all creditors of a bankrupt to participate in the fund from sale under order of the state court, which while setting aside the conveyance as to antecedent creditors held that under Ky. St. § 1907, it was valid as to subsequent creditors.—Globe Bank & Trust Co. of Paducah, Ky., v. Martin, 35 S. Ct. 377, 236 U. S. 288, 59 L. Ed. 583, denying certiorari in re Martin, 193 F. 841, 113 C. C. A. 627.

357. Proceedings for distribution in general.

See 6 Cent. Dig. Bankr. §§ 541-544.

The powers of the trustees in bankruptcy, under Rev. St. § 5103, are ministerial, and not judicial, and, though somewhat enlarged, are in the main the same as those of the assignee, and their action is subject to the revision and final control of the district court.—Merchants' & Manufacturers' Nat. Bank v. Slagle, 106 U. S. 568, 1 S. Ct. 342, 27 L. Ed. 204.

Right of bankruptcy court to distribute proceeds from sale of property by state court in a suit in which trustee in bankruptcy had intervened, as conveyed in fraud of antecedent creditors, was not excluded by the proceedings of the state court, where the highest state court directed proceeds to be disposed of in the bankruptcy proceedings.—Globe Bank & Trust Co. of Paducah, Ky., v. Martin, 35 S. Ct. 377, 236 U. S. 288, 59 L. Ed. 583, denying certiorari in re Martin, 193 F. 841, 113 C. C. A. 627.

362. Effect of proof and distribution on rights of creditors.

See 6 Cent. Dig. Bankr. §§ 485, 504, 550-554.

363. — In general.

See 6 Cent. Dig. Bankr. §§ 550-554.

Filing a claim and participating in the bankruptcy proceedings does not waive the right of a customer of stockbrokers to recover from the trustees of their bankrupt estate certain stock held as collateral to such customer's account, but on which he was not indebted, where he expressly reserved, in his proof of claim, whatever rights he might have in such stock. Judgment, in re Jacob Berry & Co. (1906) 149 F. 176, 79 C. C. A. 124, affirmed.—Thomas v. Taggart, 28 S. Ct. 519, 209 U. S. 385, 52 L. Ed. 845.

Proof of a claim in bankruptcy as upon a contract, and participation in composition proceedings, is not a bar to action for deceit in obtaining credit by false reports to a commercial agency.—Friend v. Talcott, 33 S. Ct. 505, 228 U. S. 27, 57 L. Ed. 718, affirming judgment Talcott v. Friend, 179 F. 676, 103 C. C. A. 80.

364. — Secured claims.

See 6 Cent. Dig. Bankr. §§ 485, 504.

Section 5106, providing that pending proceedings by creditors shall be stayed "upon the application of the bankrupt," relates only to creditors whose claims are "provable" but not proved; and, when the creditor proved his claim, the bankrupt was released, under section 5105, from all obligation to give further attention to the foreclosure suit, notwithstanding that the decree of foreclosure provided for continuing the cause for further proceedings; and a subsequent deficiency decree obtained therein by the creditor without actual notice of the discharge, and without notifying the bankrupt of his application therefor, was absolutely void.—Scott v. Ellery, 142 U. S. 381, 12 S. Ct. 233, 35 L. Ed. 1050.

(G) ACCOUNTING AND DISCHARGE OF TRUSTEE.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 565-574.]

IV. COMPOSITION.

380. Notice of application.

See 6 Cent. Dig. Bankr. § 577.

An accommodation maker of a note, which has been sold to one who, subsequently to the adjudgment of the drawees as bankrupts, enters into the composition scheme, is not a "creditor," within Act 1874, § 17, and cannot, in an action against the drawees, complain that he had no notice of the composition proceedings.—Liebke v. Thomas, 116 U. S. 605, 6 S. Ct. 496, 29 L. Ed. 744.

387. Operation and effect.

See 6 Cent. Dig. Bankr. §§ 603-605, 607-616.

Section 33 of the bankrupt act of 1867 (Rev. St. § 5117), providing that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy," is applicable to composition proceedings under section 17 of the supplementary act of June 22, 1874, and such debt is not discharged by the composition proceedings, though the creditor is made a party thereto, and accepts his pro rata share of the composition fund.—Bayly v. Washington & Lee University, 106 U. S. 11, 1 S. Ct. 88, 27 L. Ed. 97.

Extortion as consideration for forbearing to act in bankruptcy proceedings forbidden by Bankrupt Act July 1, 1898, § 29b, cl. 5, cannot be inferred from a promise by the bankrupt

after adjudication that, on loan of a sum to be used in a composition with creditors, he would pay them the balance of their claim when such composition was confirmed.—*Zavelo v. Reeves*, 33 S. Ct. 365, 227 U. S. 625, 57 L. Ed. 676, Ann. Cas. 1914D, 664, affirming judgment *Same v. J. S. Reeves & Co.*, 54 So. 654, 171 Ala. 401.

A bankrupt may use his credit to acquire money required for a composition offered conformably to the Bankrupt Act of July 1, 1898, § 12.—*Id.*

Effect of composition proceedings authorized by Bankr. Act July 1, 1898, § 12, as amended June 25, 1910, in a measure supersedes bankruptcy proceeding, and reinvests the bankrupt with all his property, free from the claims in bankruptcy.—*Cumberland Glass Mfg. Co. v. De Witt*, 35 S. Ct. 636, 237 U. S. 447, 59 L. Ed. 1042; affirming judgment 87 A. 927, 120 Md. 381, Ann. Cas. 1915A, 702.

No adjudication setting off, under Bankr. Act July 1, 1898, § 68a, against claim of creditor, unliquidated claim against it, held involved in composition decree, where the creditor made no attempt to have the set-off adjudicated and took its composition dividend in the same manner as other creditors.—*Id.*

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

Discharge as breach of condition in bond, see Bonds, ☞110.

Notice to creditors of application for discharge as denial of due process of law, see Constitutional Law, ☞309.

Recognition of local exemption laws as delegation of legislative power, see Constitutional Law, ☞60.

☞390. Actions by bankrupt.

See 6 Cent. Dig. Bankr. §§ 627-636.

A voluntary bankrupt has sufficient title, prior to the election of the trustee, to the personal property included in his schedule of assets, to enable him to bring, and, in case the trustee neither sues nor intervenes, to prosecute to judgment, a suit for damages occasioned by the alleged unlawful judicial sale of a portion of such property after he had filed a claim of exemption.—(1912) *Johnson v. Collier*, 32 S. Ct. 104, 222 U. S. 538, 56 L. Ed. 306, affirming judgment (1909) 49 So. 761, 161 Ala. 204.

☞391. Actions against bankrupt.

See 6 Cent. Dig. Bankr. §§ 637-655.

The duty of a state court, in which a suit against a bankrupt for a provable debt is pending, to grant a stay of proceedings, under Rev. St. U. S. § 5106, upon application of the bankrupt, until the question of his discharge shall have been determined, is not affected by the fact that the suit was begun by attachment more than four months before the adjudication in bankruptcy, and had been dissolved by giving bond with sureties to pay the amount of the judgment which might be recovered.—*Hill v. Harding*, 107 U. S. 631, 2 S. Ct. 404, 27 L. Ed. 493.

A marshall of the United States, who, under a provisional warrant in bankruptcy, has, after receiving a bond of indemnity under general order No. 13 in bankruptcy, seized goods as the property of the debtor, and been sued for damages for such seizure in an action of trespass in a state court, by a third person, who claims that the goods were his property at the time of the seizure, cannot maintain a suit in equity in a circuit court of the United States for an injunction to restrain the further prosecution of the action of trespass, the parties to the suit in equity being citizens of the same state.—*Leroux v. Hudson*, 109 U. S. 468, 3 S. Ct. 309,

27 L. Ed. 1000; *Schott v. Same*, 109 U. S. 477, 3 S. Ct. 314, 27 L. Ed. 1003.

A federal District Court sitting as a court of bankruptcy has no power to issue an ex parte injunction without notice or service of process, attempting to restrain a creditor from suing in a state outside the jurisdiction of the District Court, but such proceeding could only have binding force upon the creditor if jurisdiction were obtained over it by ancillary proceedings in a court having jurisdiction, and upon service of process upon such creditor.—(1911) *Acme Harvester Co. v. Beekman Lumber Co.*, 32 S. Ct. 96, 222 U. S. 300, 56 L. Ed. 208, affirming judgment (1908) *Beekman Lumber Co. v. Acme Harvester Co.*, 114 S. W. 1087, 215 Mo. 221.

☞394. Exemptions.

See 6 Cent. Dig. Bankr. §§ 656-673.

☞396. — Property exempt.

See 6 Cent. Dig. Bankr. §§ 659-668.

A seat in a stock exchange having a considerable vendible value, which, if exempted from liability to satisfy the debts of its owner, is so exempted by decisions of the state courts which do not rest on any exemption by reason of a state statute, but upon definitions of property, will not be deemed exempt under Bankr. Act 1898, 30 Stat. 566, c. 541 [U. S. Comp. St. 1901, p. 3418], by virtue of the provision of section 6 of that act [page 3424] which allows to bankrupts the exemptions prescribed by the state laws in force at the time of filing the petition in bankruptcy. Judgment (D. C.) 102 F. 746, and *In re Page*, 107 F. 89, 46 C. C. A. 160, 59 L. R. A. 94, affirmed.—*Page v. Edmunds*, 23 S. Ct. 200, 187 U. S. 596, 47 L. Ed. 318.

The investment feature of so-called ton-tine policies of life insurance does not exclude them from the proviso of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], which permits the bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustee its cash surrender value. Judgment, *In re Mertens* (C. C. A. 1905) 142 F. 445, 73 C. C. A. 561, affirmed.—*Hiscock v. Mertens*, 27 S. Ct. 488, 205 U. S. 202, 51 L. Ed. 771.

Life insurance policies which had not lapsed either when the petition to have the insured declared a bankrupt was filed, or when the bankruptcy was adjudged, have a cash surrender value within the meaning of the proviso of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], which permits a bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustee the cash surrender value within 30 days after such value has been ascertained and stated to the trustee by the company issuing the policy, although it may be the practice of the company not to accept a surrender until the policy has lapsed.—*Id.*

The words "cash surrender value," as used in the proviso of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], which permits a bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustees the cash surrender value, embrace policies which, by their terms, or by the practice or concession of the company issuing them, have such value.—*Id.*

☞398. — Liabilities enforceable against, and transfers of exempt property.

See 6 Cent. Dig. Bankr. §§ 676, 677.

Liens against property which may be set aside to the bankrupt as exempt, and to which the trustee in bankruptcy, under Act July 1,

1898, § 70, acquires no title, are within section 677, declaring that all liens against an insolvent obtained within four months of his bankruptcy proceedings shall be deemed void, notwithstanding a provision that the property affected by the lien shall be released from the same and pass to the trustee as a part of the estate.—*Chicago, B. & Q. R. Co. v. Hall*, 33 S. Ct. 885, 229 U. S. 511, 57 L. Ed. 1306, affirming judgment 128 N. W. 645, 88 Neb. 20.

Rights in exempt property acquired by contract or waiver of the exemption may be enforced by a judgment obtained, even after petition in bankruptcy has been filed.—*Id.*

Real property was not exempt from lien of a judgment by adoption of Const. Ga. 1868, with provisions as to homestead exemptions, nor by Act March 3, 1873, amendatory of Bankr. Act March 2, 1867, preserving exemptions under state laws.—*Kener v. La Grange Mills*, 34 S. Ct. 83, 231 U. S. 215, 58 L. Ed. 189, affirming judgment *Keener v. Same*, 70 S. E. 245, 135 Ga. 730.

—399. — **Waiver or forfeiture.**

See 6 Cent. Dig. Bankr. §§ 667, 669.

A court of bankruptcy has no jurisdiction to enforce, against the bankrupt's exemption, the rights of unsecured creditors whose evidences of indebtedness contain the waiver of homestead and exemption authorized by the state Constitution and laws, by reason of the authority conferred upon such court by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], to control exempt property, in order to set it aside, and thus exclude it from the assets of the bankrupt's estate to be administered.—*Lockwood v. Exchange Bank of Ft. Valley*, 23 S. Ct. 751, 190 U. S. 294, 47 L. Ed. 1061.

—401. **Death of bankrupt.**

See 6 Cent. Dig. Bankr. §§ 217, 680.

—403. — **Dower and allowances to widow and children.**

See 6 Cent. Dig. Bankr. § 217.

The right of the widow and children of a deceased bankrupt, under Bankr. Act July 1, 1898, § 8, to the allowance they were entitled to from his estate under state law, was not lost because the estate had vested in the trustee in bankruptcy under section 70 of the Bankruptcy Act before the death of the bankrupt.—*Hull v. Dicks*, 35 S. Ct. 152, 235 U. S. 584, 59 L. Ed. 372, revision in conformity to answer certified questions denied (C. C. A.) 220 F. 1006.

—419. **Collateral attack on discharge.**

See 6 Cent. Dig. Bankr. §§ 843-852.

Under Rev. St. § 5119, the certificate of discharge in bankruptcy is conclusive evidence, in favor of the bankrupt, "of the fact and regularity of such discharge," and it will be presumed that the application therefor was made within the time required by section 5108, or, if not, that any delay there may have been was satisfactorily explained before the discharge was granted.—*Palmer v. Hussey*, 119 U. S. 96, 7 S. Ct. 158, 30 L. Ed. 362.

—420. **Debts and liabilities discharged.**

See 6 Cent. Dig. Bankr. §§ 772-777, 779-807, 818.

—421. — **In general.**

See 6 Cent. Dig. Bankr. §§ 772-774, 776, 777, 779-781, 783-786, 788-790.

Under Rev. St. § 5119, a discharge in bankruptcy extends to provable debts only; and, under section 5075, debts secured by mortgage can only be proved to the extent of the balance after deducting the security, unless the latter is released. *Held*, that the lien of a mortgage created before the bankruptcy, on property set apart to the bankrupt, under section 5045, which is neither proved nor released, is not affected by

the discharge.—*Long v. Bullard*, 117 U. S. 617, 6 S. Ct. 917, 29 L. Ed. 1004.

A decree awarding alimony to a wife on granting her a divorce is not a debt from which the bankrupt is released by his discharge.—*Audubon v. Shufeldt*, 21 S. Ct. 735, 181 U. S. 575, 45 L. Ed. 1009; (D. C.) *Turner v. Turner*, 108 F. 785.

A discharge in bankruptcy is no bar to a claim under an agreement by a bankrupt to pay an annuity to his divorced wife "during her life or until she remarries," since, by reason of the substantial impossibility of estimating the value of the contingency of a remarriage, such a contract is not payable under the provisions of Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], for the proving, inter alia, of a fixed liability owing at the time of the filing of the petition in bankruptcy, whether then payable or not, and of debts which are "founded upon an open account or upon a contract express or implied." Judgment 62 N. E. 248, 180 Mass. 170, 94 Am. St. Rep. 623, affirmed.—*Dunbar v. Dunbar*, 23 S. Ct. 757, 190 U. S. 340, 47 L. Ed. 1084.

A father is not relieved by his discharge in bankruptcy from his liability under an agreement to pay his divorced wife a certain sum yearly for the support of his children during their minority.—*Id.*

A discharge in bankruptcy does not bar the collection of arrears in alimony and allowance for the support of minor children, due under a decree in an action for divorce, since such liability, although fixed by a decree which is beyond the power of the court to alter or amend, because it did not reserve any right of subsequent modification or amendment, is not a "debt" within the meaning of Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], providing for the proving of debts which are a fixed liability as evidenced by a judgment.—*Wetmore v. Markoe*, 25 S. Ct. 172, 196 U. S. 68, 49 L. Ed. 390, 2 Ann. Cas. 265.

A debt owing to creditors of a bankrupt which is provable in the bankruptcy proceedings is none the less barred by a discharge granted without objection because the bankrupt had been refused a discharge in a prior proceeding, on the objection of the same creditors, in respect of the same indebtedness, where the ground for the refusal does not appear, and the debt is not one which, by the terms of the bankruptcy statutes, is excepted from the operation of the discharge. Decree (1906) 41 So. 533, 51 Fla. 396, affirmed.—*Bluthenthal v. Jones*, 28 S. Ct. 192, 208 U. S. 64, 52 L. Ed. 390.

Exemptions from operation of discharge in bankruptcy made by Bankr. Act, § 17, rest solely on the ground that, though such rights are enjoyed, an exemption from the effect of the discharge is superadded.—*Friend v. Talcott*, 33 S. Ct. 505, 228 U. S. 27, 57 L. Ed. 718, affirming judgment *Talcott v. Friend*, 179 F. 676, 103 C. C. A. 80.

Discharge in bankruptcy acquits obligation of bankrupts to indemnify surety on their building contract bond, though surety did not pay damage until after bankruptcy proceedings, it being a provable debt within Bankr. Act July 1, 1898, released by discharge.—*Williams v. United States Fidelity & Guaranty Co.*, 35 S. Ct. 289, 236 U. S. 549, 59 L. Ed. 713, reversing judgment *R. P. Williams & Co. v. Same*, 75 S. E. 1067, 11 Ga. App. 635.

—423. — **Judgments in actions for fraud, false pretenses, or false representations.**

See 6 Cent. Dig. Bankr. § 818.

A judgment of a state court is rendered in "an action for fraud," so as to be exempted by

Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], from the operation of a discharge in bankruptcy, where such judgment, whatever may be the form of the action, was based upon actual, as distinguished from constructive, fraud of the bankrupt. Judgment, *In re Bullis*, 64 N. E. 1119, 171 N. Y. 689, affirmed.—*Bullis v. O'Beirne*, 25 S. Ct. 118, 195 U. S. 606, 49 L. Ed. 340.

— **Judgments for willful or malicious injuries.**

See 6 Cent. Dig. Bankr. §§ 787, 818.

A judgment for damages for criminal conversation is one recovered in an action "for willful and malicious injuries to the person or property of another" within the meaning of the provision of Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], excepting judgments recovered in such actions from the operation of a discharge in bankruptcy.—*Tinker v. Colwell*, 24 S. Ct. 505, 193 U. S. 473, 43 L. Ed. 754, affirming *Colwell v. Tinker*, 62 N. E. 668, 169 N. Y. 531, 58 L. R. A. 765, 98 Am. St. Rep. 587, which affirmed (Sup.) 71 N. Y. S. 952, 35 Misc. Rep. 330, and 72 N. Y. S. 505, 65 App. Div. 20.

— **Debts not duly scheduled.**

See 6 Cent. Dig. Bankr. § 775.

Knowledge of bankruptcy proceedings on the part of a creditor of the bankrupt, which is not acquired until after discharge, though in time to prove his claim under Bankr. Act July 1, 1898, c. 541, § 65, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], and to move, under section 15 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), to revoke the discharge, is not the "actual knowledge of the proceedings in bankruptcy" which, under section 17 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), is essential to the release, by the discharge, of provable debts which have not been duly scheduled in time for proof and allowance. Judgment, *Columbia v. Birkett*, 66 N. E. 652, 174 N. Y. 112, 102 Am. St. Rep. 478, affirmed.—*Birkett v. Columbia Bank*, 25 S. Ct. 38, 195 U. S. 345, 49 L. Ed. 231.

Debts owing judgment creditors were not properly scheduled as required by Bankruptcy Act July 1, 1898, § 7, 17, in order to be released, where the resident of the judgment creditors, though known, was not stated.—*Miller v. Guasti*, 33 S. Ct. 49, 226 U. S. 170, 57 L. Ed. 173, affirming judgment *Guasti v. Miller*, 96 N. E. 416, 203 N. Y. 259.

Listing of creditor by initial instead of Christian name is not an insufficient compliance with Bankr. Act July 1, 1898, § 7(8).—*Kreitlein v. Feger*, 35 S. Ct. 685, 238 U. S. 21, 59 L. Ed. 1184, reversing judgments 97 N. E. 819, 52 Ind. App. 199, and 98 N. E. 1005, 52 Ind. App. 199.

Schedule listing creditor's residence as Indianapolis, without giving street and house number, is prima facie compliance with Bankr. Act July 1, 1898, § 7(8), and does not, as a matter of law, render discharge inoperative under section 17 on theory that debt was not duly scheduled.—*Id.*

— **Debts created by fraud, embezzlement, misappropriation, or defalcation in official or fiduciary capacity.**

See 6 Cent. Dig. Bankr. §§ 787, 791-807.

A creditor who holds collateral for his own security is not a trustee; and a failure to deliver it up being a breach of contract, and not a breach of trust, a discharge in bankruptcy, under Rev. St. § 5117, operates to discharge him from the liability which arises from an appro-

priation of the collateral securities to his own use, and the failure to return them.—*Hennequin v. Clews*, 111 U. S. 676, 4 S. Ct. 576, 28 L. Ed. 565.

The word "fraud," as used in Bankrupt Act 1867, § 36 (Rev. St. § 5117), which provides that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without bad faith or immorality.—*Strang v. Bradner*, 114 U. S. 555, 5 S. Ct. 1038, 29 L. Ed. 248; *Noble v. Hammond*, 129 U. S. 65, 9 S. Ct. 235, 32 L. Ed. 621, reversing 57 Vt. 193.

Under the provision of Rev. St. § 5117, that a debt created by fraud or embezzlement "may be proved, and the dividend thereon shall be a payment on account of such debt," a debt created by fraud of the bankrupt is not discharged, even where it was proved against his estate, and a dividend thereon received on account.—*Strang v. Bradner*, 114 U. S. 555, 5 S. Ct. 1038, 29 L. Ed. 248.

A judgment against a broker for failure to return certain bonds according to contract under which they were deposited with him for his use, he to collect the coupons for the owner free of charge, and to pay him 2 per cent. on their par value, is not, where the broker was responsible at the time of the deposit, a debt created by fraud, embezzlement, or while the broker was acting in a fiduciary capacity.—*Palmer v. Hussey*, 119 U. S. 96, 7 S. Ct. 158, 30 L. Ed. 362.

Where the bankrupt has collected money as an accommodation, under instructions to hold it until called for, and has deposited it with his own funds in bank, there is no actual, positive fraud, and the debt is discharged by the proceedings in bankruptcy.—*Noble v. Hammond*, 129 U. S. 65, 9 S. Ct. 235, 32 L. Ed. 621, reversing *Hammond v. Noble*, 57 Vt. 193.

Where a rectifier in good faith contracts for highwines to be delivered on three days' call between certain dates, or, if not called for, to be delivered by the seller at his option on three days' notice to the purchaser, and the purchaser calls for and receives the wines within the dates limited, the debt is created by the delivery in pursuance of the call, and evidence of fraud in obtaining such delivery is admissible on the issue as to whether the debt was created by fraud, within the meaning of the bankrupt act.—*Ames v. Moir*, 138 U. S. 306, 11 S. Ct. 311, 34 L. Ed. 951, affirming judgment 130 Ill. 582, 22 N. E. 535.

Where a purchaser receives goods knowing himself to be insolvent, and with the intention of disposing of them without paying the price, he is not released from liability for the price by a discharge in bankruptcy.—*Id.*

A. directed B. to pay to plaintiff \$700 a year during her natural life, or so long as, in B.'s judgment, she comported herself as "a discreet and prudent female"; and, to that end, he delivered to B. the sum of \$10,000, declaring that such annual payments should be considered as interest thereon, and he directed that, in certain contingencies, the principal sum should be paid to plaintiff, but that, if plaintiff died without issue, it should revert to A. and his heirs. B. and plaintiff each executed a written acceptance of these directions. Held that, although in the instruments embodying it the transaction was called a "trust," and B. a "trustee" for plaintiff, the obligation assumed by him was not a debt "created in a fiduciary capacity," within the meaning of Bankruptcy Act 1867, § 33 (14 Stat. 533), which excepts such

debts from the operation of the discharge. Affirming 37 La. Ann. 138.—*Upshur v. Briscoe*, 138 U. S. 365, 11 S. Ct. 313, 34 L. Ed. 931.

Obtaining advances of money by false and fraudulent representations that the borrower has a certain quantity of wood cut, piled, and ready for shipment, and a sale of which has already been contracted at a certain price, creates a debt by means of fraud involving moral turpitude and intentional wrong that is exempt from the effect of a discharge in bankruptcy under the bankrupt act of 1867. Judgment 52 N. E. 55, 176 Ill. 359, affirmed.—*Forsyth v. Vehmeyer*, 20 S. Ct. 623, 177 U. S. 177, 44 L. Ed. 723.

Only such debts created by the fraud of a bankrupt as were so created while he was acting as an officer or in a fiduciary capacity are excepted from the operation of a discharge in bankruptcy by Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], since to hold that the language of this subdivision, making an exception in favor of debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity," includes all debts fraudulently contracted, would render meaningless the exception in subdivision 2, in favor of such claims for fraud as have been reduced to judgment.—(Ill.) *Crawford v. Burke*, 25 S. Ct. 9, 195 U. S. 176, 49 L. Ed. 147, reversing 66 N. E. 833, 201 Ill. 581; (N. Y.) *Bullis v. O'Beirne*, 25 S. Ct. 118, 195 U. S. 606, 49 L. Ed. 340, affirming *In re Bullis*, 64 N. E. 1119, 171 N. Y. 689, and *Id.*, 73 N. Y. S. 1047, 68 App. Div. 508; *Tindle v. Birkett*, 27 S. Ct. 493, 205 U. S. 183, 51 L. Ed. 762, affirming 76 N. E. 25, 183 N. Y. 267, which reversed 87 N. Y. S. 1150, 93 App. Div. 600.

Bankr. Act 1898, § 17, subd. 4, providing that the discharge of a bankrupt shall not release him from judgments in actions for fraud or obtaining property by false pretenses, a discharge does not relieve a private banker from liability for a deposit accepted by him when insolvent to his own knowledge.—*Bullis v. O'Beirne*, 25 S. Ct. 118, 195 U. S. 606, 49 L. Ed. 340, affirming *In re Bullis*, 73 N. Y. S. 1047, 68 App. Div. 508, and *Id.*, 64 N. E. 1119, 171 N. Y. 689.

Claims for damages arising out of false and fraudulent representations inducing sales of merchandise might have been proved, under Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], as debts "founded upon an open account or upon a contract, expressed or implied," if the sellers had chosen to waive the tort and take their places with the other creditors of the bankrupt estate, and are therefore barred by a discharge in bankruptcy. Judgment (1905) 76 N. E. 25, 183 N. Y. 267, affirmed.—*Tindle v. Birkett*, 27 S. Ct. 493, 205 U. S. 183, 51 L. Ed. 762.

The words "while acting as an officer or in any fiduciary capacity," as used in Bankr. Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], making an exception from the operation of a discharge in bankruptcy in favor of debts created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," extend to "fraud, embezzlement, misappropriation" as well as to "defalcation."—*Id.*

A general discharge in bankruptcy resulting, under Bankr. Act, § 14c, from a composition with creditors over objection by a creditor that the bankrupt had obtained goods by false reports to a commercial agency, is no bar to an action by such creditor for deceit in view of distinction between a general discharge and the right of a particular creditor to be exempt therefrom.—*Friend v. Talcott*, 33 S. Ct. 505,

228 U. S. 27, 57 L. Ed. 718, affirming judgment *Talcott v. Friend*, 179 F. 676, 103 C. C. A. 80.

Services of an attorney are not property within Bankr. Act July 1, 1898, § 17, par. 2, as amended by Act Feb. 5, 1903, § 5, excepting from a discharge liabilities for obtaining property by false representations.—*Gleason v. Thaw*, 35 S. Ct. 287, 236 U. S. 558, 59 L. Ed. 717, affirming judgment 196 F. 359, 116 C. C. A. 179.

427. Effect of discharge as to co-debtors, guarantors, and sureties.

See 6 Cent. Dig. Bankr. §§ 773, 782-786.

429. — Partnership and individual debts.

See 6 Cent. Dig. Bankr. §§ 773, 782.

As, under Rev. St. U. S. § 5118, a discharge in bankruptcy does not release any person jointly liable for the same debt, a judgment against a special partner alone, in an action against him and his bankrupt general partners, on a partnership debt, is authorized.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 9 S. Ct. 619, 33 L. Ed. 57.

The dismissal by a state court of a suit against a partner upon a claim against the bankrupt's estate of the partnership and its members for damages for breach of contract held proper, since the partner was released by his discharge.—*Iesser v. Gray*, 35 S. Ct. 227, 236 U. S. 70, 59 L. Ed. 471, affirming judgment 70 S. E. 104, 8 Ga. App. 605.

433. Effect of discharge as to securities and liens.

See 6 Cent. Dig. Bankr. §§ 808-823.

A judgment recovered pending the proceedings in bankruptcy, and before the granting of the certificate of discharge upon a debt due at the time of the adjudication in bankruptcy, is discharged by the certificate.—*Boynton v. Ball*, 121 U. S. 457, 7 S. Ct. 981, 30 L. Ed. 985.

Under the bankrupt act of 1867 (Rev. St. § 5106), providing that no creditor whose debt is provable can prosecute to final judgment a suit against the bankrupt, and such suit shall, on application of the bankrupt, be stayed to await the determination of the bankruptcy court as to the bankrupt's discharge; and section 5119, providing that the discharge shall release the bankrupt from all demands provable against his estate,—the omission of a defendant to plead the pendency of proceedings in bankruptcy, or to have the action stayed, will not deprive him of the benefit of a discharge to bar a judgment obtained therein before the discharge was granted. The discharge operates with the same force upon the debt after it has assumed the form of a judgment as before.—*Id.*

Where an attachment is dissolved by defendant's giving a recognizance, with sureties, conditioned to pay any judgment against him, and after verdict, and before judgment, defendant is discharged in bankruptcy proceedings commenced more than four months after the attachment, such attachment being recognized as valid by the bankrupt act (Rev. St. § 5044), there is nothing in the act to prevent the rendering of a formal judgment against defendant, with perpetual stay of execution, to enable plaintiff to proceed against the sureties on the recognizance. Such judgment is within the spirit of section 5118, providing that no discharge shall affect any person liable for the same debt, either as partner, surety, etc., or otherwise.—*Hill v. Harding*, 130 U. S. 699, 9 S. Ct. 725, 32 L. Ed. 1083.

Rev. St. § 5105, provides that a creditor who proves his debt in bankruptcy thereby waives all right of action against the bankrupt,

and that all pending proceedings or unsatisfied judgments against the latter "shall be deemed to be discharged and surrendered thereby"; and Act Cong. June 22, 1874, provides that a creditor's right of action shall not be deemed to be waived where a discharge in bankruptcy is refused, etc. *Held*, that the right of a creditor to a deficiency decree, after partial satisfaction of his claim by a foreclosure sale, was suspended upon proving the balance in bankruptcy, and that, upon the debtor's discharge, such right was absolutely lost.—*Scott v. Ellery*, 142 U. S. 381, 12 S. Ct. 233, 35 L. Ed. 1050.

A husband, after obtaining a discharge in bankruptcy, acquired lands, and mortgaged them to a third person. Thereafter his wife, though her claim had been extinguished by the discharge, brought suit against her husband in a state court for a separation of property, had a legal mortgage declared upon the lands as of the date of the recording of the marriage contract, and sold the same in satisfaction thereof. The husband did not set up his discharge in bankruptcy as a defense. *Held*, that these proceedings did not affect the title of the mortgagee, who could thereafter foreclose, and could set up the discharge to show that the wife's claim was extinguished.—*Fleitas v. Richardson*, 147 U. S. 550, 13 S. Ct. 495, 37 L. Ed. 276, affirming judgment 39 F. 129.

◀434. New promise to pay debt discharged.

See 6 Cent. Dig. Bankr. §§ 853-886; 11 Cent. Dig. Contracts, § 361.

A provable debt barred under Bankruptcy Act July 1, 1898, § 17, by a discharge may be revived by new promise between the adjudication and the discharge.—*Zavelo v. Reeves*, 33 S. Ct. 365, 227 U. S. 625, 57 L. Ed. 676, Ann. Cas. 1914D, 664, affirming judgment *Same v. J. S. Reeves & Co.*, 54 So. 654, 171 Ala. 401.

◀435. Pleading discharge.

See 6 Cent. Dig. Bankr. §§ 824-839.

Where a creditor who had taken land of his debtor on foreclosure conveys it to the debtor's wife after his discharge in bankruptcy, she may plead such discharge in an action against her after his death to set aside the transfers of this property as fraudulent, and to subject it to plaintiff's said claim, even though the heirs, who are likewise defendants in the action, do not plead the discharge.—*Upshur v. Briscoe*, 138 U. S. 365, 11 S. Ct. 313, 34 L. Ed. 931, affirming judgment 87 La. Ann. 138.

◀436. Evidence as to discharge or new promise.

See 6 Cent. Dig. Bankr. §§ 840-842, 865.

Prima facie defense to suit against bankrupt on debt existing at time of filing petition is made out by evidence of discharge, the burden being then cast upon the plaintiff to show debt excepted from operation of discharge.—*Kreitlein v. Ferger*, 35 S. Ct. 685, 238 U. S. 21, 59 L. Ed. 1184, reversing judgments 97 N. E. 819, 52 Ind. App. 199, and 98 N. E. 1005, 52 Ind. App. 199.

Prima facie effect of discharge in proceedings begun in 1905, where account for \$271 is scheduled as owed in 1895, as affecting judgment in trover for \$300 in 1897, is not defeated for difference between the account and the judgment.—*Id.*

◀438. Reversion of property or surplus to debtor on dismissal, composition, or discharge.

See 6 Cent. Dig. Bankr. § 628.

Title to a claim for usurious interest paid to a national bank cannot be asserted by a

bankrupt upon the termination of the bankruptcy proceedings, where he returned no assets to the trustee, and failed to notify either the trustee or the creditors of the existence of the claim. Judgment (Civ. App.) *Lasater v. First Nat. Bank*, 72 S. W. 1054, reversed.—*First Nat. Bank v. Lasater*, 25 S. Ct. 206, 196 U. S. 115, 49 L. Ed. 408.

VI. APPEAL AND REVISION OF PROCEEDINGS.

Review by mandamus, see *Mandamus*, ▶10.

(A) SUPERINTENDENCE AND REVISION.

◀440. Appeal or revision as proper remedy.

See 6 Cent. Dig. Bankr. § 915.

A decision of a court of bankruptcy adjudicating a claim to property by a third person against a trustee in bankruptcy is reviewable by appeal.—*Hewitt v. Berlin Machine Works*, 24 S. Ct. 690, 194 U. S. 296, 48 L. Ed. 986, affirming judgment *In re Kellogg*, 118 F. 1017, 56 C. C. A. 383, which affirmed (D. C.) 112 F. 52; *Dodge v. Norlin*, 133 F. 363, 66 C. C. A. 425; *John Deere Plow Co. v. McDavid*, 137 F. 802, 70 C. C. A. 422.

No appeal lies from a decree of a court of bankruptcy in a proceeding begun by the receiver's petition for directions respecting a sale by which the question of his possession of the property was decided, a sale decreed, and the rights of adverse claimants determined, since this is a proceeding in bankruptcy, and not an independent suit, and can only be reviewed by the circuit court of appeals by the revision in matter of law authorized under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], "on due notice and petition." Decree (1903) *In re Rodgers*, 125 F. 169, 60 C. C. A. 567, reversed.—*First Nat. Bank v. Chicago Title & Trust Co.*, 25 S. Ct. 693, 198 U. S. 280, 49 L. Ed. 1051.

An order establishing a lien against bankrupt's estate, the validity of the claim not being contested, is not reviewable by a Circuit Court of Appeals on revisory proceedings under Bankrupt Act July 1, 1898, §§ 24b, 25a.—*In re Loving*, 32 S. Ct. 446, 224 U. S. 183, 56 L. Ed. 725.

◀441. Jurisdiction of Circuit Court of Appeals.

See 6 Cent. Dig. Bankr. § 914.

The summary revisory power of the Circuit Court of Appeals for the Eighth Circuit, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], giving the several Circuit Courts of Appeals jurisdiction "to superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction," extends to questions of law arising in the progress of bankruptcy proceedings in a district court of Oklahoma territory, which is assigned to the Eighth Circuit, although jurisdiction by appeal or writ of error is vested, by sections 24a, 25a [U. S. Comp. St. 1901, pp. 3431, 3432], in the territorial Supreme Court.—*Plymouth Cordage Co. v. Smith*, 24 S. Ct. 725, 194 U. S. 311, 48 L. Ed. 992.

◀448. Review of decisions by Supreme Court.

Certiorari, and not appeal, is the proper method of obtaining a review in the Supreme Court of the United States of a decision of the Circuit Court of Appeals, made in the exercise of its jurisdiction, under Act July 1, 1898, c. 541, § 24b, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], to review by original petition, proceed-

ings of inferior courts of bankruptcy, which revised an order of the District Court allowing an exemption, since the revising order of the Circuit Court of Appeals is not "a final decision allowing or rejecting a claim," within the meaning of section 25b, providing for appeals in bankruptcy proceedings to the Supreme Court of the United States.—*Holden v. Stratton*, 24 S. Ct. 45, 191 U. S. 115, 48 L. Ed. 116, dismissing appeal *In re Holden*, 113 F. 141, 51 C. C. A. 97, and judgment reversed 25 S. Ct. 656, 198 U. S. 202, 49 L. Ed. 1018.

The revisory order of a federal Circuit Court of Appeals in the proceedings authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553, (U. S. Comp. St. 1901, p. 3432), which reversed a decree of the bankruptcy court, confirming the order of the referee, refusing to allow a certain claim to be filed for the purpose of voting at the election of the trustee, and directed that court to allow the claim to be proved, is not reviewable in the Federal Supreme Court, even if the Circuit Court of Appeals treated the proceeding as an appeal.—*Duryea Power Co. v. Sternbergh*, 31 S. Ct. 25, 218 U. S. 299, 54 L. Ed. 1047.

The disallowance of certain claims against a bankrupt's estate by the district court of the United States for Porto Rico, sitting as a court of bankruptcy, is not reviewable in the federal Supreme Court under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), investing that court with appellate jurisdiction of "controversies arising in bankruptcy proceedings" from the courts of bankruptcy from which it has appellate jurisdiction in other cases, and "a like jurisdiction" from courts of bankruptcy not within any organized circuit, since the allowance or disallowance of a claim in bankruptcy is not a controversy arising in bankruptcy proceedings, but is a proceeding in bankruptcy, the mode of reviewing which is confined, by section 25a, to an appeal to the appropriate circuit court of appeals or territorial Supreme Court.—*Tefft, Weller & Co. v. Munsuri*, 32 S. Ct. 67, 222 U. S. 114, 56 L. Ed. 118.

An order of a court of bankruptcy in a proceeding in which there was a controversy between the creditors and one of the members of a bankrupt partnership as to whether he was liable as a general or limited partner cannot be regarded as rendered in a controversy arising in bankruptcy proceedings for the purpose of sustaining an appeal to the federal Supreme Court under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), where such appeal was specifically taken from the order as one disallowing the claim of the appellants of an alleged indebtedness to them from the bankrupt firm, and such was the character necessarily attributed to the order by the judge when he entered it, and which was affixed to it by the assignments of error filed at the time the appeal was taken.—*Id.*

The right to have an order of the District Court of the United States for Porto Rico, sitting as a court of bankruptcy, disallowing certain claims against a bankrupt's estate, reviewed in the Federal Supreme Court, must be found in the bankrupt act, which furnishes the exclusive modes of review of questions arising in steps in proceedings in bankruptcy.—*Id.*

No support can be found in the provisions of Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), authorizing a petition to superintend and revise in matters of law the proceedings of courts of bankruptcy, for an attempt to have reviewed in the federal Supreme Court an order of the District Court of the United States for Porto Rico, sitting as a court of bankruptcy, holding a member of a bankrupt partnership to be a general partner and generally liable for the firm

debts.—*Munsuri v. Fricker*, 32 S. Ct. 70, 222 U. S. 121, 56 L. Ed. 121.

The right to have an order of the District Court of the United States for Porto Rico, sitting as a court of bankruptcy, holding a member of a bankrupt partnership to be a general partner and generally liable for the firm debts, reviewed by the federal Supreme Court, must be found in the bankruptcy act.—*Id.*

Federal Supreme Court has no jurisdiction of an appeal from a decree of a Circuit Court of Appeals dismissing appeal from an order of the Circuit Court on revisory petition filed under Bankruptcy Act March 2, 1867.—(1912) *Kyle v. Hammond*, 32 S. Ct. 406, 223 U. S. 716, 56 L. Ed. 627, 225 U. S. 692, 56 L. Ed. 1260, dismissing appeal (1911) *In re Sweetser*, 186 F. 989, 108 C. C. A. 659.

The right to review in the federal Supreme Court of a decision of the Circuit Court of Appeals affirming a ruling of the bankruptcy court on a subordinate issue as to whether petitioning creditors held provable claims must be found in the bankruptcy law, and is not given by Act March 3, 1891, § 6, governing the general appellate jurisdiction.—(1912) *J. W. Calnan Co. v. Doherty*, 32 S. Ct. 460, 224 U. S. 145, 56 L. Ed. 702, dismissing appeal (1909) 174 F. 222, 98 C. C. A. 130.

(B) APPEAL.

Review of action arising under laws of United States, see Courts, 4382, 394(20).

449. Nature and form of remedy.

See 6 Cent. Dig. Bankr. § 915.

A judgment that a person is not a bankrupt, entered by a court of bankruptcy on a verdict of not guilty in a trial by jury demanded as of right under section 19 of the bankruptcy act (30 Stat. 551, c. 541; U. S. Comp. St. 1901, p. 3429), is reviewable only by writ of error, as no power to re-examine the facts determined by a jury under this section, otherwise than according to the rules of the common law, was conferred by section 24, investing the federal appellate courts with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," or by section 24b, providing for the revision of such proceedings "in matter of law," or by section 25a, authorizing appeals as in equity from a judgment in bankruptcy proceedings adjudging or refusing to adjudge defendant a bankrupt.—*C. Elliott & Co. v. Toepfner*, 23 S. Ct. 133, 187 U. S. 327, 47 L. Ed. 200.

Writ of error, and not appeal, is the only method of reviewing an adjudication of bankruptcy entered on a directed verdict on a jury trial demanded as of right by the alleged bankrupt under Bankr. Act July 1, 1898, c. 541, § 19, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], for the determination of the issues as to insolvency and the commission of acts of bankruptcy.—*Frederick L. Grant Shoe Co. v. W. M. Laird Co.*, 27 S. Ct. 161, 203 U. S. 502, 51 L. Ed. 292.

450. Appellate jurisdiction.

See 6 Cent. Dig. Bankr. § 914.

451. — Circuit Courts of Appeal.

A proceeding in bankruptcy within the meaning of Bankr. Act July 1, 1898, c. 541, § 25, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), providing for appeals in bankruptcy proceedings from courts of bankruptcy to the Circuit Courts of Appeals to review judgments allowing or rejecting a debt or claim of \$500 or more, is instituted by presenting to the trustee in bankruptcy a claim upon notes of the bankrupt in excess of that amount, joined with the statement that the claimant had security upon the estate which it was his purpose to maintain,

and upon which he was entitled to priority in the distribution of the assets, although the trustee makes no objection to the amount found due upon the notes, and only seeks by his appeal to contest further the right to security. Judgment (1907) *Coder v. Arts*, 152 F. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; *In re Coder, Id.*; *In re Arts, Id.*; *Arts v. Coder, Id.*, affirmed.—*Coder v. Arts*, 29 S. Ct. 436, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

A voluntary intervention in bankruptcy proceedings to assert a claim to property in possession of the trustee is reviewable by appeal to the Circuit Court of Appeals, under Bankr. Act, § 24a.—*Houghton v. Burden*, 33 S. Ct. 491, 228 U. S. 161, 57 L. Ed. 780; affirming decree *In re Canfield*, 193 F. 934, 113 C. C. A. 562.

A dispute between the assignor of a bankrupt's accounts and his trustee in bankruptcy over proceeds of assigned accounts collected by the trustee on a petition filed in bankruptcy proceedings is a controversy arising in bankruptcy within the Bankruptcy Act July 1, 1898, § 24, governing appellate jurisdiction of the Circuit Court of Appeals and the Supreme Court.—*Greedy v. Dockendorff*, 34 S. Ct. 166, 231 U. S. 513, 58 L. Ed. 339, affirming decree *In re Schwab-Kepner Co.*, 203 F. 475, 121 C. C. A. 597.

Appearance of mortgagees on notice of petition of mortgagor's trustees in bankruptcy, and their assertion of conflicting rights, held equivalent to an affirmative intervention in connection with the trustees' petition so as to constitute a controversy over which the Circuit Court of Appeals had jurisdiction by Bankr. Act, § 24, with the same appellate jurisdiction which it possesses under Judicial Code, § 128.—*Robert Moody & Son v. Century Sav. Bank*, 36 S. Ct. 111, 239 U. S. 374, 60 L. Ed. 336, affirming decree *In re Hartzell*, 209 F. 775, 126 C. C. A. 499.

453. — Supreme Court.

See 6 Cent. Dig. Bankr. § 914.

The supreme court has no jurisdiction to review a judgment of the circuit court rendered in a proceeding upon an appeal from an order of the district court, rejecting the claim of a supposed creditor against the estate of a bankrupt, since a proceeding to prove a debt against the estate of a bankrupt is part of the suit in bankruptcy, and not an independent suit at law or in equity.—*Leggett v. Allen*, 110 U. S. 741, 4 S. Ct. 195, 28 L. Ed. 313.

An appeal lies to the federal Supreme Court, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, pp. 549, 550], from a judgment of a Circuit Court of Appeals, entered on an appeal from a judgment of a court of bankruptcy, sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention raising a distinct and separable issue, since the controversy may be regarded as one of those "controversies arising in bankruptcy proceedings," over which the Circuit Court of Appeals could, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], exercise appellate jurisdiction as in other cases. Judgment, *In re Kellogg*, 118 F. 1017, 56 C. C. A. 383, affirmed.—*Hewitt v. Berlin Mach. Works*, 24 S. Ct. 690, 194 U. S. 296, 48 L. Ed. 986.

A decision of a court of bankruptcy upholding its jurisdiction to adjudicate the validity of an alleged equitable lien upon property which it decided to be an asset of the estate in bankruptcy, and not exempt property of the bankrupt, does not create a question of jurisdiction which will sustain a direct appeal to the federal Supreme Court under Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], since, by the express terms of

Bankr. Act 1898, c. 541, § 2, subd. 11, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], jurisdiction is conferred upon courts of bankruptcy to determine all claims of bankrupts to their exemptions. Appeal (D. C. 1903) *In re Lucius*, 124 F. 455, dismissed.—*Lucius v. Cawthon-Coleman Co.*, 25 S. Ct. 214, 196 U. S. 149, 49 L. Ed. 425.

The assertion of a right of set-off in a proceeding in bankruptcy presents a claim of federal right which will sustain an appeal from a decision of a Circuit Court of Appeals, rejecting the claim, to the Supreme Court of the United States, under Bankr. Act July 1, 1898, c. 541, § 25, cl. (b) 1, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], authorizing such appeals when the question involved is one which might have been reviewed on writ of error from the latter court to a state court. Decree 129 F. 728, 64 C. C. A. 256, reversed.—*Western Tie & Timber Co. v. Brown*, 25 S. Ct. 339, 196 U. S. 502, 49 L. Ed. 571.

A decision of a Circuit Court of Appeals that a creditor is entitled to have his claim allowed against the bankrupt estate of an individual partner as well as against the estate of the bankrupt partnership, which proceeds upon a well-settled principle of general law, broad enough to sustain it without reference to the provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], is not reviewable in the federal Supreme Court under section 25b of that act, as involving a question which would sustain a writ of error to a state court.—*Chapman v. Rowen*, 28 S. Ct. 32, 207 U. S. 89, 52 L. Ed. 116.

The bare denial by a trustee in bankruptcy of a claim of a creditor asserted under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], is not the assertion by the trustee of a right under such statute, so as to give him the right to appeal to the federal Supreme Court from a decision of a Circuit Court of Appeals in favor of the creditor, under section 25b of that act, which gives such appeal when the question involved is one which would sustain a writ of error to a state court.—*Id.*

A decision of a Circuit Court of Appeals, affirming, on the revisory proceeding authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], an interlocutory order of the court of bankruptcy which overruled a motion to dismiss the proceedings, cannot preclude a writ of error from the federal Supreme Court to the bankruptcy court to review the final decision, bringing up the question of the jurisdiction of that court to make an adjudication of bankruptcy on a claim for unliquidated damages. Judgment (D. C. 1903) *In re Frederic L. Grant Shoe Co.*, 125 F. 576, affirmed.—*Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 29 S. Ct. 332, 212 U. S. 445, 53 L. Ed. 591.

The question involved in a proceeding in bankruptcy is one which within the meaning of Bankr. Act July 1, 1898, c. 541, § 25b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], giving appeals to the federal Supreme Court, would have sustained a writ of error from that court had the case been decided by the highest court of the state, where, in determining the validity of a lien asserted to secure a claim against the bankrupt's estate, a construction of the bankrupt act is directly involved, one party asserting a construction which would defeat the lien, and the other party one which would give it validity. Judgment (1907) *Coder v. Arts*, 152 F. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; *In re Coder, Id.*; *In re Arts, Id.*; *Arts v. Coder, Id.*, affirmed.—*Coder v. Arts*, 29 S. Ct. 436, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

An appeal lies to the federal Supreme Court from a judgment of a Circuit Court of Appeals, on an appeal from a court of bankruptcy, sustaining the contention, asserted by a petition in intervention, that advances by a railway company to enable a coal company under contract to supply the railway company with coal to meet its pay rolls amount to a pledge, enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued performance of the contract, of such a quantity of coal when mined as the moneys so advanced would pay for according to the terms of the original contract. Judgment (1907) *Atchison, T. & S. F. Ry. Co. v. Hurley*, 153 F. 503, 82 C. C. A. 453, affirmed.—*Hurley v. Atchison, T. & S. F. Ry. Co.*, 29 S. Ct. 466, 213 U. S. 126, 53 L. Ed. 729.

The question whether an order of the bankruptcy court from which no appeal was taken, postponing a part of the claim of an officer of a bankrupt corporation to the claim of an intervenor, was correctly interpreted below, is not one concerning the allowance or rejection of claim within Bankr. Act July 1, 1898, § 25b, governing appeals from the Circuit Courts of Appeals to the federal Supreme Court, but is a matter which the Supreme Court has no authority to review.—*Wynkoop, Hallenbeck, Crawford Co. v. Gaines*, 33 S. Ct. 214, 227 U. S. 4, 57 L. Ed. 391.

An appeal will not lie to the federal Supreme Court from a Circuit Court of Appeals which affirmed a judgment of the bankruptcy court, refusing a discharge, but the only appeal contemplated under Act July 1, 1898, §§ 24, 25, is from the bankruptcy court to the Circuit Court of Appeals.—*James v. Stone & Co.*, 33 S. Ct. 351, 227 U. S. 410, 57 L. Ed. 573.

454. Decisions reviewable.

See 6 Cent. Dig. Bankr. § 916.

455. — Of courts of bankruptcy in general.

See 6 Cent. Dig. Bankr. § 916.

No appeal lies from the judgment of a circuit court in allowing or disallowing a demand against the estate of a bankrupt.—*Ingersoll v. Bourne*, 154 U. S. 645, 14 S. Ct. 1186, 38 L. Ed. 1091.

A petition filed in a bankruptcy court by creditors of the bankrupt, asserting a lien on the proceeds of a seat in the stock exchange which had not been insisted upon because they had collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, is a bankruptcy proceeding under Bankr. Act July 1, 1898, c. 541, § 2, cl. 7, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], within the meaning of section 25 [U. S. Comp. St. 1901, p. 3432], regulating appeals in bankrupt proceedings, and a decree thereon is, therefore, not an independent ground of appeal, where it was not, within the meaning of section 25a, cl. 3, "a judgment allowing or rejecting a debt or claim of \$500 or over." Decree (1902) *Hutchinson v. Otis*, 115 F. 937, 53 C. C. A. 419, affirmed.—*Hutchinson v. Otis*, *Wilcox & Co.*, 23 S. Ct. 778, 190 U. S. 552, 47 L. Ed. 1179.

The claims of a creditor against a bankrupt estate have been rejected so as to give the right to appeal where he insisted that his claims were for a definite amount, viz., the amount stated in the proofs of debt, less the sum derived from the sale of collateral, and the referee declined to allow the claims as established as the proof stood, and the bankruptcy court approved and affirmed the ruling of the referee as a disallowance of the claims, and entered an order accordingly. Decree, *In re Mertens* (1906) 144 F. 818, 75 C. C. A. 548, affirmed.—*Hiscock v. Varick*

Bank of New York, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

456. — Of Circuit Courts of Appeal.

See 6 Cent. Dig. Bankr. § 916.

A decision of the Circuit Court of Appeals affirming a ruling of the bankruptcy court as to whether petitioning creditors held provable claims is not a final decision within the meaning of Bankruptcy Act July 1, 1898, § 25b, governing appeals to the federal Supreme Court.—(1912) *J. W. Calnan Co. v. Doherty*, 32 S. Ct. 460, 224 U. S. 145, 56 L. Ed. 702, dismissing appeal (1909) 174 F. 222, 98 C. C. A. 130.

A decree of a Circuit Court of Appeals affirming a decree of a District Court dismissing the petition of a trustee in bankruptcy to prevent the enforcement of a lien in a state court for labor and materials is appealable to the federal Supreme Court.—*Hobbs v. Head & Dowst Co.*, 34 S. Ct. 253, 231 U. S. 692, 58 L. Ed. 440, affirming decrees 184 F. 409, 106 C. C. A. 519, and 185 F. 1006, 107 C. C. A. 663.

A decree of a federal Circuit Court of Appeals affirming an order of a court of bankruptcy enjoining temporarily the prosecution in a state court of a suit affecting the bankrupt estate is interlocutory and not reviewable under Bankr. Act, § 24a, providing for appeals in bankruptcy proceedings, although the case is not one which Act March 3, 1891, § 6, makes final in the Circuit Court of Appeals.—*Mitchell Store Bldg. Co. v. Carroll*, 34 S. Ct. 410, 232 U. S. 379, 58 L. Ed. 650, dismissing appeal and denying certiorari 193 F. 616, 113 C. C. A. 484.

An appeal will not lie to the federal Supreme Court from a decision of a Circuit Court of Appeals, made under Bankr. Act, § 24b, on a petition to revise the proceedings of the bankruptcy courts.—Id.

A controversy in bankruptcy, appealable under Judicial Code, § 128 (Act March 3, 1911, c. 231, 36 Stat. 1133 [U. S. Comp. St. Supp. 1911, p. 193]), to the Circuit Court of Appeals, and thence to the federal Supreme Court, was not initiated by an attempted intervention in a summary proceeding in a court of ancillary jurisdiction to restore certain property of bankrupts in the custody of those having no right to it, to the bankruptcy court where the intervenors claim under assignments made after the filing of the petition in bankruptcy.—*Lazarus, Michel & Lazarus v. Prentice*, 34 S. Ct. 851, 234 U. S. 263, 58 L. Ed. 1305, dismissing appeal *Musica v. Prentice*, 211 F. 326, 127 C. C. A. 575, which affirms *In re A. Musica & Son*, 205 F. 413.

458. Presentation and reservation in lower court of grounds of review.

See 6 Cent. Dig. Bankr. § 916.

The capacity of a trustee in bankruptcy to sue in the bankruptcy court to recover property from a chattel mortgage, on the ground that the mortgage was not properly acknowledged and recorded, is waived when not taken in the trial court.—*Fairbanks Steam Shovel Co. v. Wills*, 36 S. Ct. 466, 240 U. S. 642, 60 L. Ed. 841, affirming decree *In re Federal Contracting Co.*, 212 F. 688, 129 C. C. A. 224.

459. Certification of questions to Supreme Court.

The use of a certificate to present to the supreme court of the United States a question of the jurisdiction of a district court in an action arising under the bankruptcy act of July 1, 1898, is subject to the general limitations of the act of congress of March 3, 1891, under which the trial court cannot by certificate send up a question as to its own jurisdiction until

after final judgment.—*Bardes v. First Nat. Bank*, 20 S. Ct. 196, 175 U. S. 526, 44 L. Ed. 262.

461. Taking and perfecting.

See 6 Cent. Dig. Bankr. §§ 920-923.

Proceedings under Rev. St. § 5081, for the re-examination of a claim against a bankrupt estate, are in the nature of a suit against the assignee, and an appeal cannot be taken by the claimant unless the notice of appeal required by Rev. St. § 4981, be given to the assignee, although it has been given to the objecting creditor.—*Ex parte Mead*, 109 U. S. 230, 3 S. Ct. 129, 27 L. Ed. 914.

The 30 days' limitation prescribed by general order in bankruptcy No. 36 for taking an appeal from a final order of a circuit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the 30 days have expired, although there may be but one term of that court, and, by its rules of practice, petitions for rehearing may be presented at any time during the term. Appeal, *In re Philip Semmer Glass Co.* (1905) 135 F. 77, 67 C. C. A. 551, dismissed.—*Couboy v. First Nat. Bank*, 27 S. Ct. 50, 203 U. S. 141, 51 L. Ed. 128.

The allowance of an appeal from a circuit court of appeals in a bankruptcy case on certificate of a Justice of the Supreme Court cannot operate as an adjudication that such appeal is taken within the thirty days allowed by general order in bankruptcy No. 36.—*Id.*

The 30-day limitation for appeals in bankruptcy cases, made by general orders in bankruptcy, rule 36 (32 C. C. A. xxxvi), does not apply to a writ of error from the federal Supreme Court to a court of bankruptcy, presenting the question of the jurisdiction to make an adjudication of bankruptcy on a claim for unliquidated damages, but such proceeding is governed by the 2-year limitation fixed by Rev. St. U. S. § 1008 (U. S. Comp. St. 1901, p. 715), and Act March 3, 1891, c. 517, §§ 4, 5, 26 Stat. 826, 827 (U. S. Comp. St. 1901, pp. 548, 549). Judgment (D. C. 1903) *In re Frederic L. Grant Shoe Co.*, 125 F. 576, affirmed.—*Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 29 S. Ct. 332, 212 U. S. 445, 53 L. Ed. 591.

A sufficient compliance with general order No. 36 (18 Sup. Ct. ix), providing that appeals under the bankrupt act from the Supreme Court shall be taken within 30 days after judgment, and that the court below shall, at or before the time of entering the judgment, make and file findings of fact and conclusions of law, which, together with the pleadings and judgment, shall constitute the record, is shown where the appeal was taken within 30 days, and the Circuit Court of Appeals made its findings of fact and conclusions of law part of the record by an order made within 30 days, directing the same to be filed nunc pro tunc as of the date of the judgment. Judgment *Coder v. Arts*, 152 F. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, affirmed.—*Coder v. Arts*, 29 S. Ct. 436, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

467. Review.

See 6 Cent. Dig. Bankr. § 929.

The objection of the want of evidence or findings respecting the acts of bankruptcy is not available on appeal from the adjudication of bankruptcy to creditors who only contested the proceedings on the ground of the occupation of the alleged bankrupt, and raised no objection below to the want of proof of the

acts of bankruptcy, and asked no findings in respect thereto, and did not object to the findings that were made for deficiencies in that regard.—*Armstrong v. Fernandez*, 28 S. Ct. 419, 208 U. S. 324, 52 L. Ed. 514.

Concurrent findings of the two courts below that two brothers were partners, and that the stock in trade belonged to the firm, do not call for reversal, where there was evidence that one brother, with the intent of forming a corporation, furnished the capital, and the other his personal services, and that the latter was interested in the profits, and was not a debtor of the former, and there was some evidence that he contributed to the assets. Decree (1907) 153 F. 525, 82 C. C. A. 475, affirmed.—*Manson v. Williams*, 29 S. Ct. 519, 213 U. S. 453, 53 L. Ed. 869.

An appeal to the federal Supreme Court under Bankr. Act, § 24a, from a decree of the Circuit Court of Appeals, opens up the whole case as in other equity cases; general orders in bankruptcy No. 36, issued under section 25b of the act, having no application.—*Houghton v. Burden*, 33 S. Ct. 491, 228 U. S. 161, 57 L. Ed. 780, affirming decree *In re Canfield*, 193 F. 934, 113 C. C. A. 562.

Action of the referee in bankruptcy, approved by the District Court and Circuit Court of Appeals in subrogating trustee in bankruptcy under Act July 1, 1898, § 67c, to the liens of judgment creditors, will be accepted as correct in the absence of proof of abuse of discretion.—*Fallows v. Continental & Commercial Trust & Savings Bank*, 35 S. Ct. 29, 235 U. S. 300, 59 L. Ed. 238, affirming decree *In re Tengwall Co.*, 201 F. 82, 119 C. C. A. 420.

468. Determination and disposition of cause.

See 6 Cent. Dig. Bankr. § 930.

A decree of a federal district court for the transfer to certain adverse claimants of a part of the proceeds of a sale of property not in possession of the trustee in bankruptcy, without prejudice to the rights of such trustee, "if this court shall so authorize," to litigate in any proper court the question of his right to recover such funds as a part of the bankrupt's general estate, is a sufficient compliance with the mandate of the federal Supreme Court, which had directed the remanding of the case for further proceedings in conformity with its opinion, in which it was stated that the District Court's original decree should have been "without prejudice to the right of respondents to litigate in a proper court." Judgment, *Ex parte Chicago Title & Trust Co.* (1906) 146 F. 742, 77 C. C. A. 408, reversed.—*Ex parte First Nat. Bank of Chicago*, 28 S. Ct. 23, 207 U. S. 61, 52 L. Ed. 103.

The special finding of fact requisite under general order in bankruptcy No. 36 (89 F. xiv, 32 C. C. A. xxxvi) on an appeal to the Federal Supreme Court, under Bankr. Act July 1, 1898, c. 541, § 25b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), from a final decision of a Circuit Court of Appeals allowing or rejecting a claim under that act, is not required where the decision below is one denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as a first lien on the property of the bankrupt, and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy, since such a contention presents a controversy arising in bankruptcy proceedings over which the Circuit Courts of Appeals, under section 24a of the bankrupt act, exercise appellate jurisdiction as in other cases, and the Circuit Court of Appeals act (Act March 3, 1891, c.

517, 28 Stat. 828 [U. S. Comp. St. 1901, p. 546]), governs the manner of review in the Supreme Court. Judgment (1908) 162 F. 675, 89 C. C. A. 467, affirmed.—*Knapp v. Milwaukee Trust Co.*, 30 S. Ct. 412, 216 U. S. 545, 54 L. Ed. 610.

VII. COSTS AND FEES.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 872-903.]

VIII. OFFENSES AGAINST BANKRUPT LAWS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bankr. §§ 904-913.]

BANKS.

Nonnavigable waters, see *Waters and Water Courses*, §§ 92-98.

BANKS AND BANKING.

Scope-Note.

[INCLUDES the regulation and conduct of the business of dealing in money by receiving and repaying deposits and collections, making loans, discounts, or other investments, and issuing bills, notes, etc., for purposes of particular transactions or for general circulation, whether these functions, or any of them, are exercised by individuals or by corporations, either ordinary banks of deposit, discount, and circulation, or savings banks, or loan, trust, and investment companies; organization, powers, and liabilities of such corporations, and rights and liabilities of their members and officers; and mutual rights, duties, and liabilities of bankers, banks, or other such institutions, and those dealing with them.

[For related matters under other topics, see cross-references after analysis.]

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I. Control and Regulation in General.

- 2. What are banks.
- 3. Power to control and regulate.
- 4. Constitutional and statutory provisions.
- 5. Charter provisions.

II. Banking Corporations and Associations.

(A) INCORPORATION, ORGANIZATION, AND INCIDENTS OF EXISTENCE.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Banks, §§ 26-41.]

(B) CAPITAL, STOCK, AND DIVIDENDS.

(C) STOCKHOLDERS.

- 46. Liability for debts and acts of bank.
- 48. — Effect of transfer of stock.

(D) OFFICERS AND AGENTS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Banks, §§ 82-124.]

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(F) EXCHANGE, MONEY, SECURITIES, AND INVESTMENTS.

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- 254. — Actions to enforce liability.
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- 278. — Attachment and garnishment.
- 281. Voluntary liquidation.
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- 287. Assets and receivers on insolvency.
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V. Savings Banks.

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VI. Loan, Trust, and Investment Companies.

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Cross-References.

Appellate jurisdiction of suit involving constitutionality of act exempting banks and trust companies from usury laws, see Courts, ❧394(10).

Exemption from usury laws as denial of equal protection of law, see Constitutional Law, ❧242.
Taxation, see Taxation, ❧125-127, 386.

I. CONTROL AND REGULATION IN GENERAL.

Depositors' guaranty law, denying due process of law, see Constitutional Law, ❧278; equal protection of laws, see Constitutional Law, ❧240; impairing obligation of contract, see Constitutional Law, ❧129; taking of property for public use, see Eminent Domain, ❧17.
Impairing obligation of contracts, see Constitutional Law, ❧138.
Interstate commerce regulations, see Commerce, ❧43, 44.
License tax, see Licenses, ❧19.
Licensing private bankers as denial of equal protection of laws, see Constitutional Law, ❧230; of due process of law, see Constitutional Law, ❧287; questioning validity, see Constitutional Law, ❧42.

❧2. What are banks.
See 6 Cent. Dig. Banks, § 2.

The business of receiving deposits of money in small sums from time to time until they reach an amount sufficient to be sent to other states or foreign countries is banking, and as such is a proper subject for regulation in the exercise of the police power of the state.—(1911) *Engel v. O'Malley*, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128, affirming decree (C. C. 1910) 182 F. 365.

❧3. Power to control and regulate.
See 6 Cent. Dig. Banks, § 2.

The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe.—(1911) *Noble State Bank v. Haskell*, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, affirming decree (1908) 97 P. 590, 22 Okl. 48. Opinion amended (1911) 31 S. Ct. 299, 219 U. S. 575, 55 L. Ed. 341; (1911) *Shallenberger v. First State Bank of*

Holstein, 31 S. Ct. 189, 219 U. S. 114, 55 L. Ed. 117, reversing decree *First State Bank of Holstein v. Shallenberger* (C. C. 1909) 172 F. 999.

❧4. Constitutional and statutory provisions.
See 6 Cent. Dig. Banks, § 2.

A state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund is no less a valid exercise of the police power because contribution to such fund is not absolutely required.—(1911) *Assaria State Bank of Assaria v. Dolley*, 31 S. Ct. 189, 219 U. S. 121, 55 L. Ed. 123, affirming decree (C. C. 1909) *Larabee v. Same*, 175 F. 365, which is reversed (1910) *Dolley v. Abilene Nat. Bank of Abilene, Kan.*, 179 F. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065.

The police power of the state justifies the requirement of Laws N. Y. 1910, c. 348, that a license from the Comptroller be obtained by individuals or partnerships desiring to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose.—(1911) *Engel v. O'Malley*, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128, affirming decree (C. C. 1910) 182 F. 365.

The Kansas bank depositors' guaranty law of March 6, 1909 (Laws 1909, c. 61) held constitutional.—*Abilene Nat. Bank of Abilene v. Dolley*, 33 S. Ct. 409, 228 U. S. 1, 57 L. Ed. 707.

Validity under the police power of Laws Okl. 1911, c. 31, as amended by Laws 1913, c. 22, under which a bank depositor's guaranty fund is created by an assessment on state banks, is not affected because the state vested the title to the fund in itself, so as to extend to the state banking board the state's immunity from

suit.—*Lankford v. Platte Iron Works Co.*, 35 S. Ct. 173, 235 U. S. 461, 59 L. Ed. 316; *American Water Softner Co. v. Lankford*, 35 S. Ct. 184, 235 U. S. 496, 59 L. Ed. 329.

—5. Charter provisions.

See 6 Cent. Dig. Banks, § 4.

The grant to a corporation of the power to receive, in trust for any person, moneys or other valuable thing, and to give an acknowledgment therefor, and to loan its surplus funds, does not authorize it to conduct a general banking business.—*Memphis City Bank v. State of Tennessee*, 161 U. S. 186, 16 S. Ct. 468, 40 L. Ed. 664, affirming judgment *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(A) INCORPORATION, ORGANIZATION, AND INCIDENTS OF EXISTENCE.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Banks, §§ 26–41.]

(B) CAPITAL, STOCK, AND DIVIDENDS.

See 6 Cent. Dig. Banks, §§ 42–60.

Impairing obligation of contracts, see Constitutional Law, —125.

(C) STOCKHOLDERS.

Limitation of action to enforce liability, see Limitation of Actions, —21.

—46. Liability for debts and acts of bank.

See 6 Cent. Dig. Banks, §§ 63, 64–81½, 341, 513, 534, 535.

—48. — Effect of transfer of stock.

See 6 Cent. Dig. Banks, §§ 69, 70.

A transfer of bank stock on the books of the bank in favor of a pledgee which held it as collateral security does not render such pledgee liable as a stockholder for the bank's indebtedness created after the stock has been retransferred on the books of the pledgor upon payment of the loan, notwithstanding the pledgee's failure to give notice of the retransfer, which, under Code Ga. 1882, § 1496, is requisite to exempt from an existing individual liability as a stockholder under a corporate charter, where the stockholder's individual liability under the charter of the bank in question is limited to the par value of his stock, "at the time the debt was created." Decree (C. C.) 112 F. 812, affirmed.—*Brunswick Terminal Co. v. National Bank of Baltimore*, 24 S. Ct. 314, 192 U. S. 386, 48 L. Ed. 491.

(D) OFFICERS AND AGENTS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Banks, §§ 82–124.]

(E) INSOLVENCY AND DISSOLUTION.

Depositors' guaranty law, equal protection of law, see Constitutional Law, —240.

Due process of law, see Constitutional Law, —318.

—66. Effect on state bank of reorganization as national bank.

See 6 Cent. Dig. Banks, § 123.

The conversion of a state bank into a national bank is not a "closing of its business," within the meaning of the statute of 1859, providing for the redemption of a state bank's circulation, and releasing it from liability on such notes as are not presented within six years after

the giving of the prescribed notice; and any notes not so presented constitute a valid claim against the national bank.—*Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 12 S. Ct. 60, 35 L. Ed. 841, affirming judgment 125 N. Y. 729, 26 N. E. 757.

—74. Transfers and preferences affected by insolvency.

See 6 Cent. Dig. Banks, § 156.

Where one rediscounted at a certain bank the notes of another, who conveyed property to the one so discounting in satisfaction of the debt, the receiver of the bank is not thereby entitled to such property as purchased with money of the bank.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

—75. Rights of persons making deposits after insolvency.

See 6 Cent. Dig. Banks, § 157.

Where a sight draft is credited by a bank to a depositor in his pass book and on its own books as cash, the bank does not become owner of the draft, so as to be entitled to the proceeds when afterwards paid, when it was insolvent at the time of making the credit, and closed its doors before the draft was paid.—*St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566, 10 S. Ct. 390, 33 L. Ed. 683, reversing (C. C.) 27 F. 243.

—77. Assets and receivers on insolvency.

See 6 Cent. Dig. Banks, §§ 165–176½.

The right to a set-off against the receiver of a bank is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created.—*Yardley v. Philler*, 17 S. Ct. 835, 167 U. S. 344, 42 L. Ed. 192, reversing decree *Philler v. Yardley*, 62 F. 645, 10 C. C. A. 562, 25 L. R. A. 824.

The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which cannot be disregarded or displaced by the comptroller of the currency.—*Earle v. Commonwealth of Pennsylvania*, 20 S. Ct. 915, 178 U. S. 449, 44 L. Ed. 1146.

No right of equitable set-off in favor of a bank against the receiver of its insolvent correspondent arises out of the voluntary payment by the former bank of an overdraft of its correspondent, in reliance upon certain notes sent for discount and credit, after receiving no response to its notification that such notes would not be discounted, but would be held as collateral, and that credits should either be transferred from other banks or currency shipped. Decree, *Hanover Nat. Bank of City of New York v. Suddath* (1907) 153 F. 1022, 82 C. O. A. 677, affirmed.—*Hanover Nat. Bank of State of New York v. Suddath*, 30 S. Ct. 63, 215 U. S. 122, 54 L. Ed. 120.

—82. Civil liability on insolvency.

See 6 Cent. Dig. Banks, §§ 203–209½.

The president and director of a bank, who is absent on account of ill health under a leave of absence granted by the board of directors, cannot be held liable for the negligent management of the bank during his absence.—*Briggs v. Spaulding*, 141 U. S. 132, 11 S. Ct. 924, 35 L. Ed. 662, affirming decree *Movius v. Lee* (1887) 30 F. 298.

Where the affairs of a bank are managed by its president, who has the reputation of being trustworthy and efficient, and who owns the greater part of the stock, and the bank is generally considered to be in a prosperous condition,

directors cannot be held liable for losses through mismanagement on the ground of negligence, in that they did not, within 90 days after they became directors, compel the board of directors to make a thorough investigation of the books and condition of the bank.—Id.

III. FUNCTIONS AND DEALINGS.

(A) BANKING FRANCHISES AND POWERS, AND THEIR EXERCISE IN GENERAL.

89. Customs and usages.

See 6 Cent. Dig. Banks, §§ 221-224.

A pledge of cotton by a factor to a bank as security for advances made by the bank to the factor in his individual capacity, if not otherwise binding on the owner and consignor of the cotton, is not made so by a general usage of trade between the banks and cotton factors in the place where they do business, not shown to be known to the consignors or other owners of cotton.—*Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

104. Disposition of property.

See 6 Cent. Dig. Banks, §§ 244-248.

The cashier of a bank kept an account with defendants, who were brokers and bought and sold stocks for him, and from time to time defendants received checks of his bank on another bank, its correspondent, drawn by him in his official capacity, and collected them and applied them to the cashier's individual account. In an action by a receiver of the bank of the cashier to recover of defendants the amount of the checks received by them, *held* that, the checks being made payable to the order of defendants for the cashier's individual use, defendants took them under an obligation to ascertain that the cashier had authority outside his ordinary official authority to make the checks, and could not assume that he was acting in the scope of his official duties.—*Kissam v. Anderson*, 12 S. Ct. 960, 145 U. S. 435, 36 L. Ed. 765, reversing judgment *Anderson v. Kissam* (C. C.) 35 F. 699.

105. Contracts.

See 6 Cent. Dig. Banks, §§ 249-252.

Where directors have, for a number of years, left the entire management of the bank to the cashier, and have acquiesced in all his acts in making loans, taking securities, and discharging mortgages, his act in discharging a mortgage will be binding on the bank.—*Martin v. Webb*, 110 U. S. 7, 3 S. Ct. 428, 28 L. Ed. 49.

112. Wrongful acts.

See 6 Cent. Dig. Banks, §§ 271, 272.

The fact that the cashier clandestinely deposited funds with the drawee to the credit of his own bank, which deposits were so credited, is not competent in mitigation of damages. When credited to the cashier's bank, the deposits became the property of that bank as against the cashier and defendants; and when it appeared that the checks had been paid by the drawee out of funds standing to the credit of the cashier's bank, plaintiff was entitled to recover the full amount; and it was incumbent on defendants, if they sought to reduce the damages, to show that notwithstanding the wrongful conversion of the paper the cashier's bank did not suffer loss.—*Kissam v. Anderson*, 12 S. Ct. 960, 145 U. S. 435, 36 L. Ed. 765, reversing judgment *Anderson v. Kissam* (C. C.) 35 F. 699.

113. Estoppel to deny authority of officer or agent.

See 6 Cent. Dig. Banks, §§ 273-276.

Where the bond of a defaulting bank president, issued by a surety company and accepted by the bank, is based on statements and representations made to the surety company by the assistant cashier, a receiver of the bank thereafter appointed in an action on the bond cannot question the authority of the assistant cashier to bind the bank by his statements and representations as to the duties and accounts of the defaulting president, and at the same time recover on the bond procured on the strength of such statements and representations. Judgment. *Willoughby v. Fidelity & Deposit Co. of Maryland* (1906) 85 P. 713, 16 Okl. 546, 7 L. R. A. (N. S.) 548, affirmed.—*Cherry v. Fidelity & Deposit Co.*, 27 S. Ct. 790, 205 U. S. 537, 51 L. Ed. 920.

114. Ratification.

See 6 Cent. Dig. Banks, §§ 277-280.

Ratification of the unauthorized act of a national bank officer in borrowing \$200,000 for the bank can only be made, if at all, by the board of directors, acting with knowledge of the material facts, and cannot be inferred from the mere fact that by direction of the same officer the money was placed to the credit of the bank, when it appears that it was drawn out by him and the assistant cashier, and that no part of it came to the use or benefit of the bank.—*Western Nat. Bank v. Armstrong*, 152 U. S. 346, 14 S. Ct. 572, 38 L. Ed. 470.

116. Notice to officer or agent.

See 6 Cent. Dig. Banks, §§ 282-287.

Certain clerks in a stock brokerage firm bought the business, including a large amount of stocks carried on margins, for the cashier of a country bank. In protecting these stocks the cashier, in his official capacity, drew large checks, in favor of the new firm, upon a New York bank, with which the country bank had deposits. Part of the money was returned by the brokers to the city bank, and was by it credited to the country bank, but much was lost in the stock transactions. The money returned was largely checked out by the cashier, and lost in other fraudulent transactions. There was no direct evidence of conspiracy between the brokers and the cashier to misapply the bank's funds. *Held*, in an action by a receiver of the bank against the brokers, that, assuming them to have knowledge that they were receiving the bank's funds, it was error to rule that they were not to be credited with the sums returned, since it was at least a question for the jury whether the other officers of the bank were not chargeable with notice of the moneys deposited to its credit, and would not have accepted such deposits as a return of the moneys to the bank.—*Kissam v. Anderson*, 12 S. Ct. 960, 145 U. S. 435, 36 L. Ed. 765, reversing judgment (C. C.) *Anderson v. Kissam*, 35 F. 699.

A president of a national bank has no power, in the ordinary course of business, to certify to the fidelity or integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity; and hence the bank cannot be deemed, merely by virtue of the president's relation to it, to have any knowledge of the giving by him of such certificate.—*American Surety Co. of New York v. Pauly*, 18 S. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming judgment 72 F. 470, 18 C. C. A. 644.

The knowledge of the vice president and of one or more of the directors of a bank, but less than a majority of the board, of a default by the president, is not rendered imputable to the bank, so as to relieve a surety on his bond from liability thereon, by the provision therein that the employer shall exercise due and custo-

mary supervision, and will not condone a default of the bonded employé, or continue him in his employment after the commission of a default, as such provision relates to the bank, and not to a minority of the board of directors, or its subordinate officers or agents. Judgment 103 F. 599, 43 C. C. A. 331, affirmed.—*Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 342, 46 L. Ed. 1193.

(C) DEPOSITS.

As preferences by debtor, see Bankruptcy, 163.

Balance of pass book as account stated, see Account Stated, 66.

Check as equitable assignment of fund, see Assignments, 49.

Depositors' guaranty law as denying due process of law, see Constitutional Law, 278; as denying equal protection of laws, see Constitutional Law, 240; impairing obligation of contract, see Constitutional Law, 129; taking of property for public use, see Eminent Domain, 17.

Forgery of checks, see Forgery.

Gift of deposit, see Gifts, 66.

Limitation of action to recover money paid on forged check, see Limitation of Actions, 21, 66.

Taxation of bank deposits, see Taxation, 100.

134. Application of deposits to debts due bank or set-off by bank.

See 6 Cent. Dig. Banks, §§ 353-374.

Corporate notes are not discharged pro tanto by the fact that the corporation has a deposit in the bank that holds the notes.—*Thomas v. Matthiessen*, 34 S. Ct. 312, 232 U. S. 221, 58 L. Ed. 577, reversing judgment 192 F. 495, 113 C. C. A. 101.

137. Payment of checks.

See 6 Cent. Dig. Banks, §§ 347, 348, 380-392, 394-414, 517.

141. — Mode and sufficiency of payment.

See 6 Cent. Dig. Banks, §§ 347, 348.

Performance by a bank on which a check is drawn of the function of collecting and crediting when the check is sent directly to the bank for collection, in the absence of fraud or mistake, is equivalent to payment in the usual course.—*American Nat. Bank of Nashville v. Miller*, 33 S. Ct. 883, 229 U. S. 517, 57 L. Ed. 1310, affirming judgment 185 F. 338, 107 C. C. A. 456.

142. — Rights of bank paying check.

See 6 Cent. Dig. Banks, §§ 410-413.

A bank taking its president's check on account of his illegal overdraft is not chargeable with knowledge of his insolvency.—*American Nat. Bank of Nashville v. Miller*, 33 S. Ct. 883, 229 U. S. 517, 57 L. Ed. 1310, affirming judgment 185 F. 338, 107 C. C. A. 456.

147. Payment of forged or altered paper.

See 6 Cent. Dig. Banks, §§ 438-454.

148. — Liabilities of bank to depositor, payee, or owner.

See 6 Cent. Dig. Banks, §§ 438-446, 451, 452.

Though the pass book of a depositor, balanced at intervals by the bank, and returned to him, is only an account stated, and not conclusive, yet where he omits altogether to examine the charges therein, and the canceled checks returned as vouchers therewith, and so fails to discover that the amounts of a number

of checks have been raised by his clerk, to whose exclusive care he has intrusted his account with the bank, and consequently is unable to give timely notice of the frauds to the bank, he is guilty of such negligence that, in an action by him to recover the amount paid upon the altered checks, it is error for the court to direct a verdict in his favor.—*Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811.

150. Overdrafts.

See 6 Cent. Dig. Banks, §§ 455-464½.

A letter to a banker inclosed a note, and asked the banker to discount it, and place the proceeds to the writer's credit, and, in that event, to charge a certain overdraft against the credit. *Held*, that the banker, having declined the discount, had no right to hold the note as collateral.—*Bank of Montreal v. White*, 154 U. S. 660, 14 S. Ct. 1191, 26 L. Ed. 307.

152. Certificates of deposit.

See 6 Cent. Dig. Banks, §§ 336, 465-482.

Plaintiff, having accepted a certificate for its full amount, and given K. credit therefor, is entitled to recover that amount from the receiver of the drawing bank, regardless of what application was made of the amount, so that it was used for the benefit of K.—*Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747.

153. Special deposits.

See 6 Cent. Dig. Banks, §§ 356, 482-501.

The fact that a bank lost, through a burglary, certain funds intrusted to it, will not, by itself, prove negligence on the part of the bank.—*Wylie v. Northampton Nat. Bank*, 119 U. S. 361, 4 S. Ct. 268, 30 L. Ed. 456.

Where a bank was broken into by burglars, and property belonging to it and to others was taken, it is competent for the bank to take measures for the recovery of its own; and if deemed best it might lawfully undertake to act for others jointly concerned; and want of proper skill and care in the performance of such an undertaking would be ground of liability in damages for failure.—*Id.*

Where the offer of bank officials, to a meeting of depositors, to appoint a joint committee to recover certain deposits lost by a bank robbery, is rejected by the depositors, and the bank proceeds to undertake the recovery on its own account, there is no evidence to sustain the allegation of a petition, brought against the bank by depositors, that the depositors were induced to abandon individual efforts at recovery by the bank's undertaking to act as the depositors' agents in the recovery.—*Id.*

Where an agent, having for a time a special deposit in his own name as agent, asked the bank for a receipt showing that fact, which was sent to the principal without any knowledge by the bank that the principal intended to revoke the agency, and where the principal continued to deal with the agent in relation to the fund, and did not communicate with the bank for a long time after the receipt was given, there is a change of the contract of bailment from one with the agent to one with the principal.—*Manhattan Bank v. Walker*, 130 U. S. 267, 9 S. Ct. 519, 32 L. Ed. 959, reversing (C. C.) *Walker v. Manhattan Bank*, 25 F. 247.

J., as agent, but without disclosing his principal, placed certain securities with defendant on special deposit. Afterwards he asked defendant for a receipt, showing the special deposit, to send to plaintiff. Defendant executed the receipt in the name of J., as agent for plaintiff, and sent it to plaintiff by mail. Defendant afterwards applied the proceeds of part of the securities to a debt of W. to it, for which J. was

surety, and delivered the balance of the securities to J. with the knowledge that he intended using them to raise money for W. The power of J. as agent was limited to investing plaintiff's money for her exclusive use and benefit. *Held*, that defendant was liable for the loss of such securities.—*Id.*

In an action against private bankers to recover the value of bonds placed with them as a special deposit, and stolen by an absconding cashier, it appeared that, about a year before his flight, the managing partner became aware that he had been speculating on the board of trade, and, on charging him therewith, was told that he had speculated, but was not doing so then, and would not thereafter; that no efforts were made to verify his statements, or ascertain whether he had used property not his own; that about eight months later it was learned that he had been speculating again, but he stated that these were deals for friends, and were closed; that an examination of the books and securities, though not of the special deposits, was then made, but the cashier was retained in his position. *Held*, that this was gross negligence, and defendants were liable whether regarded as gratuitous bailees or bailees for hire.—*Preston v. Prather*, 137 U. S. 604, 11 S. Ct. 162, 34 L. Ed. 788, affirming judgment (C. C.) *Prather v. Kean*, 29 F. 498.

(D) COLLECTIONS.

164. Rights and liabilities as to proceeds.

See 6 Cent. Dig. Banks, §§ 571-586.

165. — In general.

See 6 Cent. Dig. Banks, §§ 571-573, 583-585.

A bank holding negotiable paper for collection does not lose its lien thereon for debts due it from the depositor, by reason of the fact that the depositor becomes insolvent, makes an assignment for creditors, and goes into the hands of a receiver, even if the bank accepts the assignment, where there is nothing to show any waiver of its lien. Judgment, *Joyce v. Cockrill* (C. C. A.) 92 F. 838, 35 C. C. A. 38, affirmed.—*Joyce v. Auten*, 21 S. Ct. 227, 179 U. S. 591, 45 L. Ed. 332.

A bank forwarding a draft for collection with bills of lading is entitled to an accounting for the avails of the draft and to resist action for recovery back of money received from correspondent bank, though it may have a guaranty against loss from drawer of draft.—*Russo-Chinese Bank v. National Bank of Commerce of Seattle, Wash.*, 36 S. Ct. 652, 241 U. S. 403, 60 L. Ed. 1065, affirming judgment 206 F. 646, 124 C. C. A. 434.

166. — Insolvency of collecting bank.

See 6 Cent. Dig. Banks, §§ 574-578, 586.

The bill alleged that a bank was insolvent when a draft payable to its order was delivered to it by complainant; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant, and, by continuing business, and otherwise, represented to complainant, and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations, believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank. The answer specifically denied these averments. *Held*, that the issue thus framed allowed, on proof that the bank was hopelessly insolvent, a decree for complain-

ant.—*St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566, 10 S. Ct. 390, 33 L. Ed. 683.

Complainant sent a sight draft to a bank in New York, drawn on a debtor in Boston, and payable to the bank's order. In the accompanying deposit ticket, it was named under the head of "Checks," but it was credited on the bank's books as if it were a deposit of money. It was forwarded for collection, but before it was collected the bank closed its doors. There was no express agreement with the bank that out of town paper should be deposited as cash, nor was complainant indebted to the bank. During its five years of business with the bank, complainant had never drawn against out of town paper before it was actually collected; and, although complainant was allowed interest on its daily balance, it appeared that the bank reserved the right to charge exchange and interest for the average time taken in collection on such paper. *Held*, that the bank did not become owner of the draft.—*Id.*

A Cincinnati bank wrote to a Philadelphia bank: "Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month." The latter accepted this proposition, and thereafter, from time to time, forwarded paper indorsed "For collection." Business was carried on under this arrangement for several months, when the Cincinnati bank failed, having in its hands, or in the hands of its subagent banks, the proceeds of paper thus forwarded. *Held*, that the relation between the banks was that of principal and agent until the collection of the paper and the receipt of the money by the Cincinnati bank, after which time the relation was that of debtor and creditor; and hence that the receiver of the Cincinnati bank could not be charged, as trustee, with any moneys which were collected, and passed into its general funds, before the failure, or which before that time were collected by subagents, and credited to it on a debt which it owed them, but that he could be so charged with moneys collected by a subagent before the failure, and afterwards paid to the receiver.—*Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363, affirming judgment *Armstrong v. Commercial Nat. Bank*, 39 F. 684.

167. — Insolvency of transmitting bank.

See 6 Cent. Dig. Banks, §§ 579-582.

Where a bank received a draft as agent for plaintiff, of which fact the indorsement was a notice to other banks, it did not thereby become indebted to plaintiff for the amount thereof till after collection and possession of the proceeds, either actually or by settlement with the parties; and defendant bank, to which the draft had been sent by the first bank for collection, could not escape liability to plaintiff by making payment to the first bank, or giving the credit to it on the account between the banks after the first bank had stopped payment.—*Old Nat. Bank of Evansville v. German-American Nat. Bank of Peoria, Ill.*, 155 U. S. 556, 15 S. Ct. 221, 39 L. Ed. 259.

171. Failure to collect.

See 6 Cent. Dig. Banks, §§ 597-617.

A bank in Pittsburgh sent to a bank in New York, for collection, 11 unaccepted drafts, dated at various times through a period of over three months, and payable four months after date. They were drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," and were sent to the New York bank as drafts on the tea tray company. The New York bank sent them for collection to a bank in Newark, and, in its letters of transmission, recognized them as drafts on the company. The Newark bank took acceptances from Conger individually, on his refusal to accept as secretary, but no

notice of that fact was given to the Pittsburg bank until after the first of the drafts had matured. At that time the drawers and an indorser had become insolvent, the drawers having been in good credit when the Pittsburg bank discounted the drafts. *Held*, that the New York bank was liable to the Pittsburg bank for such damages as it had sustained by the negligence of the Newark bank.—*Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 S. Ct. 141, 28 L. Ed. 722; *Tradesman's Nat. Bank v. Same*, 112 U. S. 293, 5 S. Ct. 149, 28 L. Ed. 728.

(E) LOANS AND DISCOUNTS.

◀177. Power of discount.

See 6 Cent. Dig. Banks, §§ 654, 655.

It cannot be held, as a matter of law, that borrowing by a bank from another bank, or the rediscounting of bills or notes with another bank, is beyond its powers, or so out of the usual course of business as to charge the lender with notice of want of authority in the officers of the borrowing bank in a particular instance.—*Auten v. United States Nat. Bank*, 19 S. Ct. 628, 174 U. S. 125, 43 L. Ed. 920.

◀179. Collateral security.

See 6 Cent. Dig. Banks, §§ 667-683.

A letter to a banker inclosed a note, and asked the banker to discount it, and place the proceeds to the writer's credit, and, in that event, to charge a certain overdraft against the credit. *Held*, that the banker, having declined the discount, had no right to hold the note as collateral.—*Bank of Montreal v. White*, 154 U. S. 660, 14 S. Ct. 1191, 26 L. Ed. 307.

The inaction of a bank upon receiving notification that certain notes sent by it to another bank for discount and credit would not be discounted, but would be held as collateral, and that credit should either be transferred from other banks or currency shipped, is not equivalent to a request on its part to pay overdrafts previously drawn when presented, and to hold as collateral the notes which had been sent for discount. Judgment (1907) 153 F. 1021, 82 C. C. A. 676, affirmed.—*Hanover Nat. Bank of City of New York v. Suddath*, 30 S. Ct. 58, 215 U. S. 110, 54 L. Ed. 115.

Notes sent to a bank by its correspondent for discount and credit, which such bank refuses to rediscount, cannot be held by it as collateral to the payment of a loan voluntarily made to cover an overdraft, by virtue of an agreement embodied in a printed form prepared by such bank, and in general use by it, which gives the said bank power to appropriate any securities "deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of" its said correspondent by said bank, "or otherwise."—*Id.*

A bank which refuses to discount notes sent to it by a correspondent bank for discount and credit has no right, by virtue of its general bankers' lien, to apply such notes as collateral to the payment of a loan voluntarily made to cover an overdraft of such correspondent bank.—*Id.*

◀186. Discount of forged or fraudulent paper.

See 6 Cent. Dig. Banks, §§ 718, 719.

A bank in discounting a draft does not warrant to the acceptor bills of lading attached thereto as security.—*Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 S. Ct. 318, 30 L. Ed. 515.

(F) EXCHANGE, MONEY, SECURITIES, AND INVESTMENTS.

◀191. Letters of credit.

See 6 Cent. Dig. Banks, § 726.

Plaintiff purchased of defendant in New York a cable transfer of £5,000 to M. & Co., of Glasgow, and directed that a check for that amount should be sent by mail from defendant's London office to Glasgow. Defendant knew that this money belonged to plaintiff, and was sent to M. & Co. for the purpose of paying a draft he had drawn on them therefor. Defendant cabled the order to its London office, and the amount was placed to M. & Co.'s credit at the Bank of Scotland in London, pursuant to general instructions from M. & Co., and M. & Co. were notified by letter which reached them February 28th, and expressed their assent. The next day M. & Co. suspended, and the £5,000 in question was appropriated by the Bank of Scotland to the payment of overdrafts of their account, so that plaintiff derived no benefit therefrom and was afterwards compelled to pay his draft. *Held*, that defendant, being plaintiff's agent, and dealing with property known to be his, is liable for the loss resulting from its failure to follow his instructions.—*Bank of British North America v. Cooper*, 137 U. S. 473, 11 S. Ct. 160, 34 L. Ed. 759, affirming judgment (C. C.) *Cooper v. Bank of British North America*, 30 F. 171.

◀192. Purchase and sale of exchange.

See 6 Cent. Dig. Banks, § 725.

A New York bank authorized a New Orleans bank to draw on it in advance to the amount of \$100,000 "against exchange purchases," to be forwarded to the New York bank for collection, to secure which advances a deposit of city bonds was made. In addition to exchange purchases, the New Orleans bank forwarded drafts of its own on third persons, a number of which were protested for nonpayment. *Held*, that the drafts of the New Orleans bank were not within the term "exchange purchases," and that the New York bank had no lien on the bonds pledged for advances on the protested drafts.—*Reynes v. Dumont*, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934.

(G) CIRCULATING NOTES.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Banks, §§ 733-832.]

(H) ACTIONS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Banks, §§ 833-878.]

IV. NATIONAL BANKS.

Appeal by government in prosecution for misapplication of funds, see Courts, ◀385(1½). Appointment of receiver by comptroller as encroachment on judiciary, see Constitutional Law, ◀55.

Attachment, see Attachment, ◀334.

Certiorari to review prosecution for violation of banking law, see Criminal Law, ◀1011.

Conflicting jurisdiction of state and federal courts, see Courts, ◀489, 500.

Conspiracy by officers to misapply funds, see Conspiracy, ◀31.

Fees of district attorney for winding up insolvent bank, see District and Prosecuting Attorneys, ◀6.

Impairing obligation of contract, see Constitutional Law, ◀126.

Indictment of officers for misappropriation of funds, see Indictment and Information, ◀166, 180.

Internal revenue taxes, see Internal Revenue, 9.

Jurisdiction of federal courts, see Courts, 294.

Jurisdiction of state court of offenses against banking laws, see Criminal Law, 95.

Jurisdiction of United States Supreme Court in cases involving construction of statutes, see Courts, 385(1½).

Limitation of action to enforce stockholder's liability, see Limitation of Actions, 34, 66.

Limitation of action to recover back usury, see Limitation of Actions, 59.

Priority of United States as creditor of insolvent bank, see United States, 76.

Removal of cause, see Removal of Causes, 20.

Taxation of banks and bank shares, see Taxation, 10-12.

Taxation of national bank shares as denial of due process of law, see Constitutional Law, 283.

233. Power to control and regulate.

See 6 Cent. Dig. Banks, §§ 879-887.

So far as Code Iowa, §§ 1884, 1885, attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks. Judgment, *State v. Easton*, 85 N. W. 795, 113 Iowa, 516, 83 Am. St. Rep. 389, reversed.—*Easton v. State of Iowa*, 23 S. Ct. 288, 188 U. S. 220, 47 L. Ed. 452.

234. Statutory provisions.

See 6 Cent. Dig. Banks, §§ 879-967, 970-1127.

Pub. St. Mass. c. 157, §§ 96, 98, which invalidate transfers of property made with a view to a preference by any one insolvent or in contemplation of insolvency, where this fact is known to the transferee, in no way conflicts with Rev. St. U. S. § 5137, which grants to a national bank the right to hold such real estate as "shall be mortgaged to it in good faith by way of security for debts previously contracted," and such as "shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings"; nor does it impair any function of national banks as instrumentalities of the federal government.—*McClellan v. Chipman*, 17 S. Ct. 85, 164 U. S. 347, 41 L. Ed. 461.

237. Reorganization of state banks as national banks.

See 6 Cent. Dig. Banks, §§ 894-897.

Rev. St. U. S. § 5154, gives the privilege of becoming a national banking association to "any bank incorporated by special law, or any banking institution organized under a general law of any state." Act Cong. June 30, 1876, provides that all savings or other banks organized in the District of Columbia under any act of congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and to all acts of congress applicable to national banking associations, as far as the same may be applicable to such savings or other banks. *Held*, that savings banks so organized in the District of Columbia are entitled to become national banking associations in the mode prescribed in section 5154.—*Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531.

It is no objection to a certificate issuing from the office of the comptroller of the currency, and under the seal of that office, that it was given by L. as "acting" comptroller, and that such office was unknown to the law, as a deputy comptroller is provided for by Rev. St. U. S. §§ 178, 327, to act during the absence or inability of the comptroller.—*Id.*

241. Capital and shares.

See 6 Cent. Dig. Banks, §§ 43, 898-903.

Where a shareholder of a national bank subscribes to a certain increase of stock, and pays his subscription, and the bank afterwards reduces the amount of the increase, he waives all right to deny that his agreement binds him as a subscription to the reduced amount, by paying on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the comptroller of the currency provided for in Rev. St. § 5205.—*Delano v. Butler*, 118 U. S. 634, 7 S. Ct. 39, 30 L. Ed. 260; *Mills v. Same*, 118 U. S. 655, 7 S. Ct. 47, 30 L. Ed. 266.

Where a national bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it can reduce the amount of the increase to the amount actually paid; the amount of increase within the maximum being always subject to the discretion of the bank.—*Id.*

The provision of Rev. St. § 5142, that "no increase of capital stock shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount," is not violated where the proposed increase is reduced to the amount actually paid in, and the latter is the amount of increase specified in the notice.—*Aspinwall v. Butler*, 133 U. S. 595, 10 S. Ct. 417, 33 L. Ed. 779.

Where a person subscribes to a certain proposed increase of stock of a national bank, and pays his subscription, he is bound thereby, though the bank, under the provisions of its by-laws to "determine what disposition shall be made of the privilege of subscribing for the new stock" when it has not all been subscribed for within the time given in its notice, limits the amount of the increase to the amount paid in.—*Id.*

Where a subscriber for a proposed increase in the capital stock of a national bank pays and receives a receipt therefor, and is entered on the stock books as a stockholder, she becomes a stockholder, though her certificate of stock, which was made out for her when she should call for it, was not called for or sent to her.—*Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 11 S. Ct. 984, 35 L. Ed. 702; *Thayer v. Butler*, 141 U. S. 234, 11 S. Ct. 987, 35 L. Ed. 711, reversing judgment 144 Mass. 200, 10 N. E. 844.

Her position was not affected by the fact that subsequently thereto, by due proceedings, but unknown to her, the amount of the proposed increase was reduced.—*Id.*

The stockholders of record at the time of the reduction of the capital stock of a national bank, and not those of record at the expiration of its charter, are entitled to the proceeds of the bad or doubtful assets set apart at the time of such reduction, in compliance with the requirement of the Comptroller of the Currency that such assets should be charged off or set aside for the benefit of those who were then stockholders; the bank, after such reduction, being left with its capital stock, as reduced, unimpaired, and a surplus exclusive of the assets in question. Judgment, *Cogswell v. Second Nat. Bank* (1905) 60 A. 1059, 78 Conn. 75, affirmed.—*Jerome v. Cogswell*, 27 S. Ct. 241, 204 U. S. 1, 51 L. Ed. 343.

245. Lien of bank on stock or dividends.

See 6 Cent. Dig. Banks, §§ 909, 910.

A national bank is impliedly precluded from forbidding any transfer of its shares of stock, without the consent of the directors, by a stockholder while he is indebted to the bank, because of the repeal, by Act June 3, 1864, c. 106 (13

Stat. 99), re-enacting, in completed form, the entire law as to national banks, of the provisions of Act Feb. 25, 1863, c. 58 (12 Stat. 665), subjecting transfer of stock in a national bank to debts due by the stockholders to the bank, or permitting the board of directors to provide to that effect. Judgment, *Buffalo German Ins. Co. v. Third Nat. Bank* (1902) 64 N. E. 1119, 171 N. Y. 670, affirmed.—*Third Nat. Bank v. Buffalo German Ins. Co.*, 24 S. Ct. 524, 193 U. S. 581, 48 L. Ed. 801.

246. Rights and liabilities of stockholders in general.

See 6 Cent. Dig. Banks, §§ 911, 912.

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by Rev. St. U. S. § 5211 [U. S. Comp. St. 1901, p. 3498], requiring such banks to make reports to the Comptroller of the Currency, or by section 5240 [U. S. Comp. St. 1901, p. 3516], providing for the appointment of examiners to investigate the condition of such banks, or by section 5241 [U. S. Comp. St. 1901, p. 3517], providing that no such bank "shall be subject to any visitatorial powers other than such as are authorized by this title, or are vested in the courts of justice." Judgment, *Harkness v. Guthrie*, 75 P. 624, 27 Utah, 248, 107 Am. St. Rep. 664, affirmed.—*Guthrie v. Harkness*, 26 S. Ct. 4, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

Stockholder in a national bank cannot recover damages for tearing down its old building and constructing a new one during action by him to restrain it from doing so.—(1912) *Wingert v. First Nat. Bank*, 32 S. Ct. 391, 223 U. S. 670, 56 L. Ed. 605, dismissing appeal (1909) 175 F. 739, 99 C. C. A. 315.

247. Liability of stockholders for debts of bank.

See 6 Cent. Dig. Banks, §§ 913-939.

248. — Nature and extent.

See 6 Cent. Dig. Banks, §§ 913-915, 919-931.

In the absence of evidence of actual fraud or bad faith, the mere pledgee of stock of a national bank is not liable to its creditors as a stockholder, in the event of its failure, where he is not registered as owner, although he has procured a transfer of the stock to an irresponsible person, with the avowed purpose of avoiding such liability.—*Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 4 S. Ct. 525, 28 L. Ed. 478.

The payment of an assessment imposed by a bank on its shareholders under Rev. St. § 5205, in order to continue business and avoid liquidation, is not a discharge of a shareholder's liability in the case of liquidation, under section 5151, for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares.—*Delano v. Butler*, 118 U. S. 634, 7 S. Ct. 39, 30 L. Ed. 260; *Mills v. Same*, 118 U. S. 655, 7 S. Ct. 47, 30 L. Ed. 266.

Under the national banking act, the individual liability of the stockholders is an essential element of the contract by which the stockholders become members of the corporation; and therefore the obligation survives as against the personal representatives of a deceased stockholder.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

As the liability of the stockholder of a national bank is for the contracts, debts, and engagements of the bank, and as these would

draw interest as against the bank, it is not error to allow interest thereon, as against the stockholders, in enforcing the personal liability of the latter.—*Id.*

Defendant was a shareholder in a savings bank when it was converted into a national bank. By Rev. St. § 5154, she became, on the conversion, a shareholder in the national bank. Section 5151 imposes individual responsibility on the shareholders, to the amount of their stock, for debts, contracts, etc., and makes no exception in favor of married women. Section 5152 makes certain exceptions, not including married women. *Held*, that the fact that defendant was a married woman at the time of the transfer of stock, and also at the time the bank failed, did not exempt her from liability.—*Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531.

In an action by the receiver of an insolvent national bank against a shareholder, to recover an assessment made by the comptroller of the currency, where defendant contended that she did not own stock; that transfers to her on the books were made without her knowledge; and that checks for dividends which were apparently indorsed by her were not signed with knowledge of their contents,—the question of fraud in procuring the transfers and indorsements is immaterial, and instructions based thereon are erroneous, since defendant is liable if she learned of the transfers after they were made, and received dividends, or in any way acquiesced therein, and if she signed the checks she is estopped from asserting that she was ignorant of their contents, or was not the owner of the stock on which the dividends were declared.—*Id.*

If defendant indorsed the checks over to her husband, or indorsed them in blank, it is entirely immaterial that their proceeds went to the husband's account as consul general.—*Id.*

Defendant cannot escape liability from the fact that no new certificates were issued to her, as the transfer on the books was sufficient as between her and the bank; nor can she escape from the fact that when the bank was converted from a savings bank into a national bank no new certificates were issued, as the statute authorizing the conversion expressly declares that the shares of the old bank may continue to be for the same amount each as they were before the conversion.—*Id.*

Rev. St. § 5146, disqualifies any person from being a director of a national bank unless he owns at least 10 shares of its stock; and section 5147 requires each director, when elected, to take an oath that he is the owner of the number of shares of stock required, subscribed by him, or standing in his name on the books. Section 5210 requires the president and cashier to cause to be kept a correct list of the names of all the shareholders, and the number of shares held by each. *Held*, that a person who was elected a director, and on the same day appointed vice president and acting cashier, and who served as such for about two months, must be conclusively presumed to have had knowledge of the fact that 50 shares of stock were standing in his name on the books at the time of his election, and during the period of his service; and, the bank having become insolvent, he could not escape individual liability for an assessment of 100 per cent, as the owner thereof, by showing that in fact he had no knowledge that the shares stood in his name until some 20 days before the bank closed its doors, when he at once repudiated their ownership; especially so as the shares were still allowed to stand in his name until the bank closed.—*Finn v. Brown*, 142 U. S. 56, 12 S. Ct. 136, 35 L. Ed. 936, affirming judgment (C. C.) *Brown v. Finn*, 34 F. 124.

One who appears on the official list of the names and residences of the shareholders of a national bank only as "pledgee" of a given num-

ber of shares of the capital stock of such bank, nothing else appearing, is not a shareholder, within the meaning of Rev. St. § 5151, and is not subject to the liability imposed by that section upon shareholders of national banks. 7 C. C. A. 422, 58 F. 666, affirmed.—*Pauly v. State Loan & Trust Co.*, 17 S. Ct. 485, 185 U. S. 606, 41 L. Ed. 844.

The receiver of a national bank cannot recover a dividend paid not at all out of profits, but entirely out of the capital, where the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and where the bank, at the time such dividend was declared and paid, was not insolvent.—*McDonald v. Williams*, 19 S. Ct. 743, 174 U. S. 397, 43 L. Ed. 1022.

The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in division, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable, under Rev. St. U. S. §§ 5139, 5151, 5152, to assessments on the stock in case the bank subsequently becomes insolvent. Judgment *Dent v. Matteson*, 75 N. W. 1041, 73 Minn. 170, affirmed.—*Matteson v. Dent*, 20 S. Ct. 419, 176 U. S. 521, 44 L. Ed. 571.

Enforcing the whole amount of an assessment on national bank stock, to the extent of the distributive share received, against one of the heirs or next of kin to whom the stock has been allotted by the probate court in division, in proportion to their interest in the estate, pursuant to Gen. St. Minn. 1894, § 5918 et seq., does not violate any rights under the federal statutes.—*Id.*

A bank which receives as collateral security for a note the stock of a national bank and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank, and as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt.—*Robinson v. Southern Nat. Bank*, of New York, 21 S. Ct. 383, 180 U. S. 295, 45 L. Ed. 536.

A holder of certificates of stock in a national banking association cannot escape liability as a stockholder to creditors, under Rev. St. § 5151 [U. S. Comp. St. 1901, p. 3465], on the ground that the shares of stock which he holds are part of an increase which was made without compliance with the conditions of Act May 1, 1886, c. 73, 24 Stat. 18 [U. S. Comp. St. 1901, p. 3456], which prohibits the increase of capital until the whole amount of such increase is paid in and the comptroller has certified to that fact even if he has been induced to take such shares by fraud of the officers of the bank and of the comptroller. Judgment, *Scott v. Latimer*, 89 F. 843, 33 C. C. A. 1, 14, affirmed.—*Scott v. Deweese*, 21 S. Ct. 585, 181 U. S. 202, 45 L. Ed. 822.

The illegality of a purchase by a national bank of its own stock does not relieve one who subsequently buys it from the bank from liability as a stockholder. Judgment 97 F. 865, 38 C. C. A. 510, affirmed.—*Lantry v. Wallace*, 21 S. Ct. 878, 182 U. S. 536, 45 L. Ed. 1218.

The comptroller of the currency is authorized to make a second assessment upon the shareholders of an insolvent national banking association, where the first assessment proves insufficient to pay the debts and liabilities of the bank, by Rev. St. U. S. § 5234 [U. S. Comp. St. 1901, p. 3507], empowering him, if necessary to pay the debts of such association, to enforce the individual liability of its shareholders, which, by section 5151 [Id. p. 3465], is measured by the par value of their stock in

addition to the amount invested therein, so long as both assessments do not exceed that amount. Judgment 102 F. 947, 43 C. C. A. 69, affirmed.—*Studebaker v. Perry*, 22 S. Ct. 463, 184 U. S. 258, 46 L. Ed. 528.

A pledgee of national bank stock which he took as collateral security for a loan is not chargeable with the personal liability for the debts of the bank imposed on "shareholders" by Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], unless he has either become the owner of the shares in fact, or has held himself out to be the owner, and thereby estopped himself to deny his personal liability as such. Judgment, *Higgins v. Fidelity Ins. Trust & Safe Deposit Co.*, 108 F. 475, 48 C. C. A. 509, affirmed.—*Rankin v. Fidelity Ins. Trust & Safe Deposit Co.*, 23 S. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

The notes of a national bank, given when embarrassed by pressing demands, in part consideration of the assumption by the payee of all its outstanding obligations, secured by a pledge of all its assets remaining after turning over cash and such bills receivable as the payee would accept at par, are its valid obligations, which can be enforced against its stockholders after voluntary liquidation. Decree *George v. Wallace*, 135 F. 286, 68 C. C. A. 40, affirmed.—*Wyman v. Wallace*, 26 S. Ct. 495, 201 U. S. 230, 50 L. Ed. 738; *Frenser v. Same*, 26 S. Ct. 493, 201 U. S. 244, 50 L. Ed. 742.

Valid obligations of a national bank may, after voluntary liquidation, be enforced against a stockholder who voted against the resolutions looking towards such liquidation, where the requisite amount of stock was voted in favor of that course. Decree *George v. Wallace*, 135 F. 286, 68 C. C. A. 40, affirmed.—*Poppleton v. Wallace*, 26 S. Ct. 493, 201 U. S. 245, 50 L. Ed. 743.

The coverture of the legatee of shares of stock in a national bank when her name was placed upon the bank's books as a stockholder and when she received the certificate of stock does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency to pay the debts of the bank, although a married woman may be incapable, under the local law, of making or binding herself personally by contract, if such law does not incapacitate her from becoming an owner of such stock, by bequest or otherwise. Judgment 134 F. 842, 67 C. C. A. 438, affirmed.—*Christopher v. Norvell*, 26 S. Ct. 502, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740.

Shareholders in a national bank which has extended its corporate existence, conformably to Act July 12, 1882, c. 290, 22 Stat. 162 [U. S. Comp. St. 1901, p. 3457], ceased to be such upon the expiration of the original term of the bank's corporate life, and therefore could not thereafter be chargeable with personal liability for its debts, where they took the steps required of nonassenting stockholders in section 5 of that act by giving notice of a desire to withdraw, and by appointing an appraiser to obtain a valuation of their shares.—(1911) *Apsey v. Kimball*, 31 S. Ct. 695, 221 U. S. 514, 55 L. Ed. 834, affirming judgments (1908) *Same v. Whittemore*, 85 N. E. 91, 199 Mass. 65, and (1908) *Kimball v. Apsey*, 104 F. 830, 90 C. C. A. 634.

249. — Effect of transfer of stock. See 6 Cent. Dig. Banks, §§ 916-918.

In a proceeding in equity by the receiver of a national bank against a former stockholder, alleging a collusive and colorable transfer of his stock to an insolvent in order to avoid personal liability as stockholder, under Act June 3, 1864, c. 106, § 12, it appeared that defendant, having learned of the precarious condition of the bank,

in a confidential interview with the officers thereof, immediately made a transfer of his stock of the par value of \$13,000 to the mother of his deceased wife, a person without means, and who, in testifying, was unable to specify any other consideration than an alleged indebtedness for services in the charge of defendant's household for a period of two and a half years, at the rate of \$1,000 per year, for all the stock, which she claimed to have received at 50 cents on the dollar. Defendant himself was not sworn as a witness. *Held* sufficient evidence of the collusive character of the transfer, and that the defendant was liable to the receiver for the amount of his stock.—*Bowden v. Johnson*, 107 U. S. 251, 2 S. Ct. 246, 27 L. Ed. 386.

Where, upon the failure of a national bank, a suit is brought by a receiver under Rev. St. §§ 5152, 5157, for an assessment upon a shareholder made by the comptroller of the currency to meet the debts of the bank, and it appears that, before the suspension of the bank, such shareholder had made a bona fide sale of his stock and surrendered his certificates, and delivered to its president a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the bank to the purchaser, the receiver cannot recover.—*Whitney v. Butler*, 118 U. S. 655, 7 S. Ct. 61, 30 L. Ed. 266.

A stockholder in a national bank sold certain stocks, several months before the insolvency of the bank, but the transfer was not made on the books till the date of the bank's failure. *Held*, that he did not escape his statutory personal liability for debts of the bank, the stock being, by Rev. St. § 5139, transferable only on the books of the bank.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

Though the original transfer of bank stock was without the transferee's knowledge or consent, acquiescence therein by subsequently joining in an application to have the bank converted into a national bank, and receiving dividends on the stock, makes the transferee liable as a stockholder.—*Keyser v. Hitz*, 183 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531.

A stockholder in a national bank who knows of its existing or impending insolvency cannot escape liability for assessment under Rev. St. § 5151, by transferring the stock with intent to avoid such liability, though the transfer is absolute and to a solvent transferee, able to pay the assessments. Under such circumstances the intent with which the transfer is made is material. 72 F. 402, 18 C. C. A. 618, affirmed.—*Stuart v. Hayden*, 18 S. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

A transfer of stock of a national bank, made with knowledge of the fact that the reserve of the bank is below the limit fixed by Rev. St. U. S. § 5191 [U. S. Comp. St. 1901, p. 3486], does not create a presumption of bad faith which will avoid the transaction as a fraud on the bank's creditors in the event of the future suspension of the bank, since the statute creates no presumption of inability to continue business as a consequence of a reduction of the reserve below the legal requirement. Judgment 107 F. 639, 46 C. C. A. 498, 60 L. R. A. 266, affirmed.—*Earle v. Carson*, 23 S. Ct. 254, 188 U. S. 42, 47 L. Ed. 373.

A bona fide sale of stock of a national bank, made in the exercise of the power given to stockholders by Rev. St. U. S. § 5139 [U. S. Comp. St. 1901, p. 3461], to transfer their stock "like other personal property," was not void as a fraud on the bank's creditors because the bank was insolvent at the time of the transfer in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was

unknown to the seller of the stock at the time of the sale.—*Id.*

The insolvency of the purchaser of shares of stock of a national bank which subsequently suspends business does not render the sale void as in fraud of the bank's creditors, where the insolvency of the purchaser is unknown to the seller.—*Id.*

One who, with knowledge of the insolvency of a national bank, transfers his stock to an irresponsible vendee with intent to evade his liability under Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], for the debts of the bank, can only be held responsible for the unsatisfied debts existing when the fraudulent transfer was made, in view of the requirement of section 5210 [U. S. Comp. St. 1901, p. 3498] that the list of the names and residences of all the shareholders and the number of shares held by each be kept by the bank, subject to the inspection of all shareholders and creditors, and of the provision of section 5139 [U. S. Comp. St. 1901, p. 3461] that every person becoming a shareholder by a transfer of shares to himself shall succeed to all the rights and liabilities of the prior holder of such shares, and that no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired. Decree 134 F. 528, 67 C. C. A. 408, reversed.—*McDonald v. Dewey*, 26 S. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

A stockholder in a national bank cannot evade his liability under Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], for the debts of the bank, by a transfer of his shares of stock to a person financially irresponsible, provided he knew or should have known at the time that the bank was then insolvent.—*Id.*

A colorable transfer of shares of stock in a national bank, made for the benefit of the registered owner, cannot relieve the latter from his liability under Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], as a shareholder, for the debts of the bank.—*Id.*

One who was notified that shares in a national bank had been transferred into his name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency. Judgment (1907) 155 F. 107, 83 C. C. A. 567, affirmed.—*Kenyon v. Fowler*, 30 S. Ct. 409, 215 U. S. 593, 54 L. Ed. 341.

©—250. — Actions and proceedings to enforce.

See 6 Cent. Dig. Banks, §§ 932-939.

A letter addressed to the receiver of a national bank, and signed by the comptroller of the currency, directing the receiver to institute legal proceedings to enforce, against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute, is sufficient evidence that the comptroller decided, before the suit was brought, that it was necessary to enforce the personal liability of the stockholders.—*Bowden v. Johnson*, 107 U. S. 251, 2 S. Ct. 246, 27 L. Ed. 386.

The bill alleging that a married woman is possessed of property in her own right sufficient to pay the assessment, and praying for a decree of payment therefrom, and the bill of revivor filed after her death against her husband, praying for relief out of the assets received by him as her legatee, devisee, or executor, the case is one of equitable cognizance.—*Bundy v. Cocke*, 128 U. S. 185, 9 S. Ct. 242, 32 L. Ed. 396.

Fraudulent representations by which a person is induced to become a stockholder of a national bank constitute no defense in an action at law by a receiver of the bank to enforce the statutory liability of the stockholders, as the defense is of an equitable nature, and must be asserted, if at all, in equity. Judgment 97 F. 865, 38 C. C. A. 510, affirmed.—*Lantry v. Wallace*, 21 S. Ct. 878, 182 U. S. 536, 45 L. Ed. 1218.

The presumption of liability for an assessment on shares of stock in an insolvent national bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank. Judgment 107 F. 639, 46 C. C. A. 498, 60 L. R. A. 266, affirmed.—*Earle v. Carson*, 23 S. Ct. 254, 188 U. S. 42, 47 L. Ed. 373.

Whether a pledgee of national bank stock is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock was retained, is a question for the jury. Judgment, *Higgins v. Fidelity Ins. Trust & Safe Deposit Co.*, 108 F. 475, 46 C. C. A. 509, affirmed.—*Rankin v. Fidelity Ins. Trust & Safe Deposit Co.*, 23 S. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

One who relies upon a sale of shares of stock in a national bank, made with knowledge of its insolvency, to escape his liability as a shareholder under Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], for the debts of the bank, has the burden of proving that the vendee was financially responsible to the extent of the assessment. Decree 134 F. 528, 67 C. C. A. 408, reversed.—*McDonald v. Dewey*, 26 S. Ct. 731, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

252. Rights and liabilities of officers.
See 6 Cent. Dig. Banks, §§ 944-957.

253. — Nature and extent.
See 6 Cent. Dig. Banks, §§ 944-949.

Since the national banking law is silent as to the time when the method by which a director may resign, the common law governs, and where a director verbally resigns to the president, to whom he at the same time sells his stock, giving a power of attorney to transfer it on the books of the bank, which is done, the resignation is effective to release the director from responsibility for the subsequent conduct of the bank's affairs.—*Briggs v. Spaulding*, 141 U. S. 132, 11 S. Ct. 924, 35 L. Ed. 662, affirming decree (C. C.) *Movius v. Lee*, 30 F. 298.

Rev. St. § 5145, providing that directors of national banks shall hold office for one year, and until their successors have been elected and qualified, does not prohibit resignations within the year.—Id.

Act of directors of a national bank, including, as part of resources in report to Comptroller of the Currency, assets which they had been directed by the Comptroller to collect or remove from the bank, is an intentional violation of the bank act, rendering them liable to one purchasing stock of the bank in reliance on such report.—*Thomas v. Taylor*, 32 S. Ct. 403, 224 U. S. 73, 56 L. Ed. 673.

Directors of a national bank, who knowingly make a false financial statement to the Comptroller of Currency under Rev. St. § 5211 (Comp. St. 1913, § 9774), must be deemed to have knowingly violated Rev. St. § 5239 (Comp. St. 1913, § 9831), rendering them civilly liable for deposits received.—*Jones Nat. Bank v. Yates*, 36 S. Ct. 429, 240 U. S. 541, 60 L. Ed.

788, reversing judgment 139 N. W. 844, 1135, 93 Neb. 121.

254. — Actions to enforce liability.
See 6 Cent. Dig. Banks, §§ 950-957.

A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency have all refused to bring such a suit.—*Ex parte Chetwood*, 17 S. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the Comptroller of the Currency, the civil liability prescribed by Rev. St. U. S. § 5239 [U. S. Comp. St. 1901, p. 3515], which provides for the forfeiture of the charter of a national bank as the result of violations of the national bank act by the directors, such violations to be determined only by the federal courts, and makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof. Judgment, *Outcalt v. Jones Nat. Bank* (Neb. 1905) 105 N. W. 287; *Mosher v. Same, Id.*; *Yates v. Bailey, Id.*; *Outcalt v. Same, Id.*; *Mosher v. Same, Id.*; *Yates v. Bank of Staplehurst, Id.*; *Outcalt v. Same, Id.*; *Mosher v. Same, Id.*; *Yates v. Utica Bank, Id.*; *Outcalt v. Same, Id.*; *Mosher v. Same, Id.*, modified.—*Yates v. Jones Nat. Bank*, 27 S. Ct. 638, 206 U. S. 158, 51 L. Ed. 1002.

Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency, made and published conformably to Rev. St. U. S. § 5211 [U. S. Comp. St. 1901, p. 3498], cannot be held civilly liable to any one deceived to his injury by such report, since the exclusive test of such liability is furnished by Rev. St. U. S. § 5239 [U. S. Comp. St. 1901, p. 3515], which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability.—Id.

Facts pleaded in an action for attesting as directors a false report of the condition of a national bank determined the rights of plaintiff, so that recovery is not prevented by designating the action as one for deceit instead of one arising under the national bank act.—*Thomas v. Taylor*, 32 S. Ct. 403, 224 U. S. 73, 56 L. Ed. 673.

A finding that national bank directors making a report to the Comptroller of Currency under Rev. St. § 5211 (Comp. St. 1913, § 9774), had knowledge of the falsity of the report, held sustained by their previous official acts in respect to the business of the bank.—*Jones Nat. Bank v. Yates*, 36 S. Ct. 429, 240 U. S. 541, 60 L. Ed. 788, reversing judgment 139 N. W. 844, 1135, 93 Neb. 121.

255. Criminal responsibility of officers or of persons aiding or abetting them.
See 6 Cent. Dig. Banks, §§ 953-976.

256. — Offenses.

See 6 Cent. Dig. Banks, §§ 958-964, 967.

To constitute a "willful misapplication" of the funds of a national bank by an officer or agent thereof, within the meaning of Rev. St. § 5209, there must be a conversion to his own use, or to the use of some one else. The offense is not committed where the president of a bank uses its funds to purchase shares of its stock, and holds them in trust for it, though such a purchase of its own stock, except to secure a

debt due, is forbidden by law.—*United States v. Britton*, 107 U. S. 655, 2 S. Ct. 512, 27 L. Ed. 520; *Id.*, 108 U. S. 192, 2 S. Ct. 525, 27 L. Ed. 703.

Where an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, the use by the officer of the proceeds of the discount for his own purposes will not be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution, under section 5209, Rev. St.—*United States v. Britton*, 108 U. S. 193, 2 S. Ct. 526, 27 L. Ed. 701.

The declaration of a dividend by the officers of a national bank, in the absence of profits, though prohibited under Rev. St. § 5204, is not a "willful misapplication" of its funds, within Id. § 5209, and is not a criminal offense against the United States, and cannot be the object of a conspiracy to commit such an offense, within Id. § 5440.—*United States v. Britton*, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698.

The forgery of a note, payable at a national bank, for the purpose of deceiving the national bank examiner, does not come within Rev. St. § 5418, which makes it penal to forge any instrument with intent to defraud the United States, or to present a forged instrument at the office of an officer of the United States with such intent.—*Cross v. North Carolina*, 132 U. S. 131, 10 S. Ct. 47, 33 L. Ed. 287, affirming *State v. White*, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

On an indictment under Rev. St. § 5208, for illegally certifying a check while an officer of a bank, and under section 13 of the act of 1882, imposing a penalty upon one "who shall willfully violate," etc., the above section, defendant can show a positive agreement on the part of the officers of the bank that the overdraft caused by such certified check should be practically treated as a loan from day to day, secured by ample collateral, and that before such certified check issued there was deposited in advance an ample amount of cash.—*Potter v. United States*, 155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214, reversing judgment *United States v. Potter*, 56 F. 83.

Rev. St. § 5209, relating to national banks, provides that officers or agents thereof who willfully misapply any of its moneys, or who make any false entry or reports, with intent to injure or defraud it, or to deceive any officer of a bank, or any agent appointed to examine its affairs, and "every person" who, with like intent, aids or abets any officer or agent in any violation of the section, shall be guilty, etc. *Held*, that persons not officers or agents of a national bank may be aiders and abettors of the president of the bank in the violation of such statute.—*Coffin v. United States*, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481.

The president and assistant cashier of a national bank are indictable as principals, under Rev. St. § 5209, for making a false entry in a report, although neither of them actually signed or attested the report.—*Cochran v. United States*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704.

The "liabilities" of a national bank, which are required by Rev. St. § 5211, to be stated in the reports to the comptroller of the currency, include contingent as well as absolute liabilities; and hence an unmatured note, payment of which at maturity is guaranteed by the bank, should be included in the list of liabilities.—*Id.*

The assistant cashier of a bank is indictable under Rev. St. § 5209, for making a false entry in a report to the comptroller, although he is

not one of the officers authorized by section 5211 to make such a report; for he may be regarded as within the category of "clerk or agent," within the terms of section 5209.—*Id.*

One who has an interest in a company for the benefit of which the president of a national bank criminally misapplies its funds may be guilty as an aider and abettor in such misapplication, although the president has no interest in or relation to him, or to said company, and although he has no interest in the bank, or with the president thereof, of any kind.—*Coffin v. United States*, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109, distinguishing *State v. Teahan*, 50 Conn. 92.

It is not necessary to the guilt of aiders and abettors, who are not officers of the bank, that they should have a common purpose with the principal to subserve joint interests with him, by the misapplication of the bank's funds.—*Coffin v. United States*, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109.

Persons who have no official relation to a national bank may be indicted, under Rev. St. § 5209, as aiders and abettors of some officer of the bank in the criminal misapplication of its funds, or in the making of false entries in its books.—*Coffin v. United States*, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109, following 156 U. S. 446, 15 S. Ct. 394, 39 L. Ed. 481.

Where a transaction by a national bank officer with intent to defraud is entered on a deposit slip, entry of the contents of such slip upon the books of the bank by him, or by his direction, is making a "false entry," within Rev. St. § 5209.—*Agnew v. United States*, 17 S. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

A charge that if the defendant "either embezzled or willfully misapplied" the funds or credits, of the bank, "whereby, as a necessary, natural, or legitimate consequence, its capital was reduced, or placed beyond the control of the directors, or its ability to meet its engagements or obligations, or to continue its business, was lessened or destroyed, the intent to injure or defraud the bank may be presumed," is correct.—*Id.*

Rev. St. § 5208, makes it unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon it, unless the drawer has on deposit at the time an amount of money equal to the amount specified therein. Section 13 of the act of July 12, 1882, (22 Stat. 162, c. 290), makes a willful violation of section 5208, criminal, and affixes a penalty thereto. *Held* that, to constitute a "willful" violation of the statute, within the criminal provision, a wrongful intent is essential, and that an officer of a national bank who certified a check drawn thereon, believing in good faith that the drawer had a sufficient deposit in the bank, and having reasonable grounds for such belief, could not be convicted thereunder, though in fact the drawer's account was at the time overdrawn. Judgment 87 F. 701, 31 C. C. A. 202, reversed.—*Spurr v. United States*, 19 S. Ct. 812, 174 U. S. 728, 43 L. Ed. 1150.

The Comptroller of the Currency is an agent within the provisions of Rev. St. U. S. § 5209 (U. S. Comp. St. 1901, p. 3497), that every officer of a national bank who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that Rev. St. § 5240 (U. S. Comp. St. 1901, p. 3516), confers power upon him to appoint suitable agents to examine the affairs of such banks. Judgment (D. C. 1908) 162 F. 687, reversed.—*United States v. Corbett*, 30 S. Ct. 81, 215 U. S. 233, 54 L. Ed. 173.

Intent to injure a bank by a false report to the Comptroller of the Currency is not negatived as matter of law by the fact that the re-

port showed the bank to be in better condition than it really was.—Id.

257. — Prosecution and punishment.

See 6 Cent. Dig. Banks, §§ 965, 966, 970-976.

An indictment of the president of a national bank, under Rev. St. § 5209, for making a false entry in its account books, "to injure and defraud said association, and certain persons to the grand jurors unknown," following the language of the statute, sufficiently charges the intent with which the offense was committed, and is not repugnant or impossible.—United States v. Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. Ed. 520.

An indictment of the president of a national bank, under Rev. St. § 5209, charging him with having made a false entry in one of its account books known as "Profit and Loss No. 6," as follows: "Richard L. Dickson, 182 days' int., 8 per cent., 132,673.49, to July 1, '76,—5,365.88;" purporting thereby to show that \$5,365.88 had been received by said association on account of interest due from said Dickson, with intent to defraud the association, or to deceive any agent appointed to examine its affairs,—is not defective because it fails to allege that the entry was in an account of and in the due course of business of the bank, or that the interest in question was due; or on the ground that the entry is without significance, and unintelligible; or that it is not calculated to deceive a bank examiner; or because it is not alleged that, at the time the entry was made, an examiner had been appointed.—Id.

In an indictment charging the president of a national bank with the "willful misapplication" of its funds, by buying therewith certain shares of its stock, the exception contained in the section prohibiting a national bank from purchasing its own shares, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, must be negated.—Id.

An indictment charging that defendant, president of a national bank, "procured" a note to be discounted, well knowing the maker and indorser thereof to be insolvent, implies that he submitted it to its directors or other authorized officers, and does not charge a misapplication of the funds of the bank, under Rev. St. § 5209.—United States v. Britton, 108 U. S. 193, 2 S. Ct. 526, 27 L. Ed. 701.

An indictment charging that defendant, president of a national bank, permitted a depositor, who was indebted to the association, and whom he knew to be insolvent, to withdraw his deposit, and failed to cause it to be applied to the indebtedness, without alleging that he was the duly authorized officer of the association whose duty it was to look after the accounts of depositors, fails to charge a willful misapplication of the funds of the bank, under Rev. St. § 5209.—Id.

Under Rev. St. § 5209, punishing the president, cashier, or agent of any national bank who shall embezzle, abstract, or willfully misapply any of its funds, with intent to injure or defraud the bank, or any other person, or to deceive any officer of the bank, the offense of abstracting the funds of the bank under this section is not so equivalent to the offense of larceny that, in an indictment for the abstracting, the offense must be described by the words used to describe larceny.—United States v. Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. Ed. 664.

An indictment under Rev. St. § 5209, charging the defendant with committing the offense charged as president and agent, is good.—Id.

An indictment under Rev. St. § 5209, charging that the funds alleged to have been embezzled were at the time in the possession of the defendant as president and agent, means

that they had come into his possession in his official character, so that he held them in trust for the bank, and fully and exactly describes the offense of embezzlement under the act. But so far as the indictment charges defendant with a willful misapplication of the funds of the bank, it is not necessary to allege that they had previously been intrusted to the defendant.—Id.

Under Rev. St. § 5209, punishing any person aiding or abetting any officer, clerk, or agent in the misapplication of the funds of a bank, an indictment charging the president of the bank with aiding and abetting one who is alleged to be cashier to misapply the funds of the bank need not charge that the president knew that such person was cashier.—Id.

An indictment under Rev. St. § 5209, charging one with the offense as president of a certain national bank, "duly organized and doing business at the village of," etc., sufficiently states that the bank was organized under the national banking act to carry on the business of banking.—Id.

Under Rev. St. § 5209, making it a misdemeanor for any officer or agent of a national bank to embezzle, abstract, or misapply any moneys, funds or credits thereof, an indictment is sufficient which avers that the defendant was president of a national bank; that by virtue of his office he took into his possession certain bonds (fully described), the property of the bank; and that, with intent to injure and defraud the association, he embezzled the bonds, and converted them to his own use.—Claassen v. United States, 142 U. S. 140, 12 S. Ct. 169, 35 L. Ed. 968.

An indictment for willfully misapplying funds of a national bank (Rev. St. § 5209), charging in general words fraudulent misapplication and intent to defraud the bank, and describing specifically funds misapplied and the manner of misapplication, need not negative every possible theory consistent with an honest purpose in the disposition of the funds specified.—Evans v. United States, 153 U. S. 584, 14 S. Ct. 934, 38 L. Ed. 830; Id., 153 U. S. 608, 14 S. Ct. 939, 38 L. Ed. 839.

On trial of a national bank president on an indictment containing 25 counts, charging false entries in the books of the bank, running from February to December, 1892, with intent to injure, defraud, or deceive, in violation of Rev. St. § 5209, it was not error to permit a witness, from an examination of the bank's books, to testify to the condition of defendant's private account during such time, though he was convicted only on one count, which charged the making of the entry in February, 1892.—Allis v. United States, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

Where, in such case, a bookkeeper testified to making false entries by defendant's direction, defendant was not prejudiced by the refusal of the court to permit such witness to testify on cross-examination whether he did not put into a report prepared by him in September, in the absence of defendant from the state, the false entry made in December, and charged in a count on which defendant was acquitted.—Id.

An indictment under Act July 12, 1882, c. 290, § 13, amendatory of Rev. St. § 5208, which makes it a misdemeanor for any officer of a national bank to "certify any check" drawn by one who did not then have on deposit sufficient money to meet the same, need not allege delivery of the check by the bank after the certification.—Potter v. United States, 155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214, reversing judgment United States v. Potter (D. C.) 56 F. 83.

An indictment of persons for aiding and abetting a president of a national bank in misapplying its funds and making false entries in

its books, with intent to defraud it, in violation of Rev. St. § 5209, need not specifically set out the act or acts by which the aiding and abetting were consummated.—*Coffin v. United States*, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481.

An indictment of H. and other persons for violation of Rev. St. § 5209, averred that "said H., then and there being president" of a certain national bank, "by virtue of his said office as president aforesaid," "misapplied the funds" with intent to defraud, etc., and that such other persons did unlawfully, feloniously, "knowingly," and with intent to defraud, aid and abet the "said H. as aforesaid." *Held*, that the indictment averred that the aiders and abettors knew that H. was president of the bank at the time it is averred the acts were committed.—*Id.*

Such indictment charged that H. did misapply the moneys of the bank with intent to convert a certain sum to the use of a specified company, by causing it to be paid out of the moneys of the bank on a check drawn on the bank by such company, which check was then and there cashed and paid out of the bank's funds, which sum, and no part thereof, was such company entitled to withdraw from the bank, because it had no funds therein, and that said company was then and there insolvent, as H. well knew, whereby said sum became lost to the bank. *Held*, that the indictment averred the actual conversion of the sum misapplied.—*Id.*

Where an indictment charged that a bank president received and placed to the credit of a company a bill of exchange of a certain number of pounds sterling, and the check offered to show the payment of such money was for dollars, there was no variance, where the sum misapplied was credited by taking the bill of exchange, and such sum was paid out on the check.—*Id.*

An indictment under Rev. St. § 5209, for willfully misapplying the moneys, funds, and credits of a national bank, of which defendant was president, as well as a director and agent, must supplement the allegation of willful misapplication by allegations showing how the misapplication was made, and that it was an unlawful one.—*Batchelor v. United States*, 156 U. S. 426, 15 S. Ct. 448, 39 L. Ed. 478.

An indictment under Rev. St. § 5209, for making a false entry in a report to the comptroller, need not allege that such report was made by the banking association, or that it was actually verified by the oath or affirmation of the president or cashier, or attested by the directors, as required by section 5211; but it is sufficient to aver that defendant made such false entry "in a certain report of the condition of the First National Bank, * * * made to the comptroller of the currency in accordance with the provisions" of Rev. St. § 5211.—*Cochran v. United States*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704.

A bank president was indicted in New Hampshire for unlawfully converting the moneys of his bank. It appeared that he obtained the money from a bank in Massachusetts, with which his own bank had deposits, by means of checks drawn and collected in Massachusetts; that he had no authority to draw such checks; and that the withdrawal of the money was ratified by the bank officials in New Hampshire on false representations by him as to the use made of the money. *Held* sufficient to justify the court in leaving to the jury the question whether there was such an infirmity in the checks as made the subsequent ratification in New Hampshire one of the efficient causes of the absorption of the bank's credit, so that the same might be regarded as the consummation of the offense

in that state.—*Putnam v. United States*, 162 U. S. 687, 16 S. Ct. 923, 40 L. Ed. 1118.

An indictment for aiding and abetting one H., the president of a bank, in the criminal misapplication of its funds, charged that, on a specified date, the said H. misapplied a named sum, by causing the same to be paid out on the checks of a company having no moneys in the bank. The aiding and abetting clause charged that the accused did "on [specifying the same date] aid and abet said H., as aforesaid, to wrongfully," etc., misapply the moneys of the bank, "to wit," specifying an identical sum. *Held*, that the language sufficiently connected the acts charged against accused with the offense against H.—*Coffin v. United States*, 162 U. S. 684, 16 S. Ct. 943, 40 L. Ed. 1109.

If a violation of the statute is committed by an officer of the bank and by an outsider, the officer must be prosecuted as the principal, and the other can only be prosecuted, under the terms of the statute, as an aider and abettor.—*Id.*

On the trial for aiding the president of a bank in misapplying its funds and making false entries in its books, the jury were charged that if the president did knowingly make, or cause to be made, the false entries, they could not find defendants guilty as aiders, unless defendants, with like intent, did something showing their consent to and participation in the "unlawful and criminal acts" of the president. *Held* not open to the objection that the expression "unlawful and criminal acts" might have been understood as relating to unlawful acts of the president generally.—*Id.*

An indictment for aiding an officer of a bank in making false entries, etc., is not defective because it charges the principal with having made the entries with intent to defraud the bank, and also with intent to deceive examining agents, whereas it merely charges the aider with an intent to deceive such agents; for it is immaterial that the principal may have had several intents, if both principal and aider were actuated by the criminal intent to deceive such agents.—*Id.*

Under an indictment for aiding a bank president in violating the banking laws, the jury were instructed that, to make defendants guilty, they must have done something "showing their consent to or participation in" the unlawful acts of the president. *Held*, that the jury could not have understood that the acts of the president were to be treated by them as criminal acts; nor could they have been misled by the use of the disjunctive "or" into supposing that mere consent of defendants to his unlawful acts would be sufficient to render them guilty.—*Id.*

Evidence of the commercial rating of a president of a bank at the time of an alleged conversion by him of its funds, by purchasing for the bank, without authority, and having placed to his credit, worthless bonds, which he had guaranteed; and the testimony of the cashier of another bank as to whether, at the time of the transaction, he considered defendant's guaranty for such an amount good,—are irrelevant.—*Agnew v. United States*, 17 S. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

It is not reversible error to refuse to charge that, if defendant used the proceeds of a check belonging to the bank, and which he had caused to be placed to his credit, in the payment of a debt of the bank, the jury must find that he did not fraudulently embezzle the amount, especially where defendant's explanation of the transaction is unsatisfactory.—*Id.*

A charge to the effect that, if defendant, a bank president, purchased bonds which were worthless, or of but little value, placed them among the assets of the bank at a greatly exag-

gerated value, and had such exaggerated value placed to his own credit, these facts create a presumption of an intent to defraud the bank, which "throws the burden of proof upon the defendant," and that evidence to overcome the presumption "must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent." is not error, where the character of such evidence and the nature of a reasonable doubt are sufficiently explained in other portions of the charge.—*Id.*

The evidence showed that defendant, president of a national bank, without authority of the directors, purchased \$20,000 bonds, of little value, at a great discount, and had them placed in the assets of the bank and to his credit at face value, giving his written guaranty for the principal and interest, which, by reason of his financial condition, was almost worthless. *Held*, that it was not error to refuse to charge that, from the guaranty, the jury might find that there was no intent to defraud the bank.—*Id.*

When an officer of a national bank, indicted under Rev. St. § 5209, for making false entries, in a report of the condition of such bank, in respect to amounts of overdrafts and of loans and discounts, has testified that certain overdrafts, in respect to which the depositors had consulted the bank officers, and obtained permission to overdraw, were treated by the officers and directors of the bank as temporary loans, and were reported by him among loans, and not among overdrafts, in the belief that they might properly be so reported, it is error to charge the jury that the defendant was required by law to place under the heading "Overdrafts," in the report, all sums drawn out by depositors in excess of their deposits, and that the transfer of any such sums to the heading "Loans and Discounts" was the making of a false entry; since such charge takes from the jury the right to consider, upon the question of intent, the explanation given by the defendant, while, if they believed such explanation, and that the defendant acted in good faith, the entries were not false, within the meaning of the statute. *Mr. Justice Harlan dissenting.*—*Graves v. United States*, 17 S. Ct. 393, 165 U. S. 323, 41 L. Ed. 732.

In a prosecution of the president of a national bank for certifying checks drawn on the bank by a firm which did not have a sufficient deposit at the time to meet such checks, the defense was that defendant acted in good faith, and in reliance on the statements of the cashier and bookkeeper that the drawers had a sufficient deposit. After several hours deliberation the jury returned into court, and asked for "the law as to the certification of checks when no money appeared to the credit of the drawer." The court read to them the provision of Rev. St. § 5208, which makes it unlawful to certify checks under such circumstances, but, although requested by defendant's counsel, did not read the provisions of the act of July 12, 1882 (22 Stat. 162, c. 290), under which the prosecution was brought, and which makes the criminal offense consist in "willfully" violating Rev. St. § 5208. *Held*, that such action of the court was error, as tending to mislead the jury, and was not cured by a statement that what the court then said was to be taken in connection with the previous charge, which charge correctly stated the necessity of finding that defendant acted willfully, with knowledge of the facts, or that he purposely refrained from inquiry, to warrant a conviction. Judgment 87 F. 701, 31 C. C. A. 202, reversed.—*Spurr v. United States*, 19 S. Ct. 812, 174 U. S. 728, 43 L. Ed. 1150.

An indictment for the willful misapplication of funds of a national bank by an officer, with intent to defraud, in violation of Rev. St. U. S. § 5209 (U. S. Comp. St. 1901, p. 3497), by receiving and discounting with its money an absolutely unsecured promissory note of a named partnership, whereby the proceeds of

the discount of the note were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount, provided it does allege a conversion by such officer.—*United States v. Heinze*, 31 S. Ct. 93, 218 U. S. 532, 54 L. Ed. 1139, 21 Ann. Cas. 884.

A conversion is charged by the allegation of an indictment for willful misapplication of the funds of a national bank, in violation of Rev. St. U. S. § 5209 (U. S. Comp. St. 1901, p. 3497), that defendant, being president of the bank, and having control of its funds, with intent to injure and defraud, received and discounted a promissory note for a specified sum, for his use, benefit, and advantage, knowing that the note was wholly unsecured, whereby the proceeds of the discount were wholly lost to the bank.—*Id.*

258. Banking powers.

A national bank acts within scope of its power, under Rev. St. § 5136 (U. S. Comp. St. 1901, p. 3455), where it accepts assignment of judgment for collection, subject to order of assignor, and where the attorney pays the amount to a third person, the bank may sue in its own name under the local law, to recover the proceeds from the attorney.—(1912) *Miller v. King*, 32 S. Ct. 243, 223 U. S. 505, 56 L. Ed. 528, affirming judgment (1908) *King v. Miller*, 97 P. 542, 53 Or. 53.

259. Property and conveyances.

See 6 Cent. Dig. Banks, §§ 980-982.

Rev. St. § 5137, authorizes a national bank to purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted. *Held*, that where a national bank, in order to secure the same debt, purchases other real estate not mortgaged to it, it does not affect the title to the land it was authorized to purchase.—*Reynolds v. First Nat. Bank*, 112 U. S. 405, 5 S. Ct. 213, 28 L. Ed. 733.

A loan of money made by a national bank on the security of a mortgage is not in violation of the national banking act, and may be enforced.—*Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 5 S. Ct. 234, 28 L. Ed. 764.

Under the last clause of Rev. St. § 5136, forbidding a national bank, which has filed its articles of association and certificate of organization with the comptroller, from transacting "any business, except such as is incidental and necessarily preliminary to its organization," until authorized by the comptroller to begin the business of banking, a lease by a national bank before receiving such authorization, of a bank building, is ultra vires, and will not support an action for rent or for anything beyond the value of what the bank has actually received and enjoyed. 44 N. E. 381 affirmed.—*McCormick v. Market Nat. Bank of Chicago*, 17 S. Ct. 433, 165 U. S. 538, 41 L. Ed. 817.

260. Contracts and dealings in general.

See 6 Cent. Dig. Banks, §§ 977, 978, 983, 984, 986½-990.

A national bank has no power to deal in stocks, and cannot, therefore, acquire the stock of another corporation, except as incidental to its power to lend money on personal security.—*California Nat. Bank v. Kennedy*, 17 S. Ct. 831, 167 U. S. 362, 42 L. Ed. 198.

A national bank is without power to purchase, as an investment, with its surplus funds, and to hold as such, shares of stock in another national bank. Judgment, 79 F. 51, 24 C. C. A. 444, reversed.—*First Nat. Bank of Concord, N. H., v. Hawkins*, 19 S. Ct. 739, 174 U. S. 364, 43 L. Ed. 1007.

It is ultra vires of a national bank to take stock in a corporation organized to embark in the purely speculative business of buying and

selling the stocks and assets of an existing and insolvent corporation, with power, but without the obligation, to engage, as an independent enterprise, in a manufacturing business, although the bank takes such stock in exchange for a claim against the insolvent corporation.—*First Nat. Bank v. Converse*, 26 S. Ct. 306, 200 U. S. 425, 50 L. Ed. 537.

A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold.—*Merchants' Nat. Bank of Cincinnati v. Wehrmann*, 26 S. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036.

A national bank has no power to invest its surplus fund in the stock of another national bank, and cannot be assessed thereon as a stockholder, although it actually made the purchase and held and received dividends on the stock. Judgment 132 F. 658, 65 C. C. A. 620, affirmed.—*Shaw v. National German-American Bank of St. Paul, Minn.*, 26 S. Ct. 750, 199 U. S. 603, 50 L. Ed. 328.

An agreement between a national bank and the state to pay on the basis of average deposits, the tax imposed under P. S. Vt. §§ 804-820, on interest-bearing deposits, and relieve its depositors from making returns, is not ultra vires of the bank.—*Clement Nat. Bank v. State of Vermont*, 34 S. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment *State v. Clement Nat. Bank*, 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

—261. Effect of acts ultra vires.

See 6 Cent. Dig. Banks, §§ 991-1000.

A national bank loaned money upon shares of its own stock as collateral security, and, upon default in payment, sold the stock, and applied the proceeds as a credit. *Held*, in an action by the debtor to recover the proceeds as having been unlawfully converted, that, if the illegality of loans on such security, under Rev. St. U. S. § 5201, can be urged at all, except by the government, it can only be done while the contract is still unexecuted; after the stock is sold, and the proceeds applied to the debt, the courts will not interfere.—*First Nat. Bank v. Stewart*, 107 U. S. 676, 2 S. Ct. 778, 27 L. Ed. 592.

Though the national bank act does not authorize a bank to enter into a contract to buy certain bonds and return them to the seller at the purchase price, yet when the amount which it paid for the bonds is tendered back to it, and their surrender demanded, its authority to retain them no longer exists; and the fact that the contract under which it obtained them may be illegal will not prevent the seller from maintaining an action for their value, as such action is not in affirmance of the contract, but in disaffirmance of it, and to prevent the bank from retaining the benefit which it has derived from its unlawful act.—*Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 11 S. Ct. 496, 35 L. Ed. 107, affirming judgment 3 S. W. 122.

Rev. St. § 5208, which makes it unlawful for any national bank to certify any check unless the drawer has on deposit money sufficient to meet the same, but declares that a check so certified shall be a valid obligation against the bank, does not, as between the parties, invalidate a pledge of bonds made by the drawer of such checks to secure the indebtedness thereby created from him to the bank, when the transaction has been completed by payment of the checks.—*Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 13 S. Ct. 66, 36 L. Ed. 956, affirming judgment 113 N. Y. 325, 21 N. E. 57.

Plaintiff's testator deposited with a firm of brokers certain bonds as margins for purchases of stocks, and the brokers, without his knowledge, delivered them to a bank under a standing

agreement, previously made, that, if the brokers became indebted to the bank it might at any time, in its discretion, sell any collateral held by it to secure such debt. On the day of the pledge, but not in pursuance of any agreement made at the time of receiving the bonds, the bank, on the faith of the bonds, certified and subsequently paid certain checks drawn by the brokers. The bank took the bonds in good faith, without notice of the testator's title. *Held*, that the bonds were a valid security for the debt created by the certified checks, notwithstanding that the certification was in violation of Rev. St. § 5208, which makes it unlawful for any national bank to certify any check unless the person drawing the same on deposit sufficient money to meet it; and plaintiff could not recover the bonds without first paying the debt.—*Id.*

The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, being void, cannot be ratified, and therefore the bank is not estopped to deny its liability for the debts of such corporation, though it has received dividends on the stock.—*California Nat. Bank v. Kennedy*, 17 S. Ct. 831, 167 U. S. 362, 42 L. Ed. 198.

A national bank which itself purchased notes it had been authorized by the owner to sell to a third party, and which thus became, under general principles of law, liable for their value as for conversion, is not protected from such liability by the national banking act, even though it was not within its powers to act as agent for the sale of the notes.—*First Nat. Bank of Grand Forks v. Anderson*, 19 S. Ct. 284, 172 U. S. 573, 43 L. Ed. 558.

A national bank, which, as a matter of fact, purchased, and held as an investment, shares of stock in a second national bank, and received dividends thereon, is not thereby estopped to plead the unlawfulness of its action in defense to an action by the receiver of the second bank, after its insolvency, to collect an assessment made on the shareholders by the comptroller. The contract by which it assumed to become a shareholder, being ultra vires and in contravention of the policy of the statute, was not merely voidable, but void, and could not be given validity, nor made the foundation of any right of action, by any subsequent ratification or act of performance. Judgment 79 F. 51, 24 C. C. A. 444, reversed.—*First Nat. Bank of Concord, N. H., v. Hawkins*, 19 S. Ct. 739, 174 U. S. 364, 43 L. Ed. 1007.

If it be conceded that the liability of a shareholder in a national bank to respond to an assessment in case of insolvency is statutory, and not contractual, such fact does not affect the question of the liability of another national bank, holding stock in the insolvent bank as an investment, without authority of law, for such an assessment, as congress cannot reasonably be presumed to have intended to subject the stockholders and creditors of the defendant bank to a liability, the power to assume which it had denied to the bank for their protection.—*Id.*

Want of authority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder.—*First Nat. Bank v. Converse*, 26 S. Ct. 306, 200 U. S. 425, 50 L. Ed. 537.

The want of authority of a national bank to become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold, is a valid defense to an action against it founded upon its liability for the partnership debts.—*Merchants' Nat. Bank of Cincinnati v. Wehr-*

mann, 26 S. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036.

A national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty is beyond its powers under the national banking statutes. Judgment, Appleton v. Citizens' Cent. Nat. Bank of New York (1908) 83 N. E. 470, 190 N. Y. 417, affirmed.—Citizens' Cent. Nat. Bank of New York v. Appleton, 30 S. Ct. 364, 216 U. S. 196, 54 L. Ed. 443.

The United States alone can object to the want of authority of a national bank, under Rev. St. U. S. § 5137 (U. S. Comp. St. 1901, p. 3460), to accept a conveyance of real property to be held in trust.—(1910) Kerfoot v. Farmers' & Merchants' Bank, 31 S. Ct. 14, 218 U. S. 281, 54 L. Ed. 1042, affirming decree Hall v. Same (1898) 46 S. W. 1000, 145 Mo. 418.

262. Representation of bank by officers.

See 6 Cent. Dig. Banks, §§ 1001-1008.

The officers of a national bank which has gone into liquidation, having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such bank that its guaranty, made before liquidation, of certain notes, shall not be discharged by a change in the security of such notes and the release of the principal debtor, creates no liability on the part of the stockholders.—Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 10 S. Ct. 238, 33 L. Ed. 564.

Where the cashier of a national bank, in his official capacity, draws checks on the bank's correspondent in favor of his own creditor, and to be applied to his individual use, the payee will be liable to the bank for the money thus wrongfully applied, unless authority to the cashier to so apply the bank's funds is affirmatively shown.—Kissam v. Anderson, 12 S. Ct. 960, 145 U. S. 435, 36 L. Ed. 765, reversing judgment (C. C.) Anderson v. Kissam, 35 F. 699.

The vice president and general executive officer of a national bank has no power to borrow so large a sum as \$200,000 at four months' time for the bank in the absence of special authority from the board of directors, and persons dealing with him are presumed to know the extent of his powers in this regard.—Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. Ed. 470.

The president of a national bank has not necessarily, by virtue of his office, power to draw checks against an account kept by his bank with another bank.—Putnam v. United States, 162 U. S. 687, 16 S. Ct. 923, 40 L. Ed. 1118.

The executive officers of a national bank may legitimately borrow money for the bank's use, in the usual course of business without special authority from their board of directors. Judgment, Cherry v. City Nat. Bank of Kansas City, Mo. (1906) 144 F. 587, 75 C. C. A. 343, affirmed.—Rankin v. City Nat. Bank of Kansas City, Mo., 28 S. Ct. 346, 208 U. S. 541, 52 L. Ed. 610.

263. Deposits in general.

See 6 Cent. Dig. Banks, §§ 935, 1123.

A promissory note was executed to a national bank in consideration of the amount being placed to the credit of the maker on the books of the bank. The maker thought, and had good reason for thinking, that the bank was solvent,

but the managing officer of the bank knew it to be insolvent. Before the note matured, the charter was forfeited for insolvency, and a receiver appointed. Held, that the undrawn balance should be allowed as an equitable set-off to the note, and such allowance is not a "preference" forbidden by the national banking law. Rev. St. §§ 5234, 5236, 5242.—Scott v. Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059, reversing (C. C.) Armstrong v. Scott, 36 F. 63.

A bank which, in order to deceive a bank examiner, discounts the note of a president of another national bank and places the proceeds to the credit of his bank in a special account, not subject to check, does not, by charging the note against the account, in accordance with the agreement, without knowledge of the other bank's failing condition, become liable to the receiver of such other bank as for a conversion, on the theory that, because such president drew his check on the other bank for the full amount, and deposited it to his credit in his own bank, and, by means of a corresponding check against his personal account, removed from the assets of his bank certain notes objected to by the bank examiner, the transaction must be regarded as really a loan to the president, secured by an attempted pledge of the funds of his bank. Judgment, Cherry v. City Nat. Bank of Kansas City, Mo. (1906) 144 F. 587, 75 C. C. A. 343, affirmed.—Rankin v. City Nat. Bank of Kansas City, Mo., 28 S. Ct. 346, 208 U. S. 541, 52 L. Ed. 610.

268. Collections.

See 6 Cent. Dig. Banks, §§ 539-617, 619-653, 979.

Where a national bank has, during a series of years, kept an account with another bank, against which it has drawn in the daily course of its business, and has also constantly made remittances to its correspondent, through the mails, in the form of checks of third parties, for collection and credit to its said account, there is an implied general agreement and understanding that such remittances are in the nature of payments on account, and their deposit in the mail is a delivery to the correspondent, whose property therein is not destroyed or impaired by the suspending of the sending bank or the appointment of a receiver therefor before their actual receipt; nor is it affected by the fact that in case the paper remitted should be destroyed in transmission, or prove uncollectible, the loss would fall upon the remitting bank. Decree Hayden v. Chemical Nat. Bank, 84 F. 874, 28 C. C. A. 548, affirmed.—McDonald v. Chemical Nat. Bank, 19 S. Ct. 787, 174 U. S. 610, 43 L. Ed. 1106.

269. Loans and discounts.

See 6 Cent. Dig. Banks, §§ 1014-1022.

A national bank which uses in its business money obtained by its vice president as a loan to it from another national bank cannot escape liability to account therefor upon the ground that the loan was not negotiated by it or by its direction, or that it could not itself have legally borrowed the money. Decree Armstrong v. Chemical Nat. Bank, 83 F. 556, 27 C. C. A. 601, affirmed.—Aldrich v. Chemical Nat. Bank, 20 S. Ct. 498, 176 U. S. 618, 44 L. Ed. 611.

270. Interest or rate of discount, and usury.

See 6 Cent. Dig. Banks, §§ 1023-1053.

Under Rev. St. § 5198, which provides that, where a national bank charges a greater rate of interest than is allowed by the state where the bank is located, the person by whom such usurious interest is paid "may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid," neither principal nor surety can set off, in an action on a promissory note, usurious interest paid on the

note.—*Stephens v. Monongahela Nat. Bank of Brownsville, Pennsylvania*, 111 U. S. 197, 4 S. Ct. 336, 337, 28 L. Ed. 399, 400.

Under Rev. St. § 5198, so long as usurious interest contracted for by a national bank is actually unpaid, it remains interest "agreed to be paid," though incorporated as principal in renewal notes, and renders uncollectible on the debt anything in excess of the principal sum originally loaned. Judgment (Ky.) 35 S. W. 926, reversed.—*Brown v. Marion Nat. Bank of Lebanon, Ky.*, 18 S. Ct. 390, 169 U. S. 416, 42 L. Ed. 801.

The rate of interest which a national bank may charge in Arizona is not limited to 7 per cent. by Rev. St. U. S. §§ 5197, 5198, authorizing such banks to charge interest at the rate allowed by the laws of the state or territory where they are located, and allowing only 7 per cent. if no rate is fixed by such laws, although St. Ariz. §§ 2161, 2162, allow parties to agree upon any rate, and in default of any agreement to take 7 per cent. only, since under these statutes any rate which may be agreed upon is thereby "fixed" by the law. Judgment 53 P. 201, 5 Ariz. 409, affirmed.—*Daggs v. Phoenix Nat. Bank*, 20 S. Ct. 732, 177 U. S. 549, 44 L. Ed. 882.

Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, cannot be set off in an action upon the note, as the remedy provided by Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], where such usurious interest has been actually paid,—viz., a recovery in an action in the nature of an action of debt of twice the amount of the interest thus paid,—is exclusive. Judgment, *Central Nat. Bank v. Haseltine*, 55 S. W. 1015, 155 Mo. 58, 85 Am. St. Rep. 531, affirmed.—*Haseltine v. Central Nat. Bank of Springfield*, 22 S. Ct. 50, 183 U. S. 132, 46 L. Ed. 118.

Twice the amount of the entire interest paid, and not twice the sum by which the interest received exceeded the lawful rate, is the measure of recovery from a national bank for collecting usurious interest, under Rev. St. § 5198 [U. S. Comp. St. 1901, p. 3493], providing for a forfeiture of the entire interest whenever taken, received, reserved, or charged at a usurious rate, and for the recovery, "in case the greater interest has been paid," of twice the amount of the interest thus paid. Judgment, *Watt v. First Nat. Bank*, 82 N. W. 1118, 79 Minn. 266, affirmed.—*First Nat. Bank v. Watt*, 22 S. Ct. 457, 184 U. S. 151, 46 L. Ed. 475.

No recovery, under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], of twice the amount of usurious interest alleged to have been paid to a national bank, can be had on the theory that because, in a decree of foreclosure, in which was deducted from the sum sued for the interest charged in excess of the legal rate, was included the remaining legal interest, which under that section was subject to forfeiture, illegal interest was paid by a sale under foreclosure on such judgment, since it is the interest charged, and not the interest as to which a forfeiture might be enforced, that the statute regards as illegal. Judgment 76 N. W. 726, 106 Iowa, 361, affirmed.—*Talbot v. First Nat. Bank*, 22 S. Ct. 612, 185 U. S. 172, 46 L. Ed. 857.

A controversy respecting usurious interest paid on a note held by a national bank, secured by collateral note and mortgage, which arises in a suit to foreclose the mortgage, is none the less governed by the federal law on the subject of usury by national banks, as expressed in Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], affording the remedy of an independent action to recover back the usurious payments, because the collateral note and mortgage were executed in favor of the bank president for the benefit

of the bank, which was prohibited by the federal law from taking real estate security for a debt coincidentally contracted. Judgment, *Gadsden v. Thrush*, 89 N. W. 403, 63 Neb. 881, reversed.—*Schuyler Nat. Bank v. Gadsden*, 24 S. Ct. 129, 191 U. S. 451, 48 L. Ed. 258.

A national bank, which has made a 12 per cent. charge on overdrafts, where 8 per cent. is the highest rate of interest permitted by the state laws, cannot escape the forfeiture prescribed by Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], where a greater rate of interest is charged than the state laws allow, because of the trifling amount, or on the theory that the charge is a penalty because of the failure to pay a debt when due. Judgment (Sup.) 72 S. W. 925, 172 Mo. 384, affirmed.—*Citizens' Nat. Bank of Kansas City v. Donnell*, 25 S. Ct. 49, 195 U. S. 369, 49 L. Ed. 238.

By compounding interest oftener than is permitted by Rev. St. Mo. § 3711, a national bank charges interest at a higher rate than that allowed by the laws of the state, within the meaning of Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493], fixing the rate which national banks may charge, although the compounded interest is less than the state laws permit to be charged directly without compounding.—Id.

A national bank, whose action on a promissory note is met by the plea of usury, may not avoid the forfeiture of the entire interest, imposed by Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], in absolute terms, by declaring an election to remit the excessive interest.—Id.

The giving of a renewal note will not sustain a recovery from a national bank, under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], on account of usurious interest in the original note, since the payment contemplated by that statute is an actual payment, and not a further promise to pay. Judgment, *Lasater v. First Nat. Bank* (Civ. App.) 72 S. W. 1054, reversed.—*First Nat. Bank v. Lasater*, 25 S. Ct. 206, 196 U. S. 115, 49 L. Ed. 408.

273. Actions by or against national banking associations.

See 6 Cent. Dig. Banks, §§ 838, 1064-1074.

275. — Jurisdiction and venue.

See 6 Cent. Dig. Banks, §§ 1056-1066.

Act Cong. July 12, 1882, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," which makes, in section 4, certain provisions as to the jurisdiction of suits by and against national banks, refers only to suits brought after its passage, and does not affect prior ones.—*First Nat. Bank v. Morgan*, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282.

The exemption of national banks from suits in state courts elsewhere than in the county or city where the bank is located, which is granted by the latter act, may be waived, and a bank which submits to trial in another county cannot, on writ of error to the state supreme court, raise the objection to the jurisdiction and claim the immunity.—Id.

278. — Attachment and garnishment.

See 6 Cent. Dig. Banks, §§ 1067-1069.

Under Rev. St. § 5242, providing that no attachment before final judgment shall be issued in any state court against a national bank, and Rev. St. § 915, entitling plaintiff in the federal courts to similar remedies by attachment as those provided by the laws of the state, a federal court is limited by all the restrictions on state courts, and cannot issue an attachment before final judgment against a national bank.—*Butler v. Coleman*, 124 U. S. 721, 8 S. Ct. 718, 31 L. Ed. 567.

No right to attachment against a national bank before judgment in a suit in a state court is given by Act July 12, 1882, c. 290, § 4, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458], making the jurisdiction over suits by or against national banks the same as the jurisdiction over suits by or against banks not organized under any law of the United States. Judgments 66 N. E. 16, 173 N. Y. 314, 105 Am. St. Rep. 666, and 73 N. Y. S. 514, 67 App. Div. 75, affirmed.—*Van Reed v. People's Nat. Bank of Lebanon*, 25 S. Ct. 775, 198 U. S. 554, 49 L. Ed. 1161, 3 Ann. Cas. 1154.

Jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment, which, by reason of Rev. St. U. S. § 5242 [U. S. Comp. St. 1901, p. 3517], is beyond the power of the court.—*Id.*

A national bank, whether solvent or insolvent, is within the exemption from the issue of attachment before judgment, which Rev. St. U. S. § 5242 [U. S. Comp. St. 1901, p. 3517], affords in suits in the state courts.—*Id.*

281. Voluntary liquidation.

See 6 Cent. Dig. Banks, §§ 1075-1079; 4 Cent. Dig. Assign. 1. B. C. § 96.

If a national bank goes into liquidation, the book accounts of depositors draw interest from the date of suspension; the act of going into liquidation dispensing with demand.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Iron v. Manufacturer's Nat. Bank*, 27 F. 591.

Rev. St. §§ 5151, 5234, making shareholders in national banks liable for the debts of the bank to the amount of their stock, does not make the capital stock, on failure of the bank, such a trust fund, in the hands of the directors for the benefit of creditors, as to render invalid an assignment for benefit of creditors by the shareholders, who were also the directors.—*Peters v. Bain*, 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696.

Directors of a national bank are not empowered, without action of the stockholders, to levy the assessment ordered by the Comptroller for the purpose of restoring its capital and enabling it to continue in business by Rev. St. U. S. §§ 5136, 5145 [U. S. Comp. St. 1901, pp. 3455, 3463], investing them with authority to transact the usual and ordinary business of national banks, since the provision of section 5205 [U. S. Comp. St. 1901, p. 3495], for the appointment of a receiver to close up the business of the banking association in case it fails to pay up its capital stock, and refuses to go into liquidation, evidently confers upon the association the privilege of declining to make good the deficiency, and to elect, instead, to go into voluntary liquidation, the exercise of which would seem to be a matter in which the owners, and not the managers, of the bank primarily are interested. Judgment *Weinhard v. Commercial Nat. Bank*, 68 F. 806, 41 Or. 359, affirmed.—*Commercial Nat. Bank v. Weinhard*, 24 S. Ct. 253, 192 U. S. 243, 48 L. Ed. 425.

286. Transfers and preferences affected by insolvency.

See 6 Cent. Dig. Banks, §§ 1111-1113.

Rev. St. § 5242, makes void all transfers of evidences of debt owing to any national bank, or of deposits to its credit, and all payments made after the commission of an act of insolvency, or in contemplation thereof, with a view to prefer a creditor, except in payment of its circulating notes. The P. Bank, not being a member of the clearing house, deposited with the S. Bank all checks received by it to be collected through the clearing house, and was credited as a depositor. The directors of the P. Bank, having, one Saturday after closing, determined

to go into liquidation, dispatched a committee to confer with the comptroller of the currency as to a receiver. The appointment was made about 10 a. m. on Monday. Monday morning the cashier of the P. Bank sent checks and drafts to the S. Bank, and with them his check for the whole amount of the bank's deposits, and received a negotiable certificate of deposit of the S. Bank, which also held the P. Bank's negotiable certificate. The transaction occurred about 9:30 a. m., when no officer of the S. Bank suspected that the P. Bank was insolvent. Held, that the cashier must have presumed that the S. Bank still held its certificate, and that in sending checks and drafts he was making a transfer to prefer, and the S. Bank could not set off the P. Bank's certificate against its own.—*National Security Bank v. Butler*, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 682.

Rev. St. §§ 5234, 5236, 5242, which require a pro rata distribution of the assets of an insolvent national bank and forbid preferences, do not invalidate liens, equities, and rights arising prior to and not in contemplation of insolvency.—*Scott v. Armstrong*, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059, reversing judgment (C. C.) *Armstrong v. Scott*, 36 F. 63.

By special agreement of a national bank, holding a large amount of clearing-house certificates, instead of the usual deposit of securities as collateral for payment of its daily balance at the clearing house, each day left with the clearing-house manager all checks drawn on it, and other evidences of its indebtedness received from other banks, to be held until the balance due from it for the day was paid. On a certain day its claims against other banks amounted to \$70,005.36, while the claims against it amounted to \$117,035.21. While the vouchers representing these claims against it were held by the manager of the clearing house to secure the balance it owed, it was closed by the comptroller of the currency. Thereupon the clearing house collected the amount of the checks, etc., constituting a part of the \$117,035.21, from the banks from which they were received; and the balance of that amount, consisting of the duebills given by the bank for its balance of the preceding day, which, by agreement, were to be paid by way of set-off in the clearing, the manager collected by reducing to that extent the credit of \$70,005.36 given to the bank on account of the amount owing to it from other banks, and what remained of that credit was applied on the loan-certificate account of the bank to the association. Held, that the receiver of the bank was not entitled to the entire \$70,005.36, irrespective of the outstanding duebills which it had agreed should be set off in the clearing, but the clearing house had no right to apply to the certificate loan account the balance after deducting those duebills, and such appropriation of that balance was a preference, within the inhibition of Rev. St. § 5242.—*Yardley v. Philler*, 167 U. S. 344, 17 S. Ct. 835, 42 L. Ed. 192, reversing decree *Philler v. Yardley*, 62 F. 645, 10 C. C. A. 562, 25 L. R. A. 824.

So long as a national bank is a going concern, carrying on its business as usual, and has committed no act of insolvency, and it does not appear that a present suspension of business is contemplated by its officers, though it is actually insolvent, to their knowledge, payments or remittances made or caused to be made to a correspondent bank in the due course of its daily business cannot be said to have been made in contemplation of insolvency, or with a view to prefer the correspondent as a creditor, within the meaning of Rev. St. § 5242, making such payments void. Decree *Hayden v. Chemical Nat. Bank*, 84 F. 874, 28 C. C. A. 548, affirmed.—*McDonald v. Chemical Nat. Bank*, 19 S. Ct. 787, 174 U. S. 610, 43 L. Ed. 1106.

The mere fact that a correspondent of a national bank refuses to pay a check drawn on it by such bank at a time when the account

of the latter is overdrawn does not constitute an act of insolvency on the part of the drawing bank, which would render subsequent transfers of property or payments made by it void, as preferences, under Rev. St. § 5242.—Id.

②287. Assets and receivers on insolvency.

See 6 Cent. Dig. Banks, §§ 1089-1104, 1126, 1127.

Certain clerks in a stock brokerage firm bought the business, including a large amount of stocks carried on margins, for the cashier of a country bank. In protecting these stocks the cashier, in his official capacity, drew large checks, in favor of the new firm, upon a New York bank, with which the country bank had deposits. Part of the money was returned by the brokers to the city bank, and was by it credited to the country bank, but much was lost in the stock transactions. The money returned was largely checked out by the cashier, and lost in other fraudulent transactions. There was no direct evidence of conspiracy between the brokers and the cashier to misapply the bank's funds. *Held*, in an action by a receiver of the bank against the brokers, that, assuming them to have knowledge that they were receiving the bank's funds, it was error to rule that they were not to be credited with the sums returned, since it was at least a question for the jury whether the other officers of the bank were not chargeable with notice of the moneys deposited to its credit, and would not have accepted such deposits as a return of the moneys to the bank. (C. C.) 35 F. 699, reversed.—*Kissam v. Anderson*, 12 S. Ct. 960, 145 U. S. 435, 36 L. Ed. 765, reversing judgment (C. C.) *Anderson v. Kissam*, 35 F. 699.

Rev. St. § 5242, makes payments of money by an insolvent national bank to shareholders of creditors, with a view to preference, or to evading the disposition of assets as required by statute, null and void. Sections 5234 and 5238 require the receiver, after collecting debts, etc., to turn over all money to the United States treasurer for a ratable distribution among creditors. *Held*, that funds received on the discounting of a note, and deposited with the discounting bank, subject to the check of the depositor, and which had been drawn on by him, but were intended by him to meet the note when due, can be pleaded as a set-off in an action on the note brought by the receiver of the discounting bank.—*Scott v. Armstrong*, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059, reversing judgment (C. C.) *Armstrong v. Scott*, 36 F. 63.

The appointment of a receiver for an insolvent national bank, under Act Cong. June 30, 1876, § 1, which authorizes the comptroller to appoint a receiver to close up the association and enforce the personal liability of its stockholders, does not dissolve the corporation so as to prevent the recovery of a judgment against it on a valid claim.—*Chemical Nat. Bank of Chicago v. Hartford Deposit Co.*, 161 U. S. 1, 16 S. Ct. 439, 40 L. Ed. 595.

The comptroller may appoint a receiver for an insolvent national bank, or make a ratable assessment upon the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the liabilities of the bank.—*Bushnell v. Leland*, 17 S. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

A duly-elected "agent," who is substituted under the act of June 30, 1876 (19 Stat. 63), as amended by the act of August 3, 1892 (27 Stat. 345), for the receiver of an insolvent national bank, to complete the winding up of its affairs, proceeds with like authority to that of the receiver, and is not an officer of the circuit court, though he is required by the statute to render an account to it of all his proceedings, expendi-

tures, etc., and he and his sureties are finally discharged by its order.—*Ex parte Chetwood*, 17 S. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, under 19 Stat. 63, as amended by 27 Stat. 345, to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgments of the state supreme court in such actions.—Id.

A receiver of an insolvent national bank, appointed by the comptroller of the currency, is the agent of the United States, and not an agent or officer of any court; nor does he, by filing a petition in a federal court, under Rev. St. § 5234, for leave to sell property of the bank, or to sell or compound bad or doubtful debts, place the assets of the bank in the custody of the court, in the sense in which it has the custody of property in the hands of a receiver appointed by itself.—Id.

A secured creditor of an insolvent national bank claimed dividends on the whole amount of the debt, without regard to his collaterals, but was required by the Comptroller to first exhaust the collaterals, and then prove for the balance. The creditor accordingly pursued this course, and received dividends on such balance, but, some two years after payment of the first dividend, sued the receiver to recover dividends on the whole amount of the debt. *Held*, that the delay was not such as to raise a presumption of laches or create an estoppel, no other creditors having been harmed by the temporary submission to the comptroller's ruling. *Decrees Merrill v. First Nat. Bank*, 75 F. 148, 21 C. C. A. 282 and *Same v. National Bank of Jacksonville*, 78 F. 208, 24 C. C. A. 63, affirmed.—*Merrill v. National Bank of Jacksonville*, 19 S. Ct. 360, 173 U. S. 131, 43 L. Ed. 640.

Authorization by the comptroller is not necessary to entitle a receiver of a national bank to bring an action to establish a claim of the bank against an insolvent debtor, and for the sale of collateral held by the bank, since the provision of Rev. St. U. S. § 5234 [U. S. Comp. St. 1901, p. 3507], to the effect that the receiver shall be under the direction of the comptroller, means only that he shall be subject to such direction, and not that he shall be obliged to get special authority for every act that he does in collecting the assets and debts of the bank. Judgment *Richardson v. Turner*, 28 So. 158, 52 La. Ann. 1613, affirmed.—*Turner v. Richardson*, 21 S. Ct. 295, 180 U. S. 87, 45 L. Ed. 438.

A receiver of a national bank is not liable for damages sustained by a person on account of the fraud practiced upon him by the bank and its officers in inducing him to purchase stock. Judgment 97 F. 865, 38 C. C. A. 510, affirmed.—*Lantry v. Wallace*, 21 S. Ct. 878, 182 U. S. 536, 45 L. Ed. 1218.

The owner of real property leased to a national bank for building purposes is not liable to account to the bank's receiver for the bank building erected thereon, which the bank, while insolvent and in course of voluntary liquidation, turned over to him in consideration of a release from all further liability under the lease; the bank being at the time in arrears for rent and taxes, and the income from the property not exceeding the charges against it. Decree 118 F. 981, 55 C. C. A. 475, affirmed.—*Brown v. Schleier*, 24 S. Ct. 558, 194 U. S. 18, 48 L. Ed. 857.

288. Presentation and payment of claims.

See 6 Cent. Dig. Banks, §§ 1105-1110, 1114-1121, 1123-1125.

Bonds deposited under Rev. St. §§ 5162, 5167, to secure the circulation of a national bank, are held by the government as a trustee, and the surplus of the proceeds thereof, after payment of the notes, cannot be set off by the government against an unsecured deposit of postal funds, but must be distributed ratably among all the creditors.—Cook County Nat. Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537.

The payment by the comptroller of the currency, under Rev. St. § 5236, of a creditor of an insolvent national bank, who has recovered judgment after refusal of the comptroller to pay his claim, is to be based on the amount due on the adjudicated claim at the date of the failure of the bank, and not on the amount due when the claim is adjudicated.—United States v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603.

After a national bank went into voluntary liquidation, several creditors took in payment of their claims paper belonging to the bank, with the bank's guaranty of payment, which paper was not paid. *Held*, that such creditors were not entitled to share in the assets obtained by enforcement of the statutory liability of the stockholders, since, after the bank went into liquidation, its powers being limited to the collection of assets and the payment of debts, it could not guarantee payment.—Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 783, 30 L. Ed. 864, affirming decree (C. C.) Irons v. Manufacturers' Nat. Bank, 27 F. 591.

A claim for rent which was due nine days before the suspension of the bank is an existing demand which is entitled to be proven up for participation in the distribution of the assets.—Chemical Nat. Bank of Chicago v. Hartford Deposit Co., 161 U. S. 1, 16 S. Ct. 439, 40 L. Ed. 595.

The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to Rev. St. §§ 5236, 5242, requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore inapplicable in the case of a national bank.—Davis v. Elmira Sav. Bank, 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700.

A secured creditor of an insolvent national bank is entitled to prove and receive dividends on the full amount due him at the date of insolvency, without regard to his collaterals or any collections he may make upon them, provided only that the sums received by way of dividends and from the collaterals do not exceed the entire debt. *Decrees* Merrill v. First Nat. Bank, 75 F. 148, 21 C. C. A. 282, and Same v. National Bank of Jacksonville, 78 F. 208, 24 C. C. A. 63, affirmed.—Merrill v. National Bank of Jacksonville, 19 S. Ct. 360, 173 U. S. 131, 43 L. Ed. 640.

Collections from collateral securities made by creditor of a national bank after the declared insolvency of the bank need not be deducted from the amount on which dividends are to be computed by the receiver of the bank, as the secured creditor is a creditor to the full amount due him when the insolvency is declared, and his right to dividends is unaffected by his collateral. *Decree*, Armstrong v. Chemical Nat. Bank, 83 F. 556, 27 C. C. A. 601, affirmed.—Aldrich v. Chemical Nat. Bank, 20 S. Ct. 498, 176 U. S. 618, 44 L. Ed. 611.

Those portions of the collections on account of sales of butter actually coming into the hands of the receiver of a national bank which

had virtually acquired and operated through its officers an insolvent creamery company doing business under an arrangement by which the proceeds of sales, less a stated compensation, were to be divided pro rata among those furnishing the milk, may be recovered by the latter, even though the transaction may have been beyond the powers of the bank, and they are further entitled to participate pro rata as general creditors to the extent that the proceeds of such sales had been diverted and appropriated by the bank.—(1910) Earling v. Emigh, 30 S. Ct. 672, 218 U. S. 27, 54 L. Ed. 915, affirming judgment Emigh v. Earling (1908) 115 N. W. 128, 134 Wis. 565.

V. SAVINGS BANKS.

Questioning constitutionality of law, see Constitutional Law, 42.

Taxation, equal protection of laws, see Constitutional Law, 229.

Unclaimed deposits, see Constitutional Law, 42, 240, 296.

291. Constitutional and statutory provisions.

See 6 Cent. Dig. Banks, § 1123.

Laws Mass. 1907, c. 340, providing that deposits which have remained inactive and unclaimed for 30 years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representative, is not unconstitutional.—(1911) Provident Institution for Savings in Town of Boston v. Malone, 31 S. Ct. 661, 221 U. S. 660, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129, affirming judgment (1909) Malone v. Provident Institution for Savings in Boston, 86 N. E. 912, 201 Mass. 23.

VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

Excise taxes, see Internal Revenue, 9.

Limitation of action to enforce stockholder's liability, see Limitation of Actions, 34.

313. Stockholders.

See 6 Cent. Dig. Banks, § 1217.

A Kansas trust company, which is empowered to receive deposits and to loan money on real estate and personal security, must be deemed a "moneyed corporation" within the meaning of Code Civ. Proc. N. Y. § 394, prescribing a three-year limitation for actions to enforce stockholders' liabilities, in view of the definition of that term in 1 Rev. St. N. Y. p. 598, § 51, as one having the power to make loans upon pledges or deposits, and of the further definition of a moneyed corporation in the revised corporation act of 1890, as one formed under, or subject to, the banking or insurance law. *Judgment* 118 F. 1019, 54 C. C. A. 683, affirmed.—Platt v. Wilmot, 24 S. Ct. 542, 193 U. S. 602, 48 L. Ed. 809.

315. Functions and dealings.

See 6 Cent. Dig. Banks, §§ 1219-1221.

A guaranty by a loan and trust company, for a valuable consideration, of a promissory note given by one third party to another, and not negotiated by it, is ultra vires such a corporation organized under Comp. Laws Kan. 1885, p. 210, c. 23, for the purpose of transacting the business of a loan and trust company and of buying and selling personal property, including commercial paper, with power to enter into "any obligation or contract essential to the transaction of its ordinary affairs," but forbidden to employ its property for any other purpose than to "accomplish the legitimate objects of its creation." *Judgment* 105 F. 224,

44 C. C. A. 456, affirmed.—Ward v. Joslin, 22 S. Ct. 807, 186 U. S. 142, 46 L. Ed. 1093.

No new powers were given to trust companies generally by the provision of Laws N. Y. 1892, c. 689, § 163, that "every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter, and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company." Judgment 57 N. E. 408, 163 N. Y. 320, affirmed.—Jenkins v. Neff, 22 S. Ct. 905, 186 U. S. 230, 46 L. Ed. 1140.

No power to loan, discount, or purchase commercial paper was given trust companies by Laws N. Y. 1893, c. 696, authorizing trust companies to exercise the powers conferred on individual banks and bankers by Laws N. Y. 1892, c. 689, § 55, which provides that such banks and bankers may "take, receive, reserve, and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent. per annum; and such interest may be taken in advance."—Id.

VII. CLEARING HOUSES.

⚡320. Settlements and transactions through clearing house.

See 6 Cent. Dig. Banks, § 1228.

Failure of a bank, before settlement for the day, with the clearing house, but after surrendering demands against other banks and receiving credit on the settlement sheet, does not deprive the association of the right to collect such demands, and apply the proceeds to settle debts against the bank in accordance with the rules, though it is given no right to appropriate

a balance due the bank to a debt due it, and such appropriation is illegal, under Rev. St. § 5242.—Yardley v. Philler, 17 S. Ct. 835, 167 U. S. 344, 42 L. Ed. 192, reversing decree Philler v. Yardley, 62 F. 645, 10 C. C. A. 562, 25 L. R. A. 824.

BAR.

Action, see—

Equity, ⚡67-87.

Judgment, ⚡541-632.

Limitation of Actions, ⚡167-173.

Admission to practice law, see Attorney and Client, ⚡4.

Dower, see Dower, ⚡44-52.

Prosecution by limitation, see Criminal Law, ⚡146-153.

BARBERS.

Equal protection of laws, see Constitutional Law, ⚡238.

BARGES.

Subject of capture, see War, ⚡28.

BARRATRY.

See Insurance, ⚡410.

BARROOMS.

See Intoxicating Liquors.

BARTER.

See Exchange of Property.

BASTARDS.

Scope-Note.

[INCLUDES persons of illegitimate birth; their rights and disabilities in general; custody, support, protection, and legitimation of illegitimate children; and legal proceedings for determination of questions of legitimacy, ascertainment of paternity, and enforcement of liabilities for support.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Illegitimacy in General.

⚡9. Legitimation.

13. — Recognition or acknowledgment.

II. Custody, Support, and Protection.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bast. §§ 19-34.]

III. Proceedings Under Bastardy Laws.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bast. §§ 35-245.]

IV. Property.

⚡99. Inheritance by bastards.

101. — From or through father.

Cross-References.

Giving full faith and credit to statute of other state, see Courts, ⚡511.

Review by United States Supreme Court of decisions of Porto Rico Supreme Court, see Courts, ⚡387(4).

This Digest is compiled on the Key-Number System. For explanation, see page iii.

I. ILLEGITIMACY IN GENERAL.

—9. Legitimation.

See 6 Cent. Dig. Bast. §§ 13-18.

—13. — Recognition or acknowledgment.

See 6 Cent. Dig. Bast. §§ 16, 17.

The recognition of a natural son, ignored in his father's will, can be proved in the Porto Rico courts in a suit to nullify the institution of a universal heir by such will only by judgment, or by an act in solemn and authentic form.—*Calaf v. Calaf*, 34 S. Ct. 411, 232 U. S. 371, 58 L. Ed. 642.

II. CUSTODY, SUPPORT, AND PROTECTION.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bast. §§ 19-34.]

III. PROCEEDINGS UNDER BASTARDY LAWS.

[No paragraphs or references in this Digest. But see 6 Cent. Dig. Bast. §§ 35-245.]

IV. PROPERTY.

—99. Inheritance by bastards.

See 6 Cent. Dig. Bast. §§ 250, 252-256.

—101. — From or through father.

See 6 Cent. Dig. Bast. §§ 252, 253.

Act Utah 1852, § 25, permitting illegitimate children to inherit from the father, is valid under Act Cong. Sept. 9, 1850 (9 Stat. 453, § 6) providing that the legislative power of Utah shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of the act.—*Cope v. Cope*, 137 U. S. 682, 11 S. Ct. 222, 34 L. Ed. 832, reversing decree 7 Utah, 63, 24 P. 677.

The act was not abrogated by Act Cong. July 1, 1862 (12 Stat. 501), annulling all acts passed by the legislature of Utah territory "which establish, support, maintain, shield, or countenance polygamy," since polygamy is neither established, maintained, nor countenanced by permitting illegitimate children to inherit from the father.—*Id.*

BATTERY.

See Assault and Battery.

BEACONS.

Jurisdiction of admiralty of action for injuries to, see Admiralty, —22.

BEADS.

Duty on, see Customs Duties, —25, 37.

BEANS.

Duty on, see Customs Duties, —30.

BED.

See Navigable Waters, —36-38.

BENEFICIAL ASSOCIATIONS.

See 6 Cent. Dig. Ben. Assoc.

See—

Associations.

Building and Loan Associations.

Insurance, —700-759.

Benefit and relief funds for servants, see Master and Servant, —100.

BENEFICIARIES.

See Trusts.

BENEFITS.

Acceptance ground of estoppel, see—

Appeal and Error, —160-162.

Estoppel, —92.

Acceptance, ground of ratification, see Principal and Agent, —171.

Benefit and relief funds for servants, see Master and Servant, —100.

From appropriation of property for public use, see Eminent Domain, —144, 145.

From public improvements, see Municipal Corporations, —436-440, 464-466.

BEQUESTS.

See—

Charities.

Colleges and Universities, —6.

Executors and Administrators, —297-315.

Wills.

BEST AND SECONDARY EVIDENCE.

See—

Criminal Law, —400-404.

Evidence, —157-182.

BETTERMENTS.

See cross-references under Improvements.

BETTING.

See Gaming.

BIDS.

Combination restraining bidding, see Monopolies, —12.

Contracts, see—

Municipal Corporations, —238.

United States, —64.

Judicial sales, see Judicial Sales, —19-28.

BIGAMY.

Scope-Note.

[INCLUDES marriage of a person, who has a husband or wife living, to another person; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such marriages as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④ 1. Nature and elements of offense.
- 3. Indictment or information.
- 4. — Requisites and sufficiency.
- 17. Sentence and punishment.

Cross-References.

Disqualifying as voter, see Elections, ④60, 85.

Waiver of defects in indictment, see Indictment and Information, ④196.

④1. Nature and elements of offense.

See 6 Cent. Dig. Big. §§ 1-15.

A man who lives in the same house with two women, eats at their respective tables one-third of his time, and holds them out to the world, by his language or conduct, as his wives, is guilty of the offense of polygamy, under Act Cong. March 22, 1882, c. 47 (22 Stat. 31), although he may not occupy the same bed or sleep in the same room with either of them, or actually have sexual intercourse with either of them.—Cannon v. United States, 116 U. S. 55, 6 S. Ct. 278, 29 L. Ed. 561, affirming 4 Utah, 153, 7 P. 389.

The offense of cohabiting with more than one woman, as defined in section 3 of the act of congress of March 22, 1882, c. 47, is committed when there is a living or dwelling together as husband and wife, and is inherently a continuous offense, having duration, and not an offense consisting of an isolated act.—Ex parte Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658.

④3. Indictment or information.

See 6 Cent. Dig. Big. §§ 19-31.

④4. — Requisites and sufficiency.

See 6 Cent. Dig. Big. §§ 19-29.

An indictment which charges that "Angus M. Cannon * * * did unlawfully cohabit with more than one woman," in violation of

Act Cong. March 22, 1882, § 3, providing that "if any male person in a territory * * * shall hereafter cohabit with more than one woman, he shall be deemed guilty of a misdemeanor," sufficiently shows that defendant was a male person.—Cannon v. United States, 116 U. S. 55, 6 S. Ct. 278, 29 L. Ed. 561, affirming 4 Utah, 122, 7 P. 369.

An indictment under Act Cong. March 22, 1882, § 3, providing that, "if any male person in a territory * * * shall hereafter cohabit with more than one woman, he shall be deemed guilty of a misdemeanor," which charges that defendant "did unlawfully cohabit with more than one woman," need not allege that defendant was a "male person."—Id.

④17. Sentence and punishment.

See 6 Cent. Dig. Big. § 59.

Where three indictments are found against an accused for unlawful cohabitation with more than one woman, under section 3 of the act of congress of March 22, 1882, c. 47, alike in all respects except that each covers a different period of time, and the defendant is found guilty on each indictment, the court has no jurisdiction to inflict punishment in respect of more than one of the convictions, as the offense is to be regarded as single and entire between the earliest and latest days laid in any of the indictments.—Ex parte Snow, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658.

BILL.

Introduction and passage of legislative bills, see Statutes, ④5-64.

BILLIARD ROOMS.

See Municipal Corporations, ④598, 626.

Due process of law, see Constitutional Law, ④295.

Equal protection of laws, see Constitutional Law, ④239.

BILL OF EXCEPTIONS.

See—
Criminal Law, ④1089-1091.
Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

See Carriers, ④47-68.

Stamp tax on as tax on exports, see Commerce, ④77.

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BILL OF PARTICULARS.

See—
 Indictment and Information, ¶121.
 Pleading, ¶313-324.

BILL OF REVIEW.

See Equity, ¶443-464.

BILL OF REVIVOR.

See Equity, ¶304.

BILL OF RIGHTS.

See Constitutional Law.

BILLS AND NOTES.*Scope-Note.*

[INCLUDES instruments in writing whereby the maker requests, orders, or promises payment of a certain sum of money absolutely, whether negotiable or not; their nature, requisites, validity, incidents, construction, operation, and effect; acceptance of such requests or orders; indorsement and other modes of transfer of such instruments, and rights of purchasers, assignees, etc.; demand of acceptance or payment, protest for nonacceptance or nonpayment, and notice thereof; payment or renewal; and actions on such bills and notes.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Requisites and Validity.**

(A) **FORM AND CONTENTS OF BILLS OF EXCHANGE, DRAFTS, CHECKS, AND ORDERS.**

- ¶12. Statement as to consideration.
- 15. Checks as bills of exchange.

(B) **FORM AND CONTENTS OF PROMISSORY NOTES AND DUEBILLS.**

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 40-71.]

(C) **EXECUTION AND DELIVERY.**

- ¶62. Delivery.
- 64. — Conditional delivery.

(D) **ACCEPTANCE.**

- ¶67. What law governs.
- 84. Promise to accept.
- 85. — Requisites and validity.

(E) **CONSIDERATION.**

- ¶91. Sufficiency.
- 92. — In general.

(F) **VALIDITY.**

- ¶100. Validity of assent.
- 103. — Fraud and misrepresentation.

II. Construction and Operation.

- ¶118. Parties.
- 120. — Joint or several.
- 129. Time of maturity.
- 131. Mode and form of payment.
- 132. Conditions.

III. Modification, Renewal, and Rescission.

- ¶137. Extension and agreements to extend.
- 140. Operation and effect of extension or renewal.

IV. Negotiability and Transfer.**(A) INSTRUMENTS NEGOTIABLE.**

- ☞ 162. Medium of payment.
- 168. Recitals and provisions as to conditional sales.
- 174. Effect of payment.

(B) TRANSFER BY INDORSEMENT.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 422-490.]

(C) TRANSFER WITHOUT INDORSEMENT.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 491-523.]

V. Rights and Liabilities on Indorsement or Transfer.**(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.**

- ☞ 256. Discharge of indorser.

(B) INDORSEMENT FOR TRANSFER.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 620-711.]

(C) ASSIGNMENT OR SALE.

- ☞ 311. What law governs.
- 313. Rights of assignee or purchaser.
- 326. Express and implied warranties.

(D) BONA FIDE PURCHASERS.

- ☞ 331. Actual notice.
- 333. — Implied from relation between parties.
- 334. — Time of notice.
- 335. — Operation and effect.
- 336. Constructive notice, and facts putting on inquiry.
- 337. — Good faith in general.
- 340. — Character or capacity of persons dealing with paper.
- 347. Taking after maturity.
- 348. — Time of taking.
- 352. Consideration in general.
- 356. — Crediting proceeds.
- 358. Taking as collateral security for pre-existing debt.
- 359. Taking in payment of pre-existing debt.
- 363. Title and rights acquired by bona fide purchasers.
- 364. Defenses as against bona fide purchasers.
- 375. — Illegality in general.
- 382. — Lost or stolen instruments.

VI. Presentment, Demand, Notice, and Protest.

- ☞ 393. Necessity of demand for payment and notice of nonpayment.
- 394. — In general.
- 399. Sufficiency of presentment for payment and demand.
- 404. — Time.
- 407. — Effect of delay.
- 408. Protest and certificate thereof.
- 410. — Certificate as evidence.

VII. Payment and Discharge.

- ☞ 426. Persons by whom payment may be made and effect.
- 427. Persons to whom payment may be made.
- 428. Mode and sufficiency of payment.
- 429. — In general.

VIII. Actions.

- 441. Right of action.
- 443. — Title to sustain action.
- 450. Defenses.
- 451. — In general.
- 452. — Particular grounds.
- 453. — Persons as to or against whom defenses are available.
- 461. Declaration, complaint, or petition.
- 462. — Form and requisites in general.
- 489. Issues, proof, and variance.
- 490. Presumptions and burden of proof.
- 497. — Good faith and payment of value.
- 500. Admissibility of evidence.
- 501. — In general.
- 503. — Consideration.
- 509. — Good faith and payment of value.
- 515. Weight and sufficiency of evidence.
- 525. — Good faith and payment of value.
- 528. Amount of recovery.
- 533. — Damages for dishonor.
- 535. Trial.
- 537. — Questions for jury.
- 541. Execution.

Cross-References.

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| <p>See—
 Alteration of Instruments.
 Forgery.
 Assignment of property or funds by giving bill of exchange, check, order, or draft, see Assignments, 49, 50.
 Authority of partner to make and indorse for firm, see Partnership, 146.
 Bills of lading, see Carriers, 47-68.
 Charge against wife's separate estate, see Husband and Wife, 156.</p> | <p>Corporations, see Corporations, 414, 463-466.
 Lis pendens, application of doctrine to negotiable instruments, see Lis Pendens, 4.
 Parol or extrinsic evidence to contradict or vary instrument, see Evidence, 402.
 Receivers' certificates, see Receivers, 125-129.
 Warehouse receipts, see Warehousemen, 11-17.</p> |
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I. REQUISITES AND VALIDITY.

(A) FORM AND CONTENTS OF BILLS OF EXCHANGE, DRAFTS, CHECKS, AND ORDERS.

12. Statement to consideration.
See 7 Cent. Dig. Bills & N. § 6.

It is not essential to a bill of exchange that it should contain the words "for value received."—*Moses v. National Bank of Lawrence County*, 149 U. S. 298, 13 S. Ct. 900, 37 L. Ed. 743.

15. Checks as bills of exchange.
See 7 Cent. Dig. Bills & N. §§ 20, 21.

An instrument was as follows: "\$500. The First National Bank, Kasson, Minn., Oct. 15, 1881, pay to the order of D. \$500 in current funds. F., Cashier. To Ninth National Bank, New York City." *Held*, with respect to the liability of the parties thereto, to be a bank check, and not a bill.—*Bull v. First Nat. Bank of Kasson*, 123 U. S. 105, 8 S. Ct. 62, 31 L. Ed. 97.

A bank check is substantially the same as an inland bill of exchange. It passes by delivery, when payable to bearer, and the rules as to presentment, diligence of the holder, etc., which are applicable to the one, are generally applicable to the other.—*Rogers v. Durant*, 140 U. S. 298, 11 S. Ct. 754, 35 L. Ed. 481.

(B) FORM AND CONTENTS OF PROMISSORY NOTES AND DUEBILLS.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 40-71.]

(C) EXECUTION AND DELIVERY.

62. Delivery.
See 7 Cent. Dig. Bills & N. §§ 95-105.
64. — Conditional delivery.
See 7 Cent. Dig. Bills & N. § 104.

A note may be delivered to the party in whose favor it is drawn, upon a condition, so that, until performance of the condition, he acquires no rights to enforce it.—*Quebec Bank v. Hellman*, 110 U. S. 178, 4 S. Ct. 76, 28 L. Ed. 111; *Burke v. Dulaney*, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698, reversing judgment *Dulaney v. Burke*, 2 Idaho, 719, 23 P. 915.

A note executed in contemplation of a proposed transaction, and to be valid only on condition of the approval of the transaction by a certain attorney, becomes void upon his advising the maker to have nothing whatever to do with it.—*Ware v. Allen*, 128 U. S. 590, 9 S. Ct. 174, 32 L. Ed. 563.

(D) ACCEPTANCE.

67. What law governs.
See 7 Cent. Dig. Bills & N. § 106.

An agreement made in Missouri by a resident of Illinois to accept and pay drafts at his

place of business in Illinois is governed by the law of the latter state, to the exclusion of the Missouri statutes.—Hall v. Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. Ed. 956, affirming judgment (C. C.) Cordell v. Hall, 34 F. 866, following Coghlan v. South Carolina R. Co., 142 U. S. 101, 12 S. Ct. 150, 35 L. Ed. 951, affirming decree (C. C.) 32 F. 318.

—84. Promise to accept.

See 7 Cent. Dig. Bills & N. §§ 149-162.

—85. — Requisites and validity.

See 7 Cent. Dig. Bills & N. §§ 149-162.

The payee of a bill of exchange, who discounts the same, and pays out the proceeds to the order of the drawer, and then forwards it to the drawees for payment, does not "negotiate" it, within the meaning of the law merchant, and therefore does not come within 1 Rev. St. p. 84, § 533, providing that the preceding sections, which declare void all acceptances not made in writing, do not apply to "any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill."—Hall v. Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. Ed. 956, affirming judgment (C. C.) Cordell v. Hall, 34 F. 866.

In Illinois a parol promise upon sufficient consideration to accept a bill of exchange is binding upon the acceptor.—Id.

(E) CONSIDERATION.

—91. Sufficiency.

See 7 Cent. Dig. Bills & N. §§ 108, 109, 166-212.

—92. — In general.

See 7 Cent. Dig. Bills & N. §§ 166-173, 175-205, 208-212; 11 Cent. Dig. Contracts, §§ 287, 332.

Notes taken by a corporation were claimed to be void because of the lack of power of the corporation to execute a lease to the maker forming the consideration of the notes. Afterwards the lessee gave it a note for a less sum in compromise of the original notes, and upon express agreement that, if this note should not be paid at maturity, the corporation might surrender it to the maker, and thereupon the cause of action on those notes should revive. *Held*, that the new note was upon a sufficient legal consideration, and that the corporation, not having surrendered the new note, could recover upon it in an action on all the notes.—Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 5 S. Ct. 422, 28 L. Ed. 948.

The abandonment of a bona fide contest between two Indians before the Commission to the Five Civilized Tribes as to the right to an allotment, arising from a claim based upon selection by the contestee and upon occupancy and improvements by the contestant, is a lawful consideration for a promissory note given by the former to the latter. Judgment (1908) 95 P. 457, 20 Okl. 274, affirmed.—Williams v. First Nat. Bank of Pauls Valley, 30 S. Ct. 441, 216 U. S. 582, 54 L. Ed. 625.

(F) VALIDITY.

Effect of alteration as between parties to instrument, see Alteration of Instruments, —20.

Law relating to notes for patented articles as denying equal protection of laws, see Constitutional Law, —240.

—100. Validity of assent.

See 7 Cent. Dig. Bills & N. §§ 214, 233-247.

—103. — Fraud and misrepresentation.

See 7 Cent. Dig. Bills & N. §§ 233-240.

Gross' St. Ill. 1869, c. 73, § 11, p. 462, provides that, "if any fraud or circumvention

be used in obtaining the making or executing" of any instrument for the payment of money, the same may be pleaded in bar to any action brought on such instrument. *Held*, that the fraud or circumvention intended is not that which goes merely to the consideration of the instrument, but it must go to the execution, and there must be a trick or device by which one kind of instrument is signed in the belief that it is of another kind, or the amount or nature or terms of the instrument must be misrepresented to the signer.—Town of Oregon v. Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. Ed. 323.

Makers of notes whose signatures were obtained by fraud of the payee may defend a suit by such payee, though they were liable on prior notes for the same amount, where there were additional makers and co-sureties on the new notes.—Schmidt & Story v. Bank of Commerce, 34 S. Ct. 730, 234 U. S. 64, 58 L. Ed. 1214, reversing judgment Bank of Commerce v. Broyles, 120 P. 670, 16 N. M. 414.

II. CONSTRUCTION AND OPERATION.

Parol or extrinsic evidence to contradict or vary instrument, see Evidence, —402.

—118. Parties.

See 7 Cent. Dig. Bills & N. §§ 255-267; 40 Cent. Dig. Princ. & S. § 7.

—120. — Joint or several.

See 7 Cent. Dig. Bills & N. § 257.

A note containing simply the promise of the makers to pay is merely their joint obligation, binding each only for his proportion of the debt, under Rev. Civ. Code La. arts. 2080, 2086, and not solidary, binding each for the whole debt, as solidary must be expressly stipulated (article 2093).—Groves v. Sentell, 153 U. S. 465, 14 S. Ct. 898, 38 L. Ed. 785.

—129. Time of maturity.

See 7 Cent. Dig. Bills & N. §§ 283-282.

Where a foreign bill of exchange is dated March 4th, payable in London 60 days after sight, and accepted as "due May 21st," but no date of acceptance appears, May 21st must be regarded as the time of payment fixed by the bill.—Bell v. First Nat. Bank, 115 U. S. 373, 6 S. Ct. 105, 29 L. Ed. 409.

—131. Mode and form of payment.

See 7 Cent. Dig. Bills & N. §§ 310-315.

"In current funds," as used in a bank check, means in money.—Bull v. First Nat. Bank of Kasson, 123 U. S. 105, 8 S. Ct. 62, 31 L. Ed. 97.

—132. Conditions.

See 7 Cent. Dig. Bills & N. §§ 316-324; 41 Cent. Dig. R. R. §§ 80-86.

A promissory note, executed in contemplation of a proposed transaction, and to be valid only on condition of the approval of the transaction by a certain attorney, becomes void upon his advising the maker to have nothing whatever to do with it.—Ware v. Allen, 128 U. S. 590, 9 S. Ct. 174, 32 L. Ed. 563.

III. MODIFICATION, RENEWAL, AND RESCISSION.

Extension of time for payment as discharge of surety, see Principal and Surety, —103-105.

—137. Extension and agreements to extend.

See 7 Cent. Dig. Bills & N. §§ 334-337.

Where the holder of a note agreed to extend credit on renewal notes made by the same

parties, and the maker paid interest for an extended time, and prior thereto the surety had died, which fact was then unknown to the holder, and the renewal notes were never executed, it was held that no agreement to extend time of payment could be inferred from the mere payment of the interest under the circumstances.—*Bank of Uniontown v. Mackey*, 140 U. S. 220, 11 S. Ct. 844, 35 L. Ed. 485.

In an action by a bank against the accommodation maker of promissory notes, it appeared that the real debtor, who was otherwise indebted to the bank, had made an assignment, and defendant offered to prove that the bank, after learning the true character of the paper, agreed with the other creditors to a reconveyance of the assigned property, in order that other arrangements might be made for paying the debts, which reconveyance was accordingly made, and that subsequently a second assignment was made. Held, that this evidence was properly excluded, as it in no way tended to prove a valid agreement for the extension of time such as would release defendant, or that he was deprived of the right to take up the notes at any time, and immediately proceed against the real debtor.—*Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 S. Ct. 657, 36 L. Ed. 360.

After the reassignment, the debtor caused certain lands to be conveyed to a third person, who gave back a defeasance declaring that they were held in trust to secure the indebtedness to the bank, and that, unless sooner sold by the debtor, they were to be held for 12 months, when they should be sold in a manner to be agreed upon between the debtor and the bank. Held, that this did not amount to a contract extending the time.—Id.

—140. Operation and effect of extension or renewal.

See 7 Cent. Dig. Bills & N. §§ 355-359.

Where a note is signed by one of the parties as accommodation maker, and the holder, with knowledge of that fact, grants the principal maker an extension of time, without the consent of the accommodation maker, the latter is discharged.—*Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 S. Ct. 657, 36 L. Ed. 360.

IV. NEGOTIABILITY AND TRANSFER.

Bills of lading, see Carriers, —54-59.
Bonds, see Bonds, —78-98.

(A) INSTRUMENTS NEGOTIABLE.

—162. Medium of payment.

See 7 Cent. Dig. Bills & N. §§ 393-398.

"In current funds," as used in a bank check, means in money; and the insertion of those words in the instrument does not impair its negotiability.—*Bull v. First Nat. Bank of Kas-*

—168. Recitals and provisions as to conditional sales.

See 7 Cent. Dig. Bills & N. § 420.

An instrument in the usual form of a promissory note, to pay to the order of the payee a certain sum at a certain time, contained the statement that it was one of a series of 25 notes, and should "become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series," and that all of said notes were "given for the purchase price of 250 railway freight cars manufactured by the payee hereof, and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249, inclusive, and marked on the side thereof with the words and letters, 'Blue Line, C. & E. I. R. R. Co.'; and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all

of said notes being equally and ratably secured on said cars." Held, that the note was negotiable.—*Chicago Ry. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 10 S. Ct. 999, 34 L. Ed. 349, affirming (*C. C.*) *Merchants' Nat. Bank v. Chicago Ry. Equipment Co.*, 25 F. 809.

—174. Effect of payment.

See 7 Cent. Dig. Bills & N. § 398.

Negotiable municipal certificates which have been taken up and canceled are discharged, and hence of no further validity after their reissue.—*District of Columbia v. Cornell*, 130 U. S. 655, 9 S. Ct. 694, 32 L. Ed. 1041.

(B) TRANSFER BY INDORSEMENT.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 422-490.]

(C) TRANSFER WITHOUT INDORSEMENT.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 491-523.]

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.

—256. Discharge of indorser.

See 7 Cent. Dig. Bills & N. §§ 581-599; 2 Cent. Dig. Alt. of Inst. §§ 165, 174.

Where the holder of a note procured a judgment and execution against the maker, who was insolvent, with the intent to procure a preference over other creditors, which were set aside in a suit by the maker's assignee in bankruptcy, an accommodation indorser thereon will not be discharged from liability to the holder, since he was not debarred by the holder's conduct from proving his claim in bankruptcy against the maker.—*Streeter v. Jefferson County Nat. Bank*, 147 U. S. 36, 13 S. Ct. 236, 37 L. Ed. 68, affirming judgment 106 N. Y. 186, 12 N. E. 708.

(B) INDORSEMENT FOR TRANSFER.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Bills & N. §§ 620-711.]

(C) ASSIGNMENT OR SALE.

—311. What law governs.

See 7 Cent. Dig. Bills & N. § 744.

In Louisiana the mere contract of sale of commercial paper without recourse is governed, as to the obligations between vendor and vendee, not by the law merchant, but by the Civil Code.—*Meyer v. Richards*, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199.

Both in England and the United States, where commercial paper is sold without indorsement, or without express assumption of liability on the paper itself, the contract of sale, and the obligations which arise from it, as between the vendor and vendee, are governed by the common law relating to the sale of goods and chattels.—Id.

—313. Rights of assignee or purchaser.

See 7 Cent. Dig. Bills & N. §§ 744-750.

The rule that a person negotiating for the purchase of a note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that shown by the paper itself, does not mean that the circumstances under which the note is taken may not explain the indorsements and relieve the taker from the obligation of inquiry.

—Auten v. United States Nat. Bank, 19 S. Ct. 628, 174 U. S. 125, 43 L. Ed. 920.

—**§326. Express and implied warranties.**
See 7 Cent. Dig. Bills & N. §§ 780-787; 43 Cent. Dig. Sales, § 753.

Both in England and America, upon the sale of a negotiable instrument there is an implied warranty that the instrument is what it purports to be.—Meyer v. Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199.

(D) BONA FIDE PURCHASERS.

Of bonds, see—

Bonds, —§83-88.

Municipal Corporations, —§940-948.

—**§331. Actual notice.**

See 7 Cent. Dig. Bills & N. §§ 805-817.

—**§333. — Implied from relation between parties.**

See 7 Cent. Dig. Bills & N. §§ 806-811.

In an action on a note, it appeared that defendant agreed with the treasurer of a corporation to subscribe for 100 shares of its stock, of the par value of \$10,000, and in payment gave the company his note for \$6,666.66. Plaintiff, who was a director, and had subscribed for a large amount of the stock, and paid for it at the same price paid by defendant, took the note from the company, surrendering 100 shares of his stock, which were issued to defendant, and which defendant left with him as collateral for the note. He knew of no fraud on defendant, nor misrepresentations to him by the treasurer. *Held*, that plaintiff was a bona fide holder of the note, and a verdict was properly directed for him on a note given in renewal of it.—King v. Doane, 139 U. S. 166, 11 S. Ct. 465, 35 L. Ed. 84, affirming judgment (C. C.) Doane v. King, 30 F. 106.

—**§334. — Time of notice.**

See 7 Cent. Dig. Bills & N. §§ 812, 813.

The mere crediting of a check on the books of a bank, which may be canceled at any time, does not make the bank a bona fide purchaser; and if, after such credit, and before actual payment on the faith thereof, the bank receives notice of the invalidity of the check, it does not become a bona fide holder for value by a subsequent payment.—Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 37 L. Ed. 1063, reversing judgment Sioux Falls Nat. Bank v. First Nat. Bank, 6 Dak. 113, 50 N. W. 829.

—**§335. — Operation and effect.**

See 7 Cent. Dig. Bills & N. § 817; 33 Cent. Dig. Partners, § 252.

Where an accommodation note was executed at the request of the person to whom it was delivered, on his statement that he needed to raise money, and had exceeded his line of discounts on his own paper, and was made payable to a bank, the obvious purpose of the transaction was to procure the discount of the note at such bank; and the fact that the bank, at the time it made the discount, was chargeable with notice of the purpose for which the note was given, would not prevent its recovery thereon.—Israel v. Gale, 19 S. Ct. 768, 174 U. S. 391, 43 L. Ed. 1019, affirming judgment 77 F. 532, 23 C. C. A. 274.

—**§336. Constructive notice, and facts putting on inquiry.**

See 7 Cent. Dig. Bills & N. §§ 818-869.

—**§337. — Good faith in general.**

See 7 Cent. Dig. Bills & N. §§ 818, 856-863.

Delay upon the part of a bona fide holder for value of a bank check, drawn by a bank in

one state upon a bank in another, in presenting it for payment, does not affect the nonavailability of set-off as between such holder and the drawer, where the funds upon which the check was drawn were still in the hands of the drawee when payment was demanded.—Bull v. First Nat. Bank of Kasson, 123 U. S. 105, 8 S. Ct. 62, 31 L. Ed. 97.

—**§340. — Character or capacity of persona dealing with paper.**

See 7 Cent. Dig. Bills & N. §§ 825-828, 842-848; 33 Cent. Dig. Partners, § 252.

A national bank rediscounted a large number of notes at different times with another bank, which was shown to be in accordance with the usual course of business, not only between the two banks, but between banks generally, doing a legitimate business. The transactions were conducted on the part of the borrowing bank in some instances by the president, and in others by the cashier. The directors had knowledge that such rediscounts were being made, but made no inquiry as to which officer conducted the business or indorsed the notes, and it was not shown by which the indorsements were usually made. In response to an acceptance of an application made by the cashier for further rediscounts, the president forwarded a number of notes, among which were certain notes bearing his individual indorsement, and below it the indorsement of the bank, by him as president. The notes were accepted, and a list returned, with a statement of the discounts and of the amount credited to the borrowing bank. This letter was received, and answered by the cashier, who accepted the credit without objection, and it was drawn against by the bank in the usual course of its business. *Held* that, under the circumstances, the rediscounting bank was not put upon inquiry as to authority of the president of the borrowing bank to make the indorsements for the bank, nor charged with notice that such notes were the individual property of the president and rediscounted for his benefit, but was justified in assuming that they were the property of the bank, and entitled to hold the bank for their payment at maturity.—Auten v. United States Nat. Bank, 19 S. Ct. 628, 174 U. S. 125, 43 L. Ed. 920.

—**§347. Taking after maturity.**

See 7 Cent. Dig. Bills & N. §§ 870-897.

—**§348. — Time of taking.**

See 7 Cent. Dig. Bills & N. §§ 870-877½.

A railroad company incorporated in Vermont made and delivered in Massachusetts a demand note to a subscriber to its stock, who had advanced money to the company; and it was agreed that assessments on his stock, when they became payable, should be considered as payments on the note. After assessments exceeding the amount of the note had been made, and more than 60 days after the making of the note, the payee transferred it to another person. *Held* that, as between this indorsee and the company the note was paid for, he took it when overdue, since by the statutes, both of Massachusetts and Vermont, demand notes are overdue after 60 days from their date.—Paine v. Central Vt. R. Co., 118 U. S. 152, 6 S. Ct. 1019, 30 L. Ed. 193.

—**§352. Consideration in general.**

See 7 Cent. Dig. Bills & N. §§ 814, 893-908.

—**§356. — Crediting proceeds.**

See 7 Cent. Dig. Bills & N. § 908.

The mere crediting of a check on the books of a bank, which may be canceled at any time, does not make the bank a bona fide purchaser.—Thompson v. Sioux Falls Nat. Bank, 150 U.

S. 231, 14 S. Ct. 94, 37 L. Ed. 1063, reversing judgment *Sioux Falls Nat. Bank v. First Nat. Bank*, 6 Dak. 113, 50 N. W. 829.

⚡358. **Taking as collateral security for pre-existing debt.**

See 7 Cent. Dig. Bills & N. §§ 913-923, 961.

A note transferred before due, without notice of equities, as collateral security for a pre-existing debt, is transferred for value, and the holder takes it free from defenses or set-off existing between the original parties.—*American File Co. v. Garrett*, 110 U. S. 288, 4 S. Ct. 90, 28 L. Ed. 149.

⚡359. **Taking in payment of pre-existing debt.**

See 7 Cent. Dig. Bills & N. §§ 924-936.

One who takes accommodation paper from the party for whose benefit it was made, and gives him credit for the same on a precedent indebtedness, is a holder for value.—*Israel v. Gale*, 19 S. Ct. 768, 174 U. S. 391, 43 L. Ed. 1019, affirming judgment 77 F. 532, 23 C. C. A. 274.

⚡363. **Title and rights acquired by bona fide purchasers.**

See 7 Cent. Dig. Bills & N. §§ 790, 791, 980, 962.

Where, in a recorded deed of land subject to a mortgage, an agreement of the grantee to assume and pay it is inserted by mistake of the scrivener and against the intentions of the parties, and on the discovery of the mistake the grantor releases the grantee from all liability under the agreement, a court of equity will not enforce the agreement at the suit of one who, in ignorance of the agreement, and before the execution of the release, purchases the notes secured by the mortgage, although the grantee, after the deed of conveyance to him, paid interest accruing on the notes.—*Drury v. Hayden*, 111 U. S. 223, 4 S. Ct. 405, 28 L. Ed. 408.

⚡364. **Defenses as against bona fide purchasers.**

See 7 Cent. Dig. Bills & N. §§ 944-959, 963, 995; 48 Cent. Dig. Ven. & Pur. § 864.

⚡375. **— Illegality in general.**

See 7 Cent. Dig. Bills & N. §§ 971-981; 24 Cent. Dig. Gaming, § 44.

A person owning two notes indorsed thereon a guaranty of payment, and transferred them to another in payment of a void grain-gambling debt. The latter deposited the same with a bank as collateral security for a valid debt, less in amount than the face of the notes. The bank took them without notice of the gambling transaction, and thereafter recovered a judgment for their full value against the guarantor. *Held*, that the subsequent assignment of his interest by the guarantor, having been made in consideration of care and support and expenditures for medical attendance, carries to the assignee such a right as will entitle him to the remedies given by Rev. St. Ill. c. 38, § 131, against judgments secured on instruments executed or transferred in payment of gambling contracts.—*Pearce v. Rice*, 142 U. S. 28, 12 S. Ct. 130, 35 L. Ed. 925.

A person owning two notes indorsed thereon a guaranty of payment, and transferred them to another in payment of a void grain-gambling debt. The latter deposited the same with a bank as collateral security for a valid debt, less in amount than the face of the notes. The bank took them without notice of the gambling transaction, and thereafter recovered a judgment for their full value against the guarantor. *Held*, that this judgment was conclusive between the bank and the guarantor to the amount of the debt secured, notwithstanding that Rev. St. Ill. c. 38, §§ 130, 131, provide that all instruments and judgments given in consideration of gambling contracts may be set aside.—*Id.*

⚡382. **— Lost or stolen instruments.**

See 7 Cent. Dig. Bills & N. § 955.

Certificates issued by the board of public works of the District of Columbia, payable to bearer, were redeemed before maturity, and canceled by stamping across the face in ink, "Canceled by the Board of Audit." The fact of redemption was entered in a registry book, and the certificates were placed in a room in the treasury department occupied by several clerks of the board of audit. Before the date of maturity of the certificates they were stolen by one of the clerks of the board of audit, who occupied a desk in the room where they were placed, but whose duties were not connected with the redemption or care of the certificates, and the marks of cancellation were removed. *Held*, that bona fide purchasers could not recover from the District of Columbia, Act Cong. March 3, 1875, c. 162, § 16, requiring certain officers of the District to destroy all redeemed certificates by burning, being merely directory.—*District of Columbia v. Cornell*, 130 U. S. 655, 9 S. Ct. 694, 32 L. Ed. 1041.

VI. **PRESENTMENT, DEMAND, NOTICE, AND PROTEST.**

⚡393. **Necessity of demand for payment and notice of nonpayment.**

See 7 Cent. Dig. Bills & N. §§ 996-1050.

⚡394. **— In general.**

See 7 Cent. Dig. Bills & N. §§ 996-1050.

The drawer is entitled to notice of the dishonor of a bill, if he had reasonable ground to believe it would be honored, though he had no funds in the drawee's hands.—*Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 S. Ct. 314, 28 L. Ed. 866, reversing (C. C.) *Pendleton v. Knickerbocker Life Ins. Co.*, 5 F. 238.

An insurance company, in payment of premium, accepted a draft which contained a provision that it was given to pay the premium, and that, if it was not paid at maturity, the policy should become void. *Held*, that nonpayment of the draft on presentment, without protest, or notice thereof, was sufficient to work a forfeiture.—*Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 S. Ct. 314, 28 L. Ed. 866, reversing (C. C.) *Pendleton v. Knickerbocker Life Ins. Co.*, 5 F. 238; *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 6 S. Ct. 74, 29 L. Ed. 432.

⚡399. **Sufficiency of presentment for payment and demand.**

See 7 Cent. Dig. Bills & N. §§ 1064-1112.

⚡404. **— Time.**

See 7 Cent. Dig. Bills & N. §§ 1091-1099, 1101-1103.

Where a foreign bill of exchange is dated March 4th, payable in London 60 days after sight, and accepted as "due May 21st," but no date of acceptance appears, May 21st must be regarded as the time of payment fixed by the bill, and a demand and protest on that day will be premature because it does not appear that the days of grace were allowed.—*Bell v. First Nat. Bank*, 115 U. S. 373, 6 S. Ct. 105, 29 L. Ed. 409.

⚡407. **— Effect of delay.**

See 7 Cent. Dig. Bills & N. §§ 1110-1112.

Delay by holder for value of a check drawn by a bank on a foreign bank, in presenting it for payment, does not affect the nonavailability of set-off as between such holder and the drawer, where the funds on which the check was drawn were still in the payee's hands when payment was demanded.—*Bull v. First Nat. Bank of Kasson*, 8 S. Ct. 62, 123 U. S. 105, 31 L. Ed. 97.

408. Protest and certificate thereof.

See 7 Cent. Dig. Bills & N. §§ 1019-1021, 1113-1123.

410. — Certificate as evidence.

See 7 Cent. Dig. Bills & N. §§ 1120-1128.

In an action against the drawer of a bill of exchange payable in Norway, the notarial certificate of protest, authenticated by the notary's seal, impressed directly on the paper by a die with which ink was used, was offered to prove presentation and nonpayment. *Held*, that the court will take judicial notice of the seals of notaries public, and that it was properly admitted.—*Pierce v. Indseth*, 106 U. S. 546, 1 S. Ct. 418, 27 L. Ed. 254, affirming Fed. Cas. No. 7,026.

VII. PAYMENT AND DISCHARGE.

Application of bank deposit, see Banks and Banking, 4134.

Payment of checks by bank, see Banks and Banking, 4137-142.

Payment of forged or altered paper by bank, see Banks and Banking, 4147, 148.

Rights, duties, and liabilities of bank receiving bill or note for collection, see Banks and Banking, 4164-175.

426. Persons by whom payment may be made and effect.

See 7 Cent. Dig. Bills & N. §§ 1223-1232.

D. executed a note secured by mortgage, and, being unable to meet it when it fell due, made an agreement with T. by which the latter was to take up the note on the 1st of September, and hold it until he was reimbursed. On that date T. lacked \$3,000 of having enough to pay the note, and agreed with the bank to advance that sum for a few days until one B. should make him a promised loan of the same amount. T. then went to the payee, paid him what money he had, told him to call at the bank and get the balance, and the payee delivered the note to T., uncanceled and indorsed in blank. T. left the note at the bank, which paid the payee the \$3,000. Afterwards B. paid that sum to the bank and took the note away, T. having agreed to pledge the note to him as collateral. The payee had urged payment by D., and had left the note at a bank for collection until two days before September 1st, when he resumed possession of the note. *Held*, that the payee must be held to have had knowledge of the arrangement between D. and T., and that the latter was expecting to raise money on the note itself, and that the transaction was not a payment of the note by D. through T. as his agent, but was a sale to T.—*Carter v. Burr*, 113 U. S. 737, 5 S. Ct. 713, 28 L. Ed. 1147.

427. Persons to whom payment may be made.

See 7 Cent. Dig. Bills & N. §§ 1233-1244.

Where notes for the purchase money of land are made payable to the vendor's agent or "bearer," payment to the agent, who still holds the note, after his principal's death, is valid, and entitles the vendee to a deed.—*Long v. Thayer*, 150 U. S. 520, 14 S. Ct. 189, 37 L. Ed. 1167.

428. Mode and sufficiency of payment.

See 7 Cent. Dig. Bills & N. §§ 1245-1259, 1262, 1263.

429. — In general.

See 7 Cent. Dig. Bills & N. §§ 1245-1250, 1262, 1263.

Where the payee of a note agrees at maturity that the makers may have the principal on his death, if they will pay him 10 per cent. interest during his life, and in November of each year four months' interest in advance, and on failure to so pay in advance to pay interest on interest, the makers, in a suit

by the payee's executors, must prove that they paid the interest at the rate and in the mode agreed upon until his death, in order to avoid a recovery, as the payee's agreement is to be regarded as conditioned upon performance.—*Harmon v. McAdams*, 120 U. S. 363, 7 S. Ct. 553, 30 L. Ed. 683; *Harmon v. McAdams*, 120 U. S. 366, 7 S. Ct. 555, 30 L. Ed. 684.

VIII. ACTIONS.

See Estoppel, 487.

Action on lost draft, see Lost Instruments, 423.

Failure to set up counterclaim effect, see Judgment, 4622.

Judgment in action on one of several notes as bar to action on others, see Judgment, 4596.

Limitation of actions, see Limitation of Actions, 42, 25, 51, 145-148.

Parol or extrinsic evidence, see Evidence, 4402.

Removal of cause to federal court, see Removal of Causes, 419.

441. Right of action.

See 7 Cent. Dig. Bills & N. §§ 1286-1303, 1305-1309, 1311-1329, 1377-1423.

443. — Title to sustain action.

See 7 Cent. Dig. Bills & N. §§ 1377-1380, 1383-1392, 1394-1423.

A bank in Ohio sent to its correspondent in New York a note and mortgage received as the successor of another bank, given for a loan made by the old bank, with a written guaranty of payment of the note. The New York bank discounted the note, and placed the proceeds to the credit of the Ohio bank, which subsequently directed suit to enforce payment in the United States circuit court in Ohio. *Held*, that the New York bank could maintain the suit subject to all defenses that would have been good against the old bank.—*Lanier v. Nash*, 121 U. S. 404, 7 S. Ct. 919, 30 L. Ed. 947.

450. Defenses.

See 7 Cent. Dig. Bills & N. §§ 1303, 1340-1376.

451. — In general.

See 7 Cent. Dig. Bills & N. §§ 1342, 1343, 1365, 1366.

In an action on a promissory note a plea that it is based on partnership transactions, the accounts of which have not been settled, that the members of the firm were interested in the note, and were necessary parties to an action thereon, that the amount due thereon, if anything, could not be ascertained until final settlement of the partnership accounts, sets up an equitable defense, and cannot be entertained in a court of law.—*Burnes v. Scott*, 117 U. S. 532, 6 S. Ct. 865, 29 L. Ed. 991.

452. — Particular grounds.

See 7 Cent. Dig. Bills & N. §§ 1303, 1352-1364, 1367-1376; 4 Cent. Dig. Assign. § 203.

Any wrong done to the maker of a note secured by trust deed, through the acts of the trustee in selling the land, and any payments made by the maker to such trustee, where the trustee was the agent of the maker, constitute no defense to an action on the note.—*Gormley v. Runyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

453. — Persons as to or against whom defenses are available.

See 7 Cent. Dig. Bills & N. §§ 1344-1351.

Payee's fraud in obtaining signatures of some of the makers in a suit held available to other makers under Laws N. M. 1907, c. 83, §

55.—*Schmidt & Story v. Bank of Commerce*, 34 S. Ct. 730, 234 U. S. 64, 58 L. Ed. 1214, reversing judgment *Bank of Commerce v. Broyles*, 120 F. 670, 16 N. M. 414.

The defense that signatures of several co-makers of notes were obtained by fraudulent representations by the payee is available to other makers, though they signed the notes before they were signed by the co-makers upon whom the fraud was practiced, where the payee's position, sustained by the court, is that the defense under Laws N. M. 1907, c. 83, § 125, that the notes were altered by other signatures, is not available.—*Id.*

461. Declaration, complaint, or petition.

See 7 Cent. Dig. Bills & N. §§ 1444-1502.

462. — Form and requisites in general.

See 7 Cent. Dig. Bills & N. §§ 1444, 1445, 1452-1461, 1464-1466.

Where an order drawn on a city by a contractor, directing the payment of a specified sum to be charged to the contract price, is accepted by the city, in an action by the payees against the city on the order and its acceptance, the petition, which alleges that the city has refused to pay the same, though often requested, is not demurrable on the ground that by the acceptance the city was to pay in city warrants, and that the petition failed to allege a demand for payment in such warrants.—*City of Superior v. Ripley*, 138 U. S. 93, 11 S. Ct. 288, 34 L. Ed. 914, affirming judgment (C. C.) *Ripley v. Superior*, 41 F. 113.

489. Issues, proof, and variance.

See 7 Cent. Dig. Bills & N. §§ 1587-1642; 11 Cent. Dig. Contracts, § 1727; 29 Cent. Dig. Interest, § 154; 39 Cent. Dig. Plead. § 1325.

In a suit against the maker of a promissory note by an indorser who had been compelled to pay it, the answer alleged that it was given for corporate stock in a company of which plaintiff was president, which had been subscribed by defendant at its par value at the solicitation of plaintiff; that the subscription was paid partly in cash and partly in the note in question; that before defendant would subscribe for the stock it was understood between the plaintiff and defendant that defendant should make the cash payment and execute the note, with the privilege to renew the same from time to time as it became due, and that the stock should be held by plaintiff as collateral security for the note, with the right on the part of defendant, if he saw fit to avail himself of it within one year, to forfeit the cash payment and the stock, and be relieved from liability on the note; and that he notified plaintiff within that time that he would forfeit the payment and the stock. The evidence showed that plaintiff received from defendant the certificate of the stock with a transfer of it in blank. *Held*, that the answer sufficiently made the issue as to whether there was an agreement personally by plaintiff to take the stock subscribed for, and pay the note, to justify the submission thereof to the jury.—*Lancaster v. Collins*, 115 U. S. 222, 6 S. Ct. 33, 29 L. Ed. 373.

In an action on a note, evidence of collateral security, which it is claimed should have been exhausted before an action could be brought, is inadmissible, when the matter of the collateral is not mentioned in the answer.—*Nelson v. Flint*, 17 S. Ct. 576, 166 U. S. 276, 41 L. Ed. 1002.

490. Presumptions and burden of proof.

See 7 Cent. Dig. Bills & N. §§ 1448, 1643-1697.

497. — Good faith and payment of value.

See 7 Cent. Dig. Bills & N. §§ 1443, 1676-1681, 1682-1687.

Where, in an action on a negotiable instrument, the presumption in favor of plaintiff as a bona fide holder for value is removed by proof of fraud or illegality in its inception, it is not essential that plaintiff sustain the burden so cast on him by showing that he himself purchased the instrument for value, but he may avail himself of the position of any previous holder who was a holder for value.—*Inhabitants Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 S. Ct. 391, 27 L. Ed. 431; *Same v. Dana*, 107 U. S. 162, 2 S. Ct. 403, 27 L. Ed. 436.

500. Admissibility of evidence.

See 7 Cent. Dig. Bills & N. §§ 1698-1739.

501. — In general.

See 7 Cent. Dig. Bills & N. §§ 1698-1707.

Where the execution of an accommodation note is put in issue in an action thereon by the indorsee against the makers, testimony as to the relations between the makers and the nominal payee, and as to the use to which the latter wanted to put the money borrowed on the note, is admissible.—*Holmes v. Goldsmith*, 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118, affirming judgment (C. C.) *Goldsmith v. Holmes*, 36 F. 484, 1 L. R. A. 816.

Conversations between two makers of a note, whereby one of them was induced to sign it, are not competent evidence to affect the payee, when he was not present.—*Nelson v. Flint*, 17 S. Ct. 576, 166 U. S. 276, 41 L. Ed. 1002.

503. — Consideration.

See 7 Cent. Dig. Bills & N. §§ 1733-1739.

In an action on a note, the check which was given as the consideration for the note is admissible in evidence as part of the *res gestae* to show that the loan for which the note was given was actually received from the payee.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

509. — Good faith and payment of value.

See 7 Cent. Dig. Bills & N. §§ 1740-1745.

In an action by a bank upon an accepted draft discounted by it, and a defense by the drawee that the bill of lading attached as security to the draft was a forgery and the reputation of the drawer such as ought to have put the bank upon inquiry in discounting the draft, evidence of misconduct of the drawer in previous transactions not connected with the one in question is inadmissible.—*Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 S. Ct. 318, 30 L. Ed. 515.

Newspaper articles, showing a similar prior forgery of the drawer of a draft with forged bill of lading attached, are not admissible to establish the bad faith of the bank cashing the same, the officers of which never saw them.—*Id.*

Rumors or general reputation of bad character of the drawer do not charge a bank with bad faith in discounting a draft, and not inquiring into the genuineness of the bills of lading which purport to secure it.—*Id.*

The president of the bank, on examination by the opposing counsel, being asked why no particular pains were taken in this matter after the protest, was properly permitted to explain, notwithstanding the objection of the counsel, that the protest of drafts was of very common occurrence, on shipments with bills of lading attached.—*Id.*

515. Weight and sufficiency of evidence.

See 7 Cent. Dig. Bills & N. §§ 1800-1855.

↪525. — Good faith and payment of value.

See 7 Cent. Dig. Bills & N. §§ 1832-1839.

Where a cashier's check for a suspiciously large amount is issued, without consideration to a county treasurer, known to the bank to be a defaulter, for the mere purpose of enabling him to meet the requirements of the county commissioners, acting as an auditing committee, in the settlement of his accounts, the facts that the commissioners had previously refused to accept his pass book or a letter from the bank as sufficient evidence that he had the amount on deposit, that they almost immediately turned over the check, together with the money on hand, to the treasurer's bondsmen, without releasing them, coupled with the further fact that there was testimony tending to show both that the check was not delivered to them by the treasurer voluntarily, but was extorted by a show of force, and that they were warned that the check was fictitious, and its payment would be resisted, is sufficient to raise a question for the jury as to whether the commissioners were bona fide holders.—*Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 14 S. Ct. 94, 37 L. Ed. 1063, reversing judgment *Sioux Falls Nat. Bank v. First Nat. Bank*, 6 Dak. 113, 50 N. W. 829.

↪528. Amount of recovery.

See 7 Cent. Dig. Bills & N. §§ 1934-1948.

↪533. — Damages for dishonor.

See 7 Cent. Dig. Bills & N. §§ 1937-1940.

A debtor transmitted to his creditor certain foreign bills of exchange indorsed by him, with authority to collect them at maturity and retain the amount of the debt, and the creditor caused them to be protested when due. *Held* that, being only the holder, and not the true owner, he could not recover of his debtor the statutory damages allowed upon the protest of foreign bills, over and above the actual expense.—*Hambro v. Casey*, 110 U. S. 216, 3 S. Ct. 583, 28 L. Ed. 125.

↪535. Trial.

See 7 Cent. Dig. Bills & N. §§ 1856-1913.

↪537. — Questions for jury.

See 7 Cent. Dig. Bills & N. §§ 1862-1893.

B. gave to S. receipts for notes of S., most of the receipts expressing that the notes were received by B. for wool purchased or to be purchased by B. for S., others acknowledging receipt of notes for accommodation of and to be protected at maturity by B., and another for notes stated to be "for purchase of wool, or to be protected by us at maturity." *Held* that, even on testimony denying that any of the notes mentioned in the last receipt were to be used for the benefit of B., a peremptory instruction that B. had no right to pledge them as collateral for his own debt, and that to do so was to break faith with S., was error, as the question was for the jury.—*Corn Exch. Nat. Bank v. Schepers*, 111 U. S. 440, 4 S. Ct. 505, 28 L. Ed. 474.

↪541. Execution.

See 7 Cent. Dig. Bills & N. § 1928.

A purchaser of a note executed by a railroad company, having obtained judgment thereon, is not precluded from seeking satisfaction of the same out of the earnings of the road because he has not yet paid for the note, being under

legal obligation by the indorsement to pay the amount agreed.—*Sage v. Memphis & L. R. Co.*, 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694.

BLANKS.

See—

Alteration of Instruments, ↪12.
Deeds, ↪32.

BLASPHEMY.

[No paragraphs or references in this Digest. But see 7 Cent. Dig. Blasph.]

BLASTING.

See Trespass, ↪50.

BLIND VEINS.

See Mines and Minerals, ↪33.

BLOCKADE.

See War, ↪19.

BOARDING HOUSES.

See Innkeepers.

BOARD OF CENSORS.

Motion picture films, see Theaters and Shows, ↪2.

BOARD OF TRADE.

Deduction from weight of commodities purchased, see Weights and Measures, ↪2.
Regulations interfering with liberty of contract, see Constitutional Law, ↪276.

BOARDS.

See—

Exchanges.
Health, ↪1.
Injunction, ↪74-85.
Municipal Corporations, ↪179-187.
Taxation, ↪477-492.
Territories, ↪23.
Waters and Water Courses, ↪128.

BOILERS.

See Steam.

BONA FIDE PURCHASERS.

See—

Bills and Notes, ↪331-382, 497, 525.
Bonds, ↪93-98.
Carriers, ↪59.
Chattel Mortgages, ↪153.
Counties, ↪186.
Execution, ↪270-272.
Fraudulent Conveyances, ↪197.
Lis Pendens, ↪25.
Mortgages, ↪152-155.
Municipal Corporations, ↪940-948.
Public Lands, ↪131-133, 138.
Trusts, ↪357.
Vendor and Purchaser, ↪222-244.

BONDS.

Scope-Note.

[INCLUDES instruments in writing under seal whereby the maker binds himself to pay a certain sum of money absolutely or conditionally; their nature, requisites, validity, incidents, construction, operation, and effect in general; negotiability, transfer, and rights of purchasers, assignees, etc.; and actions on bonds.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity.

- ⌘ 42. Legality of condition or of consideration.

II. Construction and Operation.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Bonds, §§ 47-72.]

III. Negotiability and Transfer.

- ⌘ 78. Nature and form of instrument.
 - 87. Rights and liabilities on assignment or sale.
 - 91. — Express and implied warranties.
 - 92. Bona fide purchasers.
 - 93. — In general.
 - 95. — Constructive notice, and facts putting on inquiry.
 - 98. — Purchasers from bona fide holders.

IV. Performance or Breach of Condition.

- ⌘ 109. Breach of condition.
- 110. — In general.

V. Actions.

- ⌘ 123. Pleading.
 - 128. — Issues, proof, and variance.
 - 133. Damages and amount of recovery.
 - 134. — In general.

Cross-References.

See—

Indemnity.
Internal Revenue, ⌘ 19.
Bottomry and respondentia bonds, see Shipping, ⌘ 91-98.
Contractor's bonds, see United States, ⌘ 87.
Conversion of bonds, see Trover and Conversion, ⌘ 9, 50.
Convict bonds, see Convicts, ⌘ 11.
Corporate bonds, see Corporations, ⌘ 472.
County bonds, see Counties, ⌘ 172-183.
For duties, see Customs Duties, ⌘ 86.
Municipal bonds, see Municipal Corporations, ⌘ 906-955.
Railroad aid bonds, see—
Municipal Corporations, ⌘ 912.
Railroads, ⌘ 153.
School district bonds, see Schools and School Districts, ⌘ 97.
Sureties on bonds, see Principal and Surety.
Town bonds, see Towns, ⌘ 52.
United States bonds, see United States, ⌘ 91.

Bonds for performance of duties of trust or office.

See—

Clerks of Courts, ⌘ 74, 75.
Executors and Administrators, ⌘ 528-537.
Guardian and Ward, ⌘ 92, 180.
Internal Revenue, ⌘ 22.
Levees, ⌘ 34.
Officers, ⌘ 126-143.
Taxation, ⌘ 570.
United States, ⌘ 35, 51.
United States Marshals, ⌘ 36.

Bonds in judicial proceedings.

See—

Admiralty, ⌘ 92.
Appeal and Error, ⌘ 370-395, 462-475, 1228-1234.
Attachment, ⌘ 330-351.
Bail.
Costs, ⌘ 109.
Criminal Law, ⌘ 1084.
Detinue, ⌘ 14.
Injunction, ⌘ 234-252.
Replevin, ⌘ 123-135.

I. REQUISITES AND VALIDITY.**§42. Legality of condition or of consideration.**

See 8 Cent. Dig. Bonds, §§ 35-46.

The validity of a bond cannot be questioned by the beneficiary because filed in violation of an agreement between the principal obligor and sole surety to procure another surety before delivery.—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 S. Ct. 237, 32 L. Ed. 630.

II. CONSTRUCTION AND OPERATION.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Bonds, §§ 47-72.]

III. NEGOTIABILITY AND TRANSFER.

Bona fide purchasers of municipal bonds, see Municipal Corporations, §940-948.

§78. Nature and form of instrument.

See 8 Cent. Dig. Bonds, § 75.

The negotiability of bonds due on or before a certain date is not defeated by a provision making them redeemable by installments determined by drawings. Decree 80 F. 450, 25 C. C. A. 549, affirmed.—*Dickerman v. Northern Trust Co.*, 20 S. Ct. 311, 176 U. S. 181, 44 L. Ed. 423.

§87. Rights and liabilities on assignment or sale.

See 8 Cent. Dig. Bonds, §§ 88-96.

§91. — Express and implied warranties.

See 8 Cent. Dig. Bonds, § 96.

Under Civ. Code La. art. 2646, providing that he who sells a credit or an incorporeal right warrants its existence at the time of its transfer, though no warranty be mentioned in the deed, where both parties entering into the contract of sale contemplate the sale of valid securities, of which there are many outstanding, and those delivered are void, because stricken with nullity by a constitutional provision adopted after the act authorizing the issue of securities, there being nothing on the face of the bonds indicating their illegality, the vendor is liable for their value.—*Meyer v. Richards*, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199.

Where both the vendor and vendee of negotiable bonds contemplate valid securities, of which there are many outstanding, and those delivered are void, not because of a want of power to enact the law under which they were issued, or because they are ultra vires for some other legal cause, but because they have been stricken with nullity by a constitutional provision adopted after the act authorizing the issue of the securities, there being nothing on their face to indicate their invalidity, there is a breach of the implied warranty of identity, and the vendor may recover.—*Meyer v. Richards*, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199, distinguishing *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496.

§92. Bona fide purchasers.

See 8 Cent. Dig. Bonds, §§ 100-111.

§93. — In general.

See 8 Cent. Dig. Bonds, §§ 100, 106.

One taking negotiable bonds as collateral security for a pre-existing debt is a purchaser for value.—*American File Co. v. Garrett*, 110 U. S. 288, 4 S. Ct. 90, 28 L. Ed. 149.

§95. — Constructive notice, and facts putting on inquiry.

See 8 Cent. Dig. Bonds, §§ 102, 104.

Plaintiff bought at auction state railroad bonds, invalid except in the hands of a bona fide holder, knowing that they had been the subject of litigation, and that 10 years' interest on them was unpaid, from one who had been the agent of the perpetrators of the fraud that invalidated the bonds, and who held them as security for a debt less than the accrued interest, and knew of the circumstances of their fraudulent origin. *Held*, that plaintiff was not a bona fide holder.—*Trask v. Jacksonville, P. & M. R. Co.*, 124 U. S. 515, 8 S. Ct. 574, 31 L. Ed. 521.

§98. — Purchasers from bona fide holders.

See 8 Cent. Dig. Bonds, § 111.

A purchaser of bonds, with notice of a claim by a third person, from one without such notice, will be protected.—*Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 7 S. Ct. 1206, 30 L. Ed. 1210.

In an action on county bonds, where there is evidence that persons from whom plaintiff purchased the bonds, and prior holders, were bona fide purchasers for value without notice of pendency of a suit to restrain delivery of the bonds, and no evidence that plaintiff was a party to the scheme to have the bonds delivered before the suit was decided, it is proper to charge that ownership of the bonds by any prior holder, under circumstances protecting him against any defense by the county, entitled plaintiff to recover, even if he had knowledge of the suit when he purchased.—*Scotland County v. Hill*, 132 U. S. 107, 10 S. Ct. 26, 33 L. Ed. 261.

IV. PERFORMANCE OR BREACH OF CONDITION.**§109. Breach of condition.**

See 8 Cent. Dig. Bonds, §§ 119-122.

§110. — In general.

See 8 Cent. Dig. Bonds, §§ 119, 122.

A bond "in the penal sum of \$10,000, liquidated damages," conditioned on the discharge within one year of obligee from all claims against him held by the obligor and certain others, is a penal bond; and the obligor is not liable thereon if, a month after the time mentioned in the bond, but before the beginning of the action, the obligee obtained his discharge in bankruptcy.—*Bignall v. Gould*, 119 U. S. 495, 7 S. Ct. 294, 30 L. Ed. 491.

V. ACTIONS.

Limitation of actions, see Limitation of Actions, §25.

§123. Pleading.

See 8 Cent. Dig. Bonds, §§ 98, 157-217.

§128. — Issues, proof, and variance.

See 8 Cent. Dig. Bonds, §§ 98, 205-217.

An official bond dated "the — day of March, 1878," was admissible in evidence under a declaration thereon stating its date as the 2d of April, 1878, it appearing that it was not accepted until that date.—*Moses v. United States*, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

§133. Damages and amount of recovery.

See 8 Cent. Dig. Bonds, §§ 238-244, 247, 261.

134. — **In general.**

See 8 Cent. Dig. Bonds, §§ 238-240, 242, 243.

Act R. I. Jan., 1869, authorized a Massachusetts and Connecticut railroad corporation to extend its line into the state, and required it to deposit a bond with satisfactory sureties in the sum of \$100,000, conditioned that they would complete the road by a certain date. *Held*, that upon breach of condition a forfeiture of the whole amount accrued, and not merely of the actual damages arising therefrom.—Clark v. Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. Ed. 780.

BOOKKEEPING.

Interstate Commerce Commission, authority to prescribe system of accounting for carriers, see Commerce, 85; delegation of legislative power as to system of bookkeeping for carriers, see Constitutional Law, 62.

BOOKS.

Assessment books, see Taxation, 413-446.
Compelling delivery of corporate books to trustee in bankruptcy, see Bankruptcy, 136.
Competency as evidence, see Evidence, 354, 360-363, 434.
Corporate books as property vesting in trustee in bankruptcy, see Bankruptcy, 138.
Corporation, registration or transfer of stock on books, see Corporations, 128-136.
Duties on, see Customs Duties, 36.
National bank, inspection by stockholder, see Banks and Banking, 246.
Offer as evidence, see Trial, 64.

Rights of authors, see Literary Property.
Searches and seizures, compelling production of documents before grand jury, see Searches and Seizures, 7.
Witnesses' privileges as to production, see Witnesses, 298.

BOOKS OF ACCOUNT.

Best and secondary evidence, see Evidence, 166.
Compelling production by bankrupt, see Bankruptcy, 242.
Competency as evidence, see Evidence, 354, 434.
Requirement of insurance policy as to keeping books by insured, see Insurance, 335.

BOOMS.

See—
Logs and Logging, 13.
Navigable Waters, 21.

BOROUGHES.

See Municipal Corporations.

BOTTLES.

Duty on, see Customs Duties, 25, 47.

BOTTOMRY.

See Shipping, 91-98.

BOUNDARIES.

Scope-Note.

[INCLUDES lines dividing contiguous lands, as described in conveyances, surveys, etc., or indicated by marks of separation, natural or artificial; ascertainment and establishment of such lines, and agreements between adjoining proprietors and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Description.

3. Relative importance of conflicting elements.
4. Natural and permanent objects.
6. Courses and distances.
7. Location of corners.
8. Location of lines.
9. Designation, quantity, and location of land.
10. Maps, plats, and field notes.
12. Waters and water courses.
13. — In general.
14. — Construction of language of description.

II. Evidence, Ascertainment, and Establishment.

33. Presumptions and burden of proof.
34. Admissibility of evidence.
36. — Documentary evidence.
37. Weight and sufficiency of evidence.
38. Trial of issues.
40. — Questions for jury.
41. — Instructions.
49. Practical location by parties.
54. Official surveys.

Cross-References.

See Navigable Waters, ¶36, 45.

Bridges constructed over boundary stream, see Bridges, ¶7.

Determination of boundary of state and territory as political question, see Constitutional Law, ¶68.

Geographical or political divisions.

See—

Counties, ¶9-16.

Municipal Corporations, ¶26-35.

Schools and School Districts, ¶31-41.

States, ¶11-13.

Territories, ¶14.

Towns, ¶5-9.

I. DESCRIPTION.

Riparian rights on lakes, see Waters and Water Courses, ¶109, 111.

¶3. Relative importance of conflicting elements.

See 8 Cent. Dig. Bound. §§ 3-41.

Where lands are patented by a state according to the official plat in the state land office, the patent, though not describing the lands as having upon them any water course or bayou, is limited by calls for bayous noted on such official plat certified to the state by the general land office and the interior department, as *Rev. St. U. S. §§ 2395, 2396*, make it the duty of the surveyor general to note water courses over which the line he runs may pass, and also the quality of the land, and provide that a copy of his plat shall be kept for public information in the offices where the lands are to be sold, and that the boundary lines actually run and marked on his surveys shall be proper boundary lines. —*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 568.

Whether a lake ever existed in front of or bordering on land patented to the state of Oregon under the swamp land grant, the rescission of whose waters would leave the bed of the lake thus laid bare to accrue to the owner of such land, is a question of fact which is not concluded by a mere call in the official survey, plats, and maps for a meander line along the side of a lake as a boundary of such land. —*French-Glenn Live Stock Co. v. Springer*, 22 S. Ct. 563, 185 U. S. 47, 46 L. Ed. 800, affirming judgment 58 P. 102, 35 Or. 312; *Same v. Colwell*, 22 S. Ct. 566, 185 U. S. 54, 46 L. Ed. 804, affirming judgment 58 P. 1119, 38 Or. 600.

The courses and distances as set forth in the plat of an official survey, and referred to in patents from the United States which show an alleged meander line of a lake as one boundary, control in ejectment, as against the actual boundary of the lake, where the survey was grossly fraudulent, and the lake never existed within half a mile of the point indicated on the plat, and where to fix the lake as the boundary would give the patentees an area very largely in excess of that described in the patents and actually paid for, and the extension of the side lines to the lake is a matter of considerable difficulty and would necessitate going outside of the section in which the description and plat placed the land. Judgment, *Security Land & Exploration Co. v. Burns*, 91 N. W. 304, 87 Minn. 97, 63 L. R. A. 157, 94 Am. St. Rep. 684, affirmed. —*Security Land & Exploration Company v. Burns*, 24 S. Ct. 425, 193 U. S. 167, 48 L. Ed. 602; *Same v. Weckey*, 24 S. Ct. 431, 193 U. S. 188, 48 L. Ed. 674.

Monuments in a royal grant prevail over a description by courses, distances, and area where a discrepancy exists. —*Spreckels v. Brown*, 29 S. Ct. 254, 212 U. S. 208, 53 L. Ed. 476.

A mortgagor who conveyed a single body of land with definite boundaries cannot prevail in ejectment for a tract embraced within those boundaries, but alleged not to be covered by the

mortgage, brought by him against the mortgagee, the purchaser at foreclosure. —*Vevey Diaz v. Sanchez*, 33 S. Ct. 36, 226 U. S. 234, 57 L. Ed. 201.

The conspicuousness of the main ridge of the Cascade Mountains requires, when determining the boundaries of the Yakima Indian reservation defined in treaty of June 9, 1855, that the main ridge be deemed the western line of the reservation, though inconsistent with some of the calls for less conspicuous landmarks in the northern and southern boundaries. —*Northern Pac. R. Co. v. United States*, 33 S. Ct. 368, 227 U. S. 355, 57 L. Ed. 544, affirming decree 191 F. 947, 112 C. C. A. 359.

¶4. Natural and permanent objects.

See 8 Cent. Dig. Bound. §§ 42, 43.

The official plat of a township showed that sections 23 and 26 are fractional, bordering on a river on the west; that a meander line runs through them; and that the area of certain lots in such sections is 170.42 acres. In fact, along such meander line is a bayou, west of which, between it and such river, is a body of land over a mile wide, containing 600 acres, which was never surveyed. The length of the section line between such sections, from the east line thereof to the meander line, is given on such plat as 30.55 chains, while the distance from such east line to the main body of the river is about 1½ miles. *Held*, that such bayou, and not the main body of the river, is the boundary of such sections and lots, and that a patent of such lots "containing 170.42 acres, according to the official plat," did not convey the land between the bayou and the main body of the river. —*Horne v. Smith*, 159 U. S. 40, 15 S. Ct. 988, 40 L. Ed. 68.

¶6. Courses and distances.

See 8 Cent. Dig. Bound. §§ 47-57.

Where the distances of a survey have been actually measured upon the ground, the courses and distances may be reversed, when by so doing they more nearly harmonize with the natural calls of the patent. —*Ayers v. Watson*, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 803.

A deed of unimproved land, "estimated" as 200 acres, described the boundaries as "beginning at two birches on Simmons creek, corner to A.'s land; and running thence up said creek with M.'s line, S., 55° W., 120 poles, to six chestnuts, corner to M.'s survey; and with the same S., 35° E., 310 poles, to a double and single poplar, corner to A.; and with the same N., 40° E., 250 poles, to the beginning." *Held*, it being apparent that in running the lines in the reverse direction all the calls would be satisfied, and the ambiguity would disappear, such course should be adopted, especially as such boundaries were natural, rather than a construction which would entirely ignore "Simmons creek," "Miller's line," the course, "S., 55° W.," and the distance, "120 poles," notwithstanding that the lines so run in the reverse direction would include 375 acres. —*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

67. Location of corners.

See 8 Cent. Dig. Bound. §§ 58-65.

A survey was bounded on the south by a river, and the location of the eastern line was conceded. Two trees stood in the eastern line, and the deed called for two trees as a northeast corner. In trespass to try title, the evidence was not sufficient to identify the two trees as the trees called for in the grant, and neither the northeast corner nor the north line could be established by any other marks or monuments. *Held*, that the northeast corner should be fixed by the courses and distances of the western and northern lines of the survey, except that the northern line should be extended so as to meet the recognized eastern line.—*Ayers v. Watson*, 113 U. S. 584, 5 S. Ct. 641, 28 L. Ed. 1093.

The beginning corner of a plat or certificate of survey is of no higher dignity than any other corner.—*Ayers v. Watson*, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 803.

68. Location of lines.

See 8 Cent. Dig. Bound. §§ 66-76.

The decree of the United States circuit court confirming to the city of San Francisco, Cal., as successor of a Mexican pueblo, its claim, made under Act Cong. March 3, 1851, to the pueblo lands, described the tract so confirmed as "embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." *Held* that, in a survey under the decree, the shore line of the bay should be run on the line of ordinary high-water mark, crossing the mouths of all streams running into the bay, and not following the line of high water of any tidal stream or estuary forming an arm of the bay.—*Knight v. United Land Ass'n*, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974.

69. Designation, quantity, and location of land.

See 8 Cent. Dig. Bound. §§ 77-89.

Where several tracts are surveyed at the same time by the same surveyor, under warrants of the same date and for the same owner, and are returned into the land office as one body, the surveys are not to be treated as separate and individual, nor can each tract be located independently of the rest by its own individual lines or calls, or courses and distances, but such surveys are to be located together as a block or one large tract. If lines and corners made for such a block can be found on the ground, they fix the location of the block, even to the disregard of the call for adjoiners, since they apply to each and every tract of the block as much as they do to the particular tract to which they are joined.—*Clement v. Parker*, 125 U. S. 309, 8 S. Ct. 907, 31 L. Ed. 721.

70. Maps, plats, and field notes.

See 8 Cent. Dig. Bound. §§ 90, 91.

Where land is conveyed according to a certain plan taken, the courses, distances, and lines there delineated are regarded as the description by which the limits of the grant are to be ascertained.—*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566.

72. Waters and water courses.

See 8 Cent. Dig. Bound. §§ 95-122; 41 Cent. Dig. Pub. Lands, §§ 34-36.

73. — In general.

See 8 Cent. Dig. Bound. §§ 95-101; 41 Cent. Dig. Pub. Lands, §§ 34-36.

Meander lines, as shown by government surveys of land bounded by a lake or river, are

merely for the purpose of ascertaining the quantity of land to be conveyed, and do not constitute its boundary. The water is the real boundary.—*Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428, reversing judgment 16 F. 823.

A patentee from the United States government has all the rights of a riparian owner in the channel lying opposite his banks, although his land may be itself surrounded by two channels of the river. Judgment, *McBride v. Whitaker*, 90 N. W. 966, 65 Neb. 137, affirmed.—*Whitaker v. McBride*, 25 S. Ct. 530, 197 U. S. 510, 49 L. Ed. 857.

A rule of local law that the owner of land bordering on a river owns to the center of the channel inures to the benefit of a patentee from the United States as against one claiming to enter as a homestead an unsurveyed island in such river. Where the omission to survey the island was not due to fraud or mistake, and subsequent applications for a survey have been refused by the Land Department.—*Id.*

74. — Construction of language of description.

See 8 Cent. Dig. Bound. §§ 102-107; 41 Cent. Dig. Pub. Lands, §§ 34-36.

A patent issued "according to the official plat" is limited by calls for bayous noted on the official plat certified to the state by the general land office and the interior department, as Rev. St. §§ 2395, 2396 [U. S. Comp. St. 1901, pp. 1471, 1473], make it the duty of the surveyor general to note water courses over which the line he runs may pass, and also the quality of the land, and provide that the boundary lines actually run and marked on his surveys shall be the proper boundary lines.—*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566.

A deed of certain surveys in St. Clair county, Ill., which border on the Mississippi, and extend southeasterly inland, described a line as running north, 33½ deg. west, "to the present bank of the Mississippi river"; thence along the same line "to low-water mark of the Mississippi river"; and "thence down to the extended line" between specified surveys, "the tract conveyed containing 500 acres; "together with all rights as riparian owner to the accretion or sandbar lying northwardly, and between the extended lines of said land herein described." *Held*, that the land conveyed was not bounded by low-water mark, but extended to the middle of the main channel.—*City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941, affirming judgment *Rutz v. Seeger* (C. C.) 35 F. 188.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

Declaration, see Evidence, 6274.

73. Presumptions and burden of proof.

See 8 Cent. Dig. Bound. §§ 146-152.

In an action involving the ownership of land claimed to have been pre-empted by plaintiff's ancestor, where the question is as to the location of a boundary line of a grant to defendant's grantor confirmed by decree of the federal court on appeal from the land department, plaintiff must show that the land is not within the boundaries of such grant, if located and construed as claimed by him.—*Hays v. Steiger*, 156 U. S. 367, 15 S. Ct. 412, 39 L. Ed. 463.

Where the terms of an old grant, presented to the court of private land claims for confirmation, are ambiguous as to a boundary, there being two objects, either one of which may have been intended, the burden of establishing the further one, including the larger tract, as the true boundary, rests upon the claimant.—*Whit-*

ney v. United States, 17 S. Ct. 857, 167 U. S. 529, 42 L. Ed. 263.

⚡34. **Admissibility of evidence.**

See 8 Cent. Dig. Bound. §§ 153-183.

⚡36. — **Documentary evidence.**

See 8 Cent. Dig. Bound. §§ 160-162, 164, 166-176.

In trespass to try title, it appeared that the original field notes of the survey of the grant involved were made in English, and subsequently transcribed and translated into Spanish, and thus carried into the grant. The surveyor of the grant, one Johnson, and his chain bearer, both testified that the survey was made but once, and in the year 1833, and the chain bearer said it was made in the spring. In the general land office there were on file original English field notes of the survey corresponding exactly with the notes in the grant, excepting that they called for four intermediate streams, while the grant called for but two, together with a map of old surveys, including a sketch of the one in question. The field notes were dated "Sunday, 21st," and April 21, 1833, fell upon Sunday. Both notes and map were reputed to be the work of Johnson, and had been on file beyond the recollection of those connected with the office. In other litigation concerning the boundaries of the grant, these documents were held admissible by the supreme court of Texas. 13 S. W. 768. *Held*, that they were admissible in this case.—*Ayers v. Watson*, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 803.

⚡37. **Weight and sufficiency of evidence.**

See 8 Cent. Dig. Bound. §§ 184-194.

Evidence which goes no further than to raise a doubt as to whether the main channel of the Mississippi river has not at different times varied from one side of Island No. 76 to the other will not support a finding that this channel ran to the west of the island when Mississippi was admitted to the Union, and was therefore a part of that state, where such finding is opposed by testimony from memory and tradition, by the presumption from the establishment of the channel on the east side for a time running back nearly or quite to the admission of Arkansas, and by consensus of action on the part of the two states concerned and the United States. Decree, *Moore & McFerrin v. McGuire* (C. C. 1906) 142 F. 787, reversed.—*Moore v. McGuire*, 27 S. Ct. 483, 205 U. S. 214, 51 L. Ed. 776.

⚡38. **Trial of issues.**

See 8 Cent. Dig. Bound. §§ 195-208; 46 Cent. Dig. Trial, § 787.

⚡40. — **Questions for jury.**

See 8 Cent. Dig. Bound. §§ 196-204.

In trespass to try title, the question was as to the proper boundaries of a certain survey. The field notes of the survey called for two hackberry trees at the eastern terminus of the northern boundary line, "as landmark for the third corner." Plaintiff relied on two hackberry trees found in the eastern line of the survey, which was undisputed, and the evidence showed that they were duly marked and blazed, and that they were at about the proper distance from other natural landmarks to correspond with the field notes of the survey, and to make the survey contain the given quantity of land. *Held* that, though the field notes did not describe such trees as being marked, and did not refer to other near objects as bearing upon them, it was proper to let the jury say whether the hackberries relied on by plaintiff were the same trees called for by the survey; and that, if they were the same, they would control the distance assigned to the western boundary.—*Ayers v. Watson*, 113 U. S. 594, 5 S. Ct. 641, 28 L. Ed. 1093.

In ejectment for a strip of land, 23 feet wide, used by defendant as a street, it appeared that a plat of the land adopted by the court in partition proceedings, and approved by defendant's president and board of trustees, fixed the southern boundary line of plaintiff's land 23 feet south of the center of the street as laid out by defendant. Plaintiff's evidence showed that there had never been a government subdivisional survey of the quarter section embracing the land in dispute, but that the original owners had subdivided it so as to contain 80 acres in the north half and 77.23 acres in the south half,—the quarter section not containing the full 160 acres; that the southwest 10 acres of the north 80 acres had been conveyed to plaintiff; and that an ancient dividing fence, forming the southern boundary of plaintiff's land, had been located 23 feet south of the center of the street, which coincided with a line drawn halfway between the north and south lines of the quarter section. *Held*, that the question as to the location of the true southern boundary of plaintiff's land was for the jury, and that it was improper to charge that the true southern boundary of plaintiff's land was a line equidistant from the north and south lines of the quarter section, though defendant's expert witnesses testified that that was the proper method of locating it.—*McKey v. Village of Hyde Park*, 134 U. S. 84, 10 S. Ct. 512, 33 L. Ed. 860.

⚡41. — **Instructions.**

See 8 Cent. Dig. Bound. §§ 205-207.

An old map found in the general land office of Texas, and reputed to be the work of the original surveyor of the Moreno grant, contained a sketch of the survey, with notes indicating that the lines were run in the opposite direction, from the southeast corner. Defendant asked a charge that if the testimony was insufficient to identify the hackberries found as the hackberries called for in the grant, and the jury could not fix the northeast corner or the north line by any other marks or monuments, then they must fix it by the courses and distances of the first and second lines of the survey, extending the north line the 570 varas necessary to make it intersect the blazed east line. The court had charged the same, in substance, with the additional qualification that the jury must first be satisfied that the original survey was not commenced from the southeast instead of the southwest corner. *Held*, that this qualification was necessary, and the charge asked was properly rejected.—*Ayers v. Watson*, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 803.

October 18, 1833, the government of Texas granted to Maximo Moreno a tract of 11 leagues of land extending northward from the San Andres river, which runs diagonally, southeastward, across its front. The original survey called for a stake in the prairie at the northwest corner, and for two hackberries at the northeast corner. The stake had entirely disappeared. Running the courses and distances forward from the southwest corner made the east line 4,000 varas too long, gave no trace of the hackberries at the northeast corner, and disclosed serious discrepancies in the other natural calls. Running them backward from the southeast corner gave two blazed hackberries at the northeast corner, and corresponded much better with the other natural calls, but made the west line 4,000 varas too short. The north line, as called for, running forward, was blazed on the trees, and the east line was blazed northward beyond the hackberries about 4,000 varas, but the distances of the north line made it fall short of the east line by about 570 varas, and the evidence tended to show that these marks were made about 30 years after the original survey. The court charged that the jury must follow the tracks of the surveyor so far as discoverable with reasonable certainty upon the ground, and

that marked trees designating a corner or line should control both courses and distances. *Held* proper, and a charge that if the marked north line, and the east line above the hackberries, were run at the original survey, they must be considered the true boundaries, would have been misleading as an independent proposition, because it ignored the evidence tending to locate the corner at the hackberries, which was the most controlling evidence in the case.—*Id.*

In an action involving a question as to the boundaries of a grant, an instruction that if from the evidence the jury finds that some of the natural objects called for are uncertain or doubtful, and some are certain, the certain ones will prevail, cannot reasonably be construed as saying that if there is "conflicting evidence" as to the existence or location of any of the natural calls, such calls should be wholly disregarded; and a reviewing court will not assume that the jury so understood it.—*New York & T. Land Co. v. Votaw*, 150 U. S. 24, 14 S. Ct. 1, 37 L. Ed. 983.

49. Practical location by parties.

See 8 Cent. Dig. Bound. §§ 243-248.

In 1886 plaintiff purchased lands adjoining those of defendant land company, and which he had never seen. Soon afterwards he employed D. as his agent and attorney in the management and protection of such land from depredation, and gave him full power and authority to carry out the purposes of his agency. Defendant, being desirous of painting a boundary line of its lands as a guard against trespassing on the lands of adjoining owners in its lumbering operations, informed D. of its intentions; and, on his assent thereto as plaintiff's agent, defendant, on its own responsibility, employed W.

to run and paint such line. W. was paid for his work by defendant alone, and his instructions were received from it. He went upon the lands, and painted the line on three sides of defendant's tract, according to its location claimed by defendant. D., having examined certain portions of this painted line, assented to it as a correct boundary line between the lands of defendant and plaintiff. In the autumn of 1893 two members of defendant company visited plaintiff, who was a nonresident, and informed him of the transaction that had taken place with regard to the running of the painted line. He replied that he had never been on the lands, but that D. was his attorney and agent in the matter, and what D. did met his approval. It turned out that the painted line included a part of plaintiff's lands. *Held*, that since plaintiff's assent was not given to settle a dispute, but acquiescence in the running of a line about which no dispute had then arisen, and on supposition that the person engaged in running it knew where the true lines were, it was an acquiescence resulting from a pure mistake and error, and did not estop plaintiff from claiming his rights when he discovered the mistake.—*Schraeder Min. & Mfg. Co. v. Packer*, 129 U. S. 688, 9 S. Ct. 385, 32 L. Ed. 760.

54. Official surveys.

See 8 Cent. Dig. Bound. §§ 263, 263-277.

A court of the United States sitting in equity cannot control a person in the discharge of his duties as principal surveyor, or take charge of the records of his office, or declare their effect to be other than what appears upon their face.—*Fussell v. Gregg*, 113 U. S. 550, 5 S. Ct. 631, 28 L. Ed. 993; *Same v. Hughes*, 113 U. S. 565, 5 S. Ct. 639, 28 L. Ed. 993.

BOUNTIES.

Scope-Note.

[INCLUDES pecuniary premiums offered by government to all persons enlisting in the public service, or engaging in particular industries, or performing specified services for the public benefit; acceptance of such offers and performance of conditions thereof or services required; and proceedings to obtain and payment of such bounties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

2. Destruction of enemy's vessel.

7. Production of sugar.

Cross-References.

See Pensions.

Affecting amount of duty, see Customs Duties, 21.

Appropriation of funds for payment, see United States, 85.

Bounty lands, see Public Lands, 42-46.

Estoppel to question constitutionality of bounty law, see Constitutional Law, 43.

In lieu of prize money, see War, 28.

Rewards offered for performances of single and special services, see Rewards.

2. Destruction of enemy's vessel.

See 8 Cent. Dig. Bounties, § 34.

The bounty, in lieu of prize money, allowed by Act June 30, 1864, c. 174, applies only to successes achieved by the navy alone, without the assistance of the army, and solely by maritime force.—*United States v. Steam Vessels of*

War Seaboard, Texas, Beaufort, 106 U. S. 607, 1 S. Ct. 539, 27 L. Ed. 286.

In determining whether vessels of the enemy sunk or destroyed were of inferior or superior force to the American vessels engaged in the battle, for the purpose of fixing the amount of bounty to be awarded under Rev. St. U. S. § 4635, the land batteries, mines and tor-

pedoes not controlled by those in charge of the enemy's vessels, but which supported those vessels, are to be excluded altogether from consideration, and the size and armaments of the vessels sunk or destroyed, together with the number of men upon them, are alone to be regarded.—*Dewey v. United States*, 20 S. Ct. 981, 178 U. S. 510, 44 L. Ed. 1170.

7. Production of sugar.

See 8 Cent. Dig. Bounties, § 37.

The equitable obligation of the government to pay the bounty offered to sugar producers is not affected by the question of the constitutionality of the bounty provision, no attack thereon having been made by any government officer during the three years of its operation, and payments thereunder having been made without objection.—*United States v. Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 216.

The claim of sugar producers to be paid the amount of the bounties allowed by Act Oct. 1, 1890, in spite of the repeal of this act by Act Aug. 19, 1894, which forbade the payment of bounties, was such an equitable and honorable obligation on the part of the government as to authorize the appropriation by congress of money for the payment of such bounties, the producers having in good faith acted in reliance upon the former act.—*Id.*

The act of October 1, 1890, giving a right to a sugar bounty, having by its provisions created relations between the sugar grower and manufacturer such as to make them, in effect, joint producers of the sugar, the right of those parties, in respect to sugar produced in Louisiana, to reserve a lien in favor of the grower upon the bounty to secure a balance due on the price of his cane, is controlled solely by the federal laws, unaffected by the provisions of the Louisiana Code relating to liens and privileges.—*Burdon Cent. Sugar Refining Co. v. Payne*, 17 S. Ct. 754, 167 U. S. 127, 42 L. Ed. 105.

Under the provision in the act of October 1, 1890 (26 Stat. 567), giving a bounty to "the producer of sugar," and the supplementary act of March 2, 1895 (28 Stat. 910, 933), the person intended to be benefited was the manufacturer of the sugar, rather than the producer of the cane, when these were different persons. Decree, *Succession of Allen*, 22 So. 319, 49 La. Ann. 1096, reversed.—*Allen v. Smith*, 19 S. Ct. 446, 173 U. S. 389, 43 L. Ed. 741.

A sugar planter, at his death, in September, 1894, left standing on his plantation, nearly ready for harvesting, a large crop of sugar cane. He had complied with the provisions of the bounty law of October 1, 1890 (26 Stat.

567), which was repealed about a month before his death. By his will, he bequeathed one-half the proceeds of his plantation to his wife but allowed his executors five years in which to sell the property and close up the estate. In the meantime the plantation was to be worked or rented, and the net profits paid to his wife. His executors manufactured into sugar the crop of 1894, whereby a right accrued to the supplementary bounty provided by the act of March 2, 1895 (28 Stat. 910, 933). *Held*, that in so doing the executors acted for the wife, who was therefore the "producer" of the sugar, in the meaning of the bounty law, and entitled to the whole of the bounty, as against the testator's legal heirs, who claimed it as an undivided asset.—*Id.*

BOYCOTT.

See—

Injunction, 101.
Monopolies, 14.

BRAKEMAN.

Fellow servant of enginemen, see Master and Servant, 198.

BREACH.

Contracts, bonds, conditions or covenants, see—

Appeal and Error, 1228-1232.
Bail, 75.
Bonds, 109, 110.
Carriers, 268-278.
Compromise and Settlement, 20.
Contracts, 278-320.
Covenants, 87-100, 108.
Deeds, 159-162.
Injunction, 57-59, 234, 235.
Insurance, 250-300, 306-366.
Landlord and Tenant, 102-108.
Pardon, 14.
Sales, 155-181.
Trusts, 98-100, 102.
Vendor and Purchaser, 135-186.
Waters and Water Courses, 200.
Wills, 659-665.

BREACH OF MARRIAGE PROMISE.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Breach of M. P.]

BREACH OF THE PEACE.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Breach of P.]

This Digest is compiled on the Key-Number System. For explanation, see page iii.

BRIBERY.

Scope-Note.

[INCLUDES offering, promising, giving, accepting, or agreeing to accept money, property, or other consideration to influence official action by a public officer, judicial, legislative, or executive; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⇒ 1. Nature and elements of offenses.
- 2. Statutory provisions.
- 5. Indictment or information.
- 6. — Requisites and sufficiency.

Cross-References.

Ex post facto law, see Constitutional Law, ⇒ 201. | Venue, see Criminal Law, ⇒ 113.
Extortion under color of office, see Extortion. | Voters, see Elections, ⇒ 311.

⇒ 1. Nature and elements of offenses.

See 8 Cent. Dig. Brib. §§ 2, 3.

A bank check is not an "obligation for the payment of money," within the legal meaning of such term as used in Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], providing for the punishment of bribery of United States officers. Order (D. C.) United States v. Green, 136 F. 618, affirmed.—Green v. MacDougall, 26 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

The tendering by a person of his personal check, drawn on a bank and payable to an officer of the United States, to such officer, with intent thereby to affect his official action, does not constitute the crime of bribery under Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], since a check made and delivered for such illegal purpose is void, and not within any of the classes of instruments enumerated in the statute.—Id.

The official action sought to be influenced by a bribe charged to have been given and accepted contrary to the federal Criminal Code, §§ 39, 117 (Act March 4, 1909, c. 321, 35 Stat. 1096, 1109 [U. S. Comp. St. Supp. 1911, pp. 1600, 1623]), need not have been prescribed by statute, but may be found in an established usage which constituted the common law of the executive department.—United States v. Birdsell, 34 S. Ct. 512, 233 U. S. 223, 58 L. Ed. 930, reversing judgment (D. C.) 206 F. 818.

⇒ 2. Statutory provisions.

See 8 Cent. Dig. Brib. § 1.

Pen. Code N. Y. § 72, prescribing the punishment for bribery, repealed New York City Charter, § 100, and subsequently the consolidation act, the purpose of which was to codify the existing laws local to the city, passed July 1, 1882, to take effect March 1, 1883, re-enacted section 100 as section 58 of the new act. Pen. Code, § 725, which took effect December 1,

1882, excepted from its operation acts granting or amending the charters of municipalities, except as repealed by subsequent laws. The consolidation act provided that, as to the operation of the two acts, the Penal Code should be treated as taking effect after the former act. Held, that section 725 did not preserve section 100 of the former charter as section 58 of the consolidation act, but that section 72 became the law applicable to bribery in the city, as to cases arising after its passage.—Jaehne v. People of New York, 128 U. S. 189, 9 S. Ct. 70, 32 L. Ed. 398, affirming (C. C.) In re Jaehne, 35 F. 357.

Though Pen. Code N. Y. § 72, which increased the penalty for bribery, was, by its adoption by the consolidation act relating to local city laws, made applicable to bribery in the city committed before it took effect, and as to such is void, its validity is not affected as to offenses arising after April 1, 1883, when both the consolidation act and the Penal Code were in force.—Id.

⇒ 5. Indictment or information.

See 8 Cent. Dig. Brib. §§ 5-8.

⇒ 6. — Requisites and sufficiency.

See 8 Cent. Dig. Brib. §§ 5-8.

The offense denounced by Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], is properly described in a complaint as bribery of an officer of the United States, being so designated in the marginal note to the section, which was a part of the Revised Statutes when the same were enacted. Order (D. C.) United States v. Green, 136 F. 618, affirmed.—Green v. MacDougall, 26 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

BRICK YARDS.

See Municipal Corporations, ⇒ 613.

BRIDGES.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and use of bridges for the passage of the public, whether erected under franchises granted therefor or directly by the government, and whether passage be subject to payment of tolls or free; organization, franchises, and powers of bridge companies; and rights, duties, and liabilities of such companies or of municipalities in respect to the management and operation of their bridges.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Establishment, Construction, and Maintenance.

⌚6. Establishment by public authorities.

7. — In general.

20. Construction.

II. Regulation and Use for Travel.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Bridges, §§ 71-122.]

Cross-References.

Fraud of contractor, see Fraud, ⌚3.
Imposing on railroad expense of bridge over highway, due process of law, see Constitutional Law, ⌚280.

Over navigable waters, see Navigable Waters, ⌚20.
Regulation as interference with commerce, see Commerce, ⌚26, 48, 58, 69, 73, 74.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

See Eminent Domain, ⌚2, 59.

Due process of law, see Constitutional Law, ⌚291.

Impairing obligation of contract, see Constitutional Law, ⌚120, 138.

Special privileges, see Constitutional Law, ⌚205.

⌚6. Establishment by public authorities.

See 8 Cent. Dig. Bridges, §§ 9-24.

⌚7. — In general.

See 8 Cent. Dig. Bridges, §§ 9-12, 15, 16.

Gen. St. c. 28, art. 16, § 1, providing that county courts shall have jurisdiction to "erect and keep in repair * * * necessary bridges," authorizes a county to erect a bridge over a boundary stream, without the co-operation of the adjoining county, and a contract therefor is valid, though chapter 94, art. 1, provides (section 36) that, when the county court of any county shall deem it advisable to construct a bridge over any place between that and an adjoining county, the court shall appoint a commissioner, and notify the court of the adjoining county, and request the latter to appoint a like commissioner, and it shall be the duty of the court so requested to appoint such commissioner; that the commissioners shall meet and agree on a plan for the bridge, and contract for the erection thereof, the cost to be apportioned between the two counties; and (sections 37, 38) that, if such adjoining county refuses to appoint a commissioner, it may be compelled to do so by mandamus.—Washer v. Bullitt County, 110 U. S. 558, 4 S. Ct. 249, 28 L. Ed. 249.

⌚20. Construction.

See 8 Cent. Dig. Bridges, §§ 37-44, 46, 47; 12 Cent. Dig. Counties, § 197.

By the settled course of decisions in Kentucky the justices of the peace do not form a necessary part of the county court, except when sitting as a court of claims, or when engaged in making appropriations or levying taxes; and a contract for building a bridge having been entered into in the prescribed manner, the county court, held by the county judge alone, had the power to superintend, and control the erection of the bridge.—Bullitt County v. Washer, 130 U. S. 142, 9 S. Ct. 499, 32 L. Ed. 885.

Gen. St. Ky. art. 17, c. 28, relating to the county court, declares the county court to be a court of record, and requires the records to show at all times by whom the court is held, and, when the justices of the peace form a part of the court, to state the names of those present. Article 3, c. 27, § 1, provides that the county court, unless composed of a majority of the justices of the peace, shall not have power to appropriate revenue or to make any charge thereon greater than \$50. Held, that when the record shows that the court, "properly constituted," decided on the necessity for the erection of a bridge, made an appropriation for preliminary work, appointed an agent to make the contract, and recognized the contract by directing a levy of taxes to pay for the work done, it is not necessary that it should also show that the contract was reported to and accepted by the court.—Id.

II. REGULATION AND USE FOR TRAVEL.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Bridges, §§ 71-122.]

BRIEFS.

Leave to file briefs by amicus curiæ, see Amicus Curia, ⌚1.

On appeal or writ of error, see Appeal and Error, ⌚763-773.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 287]

BROKERS.

Scope-Note.

[INCLUDES the regulation and conduct of the business of negotiating contracts and bargains on behalf of others, without possession or control by the broker, as such, of any property involved; and rights, powers, duties, and liabilities of such brokers and their principals or employers, as between themselves and as to others, arising from the relation between them and incidental transactions, such as advances, pledges, etc.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Regulation and Conduct of Business in General.

II. Employment and Authority.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Brok. §§ 4-45.]

III. Duties and Liabilities to Principal.

- ☞ 24. Purchases and sales on margin.
- 29. Failure to act.
- 38. Actions for negligence or wrongful acts of broker.

IV. Compensation and Lien.

- ☞ 41. Ratification of broker's acts.
- 43. Necessity of contract in writing.
- 47. Sufficiency of services of broker.
- 52. — Completion of negotiations.
- 54. — Ability and willingness of party procured to perform contract.
- 58. — Invalidity of contract or transaction negotiated.
- 59. Failure to complete contract or transaction negotiated.
- 60. — In general.
- 68. Rate or amount of compensation.
- 69. — In general.

V. Actions for Compensation.

- ☞ 88. Trial.

VI. Rights, Powers, and Liabilities as to Third Persons.

- ☞ 93. Purchases, sales, and conveyances.
- 94. — In general.
- 99. Undisclosed agency or principal.
- 103. Repudiation or ratification of broker's acts.

Cross-References.

See Factors.

Gambling transactions, see Gaming, ☞ 35-38.
Preferential transfers on bankruptcy, see Bankruptcy, ☞ 159.

Rights and liabilities as members of exchange, see Exchanges.

I. REGULATION AND CONDUCT OF BUSINESS IN GENERAL.

See 8 Cent. Dig. Brok. §§ 1-3.

Due process of law, see Constitutional Law, ☞ 287, 296.

Equal protection of laws, see Constitutional Law, ☞ 230.

Interference with liberty to contract, see Constitutional Law, ☞ 276.

Interstate commerce regulations, see Commerce, ☞ 65.

II. EMPLOYMENT AND AUTHORITY.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Brok. §§ 4-15.]

III. DUTIES AND LIABILITIES TO PRINCIPAL.

See Account, ☞ 4, 6.

☞ 24. Purchases and sales on margin.
See 8 Cent. Dig. Brok. § 19.

A stockbroker is not the owner of the shares of stock which he purchases and carries for his customers on margin, but is essentially, if not strictly, as understood at common law, a pledgee. Judgment (1906) 147 F. 659, 77 C. C. A. 643, affirmed.—Richardson v. Shaw, 28 S. Ct. 512, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981.

◀ 29. Failure to act.

See 8 Cent. Dig. Brok. § 22.

A stockbroker who, when directed by telegraph to sell stocks of his principal in his possession, and convert them into other stocks, does not do so, and, instead of promptly notifying the latter of his refusal by telegraph, informs him by mail, which requires two days, is liable for loss resulting from his failure to obey instructions, though his principal is indebted to him for previous advances to a greater amount than the market value of the stocks.—*Gallagher v. Jones*, 129 U. S. 193, 9 S. Ct. 335, 32 L. Ed. 658.

◀ 38. Actions for negligence or wrongful acts of broker.

See 8 Cent. Dig. Brok. §§ 31-34.

The measure of damages in an action against a broker for selling his principal's stocks in violation of his orders is the highest intermediate value reached by the stocks between the time of sale and a reasonable time after the owner has received notice of it to enable him to replace the stocks.—*Gallagher v. Jones*, 129 U. S. 193, 9 S. Ct. 335, 32 L. Ed. 658.

IV. COMPENSATION AND LIEN.

See Customs and Usages, ▶ 12, 15.

▶ 41. Ratification of broker's acts.

See 8 Cent. Dig. Brok. § 41.

Grain brokers employed by a dealer to buy and sell wheat for future delivery cannot recover commissions and advances where they write the dealer that a contract which he has for May can be changed to June delivery, to which letter the dealer makes no reply, though he is in a position to do so, and the brokers then change the contract, and the fact that the dealer receives and retains a statement sent him by the brokers, showing such change, does not show a ratification of the brokers' act in making the change.—*Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment *Boyd v. Hanson* (C. C.) 41 F. 174.

▶ 43. Necessity of contract in writing.

See 8 Cent. Dig. Brok. § 44; 23 Cent. Dig. Frds. St. of, § 131.

In an action by brokers for commissions, even if memoranda showing the transactions in question were not sufficient under the statute of frauds, this will not affect plaintiffs' right to commissions and to the recovery of advancements made, where the contracts have been duly executed by them according to their terms.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

▶ 47. Sufficiency of services of broker.

See 8 Cent. Dig. Brok. §§ 65-90; 44 Cent. Dig. Ship. § 403.

▶ 52. — Completion of negotiations.

See 8 Cent. Dig. Brok. § 73.

A binding agreement between vendor and purchaser is not necessary before a broker's commission can be earned, under an agreement by which such broker was employed to find a purchaser. Judgment (1906) 27 App. D. C. 500, affirmed.—*Dotson v. Milliken*, 28 S. Ct. 489, 209 U. S. 237, 52 L. Ed. 768.

▶ 54. — Ability and willingness of party procured to perform contract.

See 8 Cent. Dig. Brok. §§ 75-81.

The inability of the prospective purchaser to complete the purchase is not available as an afterthought to defeat the right of the broker

employed to find a purchaser to recover his agreed commissions, where the sale failed wholly through the fault of the owner, who made no objection to the purchaser. Judgment (1906) 27 App. D. C. 500, affirmed.—*Dotson v. Milliken*, 28 S. Ct. 489, 209 U. S. 237, 52 L. Ed. 768.

▶ 58. — Invalidity of contract or transaction negotiated.

See 8 Cent. Dig. Brok. § 90.

While a broker who in good faith negotiates a contract, though it be illegal in character, may recover from his principal for services and actual advances, where he is not privy to the unlawful design of the parties, yet if he brought the parties together for the purpose of entering into such illegal agreement, he is *particeps criminis*, and has no standing in court.—*Irwin v. Williar*, 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225.

▶ 59. Failure to complete contract or transaction negotiated.

See 8 Cent. Dig. Brok. §§ 77, 78, 81, 91-97; 44 Cent. Dig. Ship. § 122.

▶ 60. — In general.

See 8 Cent. Dig. Brok. § 91; 44 Cent. Dig. Ship. § 122.

A broker who finds a person who takes an option on the purchase of certain mining property, which is never carried out, cannot, where the owner dies before the option expires, recover his agreed commission from the administrator, when the latter, after the expiration of the option, sells the property to the same person and at the same price.—*Crowe v. Trickey*, 27 S. Ct. 275, 204 U. S. 228, 51 L. Ed. 454, affirming judgment *Trickey v. Crowe* (Ariz. 1903) 71 P. 965; *Crowe v. Harmon*, 27 S. Ct. 280, 204 U. S. 241, 51 L. Ed. 461, affirming judgment *Harmon v. Crowe* (Ariz. 1903) 71 P. 1125.

The failure of the prospective purchaser of coal lands to rely upon the owner's representations to the broker employed to find a purchaser that a railway company had consented or agreed to construct a branch railroad into such lands does not defeat the broker's right to his agreed commissions, where, relying upon such representations, he finds a purchaser, and the sale fails because of their inaccuracy. Judgment (1906) 27 App. D. C. 500, affirmed.—*Dotson v. Milliken*, 28 S. Ct. 489, 209 U. S. 237, 52 L. Ed. 768.

A broker employed to find a purchaser for the whole, or any considerable part, of a tract of coal land, is entitled to his agreed commission, where he finds a purchaser for 10,000 acres, and the sale fails because of the inaccuracy of the owner's representations to the broker that a railway company had consented or agreed to construct a branch railroad into such lands.—*Id.*

▶ 68. Rate or amount of compensation.

See 8 Cent. Dig. Brok. §§ 55, 56; 44 Cent. Dig. Ship. § 122.

▶ 69. — In general.

See 8 Cent. Dig. Brok. § 55.

In an action by brokers for commissions, where plaintiffs were compelled by the rules of the exchange, of which defendants had full notice, to go into the market and buy cotton to cover their contracts for sales for future delivery on defendants' account by reason of the latter's failure to furnish sufficient margins to make good the increase in price, they are entitled to recover of defendants, as for advances made, the difference between the price at which the cotton was to be sold and the increased price they were compelled to pay for cotton to

cover the contracts.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

V. ACTIONS FOR COMPENSATION.

Harmless error, see Appeal and Error, 81060.

88. Trial.

See 8 Cent. Dig. Brok. §§ 121, 123-130; 44 Cent. Dig. Ship. § 123.

A finding that the owner and purchaser had agreed upon terms is presupposed in an instruction authorizing the recovery of agreed commissions by a broker employed to find a purchaser for the whole, or any considerable part, of a tract of coal lands, who had found a purchaser able, ready, and willing to purchase 10,000 acres of the said lands at the stipulated price, where the sale failed because of the inaccuracy of the owner's representations to the broker that a railway company had consented or agreed to construct a branch railroad into such lands. Judgment (1906) 27 App. D. C. 500, affirmed.—*Dotson v. Milliken*, 28 S. Ct. 489, 209 U. S. 237, 52 L. Ed. 768.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

93. Purchases, sales, and conveyances.

See 8 Cent. Dig. Brok. §§ 136, 137.

94. — In general.

See 8 Cent. Dig. Brok. § 136.

A tender of stock by a broker on behalf of his principal, for whom he has made a sale, is not invalidated by the fact that the principal did not at the time have any legal title to the stock. Decree 96 F. 648, 38 C. C. A. 473, reversed.—*Clews v. Jamieson*, 21 S. Ct. 845, 182 U. S. 461, 45 L. Ed. 1183.

The existence of contracts by a broker for different principals for the sale of stock, on

an exchange by the rules of which a purchaser of the same amount of stock from a different party may be made a substituted purchaser from such broker, does not prevent a privity of contract between such substituted purchaser and the principal of the broker.—Id.

99. Undisclosed agency or principal.

See 8 Cent. Dig. Brok. §§ 140, 141.

Privity of contract exists between the undisclosed principal of a broker who sells stock on an exchange and one who buys an equal amount of stock from another party, but who is made a substituted purchaser of the stock sold by said broker by virtue of the rules of the exchange. Decree 96 F. 648, 38 C. C. A. 473, reversed.—*Clews v. Jamieson*, 21 S. Ct. 845, 182 U. S. 461, 45 L. Ed. 1183.

103. Repudiation or ratification of broker's acts.

See 8 Cent. Dig. Brok. § 147.

A contract of sale by a broker is not lacking in mutuality when ratified by the principal, merely because the broker exceeded his authority in making the sale on the terms agreed. Decree 96 F. 648, 38 C. C. A. 473, reversed.—*Clews v. Jamieson*, 21 S. Ct. 845, 182 U. S. 461, 45 L. Ed. 1183.

Failure of a principal to repudiate a sale of stock made by his broker on a stock exchange, immediately after it is reported to him, operates as a ratification and precludes him from subsequently contending that the terms of the sale were unauthorized.—Id.

BUCKET SHOPS.

See Gaming, 10-14, 35-38.

Equal protection of laws, see Constitutional Law, 240.

BUILDING AND LOAN ASSOCIATIONS.

Scope-Note.

[INCLUDES bodies, incorporated or unincorporated, formed for the purpose of mutual aid to members by means of contributions to loans for the erection of dwellings or other objects.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

7. Stock.

- 12. — Maturity of shares.
- 25. Loans.
- 27. — What law governs.
- 46. Foreign associations.

Cross-References.

Admissions by demurrer in suit to foreclose mortgage, see Equity, 239.

Impairing obligation of contract, see Constitutional Law, 145.

7. Stock.

See 8 Cent. Dig. B. & L. Assoc. §§ 10-20.

12. — Maturity of shares.

See 8 Cent. Dig. B. & L. Assoc. § 14.

The undertaking of a building and loan association to mature certain shares of its stock

in a specified time is not affected by the fact that the holder of such shares obtained a loan from the association on the security of his shares after the by-laws of the corporation had been amended to provide that its stock should mature and be payable when the dues paid thereon, with the apportioned profits, equaled

the par value thereof. *Judgment, Williamson v. Eastern Building & Loan Ass'n*, 38 S. E. 616, 1008, 62 S. C. 390, affirmed.—*Eastern Building & Loan Ass'n v. Williamson*, 23 S. Ct. 527, 189 U. S. 122, 47 L. Ed. 735.

An absolute promise by a building and loan association to mature its shares in a specified time is not changed to a conditional one, dependent upon the success of the enterprise, by the shareholder's agreement, as expressed in the certificate of stock, to pay a specified monthly installment on each share until it matures or is withdrawn, and the provision of the by-laws, accepted by him, that such installments shall be paid until each share is fully paid.—*Id.*

⚡25. Loans.

See 8 Cent. Dig. B. & L. Assoc. §§ 36, 69; 7 Cent. Dig. Bills & N. §§ 30, 106, 213, 248-254, 362, 429, 526, 647-649, 681, 744, 788, 1051-1054, 1310, 1340, 1341, 1648, 1938; 11 Cent. Dig. Contracts. §§ 2, 145, 162, 190, 198, 226, 455-461, 724-728, 750, 1216, 1558-1562, 1639; 29 Cent. Dig. Interest, §§ 2, 56, 156; 47 Cent. Dig. Usury, §§ 2-15.

⚡27. — What law governs.

See 7 Cent. Dig. Bills & N. §§ 30, 106, 213, 248-254, 362, 429, 526, 647-649, 681, 744, 788, 1051-1054, 1310, 1340, 1341, 1648, 1938; 11 Cent. Dig. Contracts. §§ 2, 145, 162, 190, 198, 226, 455-461, 724-728, 750, 1216, 1558-1562, 1639; 29 Cent. Dig. Interest, §§ 2, 56, 156; 47 Cent. Dig. Usury, §§ 2-15.

A contract of a foreign loan association, which is not usurious under the laws of the state where the association is domiciled and where the obligations are payable, cannot be attacked for usury in the state where the land mortgaged is situated.—*Bedford v. Eastern Building & Loan Ass'n*, 21 S. Ct. 597, 181 U. S. 227, 45 L. Ed. 834.

A foreign building association, having no office or general agent in Mississippi, but having special agents in various towns of the state to solicit stock subscriptions, receive payments of dues, interest, and premiums, and applications for loans, loaned money to a shareholder, residing in Mississippi, the certificate of stock providing that payments should be made at the association's principal office, unless the "stockholder received official notice in writing from the association designating a depository or collection agent to whom to make payments." The association fixed a place of payment in Mississippi, establishing there its local board, and constituting its secretary and treasurer its agent to receive payments. The borrower was apprised of this authority, and made his payments to such agent. *Held*, that the contract was a Mississippi contract, and governed by its laws as to usury, the payments having been made in Mississippi according to the express terms of the provision in the stock certificate. *Judgment* 33 So. 2, 81 Miss. 364, affirmed.—*National Mut. Building & Loan Ass'n v. Farnham*, 24 S. Ct. 858, 194 U. S. 630, 48 L. Ed. 1158.

⚡46. Foreign associations.

See 8 Cent. Dig. B. & L. Assoc. §§ 6, 69, 83.

The granting of a loan by a Tennessee building and loan association to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent for the association, and the taking as security of a note and mortgage executed within the state by the borrower, constitute, regardless of the form and terms of such instruments, the doing of business in the state within the meaning of Const. Ala. art. 14, and Code Ala. 1896, §§ 1316, 1318, 1319, requiring foreign corporations doing any business within the state to designate a local agent for service of process, and to have a known place of business within the state. *Decree Denson v. Chattanooga Nat. Building & Loan Ass'n*, 107 F. 777, 46 C. C. A. 634, affirmed.—*Chattanooga Nat. Building & Loan Ass'n v. Denson*, 23 S. Ct. 630, 189 U. S. 408, 47 L. Ed. 870.

BUILDING CONTRACTS.

See—

Contracts, ⚡197, 198.

Mechanics' Liens.

Principal and Surety, ⚡100.

BUILDING LINES.

Due process of law, see Constitutional Law, ⚡278, 305.

BUILDINGS.

Construction, due process of law, see Constitutional Law, ⚡278; equal protection of laws, see Constitutional Law, ⚡212.

Fixtures, see Fixtures.

Health regulations as to construction of, see Health, ⚡21.

Lien for construction or repair, see Mechanics' Liens.

Municipal regulations, see Municipal Corporations, ⚡601.

Public buildings, see Counties, ⚡108.

BULK SALES.

Due process of law, see Constitutional Law, ⚡296.

Equal protection of laws, see Constitutional Law, ⚡240.

BURDEN OF PROOF.

See—

Appeal and Error, ⚡901.

Evidence, ⚡94.

BURGLARY.

Scope-Note.

[INCLUDES breaking and entering buildings or other structures, or attempting to do so, with intent to commit a crime therein; nature and elements of the crimes of burglary, house breaking, etc., and of degrees thereof; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Offenses and Responsibility Therefor.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Burg. §§ 1-30.]

II. Prosecution and Punishment.

⇒40. Weight and sufficiency of evidence.

42. — Effect of possession of property stolen.

Cross-References.

Loss of special deposit by burglary, see Banks and Banking, ⇒153.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

[No paragraphs or references in this Digest. But see 8 Cent. Dig. Burg. §§ 1-30.]

II. PROSECUTION AND PUNISHMENT.

⇒40. Weight and sufficiency of evidence.

See 8 Cent. Dig. Burg. §§ 80, 94-109.

⇒42. — Effect of possession of property stolen.

See 8 Cent. Dig. Burg. §§ 80, 104-107.

Guilty participation in the burglary of a garage may be inferred from possession of an automobile kept there by a person engaged, shortly after the burglary, in an effort to crank the engine, where the automobile had been moved some distance from the building.—*McNamara v. Henkel*, 33 S. Ct. 146, 228 U. S. 520, 57 L. Ed. 330.

BURIAL.

See Cemeteries.

BUSINESS.

Carrying on business, by foreign corporations, see Corporations, ⇒642.

Conspiracy to injure, see Conspiracy, ⇒30.

License taxes for occupations, see Licenses, ⇒2-35.

Married women carrying on business, see Husband and Wife, ⇒98.

Municipal regulation of occupations and employments, see Municipal Corporations, ⇒610-617.

Regulation of conduct of business as regulation of commerce, see Commerce, ⇒56-62.

Regulations as denying equal protection of laws, see Constitutional Law, ⇒239, 240.

Restraining injury to trade or business, see Injunction, ⇒55.

BUTTER.

Artificial color of oleomargarine, see Internal Revenue, ⇒16.

Interstate commerce, regulation, see Commerce, ⇒60.

Regulation of manufacture as denial of due process of law, see Constitutional Law, ⇒296.

BY-LAWS.

See Insurance, ⇒717-719.

BYSTANDERS.

Summoning as jurors, see Jury, ⇒72.

CADETS.

See Army and Navy, ⇒16.

CALENDARS.

Causes on appeal or error, see Appeal and Error, ⇒811.

Computation of time, see Time.

CALLS.

In deeds, see Boundaries, ⇒3-14.

On unpaid subscriptions to corporate stock, see Corporations, ⇒80.

CANAL BOATS.

Jurisdiction of admiralty, see Admiralty, ⇒6.

CANALS.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and use of artificial water courses for purposes of navigation, whether constructed under franchises granted therefor or directly by the government, and whether the use be subject to payment of tolls or free; organization, franchises, and powers of canal companies; and rights, duties, and liabilities of such companies or of state or municipal governments in respect to the management and operation of canals by them.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Establishment, Construction, and Maintenance.

⚡4. Establishment by state.

5. — In general.

16. Maintenance and repair.

18. Injuries from construction or maintenance.

22. Abandonment of canal.

II. Regulation and Operation.

⚡28. Sale or lease of water.

Cross-References.

Tax exemptions, see Taxation, ⚡247.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

See Eminent Domain, ⚡23, 34, 134.

⚡4. Establishment by state.

See 8 Cent. Dig. Canals, § 4.

⚡5. — In general.

Congress has power to construct the Panama Canal in the territory acquired by the treaty of November 18, 1903, 33 Stat. 2234, with the Republic of Panama. Decree (1905) 25 App. D. C. 510, affirmed.—Wilson v. Shaw, 27 S. Ct. 233, 204 U. S. 24, 51 L. Ed. 351.

⚡16. Maintenance and repair.

See 8 Cent. Dig. Canals, §§ 17, 18.

A contract for the perpetual maintenance of the canals for which lands were granted by Act Cong. of May 24, 1828, to the state of Ohio, was not created by the acceptance of the grant, with the provision that the canals, "when completed or used, shall be and forever remain public highways"; but this imposes the obligation to maintain the canals as public highways only so long as they are "used" as such.—Walsh v. Columbus, H. V. & A. R. Co., 20 S. Ct. 393, 176 U. S. 469, 44 L. Ed. 548, affirming decree 50 N. E. 442, 58 Ohio St. 123; Vought v. Same, 20 S. Ct. 398, 176 U. S. 481, 44 L. Ed. 554, and Wright v. Same, Id., affirming judgment 50 N. E. 442, 58 Ohio St. 123.

A proprietor of lands crossed by a canal which the state has contracted with the federal government to maintain cannot take advantage of a default of the state in this particular, when he was not a party to the contract.—Id.

⚡18. Injuries from construction or maintenance.

See 8 Cent. Dig. Canals, §§ 20-24.

The War Department held not to have authority to blast out an embankment at the head

of a ship canal connecting Lake Washington with Salmon Bay on Puget Sound, lowering the lake level where prior to River and Harbor Act June 25, 1910, all that was done consisted of dredging work in Salmon Bay and no authority having ever been given by the federal government, with reference to lowering the level of Lake Washington, raising the level of Salmon Bay, or altering the level of any part of the waterway.—Carlson v. State of Washington, 34 S. Ct. 717, 234 U. S. 103, 58 L. Ed. 1237, affirming judgment 120 P. 104, 66 Wash. 639.

⚡22. Abandonment of canal.

See 8 Cent. Dig. Canals, § 23.

A private corporation acquired land for canal purposes, under an act whereby, on the abandonment of the canal, the land was to revert to the original owners. Subsequently, the state acquired the canal, which it afterwards abandoned for canal purposes by leasing the canal to a railroad company, for the construction and operation of a railroad thereon. Held, that the land did not revert, and that the original owners were only entitled to compensation for such additional burden as would be imposed on the land by the new use.—Walsh v. Columbus, H. V. & A. R. Co., 20 S. Ct. 393, 176 U. S. 469, 44 L. Ed. 548, affirming decree 50 N. E. 442, 58 Ohio St. 123; Vought v. Same, 20 S. Ct. 398, 176 U. S. 481, 44 L. Ed. 554, affirming judgment 50 N. E. 442, 58 Ohio St. 123.

Lands acquired for its use by a canal company, a private corporation, under 24 Ohio Laws, p. 71, authorizing it to acquire lands for its use by donation, grant, or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired or to his successor on the abandonment of the canal.—Id.

Owners of lands abutting on a canal have no property interest in the incidental benefits arising from the water it affords, and from its facilities for drainage, and cannot on such

ground enjoin the abandonment of the canal, or claim compensation therefor.—Id.

II. REGULATION AND OPERATION.

Impairing obligation of contracts, see Constitutional Law, ¶124.

28. Sale or lease of water.

See 8 Cent. Dig. Canals, §§ 33-35.

A sale by a state of surplus water power incidentally created by the construction of a dam for its public canals is not a taking of private property from a riparian owner on such

dam for private use.—*Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

CANAL ZONE

Acquisition, see Territories, ¶5.

Appellate jurisdiction to determine liability of imports to customs duties, see Courts, ¶385(6).

CANCELLATION OF INSTRUMENTS.

Scope-Note.

[INCLUDES actions to compel annulment or abrogation of conveyances and contracts or other instruments in writing, and the cancellation or surrender of such instruments; nature and scope of the remedy in general; what instruments may be so annulled, etc.; grounds of such actions, and defenses thereto; jurisdiction to decree such cancellation, surrender, etc., and proceedings therefor; incidental or alternative relief; reinstatement of instruments canceled, etc.; judgments or decrees, and operation and effect thereof; review of proceedings; and costs in actions for such rescission, cancellation, etc.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Action and Defenses.

- 9. Adequate remedy at law.
- 13. — Defense to action on instrument.
- 15. — Recovery of damages.
- 18. Estoppel or waiver.
- 19. Conditions precedent.
- 24. — Restoration of consideration or benefit.

II. Proceedings and Relief.

- 32. Form of remedy.
- 34. Limitations and laches.
- 36. Pleading.
- 37. — Bill, complaint, or petition.
- 48. Trial or hearing.
- 53. — Trial and findings by court or referee.
- 54. Relief awarded.
- 57. — Alternative, additional, or incidental equitable relief.

Cross-References.

See—
 Quieting Title.
 Reformation of Instruments.
 Setting aside transfer in fraud of creditors, see
 Fraudulent Conveyances, ¶228-310.
*Grounds for cancellation, and cancellation or
 rescission of particular instruments
 by act of parties.*
 See—
 Aliens, ¶71½.

See—
 Infants, ¶31, 58.
 Insurance, ¶229-246.
 Mines and Minerals, ¶11, 18, 45, 54.
 Patents, ¶128.
 Public Lands, ¶119-122.
 Sales, ¶84-121.
 Taxation, ¶793-805.
 United States, ¶2.
 Vendor and Purchaser, ¶106-126.
 Waters and Water Courses, ¶200.

I. RIGHT OF ACTION AND DEFENSES.

9. Adequate remedy at law.

See 8 Cent. Dig. Can. of Inst. §§ 7-9, 11-22; 32 Cent. Dig. Land. & Ten. § 97; 25 Cent. Dig. Mtg. § 195.

13. — Defense to action on instrument.

See 8 Cent. Dig. Can. of Inst. § 13.

Equitable jurisdiction of a suit to cancel an insurance policy for fraud, which the insur-

ance company could set up as a defense to an action on the policy, cannot be founded on the theory that the company would not have the same control of the case as a defendant that it would have as plaintiff. Judgment, 111 F. 19, 49 C. C. A. 216, reversed.—*Cable v. United States Life Ins. Co.*, 24 S. Ct. 74, 191 U. S. 288, 48 L. Ed. 188.

215. — Recovery of damages.

See 8 Cent. Dig. Can. of Inst. §§ 14, 21.

The plaintiffs alleged that they made a contract by which the defendant was to deliver them a certain number of cattle; that subsequently the defendant induced them to accept an assignment of a contract in his favor by another person to deliver the cattle; that thereupon the plaintiffs paid defendant \$15,000, which he had paid to such third party, gave him their obligation to pay him a sum which represented his profit on the sale to them, and returned to him the original contract with him; that they were induced to accept such assignment, to pay said sum, and to give the obligation, by the false and fraudulent representations of the defendant as to such third party's solvency and business standing; and praying for a discovery, for the rescission and cancellation of the assignment and of the plaintiffs' obligation, for a reinstatement and confirmation of the original contract, and its enforcement; or, if that could not be done, that the defendant be compelled to repay the \$15,000 paid him, and to pay the damages sustained. *Held*, that the bill stated a case for which an action of deceit could be maintained at law, and would afford full, complete, and adequate remedy, and that a court of equity had no jurisdiction to entertain the suit.—*Buzard v. Houston*, 119 U. S. 347, 7 S. Ct. 249, 30 L. Ed. 451.

Equity has jurisdiction to cancel the deed made to the purchaser at execution sale, even after the time of redemption, if it appears that the sale was fraudulent, and that the purchaser has received rents from the property, and expended various sums for taxes and other purposes, so as to render an accounting necessary, as the remedy at law is not complete.—*Schroeder v. Young*, 161 U. S. 334, 16 S. Ct. 512, 40 L. Ed. 721.

Where a waterworks company breaches its contract with a municipality to furnish a continuous adequate supply of wholesome water, the municipality has the right to invoke the aid of a court of equity to enforce its rescission of the contract, since the remedy at law by an action for damages is wholly inadequate.—(1910) *City of Columbus v. Mercantile Trust & Deposit Co. of Baltimore*, 31 S. Ct. 105, 218 U. S. 645, 54 L. Ed. 1193, reversing decree (C. C. 1908) *Mercantile Trust & Deposit Co. of Baltimore v. City of Columbus*, 161 F. 135.

18. Estoppel or waiver.

See 8 Cent. Dig. Can. of Inst. §§ 23-27; 16 Cent. Dig. Deeds, § 210; 35 Cent. Dig. Mtg. § 196.

In a suit to set aside a deed given by a father, shortly before his death, to one of his children, on the ground that it was procured by undue influence, the fact that the father had previously made a parol gift of the land to the son, and that the latter had entered into possession and made improvements thereon, presents equitable considerations for a decree establishing the conveyance as a confirmation of the equitable title.—*Mackall v. Mackall*, 135 U. S. 167, 10 S. Ct. 705, 34 L. Ed. 84.

19. Conditions precedent.

See 8 Cent. Dig. Can. of Inst. §§ 23-28; 16 Cent. Dig. Deeds, § 212; 26 Cent. Dig. Hus. & W. § 207; 35 Cent. Dig. Mtg. § 196; 42 Cent. Dig. Release, § 45.

24. — Restoration of consideration or benefit.

See 8 Cent. Dig. Can. of Inst. §§ 33-38; 9 Cent. Dig. Chat. Mtg. § 147; 12 Cent. Dig. Corp. § 1857; 16 Cent. Dig. Deeds, § 212; 35 Cent. Dig. Mtg. § 196; 42 Cent. Dig. Release, § 45.

In an action to cancel a contract of sale on the ground of the fraud of the vendee, the complaint showed that the consideration never came to plaintiff, but was used in part by defendants in extinguishing a debt of plaintiff to them, and in part by his wife in paying other debts, and that he has no means of tendering the same except his interest in the property. *Held*, that equity will not require a repayment as a condition precedent, since plaintiff's inability is without fault of his; and the court can, in its final decree, make provision for repayment.—*Thackrah v. Haas*, 119 U. S. 499, 7 S. Ct. 311, 30 L. R. A. 488.

II. PROCEEDINGS AND RELIEF.

Laches, see Equity, 280, 81, 83.

32. Form of remedy.

See 11 Cent. Dig. Contracts, § 1195.

A suit, the purpose of which is to have canceled a guaranty upon a large number of negotiable bonds which might otherwise pass into the hands of bona fide purchasers, and to restrain suits upon the guaranty because of facts not appearing upon its face, is of equitable cognizance.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

34. Limitations and laches.

See 8 Cent. Dig. Can. of Inst. §§ 49-54; 16 Cent. Dig. Deeds, § 210; 40 Cent. Dig. Princ. & S. § 77.

A delay of two years and one month in bringing suit to cancel a conveyance by which a mortgagee, by means of fraud, oppression, and undue influence, acquired in settlement of the mortgage debt a tract of land of far greater value than the amount of such debt, is not such laches as bars the suit. Judgment (1907) 92 P. 250, 19 Okl. 525, affirmed.—*Wagg v. Herbert*, 30 S. Ct. 218, 215 U. S. 546, 54 L. Ed. 321.

36. Pleading.

See 8 Cent. Dig. Can. of Inst. §§ 66-99; 11 Cent. Dig. Contracts, § 1196; 35 Cent. Dig. Mtg. § 196; 42 Cent. Dig. Release, § 46.

37. — Bill, complaint, or petition.

See 8 Cent. Dig. Can. of Inst. §§ 66-80; 11 Cent. Dig. Contracts, § 1196; 35 Cent. Dig. Mtg. § 196.

A complaint alleging that, while plaintiff was in such a state of intoxication as not to be in his right mind, or capable of transacting business, defendants, knowing his condition, fraudulently extorted from him, for \$1,200, \$80,000 worth of stock of a mining corporation, and praying for a cancellation of the transfer, a sale of enough of the stock to repay the \$1,200, the issue of the rest to plaintiff, the restoration of any certificate he may have transferred, and for an account and injunction, states a case entitling plaintiff to relief in equity.—*Thackrah v. Haas*, 119 U. S. 499, 7 S. Ct. 311, 30 L. Ed. 486.

Civ. Code La. arts. 401, 402, provide that all acts done by a person interdicted, from the date of filing the petition until the day when the interdiction is pronounced, are void, but that no act anterior to the petition for interdiction shall be annulled unless it be proved that the cause of interdiction notoriously existed at the time of the act, or that the party who contracted with the interdicted person could not have been deceived as to the state of his mind.

A bill filed by the curator of an interdict to avoid an agreement made before the petition was filed, alleged that at the time of making the agreement he was losing, and to a great extent had lost, his capacity to attend to business, and so continued until he was judicially interdicted some months afterwards. *Held*, that the allegations are not sufficient to entitle plaintiff to relief on the ground that the interdict was incapable of making a binding agreement. —*Stockmeyer v. Tobin*, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123.

48. Trial or hearing.

See 8 Cent. Dig. Can. of Inst. §§ 104-111; 42 Cent. Dig. Release, § 46.

53. — Trial and findings by court or referee.

See 8 Cent. Dig. Can. of Inst. §§ 109-111.

In a suit by a mother against her son to set aside a deed from her to him, the complaint alleged that the instrument was executed in the belief, caused by the false and fraudulent statements of the son, that it was an agreement under which the mother was to have a life lease of property belonging to the son, and not a deed conveying her own property absolutely in fee to him. The court found the fraud, but found also that the mother, when she signed the deed, was induced by the son to believe that it was merely a paper which she had instructed him to prepare to carry out an agreement between them, whereby she was to advance him money to assist in building a house on his own land, and he was to give her a life lease of the house when built in return. *Held*, that the facts found were substantially the facts alleged, and that they would support a decree declaring the deed null and void, and directing a reconveyance. —*Tufts v. Tufts*, 123 U. S. 76, 8 S. Ct. 54, 31 L. Ed. 91.

54. Relief awarded.

See 8 Cent. Dig. Can. of Inst. §§ 112-125; 11 Cent. Dig. Contracts, § 1201.

57. — Alternative, additional, or incidental equitable relief.

See 8 Cent. Dig. Can. of Inst. §§ 114-118.

A decree which avoids a subsequent conveyance to a mortgagee, thus leaving the original

mortgage binding, and orders an accounting by the fraudulent grantee as a mortgagee in possession, is not open to the objection that it makes a new contract for the parties. Judgment (1907) 92 P. 250, 19 Okl. 525, affirmed. —*Wagg v. Herbert*, 30 S. Ct. 218, 215 U. S. 546, 51 L. Ed. 321.

CAPITA.

Taking property per stirpes or per capita, see Wills, 530, 531.

CAPITAL.

Corporate capital, see—

Corporations, 75-161.

Wills, 684.

Taxation of corporate capital, see Taxation, 127.

CAPITAL PUNISHMENT.

Death by execution as risk within insurance policy, see Insurance, 438.

CARBON STICKS.

Duty on, see Customs Duties, 25.

CARELESSNESS.

See Negligence.

CAR INSPECTOR.

Fellow servant of brakeman, see Master and Servant, 180.

CARMACK AMENDMENT.

See Commerce, 8.

CARRIAGES.

Duty on, see Customs Duties, 33.

CARRIERS.

Scope-Note.

[INCLUDES the regulation and conduct of the business of transportation of goods and passengers by common or private carriers, and matters incidental thereto, such as the operation of palace cars, sleeping cars, etc., freight lines, collection and transportation of money by express companies, etc.; and rights, duties, and liabilities of those engaged in any such business, as to the public and as to individuals, in respect of the persons and property carried.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Control and Regulation of Common Carriers.

(A) IN GENERAL.

1. Power to control and regulate.
2. Constitutional and statutory provisions.
4. Who are common carriers.
5. Companies, persons, or instrumentalities affected by regulations.

I. Control and Regulation of Common Carriers—Continued.**(A) IN GENERAL—Continued.**

- ⚡ 12. Charges.
- 13. Preferences and discriminations.
- 14. Exclusive privileges.
- 15. Connections with and facilities to other carriers.
- 16. Use of carrier's premises.
- 18. Proceedings to enforce or to prevent enforcement of regulations.
- 20. Penalties for violations of regulations.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

- ⚡ 23. Statutory provisions.
- 24. Subjects of regulations.
- 25. Carriage of particular articles.
- 26. Charges in general.
- 27. Special rates.
- 28. Charges for long and short hauls.
- 29. Pooling or dividing freights or earnings.
- 30. Schedules of rates.
- 31. Change of rates.
- 32. Preferences and discriminations.
- 33. Facilities to connecting lines.
- 34. Judicial proceedings to enforce regulations.
- 35. Contracts in violation of regulations.
- 36. Damages for violations of regulations.
- 37. Penalties for violations of regulations.
- 38. Offenses.

II. Carriage of Goods.**(A) DELIVERY TO CARRIER.**

- ⚡ 45. Actions for refusal to receive or transport goods, or furnish facilities.

(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.

- ⚡ 47. Authority of agents and employés.
- 50. Construction and operation of bill of lading.
- 51. — In general.
- 54. Negotiability and transfer of bill of lading.
- 56. — Indorsement or other transfer.
- 57. — Rights of transferee as against carrier.
- 59. — Bona fide purchasers.
- 61. Contracts for transportation of goods.
- 63. — Construction and operation.
- 68. Modification, merger, or rescission.

(C) CUSTODY AND CONTROL OF GOODS.

- ⚡ 70. Title to goods.
- 76. Actions by or against carriers in respect of goods.

(D) TRANSPORTATION AND DELIVERY BY CARRIER.

- ⚡ 88. Acts constituting delivery.
- 91. Liability for failure or refusal to deliver.

(E) DELAY IN TRANSPORTATION OR DELIVERY.

- ⚡ 100. Demurrage, and liability of consignee or owner for delay.

(F) LOSS OF OR INJURY TO GOODS.

- ⚡ 108. Nature of liability as common carrier.
- 115. Acts or omissions constituting negligence by carrier in general.
- 116. Deviation or delay.
- 118. Negligence of agents or servants.

II. Carriage of Goods—Continued.**(F) LOSS OF OR INJURY TO GOODS—Continued.**

- ⚡ 124. Extent of liability.
- 125. Effect of insurance.
- 126. Actions for loss or injury.
- 131. — Pleading.
- 132. — Presumptions and burden of proof.
- 133. — Admissibility of evidence.
- 136. — Questions for jury.

(G) CARRIER AS WAREHOUSEMAN.

- ⚡ 140. Goods awaiting delivery.
- 146. Actions involving liability as warehouseman.

(H) LIMITATION OF LIABILITY,

- ⚡ 148. What law governs.
- 149. Liabilities subject to limitation.
- 150. — Negligence or misconduct.
- 151. Mode or form of limitation.
- 153. — Bill of lading or shipping receipt.
- 154. Consideration.
- 155. Assent of consignor or owner.
- 156. Operation and effect of limitation in general.
- 158. Limitation of amount of liability.
- 160. Limitation of time to sue.
- 161. Limitation of liability as ground of defense.
- 163. — Presumptions and burden of proof.

(I) CONNECTING CARRIERS.

- ⚡ 173. Special contracts for through transportation.
- 176. Delay in transportation or delivery.
- 177. Loss of or injury to goods.
- 178. Carrier as forwarder or warehouseman.
- 179. Transportation of cars or other vehicles of other carrier.
- 180. Limitation of liability.
- 181. Actions against connecting carriers.
- 185. — Evidence.

(J) CHARGES AND LIENS.

- ⚡ 188. Rights of carrier in general.

(K) DISCRIMINATION AND OVERCHARGE.

- ⚡ 198. Rights and liabilities of carrier in general.
- 201. Actions for discrimination.

III. Carriage of Live Stock.

- ⚡ 204. Statutory regulation.
- 205. Nature of carrier's duties and liabilities in general.
- 207. Special contract for transportation.
- 212. Duties in respect to delivery.
- 213. Delay in transportation or delivery.
- 214. Loss or injury.
- 215. — Liability in general.
- 218. Limitation of liability.
- 219. Connecting carriers.
- 220. Actions against carriers of live stock.
- 228. — Evidence.
- 229. — Damages.
- 230. — Trial.

IV. Carriage of Passengers.**(A) RELATION BETWEEN CARRIER AND PASSENGER.**

- ⚡ 236. Duty to receive and transport passengers.
- 237. Who are passengers.

IV. Carriage of Passengers—Continued.

(A) RELATION BETWEEN CARRIER AND PASSENGER—Continued.

⇐ 241. — Employés of others carried under contract with carrier.

247. Commencement and termination of relation.

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⇐ 251. Acts and statements of agents or employés.

252. Sale of tickets.

254. Conditions in tickets.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

⇐ 268. Stopping over at intermediate points.

269. Changes and transfers to connecting lines.

270. Duties of connecting carriers.

273. Actions arising out of breach of contract.

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(D) PERSONAL INJURIES.

⇐ 281. Care as to persons under disability.

282. Persons to whom carrier is liable.

283. Acts or omissions of carrier's employés.

284. Acts of fellow passengers or other third persons.

285. Act of God, vis major, or inevitable accident.

286. Condition and use of premises.

287. Taking up passengers.

288. Sufficiency and safety of means of transportation.

291. — Railroad tracks and roadbeds.

294. Management of conveyances.

295. — In general.

303. Setting down passengers.

305. Proximate cause of injury.

306. Companies or persons liable.

307. Limitation of liability.

309. Actions for injuries.

314. — Pleading.

315. — Issues, proof, and variance.

317. — Admissibility of evidence.

318. — Sufficiency of evidence.

319. — Damages.

320. — Questions for jury.

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⇐ 327. Awaiting and seeking transportation.

329. In transit.

331. — Dangerous position.

333. Leaving conveyance.

334. Disobedience of rules of carrier.

339. Proximate cause of injury.

342. Contributory negligence as ground of defense.

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356. — Defective or invalid tickets.

361. Intruders and trespassers.

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IV. Carriage of Passengers—Continued.

(G) PASSENGERS' EFFECTS.

- ❧394. Checks and receipts.
- 397. Loss or injury.
- 400. — Notice to carrier of nature or value of goods.
- 401. — Property under control of passenger.
- 405. Limitation of liability.

(H) PALACE CARS AND SLEEPING CARS.

- ❧408¹/₂ [New, vol. 3 Key-No. Series]. Constitutional and statutory provisions.

Cross-References.

See Ferries, ❧30-32.

Abandonment of contract right of street railway company as to rate of charges, see Street Railroads, ❧60.

Advertisement on stages, ordinance denying equal protection of the laws, see Constitutional Law, ❧235; impairing obligation of contract, see Constitutional Law, ❧154.

As employers, see Master and Servant.

Combinations to control transportation, see Monopolies, ❧16, 17.

Construction, regulation, and operation of railroad, see Railroads; of street railroads in general, see Street Railroads; of telegraph and telephone lines, see Telegraphs and Telephones.

Criminal responsibility for transportation under White Slave Act, see Prostitution, ❧1, 3, 4. Delegation of legislative powers to interstate commerce commission, see Constitutional Law, ❧62.

Regulation of hours of labor, by employes, see Commerce, ❧85; report to Interstate Commerce Commission, see Witnesses, ❧292.

Report, under interstate commerce laws, see Commerce, ❧57.

Separate coach law as imposing involuntary servitude, see Constitutional Law, ❧83.

Taxation of express companies, partial invalidity, see Statutes, ❧64.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

See District of Columbia, ❧22.

Equal protection of laws, see Constitutional Law, ❧247.

Statute relating to distribution of coal cars as destroying freedom of contract, see Constitutional Law, ❧276.

Statutory and municipal regulation of railroads, see Railroads, ❧227-254.

Validity of employers' liability act as applied to territories, see Territories, ❧11; as dependent on superseding law governing territory, see Statutes, ❧55.

(A) IN GENERAL.

Abandonment of street railway franchise, see Street Railroads, ❧60.

Certainty of statutes, see Statutes, ❧47.

Combination to control rates, see Monopolies, ❧16, 17.

Commerce, congressional inaction affecting right of state to regulate rates, see Commerce, ❧10.

Conclusiveness in federal court of judgment of state court in proceedings to enforce regulations, see Judgment, ❧828.

Due process of law, see Constitutional Law, ❧217, 296-298, 305.

Effect of admission of territory as state on authority to enact separate coach laws, see States, ❧9.

Establishment of passenger rates by corporation commission as res judicata in suit to restrain enforcement of rates, see Judgment, ❧552.

Errors in instruction cured by other instruction in prosecution for giving rebates, see Criminal Law, ❧823.

Federal court, injunction against enforcement of rates established by commission as suit against the state, see Courts, ❧303.

Impairing obligation of contract, see Constitutional Law, ❧126, 135.

Jurisdiction of commerce court of proceedings to enforce regulations, see Commerce, ❧92.

Jurisdiction of federal court to enjoin rates fixed by state corporation commission, see Courts, ❧508.

Partial invalidity of statute, see Statutes, ❧64.

Persons entitled to raise constitutional questions, see Constitutional Law, ❧42.

Protection of laws, see Constitutional Law, ❧218, 240-242, 248.

Regulation as taking property without compensation, see Eminent Domain, ❧2.

Regulation of as interference with commerce, see—

Commerce, ❧5, 32-34, 58, 61, 62, 69, 74.

Constitutional Law, ❧43.

Review in prosecution for violation of regulations, see Criminal Law, ❧1172.

Review of action to recover penalty, see Courts, ❧394(3).

Review of proceeding to prevent enforcement of regulations, see Courts, ❧400.

Unreasonable searches and seizures, see Searches and Seizures, ❧7.

Venue of prosecution for obtaining illegal rates, see Criminal Law, ❧113.

❧1. Power to control and regulate.

See 9 Cent. Dig. Carr. § 1.

The fact that the legislature has power to repeal the charter, and thus terminate the legal existence of a railroad company, does not validate an act which is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of the railroad company. Judgment, *Smith v. Lake Shore & M. S. Ry. Co.*, 72 N. W. 323, 114 Mich. 460, 4 Detroit Leg. N. 662, reversed. —*Lake Shore & M. S. Ry. Co. v. Smith*, 19 S. Ct. 565, 173 U. S. 684, 43 L. Ed. 858.

A municipal contract which secures to the public for a term of years the benefit of a single fare of not more than 5 cents for a continuous passage over the whole length, or any portion of consolidated and extended street railway lines does not violate the provision of *Bates' Ann. St. Ohio 1897*, § 2502, that a municipal corporation shall not, during the term of

a street railway grant, or renewal thereof, release the grantee from any obligation or liability thereby imposed, because such contract deprives the municipality of the right to regulate fares over a portion of the consolidated lines, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned such portion of the lines. Decree, *Cleveland City Ry. Co. v. City of Cleveland* (C. C.) 94 F. 385, affirmed.—*City of Cleveland v. Cleveland City Ry. Co.*, 24 S. Ct. 756, 194 U. S. 517, 48 L. Ed. 1102; Same v. *Cleveland Electric Ry. Co.*, 24 S. Ct. 764, 194 U. S. 538, 48 L. Ed. 1109.

The surrender by a railway company of its special charter, to accept a general railroad law, before the state had made any attempt to regulate its tolls, freed the company from all liability to the state under a charter provision that when declared dividends shall aggregate a specified amount the legislature "may so regulate" the tolls that not more than a fixed percentage shall be divided annually on the capital employed, and the surplus profits shall be paid over to the state treasurer, and that, "if required," the corporation shall furnish the legislature a statement of expenditures; and such liability, therefore, cannot be enforced by virtue of subsequent legislation, without impairing the rights of the railroad company under the federal Constitution.—*Terre Haute & I. R. Co. v. State of Indiana ex rel. Ketcham*, 24 S. Ct. 767, 194 U. S. 579, 48 L. Ed. 1124.

The state of Mississippi may, so far as the federal Constitution is concerned, establish a flat rate of $3\frac{1}{2}$ cents per 100 pounds on grain and grain products carried from Vicksburg to Meridian over the road of the Alabama & Vicksburg Railway Company, where that company, under the guise of a "rebilling rate," gives any Vicksburg merchant receiving a car load of grain or grain products over the Vicksburg, Shreveport, & Pacific Railroad a rate of $3\frac{1}{2}$ cents per 100 pounds on any grain he may ship to Meridian. Judgment (1905) 38 So. 356, 86 Miss. 667, affirmed.—*Alabama & V. Ry. Co. v. Railroad Commission of State of Mississippi*, 27 S. Ct. 163, 203 U. S. 496, 51 L. Ed. 289.

—2. Constitutional and statutory provisions.

See 9 Cent. Dig. Carr. §§ 4, 5.

No repeal of the provisions of Gen. St. Ky. 1894, § 819, that prosecution by indictment of railroad companies for charging unlawful rates shall be had only on recommendation or request of the railroad commission, and also for an action in the name of the commonwealth on information filed by the board of railroad commissioners, was effected by Act Ky. March 10, 1900, providing for the fixing of rates by such commission, although, while repeating many of the provisions of the section it omitted these provisions. Decree (C. C.) *Louisville & N. R. Co. v. McChord*, 103 F. 216, reversed.—*McChord v. Cincinnati, N. O. & T. P. Ry. Co.*, 22 S. Ct. 165, 183 U. S. 483, 46 L. Ed. 289.

Laws Miss. 1908, c. 196, penalizing carriers for failing to settle a claim promptly which a judgment finds to be just, held constitutional.—*Yazoo & Mississippi Val. R. Co. v. Jackson Vinegar Co.*, 33 S. Ct. 40, 226 U. S. 217, 57 L. Ed. 193.

A carrier penalized under Laws Miss. 1908, c. 196, for failure to settle a claim promptly which a judgment finds to be just, cannot urge that the statute is unconstitutional as penalizing the failure to accede to an extravagant claim.—*Id.*

Fixing damages for violation of Laws Neb. 1905, c. 107, limiting the time for transporting live stock at \$10 for each car for every hour of time exceeding the limit, held constitutional.

—*Chicago, B. & Q. R. Co. v. Cram*, 33 S. Ct. 437, 228 U. S. 70, 57 L. Ed. 734, affirming judgment *Cram v. Chicago, B. & Q. R. Co.*, 122 N. W. 31, 84 Neb. 607, 26 L. R. A. (N. S.) 1022, and 123 N. W. 1045, 85 Neb. 586, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170; *Chicago, B. & Q. R. Co. v. Kyle*, 33 S. Ct. 440, 228 U. S. 85, 57 L. Ed. 741, affirming judgment *Kyle v. Chicago, B. & Q. R. Co.*, 122 N. W. 37, 84 Neb. 621.

Laws Or. 1907, p. 67, empowering the state railroad commission to remedy discrimination in railway fares, may validly prohibit fares that are unjustly discriminatory as against a given locality.—*Portland Ry., Light & Power Co. v. Railroad Commission of Oregon*, 33 S. Ct. 820, 229 U. S. 397, 57 L. Ed. 1248, affirming judgment 105 P. 709, 56 Or. 468; *Id.*, 33 S. Ct. 827, 229 U. S. 414, 57 L. Ed. 1259.

The imposition by Laws Kan. 1905, c. 353, of a liability of \$500 and attorney's fees for every excessive charge by a carrier held unconstitutional.—*Missouri Pac. R. Co. v. Tucker*, 33 S. Ct. 961, 230 U. S. 340, 57 L. Ed. 1507, reversing judgment *Tucker v. Missouri Pac. Ry. Co.*, 108 P. 89, 82 Kan. 222.

Failure of Act Ky. March 10, 1900 (Ky. St. § 820a), to provide for an appeal from final order of railroad commission fixing freight rates or for review of their reasonableness, does not make the statute unconstitutional.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

Laws Kan. 1905, c. 345, under which, as amended by Laws Kan. 1907, c. 275, an attorney's fee is allowed shipper who successfully sues a railroad for failure to furnish cars, while no such allowance is made in successful action by railroad in suit under such statute against a shipper failing to use the cars held unconstitutional.—*Atchison, T. & S. F. Ry. Co. v. Vosburg*, 35 S. Ct. 675, 238 U. S. 56, 59 L. Ed. 1199, L. R. A. 1915E, 953, reversing judgment *Vosburg v. Atchison, T. & S. F. Ry. Co.*, 130 P. 667, 89 Kan. 114.

Civ. Code S. C. 1912, §§ 2754, 2755, authorizing suit against any carrier participating in a through intrastate shipment, for damages occurring on any part of the through route, held valid.—*Atlantic Coast Line R. Co. v. Glenn*, 36 S. Ct. 154, 239 U. S. 388, 60 L. Ed. 344, affirming judgment *Glenn v. Atlantic Coast Line R. Co.*, 80 S. E. 898, 96 S. C. 357.

—4. Who are common carriers.

See 9 Cent. Dig. Carr. §§ 1, 462-478.

Goods were shipped by the owner upon a steamer belonging to defendant, along with a large amount of merchandise belonging to other parties. The steamer performed regular service in the transportation of merchandise for hire between the ports of Liverpool and New York. Held, that defendant was liable as a common carrier.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; Same v. *Insurance Co. of North America*, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800, affirming decree *The Montana*, 22 F. 715, 22 Blatchf. 372.

A railway company transporting at reduced rates men and supplies required by construction company in grading an extension is not acting as a common carrier.—*Santa Fé, P. & P. R. Co. v. Grant Bros. Const. Co.*, 33 S. Ct. 474, 228 U. S. 177, 57 L. Ed. 787, reversing judgment 108 P. 467, 13 Ariz. 186.

The right of the public to use the facilities of a railroad and to demand service of it, rather than the extent of its business, is the criterion by which to determine whether or not it is a common carrier.—*United States v. Louisiana &*

P. R. Co., 34 S. Ct. 741, 234 U. S. 1, 58 L. Ed. 1185, affirming judgment (Com. C.) Louisiana & R. Ry. Co. v. United States, 209 F. 244.

Tap line railroads connecting timber lands and lumber mills with trunk line railroads, though owned by the owners of the timber and mills, are common carriers as well of the freight of the owners of such tap lines as of nonproprietary traffic.—Id.

The prohibition against charging a lesser rate for a longer than a shorter haul without consent of the Interstate Commerce Commission made by Act June 18, 1910, § 8, amending Act Feb. 4, 1887, § 4, prevents carriers not having consent from granting a rebilling privilege to shippers of grain and hay at Nashville whereby they receive on reshipment allowance on local rate to the southeastern point of destination.—United States v. Louisville & N. R. Co., 35 S. Ct. 113, 235 U. S. 314, 59 L. Ed. 245, reversing order (Com. C.) Louisville & N. R. Co. v. United States, 197 F. 58.

Corporation, owning refrigerator and other cars and leasing them to railroads operating icing stations, held not a common carrier, subject to Act Feb. 4, 1887, though definition of "transportation" in section 1 includes such instrumentalities as the corporation leases to railway companies.—Ellis v. Interstate Commerce Commission, 35 S. Ct. 645, 237 U. S. 434, 59 L. Ed. 1036.

5. Companies, persons, or instrumentalities affected by regulations.

See 9 Cent. Dig. Carr. §§ 3, 4, 7.

A railroad company, accepting its charter subject to the provisions of Const. Ky. § 218, prohibiting greater charges for shorter than for longer hauls, except when permitted by the railroad commission, is as much subject to the provisions for exoneration from that prohibition as to the prohibition itself, and cannot claim that it has any implied contract exemption from these provisions by virtue of its charter and the consequent right to charge reasonable rates for its service. Judgment 51 S. W. 164, 1012, 21 Ky. Law Rep. 232, 106 Ky. 633, 90 Am. St. Rep. 236, affirmed.—Louisville & N. R. Co. v. Commonwealth of Kentucky, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

12. Charges.

See 9 Cent. Dig. Carr. §§ 7-11, 15-20; 44 Cent. Dig. St. R. R. § 151.

Under Const. Ark. art. 12, § 6, giving the legislature power to prevent excessive charges by railroad companies, a regulation by the legislature of three cents per mile as the maximum to be charged for carrying passengers will not be considered unreasonable, in that it reduces the net income to 1½ per cent. on the original cost of the road, and to 2 per cent. on the amount of its bonded debt, or as confiscating property without due process of law, where there is no evidence to show that plaintiffs, who had purchased the property at a foreclosure sale, had paid a price equal to the original cost of the road or to the bonded debt.—Dow v. Beidelman, 125 U. S. 680, 8 S. Ct. 1028, 31 L. Ed. 841, affirming judgment 49 Ark. 325, 5 S. W. 297.

Act Mich. 1889, No. 202, fixes a maximum rate of two cents per mile on all railroads whose gross yearly passenger earnings exceed \$3,000, but makes no regulations in regard to freight charges. Held that, in an action in damages for a refusal to carry a passenger at the maximum rate, the court properly refused to instruct the jury that the law was unconstitutional in its application to the road in question, merely upon an agreed statement showing that its income at existing rates was entirely consumed by operating expenses and fixed charges, and the testimony of two of its officers that an increase of freight rates would diminish its income by

throwing business to competing roads; since such an instruction required the court to hold that this testimony was conclusive in law, and to assume, as a matter of law, that a reduction in passenger fares would not bring an increase of travel sufficient to equalize the earnings.—Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176, affirming judgment Wellman v. Chicago & G. T. Ry. Co., 83 Mich. 592, 47 N. W. 489.

State legislatures have power to fix maximum rates of railroad passenger fare, and the courts can only interfere therewith to protect the roads from unreasonable rates.—Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176, affirming judgment Wellman v. Chicago & G. T. Ry. Co., 83 Mich. 592, 47 N. W. 489; following Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 S. Ct. 334, 383, 1191, 29 L. Ed. 636; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. Ed. 970.

The reasonableness of a passenger rate of a certain amount per mile fixed by the legislature must in the case of a railroad company be determined by its effect on the net earnings of the company on its entire line within the state, and not by its effect on any subdivision, even though it was once a separate road.—St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. Ed. 567, affirming judgment 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452.

The legislative power to alter or amend the charter of a railroad company does not authorize legislation fixing the rates for 1,000-mile tickets good for two years. Judgment, Smith v. Lake Shore & M. S. Ry. Co., 72 N. W. 328, 114 Mich. 460, 4 Detroit Leg. N. 662, reversed.—Lake Shore & M. S. Ry. Co. v. Smith, 19 S. Ct. 565, 173 U. S. 684, 43 L. Ed. 858.

The maximum rates for transportation of passengers on a railroad, as fixed by the legislature, will be prima facie presumed to be reasonable, so that it cannot be contended, in support of a statute reducing the rate where a 1,000-mile ticket is purchased, that the legislature would have power to reduce the maximum rate for all persons to the same rate fixed by such statute.—Id.

The fact that a railroad company has voluntarily sold 1,000-mile tickets, good for a year from the time of their sale, does not of itself authorize the legislature to require the road so to do, nor furnish a standard by which to measure the reasonableness of a statute requiring the company to sell 1,000-mile tickets at rates less than the regular rates, and to be valid for two years.—Id.

Pub. Acts Mich. 1891, No. 90, requiring railroad companies in the state to keep for sale 1,000-mile tickets at specified rates, less than the regular rate, to be used in the name of the purchaser, his wife and children, and valid for two years, is not legislation for the convenience of the public, so as to be validated on that ground.—Id.

The reasonableness of a schedule of rates for local business of a railroad company must be determined by a comparison between the gross receipts and the cost of doing the business, and cannot be determined until the cost of doing the business is ascertained. Decree (C. C. 1898) 90 F. 363, reversed.—Chicago, M. & St. P. Ry. Co. v. Tompkins, 20 S. Ct. 336, 176 U. S. 167, 44 L. Ed. 417.

Binding agreements relative to rates of fare between a municipality and street railways organized either under the Michigan tram railway act as amended in 1861, or under the street railway act of 1867, which cannot be altered without consent of both parties, were expressly authorized by section 20 of the latter act, declaring that street railway rates shall be estab-

lished by agreement between the company and the corporate authorities, the provisions of which section were by section 29 made applicable to all street railway corporations already organized and in operation.—*City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 S. Ct. 410, 184 U. S. 368, 46 L. Ed. 592.

No permission to municipal authorities to reduce street railway fares without the consent of the company below the rate at which they were fixed in compliance with Michigan Street Railway Act 1887, § 20, which declares that such rates shall be established by agreement between the parties, can be implied from the further provision of that section that the rates of fare agreed upon shall not be increased without the consent of the city authorities.—*Id.*

No right to reduce street railway fares established by agreement between a city and the railway company subsequent to the amendment of March 27, 1887, to section 34 of the Michigan tram railway act, so long as by such reduction rights or franchises already granted were not destroyed or impaired, or the company deprived of granted rights of construction and operation, was given such city by the provision of that amendment forbidding municipal authorities from making any regulations or conditions which would have that effect, as such provision, being a general one, does not limit the express authority of the municipality, previously conferred by section 20 of the Michigan street railway act, to bind itself by an agreement fixing street railway fares.—*Id.*

A reservation in an ordinance granting a street railway franchise of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, does not include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in such ordinance.—*Id.*

A state legislature may authorize its railroad commission to reduce, as unreasonable, a joint through rate agreed upon by two or more railroads, and apportion the same among the several railroad companies interested. Judgment, *State v. Minneapolis & St. L. R. Co.*, 83 N. W. 60, 80 Minn. 191, 89 Am. St. Rep. 514, affirmed.—*Minneapolis & St. L. R. Co. v. State of Minnesota*, 22 S. Ct. 900, 186 U. S. 257, 46 L. Ed. 1151.

A through rate is not necessarily reasonable because it does not exceed the aggregate of two reasonable local rates.—*Id.*

A street railway company whose charter subjects it to "all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force relating to street railway companies," is bound by the requirement of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations. Judgment, *Commonwealth v. Interstate Consol. St. Ry. Co.* (1905) 73 N. E. 530, 187 Mass. 436, affirmed.—*Interstate Consol. St. Ry. Co. v. Commonwealth*, 28 S. Ct. 26, 207 U. S. 79, 52 L. Ed. 111, 12 Ann. Cas. 555.

Power to make a general schedule of maximum rates for the transportation of all commodities, upon all railroads, to and from all points within the state, upon a general and comprehensive complaint that rates are too high, or upon like information of the commission itself, is not conferred upon the Kentucky Railroad Commission by Act Ky. March 10, 1900 (Acts 1900, p. 5, c. 2), authorizing it, upon complaint that the rates of any railway company are extortionate, or upon its own information, to fix a reasonable rate if, after hearing, it finds the rates extortionate.—*Siler v. Louisville & N. R. Co.*, 29 S. Ct. 451, 213 U. S. 175, 53 L. Ed.

753; *Same v. Illinois Cent. R. Co.*, 29 S. Ct. 458, 213 U. S. 199, 53 L. Ed. 760.

A particular rate on a specific commodity fixed by the Kentucky Railroad Commission will not, in order to sustain its validity, be separated from the general order fixing a general schedule of maximum rates for all commodities, upon all railroads, to and from all points within the state, where the specific order was made after a general complaint was filed, and is itself a general order, and was made in the exercise of the unfounded assumption of the power under Act Ky. March 10, 1900 (Acts 1900, p. 5, c. 2), to make a general tariff of rates.—*Id.*

The market value of the stocks and bonds representing the property of a railway company, including assets not forming a part of the operating property of the carrier or devoted to the public service, furnish no criterion in testing the reasonableness of state regulation of rates by which to determine the value of the property on which a fair return is to be computed.—*Simpson v. Shepard*, 33 S. Ct. 729, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, modifying decree (C. C.) *Shepard v. Northern Pac. Ry. Co.*, 184 F. 765.

The cost to a railway company of acquiring the land necessary for its terminal and right of way if the railroad should be called upon to reproduce its road, including the excess over the market value of similarly situated property which the railway company would be obliged to pay and an allowance for consequential damages, was not the proper basis for valuing such property to test the reasonableness of state regulation of rates.—*Id.*

Estimates of the value of the right of way and terminals of a railway company cannot properly be based, in determining the reasonableness of state regulation of rates, on their supposed value for railroad purposes in excess of the market value of contiguous property.—*Id.*

The fair present value of a railroad's right of way and terminals cannot be increased when testing the reasonableness of state regulation of its rates, by adding further sums calculated on that value for engineering, superintendence, contingencies, and interest during construction.—*Id.*

The physical valuation of the property of a railroad on the basis of the cost of reproduction for the purpose of testing the reasonableness of state regulation of its rates is incomplete where depreciation is found in general terms to be more than offset by appreciation, without showing the items of such appreciation and depreciation.—*Id.*

A division of the value of the property of an interstate carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state is not an accurate measure of the value of the use of its property in intrastate business, so as to serve as the basis of a judicial holding in a close case that the intrastate rates are confiscatory.—*Id.*

The total value of the property of an interstate carrier within a state, independently of revenue, should be divided as between its interstate and intrastate business when testing the reasonableness of state regulation of its intrastate rates, according to the use made of the property, assigning to each business that proportion of the total value of the property which corresponds to its employment in that business.—*Id.*

General estimates as to the extra cost of the intrastate business of a carrier over its interstate business, made without the accurate data for at least test periods not beyond the power of a carrier to furnish, is not adequate proof to sustain a finding that the carrier's intrastate

rates, as fixed by the state, are confiscatory.—*Id.*

Evidence is insufficient to support a finding that intrastate rates of an interstate carrier as fixed by the state are confiscatory, where neither the share of the expenses attributable to the intrastate business nor the value of the property employed therein is satisfactorily shown.—*Id.*

A state may not fix the intrastate rates of an interstate carrier so low that the carrier's entire revenue from all its business in the state, after paying only operating expenses and taxes, amounts to only about 4 per cent. of the value of its property in the state.—*Id.*

Valuations of railway properties by state assessors for taxation do not afford an adequate basis to determine the fair value of the property when testing the reasonableness of state regulation of railway rates.—*Knott v. Chicago, B. & Q. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, modifying decree (C. C.) *St. Louis & S. F. R. Co. v. Hadley*, 168 F. 317.

Broad estimates of the value of railway property are insufficient to support a finding that railway rates fixed by a state are confiscatory.—*Id.*

Finding that state railway rates are confiscatory cannot be based on an intrastate valuation of the railway property, which if extended to the entire system would exceed the railway company's total capitalization, in the absence of proof that the value actually existed, and that different items were estimated by correct methods.—*Id.*

A division of the value of property of an interstate carrier within the state according to gross earnings derived from its interstate and intrastate business in the state does not give a sufficiently accurate measure of the value of the use of the property in intrastate commerce to serve as a basis for a holding that the intrastate rates are confiscatory.—*Id.*

General estimates of the extra cost of intrastate business over interstate business made without accurate data will not be accepted to sustain a finding that intrastate rates fixed by the state are confiscatory.—*Id.*

Legislative regulation of rates not confiscatory as to certain railroads is enforceable as against them, though it may be unenforceable as against another carrier differently situated.—*Id.*

State statutes fixing maximum railroad rates are not invalid because they have caused the discharge of many railroad employes.—(C. C. 1909) *St. Louis & S. F. R. Co. v. Hadley*, 168 F. 317, decree modified (1913) *Knott v. Chicago, B. & C. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, decree reversed (1913) *Same v. St. Louis, K. C. & C. R. Co.*, 33 S. Ct. 983, 230 U. S. 512, 57 L. Ed. 1596, and appeal dismissed (1913) *Same v. St. Louis Southwestern R. Co.*, 33 S. Ct. 984, 230 U. S. 509, 57 L. Ed. 1595.

That state statutes fixing railroad rates are not enforceable as to particular railroads, because the rates as applied to such roads are not compensatory, does not render them invalid as to other roads.—*Id.*

In determining the reasonableness of freight and passenger rates established by a state on intrastate railroad traffic, as applied to a railroad doing both interstate and intrastate business, the difference in the cost of handling each kind of business as related to the earnings from each should be considered, and in apportioning the total expenses between the two kinds of business the best method is to make the division on the basis of the relative earnings from each class of business.—*Id.*

Railroad property, properly built and managed, is entitled to earn an annual income of 6 per cent. on its fair valuation, and a statute fixing rates under which it cannot make such

income is confiscatory and unconstitutional.—*Id.*

Act Mo. Feb. 27, 1907 (Laws 1907, p. 170), establishing two cent passenger fares on intrastate railroads, and Act March 19, 1907 (Laws 1907, p. 171), establishing maximum freight rates held confiscatory and unconstitutional on evidence showing that none of the roads doing business thereunder can earn to exceed 3 per cent. net income on its state business, while as to some the business must be done at a loss.—*Id.*

A division of the value of property of an intrastate carrier within a state according to gross earnings derived from its interstate and intrastate business in the state is not a sufficiently accurate measure of the value of the use of its property in intrastate business to serve as a basis for a holding that the intrastate rates are confiscatory.—*Allen v. St. Louis, I. M. & S. Ry. Co.*, 33 S. Ct. 1030, 230 U. S. 553, 57 L. Ed. 1625, reversing decree (C. C.) *In re Arkansas Rate Cases*, 187 F. 290.

General estimates of conditions of transportation with reference to the extra cost of intrastate business over interstate business do not take the place of data compiled for representative test periods as a basis for a finding that the intrastate rates are confiscatory.—*Id.*

The ratio of the total operating expenses of a railroad, or a railroad division, to the entire receipts of such railroad or division is not a sufficient basis, when testing the reasonableness of rates prescribed under state authority for determining the cost of interstate freight traffic, moving on class rates between two points of such division.—*Wood v. Vandavia R. Co.*, 34 S. Ct. 7, 231 U. S. 1, 58 L. Ed. 97.

The prohibition against charging a lesser rate for a longer than a shorter haul without consent of the Interstate Commerce Commission made by Act June 18, 1910, § 8, amending Act Feb. 4, 1887, § 4, prevents carriers not having consent from granting a rebilling privilege to shippers of grain and hay at Nashville whereby they receive on reshipment allowance on local rate to the southeastern point of destination.—*United States v. Louisville & N. R. Co.*, 35 S. Ct. 113, 235 U. S. 314, 59 L. Ed. 245.

Evidence that a carrier maintained comparatively low rates on distillery supplies for many years, and had then withdrawn them on the ground that they were inadequate, and introduced higher rates, authorized an order of the State Railway Commission re-establishing such special rates as the maximum interstate freight rates.—*Louisville & N. R. Co. v. Finn*, 35 S. Ct. 146, 235 U. S. 601, 59 L. Ed. 379, affirming order (D. C.) *Louisville & N. R. Co. v. Kentucky Railroad Commission*, 214 F. 465.

An order of a state railroad commission directing a railroad company to discontinue demanding prepayment of freight from a connecting carrier held valid.—*Wadley Southern Ry. Co. v. State of Georgia*, 35 S. Ct. 214, 235 U. S. 651, 59 L. Ed. 405, affirming judgment 73 S. E. 741, 137 Ga. 497.

The cost of transportation, to be considered in determining whether intrastate rates for carriage of a certain commodity are confiscatory, includes all outlays which pertain to such transportation.—*Northern Pac. Ry. Co. v. State of North Dakota ex rel. McCue*, 35 S. Ct. 429, 236 U. S. 585, 59 L. Ed. 735, Ann. Cas. 1916A, 1, reversing judgment *State v. Northern Pac. Ry. Co.*, 145 N. W. 135, 26 N. D. 438.

A state may not compel a carrier to establish a rate on a particular commodity less than reasonable to build up a local enterprise.—*Id.*

The maximum intrastate rates fixed by Laws N. D. 1907, c. 51, for transportation of coal in car load lots, held confiscatory and unconstitutional.—*Id.*

Rate of 2 cents a mile fixed for passenger traffic by Acts W. Va. 1907, c. 41 (Code 1913, c. 54, §§ 71f I, 71f II [secs. 3020, 3021]), held confiscatory and unconstitutional.—*Norfolk & W. Ry. Co. v. Conley*, 35 S. Ct. 437, 236 U. S. 605, 59 L. Ed. 745.

—13. Preferences and discriminations.
See 9 Cent. Dig. Carr. § 21-24.

A discriminating rate on shipments of coal cannot be justified on the ground of the cost of mining coal to the company in whose favor the rate is made, and any evidence as to the cost of mining is irrelevant.—*Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 13 S. Ct. 970, 37 L. Ed. 896; *Same v. Taggart*, 149 U. S. 698, 13 S. Ct. 977, 37 L. Ed. 905.

Charging a 10-cent fare without transfer privileges for a ride on an electric railway from a city terminus to a specified town and 5-cent fares with transfer privileges for a ride between such terminus and a town farther away on another division, held no less a violation of Laws Or. 1907, p. 67, prohibiting discriminations because the fare on the latter division is fixed at five cents by a contract with the railway company's predecessor.—*Portland Ry., Light & Power Co. v. Railroad Commission of Oregon*, 33 S. Ct. 820, 229 U. S. 397, 57 L. Ed. 1248, affirming judgment 105 F. 709, 56 Or. 468, 1d., 33 S. Ct. 827, 229 U. S. 414, 57 L. Ed. 1259.

—14. Exclusive privileges.

See 9 Cent. Dig. Carr. § 25.

A railway company which has made an arrangement with a transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of the passengers arriving there on its trains or on the trains of other railroad companies using the station may legally exclude from the station and depot grounds all other hackmen or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers.—*Donovan v. Pennsylvania Co.*, 26 S. Ct. 91, 199 U. S. 279, 50 L. Ed. 192, affirming decrees 120 F. 215, 57 C. C. A. 362, 61 L. R. A. 140, and *Donnovan v. Same*, 124 F. 1016, 60 C. C. A. 168.

—15. Connections with and facilities to other carriers.

See 9 Cent. Dig. Carr. § 25-27.

Const. Colo. art. 15, § 6, providing that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company * * * shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposes only the common-law obligations of a common carrier, and does not require a railroad company which has arranged with a connecting road to do a joint business to make a similar arrangement with another connecting road, or to establish a passenger or freight depot at a point where another road has made a junction therewith.—*Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 S. Ct. 185, 28 L. Ed. 291, reversing judgment *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 13 F. 546 and 15 F. 650.

Such provision is not violated by the refusal of a railroad company to give a connecting line the same arrangement as to through rates as it gives to another connecting line, unless the conditions are substantially alike in both cases.—*Id.*

At common law a carrier is not bound to carry except on its own line. If he contracts to go beyond, he may, in the absence of statu-

tory regulation to the contrary, determine for himself what agencies he will employ.—*Id.*

The obligations of a railroad company to the public as a common carrier do not require it to furnish an express company facilities for doing an express business upon its road, the same in all respects as it provides for itself or affords to any other express company.—*Memphis & L. R. Co. v. Southern Exp. Co.*, 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791, reversing 10 F. 210, 869; *St. Louis, I. M. & S. R. Co. v. Same*, 117 U. S. 601, 6 S. Ct. 1190, 29 L. Ed. 791.

The duty imposed on railway companies by Const. Ky. § 213, to receive, deliver, and transport freight from and to any point where there is a physical connection between the tracks of the railway concerned and any other, does not require a railway company maintaining a live stock depot as a point of delivery for cattle having a municipality as their general destination to receive live stock billed to a similar depot at substantially the same point on another railway, and to deliver the same to that railway at a point of physical connection between the two roads for ultimate delivery there. Decree 118 F. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed.—*Central Stockyards Co. v. Louisville & N. R. Co.*, 24 S. Ct. 339, 192 U. S. 568, 48 L. Ed. 565.

The power of the state to regulate railroads extends to securing to the public reasonable facilities for making connections between different carriers. Judgment, *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* (1904) 49 S. E. 191, 137 N. C. 1, affirmed.—*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 27 S. Ct. 585, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398.

Railroad companies cannot assert, as against the power of the state to compel interchange of traffic in the corporate limits of a city, that they were not incorporated for intracity transportation.—*Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 34 S. Ct. 152, 231 U. S. 457, 58 L. Ed. 310, affirming decree (D. C.) 198 F. 1009.

—16. Use of carrier's premises.

See 9 Cent. Dig. Carr. § 28-30; 36 Cent. Dig. Mun. Corp. § 1351.

A railway company which has made an arrangement with a transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of the passengers arriving there on its trains or on the trains of other railroad companies using the station may legally exclude from the station and depot grounds all other hackmen or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers.—*Donovan v. Pennsylvania Co.*, 26 S. Ct. 91, 199 U. S. 279, 50 L. Ed. 192, affirming decrees 120 F. 215, 57 C. C. A. 362, 61 L. R. A. 140, and *Donnovan v. Same*, 124 F. 1016, 60 C. C. A. 168.

Licensed hackmen or cabmen, when not forbidden by valid municipal regulations, may, within reasonable limits, use the public sidewalk in front of, adjacent to, or about the main entrance to a railway passenger station in prosecuting their calling, but are not entitled to congregate upon such sidewalk so as to interfere with the ingress and egress of passengers and employes.—*Id.*

The inadequacy of any remedy at law justifies injunctive relief against the constant, unlawful attempt of hackmen and cabmen to enter a railway passenger station and depot grounds to solicit patronage, and their use of the sidewalk in front of the station so as to interfere unduly with the ingress and egress of passengers.—*Id.*

18. Proceedings to enforce or to prevent enforcement of regulations.

See 9 Cent. Dig. Carr. §§ 13, 16-18, 20, 24; 27 Cent. Dig. Inj. § 141.

On demurrer to a bill to restrain enforcement by state railroad commissioners of a tariff of rates prescribed by them for carriage of goods by a railroad, averring that such tariff was unjust and unreasonable, it was admitted that the road cost far more than the amount of the company's stock and bonds outstanding, which represented money invested in its construction; that there had been no waste or mismanagement in the construction or operation; that supplies and labor had been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company had been for 10 years steadily decreasing, until the aggregate decrease had been more than 50 per cent.; that under the rates thus voluntarily established the stock, which represented two-fifths of the value, had never received anything in the way of dividends, and that for the last three years the earnings above operating expenses had been insufficient to pay the interest on the bonded debt; and that the proposed tariff, as enforced, would so diminish the earnings that they would not pay one-half the interest on the bonded debt above the operating expenses. *Held* that, in the absence of any satisfactory showing to the contrary, this justified a finding that the proposed tariff was unjust and unreasonable, and a decree restraining it being put in force.—*Reagan v. Farmers' Loan & Trust Co.*, 14 S. Ct. 1047, 154 U. S. 362, 38 L. Ed. 1014; *Same v. Mercantile Trust Co.*, 14 S. Ct. 1062, 154 U. S. 418, 38 L. Ed. 1030.

It was not an abuse of discretion to permit filing in a suit assailing state railway rate legislation of amended and supplemental bills attacking new rate legislation pending suit, though the earlier legislation was repealed, saving, however, the penalties and liabilities incurred, and though slightly higher rates were substituted in certain cases.—*Knott v. Chicago, B. & Q. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, modifying decree (C. C.) *St. Louis & S. F. R. Co. v. Hadley*, 168 F. 317.

Injunction against the enforcement, as applied to goods moving in interstate commerce, of a rate order of a state railroad commission applicable to intrastate transportation, can only be granted on a showing of actual conditions, and that the order is misapplied as to the particular transactions.—*Oregon R. & Nav. Co. v. Campbell*, 33 S. Ct. 1026, 230 U. S. 525, 57 L. Ed. 1804, affirming decrees (C. C.) 173 F. 957, 177 F. 318.

Allegations of a bill seeking to restrain state regulation of local rates of an interstate carrier are insufficient to show that they will deprive the carrier of just compensation in its intrastate transportation, where receipts and disbursements for the previous year are not given, and there are no averments as to the expenses incurred in the intrastate business as distinguished from the interstate business, or the share of the value of the carrier's property assignable to the former.—*Southern Pac. Co. v. Campbell*, 33 S. Ct. 1027, 230 U. S. 537, 57 L. Ed. 1610, affirming decree (C. C.) 182 F. 182.

The courts will not substitute their judgment for that of a state railroad commission on such questions as the conditions of traffic, the adjustment of rates, and the appropriate basis for classification, where the commission's action did not constitute an abuse of power.—*Id.*

The right of a carrier to contest the validity of state regulation of intrastate rates, if found confiscatory, is not impaired by its action in putting them into effect.—*Allen v. St. Louis, I. M. & S. Ry. Co.*, 33 S. Ct. 1030, 230 U. S. 553, 57 L. Ed. 1625, reversing decree (C. C.) *In re Arkansas Rate Cases*, 187 F. 290.

General allegations in bill attacking order of state railroad commission fixing freight rates, stating that the evidence in the judgment of the pleader did not "establish," are insufficient to justify enjoining enforcement of the rate-making order.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

Enforcement of order of Kentucky Railroad Commission fixing the maximum intrastate freight rates on distillers' materials and supplies will not be enjoined, if otherwise valid, because the maintenance by the complaining carrier of other rates to other distillery stations not yet passed upon by the commission may result in unjust discrimination within Ky. St. §§ 817, 819.—*Id.*

A rate-making order of the Kentucky Railroad Commission made under Act Ky. March 10, 1900 (Ky. St. § 820a), is not subject to revision by the federal courts on question of facts as to the reasonableness of the rates existing when the order was made as well as those fixed by the commission.—*Id.*

Confiscation entitling a carrier to injunction against order fixing maximum intrastate rates is not made by a bill alleging that certain specified losses in revenue will result without showing the return permitted under the rates prescribed.—*Id.*

Persons granted specified amounts by railroad commission under Ky. St. §§ 821, 829, in reparation for payments made to a carrier in excess of rates found reasonable, which could be enforced in the state courts, are necessary parties to a suit in the federal court to restrain enforcement of a reparation order.—*Id.*

The federal courts will not disturb, on the theory of interference with interstate commerce, an order of a state railroad commission suspending an interstate railway company's supplemental tariff to give the commission an opportunity to investigate where the affidavits are conflicting.—*Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 34 S. Ct. 152, 231 U. S. 457, 58 L. Ed. 310, affirming decree (D. C.) 198 F. 1009.

20. Penalties for violations of regulations.

See 9 Cent. Dig. Carr. §§ 32-49, 133, 327.

In an action by a shipper of coal to recover penal damages from a railroad company for unlawful discrimination in rates, the railroad company pleaded in defense a certain contract between itself and the coal company in whose favor discrimination was alleged, whereby, in consideration of the release by such company of a certain claim against defendant for damages, and its agreement to furnish coal to defendant for use in its locomotives at cost, or at a maximum price (which was alleged to have proved less than cost), defendant agreed to allow a rebate of 40 cents per ton in case the coal company's shipments of coal exceeded 200,000 tons annually. *Held* that, in the absence of any allegations that the shipments of coal exceeded 200,000 tons annually, this answer constituted no defense.—*Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 13 S. Ct. 970, 37 L. Ed. 896; *Same v. Taggart*, 149 U. S. 698, 13 S. Ct. 977, 37 L. Ed. 905.

In an action by a shipper to recover penal damages under a statute forbidding discrimination in freight rates, the railroad company cannot set up in justification of the lower rates a contract with the party in whose favor they were made, whereby in consideration of the lower rates, such party releases the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defense would practically emasculate the law.—*Id.*

Where the legislature establishes a passenger rate of so much per mile, and prescribes

penalties for a charge in excess thereof, to be recovered of the carrier by the passenger excessively charged, the question of the reasonableness of the rate so fixed by the legislature may be raised in an action for such penalty.—*St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 S. Ct. 484, 39 L. Ed. 567, affirming judgment 15 S. W. 18, 54 Ark. 101, 11 L. R. A. 452.

Constitutionality of statute authorizing penalty for violation of orders of state railroad commission determined.—*Wadley Southern Ry. Co. v. State of Georgia*, 35 S. Ct. 214, 235 U. S. 651, 59 L. Ed. 405, affirming judgment 73 S. E. 741, 137 Ga. 497.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

See Courts, ←97.

Amendment of bill to restrain transportation, see Pleading, ←248.

Attachment of cars of foreign carrier as interference with interstate commerce, see Commerce, ←81.

Consolidation of action to recover penalties, see Courts, ←352.

Delegation of legislative powers, see Constitutional Law, ←62.

Denial of due process of law, see Constitutional Law, ←258, 283, 297.

Determination of constitutionality of act, forbidding railroads to transport commodities mined or produced by them, see Constitutional Law, ←46.

Dismissal of appeal, in suit to restrain enforcement of order from interstate commerce commission, see Appeal and Error, ←781.

Garnishment of sums due foreign carrier on interstate shipments as interference with interstate commerce, see Commerce, ←81.

Imposition of liability on initial carrier with right of recovery over against connecting carrier as infringing liberty to contract, see Constitutional Law, ←89, 276; as regulation of commerce, see Commerce, ←33.

Interstate commerce regulations, see Commerce, ←8, 10, 32–34, 47, 57, 61, 62, 69, 72, 85, 88, 89, 98.

Joinder of corporation and its agents in indictment for giving rebates, see Indictment and Information, ←124.

Jurisdictional amount, in action to recover penalties, see Courts, ←328.

Jurisdiction of commerce court, see Commerce, ←92.

Jurisdiction of federal court of action to restrain advance in freight rates, see Courts, ←272.

Partial invalidity of statute, see Statutes, ←64.

Persons entitled to raise constitutional questions, see Constitutional Law, ←42.

Regulations avoiding contracts for annual passes as impairing obligation of contract, see Constitutional Law, ←155.

Regulation avoiding prior contract as abridging liberty to contract, see Constitutional Law, ←276.

Switch connections of railroads, see Railroads, ←51.

Venue of prosecution of offenses, see Criminal Law, ←113.

←23. Statutory provisions.

See 9 Cent. Dig. Carr. §§ 57–59; 10 Cent. Dig. Commerce, §§ 1–148.

The payment of a rebate after the passage of *Elkins Act*, Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 890), but upon shipments of property transported prior to that enactment, is comprehended by its provisions that it shall be unlawful to offer, grant, or give, or to solicit, accept, or receive any rebate in respect to property in interstate commerce transportation, whereby any such property shall be transported at less than the published

rates. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. R. Co.*, 146 F. 298; *Same v. Guilford, Id.*, affirmed.—*New York Cent. & H. R. R. Co. v. United States*, 29 S. Ct. 309, 212 U. S. 500, 53 L. Ed. 624.

The Carmack amendment to the Hepburn act (Act June 29, 1906), also known as the "Initial Carrier's Act," is constitutional.—(1911) *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 S. Ct. 164, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, affirming judgment (C. C. 1909) *Riverside Mills v. Atlantic Coast Line R. Co.*, 168 F. 990.

An agreement by an interstate carrier to issue annual passes for life in consideration of a release of a claim for damages, though entered into prior to Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), was made unenforceable by the prohibition of section 6 (page 1163) of that act, against demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in the carrier's published schedule of rates.—(1911) *Louisville & N. R. Co. v. Mottley*, 31 S. Ct. 285, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, reversing decree (1909) 118 S. W. 982, 133 Ky. 652.

←24. Subjects of regulations.

See 9 Cent. Dig. Carr. §§ 60–66; 10 Cent. Dig. Commerce, § 26.

A railroad company which "has become a link in a through line of road, over which, as part of its business, freight and passengers are carried into and out of" a state, is engaged in interstate commerce, within the meaning of Const. art. 1, § 8, giving congress the power to regulate commerce between the several states.—*Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394, reversing judgment 114 Pa. St. 256, 6 Atl. 45.

When a railroad company whose road lies wholly within a state receives goods brought from beyond the state, under through bills of lading, and participates in through rates and charges, according to a proportion previously agreed on, it thereby becomes part of a continuous line, "under a common control, management or arrangement for a continuous carriage or shipment," within the meaning of the interstate commerce law; and it is immaterial that it receives as its share the regular rate charged by it for local traffic.—*Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935.

Rev. St. Ohio 1890, § 3320, requiring all railroad companies operating lines within the state to cause three, each way, of its regular passenger trains, if so many are run daily, to stop at a city or village containing over 3,000 inhabitants to receive and discharge passengers, etc., is a valid exercise of the police power of the state, and applies to an interstate railroad incorporated by and operating through such state, the federal government not having taken any affirmative action on the subject, under its powers to regulate interstate commerce.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 19 S. Ct. 465, 173 U. S. 285, 43 L. Ed. 702.

Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and negro interstate passengers.—(1910) *Chiles v. Chesapeake & O. Ry. Co.*, 30 S. Ct. 667, 218 U. S. 71, 54 L. Ed. 936, 20 Ann. Cas. 980, affirming judgment (1907) 101 S. W. 386, 125 Ky. 299.

A railway company operating as lessee for division of profits a railroad system owned by a stockyard company for the transportation of cars to and from trunk lines is an interstate carrier within Interstate Commerce Act Feb.

4, 1887, and obliged to file its tariffs with the interstate commerce commission as required by section 6.—*United States v. Union Stock Yard & Transit Co. of Chicago*, 33 S. Ct. 83, 226 U. S. 288, 57 L. Ed. 226, modifying judgment (Com. C.) 192 F. 330.

A corporation maintaining a stockyard which operates a railroad system for cars to and from trunk lines in the course of their transportation from beyond the state is an interstate railway carrier within Interstate Commerce Act Feb. 4, 1887, and obliged to file its tariffs with the Interstate Commerce Commission under section 6 of the act.—*Id.*

A stockyard company operating a railway system for cars to and from trunk lines in their transportation from and beyond the state did not cease to be an interstate carrier within Interstate Commerce Act Feb. 4, 1887, and as such obliged to file its tariffs under section 6 of the act by leasing its railway to another corporation for a division of profits.—*Id.*

There is no merit in objection that Act Feb. 4, 1887, § 8, and section 16 as amended by Act June 29, 1906, § 5, for allowance of attorney's fee on plaintiff's success in action for damages sustained by a shipper, is invalid as imposing a penalty for failing to pay a debt.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

25. Carriage of particular articles.

See 10 Cent. Dig. Commerce, § 81.

The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association result from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." Judgments and decrees (C. C. 1908) *United States v. Delaware & H. Co.*, 164 F. 215, reversed.—*United States ex rel. Attorney General of the United States v. Delaware & H. Co.*, 29 S. Ct. 527, 213 U. S. 366, 53 L. Ed. 836.

The ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the "interest, direct or indirect," in such commodity, forbidden to the carrier by the Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), but such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer.—*Id.*

Transportation when the thing to be transported has been manufactured, mined, or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."—*Id.*

The exception in favor of timber and manufactured products thereof, contained in the

provisions of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), forbidding railway carriers from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.—*Id.*

The Delaware & Hudson Company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.—*Id.*

The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 1149), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect."—*United States v. Lehigh Valley R. Co.*, 31 S. Ct. 387, 220 U. S. 257, 55 L. Ed. 458.

Transportation by railroad in interstate commerce from market to mine of articles for use in its private business for mining held a violation of the commodity clause of the Hepburn Act June 29, 1906.—*Delaware, L. & W. R. Co. v. United States*, 34 S. Ct. 65, 231 U. S. 363, 58 L. Ed. 269.

Hay purchased by railroad for use of animals in its coal mines held not necessary for the use of the company in its business as a common carrier within commodity clause of Hepburn Act June 29, 1906, where the company sells 75 per cent. of the coal produced, using only 25 per cent. for its locomotives.—*Id.*

Oil companies controlling interstate pipe lines carrying oil offered between oil fields east of California and the Atlantic seaboard on condition that the offeror shall first sell the oil to them on their own terms, are embraced within Act June 29, 1906, extending the operation of the interstate commerce act to pipe lines, which shall be considered to be common carriers within the act.—*United States v. Ohio Oil Co.*, 34 S. Ct. 956, 234 U. S. 548, 58 L. Ed. 1459, modifying decree (Com. Ct.) *Prairie Oil & Gas Co. v. United States*, 204 F. 798.

An oil company using a pipe line solely to conduct its own oil from its own wells in one state to its own refinery in another state is not within Act June 29, 1906, extending operation of interstate commerce act to pipe lines, who shall be considered common carriers within the act.—*Id.*

Mere ownership of railway shareholders of the stock of coal company is not a test by which to determine legality of interstate transportation of the coal by the railway company under Act June 29, 1906, making it unlawful for railroad to transport articles which it owned or in which it has any interest.—*United States v. Delaware, L. & W. R. Co.*, 35 S. Ct. 873, 238 U. S. 516, 59 L. Ed. 1438, reversing decree (D. C.) 213 F. 240.

A contract, between railway company owning coal mines and a coal company with practically identical stock ownership and manage-

ment, by which the railroad sold the coal at the mines to the coal company, regaining possession as carrier, violates the commodity clause of Act June 29, 1906, and Sherman Anti-Trust Act July 2, 1890.—Id.

—26. Charges in general.

See 9 Cent. Dig. Carr. §§ 67-82.

Carriers who had long delivered live stock to the Union Stock Yards in Chicago without making any distinct terminal charge did not, by giving notice to the public that after June 1, 1894, a terminal charge of \$2 per car would be made for delivery at the stock yards, in addition to the entire previous through rate to Chicago, and by filing a memorandum to that effect with their rate sheets with the interstate commerce commission, separate in their schedules the entire terminal charge from the through rate, as required by the sixth section of the act to regulate commerce, but simply added this additional charge to the sum of the terminal charge embraced in the prior through rate. Decree 103 F. 249, 43 C. C. A. 209, affirmed.—Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 22 S. Ct. 824, 186 U. S. 320, 46 L. Ed. 1182.

Railroad companies may make a distinct charge for carriage from the point of shipment of live stock to Chicago, and a separate terminal charge for delivery to the Union Stock Yards, a point beyond the lines of the respective carriers,—especially in view of the sixth section of the act to regulate commerce, providing that schedules of rates to be filed by carriers shall "state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of said aforesaid rates and fares and charges."—Id.

The imposition by railroad companies, in addition to the terminal charge embraced in the through rates to Chicago, of a terminal charge of \$2 per car for delivering live stock to the Union Stock Yards in Chicago, although not justified by an additional average charge of \$1 per car for trackage by the Union Stock Yards Company, cannot be said to be unjust and unreasonable, where the through rates to Chicago have since been reduced \$10 or \$15 per car, both the terminal charges and the through rates as reduced being in themselves just and reasonable when separately considered as distinct charges.—Id.

A common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the Interstate Commerce Commission and posted in the stations of such carrier, as required by the interstate commerce act, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted. Judgment 83 S. W. 800, 98 Tex. 352, 107 Am. St. Rep. 633, reversed.—Texas & P. Ry. Co. v. Mugg & Dryden, 26 S. Ct. 628, 202 U. S. 242, 50 L. Ed. 1011.

An order of the Interstate Commerce Commission, based on a finding that the action of certain railroad companies in changing their classification by advancing hay and straw in car loads from the sixth to the fifth class was unlawful, commanding them to cease and desist "from classifying hay and straw in car loads as fifth-class freight, and from charging and exacting fifth-class rates for the transportation of such commodities in car load quantities," and requiring them "to wholly cease and desist * * * from failing and neglecting to properly classify hay and straw in car loads as sixth-class freight, * * * and from failing and neglecting to apply sixth-class rates for the transportation of hay and straw when shipped in car loads," is invalid as an attempt to fix rates and beyond the power of the commission.

Decree (C. C.) Interstate Commerce Commission v. Lake Shore & M. S. Ry. Co., 134 F. 942, affirmed.—Interstate Commerce Commission v. Lake Shore & M. C. Ry. Co., 26 S. Ct. 766, 202 U. S. 613, 50 L. Ed. 1171.

Expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate.—Illinois Cent. R. Co. v. Interstate Commerce Commission, 27 S. Ct. 700, 206 U. S. 441, 51 L. Ed. 1128.

No presumption of law that a freight rate upon a particular commodity is reasonably low exists because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission.—Id.

Railway companies may contract with shippers for a single transportation or for successive transportations, subject to a change of rates in the manner provided in the interstate commerce act. Decree (C. C. 1905) 141 F. 1003, affirmed.—Interstate Commerce Commission v. Chicago Great Western Ry. Co., 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

Railway companies, in fixing their rates, may take into account competition with other carriers, provided that such competition is genuine.—Id.

The personal preferences of many travelers for a southern route between eastern points and points on the Northern Pacific Railway between Portland and Seattle do not make the through route via the Northern Pacific Railway unreasonable or unsatisfactory, so as to justify the Interstate Commerce Commission in the exercise of its power under Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), to establish through routes and joint rates where "no reasonable or satisfactory through route exists," in ordering the establishment of through rates and joint rates between those points via the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Pacific Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle.—Interstate Commerce Commission v. Northern Pac. Ry. Co., 30 S. Ct. 417, 216 U. S. 538, 54 L. Ed. 608.

Shipments over connecting lines must, under Interstate Commerce Act Feb. 4, 1887, take the lawfully established rate on each line where there is no established joint rate.—(1912) Kansas City Southern R. Co. v. C. H. Albers Commission Co., 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment (1908) 99 P. 819, 79 Kan. 59.

An order of the Interstate Commerce Commission fixing a charge of \$7.50 per car for services rendered in shipments of citrus fruits from California to the East, which, being pre-cooled, required no re-icing, will not be disturbed on the ground that the carriers were required to haul the ice without reasonable compensation, where the revenue from the car is greater than that derived from a car of standard refrigeration, without corresponding increase in cost.—Atchison, T. & S. F. R. Co. v. United States, 34 S. Ct. 291, 232 U. S. 190, 58 L. Ed. 568, affirming decree (Com. C.) 204 F. 647.

Tap line railroads connecting timber lands and lumber mills with trunk line railroads, though owned by the owners of the timber and mills, are entitled to participate with the trunk lines in joint through rates where organized as common carriers under the state laws.—United States v. Louisiana & P. R. Co., 34 S. Ct. 741, 234 U. S. 1, 58 L. Ed. 1185, affirming judgment (Com. C.) Louisiana & P. Ry. Co. v. United States, 209 F. 244.

A tap line railroad is entitled to the same allowance from the trunk lines out of joint

through rates for logs and lumber offered to the tap line by its proprietary company as it receives out of the joint rate for non-proprietary log and lumber traffic under exceptions in Hepburn Act June 29, 1906, forbidding carriers to transport in interstate commerce articles in which they are associated or interested.—*United States v. Butler County R. Co.*, 34 S. Ct. 748, 234 U. S. 29, 58 L. Ed. 1196, affirming judgment (Com. C.) *Butler County R. Co. v. United States*, 209 F. 260.

Delivery and receipt on industrial spur tracks within switching limits of car load freight in interstate commerce is not an added service, for which the carrier can make an additional charge to the line-haul rate to or from such city, where that rate embraces a receiving and delivery service at team tracks or at freight sheds within such limits, for which the spur-track service is a substitute.—*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 814, 234 U. S. 294, 58 L. Ed. 1319, reversing orders (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission*, 188 F. 229, 929; *Same v. Southern Pac. Co.*, 34 S. Ct. 820, 234 U. S. 315, 58 L. Ed. 1329, reversing order (Com. Ct.) *Southern Pac. Co. v. Interstate Commerce Commission*, 188 F. 241.

Order of Interstate Commerce Commission reducing freight rate on coal from mines to a specified city *held* supported by findings that it is higher than coal rates between other points on the same route and yields a higher return than coal rates of other railroads and than the average earnings of such roads.—*Louisville & N. R. Co. v. United States*, 35 S. Ct. 696, 238 U. S. 1, 59 L. Ed. 1177, affirming judgment (D. C.) 216 F. 672.

27. Special rates.

See 9 Cent. Dig. Carr. §§ 73, 74, 94.

"Unjust discrimination" and "undue or unreasonable preference or advantage" are made unlawful by sections 2 and 3, and the declaration in section 22 that the act shall not prevent the giving of reduced rates for the purposes and to the classes of persons therein named does not exclude the idea that reduced rates for other purposes or to other classes may not be reasonable and just, and therefore lawful.—*Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699, affirming decree (C. C.) 43 F. 37.

There is no merit in the suggestion that "party rate" tickets may be used by ticket brokers as a means of evading the law, since, being for 10 or more persons, they would hardly be available for that purpose, and, if issued for so small a number of persons as to become available, the courts would have authority to apply the proper remedy.—*Id.*

The issuance of "party rate" tickets, each good for a party of ten or more persons, at the rate of two cents per mile, while single passengers are charged three cents, is neither an unjust discrimination nor an undue or unreasonable preference or advantage, within the meaning of the interstate commerce act (24 Stat. 379, §§ 2, 3), when such tickets are offered to the public generally.—*Id.*

28. Charges for long and short hauls.

See 9 Cent. Dig. Carr. §§ 75-79.

The interstate commerce act was not designed to prevent competition between different carriers, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling on the same road.—*Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699, affirming decree (C. C.) 43 F. 37.

A joint tariff rate established by two connecting railroads on through shipments does not constitute a standard by which the reasonableness of local rates on either road are to be determined, nor does the fact that the part of such joint rate received by one of the roads is less than its local rate charged for a shorter distance render it subject to the penalty for violation of the long and short haul clause of section 4 of the interstate commerce act.—*Parsons v. Chicago & N. W. Ry. Co.*, 17 S. Ct. 887, 167 U. S. 447, 42 L. Ed. 231, affirming judgment 63 F. 903, 11 C. C. A. 489.

A petition alleging that a rate of tariff between two points on a railroad, established by the company as a part of what purported to be a joint rate on through shipments to certain points on connecting lines, was less than the local rate charged for a shorter distance, does not show an unlawful discrimination, where the entire through rate is not shown, and it is not sufficiently alleged that any shipments were made at the lower rate except such as were billed through under the joint rate.—*Id.*

The fourth section of the interstate commerce law, prohibiting a greater charge for a shorter than for a longer haul over the same line in the same direction, in respect to railroad transportation, applies only to carriage by rail; and when the property has been discharged from the company's cars at the city of their destination, without any greater charge for the longer haul, the obligations of the company under this section are fulfilled, and it is no violation thereof for the company to then furnish free cartage to the stores or business houses of the consignees.—*Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 17 S. Ct. 986, 167 U. S. 633, 42 L. Ed. 306, affirming decree *Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission*, 74 F. 803, 21 C. C. A. 103.

A substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for a shorter than for a longer haul, without first obtaining an order from the commission allowing them to do so. Whether or not the conditions of the carriage are substantially similar is a question of fact, which the railroads may determine for themselves, subject to revision by the commission, when its powers are invoked, and afterwards by the courts.—*Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414, affirming decree 74 F. 715, 21 C. C. A. 51.

In determining what is an undue or unreasonable preference or advantage, under the third section of the interstate commerce act, and what are substantially dissimilar circumstances and conditions, such as will justify a greater charge for a shorter than for a longer haul, under the fourth section, the fact of competition between carriers which affects rates is to be taken into consideration. And this applies to competition between rival carriers, both subject to the interstate commerce law. But the mere fact of competition, without regard to its character or extent, does not necessarily relieve the carrier from the provisions of these sections.—*Id.*

The interest of the public, especially at the place from which traffic moves and the place to which it is to be delivered, as well as that of the carrier, must be taken into consideration in determining the right of the carrier to charge, of his own motion, a lesser sum for the longer haul. Decree *Behlmer v. Louisville & N. R. Co.*, 83 F. 898, 28 C. C. A. 229, reversed.—*Louisville & N. R. Co. v. Behlmer*, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

The right of a carrier to take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions is subject to the requirement that all rates shall be just and reasonable and without

undue discrimination, and that competition shall not be artificial or merely conjectural, but material and substantial.—Id.

Competition which is material, arising from carriers who are subject to the act to regulate commerce, can be taken into consideration for the purpose of determining the existence of a dissimilarity of circumstance and condition, within the meaning of section 4 of the act, although that competition does not originate at the initial point of the traffic.—Id.

Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the act to regulate commerce, may produce the dissimilarity of circumstances and conditions provided in section 4 of the act; so as to enable a carrier, in adjusting rates, to take into view such competition without the previous assent of the interstate commerce commission.—*Interstate Commerce Commission v. Clyde S. S. Co.*, 21 S. Ct. 512, 181 U. S. 29, 45 L. Ed. 729, modifying decree 93 F. 83, 35 C. C. A. 217; *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 21 S. Ct. 516, 181 U. S. 1, 45 L. Ed. 719, reversing decree 99 F. 52, 39 C. C. A. 413.

The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition of the interstate commerce act [U. S. Comp. St. 1901, p. 3154] against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. Decree, *Louisville & N. R. Co. v. Interstate Commerce Commission*, 108 F. 988, 46 C. C. A. 685, affirmed.—*Interstate Commerce Commission v. Louisville & N. R. Co.*, 23 S. Ct. 687, 190 U. S. 273, 47 L. Ed. 1047.

Freight rates from New Orleans, La., to La Grange, Ga., arrived at by charging the through rate to Atlanta, Ga., fixed as the result of competition at that point, and adding thereto the local rate back over the same line from Atlanta to La Grange, are not obnoxious to the prohibition of the interstate commerce act [U. S. Comp. St. 1901, p. 3154] against undue discrimination and a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions, because stations between La Grange and Atlanta to which the same rule is applied receive lower rates from New Orleans than La Grange, where the La Grange rates, if based on the nearest competitive point south, with the local rate from such point added, would be still higher.—Id.

The full local rate cannot be charged for transportation of property and troops of the United States over the nonfree-haul portion of a through shipment over a continuous line of railway, part of which, under Act July 25, 1866, § 5, is free-haul and the remaining part nonfree-haul under Act July 1, 1862.—*Southern Pac. Co. v. United States*, 35 S. Ct. 573, 237 U. S. 202, 59 L. Ed. 916, affirming judgment 48 Ct. Cl. 227.

☞29. Pooling or dividing freights or earnings.

See 9 Cent. Dig. Carr. § 80.

The pooling of freights of competing railroads, forbidden by Act Feb. 4, 1887, c. 104, § 5, 24 Stat. 379 [U. S. Comp. St. 1901, pp. 3154-3165], is not accomplished by the adoption by common carriers, as part of an agreement for a through rate from California to the East for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, even though the initial

carrier promises fair treatment to the connecting lines, and carries out such promise, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments en route are usually allowed. Decree (C. C.) *Interstate Commerce Commission v. Southern Pac. Co.*, 132 F. 829, reversed.—*Southern Pac. Co. v. Interstate Commerce Commission*, 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

☞30. Schedules of rates.

See 9 Cent. Dig. Carr. § 81.

A railroad company, which for many years prior to the passage of the interstate commerce law furnished free cartage between its depot and the business houses of shippers or consignees, will not be held guilty of violating section 6 of the act by its failure to publish the fact of free cartage in its schedules of rates, in the absence of any general order by the interstate commerce commission requiring such publication.—*Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 17 S. Ct. 986, 167 U. S. 633, 42 L. Ed. 306, affirming decree *Detroit G. H. & M. Ry. Co. v. Interstate Commerce Commission*, 74 F. 803, 21 C. C. A. 103.

Nothing in the provisions of Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 379 [U. S. Comp. St. 1901, pp. 3154-3165], requiring joint traffic rates, when agreed upon, to be filed with the Interstate Commerce Commission, and made public when required, and empowering the Commission to prescribe forms of schedules of such rates, forbids the adoption by common carriers, as part of an agreement for a through rate from California to the East for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guarantying the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments en route are usually allowed. Decree (C. C.) *Interstate Commerce Commission v. Southern Pac. Co.*, 132 F. 829, reversed.—*Southern Pac. Co. v. Interstate Commerce Commission*, 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

Interstate freight rates are established when a schedule thereof is filed by a carrier with the Interstate Commerce Commission and copies are furnished by the railway company to its freight offices, although such rates may not be "posted," as required by section 6 of the act to regulate commerce, as amended March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3158], which is not made a condition precedent to the establishment and putting in force of the tariff of rates, but is a provision based upon the existence of an established rate, which has for its object the affording of special facilities to the public for ascertaining the rates actually in force.—*Texas & P. Ry. Co. v. Cisco Oil Mill*, 27 S. Ct. 358, 204 U. S. 449, 51 L. Ed. 562.

Carriers separately state the terminal charges for delivering live stock beyond their own lines to the Union Stockyards in Chicago, as required by Act June 29, 1906, c. 3591, § 2 (U. S. Comp. St. Supp. 1907, p. 896), where their tariff schedules inform shippers that the live stock rates to Chicago apply only to deliveries at the carriers' own yards and that, for transportation to the Union Stockyards, a stated additional charge will be made, the amount of such charge being entered, not upon the general freight charges of the companies, but as a separate item. Order, *Stickney v. Interstate Commerce Commission* (C. C. 1908) 164 F. 638, affirmed.—In-

terstate Commerce Commission v. Stickney, 30 S. Ct. 66, 215 U. S. 98, 54 L. Ed. 112.

Interstate freight rates held established when schedules are printed and filed, though the rates may not be posted in public places as required by Interstate Commerce Act Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1.—(1912) Kansas City Southern R. Co. v. C. H. Albers Commission Co., 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment (1908) 99 P. 819, 79 Kan. 59.

Sanction of other roads to schedules of freight rates held not essential to establishment of such rates in a proceeding involving shipments over such railroad and connecting line.—Id.

Schedules of freight rates of a designated railroad "in connection with" other specified roads may be made applicable to a shipment over different railroad from a city which is not a common point.—Id.

Compliance with Interstate Commerce Act Feb. 4, 1887, § 6, amended by Act June 29, 1906, § 2, as to posting copies of schedules and tariffs, held not essential to bring a tariff within such act and making it a misdemeanor for a shipper to accept rebates.—(1912) United States v. Miller, 32 S. Ct. 323, 223 U. S. 599, 56 L. Ed. 568, reversing judgment (C. C. 1911) 187 F. 375.

Erroneous quotation by agent of an interstate carrier of a lower freight rate than that fixed by the published tariff gives no right of action to a shipper who sustains injury by acting on the faith of the quoted rate, though such tariff was not posted in the carrier's local station.—Illinois Cent. R. Co. v. Henderson Elevator Co., 33 S. Ct. 176, 226 U. S. 441, 57 L. Ed. 290, reversing judgment 127 S. W. 779, 138 Ky. 220.

A limitation as to baggage liability of an interstate carrier based on the requirement to declare its value when more than \$100 and pay an excess charge is a regulation determinative of the rate to be charged within the meaning of Act Feb. 4, 1887, § 6, as amended by Act June 29, 1906, § 2, requiring regulations of that character to be filed and posted as part of the tariff schedules.—Boston & M. R. R. v. Hooker, 34 S. Ct. 528, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, reversing judgment Hooker v. Boston & M. R. R., 95 N. E. 945, 209 Mass. 598, Ann. Cas. 1912B, 669.

A carrier's demurrage tariff held sufficiently published and filed where a carrier filed with the Interstate Commerce Commission a book of rules relating to liability for demurrage of a car service association of which it was a member.—Berwind-White Coal Mining Co. v. Chicago & E. R. Co., 35 S. Ct. 131, 235 U. S. 371, 59 L. Ed. 275, affirming judgment Chicago & E. R. Co. v. Berwind-White Coal Mining Co., 171 Ill. App. 302.

Posting for public inspection is not essential to make effective the carrier's tariffs filed with the Interstate Commerce Commission.—Id.

A through freight rate filed by an initial carrier with the Interstate Commerce Commission became on its effective date the lawful through joint rate, where the connecting carrier received the tariff and filed it without notice to the initial carrier of its acceptance, not then required by the Interstate Commerce Commission.—Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. Ry. Co., 36 S. Ct. 137, 239 U. S. 446, 60 L. Ed. 375, affirming judgment (Tenn.) 183 S. W. 739.

§31. Change of rates.

See 9 Cent. Dig. Carr. § 82.

There is no presumption of wrong arising from a change of rates by a carrier. Decree (C. C. 1905) 141 F. 1003, affirmed.—Interstate

Commerce Commission v. Chicago Great Western Ry. Co., 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

§32. Preferences and discriminations.

See 9 Cent. Dig. Carr. §§ 83-85.

Where a railroad company, in order to obtain shipments from one so located as to require no cartage when he ships by another road, makes him a rebate to cover the cost of cartage, but makes no such rebate to other shippers who require cartage by whichever road they may ship, it is guilty of unjust discrimination, under section 2 of the interstate commerce act.—Wight v. United States, 17 S. Ct. 822, 167 U. S. 512, 42 L. Ed. 258.

The requirement of section 2 of the interstate commerce act, that, in order to constitute the offense of unjust discrimination, the transportation must be "under substantially similar circumstances and conditions," refers to the matter of carriage, and does not include competition, though it may be that the same phrase found in section 4 of the act has a broader meaning.—Id.

Competition between carriers is not a circumstance to be considered in applying the provisions of the second section, which seeks to prevent discrimination between shippers over the same line of road, and thus leaves no room for the operation of competition.—Interstate Commerce Commission v. Alabama Midland Ry. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414, affirming decree 74 F. 715, 21 C. C. A. 51.

The discrimination in favor of competitive points on account of competition which compels a reduction of rates to those points below the rate charged for shorter distances is not an undue or unjust discrimination prohibited by section 3 of the act to regulate commerce. Decree 99 F. 52, 39 C. C. A. 413, reversed.—East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 21 S. Ct. 516, 181 U. S. 1, 45 L. Ed. 719.

The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that act, this construction, which has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute. Decree (C. C.) Interstate Commerce Commission v. Chesapeake & O. R. Co., 128 F. 59, modified.—New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 26 S. Ct. 272, 200 U. S. 361, 50 L. Ed. 515.

Deliveries of coal by an interstate carrier not empowered to mine and market coal by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination, whenever, for any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made.—Id.

An interstate carrier, not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal, violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed

price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.—Id.

A discrimination forbidden by Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 379 [U. S. Comp. St. 1901, pp. 3154-3165], is not made by the adoption by common carriers, as part of an agreement for a through rate from California to the East for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments en route are usually allowed. Decree (C. C.) Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829, reversed.—Southern Pac. Co. v. Interstate Commerce Commission, 28 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

The disturbance in the relations between freight rates for soap in car load and less than car load lots created by advancing the former from class 6 to class 5, and the latter from class 4 to class 3 in a new classification adopted to govern in official classification territory, was not cured by classifying soap in less than car-load lots at 20 per cent. less than third class, but not less than fourth class, where the result of applying this modified percentage classification to the varying rates is to leave soap in less than car load lots in the fourth class in portions of the territory, and in a higher class in other portions. Decree, Interstate Commerce Commission v. Cincinnati, H. & D. Ry. Co. (C. C. 1905) 146 F. 559, affirmed.—Cincinnati, H. & D. Ry. Co. v. Interstate Commerce Commission, 27 S. Ct. 648, 206 U. S. 142, 51 L. Ed. 995.

Unlawful preferences and discriminations are created by fixing the freight rate for common soap in less than car-load lots in a new classification adopted to govern in official classification territory at 20 per cent. less than third class, but not less than fourth class, at which that commodity had previously been rated, where the result of applying this classification to the varying rates is to leave soap in less than car-load lots in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision.—Id.

A connecting carrier which takes the cars as they are delivered to it by the initial carrier is not liable for a discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels, which may be practiced by the initial carrier, merely because such connecting carrier has participated in the adoption of a joint through rate for barrel shipments, which is, in itself, reasonable, although, by Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 379, a carrier which "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful," shall be liable to the full amount of the damages sustained by one injured thereby. Judgment, Western New York & P. R. Co. v. Penn Refining Co. (1905) 137 F. 343, 70 C. C. A. 23, affirmed.—Penn Refining Co. v. Western New York & P. R. Co., 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

Carriers cannot be charged with discriminating against shippers of oil in barrels from the Pennsylvania oil fields to Perth Amboy, New Jersey, because they charge for the barrel package without making a corresponding charge upon shipments in tank cars owned by those shippers who can afford to build and furnish them, the carriers having none of their own, where the transportation by tank cars is more remunerative to the carriers than the trans-

portation by barrels, and the barrel shippers have made no demand for tank cars, and cannot use them economically for shipments to Perth Amboy on account of the lack of facilities for unloading at that point.—Id.

The cost of carriage, the risk of injury, and the larger amount which the railway companies are called upon to pay out in damages for losses may excuse a higher freight rate on live stock than on dressed meats and packing house products. Decree (C. C. 1905) 141 F. 1003, affirmed.—Interstate Commerce Commission v. Chicago Great Western Ry. Co., 28 S. Ct. 493, 209 U. S. 108, 52 L. Ed. 705.

A reduction of freight rates for dressed meats and packing house products from Missouri river points and other points similarly situated to Chicago, which makes such rates lower than those charged for live stock, does not work an undue and unreasonable preference, where the higher rate on live stock has not materially affected any of the markets, prices, or shipments, being reasonably fair to Chicago and the shippers, and the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the change of rates, and where the lower rate given to the packers was the result of competition, and does not directly influence or injure shippers of live stock.—Id.

A genuine competition which results in a reduction of freight rates negatives any unlawful intent on the part of the carrier, and leaves open only the question as to whether the rates, as established, work an undue preference or discrimination.—Id.

Express companies are prohibited from giving free transportation of personal packages to their officers and employes and members of their families, and to the officers of other transportation companies, and members of their families, in exchange for passes issued by the latter to the officers of the express companies, by Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], as amended by the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584, 587 [U. S. Comp. St. Supp. 1907, pp. 892, 898]), which forbids all transportation of property at less than the published rates. Decree (C. C. 1908) United States v. Wells-Fargo Express Co., 161 F. 606, affirmed.—American Express Co. v. United States, 29 S. Ct. 315, 212 U. S. 522, 53 L. Ed. 635.

The proviso to the Hepburn Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892], following language appertaining solely to the carriage of passengers, that its provisions shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers and their families, or to prohibit any carrier from carrying passengers free in certain cases, does not embrace free transportation by express companies, although, by the terms of that act, express companies are deemed common carriers.—Id.

The use of the word "discrimination" in section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), as amended by Hepburn Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 [U. S. Comp. St. Supp. 1907, p. 897], without the qualifying words "unjust," etc., used in the original Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380 [U. S. Comp. St. 1901, p. 3155], was not intended to broaden the provisions of the earlier act in that respect; the word "discrimination" itself, as so applied, implying an unjust or unfair distinction.—Id.

The provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380 [U. S. Comp. St. 1901, p. 3155], prohibiting unjust discriminations and undue and unreasonable preferences, have reference to the service ren-

dered, and not to the person of the sender or consignee.—Id.

The issuing of franks by an express company to officers, agents, attorneys, or employees of itself or other express companies or railroad companies, or to the families of such persons, upon which property is transported from one state to another free of charge, relates to interstate commerce, which it is within the constitutional power of Congress to regulate, and is within the prohibitions of the interstate commerce act and its amendments against discrimination, undue preference, and departure from the published schedule of rates, and is unlawful. Such gratuitous carriage is not within the exceptions made in Interstate Commerce Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3170), which by their terms are restricted to certain classes of passengers carried by railroads and property carried for certain classes of shippers and for stated purposes.—Id.

Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of \$1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, constituted the giving of a rebate, in violation of section 1 of Elkins Act February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880].—(1909) *Chicago & A. R. Co. v. United States*, 29 S. Ct. 689, 212 U. S. 563, 53 L. Ed. 653, affirming judgment (1907) 156 F. 558, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551, which affirmed (D. C. 1906) *United States v. Chicago & A. R. Co.*, 148 F. 646.

A reduction in that part of the through rates on Atlantic seaboard shipments to Missouri river cities which applies to the haul between the Mississippi and Missouri rivers is not beyond the power of the Interstate Commerce Commission, as introducing a new system of rate making by artificially apportioning the country into zones tributary to given trade centers, in order to build up or protect certain distributing centers at the expense of others where the commission, by its order, intended only to correct through rates which it found upon complaint were unreasonable in themselves, by substituting therefor reasonable rates.—(1910) *Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 651, 218 U. S. 88, 54 L. Ed. 946; *Same v. Chicago, B. & Q. R. Co.*, 30 S. Ct. 660, 218 U. S. 113, 54 L. Ed. 959. Reversing decrees *Chicago, R. I. & P. Ry. Co. v. Interstate Commerce Commission* (C. C. 1909) 171 F. 680.

A lease to a shipper of one of the piers and improvements thereon belonging to a terminal company, which relieves him from the payment of all wharfage and storage charges other than as the same may be included in the yearly rental, and has enabled him to acquire practically a monopoly of the export of cottonseed products, constitutes an unlawful or undue preference under the act to regulate commerce, where other shippers are not and cannot be afforded the same facilities on the same conditions.—*Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 31 S. Ct. 279, 219 U. S. 498, 55 L. Ed. 310.

A carrier may not, under the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) make the ownership of goods tendered to it for carriage the criterion by which its charge for such carriage is to be measured.—(1911) *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*,

31 S. Ct. 392, 220 U. S. 235, 55 L. Ed. 448, reversing decree *Delaware, L. & W. R. Co. v. Interstate Commerce Commission* (C. C. 1908) 166 F. 499.

The ownership or nonownership by the shipper of the goods tendered for carriage is not a dissimilar circumstance and condition, within the meaning of Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), prohibiting inequality and discrimination in rates.—Id.

A forwarding agent is a person within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), forbidding preferences and discrimination in rates.—Id.

A carrier may not forbid the aggregation of the shipments of various owners for the purpose of car load rating in official classification territory, or the combination of such shipments by forwarding agents for that purpose, where preferences and discriminations forbidden by Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), will result from the carrier's action.—Id.

The Interstate Commerce Commission cannot make the allowance by a carrier to the owner of an elevator of the cost of the elevation in transit of grain in which he has an interest, conditional upon his failure to use the opportunity afforded during the process of elevation to treat, weigh, inspect, or mix the grain, since such allowance cannot be deemed an undue preference or discrimination forbidden by the act to regulate commerce, in view of the provisions of Amending Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier.—(1911) *Interstate Commerce Commission v. Dittenbaugh*, 32 S. Ct. 22, 222 U. S. 42, 56 L. Ed. 83, modifying decree (C. C. 1910) *F. H. Peavey & Co. v. Union Pac. R. Co.*, 176 F. 409.

A carrier cannot refuse the allowance for elevator service on through grain in car loads at terminal points to elevator owners who, through ownership of the grain, derive an incidental advantage by using the opportunity afforded during the process of elevation to weigh, store, inspect, clean, mix, or otherwise treat the grain, in view of the provisions of Act June 29, 1906, c. 3591, 34 Stat. 584, 590 (U. S. Comp. St. Supp. 1909, p. 1149), recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier.—(1911) *Union Pac. R. Co. v. Updike Grain Co.*, 32 S. Ct. 39, 222 U. S. 215, 56 L. Ed. 171, affirming judgment (1910) 178 F. 223, 101 C. C. A. 583.

A carrier cannot enforce a rule making its allowance for elevator service on through grain in car loads at terminal points conditional upon the return of the empty car to the carrier within 48 hours after delivery to the elevator, so as to defeat the right to compensation for elevator service rendered at elevators located on the lines of other railroads, where the return of the cars to the carrier was made impossible by the rules of a railway association of which the carrier was a member, and over which the elevator owners had no control, no such impossibility existing if the elevator was one of those located along the carrier's tracks.—Id.

A carrier may make its allowance for elevator service on through grain in car loads at terminal points at elevators located on the lines of other carriers, as well as those located along its own tracks, conditional upon the return of the empty car to the carrier within 48 hours after delivery to the elevator, where such car can be unloaded and returned in a much shorter time.—Id.

An undue and unreasonable preference forbidden by Act Feb. 4, 1887, §§ 3, 6, and Act Feb. 19, 1903, is accorded a shipper by an agreement to expedite a shipment of horses so as to reach a connecting carrier in time to be carried by a special fast train; the shipper being charged the regular rates, which make no provision for such special service.—(1912) *Chicago & A. R. Co. v. Kirby*, 32 S. Ct. 648, 225 U. S. 155, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, reversing judgment *Kirby v. Chicago & A. R. Co.* (1909) 90 N. E. 252, 242 Ill. 418.

Differences as to competition between coal intended for railway consumption and other coal, depending on difference in facilities possessed by the different parties, do not make interstate commerce therein dissimilar within Interstate Commerce Act Feb. 4, 1887, § 2, so as to justify the giving of a lower rate for transportation of railway coal.—*Interstate Commerce Commission v. Baltimore & O. R. Co.*, 32 S. Ct. 742, 225 U. S. 326, 56 L. Ed. 1107, Ann. Cas. 1914A, 504.

An undue advantage and unlawful discrimination forbidden by Interstate Commerce Act Feb. 4, 1887, § 2, and Act June 29, 1906, § 2, *held* accorded by a contract between a packing house firm and a stockyard company, by which the company paid a bonus to the packers if they would erect their new plant adjacent to the stockyard instead of in another city as proposed, and operate the plant, and buy only such stock as moved through such stockyards, and pay regular charges on live stock not so bought as if the same had moved to the stockyards.—*United States v. Union Stock Yard & Transit Co. of Chicago*, 33 S. Ct. 83, 226 U. S. 286, 57 L. Ed. 226, modifying judgment (Com. Ct.) 192 F. 330.

An arrangement between a railway company and a construction company for reduced-rate transportation of men and materials required by the company in grading an extension, when entered into in good faith, is not obnoxious to the provisions of laws prohibiting departure from published tariffs.—*Santa Fé, P. & P. R. Co. v. Grant Bros. Const. Co.*, 33 S. Ct. 474, 228 U. S. 177, 57 L. Ed. 787, reversing judgment 108 P. 467, 13 Ariz. 186.

A carrier may lawfully grant shippers of coal doing their own hauling to the station a reasonable allowance from the published tariff, which, though naming the rate as from the station to the destination, is uniformly construed to include the haul from the mine.—*Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 33 S. Ct. 916, 230 U. S. 247, 57 L. Ed. 1472, modifying judgment (C. Ct.) 183 F. 908.

Sugar refiners whose plant is situated ten miles beyond the limit of free lighterage zone, established on the river front of Greater New York by interstate trunk railroads, whose freight terminals are at the New Jersey shore of New York harbor, are not entitled to compensation from the railway companies under Act June 29, 1906, for lightering their sugar from the refinery to their terminals.—*United States v. Baltimore & O. R. Co.*, 34 S. Ct. 75, 231 U. S. 274, 58 L. Ed. 218, affirming decree (Com. Ct.) *Baltimore & O. R. Co. v. United States*, 200 F. 779.

Interstate trunk railway companies having their terminals on the New Jersey shore of New York harbor, having established a zone within which they perform lighterage service without additional charge, may pay reasonable compensation on tonnage basis to owners of water front within such zone operating a sugar refinery for maintenance of a public freight terminal station and for lightering, without allowing similar compensation to sugar refiners whose plant is situated some ten miles beyond

the free lighterage zone; the compensation made being a proper allowance under Act June 29, 1906, and not an illegal preference within Act Feb. 4, 1887, § 3.—*Id.*

A pass issued by a railroad for interstate transportation to the wife of an employé under Act June 29, 1906, § 1, must be deemed gratuitous, in view of prohibition in section 2 of that act against charging a greater or different compensation for transportation of passengers from that scheduled in the published rates.—*Charleston & W. C. R. Co. v. Thompson*, 34 S. Ct. 964, 234 U. S. 576, 58 L. Ed. 1476, reversing judgment 79 S. E. 242, 13 Ga. App. 541.

The imperative enforcement of Act Feb. 4, 1887, § 4, as amended by Act June 18, 1910, § 8, forbidding carriers to charge a lesser rate for a longer than for a shorter haul, when the Interstate Commerce Commission has refused an application for relief from such long and short haul clause, does not render the statute repugnant to Const. Amend. 5.—*United States v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; *Same v. Union Pac. R. Co.*, 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. United States*, 191 F. 856.

Right of a carrier, subject to Interstate Commerce Act Feb. 4, 1887, to issue passes to employés of carriers not subject to that act, is recognized in section 1 of that act as amended by Act June 29, 1906, § 1.—*United States v. Erie R. Co.*, 35 S. Ct. 396, 236 U. S. 259, 59 L. Ed. 567, affirming decree (D. Ct.) 213 F. 391.

So long as two carriers furnish switching service to each other in a certain city on all business, and to a third carrier on all except coal, and competitive business, they may be compelled by the Interstate Commerce Commission under Act Feb. 4, 1887, § 3, to discontinue such discrimination against the third carrier.—*Louisville & N. R. Co. v. United States*, 35 S. Ct. 696, 238 U. S. 1, 59 L. Ed. 1177, affirming judgment (D. Ct.) 216 F. 672.

Order of Interstate Commerce Commission under Act Feb. 4, 1887, § 3, commanding carriers to discontinue such discrimination against the third carrier, *held* constitutional.—*Id.*

Act Feb. 4, 1887, § 15, as amended by Act June 18, 1910, § 12, empowering the Interstate Commerce Commission to prevent unlawful discrimination, authorizes the Commission to prescribe the maximum allowance out of the joint rates which trunk line railways may make to tap lines owned by persons owning timber and mills which they principally serve, though no joint rate was fixed either by the commission or by the carriers, and they had not been afforded an opportunity to agree in respect to the division.—*O'Keefe v. United States*, 36 S. Ct. 313, 240 U. S. 294, 60 L. Ed. 651.

The division of through rates between trunk line railways and tap lines as prescribed by the Interstate Commerce Commission *held* not arbitrary, because specified amounts are allowed for switching while all other distances are based upon mileage.—*Id.*

Jersey City *held* not subjected to any undue or unreasonable prejudice in respect to freight rates on cement from the Lehigh cement district.—*Philadelphia & Reading Ry. Co. v. United States*, 36 S. Ct. 354, 240 U. S. 334, 60 L. Ed. 675, reversing decree 219 F. 988.

A so-called embargo, by which railroad refused to furnish cars to shippers for interstate consignments to a paper company at its request, which the latter was under obligation to receive, *held* a violation of Hepburn Act, and such embargo could be removed by the railroad without notice to the paper company.—*Menasha Paper Co. v. Chicago & N. W. Ry. Co.*, 36 S. Ct. 501,

241 U. S. 55, 60 L. Ed. 885, affirming judgment Chicago & N. W. Ry. Co. v. Menasha Paper Co., 149 N. W. 751, 159 Wis. 508.

33. Facilities to connecting lines.

See 9 Cent. Dig. Carr. §§ 86-90.

A railway maintaining a live stock depot as a point of delivery for cattle having a municipality as their general destination cannot be compelled to receive live stock billed to a similar depot at substantially the same point on another railway, and to deliver the same to that railway at a point of physical connection between the two roads for ultimate delivery there, by virtue of the provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155], making it unlawful for common carriers subject to the act to give unreasonable preferences and requiring them to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of property to and from their several lines and those connecting therewith. Decree 118 F. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed.—Central Stockyards Co. v. Louisville & N. R. Co., 24 S. Ct. 339, 192 U. S. 568, 48 L. Ed. 565.

What is an undue advantage forbidden by Act Feb. 4, 1887, § 3, is a question of fact.—Pennsylvania Co. v. United States, 35 S. Ct. 370, 236 U. S. 351, 59 L. Ed. 616, affirming decree (D. C.) 214 F. 445.

Transportation which, under Act Feb. 4, 1887, § 3, when read in connection with Acts June 29, 1906, and June 18, 1910, must be furnished to all equally, covers the entire carriage of property in interstate commerce, including use of terminal facilities.—Id.

Reciprocal switching arrangements between a carrier and three of four connecting lines for exchange of traffic do not remove the discriminatory character under Act Feb. 4, 1887, § 3, of the practice of the first carrier to refuse to interchange car load freight with the fourth connecting line within the switching limits.—Id.

The use of tracks or terminal facilities of one carrier is not given to another, contrary to Act Feb. 4, 1887, § 3, by order of Interstate Commerce Commission requiring carrier to refrain from refusing to interchange car load freight with a connecting carrier while performing such service in connection with other connecting carriers.—Id.

34. Judicial proceedings to enforce regulations.

See 9 Cent. Dig. Carr. §§ 91-93.

A suit to enjoin a common carrier from discriminating between localities in violation of the act to regulate commerce could not be brought on behalf of the United States by its law officers, at the request of the Interstate Commerce Commission, prior to the passage of Act Cong. Feb. 19, 1903, the third section of which expressly authorizes the prosecution of such suits.—Missouri Pac. Ry. Co. v. United States, 23 S. Ct. 507, 189 U. S. 274, 47 L. Ed. 811.

The new remedies to compel compliance with the act to regulate commerce, given by Act Cong. Feb. 19, 1903, § 3, are so far made applicable to prior pending proceedings to enforce the former act by the provision of section 4 that pending causes shall not be affected by the repeal of conflicting laws provided for therein, but shall be prosecuted to a conclusion in the manner theretofore provided, "and as modified by the provisions of this act" that a decree granting the relief prayed for in a suit brought on behalf of the United States by its law officers to enjoin discrimination between localities, which suit was unauthorized, because brought before the passage of the later act, must be reversed, and the cause remanded for further proceedings consistent with the act to

regulate commerce as originally enacted and subsequently amended.—Id.

A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular. Decree (C. C.) Interstate Commerce Commission v. Chesapeake & O. R. Co., 128 F. 59, modified.—New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 26 S. Ct. 272, 200 U. S. 361, 50 L. Ed. 515.

The enforcement of an order of the Interstate Commerce Commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a federal Circuit Court if it finds such rule is, for any reason, in violation of Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, pp. 3154-3165], although such reason may not have been the one relied upon by the commission itself to invalidate the rule. Decree (C. C.) Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829, reversed.—Southern Pac. Co. v. Interstate Commerce Commission, 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

The Commerce Court may enjoin the performance of a contract offending provisions of Interstate Commerce Act Feb. 4, 1887, § 6, and Act June 29, 1906, § 2, intended to prevent undue advantage or unlawful discrimination.—United States v. Union Stockyard & Transit Co. of Chicago, 33 S. Ct. 83, 226 U. S. 286, 57 L. Ed. 226, modifying judgment (Com. C.) 192 F. 330.

Shipper, not a party to proceedings to have increase in freight rates declared unreasonable, may maintain reparation claim before the Commission or the courts, based on a finding that the increase was unreasonable.—A. J. Phillips Co. v. Grand Trunk Western Ry. Co., 35 S. Ct. 444, 236 U. S. 662, 59 L. Ed. 774, affirming judgment 195 F. 12, 115 C. C. A. 94.

Neither proceedings by other shippers before Interstate Commerce Commission to have increase in freight rates declared unreasonable nor finding of unreasonableness will save the right of shipper to recover the overcharge, where he had disregarded requirements of Act June 29, 1906.—Id.

35. Contracts in violation of regulations.

See 9 Cent. Dig. Carr. § 94.

The granting of a rebate contrary to the provision of the interstate commerce law does not render the bill of lading void, so that no action can be maintained against the carrier for loss of the goods by negligence.—Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195, affirming judgment Insurance Co. of North America v. Delaware Mut. Safety Ins. Co., 91 Tenn. 537, 19 S. W. 755.

A carrier engaged in interstate commerce cannot lawfully charge, collect, or receive anything but money for transportation on its road since the enactment of Act June 29, 1906, c. 3591, § 6, 34 Stat. 592 [U. S. Comp. St. Supp. 1909, p. 1163], prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.—(1911) Louisville & N. R. Co. v. Mottley, 31 S. Ct. 265, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, reversing decree (1909) 118 S. W. 982, 133 Ky. 652.

An interstate carrier cannot make a valid contract to issue annual passes for life in consideration of a release of a claim for damages since the enactment of Act June 29, 1906, c.

3591, § 6, 34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1163), expressly prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.—*Id.*

The acceptance of advertising by a carrier in lieu of money in payment of interstate transportation furnished to the publisher, his employees, and the immediate members of his and their families, violates the provisions of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), and Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), amendatory thereof, prohibiting the furnishing of interstate transportation for a less or different compensation than that specified in the carrier's published rates.—(1911) *Chicago, I. & L. Ry. Co. v. United States*, 31 S. Ct. 272, 219 U. S. 486, 55 L. Ed. 305, affirming judgment *United States v. Chicago, I. & L. Ry. Co.* (C. C. 1908) 163 F. 114.

Agreement with single shipper for shipment over connecting lines having no joint through rate at less than the local rates for each road held void and not to prevent collecting the established rates by such carriers under Interstate Commerce Act Feb. 4, 1887, § 6, as amended by Act March 2, 1889, § 1.—(1912) *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment (1908) 99 P. 819, 79 Kan. 59.

A lumber company, using a railroad owned by stockholders of a rival lumber company that operated as a separate corporation, would be given a rebate contrary to the Interstate Commerce Act if a nondiscriminatory agreement between the two lumber companies were construed to entitle the former company to the same proportion of the interstate freight rates on its shipments which the railway company receives on the interstate shipments by the other lumber company.—*Fourche River Lumber Co. v. Bryant Lumber Co.*, 33 S. Ct. 887, 230 U. S. 316, 57 L. Ed. 1498, reversing judgment 135 N. W. 796, 97 Ark. 623.

A special contract for an interstate shipment without limitation of the carrier's liability to an agreed value has no binding force where the carrier's tariffs on file with the Interstate Commerce Commission graduate the rates according to declared value and limit the carrier's liability accordingly.—*Atchison, T. & S. F. Ry. Co. v. Robinson*, 34 S. Ct. 556, 233 U. S. 173, 58 L. Ed. 901, reversing judgment 129 P. 20, 36 Okl. 435; *Same v. Moore*, 34 S. Ct. 556, 233 U. S. 182, 58 L. Ed. 906, reversing judgment 129 P. 24, 36 Okl. 433.

A carrier, which has exacted less than the published rate for interstate round-trip tickets, may, under Act Feb. 4, 1887, § 6, as amended by Act June 29, 1906, § 2, recover from the purchaser the difference between the amount paid and the amount which should have been collected.—*Louisville & N. R. Co. v. Maxwell*, 35 S. Ct. 494, 237 U. S. 94, 59 L. Ed. 853, L. R. A. 1915E, 665.

The prohibition of Hepburn Act, § 2, does not prevent or relieve a carrier from paying the unpaid balance of the price of a map made for it because the statute made free transportation unlawful.—*New York Cent. & H. R. R. Co. v. Gray*, 36 S. Ct. 176, 239 U. S. 583, 60 L. Ed. 451, affirming judgment *Gray v. New York Cent. & H. R. R. Co.*, 145 N. Y. S. 1125, 161 App. Div. 924.

The parties to an interstate shipment may not, by special agreement, alter the conditions of a bill of lading fixing the carrier's liability in case the goods are not removed within 48

hours after notice to the consignee, conforming to the carrier's published regulations.—*Southern Ry. Co. v. Prescott*, 36 S. Ct. 469, 240 U. S. 632, 60 L. Ed. 836, reversing judgment *Prescott v. Southern Ry. Co.*, 83 S. E. 781, 99 S. C. 422.

Ⓒ—36. Damages for violations of regulations.

See 9 Cent. Dig. Carr. § 86.

The right of recovery given by the interstate commerce act against a carrier for violation of its provisions, to any person or persons injured thereby, for the full amount of damages sustained in consequence of such violation, is in the nature of a penalty, and only exists on proof, not only of the wrong, but that it has in fact operated to plaintiff's injury. An allegation that a joint tariff rate established by a defendant railroad company and another was not filed with the commission as required by the law, nor published, but was concealed from the plaintiff and other shippers, does not authorize a recovery under such provision, where it is not alleged that plaintiff made any shipments to the points covered by such rate, or that he would or could have availed himself of the rate had he known of it.—*Parsons v. Chicago & N. W. Ry. Co.*, 17 S. Ct. 887, 167 U. S. 447, 42 L. Ed. 231, affirming judgment 63 F. 903, 11 C. C. A. 489.

Liability of a carrier to a shipper who has paid the lawful published freight rates, while lower rates resulting from rebates have been allowed other shippers during the same period between the same termini, is limited to the pecuniary loss suffered by Act Feb. 4, 1887, § 8, together with a reasonable attorney's fee.—*Pennsylvania R. Co. v. International Coal Min. Co.*, 33 S. Ct. 893, 230 U. S. 184, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, reversing judgment 173 F. 1, 97 C. C. A. 383.

Damages awarded shipper by Interstate Commerce Commission for unjust discrimination and unreasonable rates, under Act Feb. 4, 1887, § 8, may be measured by the rebate to a favored competitor and by the charge in excess of the reasonable rate.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Valley R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

Ⓒ—37. Penalties for violations of regulations.

See 9 Cent. Dig. Carr. §§ 95, 97.

Railroad receivers are not liable to an action for penalties under Rev. St. U. S. §§ 4386-4389, for failure to comply with the regulations as to transportation of live stock by "any company, owner, or custodian of such animals," since receivers are plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and therefore, as the statute is penal, it cannot be construed to extend to them.—*United States v. Harris*, 20 S. Ct. 609, 177 U. S. 305, 44 L. Ed. 780, affirming 78 F. 290, and 85 F. 533, 29 C. C. A. 327.

The number of the penalties recoverable under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), making 28 hours the limit of confinement of live stock in transit without unloading, and prescribing a penalty for every failure of the carrier to comply with this provision, is not measured by the number of shipments on the same train, nor is the train the unit of offense, but where the same train contains live stock loaded at different periods, one penalty accrues when the period of lawful confinement for the cattle first loaded expires, and other separate and distinct penalties accrue as the time for the lawful confinement of the cattle loaded at later periods successively expires.—(1911) *Baltimore & O. S. W. R. Co. v. United States*, 31

S. Ct. 368, 220 U. S. 94, 55 L. Ed. 384, modifying judgment *United States v. Baltimore & O. S. W. R. Co.* (1908) 159 F. 33, 86 C. C. A. 223.

But one penalty may be recovered against a carrier violating the provisions of Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), making 28 hours the limit of confinement of live stock in transit without unloading, unless extended by request of the owner to 36 hours, and prescribing a penalty for every failure of the carrier to comply with this provision, where the time for the required unloading of two shipments loaded at different times coincides, because one shipment was forwarded under the 36-hour rule, and the other was made eight hours later, under the 28-hour rule, from a different station.—*Id.*

38. Offenses.

See 9 Cent. Dig. Carr. §§ 96, 97.

A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), making it a criminal offense for any person or corporation to offer, grant, solicit, give or to accept or receive any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practiced.—*Armour Packing Co. v. United States*, 28 S. Ct. 423, 209 U. S. 56, 52 L. Ed. 681; *Swift & Co. v. Same, Id.*; *Morris & Co. v. Same, Id.*; *Cudahy Packing Co. v. Same, Id.* Affirming judgment (1907) 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; *Chicago, B. & Q. Ry. Co. v. Same*, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment (1907) 157 F. 880, 85 C. C. A. 194.

Shipments under a through bill of lading from an interior point in the United States to a foreign port are embraced in the provisions of *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates.—*Id.*

A shipper is guilty of accepting transportation at less than the carrier's published rates, in violation of *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.—*Id.*

An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.—*Id.*

Intentionally accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates, which is forbidden by *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), is sufficient to sustain a conviction under that act, although such action may have been taken in good faith, under a claim of legal right.—*Id.*

The offense of giving rebates in violation of *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat.

847 (U. S. Comp. St. Supp. 1907, p. 880), is complete when the carrier, to whom the shipper has paid the full legal rate, pays over to the shipper, upon a claim presented by him, the amount of the rebates stipulated in the shipping agreement. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. R. Co.*, 146 F. 298; *Same v. Guilford, Id.*, affirmed.—*New York Cent. & H. R. R. Co. v. United States*, 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613.

A carrier which gives rebates from a joint rate on file with the Interstate Commerce Commission may, although it did not itself publish and file the rate, be convicted of violating *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), which, *inter alia*, provides that the published rate shall be conclusively deemed, in any prosecution under the act, to be the legal rate as against the carrier who files the same or "participates in any rates so filed or published," and that any departure from such rate shall be deemed to be an offense under the act. Judgment (C. C. 1907) 157 F. 293, reversed.—*United States v. New York Cent. & H. R. R. Co.*, 29 S. Ct. 313, 212 U. S. 509, 53 L. Ed. 629.

A joint stock association organized under New York Laws to do an express business is subject to criminal prosecution under Interstate Commerce Act Feb. 4, 1887, § 10, as amended by Act June 18, 1910, § 10, for willful violation of the act, since under the first section of the original act, as amended by Act June 29, 1906, the term "carrier" is defined as including "express company."—*United States v. Adams Exp. Co.*, 33 S. Ct. 878, 229 U. S. 381, 57 L. Ed. 1237.

Receivers operating a railway are common carriers within Act March 4, 1913, making a provision of the original Cattle Quarantine Act March 3, 1906, apply to carriers transporting cattle for a quarantine state to any other state.—*United States v. Nixon*, 35 S. Ct. 49, 235 U. S. 231, 59 L. Ed. 207.

Riding upon tender of interstate train by engineer's permission without payment of fare held unlawful under Act Feb. 4, 1887, § 1, as amended by the Act June 29, 1906, making carrier giving, and person receiving, interstate free transportation in violation thereof, guilty of a misdemeanor.—*Illinois Cent. R. Co. v. Messina*, 36 S. Ct. 368, 240 U. S. 395, 60 L. Ed. 709, reversing judgment *Yazoo & M. V. R. Co. v. Same*, 67 So. 963.

A consignee is guilty of fraudulently obtaining interstate transportation at less than the established rates contrary to Act Feb. 4, 1887, § 10, as amended by Act June 18, 1910, where he understates the weight of the shipment, though the shipment had been delivered to him before the representations were made.—*United States v. Union Mfg. Co.*, 36 S. Ct. 420, 240 U. S. 605, 60 L. Ed. 822.

II. CARRIAGE OF GOODS.

Exclusive powers of Congress, see Commerce, 3.

Insurable interest, see Insurance, 115.

Matters peculiar to carriage by vessel, see Shipping, 102-145.

Regulation, as regulation of commerce, see Commerce, 32-34, 47.

Subrogation of insurer to shipper's rights against carrier, see Insurance, 606.

(A) DELIVERY TO CARRIER.

Delivery of goods to carrier as delivery to buyer, see Sales, 161.

Interstate commerce regulations, see Commerce, 61, 85, 89.

⚡45. **Actions for refusal to receive or transport goods or furnish facilities.**

See 9 Cent. Dig. Carr. §§ 120, 123-128.

Bad faith of a railway company in insisting, to prevent an interstate shipment of cross-ties over its line, that its published joint through interstate rate on lumber did not cover cross-ties, cannot be considered in a suit against the carrier, based on its unlawful refusal, in view of the filed tariff, to accept the shipment.—*Texas & P. R. Co. v. American Tie & Timber Co.*, 34 S. Ct. 885, 234 U. S. 138, 58 L. Ed. 1255, reversing judgment 190 F. 1022, 111 C. C. A. 673.

(B) **BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.**

Construction by federal courts, see Courts, ⚡394(15).

Forwarder's authority, see Principal and Agent, ⚡116.

Stamp tax on bill of lading as tax on exports, see Commerce, ⚡77.

⚡47. **Authority of agents and employees.**

See 9 Cent. Dig. Carr. §§ 107, 108, 134-141, 204.

The general agent of the receivers of a railway company is acting as agent for such receivers, and not as the agent of a connecting steamship company, in agreeing to forward a through shipment by a steamer sailing on a specified day, where his only authority as agent of the steamship company was created by a contract between the railway and steamship companies, under which the railway company was to appoint agents, who should act for the steamship company to quote through rates and issue through bills of lading, and the application for a rate for such shipment was made to him as agent for the receivers, and the rate was quoted by him as such agent, and as such he signed a letter confirming the rate, and so described himself when informing the steamship company's agents at the connecting point that he had made a contract guarantying delivery by the designated steamer. *Decree, Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 120 F. 873, 57 C. C. A. 533, affirmed.—*Northern Pac. Ry. Co. v. American Trading Co.*, 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

⚡50. **Construction and operation of bill of lading.**

See 9 Cent. Dig. Carr. §§ 109, 131, 148-161, 163-167.

⚡51. **— In general.**

See 9 Cent. Dig. Carr. §§ 143, 149.

In an action against a carrier for loss of goods delivered for transportation, evidence is admissible for plaintiffs that the contract was by parol, and was not expressed in a bill of lading given for the goods to a broker not authorized to make a shipping contract.—*Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527.

⚡54. **Negotiability and transfer of bill of lading.**

See 9 Cent. Dig. Carr. §§ 130, 163-190; 43 Cent. Dig. Sales, § 649.

⚡56. **— Indorsement or other transfer.**

See 9 Cent. Dig. Carr. § 163.

The indorsement "for collection" by a bank on invoices accompanying bills of lading attached to drafts is not a guaranty that the bills are genuine. It is simply a notification that the goods are to be held for the draft, if it is not accepted.—*Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 S. Ct. 318, 30 L. Ed. 515.

⚡57. **— Rights of transferee as against carrier.**

See 9 Cent. Dig. Carr. §§ 169-178, 308, 309, 311, 312.

Where a station agent, having authority to sign bills of lading, by collusion with a pretended shipper issues a bill of lading of goods which are not delivered for transportation, and which have no existence, and the shipper negotiates it for value to a third person, who is ignorant of the facts, the railroad company is not liable on the bill to the purchaser; the fraud of the agent being outside the scope of his employment, as he could only issue bills for property delivered.—*Friedlander v. Texas & P. Ry. Co.*, 130 U. S. 416, 9 S. Ct. 570, 32 L. Ed. 991.

The Texas statutes which provide that the trip or voyage commences from the time of the signing of the bill of lading issued on the delivery of the goods, and under which the carrier cannot avoid his liability, even though the goods are not actually on their passage at the time of loss, have no application to such a case.—*Id.*

On bills of lading for cotton which, pursuant to agreement and course of dealing between carrier and shipper, remains in possession of a compress company, as agent of the shipper to be compressed for the shipper's account, and, before delivery to the carrier, is destroyed by fire, the carrier is not liable, even to assignees of the bills of lading, without notice of such agreement and course of dealing.—*Missouri Pac. Ry. Co. v. McFadden*, 154 U. S. 155, 14 S. Ct. 990, 38 L. Ed. 944.

⚡59. **— Bona fide purchasers.**

See 9 Cent. Dig. Carr. §§ 170-190.

A pledgee to whom a bill of lading is given as security gets the legal title to the goods only if such is the intention of the parties, and that intention is open to explanation, even as against persons who may have innocently paid value for the bill.—*The Carlos F. Roses*, 20 S. Ct. 803, 177 U. S. 655, 44 L. Ed. 929.

⚡61. **Contracts for transportation of goods.**

See 9 Cent. Dig. Carr. §§ 195-206½, 210-215.

⚡63. **— Construction and operation.**

See 9 Cent. Dig. Carr. §§ 210, 211.

A hidden or obscure meaning will not be sought for a particular clause of a bill of lading, because its obvious meaning provides for contingencies which are also provided for by other clauses of the same bill. Judgment, 99 F. 1006, 39 C. C. A. 679, affirmed.—*Texas & P. Ry. Co. v. Reiss*, 22 S. Ct. 253, 183 U. S. 621, 46 L. Ed. 358.

A contract between a railway and a construction company held to require the hauling of a camp and grading outfit required by the company in grading a railway extension to and from points as near as possible to the work without regard to regular stations.—*Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co.*, 33 S. Ct. 474, 228 U. S. 177, 57 L. Ed. 787, reversing judgment 108 P. 467, 13 Ariz. 186.

⚡68. **Modification, merger, or rescission.**

See 9 Cent. Dig. Carr. §§ 143, 194, 207-209, 216.

A special agreement in behalf of railway receivers to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not modified by the mere receipt, without objection, and the subsequent hypothecation, of the bill of lading containing, as a part of numerous conditions printed in small type, the statements that the carrier is not to be liable for any loss not occurring on its own road, and that the contract as executed is accomplished, and all liability thereunder

terminates, upon the delivery of the property to the vessel, where the bill was not examined or read, and was accepted after the goods had passed from the control of the shipper, by a clerk who had no knowledge of these conditions, and no authority to consent to a modification of the contract already made. *Decree, Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 120 F. 873, 57 C. C. A. 533, affirmed.—*Northern Pac. Ry. Co. v. American Trading Co.*, 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

(C) CUSTODY AND CONTROL OF GOODS.

70. Title to goods.

See 9 Cent. Dig. Carr. §§ 240-242.

The presumption as to ownership arising from a bill of lading may be explained or rebutted by other evidence showing where the real ownership lies.—*The Carlos F. Roses*, 20 S. Ct. 803, 177 U. S. 655, 44 L. Ed. 929.

76. Actions by or against carriers in respect of goods.

See 9 Cent. Dig. Carr. §§ 256-271, 363.

A carrier may sue in his own name in admiralty, as well as at common law, as the representative of the owner, for a trespass on or an injury to the property carried.—*The Beaconsfield*, 153 U. S. 303, 15 S. Ct. 860, 39 L. Ed. 993.

(D) TRANSPORTATION AND DELIVERY BY CARRIER.

88. Acts constituting delivery.

See 9 Cent. Dig. Carr. §§ 280-289½, 319-321.

An instruction to the jury that if defendant's freight agent accepted an inferior cotton for shipment to plaintiffs, knowing at the time that it was of a quality inferior to that called for by the bills of lading, and that the marks on the bales had been changed from marks indicating a lower grade of cotton to marks indicating the grade called for by plaintiffs' bills of lading, then the defendant was liable, *held* erroneous.—*St. Louis, I. M. & S. Ry. Co. v. Knight*, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

91. Liability for failure or refusal to deliver.

See 9 Cent. Dig. Carr. §§ 338-355.

Wrongful refusal of express company to carry out C. O. D. shipment contracts will support, in Missouri, action for conversion by the consignor.—*Rosenberger v. Pacific Exp. Co.*, 36 S. Ct. 510, 241 U. S. 48, 60 L. Ed. 880, reversing judgment 167 S. W. 429, 258 Mo. 97.

(E) DELAY IN TRANSPORTATION OR DELIVERY.

Interstate commerce regulations, see Commerce, 8.

100. Demurrage, and liability of consignee or owner for delay.

See 9 Cent. Dig. Carr. §§ 427-433.

Cars billed to Chicago for reconsignment have reached their destination for purposes of demurrage charge where held on storage tracks in Indiana convenient to the belt line by which they could be transferred to any new destination.—*Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 35 S. Ct. 131, 235 U. S. 371, 59 L. Ed. 275, affirming judgment *Chicago & E. R. Co. v. Berwind-White Coal Mining Co.*, 171 Ill. App. 802.

A private switch track is "full" within carrier's rules relating to car service and demurrage charges, where, though the track would hold more cars, there were upon it all the cars that the consignee could unload.—*Menasha Paper Co. v. Chicago & N. W. Ry. Co.*, 36 S. Ct.

501, 241 U. S. 55, 60 L. Ed. 885, affirming judgment *Chicago & N. W. Ry. Co. v. Menasha Paper Co.*, 149 N. W. 751, 159 Wis. 508.

(F) LOSS OF OR INJURY TO GOODS.

By vessel, see Shipping, 119-142.

Costs in action for loss or injury, see Costs, 173.

Due process of law, see Constitutional Law, 301, 303.

Exclusive or concurrent jurisdiction, see Courts, 489.

Imposition of penalty for failure to pay damages, interference with interstate commerce, see Commerce, 61.

Liability of express company to consignor of intoxicating liquors seized and destroyed under default judgment rendered in another state, see Judgment, 825.

108. Nature of liability as common carrier.

See 9 Cent. Dig. Carr. §§ 471-495.

Liability for default in common-law duty, and not liability as an insurer, is imposed by Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, under which interstate carrier is liable to the holder of bill of lading for any damage caused by it or any connecting carrier.—*Adams Exp. Co. v. Croninger*, 33 S. Ct. 148, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Chicago, St. P. & O. Ry. Co. v. Latta*, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328, reversing judgments *Latta v. Chicago, St. P., M. & O. Ry. Co.*, 172 F. 850, 97 C. C. A. 198, and *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 184 F. 987, 106 C. C. A. 664.

Common-law liability of carrier as insurer was not changed as to a loss on its own line by Carmack Amendment.—*Cincinnati, N. O. & T. P. Ry. Co. v. Rankin*, 36 S. Ct. 555, 241 U. S. 319, 60 L. Ed. 1022.

115. Acts or omissions constituting negligence by carrier in general.

See 9 Cent. Dig. Carr. §§ 501-507.

A carrier is not chargeable with negligence in failing to take precautions to guard against the danger from fire to cotton awaiting transportation in locked box cars on a side track, in the open country, established and maintained for the accommodation of the planters in that neighborhood, where the carrier is merely following a practice which has continued for years without any resulting loss or complaint. Judgment 113 F. 92, 51 C. C. A. 78, affirmed.—*Charnock v. Texas & P. Ry. Co.*, 24 S. Ct. 671, 194 U. S. 432, 48 L. Ed. 1057.

116. Deviation or delay.

See 9 Cent. Dig. Carr. § 483.

No deviation from the route of a shipment of cotton from Texas to the port of New Orleans for export is made by the carrier's delivery of the cotton at its terminal wharf at Westwego, a few miles above, and on the opposite side of the river from, New Orleans, but outside of the limits of the municipality or of the port, as defined by statute. Judgment 102 F. 246, 42 C. C. A. 317, reversed.—*Marande v. Texas & P. Ry. Co.*, 22 S. Ct. 340, 184 U. S. 173, 46 L. Ed. 487.

118. Negligence of agents or servants.

See 9 Cent. Dig. Carr. §§ 492, 517-519.

A carrier which issues bills of lading to a shipper in return for receipts given by a compress company for cotton in the latter's custody is liable for loss by fire due to the negligence of the servants of the compress company in caring for the cotton while awaiting the compression and loading which the railway company had ordered done for its own convenience and

at its own cost, where such company, if it did not regard the presentation of the receipts as a tender of the cotton, or if it were not a valid tender, could, notwithstanding the rules of the Texas state railroad commission as well as its own rules, have refused to sign the bills of lading. Judgment (C. C. A. 1905) 139 F. 127, 71 C. C. A. 391, reversed.—*Arthur v. Texas & P. Ry. Co.*, 27 S. Ct. 338, 204 U. S. 505, 51 L. Ed. 590.

124. Extent of liability.

See 9 Cent. Dig. Carr. §§ 599-602, 604-607.

Rev. St. Mo. 1879, § 2126, provides that "the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure." Section 2723 allows interest on moneys due on written contracts, on accounts, and sundry other money demands. *Held*, that interest is not allowable in an action against a carrier for injuries to goods caused by its negligence in transportation.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, modifying judgment (C. C.) *Estill v. New York, L. E. & W. R. Co.*, 41 F. 849.

125. Effect of insurance.

See 9 Cent. Dig. Carr. §§ 552-556.

As a common carrier may contract valid insurance, which will protect him from a loss of cargo, occasioned by the negligence of his own servants, there is no reason why, in a suit against him for negligent loss, brought by the insurer, who has become subrogated to the rights of the insured by payment of the policy, he may not claim the benefit, under a stipulation of his bill of lading, of any insurance that may have been effected on the goods.—*Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 S. Ct. 750, 1176, 29 L. Ed. 873.

A clause, in a policy of insurance on goods in transportation, that in case of loss the insured shall proceed against the carrier in the first instance, is valid, as against the carrier.—*Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612.

A stipulation in a bill of lading that, in case of loss, the carrier shall have the benefit of any insurance on the goods, does not entitle the carrier to receive such benefit, or to a tender thereof, before an action can be brought against it for the loss.—*Id.*

A failure to give the carrier the benefit of the insurance as stipulated in the bill of lading cannot avail as a counterclaim, unless it be proved that the shipper had actually received the insurance money, and had refused to allow the carrier the benefit of it.—*Id.*

Where a part of the goods was shipped from an inland point under a through bill of lading which contained two sets of conditions, the first set relating exclusively to land carriage by certain railroads, and the second to the ocean transportation by the steamer, the carrier could not avail itself of a clause contained in the first set of conditions concerning the right of the carrier to have the benefit of any insurance on the goods for the loss of which it might be liable when the goods were lost at sea.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Same v. Insurance Co. of North America*, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800. Affirming decree *The Montana*, 22 F. 715.

126. Actions for loss or injury.

See 9 Cent. Dig. Carr. §§ 478, 545-551, 557-560, 562-567.

131. — Pleading.

See 9 Cent. Dig. Carr. §§ 569-577, 593.

In an action on a bill of lading calling for cotton of a higher grade than that actually shipped, under the plea of non assumpsit, not verified as required by *Hurd's Rev. St. Ill. p. 1075* (Prac. Act, § 34), defendant cannot deny the execution of the bills of lading sued on; but evidence is admissible tending to show that the marks on the cotton, when received by defendant for shipment, answered the marks described in the bills of lading, and that the contract contained in them has been fully performed by defendant.—*St. Louis, I. M. & S. Ry. v. Knight*, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

In an action of assumpsit against a railroad company for failure to deliver 525 bales of cotton described in the bills of lading, the evidence was that one P., a cotton broker, purchased large quantities of cotton from time to time, and, under a contract with the defendant railway company, caused the cotton to be compressed, and made ready for shipping. When compressed, each bale was by him weighed, classed, and marked; and, when a number of bales had been so marked, he made out a bill of lading, describing them by their appropriate marks, and obtained the certificate of the superintendent of the compress company, indorsed thereon, that the cotton called for by the bill was in the warehouse; also the signature of the defendant's freight agent. Whenever a sale was made, P. assigned the proper bills of lading to the purchaser. Plaintiffs claimed as such purchasers and assignees of P. There was evidence that, at the time plaintiffs' bills of lading were made out and signed as above, there was no cotton of the grade called for in the warehouse (and it was conceded that, by an arrangement between P. and defendant, bills of lading were often issued before the cotton called for had arrived), but that in this instance there was other cotton on hand of an inferior grade, some of which certain employes of P., with knowledge of defendant's freight agent, remarked with marks indicating the grade called for by plaintiffs' bills, and that defendant forwarded this inferior cotton to plaintiffs. *Held*, that in such action the only issue was as to defendant's liability upon the bills of lading as a common carrier.—*Id.*

132. — Presumptions and burden of proof.

See 9 Cent. Dig. Carr. §§ 578-582, 606.

The burden is on the carrier to prove that the damage sued for was caused by an act of God.—*The Majestic*, 17 S. Ct. 597, 166 U. S. 375, 41 L. Ed. 1039, reversing order 60 F. 624, 9 C. C. A. 161, 23 L. R. A. 746, modifying decree (D. C.) 56 F. 244.

133. — Admissibility of evidence.

See 9 Cent. Dig. Carr. §§ 583-587, 606.

Rate schedules of an interstate carrier on file with the Interstate Commerce Commission are admissible in an action for delay of an interstate shipment on the issue of the validity and effect of a limitation of liability in the bill of lading.—*Southern Express Co. v. Byers*, 36 S. Ct. 410, 240 U. S. 612, 60 L. Ed. 825, reversing judgment *Byers v. Southern Exp. Co.*, 81 S. E. 741, 165 N. C. 542.

136. — Questions for jury.

See 9 Cent. Dig. Carr. §§ 478, 596-598.

The question whether cotton was set on fire by sparks from a locomotive is for the jury, where the cotton was stored in and along the side of open sheds in close proximity to railroad tracks on each side, although the only locomotive near the cotton on the day that the fire was discovered did not go near the shed

where the fire started, and is not shown to have been throwing out any sparks, while, if there had been any, the wind would have carried them in the opposite direction, since one possibility is that the fire was set by other locomotives on a preceding day, and smouldered until the day it was discovered. Judgment 102 F. 246, 42 C. C. A. 317, reversed.—*Marande v. Texas & P. Ry. Co.*, 22 S. Ct. 340, 184 U. S. 173, 46 L. Ed. 487.

In such an action the question whether the negligence of a railroad company in failing to provide proper facilities for extinguishing fire in cotton sheds contributed to a loss of the cotton by fire is for the jury, where the cotton was piled up high around the platforms on which hose was kept, and when an attempt was made to use the hose the water would not come, either because the hose had become tangled, or otherwise, and the valve was found already open when one of the men tried to open it, though the railroad company contends, but without any positive proof of the fact, that one of the employes had opened the valve and tangled the hose after the alarm of fire, especially when there had been no systematic inspection thereof, and no fire drill had, and no instructions given as to the use of the apparatus.—*Id.*

In an action to recover for the loss by fire of a shipment of cotton while standing in cars on the carrier's tracks, the question whether a lack of sufficient watchmen contributed to the loss of cotton by fire is for the jury, notwithstanding the contention that the watchmen actually present discovered the fire as soon as it started, where it is possible for the jury to infer that the fire might have been smouldering for a considerable period before its discovery, and a sufficient force of watchmen, if present, might have materially aided in extinguishing the fire.—*Id.*

(G) CARRIER AS WAREHOUSEMAN.

Review of actions involving liability as warehousemen, see Courts, ¶394(15).

¶140. Goods awaiting delivery.

See 9 Cent. Dig. Carr. §§ 609, 609½, 611-616.

A railroad company is liable, at least as a warehouseman, for goods transported by it and remaining in cars still subject to its orders in the yard of a terminal association under a contract with the terminal association for "terminal facilities" for "the handling of its trains * * * and the handling and care of its freight," without any provision that the terminal association will store cars, but only to furnish "storage room" for the cars necessary to the carrier's business, with a provision, also, that the railroad company shall repair its own cars damaged in making and breaking up trains, except those damaged outside of the yards set apart for its use, and that these shall be repaired by the party causing the damage, while the cars in the yards are not subject to be moved by the terminal association, by the orders of the consignee or any other person, until instructions to do so are given by the railroad company, and it, in its dealings with other carriers, assumes to have the possession and control of such cars.—*Hunting Elevator Co. v. Bosworth*, 21 S. Ct. 183, 179 U. S. 415, 45 L. Ed. 256; *Rau v. Bosworth*, 21 S. Ct. 194, 179 U. S. 443, 45 L. Ed. 268; *Bosworth v. Carr, Ryder & Engler Co.*, 21 S. Ct. 194, 179 U. S. 444, 45 L. Ed. 268.

The retention of an interstate shipment by a carrier as warehouseman under the provisions of its bill of lading held a terminal service under Act Feb. 4, 1887, as amended by Act June 29, 1906.—*Southern Ry. Co. v. Prescott*, 36 S. Ct. 469, 240 U. S. 632, 60 L. Ed. 836, reversing judgment *Prescott v. Southern Ry. Co.*, 83 S. E. 781, 99 S. C. 422.

Removal of a part of the goods included in an interstate shipment held not to discharge the

carrier's liability under the bill of lading issued pursuant to Act Feb. 4, 1887, as amended by Act June 29, 1906, and create an obligation as warehouseman governed by a local law casting on the carrier holding goods as warehouseman the burden of disproving negligence.—*Id.*

¶146. Actions involving liability as warehouseman.

See 9 Cent. Dig. Carr. §§ 619½, 631-636.

In an action of assumpsit against a railroad company for failure to deliver 525 bales of cotton described in the bills of lading, the evidence was that one P., a cotton broker, purchased large quantities of cotton from time to time, and, under a contract with the defendant railway company, caused the cotton to be compressed, and made ready for shipping. When compressed, each bale was by him weighed, classed, and marked; and, when a number of bales had been so marked, he made out a bill of lading, describing them by their appropriate marks, and obtained the certificate of the superintendent of the compress company, indorsed thereon, that the cotton called for by the bill was in the warehouse; also the signature of the defendant's freight agent. Whenever a sale was made P. assigned the proper bills of lading to the purchaser. Plaintiffs claimed as such purchasers and assignees of P. There was evidence that, at the time plaintiffs' bills of lading were made out and signed as above, there was no cotton of the grade called for in the warehouse (and it was conceded that, by an arrangement between P. and defendant, bills of lading were often issued before the cotton called for had arrived), but that in this instance there was other cotton on hand of an inferior grade, some of which certain employes of P., with knowledge of defendant's freight agent, re-marked with marks indicating the grade called for by plaintiffs' bills, and that defendant forwarded this inferior cotton to plaintiffs. *Held*, that in such action the only issue was as to defendant's liability upon the bills of lading as a common carrier, and that it was error to charge the jury upon any theory of liability as warehouseman, by reason of defendant's connection with the cotton while in the warehouse, and before delivery for shipment.—*St. Louis, I. M. & S. Ry. Co. v. Knight*, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

The measure of an interstate carrier's liability as warehouseman under a bill of lading issued pursuant to Act Feb. 4, 1887, as amended by Act June 29, 1906, held governed by the provisions of the bill of lading and not by a local law fixing the burden of proof in case of loss by fire.—*Southern Ry. Co. v. Prescott*, 36 S. Ct. 469, 240 U. S. 632, 60 L. Ed. 836, reversing judgment *Prescott v. Southern Ry. Co.*, 83 S. E. 781, 99 S. C. 422.

(H) LIMITATION OF LIABILITY.

By vessel, see Shipping, ¶139-142.
Interstate commerce regulations, see Commerce, ¶8, 10, 33, 61, 80.

¶148. What law governs.

See 9 Cent. Dig. Carr. §§ 650, 663.

A clause in a bill of lading, exempting the carrier from liability for loss caused by the negligence of its servants, will be held invalid in the federal courts, though the law of the state where the bill of lading was executed may be otherwise.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 798; *Same v. Insurance Co. of North America*, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800. Affirming decree *The Montana*, 22 F. 715.

¶149. Liabilities subject to limitation.

See 9 Cent. Dig. Carr. §§ 651-662.

—150. — Negligence or misconduct.

See 9 Cent. Dig. Carr. §§ 654-659.

A railway company transporting at reduced rates men and supplies required by construction company in grading an extension may exempt itself from liability for negligence.—*Santa Fé, P. & P. R. Co. v. Grant Bros. Const. Co.*, 33 S. Ct. 474, 228 U. S. 177, 57 L. Ed. 787, reversing judgment 108 P. 467, 13 Ariz. 186.

—151. Mode or form of limitation.

See 9 Cent. Dig. Carr. §§ 672-676, 680, 681, 687-690.

—153. — Bill of lading or shipping receipt.

See 9 Cent. Dig. Carr. §§ 687-690.

A shipper's acceptance of an express company's receipt limiting liability for value unless a different value is stated is sufficient to justify application of doctrine that such company, when its rates are graduated by value may under Carmack Amendment June 29, 1906, to Act Feb. 4, 1887, § 20, limit its liability for loss to the declared value.—*Wells Fargo & Co. v. Neiman-Marcus Co.*, 33 S. Ct. 267, 227 U. S. 469, 57 L. Ed. 600, reversing judgment (Tex. Civ. App.) 125 S. W. 614.

Valuation named in a shipping contract signed by the shipper is as much an agreed valuation within Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, as if the shipper had stated the value on inquiry.—*Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690, reversing judgment (Tex. Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Same*, 128 S. W. 932.

A case of an agreed valuation is presented where the shipper's agent filled out a printed bill of lading describing the shipment as "emigrant movables released to \$10 per cwt.," which was signed by the carrier's agent, and the goods were shipped under the lower rate applicable to goods of that character and value.—*Great Northern R. Co. v. O'Connor*, 34 S. Ct. 380, 232 U. S. 508, 58 L. Ed. 703, reversing judgments *O'Connor v. Great Northern R. Co.*, 136 N. W. 743, 118 Minn. 223, and 139 N. W. 618, 120 Minn. 359.

—154. Consideration.

See 9 Cent. Dig. Carr. §§ 641-645, 667.

The lack of an independent consideration for an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, cannot successfully be urged to avoid such provision, although the carrier may have had but one rate, where the consideration expressed was sufficient to support the entire contract made. Judgment 113 F. 91, 51 C. C. A. 76, affirmed.—*Cau v. Texas & P. Ry. Co.*, 24 S. Ct. 663, 194 U. S. 427, 48 L. Ed. 1053.

A clause in a bill of lading exempting a carrier from liability for loss by fire is valid, although the regular freight rates were charged and no option was given to the shipper to receive any other form of bill of lading. Judgment (C. C. A. 1905) 139 F. 127, 71 C. C. A. 391, reversed.—*Arthur v. Texas & P. Ry. Co.*, 27 S. Ct. 338, 204 U. S. 505, 51 L. Ed. 590.

—155. Assent of consignor or owner.

See 9 Cent. Dig. Carr. §§ 677, 679, 682-685, 691-696.

An exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, is valid, although the option or opportunity to ship the goods under the common-law liability, was not actually presented to the shipper by the carrier. Judgment 113 F. 91, 51 C. C. A. 76, affirmed.—*Cau v. Texas & P. Ry. Co.*, 24 S. Ct. 663, 194 U. S. 427, 48 L. Ed. 1053.

—156. Operation and effect of limitation in general.

See 9 Cent. Dig. Carr. §§ 697-719.

Contract between railway company and a construction company for reduced rate for transportation of camp outfit and supplies required in grading an extension held to exempt the railroad from all liability for loss during the transportation whether attributable to its negligence or not.—*Santa Fé, P. & P. R. Co. v. Grant Bros. Const. Co.*, 33 S. Ct. 474, 228 U. S. 177, 57 L. Ed. 787, reversing judgment 108 P. 467, 13 Ariz. 186.

—158. Limitation of amount of liability.

See 9 Cent. Dig. Carr. §§ 663-667, 699-703½, 708-710, 718, 718½.

H. shipped five horses and other property, by a railroad, in one car, under a bill of lading, signed by him, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable: First, to pay freight thereon" at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. * * * If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load. But no carrier shall be liable for the acts of the animals themselves, * * * nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." By the negligence of the railroad company or its servants, one of the horses was killed, and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race horses, and the plaintiff offered to show damages, based on their value, amounting to over \$25,000. Held, that the testimony was properly excluded, and he was entitled to recover only \$1,200.—*Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717.

Inquiry as to actual value of interstate shipment is not vital to fairness, under Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, of a stipulation limiting carrier's liability to agreed value, where it plainly appears that the rate charged was based on value.—*Adams Exp. Co. v. Croninger*, 33 S. Ct. 148, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 33 S. Ct. 155, 228 U. S. 519, 57 L. Ed. 328, reversing judgments *Latta v. Chicago, St. P., M. & O. Ry. Co.*, 172 F. 850, 97 C. C. A. 198, and *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 184 F. 987, 106 C. C. A. 664.

A carrier could, at common law, by a fair agreement, limit the recovery in case of loss to an agreed value made to obtain the lower of two or more rates.—Id.

A stipulation in a carrier's receipt, limiting liability to an agreed value made to adjust the rate, is not forbidden by Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, providing that a carrier shall not be exempted from liability imposed by such amendment.—Id.

Shipper and carrier of an interstate shipment are not forbidden to contract to limit carrier's liability to an agreed value made to adjust the rates by provisions of Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20.—*Chicago, B. & Q. Ry. Co. v. Miller*, 33 S. Ct. 155, 226 U. S. 513, 57 L. Ed. 323, reversing judgment *Miller v. Chicago, B. & Q. R. Co.*, 123 N. W. 449, 85 Neb. 458; *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328, reversing judgments *Latta v. Chicago, St. P., M. & O.*

Ry. Co., 172 F. 850, 97 C. C. A. 198, and Chicago, St. P., M. & O. Ry. Co. v. Latta, 184 F. 987, 106 C. C. A. 664.

A limitation of liability to a valuation agreed upon to determine which of two rates shall apply to a particular shipment is not forbidden by the provision in Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20.—Kansas City Southern R. Co. v. Carl, 33 S. Ct. 391, 227 U. S. 639, 57 L. Ed. 683, reversing judgment 121 S. W. 932, 91 Ark. 97, 134 Am. St. Rep. 56.

A case of valuation to adjust the rate and not of exemption from liability for negligence, forbidden by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, is presented where the shipper delivered to the initial carrier an agreement to release all liability in excess of \$5 per hundred pounds for household goods, carrier's tariff sheets on file showing two rates on household goods, one when released to \$5 per hundred pounds and the higher rate when not so released, and the rate indorsed being such lower rate.—Id.

Shipper and carrier of an interstate shipment are not forbidden to contract to limit the carrier's liability to an agreed value to adjust the rate by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20.—Missouri, K. & T. R. Co. v. Harriman Bros., 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690, reversing judgment (Tex. Civ. App.) Missouri, K. & T. Ry. Co. of Texas v. Same, 128 S. W. 932.

Gross disproportion between value of interstate express shipment and the arbitrary value fixed in express receipt does not prevent application of rule that carrier may, under Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, limit its liability to an agreed value to secure a lower rate.—George N. Pierce Co. v. Wells Fargo & Co., 35 S. Ct. 351, 236 U. S. 278, 59 L. Ed. 576, affirming judgment 189 F. 561, 110 C. C. A. 645.

Liability of a terminal carrier as warehouseman is controlled by a limitation to an agreed value on which the rate was adjusted, in view of the Hepburn Act and of a provision in the bill of lading.—Cleveland, C., C. & St. L. Ry. Co. v. Dettlebach, 36 S. Ct. 177, 239 U. S. 588, 60 L. Ed. 453.

160. Limitation of time to sue.

See 9 Cent. Dig. Carr. §§ 231, 673.

Shipper and carrier of an interstate shipment are not forbidden to stipulate that an action for damage to shipment must be brought within 90 days by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887.—Missouri, K. & T. R. Co. v. Harriman Bros., 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690, reversing judgment (Tex. Civ. App.) Missouri, K. & T. Ry. Co. of Texas v. Same, 128 S. W. 932.

161. Limitation of liability as ground of defense.

See 9 Cent. Dig. Carr. §§ 649, 672, 720-733.

163. — Presumptions and burden of proof.

See 9 Cent. Dig. Carr. §§ 722-725.

The burden of showing that a fire causing the loss of a shipment was due to the negligence of the carrier or its servants rests on the shipper, where the bill of lading contains a provision exempting the carrier from liability from damages caused by fire.—(Sup., La.) Cau v. Texas & P. Ry. Co., 24 S. Ct. 663, 194 U. S. 427, 48 L. Ed. 1053, affirming judgment 113 F. 91, 51 C. C. A. 76.

Shipper's knowledge that carrier's rate was based on value of the shipment is to be presumed, where it appears from the terms of the bill of lading and from the published rates on file.—Adams Exp. Co. v. Croninger, 33 S. Ct. 148, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Chicago, St. P., M. & O. Ry. Co.

v. Latta, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328, reversing judgments Latta v. Chicago, St. P., M. & O. Ry. Co., 172 F. 850, 97 C. C. A. 198, and Chicago, St. P., M. & O. Ry. Co. v. Latta, 184 F. 987, 106 C. C. A. 664.

Recitals in bill of lading for interstate shipment held prima facie evidence of a choice of rates by shipper, casting burden of proof on him to show that carrier had not complied with the law as to filing and publishing of rate schedules.—Cincinnati, N. O. & T. P. Ry. Co. v. Rankin, 36 S. Ct. 555, 241 U. S. 319, 60 L. Ed. 1022.

(I) CONNECTING CARRIERS.

Action against foreign connecting carrier, see Corporations, 662.

Attorneys' fees as costs, see Costs, 173.

Due process of law, see Constitutional Law, 297.

Equal protection of law, see Constitutional Law, 241.

Exclusiveness of congressional regulations, see Commerce, 8.

Exclusive or concurrent jurisdiction of state and federal courts of action against, see Courts, 489.

Imposition of liability on initial carrier with right of recovery over against connecting carrier as deprivation of property without due process of law, see Constitutional Law, 297; as infringing liberty to contract, see Constitutional Law, 276; as regulation of commerce, see Commerce, 33.

Process, service on foreign corporation, see Corporations, 662.

173. Special contracts for through transportation.

See 9 Cent. Dig. Carr. §§ 760-763, 781-784.

A bill of lading stating that the goods are consigned to plaintiff at P.; that they are to be transported to the carrier's warehouse at —; that goods consigned to a place beyond its line will be forwarded, but that it will not be liable for loss occurring after they are forwarded,—is not a through contract, entitling plaintiff to recover against the first carrier for loss occurring by reason of a wrong delivery by the last carrier.—Michigan Cent. R. Co. v. Myrick, 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

A special agreement by a carrier to transport a through shipment by the vessel of a connecting carrier sailing on a designated date results from the acceptance of a through rate for a shipment "to be forwarded" via such steamer, which rate was quoted with notice that it was of vital importance that the shipment should be transported promptly, and should go forward by the earliest possible steamer without delay, in order to enable the shipper to fulfill a proposed agreement which it was about to make for the sale of the goods at the final destination, and which would require delivery there at a fixed date. Decree Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 120 F. 873, 57 C. C. A. 533, affirmed.—Northern Pac. Ry. Co. v. American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

176. Delay in transportation or delivery.

See 9 Cent. Dig. Carr. §§ 766-774.

Nonperformance of a special agreement of a carrier to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not excused by the refusal of the deputy collector of the port to grant a clearance while the freight was on board because it was contraband of war, where the contract was not unlawful when made, and was not rendered unlawful by any subsequent legislation, and was made with knowledge that difficulties might arise in the course of transportation

because of the character of the freight. Decree Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 120 F. 873, 57 C. C. A. 533, affirmed.—Northern Pac. Ry. Co. v. American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

◀177. Loss of or injury to goods.

See 9 Cent. Dig. Carr. §§ 775-789, 791-803.

The rule as to transportation by connecting lines of railroads is that each company is only bound, in the absence of a special contract, to carry safely over its own route, and deliver safely to the next carrier.—Michigan Cent. R. Co. v. Myrick, 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

A carrier receiving property for transportation to a point on another line in another state, is, under the Carmack amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]) to Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 8154), liable for the other carrier's negligence in failing to deliver shipment.—(1912) Galveston, H. & S. A. Ry. Co. v. Wallace, 32 S. Ct. 205, 223 U. S. 481, 58 L. Ed. 516, affirming judgment (Civ. App. 1909) 117 S. W. 169, and (Civ. App. 1909) Same v. Crow, Id. 170.

Damages for loss of market for unreasonable delay in transportation en route are within provision of Carmack Amendment.—New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland, 36 S. Ct. 230, 240 U. S. 34, 60 L. Ed. 511, affirming judgment 89 A. 433, 122 Md. 215.

A terminal carrier is not relieved from liability for misdelivering an interstate shipment by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, making initial carrier liable for loss anywhere en route.—Georgia, F. & A. Ry. Co. v. Blish Milling Co., 36 S. Ct. 541, 241 U. S. 190, 60 L. Ed. 948, affirming judgment 82 S. E. 784, 15 Ga. App. 142.

An express company, accepting in London an automobile to be shipped to New York, which boxed the same, taking from steamship bill of lading limiting liability to \$100, held secondarily liable to the owner, where car was damaged through the negligence of stevedores of the steamship company in discharging the cargo.—Reid v. Fargo, 36 S. Ct. 712, 241 U. S. 544, 60 L. Ed. 1156, reversing decree 213 F. 771, 130 C. C. A. 285.

◀178. Carrier as forwarder or warehouseman.

See 9 Cent. Dig. Carr. §§ 804-812.

The fact that the railroad company, which had delivered cotton on a wharf, to be loaded on a steamer, had notified the steamship line that the cotton was ready, and asked them to take it away, did not make the custody of the railroad company that of a warehouseman, instead of a common carrier.—Texas & P. Ry. Co. v. Clayton, 19 S. Ct. 421, 173 U. S. 348, 43 L. Ed. 725, affirming judgment 84 F. 306, 28 C. C. A. 142.

◀179. Transportation of cars or other vehicles of other carrier.

See 9 Cent. Dig. Carr. §§ 812, 814.

A railroad company is liable to a connecting carrier for the loss of the latter's cars by fire while in the possession and control of the former company, but standing in the yard of a terminal company, awaiting orders from consignees for further movement, where the contract with the terminal company is not for the storage of the cars, but merely for terminal facilities and storage room.—Chicago, M. & St. P. R. Co. v. Bosworth, 21 S. Ct. 183, 179 U. S. 442, 45 L. Ed. 287.

◀180. Limitation of liability.

See 9 Cent. Dig. Carr. §§ 815-822.

A railroad bill of lading for cotton shipped from Texas to Liverpool provided that responsibility on the part of such railroad should cease "upon delivery of said cotton to its next connecting carrier," and, in case of loss or damage, "that carrier alone shall be held liable therefor in whose actual custody" the cotton shall be at the time of such damage or loss. The railroad transported the cotton to New Orleans, and unloaded it on its own wharf, from which it was to be loaded upon the steamship of a connecting carrier, and gave notice to such carrier that the cotton was ready to be taken by it. The cotton was destroyed by fire while on the wharf, and before the arrival of the vessel. Held, that such loss occurred while the cotton was in the "actual custody" of the railroad company, and it was liable therefor, under the bill of lading.—Texas & P. Ry. Co. v. Clayton, 19 S. Ct. 421, 173 U. S. 348, 43 L. Ed. 725, affirming judgment 84 F. 306, 28 C. C. A. 142.

A railroad company does not, by unloading cotton on a pier under its sole and absolute control and possession, and notifying a steamship company, the succeeding carrier, of its arrival, deliver the cotton "to the steamship company or on the steamship pier," within the meaning of a clause in the bill of lading providing that its liability shall terminate on such delivery, even assuming that such pier was the place agreed upon between the railroad and steamship companies to make delivery of cotton to be thereafter carried by the steamship company, where the railroad company still continues to retain full control of the cotton, and could, under certain contingencies, and at any time before delivery to the steamship, send the cotton by another steamer, and by agreement between the parties the steamship company was not to take the property until it sent a steamer to the pier for that purpose. Judgment, Texas & P. Ry. Co. v. Callendar, 98 F. 538, 39 C. C. A. 154, affirmed.—Texas & P. Ry. Co. v. Callender, 22 S. Ct. 257, 183 U. S. 632, 46 L. Ed. 362.

A carrier remains liable as at common law for a loss of cotton by fire while in its possession, although it was "ready for delivery" to the next carrier, or was awaiting further conveyance within the meaning of clauses in the bill of lading, modifying its common-law liability for the loss of goods under such circumstances, where such bill of lading also declares that "cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," since this specific clause takes effect to the exclusion of general clauses containing matters of general exemption.—Id.

Any limitation of liability in a contract made by the initial carrier of an interstate shipment which would be valid in its own behalf under Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, will inure to the benefit of any succeeding carrier in the chain of transportation.—Kansas City Southern R. Co. v. Carl, 33 S. Ct. 391, 227 U. S. 639, 57 L. Ed. 683, reversing judgment 121 S. W. 932, 91 Ark. 97, 134 Am. St. Rep. 56.

Acceptance by carrier of interstate shipment over route selected by shipper as to which the carrier had no established rate held not so involuntary, within Carmack Amendment June 29, 1906, § 7, to Interstate Commerce Act Feb. 4, 1887, § 20, making such carrier answerable for damages by connecting carriers notwithstanding contrary stipulation, as to be unconstitutional.—Norfolk & W. R. Co. v. Dixie Tobacco Co., 33 S. Ct. 609, 228 U. S. 593, 57 L. Ed. 930, affirming judgment 69 S. E. 1106, 111 Va. 813.

Fifty dollars is the limit of recovery from an express company on its breach of duty imposed by Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, as initial carrier of interstate shipment, where the shipper accepted the company's receipt limiting the amount of recovery to \$50.—*George N. Pierce Co. v. Wells Fargo & Co.*, 35 S. Ct. 351, 236 U. S. 278, 59 L. Ed. 576, affirming judgment 189 F. 561, 110 C. C. A. 645.

Misdelivery of interstate shipment by terminal carrier is "failure to make delivery," within clause in bill of lading issued by initial carrier under Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20.—*Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 36 S. Ct. 541, 241 U. S. 190, 60 L. Ed. 948, affirming judgment 82 S. E. 784, 15 Ga. App. 142.

Initial carrier may stipulate, in bill of lading issued under Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, that claims for loss or delay must be made at the point of delivery or point of origin within four months after delivery, or after reasonable time for delivery.—*Id.*

Stipulation in bill of lading requiring claims for damages or misdelivery to be presented within four months after a reasonable time for delivery has elapsed cannot be avoided by suing in trover, since the parties could not waive terms of contract, under shipment under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, nor could carrier by conduct give shipper right to hold carrier to different responsibility from that fixed by the agreement.—*Id.*

Claim for value of shipment misdelivered held sufficient, within requirement that claims must be made in writing within four months after time for delivery, where shipper telegraphed carrier five days after arrival, refusing shipment because of delay.—*Id.*

181. Actions against connecting carriers.

See 9 Cent. Dig. Carr. §§ 790, 829-852.

185. — Evidence.

See 9 Cent. Dig. Carr. §§ 835-850.

Proof of delivery of interstate shipment to initial carrier and failure to deliver to the consignee raises a presumption of negligence creating liability under the Carmack amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), to Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), for loss or damage caused thereby.—(1912) *Galveston, H. & S. A. Ry. Co. v. Wallace*, 32 S. Ct. 205, 223 U. S. 481, 56 L. Ed. 516, affirming judgments (Civ. App. 1909) 117 S. W. 169, and (Civ. App. 1909) *Same v. Crow*, *Id.* 170.

(J) CHARGES AND LIENS.

For payment of custom duties, see Customs Duties, 188.

Liability of custom collector for failure to give notice of charges, see Customs Duties, 185.

188. Rights of carrier in general.

See 9 Cent. Dig. Carr. §§ 853-858.

A carrier is entitled to compensation in addition to the actual cost involved in taking loaded cars in transit to the shipper's warehouses at an intermediate point for unloading, inspection, and reloading, and taking away the reloaded cars, whether or not the carrier is under any obligation to extend such a privilege to shippers. Judgment (C. C. A. 1907) 153 F. 728, 82 C. C. A. 614, reversed.—*Southern Ry. Co. v. St. Louis Hay & Grain Co.*, 29 S. Ct. 678, 214 U. S. 297, 53 L. Ed. 1004.

(K) DISCRIMINATION AND OVERCHARGE.

198. Rights and liabilities of carrier in general.

See 9 Cent. Dig. Carr. § 901.

A common carrier may be compelled by mandamus or other writ to treat all shippers alike. Judgment *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 88 F. 72, 74 Kan. 803, affirmed.—*Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 29 S. Ct. 214, 211 U. S. 612, 53 L. Ed. 352.

Settlement in good faith on actual shipping weights of a controversy between shipper and carrier over freight charges prevents carrier from recovering difference between the charge as settled and the rate based on car capacity.—*St. Louis Southwestern Ry. Co. v. Spring River Stone Co.*, 35 S. Ct. 456, 236 U. S. 718, 59 L. Ed. 805.

201. Actions for discrimination.

See 9 Cent. Dig. Carr. §§ 906-915.

The measure of damages to a shipper of coal for unlawful discriminations by a railroad company in favor of another coal shipper, similarly circumstanced as to place and distance, is the amount which the complaining party would have received if he had been allowed the same rebate per ton as the favored shipper. The questions whether profits were lost in the sale of coal by reason of the nonallowance of such rebates is too remote to be considered.—*Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 13 S. Ct. 970, 37 L. Ed. 896; *Same v. Taggart*, 149 U. S. 698, 13 S. Ct. 977, 37 L. Ed. 905.

III. CARRIAGE OF LIVE STOCK.

Due process of law, see Constitutional Law, 303.

Peremptory instructions in action for loss of shipment, see Trial, 141.

Regulation as interference with commerce, see Commerce, 35, 62.

Review of rulings in action for injuries, see Appeal and Error, 171.

Transportation of diseased animals, see Animals, 31.

204. Statutory regulation.

See 9 Cent. Dig. Carr. § 927.

Limitation of time for transportation of live stock may be imposed, as is done by Laws Neb. 1905, c. 107, passed in the power of the state to regulate carriers in the performance of their duties.—*Chicago, B. & Q. R. Co. v. Cram*, 33 S. Ct. 437, 228 U. S. 70, 57 L. Ed. 734, affirming judgments *Cram v. Chicago, B. & Q. R. Co.*, 122 N. W. 31, 84 Neb. 607, 26 L. R. A. (N. S.) 1022 and 123 N. W. 1045, 85 Neb. 586, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170; *Chicago, B. & Q. R. Co. v. Kyle*, 33 S. Ct. 440, 228 U. S. 85, 57 L. Ed. 741, affirming judgment *Kyle v. Chicago, B. & Q. R. Co.*, 122 N. W. 37, 84 Neb. 621.

205. Nature of carrier's duties and liabilities in general.

See 9 Cent. Dig. Carr. §§ 918, 920, 923.

A carrier of live stock cannot make a valid agreement to receive and deliver all stock consigned to it exclusively at and through the stock yards of another corporation, and to charge the shipper or consignee, for the benefit of such corporation, a certain amount for the use of its yards, in addition to charges for transportation.—*Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73.

◀ 207. Special contract for transportation.

See 9 Cent. Dig. Carr. §§ 129-239.

The rule as to transportation by connecting lines of railroads is that each company is only bound, in the absence of a special contract, to carry safely over its own route and deliver safely to the next carrier. Whether a receipt for cattle consigned to a point beyond the end of its line, upon which was indorsed a "rule of transportation" that the company would not be liable as carrier beyond its terminus, constituted a special contract for through carriage, was a question that should have been submitted to the jury, with the evidence of all the attendant circumstances.—*Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

◀ 212. Duties in respect to delivery.

See 9 Cent. Dig. Carr. §§ 918, 919.

Action was brought against a railroad company by the assignee of freight receipts to recover for the misdelivery of live stock to parties whom defendants had been directed to notify of their arrival, but who presented no bill of lading or order of the consignee. It was not shown on the trial that plaintiff or the shipper had any knowledge that it had been the common practice of defendant to so deliver former shipments between the same parties. *Held*, that defendant was liable for the value of the stock.—*North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 8 S. Ct. 266, 31 L. Ed. 287.

◀ 213. Delay in transportation or delivery.

See 9 Cent. Dig. Carr. §§ 920-922.

A railroad company cannot be exonerated from liability for an unreasonable delay in the transportation of stock on the ground that a heavy dew rendered the track slippery and impeded the progress of the train; such an occurrence being an ordinary one, against the effect of which it was the duty of the company to provide. Judgment 104 F. 728, 44 C. C. A. 179, affirmed.—*Missouri, K. & T. Ry. Co. v. Truskett*, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259.

A shipper cannot recover damages for breach of carrier's special agreement by which, contrary to Act Feb. 4, 1887, §§ 3, 6, and Act Feb. 19, 1903, it undertook, for the joint through rate, to expedite a railroad shipment of horses, though the shipper did not know that the established schedules did not provide for such special service.—(1912) *Chicago & A. R. Co. v. Kirby*, 32 S. Ct. 648, 225 U. S. 155, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, reversing judgment (1909) *Kirby v. Chicago & A. R. Co.*, 90 N. E. 252, 242 Ill. 418.

◀ 214. Loss or injury.

See 9 Cent. Dig. Carr. §§ 923, 929, 931.

◀ 215. — Liability in general.

See 9 Cent. Dig. Carr. § 923.

Deviation by a carrier of live stock from the usual and most direct route because of a washout on a connecting line, and the bad condition of its own tracks, will not, in the entire absence of all negligence in selecting the new route, which is as reasonably direct as is available under existing conditions render the carrier liable for a loss occasioned by a flood at a point on such new route. Judgments (1906) *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 147 F. 457, 77 C. C. A. 601, and *Minnesota & D. Cattle Co. v. Same*, 147 F. 463, 77 C. C. A. 607, affirmed.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 28 S. Ct. 607, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70.

◀ 218. Limitation of liability.

See 9 Cent. Dig. Carr. §§ 674-696, 927, 928, 933-949.

A stipulation, in a shipping contract limiting carrier's liability on the loss of interstate shipment of cattle to \$30 for each bull and \$20 for each cow to secure the lower of two rates on file, was not forbidden by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, though the true value of the cattle greatly exceeded this valuation, where they were loaded by the shipper and not seen by carrier.—*Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690, reversing judgment (Tex. Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Same*, 128 S. W. 932.

◀ 219. Connecting carriers.

See 9 Cent. Dig. Carr. §§ 950, 951.

A contract made by a railroad company, containing a positive obligation on its part to transport live stock from a point in Missouri to Chicago, over lines of other companies as well as its own, limited only by reference to subsequent conditions or rules and regulations inserted therein, subjects the carrier to liability under the state statute, as interpreted by its supreme court; but of this the carrier has no constitutional ground of complaint, since the liability is not imposed by the statute on the interstate shipment, but arises from the failure of the contract to conform to the statutory requirements.—*Missouri, K. & T. Ry. Co. v. McCann*, 19 S. Ct. 755, 174 U. S. 580, 43 L. Ed. 1093.

Notice to officer of connecting carrier at final destination *held* to satisfy requirement of stipulation in through bill of lading for interstate shipment that the shipper shall give notice of claim to some officer "of said company" before cattle are removed, in view of Carmack amendment.—*Northern Pac. Ry. Co. v. Wall*, 36 S. Ct. 493, 241 U. S. 87, 60 L. Ed. 905, reversing judgment *Wall v. Northern Pac. Ry. Co.*, 145 P. 291, 50 Mont. 122.

◀ 220. Actions against carriers of live stock.

See 9 Cent. Dig. Carr. §§ 930, 932, 952-964.

◀ 228. — Evidence.

See 9 Cent. Dig. Carr. §§ 957-960.

In an action against a railroad company for damage to cattle during transportation, the measure of damages being the difference between the market value of the animals, as sound as when received by the defendant, and their value in the condition in which it delivered them, evidence that, after they reached their destination, some died, and others aborted, is admissible, as showing the extent to which they had been injured at the time of delivery, and is not objectionable as allowing a double assignment of damages for the animals that died.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, modifying judgment (C. C.) *Estill v. New York, L. E. & W. R. Co.*, 41 F. 849.

◀ 229. — Damages.

See 9 Cent. Dig. Carr. §§ 930, 963, 964.

Plaintiffs imported cattle for breeding purposes, and in the course of their transportation by defendant railroad company they were so injured in a collision that many of them, which were with calf, miscarried. *Held*, in an action for damages, that the measure of recovery was the difference between the market value of the cattle had they reached their destination in calf, and their market value after losing their calves.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L.

Ed. 292, modifying judgment (C. C.) Estill v. New York, L. E. & W. R. Co., 41 F. 849.

Plaintiffs imported cattle for breeding purposes, and in the course of their transportation by defendant railroad company they were so injured in a collision that many of them, which were with calf, miscarried. *Held*, in an action for damages, that it was not necessary to show that the carrier had notice that the cattle were with calf, in order to charge it with the damages resulting from abortions produced by its negligence, where there was nothing to show that any special or unusual care was requisite by reason of their being pregnant.—*Id*.

Loss occasioned by fall in market value during delays attributable to the carrier's fault is not too speculative to form the basis of damages, where, at the time the contract of carriage was made, both parties knew and contemplated that the cattle were to be sold in a given market on the first possible market day after arrival.—*The Caledonia*, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, affirming decree (C. C.) 43 F. 681 (D. C.) 50 F. 567.

An action against a railroad for delay in the transportation of stock, by reason of which the shipper suffered damage, is one for breach of contract, and interest is recoverable on the amount of the loss from the time compensation therefor was demanded.—*Missouri, K. & T. Ry. Co. v. Truskett*, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259, affirming judgment 104 F. 728, 44 C. C. A. 179.

In an action against a railroad to recover for unreasonable delay in the transportation of cattle, it is not error to take as the basis for computation of damages the difference in the market price of the cattle in the market to which they were being shipped, where the destination was known to the defendant, although its contract covered their transportation only over its own line, and their delivery to a connecting carrier for the remainder of the shipment.—*Id*.

6-230. — Trial.

See 9 Cent. Dig. Carr. §§ 961, 962.

Plaintiffs imported cattle for breeding purposes, and in the course of their transportation by defendant railroad company they were so injured in a collision that many of them, which were with calf, miscarried. *Held*, in an action for damages, that instructions that the carrier was bound to deliver the cattle at their destination in as good order as it received them, and that if it failed so to do it must pay the difference between their value in such condition and their value in the condition in which they were actually delivered, are not misleading, when the jury are told in the same charge that the carrier is liable only for injuries directly traceable to its negligence.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, modifying judgment (C. C.) Estill v. New York, L. E. & W. R. Co., 41 F. 849.

IV. CARRIAGE OF PASSENGERS.

Matters peculiar to carriage by vessels, see Shipping, 6-157-168.

Orders of railroad commission as denying due process of law, see Constitutional Law, 6-297; as interference with interstate commerce, see Commerce, 6-62.

(A) RELATION BETWEEN CARRIER AND PASSENGER.

6-236. Duty to receive and transport passengers.

See 9 Cent. Dig. Carr. §§ 968-972.

The right to railway passenger carriage is not confined to persons who are physically sound, but is open, within a reasonable degree,

to those ailing and infirm. Judgment, *Mathew v. Wabash R. Co.* (Mo. App.) 78 S. W. 271, affirmed.—*Wabash R. Co. v. Mathew*, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

6-237. Who are passengers.

See 9 Cent. Dig. Carr. §§ 973-933, 1076, 1109, 1115, 1116, 1284.

6-241. — Employés of others carried under contract with carrier.

See 9 Cent. Dig. Carr. §§ 977-979.

An express messenger, occupying an express car, in charge of express matter, in pursuance of a contract between the railroad company and the express company, is not a passenger, within the meaning of the rule of public policy, which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence, and cannot recover of the railroad company for injuries sustained in a collision, where the contract between the companies exempts the railroad company from such liability, while his own contract, voluntarily entered into as a condition of employment, assumes all such risks, and stipulates that he will indemnify and hold his employer harmless from all liability for such accident or injury.—*Baltimore & O. S. W. Ry. Co. v. Voigt*, 20 S. Ct. 385, 176 U. S. 498, 44 L. Ed. 560.

6-247. Commencement and termination of relation.

See 9 Cent. Dig. Carr. §§ 984-993.

One who goes in proper time to a station, to take a train, and has a ticket for his passage, is entitled to the degree of care which the railroad company is bound to exercise towards passengers, as distinguished from mere strangers or trespassers; and his right to such care is not postponed until he has manifested by some outward act his intention to board the train. Judgment 7 App. D. C. 79, reversed.—*Warner v. Baltimore & O. R. Co.*, 18 S. Ct. 68, 168 U. S. 339, 42 L. Ed. 491.

(B) FARES, TICKETS, AND SPECIAL CONTRACTS.

Exclusive power of congress to regulate commerce, see Commerce, 6-8.

Regulations avoiding contracts for annual passes as impairing obligation of contract, see Constitutional Law, 6-155; as abridging liberty to contract, see Constitutional Law, 6-276.

Restraining dealing in tickets, see Injunction, 6-42, 189.

Suit for specific performance of agreement to issue free passes, jurisdiction of federal court, see Courts, 6-299.

6-251. Acts and statements of agents or employes.

See 9 Cent. Dig. Carr. §§ 1014, 1026; 40 Cent. Dig. Princ. & A. § 339.

Where the ticket expressly provided that no employé of defendant is authorized to waive any conditions of the contract, the action of defendant's baggageman in punching plaintiff's ticket and checking his baggage, and of the gateman in admitting him to the train, does not estop defendant to deny plaintiff's right to be carried on his return trip without compliance with an express provision of the ticket that it shall be stamped and signed by defendant's agent at the place of destination, before it will be received for return passage.—*Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 S. Ct. 50, 33 L. Ed. 290.

6-252. Sale of tickets.

See 9 Cent. Dig. Carr. §§ 1009, 1010, 1015.

Carrying on the business of purchasing and selling nontransferable reduced-rate excursion

railroad tickets for profit, to the injury of the railroad company issuing such tickets, is an actionable wrong, although actual malice in the sense of personal ill will may not exist. *Decree (1906) Louisville & N. R. Co. v. Bitterman*, 144 F. 34, 75 C. C. A. 192, affirmed.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 206, 52 L. Ed. 171, 12 Ann. Cas. 693.

Ⓒ—254. Conditions in tickets.

See 9 Cent. Dig. Carr. §§ 1020-1026.

Defendant sold plaintiff a ticket to a point beyond its own line providing that in selling the ticket defendant acted only as agent of the carrier beyond its own line, and was not responsible beyond that point; that the ticket was not good for a return passage, unless the holder identified himself at the office of the second carrier, and unless the ticket was properly stamped, etc.; that plaintiff should identify himself whenever required by conductors or other agents of the road; and that no agent had authority to alter the terms of the contract. Plaintiff presented himself for identification at the required place and at a proper time before the departure of a train, but no agent was present to perform the services or stamp the ticket. After reaching defendant's road, plaintiff was ejected because his ticket was not properly stamped, although he offered to identify himself to the conductor. *Held*, that defendant was under no obligations to accept the ticket until plaintiff had it properly stamped.—*Mosher v. St. Louis, I. M. & S. Ry. Co.*, 127 U. S. 390, 8 S. Ct. 1324, 32 L. Ed. 249.

In assumption against a railroad company for breach of a contract to carry plaintiff, which contract was contained in a ticket accepted and signed by plaintiff, evidence as to when he first knew of a condition contained in it is immaterial, as he is bound by the conditions, whether he read them or not.—*Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 S. Ct. 50, 33 L. Ed. 290.

Where plaintiff failed to comply with an express provision of his ticket that it should be stamped and signed by defendant's agent before it would be received for a return passage, he is not entitled to passage thereon.—*Id.*

The express recognition in the act to regulate commerce of the power of carriers engaged in interstate commerce to issue nontransferable reduced-rate excursion tickets, when considered with the restrictions embodied in the act concerning equality of rates, and with the prohibition against preferences, must be regarded as charging the carrier with the duty of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and hence causes the nontransferable clause to be operative and effective against anyone who wrongfully attempts to use such tickets. *Decree, Louisville & N. R. Co. v. Bitterman (1906)* 144 F. 34, 75 C. C. A. 192, affirmed.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 206, 52 L. Ed. 171, 12 Ann. Cas. 693.

A carrier may sell nontransferable round-trip, reduced-rate excursion tickets, and the condition of nontransferability and forfeiture embodied therein is not only binding upon the original purchaser, but upon anyone who acquires such a ticket and attempts to use the same in violation of its terms.—*Id.*

Presentation of mileage book by original purchaser for transportation of another accompanying him does not justify a forfeiture of the book under rule providing for forfeiture if presented by any other than original purchaser.—*Southern Ry. Co. v. Campbell*, 36 S. Ct. 33, 239 U. S. 99, 60 L. Ed. 165, affirming judgment *Campbell v. Southern Ry. Co.*, 77 S. E. 745, 94 S. C. 95.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

Ⓒ—268. Stopping over at intermediate points.

See 9 Cent. Dig. Carr. §§ 1056-1059.

Passengers are not presumed to know the regulations of railroad companies made for the guidance of conductors of trains in relation to stop-over privileges, and unless the passenger has actual knowledge thereof, or the face of his ticket shows the rule requiring a stop-over check, he is entitled to rely upon the representation of the ticket seller as to what is necessary to entitle him to such privilege.—*New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71.

Ⓒ—269. Changes and transfers to connecting lines.

See 9 Cent. Dig. Carr. §§ 1060-1063.

A carrier accepting a passenger for a destination beyond its line is guilty of negligence by delivering him at the junction point during a storm without sufficient shelter, where he could have reached a through coach on the train had he been informed there was such a car.—*Texas & P. Ry. Co. v. Bigger*, 36 S. Ct. 127, 239 U. S. 330, 60 L. Ed. 310, affirming judgment 218 F. 990, 133 C. C. A. 673.

Ⓒ—270. Duties of connecting carriers.

See 9 Cent. Dig. Carr. §§ 1064-1066.

A connecting carrier owes the same degree of care towards a through passenger alighting at a junction point to change cars that is required in his transportation.—*Texas & P. Ry. Co. v. Bigger*, 36 S. Ct. 127, 239 U. S. 330, 60 L. Ed. 310, affirming judgment 218 F. 990, 133 C. C. A. 673.

Ⓒ—273. Actions arising out of breach of contract.

See 9 Cent. Dig. Carr. §§ 1075-1084.

Ⓒ—277. — Damages.

See 9 Cent. Dig. Carr. §§ 1082-1084.

The amount of wages or profits which plaintiff alleges he could have earned by securing employment at the place of destination cannot be included in the damages recoverable for a carrier's breach of contract of transportation, where plaintiff did not know what his occupation or business would be at the place of destination. Judgment, *Morrison v. North American Transportation & Trading Co. (C. C.)* 85 F. 802, reversed.—*North American Transportation & Trading Co. v. Morrison*, 20 S. Ct. 869, 178 U. S. 262, 44 L. Ed. 1061.

Ⓒ—278. — Trial.

See 9 Cent. Dig. Carr. §§ 1080, 1081.

Whether a passenger for a station beyond the carrier's line should have known there was a through coach on the train *held* for the jury in an action for his death caused by exposure when transferring at the junction point.—*Texas & P. Ry. Co. v. Bigger*, 36 S. Ct. 127, 239 U. S. 330, 60 L. Ed. 310, affirming judgment 218 F. 990, 133 C. C. A. 673.

(D) PERSONAL INJURIES.

Appellate jurisdiction of Supreme Court in action for injuries, see Courts, Ⓒ—394(7). Due process of law, see Constitutional Law, Ⓒ—301.

Instruction assuming facts in action for injuries, see Trial, Ⓒ—191.

Interference with commerce, see Commerce, Ⓒ—62.

Nature of action for injuries, see Action, Ⓒ—27.

281. Care as to persons under disability.

See 9 Cent. Dig. Carr. §§ 1093-1097, 1241.

An invalid passenger is entitled to receive the same general high degree of care as other passengers, though in the absence of notice to the carrier of her condition, she is not entitled to special care. Judgment, *Mathew v. Wabash R. Co.* (Mo. App.) 78 S. W. 271, affirmed.—*Wabash R. Co. v. Mathew*, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

282. Persons to whom carrier is liable.

See 9 Cent. Dig. Carr. §§ 1103, 1107, 1108, 1115, 1116; 44 Cent. Dig. St. R. R. §§ 178-180.

A railway mail clerk accepting, when off duty, free passage in interstate transportation, does not forfeit his right to benefit of a local law charging a carrier with duty to exercise care for safety of gratuitous passengers, because his carriage may have been forbidden by Hepburn Act June 29, 1906.—*Southern Pac. Co. v. Schuyler*, 33 S. Ct. 277, 227 U. S. 601, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901, affirming judgments *Schuyler v. Southern Pac. Co.*, 109 P. 458, 37 Utah, 581, and 109 P. 1025, 37 Utah, 612.

283. Acts or omissions of carrier's employes.

See 9 Cent. Dig. Carr. §§ 1119-1124, 1140, 1141.

Where a deck passenger has notice of, and has contracted to observe, a regulation restricting deck passengers to a particular part of the boat, and the steamboat hands, in removing him from a place in which he had no right to be, use unnecessary and excessive force, the company is liable for the injuries caused to the passenger thereby.—*New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 S. Ct. 1039, 30 L. Ed. 1049.

A carrier is not liable in damages for an injury caused to a passenger by its servant under circumstances which free the servant from all criminal or civil responsibility.—*New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 18, 12 S. Ct. 109, 35 L. Ed. 919.

When a railroad conductor shoots a passenger, under the belief, which is reasonably warranted by the passenger's manner, attitude, and conduct, that an immediate assault upon him with a deadly weapon is intended, the company is not liable in damages, although in fact there was no actual danger.—*Id.*

284. Acts of fellow passengers or other third persons.

See 9 Cent. Dig. Carr. §§ 1126, 1127-1135, 1173, 1222.

Where a railway company delivers cars to a mining company by leaving them on a siding, it is bound to see that they are left and maintained in such a position as not to interfere with trains on the main track; and if the mining company negligently permits them to run down on the main track, whereby a train is derailed and plaintiff injured, the railway company is liable.—*Union Pac. Ry. Co. v. Harris*, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003.

285. Act of God, vis major, or inevitable accident.

See 9 Cent. Dig. Carr. §§ 1136-1139.

A landslide in a railway cut, which results from the loosening of the earth in its sides by a fall of rain which is not of unusual violence, is not such an occurrence as is embraced in the phrase "act of God."—*Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, reversing judgment 5 Mackey, 356.

286. Condition and use of premises.

See 9 Cent. Dig. Carr. §§ 1142-1148, 1150-1152.

The obligation of a railroad to use ordinary care to light its stations and approaches obtains while passengers sustain the relation of passengers, such as when leaving the train for refreshment, for the sending of telegrams, and the like.—*Texas & P. R. Co. v. Stewart*, 33 S. Ct. 548, 228 U. S. 357, 57 L. Ed. 875, affirming judgment *Same v. Mayer*, 183 F. 575, 105 C. C. A. 646.

287. Taking up passengers.

See 9 Cent. Dig. Carr. §§ 1154-1159, 1161-1166.

Where one who had procured a railroad ticket necessarily had to cross, from the depot, an intervening track, in order to reach his train after it had stopped at the platform, and in so doing was struck and killed by a train coming at full speed in the opposite direction, held, that the case was not governed by the strict rules as to stopping, looking, and listening applicable to trespassers or to strangers crossing the tracks, and the question whether he was guilty of contributory negligence should have been submitted to the jury. Judgment 7 App. D. C. 79, reversed.—*Warner v. Baltimore & O. R. Co.*, 18 S. Ct. 68, 168 U. S. 339, 42 L. Ed. 491.

288. Sufficiency and safety of means of transportation.

See 9 Cent. Dig. Carr. §§ 1168-1173, 1180-1185, 1188, 1189.

291. — Railroad tracks and roadbeds.

See 9 Cent. Dig. Carr. §§ 1170-1176.

It is negligence for the servants of a railroad company to leave a freight car, for five or ten minutes before the approach of an incoming passenger train, standing on a side track so near the main line as to make a collision inevitable, and a passenger on the latter, injured thereby, is entitled to recover.—*Farlow v. Kelly*, 108 U. S. 288, 2 S. Ct. 555, 27 L. Ed. 726.

A railroad company which maintains a cut with sides in such a condition that a landslide occurs therein is guilty of negligence, though the immediate cause of the accident was vibration produced by a train passing through the cut.—*Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, reversing judgment 5 Mackey, 356.

294. Management of conveyances.

See 9 Cent. Dig. Carr. §§ 1191-1215, 1219, 1220.

295. — In general.

See 9 Cent. Dig. Carr. §§ 1191-1197, 1199, 1213-1215, 1219, 1220.

In an action against a railroad company for negligent injuries, an instruction that, if defendant undertook to manage and conduct the running of trains by telegraph, it was bound to have a proper line for this purpose, with a reasonable number of stations and operators to properly control the movements of trains, is correct.—*Grand Trunk Ry. v. Walker*, 154 U. S. 653, 14 S. Ct. 1180, 25 L. Ed. 977.

303. Setting down passengers.

See 9 Cent. Dig. Carr. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243.

It is the duty of a street-railroad company to safely carry and deliver a passenger, and, in doing so, not only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger is about to alight, and not to start the car until he has alighted.—*Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 281.

305. Proximate cause of injury.

See 9 Cent. Dig. Carr. §§ 1132, 1136-1139, 1245, 1246.

If a horse-car driver was negligent in attempting to cross a steam railroad in front of an approaching train, resulting in injury to a passenger who jumped from the car in a reasonable effort to avoid injury from the expected collision, the fact that the negligence of the gateman in lowering the gate between the horses and the car united in producing the result does not absolve the horse-car company from liability.—*Washington & G. R. Co. v. Hickey*, 17 S. Ct. 661, 166 U. S. 521, 41 L. Ed. 1101.

Leaving a baggage truck at the very end of the station platform, at or near the place where it has been used in unloading baggage from the baggage car of a train, and failing to light the platform at that point, is not such negligence as will render the railway company liable, where a person, while endeavoring, by running alongside the rapidly receding train, to restore a child in his arms to its mother, who is standing on the platform of a car, stumbles over the truck in the dark, and drops the child, to its injury, as the railway is not bound to foresee and guard against such extraordinary conduct. Judgment (1907) 89 P. 207, 18 Okl. 75, reversed.—*Atchison, T. & S. F. Ry. Co. v. Calhoun*, 29 S. Ct. 321, 213 U. S. 1, 53 L. Ed. 671.

306. Companies or persons liable.

See 9 Cent. Dig. Carr. §§ 1249-1251; 41 Cent. Dig. R. R. §§ 812, 841.

The illegality of an agreement or arrangement under which a train is run by a railroad company over the track of another company will not relieve the owner of the train from liability for damages to a passenger caused by the negligence of its agents or servants. Judgment 14 App. D. C. 282, affirmed.—*Chesapeake & O. Ry. Co. v. Howard*, 20 S. Ct. 880, 178 U. S. 153, 44 L. Ed. 1015.

The existence of a lease by a railroad company of its road for an annual rental will not relieve a company which is running a train over the road from liability for injury to a passenger caused by the negligence of its own agents or servants in charge of the train.—*Id.*

307. Limitation of liability.

See 9 Cent. Dig. Carr. §§ 1252-1259, 1491.

A stipulation in a railway pass that the railway company shall not be liable to the user "under any circumstances, whether of negligence of agents or otherwise, for any injury to the person," violates no rule of public policy, and relieves the company from liability for personal injuries resulting from the ordinary negligence of its employees to one riding on the pass, who has accepted it with knowledge of its conditions. Judgment 118 F. 324, 54 C. C. A. 196, reversed.—*Northern Pac. Ry. Co. v. Adams*, 24 S. Ct. 408, 192 U. S. 440, 48 L. Ed. 513.

A stipulation in a free railway pass, requiring the user to assume the risk of injury due to the carrier's negligence, is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her. Judgment 20 App. D. C. 500, affirmed.—*Boeing v. Chesapeake Beach Ry. Co.*, 24 S. Ct. 515, 193 U. S. 442, 48 L. Ed. 742.

A carrier may validly stipulate in a pass for interstate transportation issued to the wife of an employé under Act June 29, 1906, § 1, that it shall not be liable for negligent injury to her person.—*Charleston & W. C. R. Co. v. Thompson*, 34 S. Ct. 964, 234 U. S. 576, 58 L. Ed. 1476, reversing judgment 79 S. E. 242, 13 Ga. App. 541.

Provision in contract by Pullman car porter releasing carriers from liability for injuries held a complete bar to recovery for injuries received in a collision due to carrier's negligence.—*Robinson v. Baltimore & O. R. Co.*, 35 S. Ct. 491, 237 U. S. 84, 59 L. Ed. 849, affirming judgment 40 App. D. C. 169.

A Pullman porter may stipulate in his contract with the Pullman Company to exempt any carrier hauling cars from liability for injuries, notwithstanding the prohibition of Employers' Liability Act April 22, 1908, § 5; he not being an employé of the carrier.—*Id.*

309. Actions for injuries.

See 9 Cent. Dig. Carr. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1247, 1248, 1270-1274, 1276-1283, 1285-1295, 1297-1305, 1307-1336, 1340-1345.

314. — Pleading.

See 9 Cent. Dig. Carr. §§ 1260, 1270, 1273, 1274, 1276-1280; 37 Cent. Dig. Neglig. § 182.

Where a complaint against two railroad companies designates them as several defendants, and alleges that each is a corporation, and that they jointly own and operate the road on which plaintiff was injured, and jointly committed the acts causing such injury, an allegation that they together "were a common carrier of passengers on said road" cannot be construed to mean that they were a single company, and so incapable of separate liability.—*Atlantic & P. Ry. Co. v. Laird*, 17 S. Ct. 120, 164 U. S. 393, 41 L. Ed. 485, affirming judgment 58 F. 760, 7 C. C. A. 489.

315. — Issues, proof, and variance.

See 9 Cent. Dig. Carr. §§ 1270, 1281, 1282.

A declaration having alleged that plaintiff was injured by being pushed from a horse car at a crossing in the commotion caused by an approaching train, proof that she was injured by jumping from the car in a reasonable effort to avoid danger is not a substantial variance.—*Washington & G. R. Co. v. Hickey*, 17 S. Ct. 661, 166 U. S. 521, 41 L. Ed. 1101.

Agreement of Pullman car porter to release carrier from liability for injuries sustained held properly admitted in evidence under plea of not guilty in a suit for damages sustained in a collision.—*Robinson v. Baltimore & O. R. Co.*, 35 S. Ct. 491, 237 U. S. 84, 59 L. Ed. 849, affirming judgment 40 App. D. C. 169.

317. — Admissibility of evidence.

See 9 Cent. Dig. Carr. §§ 1285, 1297-1305.

In an action by a passenger against a carrier for injuries sustained through the negligence of defendant's servant, defendant, in order to prove that plaintiff was a trespasser, may ask plaintiff, on cross-examination, if he did not refuse to pay his fare or leave the coach, when plaintiff has testified that he was rightfully in the coach as a passenger under the usual conditions.—*Gilmer v. Higley*, 110 U. S. 47, 3 S. Ct. 471, 28 L. Ed. 62.

In an action against a railroad corporation for personal injuries, there being evidence tending to show that the accident was caused by a worn-out rail, evidence as to the general condition of the track, and that the rails had been in use a great many years, is admissible as tending to show that a worn-out rail was the cause of the accident, and that defendant had neglected to repair the defect.—*Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257.

318. — Sufficiency of evidence.

See 9 Cent. Dig. Carr. §§ 1270, 1307-1314.

In an action against a steamship company for causing the death of plaintiff's intestate in a collision between two of defendant's vessels,

on one of which the intestate was going from New York to Stonington, where the only evidence as to the intestate's death was that of a witness who testified that he saw the dead body at Stonington two days after the collision, there being no evidence as to what caused the intestate's death, or how his body came to be found there, it is error to direct the jury to find for plaintiff, the proof not showing that the intestate lost his life in consequence of the collision.—*Providence & S. S. S. Co. v. Clare*, 127 U. S. 45, 8 S. Ct. 1094, 32 L. Ed. 199.

319. — Damages.

See 9 Cent. Dig. Carr. § 1339-1345.

For wrongful arrest of a passenger on a railway train by the conductor, the railroad company is not liable to punitive damages, in addition to such damages as will compensate the passenger for his outlay and injured feelings, merely on the ground that the conductor's illegal conduct was wanton and oppressive, where it is not shown that he was known to the company to be an unsuitable person, or that it participated in, approved, or ratified his treatment of the passenger.—*Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 S. Ct. 261, 37 L. Ed. 97.

320. — Questions for jury.

See 9 Cent. Dig. Carr. § 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1326; 37 Cent. Dig. Neglig. § 301.

Whether it is negligence to run a street car at full speed past a usual stopping place when persons can plainly be seen standing upon the platform between the inner rails, awaiting a car approaching from the opposite direction, is a question for the jury, where the street car company had sanctioned such a practice on the part of intending passengers, and the space between the rails, while wide enough to enable a person standing in the center to escape injury, left but a narrow margin of safety. Judgment (1904) 23 App. D. C. 551, reversed.—*Chunn v. City & Suburban Ry. of Washington*, 28 S. Ct. 63, 207 U. S. 302, 52 L. Ed. 219.

The duty to keep an elevator door shut cannot be said not to exist, as a matter of law, in favor of all passengers, whether the car is crowded or not.—*Munsey v. Webb*, 34 S. Ct. 44, 231 U. S. 150, 58 L. Ed. 162, affirming judgment 37 App. D. C. 185.

Failure to close the elevator door or to guard the open space with the arm of the elevator boy, cannot, as a matter of law, be said not to be the proximate cause of the death of a passenger who fell into the opening while the car was ascending.—*Id.*

321. — Instructions.

See 9 Cent. Dig. Carr. § 1247, 1326-1336, 1342.

In an action against a railroad company for injuries to a passenger, where an instruction is given for defendant that the burden of proof is on plaintiff to show negligence from which his injury resulted, it is error to refuse to modify the instruction by adding that the injury itself, if plaintiff was in the exercise of ordinary care, is prima facie evidence of negligence.—*Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, reversing judgment 5 Mackey, 356.

The trial court is not bound to grant an instruction which assumes that there is no evidence of negligence on the part of the conductor of a street car toward a passenger attempting to alight therefrom, and that the negligence, if any, was wholly that of the motorman, where the whole case as to the alleged negligence of the company was properly submitted to the jury, leaving them to determine whether, under all the evidence, the injury was caused by the negligence of its employes or any of them. Judgment, *City & S. Ry. Co. v. Svedborg*, 20

App. D. C. 543, affirmed.—*City & S. Ry. of Washington v. Svedborg*, 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

In an action by a passenger for injuries, it is proper to instruct that if in making the coupling, the attempt to accomplish which occasioned the collision and consequent injury, the company used a degree of care or caution less, in however small a degree, than the utmost care of very cautious railroad men under the same or similar circumstances, then the defendant was not cautious. Judgment, *Mathew v. Wabash R. Co.* (Mo. App.) 78 S. W. 271, 81 S. W. 646, 115 Mo. App. 468, affirmed.—*Wabash R. Co. v. Mathew*, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

(E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

327. Awaiting and seeking transportation.

See 9 Cent. Dig. Carr. § 1363-1366.

A railroad company owes to one standing to it in the relation of a passenger, who must necessarily cross its tracks at a way station to reach his train, a higher degree of care than that due to mere trespassers or strangers; and the passenger has a right to rely on the exercise of such care by the company. Judgment 7 App. D. C. 79, reversed.—*Warner v. Baltimore & O. R. Co.*, 18 S. Ct. 68, 168 U. S. 339, 42 L. Ed. 491.

329. In transit.

See 9 Cent. Dig. Carr. § 1370-1384.

331. — Dangerous position.

See 9 Cent. Dig. Carr. § 1371, 1374-1382.

A passenger in a railroad car, who, while riding with his elbow on the sill of an open window, is so jarred by a collision that his arm is thrown outside the car, and, coming in contact with another car, is crushed, is not guilty of contributory negligence.—*Farlow v. Kelly*, 108 U. S. 288, 2 S. Ct. 555, 27 L. Ed. 726.

333. Leaving conveyance.

See 9 Cent. Dig. Carr. § 1385, 1386, 1388-1397.

If a conductor of a street car negligently fails to observe whether a passenger has alighted, or, knowing that he has not, negligently starts the car with a sudden jerk, in consequence whereof the passenger is thrown from the step, and injured, such negligence as might be imputed to the passenger in being upon the step at all cannot be properly considered as contributory negligence.—*Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

In an action against a railroad company for death by wrongful act, plaintiff's testimony was that deceased, after leaving a train at a small way station, stopped to help a family, including two small children, to alight from the car, and started towards the station, purposing to spend the night there. In so doing he stepped upon an intervening track, which had been leveled up with earth for crossing, and was struck by a train which was moving rapidly without ringing a bell. The family that deceased had assisted barely escaped, and two members thereof testified that they did not know that they were walking upon a track, and had no idea that an engine was approaching. There was no light except a bonfire and the locomotive headlights. There was some conflicting testimony as to these facts, but the jury gave a verdict for plaintiffs. Held, that defendant was not entitled to an instruction that deceased was guilty of contributory negligence.—*Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642.

A flight of steps descended from a railroad station about 15 feet to an unimproved street,

passing under the tracks, with uneven surface, being a natural ravine, down which ran a large stream, making the ground marshy. It was the universal custom for persons going across the railroad to cross over the tracks. *Held*, that there was no absolute obligation upon a passenger, alighting from a train on a dark night, the street being unlighted, to use it in crossing the railroad to reach his home.—*Chicago, M. & St. P. Ry. Co. v. Lowell*, 151 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131.

—334. Disobedience of rules of carrier.
See 9 Cent. Dig. Carr. § 1355.

A passenger, while crossing the track next the train he had left, was injured by another train passing thereon. He had alighted on that side, contrary to a notice of the railway company, without special necessity, but it was customary for passengers to do so, without objection. There was no manifest danger, and he got off in such a way that he could not have failed to see a train coming, if properly lighted. *Held*, that disregarding the notice was not, as matter of law, contributory negligence.—*Chicago, M. & St. P. Ry. Co. v. Lowell*, 151 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131.

A shipper of stock in an emigrant car, who rode with it in the car in violation of the terms of his contract, which required him to remain in the caboose while the train was in motion, was not for that reason guilty of negligence preventing his recovery for an injury which resulted from the negligence of defendant's servants in charge of the train while the car was stationary, and while plaintiff was giving proper attention to his stock. Judgment 76 F. 550, 22 C. C. A. 314, affirmed.—*Texas & P. Ry. Co. v. Reeder*, 18 S. Ct. 705, 170 U. S. 530, 42 L. Ed. 1134.

—339. Proximate cause of injury.
See 9 Cent. Dig. Carr. § 1353.

A shipper of stock in an emigrant car, who rode with it in the car in violation of the terms of his contract, which required him to remain in the caboose while the train was in motion, was not for that reason guilty of negligence preventing his recovery for an injury which resulted from the negligence of defendant's servants in charge of the train while the car was stationary, and while plaintiff was giving proper attention to his stock. Judgment 76 F. 550, 22 C. C. A. 314, affirmed.—*Texas & P. Ry. Co. v. Reeder*, 18 S. Ct. 705, 170 U. S. 530, 42 L. Ed. 1134.

The conduct of an elderly woman passenger once safely on a train, in attempting to alight to ascertain whether such train is the right one, where no one had entered the car for some ten minutes and there was no one in charge, is not the intervention of a new proximate cause of her injury by falling from the car platform which will relieve the carrier from liability for its negligent failure to light the station grounds properly.—*Texas & P. Ry. Co. v. Stewart*, 33 S. Ct. 548, 228 U. S. 357, 57 L. Ed. 875, affirming judgment *Same v. Mayer*, 183 F. 575, 105 C. C. A. 646.

—342. Contributory negligence as ground of defense.

See 9 Cent. Dig. Carr. §§ 1346, 1350-1386, 1388-1408.

—347. — Questions for jury.

See 9 Cent. Dig. Carr. §§ 1346, 1350-1386, 1388-1397, 1402.

The court need not direct the jury to find for a street railway company, in an action to recover damages for the injuries sustained by a passenger in alighting from one of its cars, where there was evidence on behalf of the plaintiff of a substantial character, bearing upon the general issue as to the carrier's negli-

gence. Judgment, *City & S. Ry. Co. v. Svedborg*, 20 App. D. C. 543, affirmed.—*City & S. Ry. of Washington v. Svedborg*, 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

A person is not, as a matter of law, guilty of such contributory negligence in following the customary practice sanctioned by a street car company of standing upon the platform between the two inner rails at a usual stopping place, awaiting an approaching car, as precludes a recovery for injuries sustained from being struck by a car which ran by this stopping place on the other track at full speed, where the space between the rails, though leaving but a narrow margin of safety, was wide enough to permit a person standing directly in the center to escape injury. Judgment (1904) 23 App. D. C. 551, reversed.—*Chunn v. City & Suburban Ry. of Washington*, 28 S. Ct. 63, 207 U. S. 302, 52 L. Ed. 219.

An elderly woman passenger is not guilty of contributory negligence as a matter of law in alighting to ascertain whether the train she is on is the right one, so as to bar recovery for injuries sustained through the carrier's failure properly to light the station grounds, where there was no one in charge of her car.—*Texas & P. Ry. Co. v. Stewart*, 33 S. Ct. 548, 228 U. S. 357, 57 L. Ed. 875, affirming judgment *Same v. Mayer*, 183 F. 575, 105 C. C. A. 646.

(F) EJECTION OF PASSENGERS AND INTRUDERS.

—354. Failure to procure ticket or pay fare.

See 9 Cent. Dig. Carr. §§ 1409, 1410, 1416-1433.

—356. — Defective or invalid tickets.

See 9 Cent. Dig. Carr. §§ 1409, 1410, 1423-1432.

Plaintiff not having attempted to have the ticket stamped, and declining to pay any further fare, the fact that defendant's conductor did not inform him of the amount of fare required before ejecting him from the train is immaterial.—*Boylan v. Hot Springs R. Co.*, 132 U. S. 140, 10 S. Ct. 50, 33 L. Ed. 290.

—361. Intruders and trespassers.

See 9 Cent. Dig. Carr. §§ 1409-1466, 1469, 1470, 1472-1476, 1478-1501.

Money paid by a railroad company as damages and expenses of a suit brought against it for ejecting a passenger, who refused to pay fare except by presenting a coupon issued by a connecting line without authority, cannot be recovered from the latter; for the only remedy, as against it, was to refuse to recognize the coupon, and the subsequent ejection, particularly if accompanied by unnecessary force, was not made legally necessary by its act in selling the ticket, but was upon the sole responsibility of the company causing the same.—*Pennsylvania R. Co. v. Wabash, St. L. & P. Ry. Co.*, 157 U. S. 225, 15 S. Ct. 576, 39 L. Ed. 682.

—375. Actions for wrongful ejection.

See 9 Cent. Dig. Carr. §§ 1463-1466, 1469, 1470, 1472-1501.

—382. — Damages.

See 9 Cent. Dig. Carr. §§ 1478, 1483-1491.

A railway company is not liable to punitive damages for the malicious acts of its conductor in expelling a passenger, if it did not direct the acts or subsequently ratify them.—*Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 S. Ct. 261, 37 L. Ed. 97.

—384. — Instructions.

See 9 Cent. Dig. Carr. §§ 1497-1500.

Where a passenger riding on a street car on a transfer ticket given him by the agent of the company, at the place where the lines inter-

sect each other, is ejected from the car on the ground that his ticket only entitled him to ride on the other line, in an action to recover damages for the ejection, an instruction that, if the agent of the company had made a mistake in giving him the wrong ticket, he was entitled to damages, and if the agent had willfully given him the wrong ticket, and ejected him, he was entitled to vindictive damages, but that, if the jury believe plaintiff did not get off the line of cars as related by him, but came from another line, and received the transfer ticket without objection, and undertook to ride on the line that it did not call for, he was not entitled to recover, will not be held erroneous, after a verdict for defendant, when there is evidence to support such verdict.—*Carpenter v. Washington & G. R. Co.*, 7 S. Ct. 1002; 121 U. S. 474, 30 L. Ed. 1015.

Where plaintiff's evidence plainly shows the use of unnecessary and excessive force, the court may instruct the jury that, if they believe the plaintiff's evidence, "as a matter of law, there was more force used than was necessary to accomplish the result, and the plaintiff is entitled to a verdict," if the court at the same time presents the case as made out by the evidence for the defendant.—*New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 S. Ct. 1039, 30 L. Ed. 1049.

(G) PASSENGERS' EFFECTS.

On vessels, see Shipping, —167.

—394. Checks and receipts.

See 9 Cent. Dig. Carr. §§ 1504, 1506, 1516.

A railway carrier receiving baggage for interstate transportation is not required to give any other receipt than the customary baggage check, under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, requiring the railroad receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor.—*Boston & M. R. R. v. Hooker*, 34 S. Ct. 526, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, reversing judgment *Hooker v. Boston & M. R. R.*, 95 N. E. 945, 209 Mass. 598, Ann. Cas. 1912B, 669.

—397. Loss or injury.

See 9 Cent. Dig. Carr. §§ 1519-1537.

—400. — Notice to carrier of nature or value of goods.

See 9 Cent. Dig. Carr. §§ 1531-1534.

The traveling salesman of a firm of jewelers bought a ticket over defendant's road, and demanded a check for his trunk, without saying anything as to its contents. The trunk contained a stock of jewelry, from which sales were to be made to his principals' customers at various places; but, except that it was unusually heavy for its size, there was nothing to indicate its contents, and defendants' baggage agent checked it without any inquiries. The car in which it was placed was thrown from the track, and the trunk and its contents were destroyed by fire. It was shown that it was usual to transport such trunks in this way, but there was no evidence that any railroad company would do so if notified of their character and contents. *Held*, that the railroad's liability, under the circumstances, was only as for personal baggage, and the value of the jewelry could not be recovered from it.—*Humphreys v. Perry*, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587.

—401. — Property under control of passenger.

See 9 Cent. Dig. Carr. § 1529.

A railroad company is not liable in damages for a loss resulting to a passenger from its refusal to stop the train upon which he was

riding, short of a usual station, to enable him to recover a hand bag which he was carrying with him, and which he dropped from the window of the car while attempting to lower the sash.—*Henderson v. Louisville & N. R. Co.*, 123 U. S. 61, 8 S. Ct. 60, 31 L. Ed. 92, affirming judgment (C. C.) 20 F. 430.

—405. Limitation of liability.

See 9 Cent. Dig. Carr. §§ 1544-1549.

Conditions printed on the back of a passenger's ticket, exempting the carrier from liability for loss of or damage to baggage under certain circumstances or beyond a specified amount, are not binding on the passenger, if not signed or seen by him, nor referred to in the contract on the face of the ticket, nor otherwise brought to his attention.—*The Majestic*, 17 S. Ct. 597, 166 U. S. 375, 41 L. Ed. 1039, reversing order 60 F. 624, 9 C. C. A. 161, 23 L. R. A. 746.

A regulation in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its baggage liability to \$100, unless a greater value is declared by the owner, and excess charges paid, is binding on the passenger, not knowing of such regulation, though the carrier did not inquire as to the value of the baggage; any state law to the contrary having been superseded by the amendment of June 29, 1906, to the act to regulate commerce of February 4, 1887.—*Boston & M. R. R. v. Hooker*, 34 S. Ct. 526, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, reversing judgment *Hooker v. Boston & M. R. R.*, 95 N. E. 945, 209 Mass. 598, Ann. Cas. 1912B, 669.

(H) PALACE CARS AND SLEEPING CARS.

Constitutionality of gross earnings tax law, necessity of determination, see Constitutional Law, —46.

Contracts with railroad in restraint of trade, see Contracts, —116.

Due process of law, see Constitutional Law, —284.

Gross earnings tax laws, decisions of state court as authority in federal court, see Courts, —363.

Regulations of interstate commerce, see Commerce, —69, 74.

—408½ [New, vol. 3 Key-No. Series]. Constitutional and statutory provisions.

Laws Wis. 1911, c. 272, prohibiting the letting down of an unoccupied upper berth in a sleeping car when lower berth is occupied, *held invalid*.—*Chicago, M. & St. P. R. Co. v. State of Wisconsin*, 35 S. Ct. 809, 238 U. S. 491, 59 L. Ed. 1423, L. R. A. 1916A, 1133, reversing judgment *State v. Chicago, M. & St. P. R. Co.*, 140 N. W. 70, 152 Wis. 341, Ann. Cas. 1914C, 478.

CARTAGE.

Cost of cartage as claim against surety of government contractor, see United States, —67.

CASE ON APPEAL.

Contents, making, and settlement, see Appeal and Error, —567-573.

Necessity for purpose of review, see Appeal and Error, —544-554.

CASHIERS.

See Banks and Banking, —104, 105.

CATHOLIC CHURCH.

Capacity to hold property acquired by gift, see Religious Societies, ¶16.

CATTLE.

See Animals.

Injuries to, by operation of railroad, see Railroads, ¶433-444.

CAUSE OF ACTION.

See Action.

CAVEAT EMPTOR.

See Vendor and Purchaser, ¶37.

CEMETERIES.*Scope-Note.*

[INCLUDES lands used for burial of the dead, whether in churchyards or other places, and regulations relating thereto; organization, franchises, and powers of companies formed to provide and maintain such places; and rights, duties, and liabilities of such companies and of purchasers of lots or other rights or privileges in respect of property.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶5. Companies and associations.
- 10. Acquisition of and title to lands.
- 13. — Power to sell or mortgage.

Cross-References.

Impairing obligation of charter by amendment, see Constitutional Law, ¶128.
Ordinance prohibiting burial within city and county limits, as denying due process of law, see Constitutional Law, ¶278; right to

question validity, see Constitutional Law, ¶42.

Resulting trusts, see Trusts, ¶68.

Rights of Indians as to cemeteries on lands ceded to United States, see Indians, ¶11.

¶5. Companies and associations.

See 9 Cent. Dig. Cem. §§ 4-8.

Where the charter of a cemetery company (Act Cong. July 27, 1854 [10 Stat. 789]), which plainly indicates by its terms a purpose not merely to benefit the original shareholders and their successors, but chiefly to establish and maintain a public cemetery for the burial of the dead, to which end the company is authorized, among other things, to receive gifts and bequests, and its property exempted from taxation, puts the management into the hands of a board elected by the shareholders, and makes no restriction upon the relative proportions in which moneys received from the sale of lots shall be distributed in dividends or expended in the embellishment of the property, but does reserve to congress the power of alteration, amendment, and repeal, an act (Act Cong. Feb. 28, 1877 [19 Stat. 266]) passed after a large number of persons had become interested in the cemetery by the purchase of lots, which placed the control in a board of five trustees, elected annually, three by the lot holders and two by the original proprietors, and provided that, from the gross receipts arising from the sale of lots, one-fourth should be paid to the original proprietors, and the rest devoted to the improvement and maintenance of the cemetery, is a valid exercise of the reserved power of amendment and alteration.—*Close v. Greenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

In 1854 congress incorporated a cemetery company, authorizing it to purchase a certain amount of land, and receive gifts and bequests for the purpose of improving the cemetery, the affairs of the company to be conducted by

a president and three other managers, who were to have power to lay out and ornament the grounds and sell burial lots. Congress reserved power to amend or repeal the act. After 2,000 lots had been sold, congress amended the charter, giving the management of the corporation's affairs to a board of trustees, a majority of whom should be elected by the lot owners and the rest by the original proprietors, and providing that of the gross receipts from future sale of lots one-fourth should go to the original proprietors and the balance be used in improving and maintaining the cemetery. *Held* that, as it did not appear that the compensation given to the original proprietors was unreasonable, the amendment was valid.—*Id.*

¶10. Acquisition of and title to lands.

See 9 Cent. Dig. Cem. §§ 12-15.

¶13. — Power to sell or mortgage.

See 9 Cent. Dig. Cem. § 14.

An absolute, alienable title was acquired by the city of Denver, Colo., under a patent purporting to convey to the "mayor in trust for said city and to his successors" land which had been purchased pursuant to Act May 21, 1872, c. 187 (17 Stat. 140), authorizing the mayor of that city to enter at the minimum price certain lands, "to be held and used for a burial place for said city and vicinity." *Judgment*, *Morgan v. Johnson*, 106 F. 452, 45 C. C. A. 421, affirmed.—*Wright v. Morgan*, 24 S. Ct. 6, 191 U. S. 55, 48 L. Ed. 89.

A general power of alienation conferred upon a city by its charter extends to the alienation of property owned by it and devoted to burial purposes.—*Id.*

CENSORS.

Board of censors of motion picture films, see Theaters and Shows, ¶2.

CENSUS.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Census.]

CERTAINTY.

Acknowledgment of debt barred, see Limitation of Actions, ¶150.
 Allegation, see—
 Indictment and Information, ¶71.
 Pleading, ¶367.
 Amount or extent of damage, see Damages, ¶79.
 Beneficiaries of charitable gift, see Charities, ¶21.
 Contracts, see—
 Contracts, ¶9.
 Specific Performance, ¶27-29.
 Description of property conveyed, see Deeds, ¶38.
 Language used in alleged libel or slander, see Libel and Slander, ¶20, 21.

CERTIFICATE.

Acknowledgment of written instrument, see Acknowledgment, ¶35-37.
 Board of audit, see District of Columbia, ¶32, 35.
 By architects, arbitrators, or others approving performance of contract, see Contracts, ¶287.
 Case or question of law from circuit court of appeals to Supreme Court, see Courts, ¶384.
 Certified copies of public or official acts and records as evidence, see Evidence, ¶341-349.

Corporate stock, see Corporations, ¶104.
 Counsel accompanying demurrer, see Equity, ¶320.
 Deposit, see Banks and Banking, ¶152.
 Grounds of appeal, see Appeal and Error, ¶366.
 Indebtedness of municipal corporation, see Municipal Corporations, ¶895-901.
 Identification of Chinese leaving country, see Aliens, ¶27, 28.
 Internal revenue tax on certificates of indebtedness, see Internal Revenue, ¶9.
 Judgment, see Criminal Law, ¶1000.
 Location of mining claim, see Mines and Minerals, ¶21.
 Mining assessment work, see Mines and Minerals, ¶23.
 Naturalization, see Aliens, ¶71½.
 Protest of bill or note, see Bills and Notes, ¶410.
 Question of jurisdiction on appeal to Supreme Court, see Courts, ¶385(4).
 Questions to Supreme Court, see Bankruptcy, ¶459.
 Receivers' certificates, see Receivers, ¶125-129.
 Record for purpose of review, see Appeal and Error, ¶613-616.

CERTIFICATE OF DEPOSIT.

See Banks and Banking, ¶152.

CERTIFIED CHECKS.

See Banks and Banking, ¶256, 257, 261.

CERTIFIED COPIES.

Public or official acts and records as evidence, see—
 Criminal Law, ¶444.
 Evidence, ¶341-349.

CERTIORARI.*Scope-Note.*

[INCLUDES review by superior courts of judicial action of inferior tribunals or officers in statutory or other proceedings not subjects of appeal or writ of error, etc., by removal and examination of records of such proceedings for correction of errors and irregularities therein; nature and scope of the remedy in general; in what cases and as to what proceedings review by certiorari is allowed; grounds for, jurisdiction to grant, and proceedings to obtain review by certiorari; requisites, issuance, and effect of writs, etc., of certiorari; quashing or dismissing such writs; returns thereto and proceedings thereon; hearing and determination thereof, and effect of decisions thereon; review of the proceedings; and costs on certiorari.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Nature and Grounds.**

- ¶3. Availability of relief in original proceeding.
- 4. Existence of other remedy in general.
- 5. Existence of remedy by appeal or writ of error.
- 7. Recourse to or pendency of other proceeding.
- 9. Discretion as to grant of writ.
- 11. Decisions and proceedings of courts, judges and judicial officers.
- 14. — Courts and other tribunals subject to review.
- 16. — Finality of determination.

I. Nature and grounds—Continued.

20. Acts and proceedings of public officers and boards and municipalities.

21. — Judicial nature of proceedings in general.

II. Proceedings and Determination.

48. Return and record.

50. — Scope and contents of record or transcript.

54. — Defects and objections.

63. Review.

64. — Scope and extent in general.

69. Determination and disposition of cause.

70. Appeal or other proceedings for review.

Cross-References.

Ancillary to habeas corpus, see Habeas Corpus,

66.

Bringing up record on appeal or writ of error, see Appeal and Error, 658-660.

To supply omission in transcript, see Appeal and Error, 653.

Review in particular proceedings.

See—

Army and Navy, 11.

Bankruptcy, 448.

Contempt, 66.

Criminal Law, 1011.

I. NATURE AND GROUNDS.**3. Availability of relief in original proceeding.**

See 9 Cent. Dig. Cert. § 3.

A writ of certiorari to the circuit court of appeals may be allowed by the supreme court of the United States, under the judiciary act of March 3, 1891 [U. S. Comp. St. 1901, p. 547], where the cause has been improperly brought up by writ of error; and in such case the copy of the record filed under the writ of error may be directed to be taken and deemed a sufficient return to the certiorari. Judgment 104 F. 380, 43 C. C. A. 594, reversed.—Security Trust Co. v. Dent, 23 S. Ct. 61, 187 U. S. 237, 47 L. Ed. 158.

4. Existence of other remedy in general.

See 9 Cent. Dig. Cert. § 4.

When sought as between private persons, the general rule is that the writ of certiorari will be granted or denied, in the sound discretion of the court, on special cause or ground shown, and will be refused where there is a plain and equally adequate remedy by appeal or otherwise.—In re Tampa Suburban R. Co., 18 S. Ct. 177, 168 U. S. 583, 42 L. Ed. 589.

5. Existence of remedy by appeal or writ of error.

See 9 Cent. Dig. Cert. §§ 5, 6; 31 Cent. Dig. J. P. § 751.

Where an appeal lies from the judgment, it cannot be quashed by certiorari, unless for want of jurisdiction, appearing on the face of the record.—Harris v. Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. Ed. 697, affirming Barber v. Harris, 6 Mackey (D. C.) 586.

In view of the fact that the Chinese treaty of 1888 guaranteed the right of all Chinese subjects to enter the United States without restrictions, and that the treaty of 1880 only restricted that right as far as Chinese laborers were concerned, a decision by the circuit court of appeals that a Chinese merchant domiciled here, and having an established business, must, on returning from a visit to China, present to the collector the certificate required by the Chinese exclusion act (Act Cong. May 6, 1882, § 6, as amended by Act July 5, 1884), notwith-

standing that he has given that official satisfactory evidence of his status as a merchant here, presents a question of such importance as will justify the supreme court in requiring, by certiorari, the circuit court of appeals to certify the case to it for review under Act Cong. March 3, 1891, establishing that court, and (section 6) making its decisions final in certain cases, but providing that the supreme court may require any such case to be certified to it for review as if it had been taken there on appeal or writ of error.—Ex parte Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43, 35 L. Ed. 868; Lau Ow Bew v. United States, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

The questions whether, in an action for personal injuries, a judgment of dismissal at the conclusion of plaintiff's evidence is a bar, under a state statute, to another suit on the same cause of action, or whether, in such action, the law in respect to the recovery by a servant against his master was properly applied to the facts disclosed by the evidence, are not such questions of gravity and importance as justifies the supreme court in allowing certiorari to the circuit court of appeals as a substitute of appeal or writ of error, under Act Cong. March 3, 1891, § 6.—In re Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125.

The question whether the circuit court of appeals has authority to entertain an appeal from a decree setting aside an order appointing a receiver is not of such importance, even though the court has exercised such authority, as to require the interposition of the supreme court, either by mandamus or certiorari; for, even if the interlocutory order could not be the subject of a separate appeal, it might be brought before the circuit court of appeals on appeal from the final decree in the cause.—American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. Ed. 486.

Where, on an appeal from an order made in the circuit court by the district judge, setting aside an order made by the circuit judge, the circuit judge takes part in the decision in the circuit court of appeals, the question whether he was not disqualified to so take part under Judiciary Act March 3, 1891, § 3, and whether the decree of the circuit court of appeals was not therefore void, is one which deeply affects the administration of justice in that court;

This Digest is compiled on the Key-Number System. For explanation, see page iii.

and, in order to determine the same, the supreme court will issue a rule to show cause why a writ of certiorari should not issue, and if it should be determined on the hearing thereof that the circuit judge was disqualified, and that the decree was therefore void, the writ will issue to bring up and quash the same.—*Id.*

Where the circuit court of appeals, under the authority given it by Judiciary Act March 3, 1891, § 7, to entertain an appeal from an interlocutory order "granting or continuing an injunction," entertains an appeal from an order appointing a receiver for a railroad company and enjoining the disposition of its property, and not only modifies the injunction, but also directs the circuit court to discharge the receiver and restore the property to the company, the case is not one for the interposition of the supreme court by writ of certiorari under section 6, for this branch of its jurisdiction is to be sparingly exercised; and the decree of the circuit court of appeals was neither so important in its immediate effect, nor so far-reaching in its consequences, as to warrant the supreme court in issuing the writ.—*Id.*

Except as provided in Judiciary Act March 3, 1891, § 8, a writ of certiorari cannot be made to serve the purpose of an appeal or writ of error, though section 14 empowers the supreme court "to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law."—*Id.*

The Supreme Court will not issue a writ of certiorari to review the action of a circuit court in granting a preliminary injunction and appointing a receiver, on the ground that the orders were made by a judge outside the limits of his circuit, since there is an adequate remedy by appeal to the Circuit Court of Appeals under the seventh section of the act of March 3, 1891, as amended by the act of February 18, 1895.—*In re Tampa Suburban R. Co.*, 18 S. Ct. 177, 168 U. S. 583, 42 L. Ed. 589.

67. Recourse to or pendency of other proceeding.

See 9 Cent. Dig. Cert. §§ 12, 13; 1 Cent. Dig. Abate. & R. § 66.

Certiorari to the Circuit Court of Appeals will be allowed by the federal Supreme Court, where the importance of the case demands it, to avoid any question as to the jurisdiction of the Supreme Court of a writ of error duly allowed, where an application for certiorari was made after a motion to dismiss the writ of error was filed. Judgment (C. C. A. 1906) 147 F. 897, 78 C. C. A. 33, reversed.—*Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 27 S. Ct. 254, 204 U. S. 204, 51 L. Ed. 444.

69. Discretion as to grant of writ.

See 9 Cent. Dig. Cert. §§ 15, 16.

The discretion vested in the supreme court to review the decisions of the circuit court of appeals by certiorari (Act Cong. March 3, 1891, § 6) will only be exercised in matters of gravity and general importance; and a question as to whether, in an action for personal injuries, a judgment of dismissal, at the conclusion of plaintiff's evidence, is a bar, under the state law, to another suit on the same cause of action, or whether, in such an action, the law in respect to the recovery of a servant against his master was properly applied to the special facts disclosed by the evidence, is not of a character to call for the exercise of such discretion.—*In re Woods*, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125.

The power of the supreme court, under Judiciary Act March 3, 1891, § 6, to review, by writ of certiorari to the circuit court of appeals, cases made final in that court, extends to cases brought there by appeals under section 7 from interlocutory decrees granting or continuing injunctions, and it is left to the dis-

cretion of the supreme court to determine at what stage of the proceedings it will exercise this power; but the writ will not be issued at all in such cases unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.—*American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 13 S. Ct. 758, 37 L. Ed. 486.

11. Decisions and proceedings of courts, judges, and judicial officers.

See 9 Cent. Dig. Cert. §§ 12-32.

14. — Courts and other tribunals subject to review.

See 9 Cent. Dig. Cert. § 19.

Under the sixth section of the act creating the circuit court of appeals (28 Stat. p. 828) the supreme court has jurisdiction to review by writ of certiorari a judgment of that court, denying to a Chinese merchant long domiciled in this country the right to land, after a temporary visit to China, without presenting the viséed certificate required by the sixth section of the amended exclusion act (23 Stat. p. 115).—*Lau Ow Bew v. United States*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

16. — Finality of determination.

See 9 Cent. Dig. Cert. §§ 31, 32.

The supreme court will not issue a writ of certiorari to review a judgment of the circuit court of appeals reversing a judgment of the circuit court and remanding the cause for further proceedings; for such a judgment is not final, and the supreme court is therefore without jurisdiction to revise it.—*Chicago & N. W. Ry. Co. v. Osborne*, 146 U. S. 354, 13 S. Ct. 281, 36 L. Ed. 1002, following *McLish v. Roff*, 141 U. S. 661, 12 S. Ct. 118, 35 L. Ed. 893; *Rice v. Sanger*, 144 U. S. 197, 12 S. Ct. 664, 36 L. Ed. 403; *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 12 S. Ct. 876, 36 L. Ed. 834.

20. Acts and proceedings of public officers and boards and municipalities.

See 9 Cent. Dig. Cert. §§ 33-39.

21. — Judicial nature of proceedings in general.

See 9 Cent. Dig. Cert. §§ 33, 34.

An order of the Postmaster General directing the nondelivery of mail addressed to certain persons, who he found under Rev. St. §§ 3929, 4041 (U. S. Comp. St. 1901, pp. 2686, 2749), were using the mails to defraud though quasi judicial, is not subject to review by certiorari.—*Degge v. Hitchcock*, 33 S. Ct. 639, 229 U. S. 162, 57 L. Ed. 1135, affirming judgments *Id.*, 35 App. D. C. 218, and *Maury v. Hitchcock*, 35 App. D. C. 228.

II. PROCEEDINGS AND DETERMINATION.

Original jurisdiction of circuit court of appeals, see Courts, 6404.

48. Return and record.

See 9 Cent. Dig. Cert. §§ 123-149.

50. — Scope and contents of record or transcript.

See 9 Cent. Dig. Cert. § 131.

A Canadian statute, used in the trial court by consent of counsel, and shown by affidavit to have been treated as part of the record, though not formally certified as such, but certified by the clerk to be a true copy of the act as published, in response to a writ of certiorari, reciting that the statute had been introduced in evidence, and requiring the clerk to transmit a

certified copy thereof to the circuit court of appeals, may be considered on a review of the decision by the supreme court of the United States on writ of certiorari. *Decrees, Union Steamboat Co. v. Erie & W. Transp. Co.*, 82 F. 819, 27 C. C. A. 154, and *Union S. S. Co. v. Same*, 86 F. 814, 30 C. C. A. 628, reversed.—*The New York*, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126.

A printed copy of the transcript of record from a circuit court, which was printed under the supervision, direction, and control of the clerk of the circuit court of appeals, under and pursuant to the rules of that court, may be used, without being reproduced in manuscript by the clerk, in furnishing a certified copy of the record of the case, as required by rule 37 of the supreme court in case of an application for certiorari under the judiciary act of March 3, 1891 (section 8).—*Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. of New York*, 20 S. Ct. 383, 176 U. S. 219, 44 L. Ed. 442, denying certiorari *Hamlin v. Same*, 95 F. 497, 36 C. C. A. 155.

⚡54. — Defects and objections.

See 9 Cent. Dig. Cert. § 138.

Technical defects in the return of municipal officers in a proceeding by certiorari to quash an alleged illegal drainage tax assessment are waived by failure to object when the return to the rule to show cause was made the return to the writ. *Judgment (1907) 29 App. D. C. 563*, reversed.—*District of Columbia v. Brooke*, 29 S. Ct. 560, 214 U. S. 138, 53 L. Ed. 941.

⚡63. Review.

See 9 Cent. Dig. Cert. §§ 174-184; 31 Cent. Dig. J. P. § 758.

⚡64. — Scope and extent in general.

See 9 Cent. Dig. Cert. §§ 174, 176, 183, 184; 31 Cent. Dig. J. P. § 758.

The scope of review on certiorari will not be broadened to include technical questions tending to delay the final ending of an action, the merits of which are with the respondents. *Judgment (C. C. A. 1908) Thomas v. Green County*, 159 F. 339, 89 C. C. A. 405, affirmed.—*Green County v. Thomas' Ex'r*, 29 S. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

⚡69. Determination and disposition of cause.

See 9 Cent. Dig. Cert. §§ 185-194.

The exemption of express companies by Act March 2, 1901, c. 806, from the requirement of War Revenue Act June 13, 1898, c. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests, or other evidences of the receipt of goods for carriage or transportation, requires the affirmance on certiorari, without reference to the merits of the case as affected by the earlier act, of a judgment of the circuit court of appeals affecting the dismissal of a suit to prevent the application by an express company of any of its moneys to meet this requirement. *Judgment, Trammell v. Dinsmore*, 102 F. 794, 42 C. C. A. 623, affirmed.—*Dinsmore v. Southern Exp. Co.*, 22 S. Ct. 45, 183 U. S. 115, 46 L. Ed. 111.

⚡70. Appeal or other proceedings for review.

See 9 Cent. Dig. Cert. §§ 195-208; 2 Cent. Dig. App. & E. §§ 366, 571; 31 Cent. Dig. J. P. § 830.

A writ of certiorari to bring up after judgment the proceedings of an inferior court, whose procedure is not according to the course of the common law, is in the nature of a writ of error; and, though the granting of it rests in the discretion of the court, yet after it has been granted, and the record certified in obedience to it, the questions arising on that record must be determined according to fixed rules of law, and their determination is reviewable on error.—*Harris v. Barber*, 129 U. S. 366, 9 S. Ct. 314, 32 L. Ed. 697, affirming *Barber v. Harris*, 6 Mackey (D. C.) 586.

CHALLENGE.

See Grand Jury, ⚡17.

CHAMBERS.

Review of decisions made in chambers, see Appeal and Error, ⚡131.

CHAMBERS OF COMMERCE.

See—

Exchanges.

Taxation, ⚡47, 67, 98.

CHAMPERTY AND MAINTENANCE.

Scope-Note.

[INCLUDES officious intermeddling in a suit between others by assisting either party to carry it on, with or without an agreement to divide the subject of the litigation in the event of success; agreements for such division, or for the purchase of property held adversely, conveyances of such property, and agreements for the purchase of pretended titles or rights of action for the purpose of suing thereon; and criminal responsibility for unlawful maintenance of suits.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⚡5. Contracts and transactions with attorneys.
- 7. Grants of lands held adversely.

Cross-References.

Validity of contract for contingent fees, see Attorney and Client, ⚡147.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

Ⓔ5. Contracts and transactions with attorneys.

See 9 Cent. Dig. Champ. §§ 24-51; 5 Cent. Dig. Att'y. & C. § 247.

A contract made by an attorney with the tutor and tutrix of minor heirs for a contingent fee of 10 per cent. on the recovery, if any, in a suit brought by the attorney to enforce a claim of the heirs, there being no means of paying counsel fees except out of the recovery, is valid, and entitles the attorney to a lien on the recovery for his fee.—Taylor v. Bemiss, 110 U. S. 42, 3 S. Ct. 441, 28 L. Ed. 64.

Act June 23, 1874, c. 459, establishing the court of commissioners of Alabama claims, and providing (section 18) that liens or assignments, either absolute or conditional, for past or future services about any claim made or to be made before judgment in that court, should be void, did not invalidate a mere personal agreement between a claimant and his attorney to pay, as compensation for services about a claim, a sum of money equal to a certain proportion of the amount which might be recovered.—Bachman v. Lawson, 109 U. S. 659, 3 S. Ct. 479, 27 L. Ed. 1037.

An attorney's agreement to carry on litigation for a contingent fee is not champertous, if it does not also contemplate payment of the costs by the attorney.—Jeffries v. Mutual Life Ins. Co. of New York, 110 U. S. 305, 4 S. Ct. 8, 28 L. Ed. 156.

A contract made in Missouri between an administrator and an attorney, whereby the attorney was given an interest in the proceeds of the claim to be sued for, with authority to compromise it, was not champertous, under the laws of Missouri.—Id.

The making of a champertous contract between counsel and client cannot be set up in bar of a recovery on the cause of action to which the champertous contract relates.—Burnes v. Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. Ed. 991.

An agreement by an attorney at law to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the thing recovered, is champertous and void.—Peck v. Heurich, 17 S. Ct. 927, 167 U. S. 624, 42 L. Ed. 302.

A deed to an attorney and another in trust to enable them to obtain title and possession of the lands conveyed being void because the attorney was to conduct the necessary litigation at his own expense, and to have a part of the proceeds of the land recovered as compensation for his services, the trustees cannot maintain an action to recover the land, though the grantors might maintain a similar action in their own names.—Id.

The intention that all costs and expenses of obtaining title and possession of lands conveyed to an attorney and another in trust for that purpose shall be borne by the attorney, and in no part by the grantors, is shown by the stipulation that he shall receive one-third of the proceeds "after paying all expenses, costs, and expendi-

tures of" the trustees in the execution of the trust "out of the same"—evidently meaning out of his third part.—Id.

Ⓔ7. Grants of lands held adversely.

See 9 Cent. Dig. Champ. §§ 54-110.

A conveyance by a disseisee is valid in the District of Columbia. Judgment 23 App. D. C. 587, affirmed.—Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co., 26 S. Ct. 25, 199 U. S. 247, 50 L. Ed. 175.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Venue, Ⓔ42-79.

CHARACTER.

Parties, witnesses or other persons, see—
Criminal Law, Ⓔ722, 757, 776.
Courts, Ⓔ301-326.
Homicide, Ⓔ188.
Removal of Causes, Ⓔ26-61.
Witnesses, Ⓔ334-532.

CHARGE.

See Customs Duties, Ⓔ92.
Carriers, congressional inaction affecting right of state to regulate, see Commerce, Ⓔ10.
Combination to control charges, see Monopolies, Ⓔ17.
Compensation for services, see—
Carriers, Ⓔ12, 13, 26-38, 188, 198-201.
Gas, Ⓔ14.
Shipping, Ⓔ144, 145.
Telegraphs and Telephones, Ⓔ33.
Waters and Water Courses, Ⓔ203.
Criminal accusation, see Indictment and Information.
Impairing obligation of contract, see Constitutional Law, Ⓔ126, 135.
In account between partners, see Partnership, Ⓔ333.
Indebtedness on married women's separate property, see Husband and Wife, Ⓔ147-171.
Instructions to jury, see—
Criminal Law, Ⓔ754-768, 773-834, 841-845.
Trial, Ⓔ185-296.
Legacies on property by will, see Wills, Ⓔ820-826.
Police power to regulate, see Constitutional Law, Ⓔ81.
Regulation as regulation of commerce, see Commerce, Ⓔ34, 57.
Regulation of charges as denial of equal protection of laws, see Constitutional Law, Ⓔ242; as denial of due process of law, see Constitutional Law, Ⓔ298.

CHARGES D'AFFAIRES.

See Extradition. Ⓔ14.

CHARITIES.

Scope-Note.

[INCLUDES gifts, devises, bequests, and trusts for purposes regarded as charitable uses; their validity, operation, and effect in general, and application to them of doctrine of cy pres; organization, franchises, and powers of charitable societies; rights, powers, and liabilities of such societies, or of trustees of charities, or of the donors, and of beneficiaries; judicial control and protection of charitable societies and charities; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation, Existence, and Validity.

- ⇒ 4. Validity of gifts and trusts in general.
 - 9. Purposes of gift.
 - 11. — Relief of poor or unfortunate.
 - 17. Certainty as to property.
 - 20. Capacity of trustees or donees to take.
 - 21. Certainty as to beneficiaries.
 - 22. Certainty as to purpose of gift.
 - 28. Modification or revocation.
 - 29. Nonuser or misuser.

II. Construction, Administration, and Enforcement.

- ⇒ 37. Application of doctrine of cy pres.

Cross-References.

Charitable corporation as citizen of United States within act relating to jurisdiction of district courts for Porto Rico, see Courts, ⇒ 438.

Exemption of property of charitable institutions from general taxation, see Taxation, ⇒ 241.
Exemption of property of charitable institutions from legacy and transfer taxes, see Taxation, ⇒ 876.

I. CREATION, EXISTENCE, AND VALIDITY.

Restrictions on charitable devises or bequests, see Wills, ⇒ 12-14.

⇒ 4. Validity of gifts and trusts in general.

See 9 Cent. Dig. Char. §§ 7, 9, 10.

A devise to an historical society of a house containing a collection of books, documents, and works of art, in trust to keep and preserve the same, with the collection therein, and other books and works of art to be purchased by the officers of the society out of the income of a fund bequeathed by the devisor for the purpose, "as a public edifice for a library and academy of arts and sciences," and "to be open for the use of the public," on such terms and under such reasonable regulations as the society may prescribe, is a good charitable devise.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

A bequest "to the First Christian Church, erected, or to be erected, in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same," is a valid bequest to charitable uses.—*Id.*

Under Code Ga. 1873, § 3157, cl. 7, enumerating, among charitable uses, "the improvement or repair of burying grounds or tombstones," the provision in a devise to a church that it "will keep in good order and have thoroughly cleaned up, every spring and autumn,"

the testatrix's lot in a cemetery, is a valid condition.—*Id.*

A testator provided in his will that all the residue of his property, after paying legacies and debts, should be used "for the purpose of founding and supporting, or uniting in the support of, any institution that may be then founded, to furnish a retreat and a home for disabled or aged and infirm and deserving American mechanics." *Held*, that the validity of the trust was undoubted, notwithstanding that the trustees might appropriate the fund to an institution established after the testator's death.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

⇒ 9. Purposes of gift.

See 9 Cent. Dig. Char. §§ 34-40.

⇒ 11. — Relief of poor or unfortunate.

See 9 Cent. Dig. Char. § 35.

A devise to a society for the relief of indigent widows and orphans, of property the income of which is to be appropriated to the benevolent purposes of the society, and another devise to a society "for the relief of distressed widows, and the schooling and maintaining poor children," of property the rents and profits of which it is provided shall be used for the support of the school and the charities of the institution, are valid devises to charitable uses, under Code Ga. 1873, § 3157, providing that the "relief of aged, impotent, diseased, or poor people is a proper matter of charity for the juris-

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diction of equity."—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

17. Certainty as to property.

See 9 Cent. Dig. Char. § 41.

Uncertainty as to the amount cannot successfully be urged to defeat the bequest of a sum not exceeding \$5,000, to be equally divided between two named charitable institutions, which the testator directs to be made in the event of the invalidity of a prior bequest of a sum not exceeding \$5,000 for another purpose. Judgment, *Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 26 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

A bequest of a sufficient sum, not to exceed \$3,000, the income to be applied to maintain a scholarship in a medical college, is not void for any uncertainty as to the amount.—*Id.*

20. Capacity of trustees or donees to take.

See 9 Cent. Dig. Char. §§ 18-33.

A gift of land and personalty in trust for an educational institution not then in existence, with directions to the grantee to sell the property and pay over the proceeds to a certain person named as president of the board of trustees of such institution, creates a valid charitable gift, though the institution was not established or incorporated in the lifetime of the donor, or of the person named as president.—*Russell v. Allen*, 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397.

A devise and bequest in trust for the building, endowment, and maintenance of "a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by" certain directresses named, and their associates, who are to obtain an act of incorporation for the purpose, are a valid charitable devise and bequest, although no time is limited for the erection of the building or the obtaining of the charter.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

The charter of an "Independent Presbyterian Church" provided that the trustees should be invested with all manner of property, real and personal, moneys, donations, gifts, grants, privileges, and immunities, but that nothing therein should be construed to vest in them "any right or title to any estate or property whatsoever, real or personal, other than such as doth or may rightfully and lawfully belong to said Presbyterian Church." Held, that the church was not thereby disqualified from accepting and administering a trust created by a devise of real property, with directions to the trustees to "appropriate annually, out of the rents and profits, the sum of \$1,000," to one or more Presbyterian or Congregational churches in the state of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the state.—*Id.*

21. Certainty as to beneficiaries.

See 9 Cent. Dig. Char. §§ 44-50.

A conveyance of lands and personalty was expressed to be "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," and in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri." The grantee was directed to sell the property, and pay the proceeds "to Thomas Allen, president of the board of trustees of said Russell Institute of St. Louis, Missouri." The institution was not established in the lifetime of either the donor or of Allen. Held, in a proceeding by the donor's heirs at law and next of kin to establish a trust in

their favor, that the beneficiaries were sufficiently certain.—*Russell v. Allen*, 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397.

The discretion to be exercised by the trustees under a will in selecting the medical college in which a scholarship is to be maintained does not avoid the bequest where the testator expressed his preference for Georgetown College, if the scholarship could be maintained in that institution, and, if not, directed that it be a scholarship in some medical college in the District of Columbia. Judgment, *Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 26 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

22. Certainty as to purpose of gift.

See 9 Cent. Dig. Char. §§ 51-56.

A conveyance of lands and personalty was expressed to be "for the purpose of founding an institution for the education of youth in St. Louis county, Mo.," and in trust for the benefit of the Russell Institute of St. Louis, Mo. The proceeds of the property were to be paid to "Thomas Allen, president of the board of trustees of said Russell Institute at St. Louis, Missouri." Held, that the uses were sufficiently definite to be enforced in a court of equity, as against the donor's heirs and next of kin, although the institution was not established in the life of either the donor or of Allen.—*Russell v. Allen*, 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397.

A devise to an historical society of a house, containing books, documents, and works of art, describing the general nature of the charitable purpose, though leaving the selection of the particular objects to the trustees, is a good charitable use, and sufficiently defined.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

A valid charitable trust was created by the will of a retired naval officer by a devise to an educational institution in trust for the education of young men for admission to the United States Naval Academy, or to the merchant marine service, or to the engineering department of the navy.—*Taylor v. Columbian University*, 33 S. Ct. 73, 226 U. S. 126, 57 L. Ed. 152, affirming decree 35 App. D. C. 68.

23. Modification or revocation.

See 9 Cent. Dig. Char. §§ 57, 58, 62.

By Act May 20, 1870, public land in Washington City was granted to a company for use as a market, reserving to the District of Columbia an annual rental of \$25,000, to be used for the relief of the poor. By Act March 3, 1873, a sum of money was appropriated to the District of Columbia, to be used only in the erection of buildings for District offices, and it was authorized "to make arrangements to secure sufficient land" on which to erect them, indicating the same land which had been granted to the market company. Held, that the reservation of the rental did not create an irrevocable charitable trust for the poor, and that it was competent for the District to assume all the obligations incurred by the market company under Act May 20, 1870, in consideration of a conveyance of sufficient land for its offices.—*District of Columbia v. Washington Market Co.*, 108 U. S. 243, 2 S. Ct. 543, 27 L. Ed. 714.

29. Nonuser or misuser.

See 9 Cent. Dig. Char. §§ 59, 60.

A charitable trust for the education of young men for admission to the United States Naval Academy does not fail where only two out of 24 of those who availed themselves of its benefits entered the academy.—*Taylor v. Columbian University*, 33 S. Ct. 73, 226 U. S. 126, 57 L. Ed. 152, affirming decree 35 App. D. C. 68.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.**§37. Application of doctrine of cy pres.**

See 9 Cent. Dig. Char. §§ 91-93.

Under Organic Act Utah Sept. 9, 1850 (9 Stat. 453), the general system of common law and equity, as it exists in this country, became operative in the territory of Utah; and therefore, on the dissolution of said religious and charitable corporation, its personal property became vested in the government of the United States, in its sovereign capacity to be applied, under the general doctrine of cy pres, either by the court or by direction of congress, to some kindred object, whereby the general purposes of religion and charity may be promoted.—*Late Corporation of Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 10 S. Ct. 792, 34 L. Ed. 478, affirming *United States v. Church of Jesus Christ of Latter Day Saints*, 5 Utah, 361, 15 P. 473.

One F. conveyed a parcel of land to three persons, "trustees for the U. Society," habendum to them "and their successors in office forever, for the sole use and benefit of the U. Society, as aforesaid, for a burial ground, and for no other purpose whatever." The U. Society was an unincorporated association for the mu-

tual aid of its members. *Held*, that the trust created by such deed, if a charitable trust in any sense, was not for a general charitable purpose which would bring it within the application of the cy pres doctrine, and it would end, at the latest, when the land ceased to be used as a burial ground, and the society was dissolved.—*Hopkins v. Grimshaw*, 17 S. Ct. 401, 165 U. S. 342, 41 L. Ed. 739.

CHARTER.

Corporate charter, see—

Banks and Banking, §5.

Corporations, §7, 8, 38, 372.

Municipal Corporations, §46-48.

Street Railroads, §19.

Turnpikes and Toll Roads, §30.

Filing charter of foreign corporation in state where business is carried on, see Corporations, §644.

Impairing obligation of charter, see Constitutional Law, §125, 126.

Validity of grant by territorial legislature, see Statutes, §55.

CHARTER PARTIES.

See Shipping, §37-58.

CHATTEL MORTGAGES.*Scope-Note.*

[INCLUDES transfers of personal property in general as security for payment of money or performance of contracts or other obligations, whether such transfers be made by conveyance on condition or with a defeasance or by deed of trust, or be made by bill of sale or other conveyance absolute in form without delivery of the property; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; instruments in writing by which such conveyances, defeasances, etc., are made, and delivery, acceptance, recording, or registration, and construction thereof; liens of mortgages and priorities; rights, duties, and liabilities of the parties as between themselves and as to others; effect of transfers of debts or obligations secured, or of mortgages, and of property mortgaged; fraudulent sale or removal of mortgaged goods; payment or other satisfaction or release; enforcement; and redemption.]

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Requisites and Validity.****(A) NATURE AND ESSENTIALS OF TRANSFERS OF CHATTELS AS SECURITY.**

§4. Mortgage distinguished from other transactions.

5. — In general.

6. — Sale.

35. Evidence as to character of transaction or instrument.

38. — Parol evidence.

(B) FORM AND CONTENTS OF INSTRUMENTS.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 83-109.]

(C) EXECUTION AND DELIVERY.**(D) VALIDITY.**

§75. Estoppel or waiver as to defects or objections.

II. Filing, Recording, and Registration.**(A) ORIGINAL.**

⌚ 87. Place.

(B) RENEWAL.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 175-183.]

III. Construction and Operation.**(A) GENERAL RULES OF CONSTRUCTION.**

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 184-188.]

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 189-197.]

(C) PROPERTY MORTGAGED, AND ESTATES AND INTERESTS OF PARTIES THEREIN.

⌚ 117. Crops.

118. Animals and increase.

125. Change in character or identity of property.

(D) LIEN AND PRIORITY.

⌚ 133. Nature and existence of lien in general.

135. Duration of lien.

139. Mortgagee as bona fide purchaser.

145. Notice affecting priority.

146. — In general.

151. Failure to file or record mortgage.

152. — Effect in general.

153. — Subsequent bona fide purchasers or mortgagees.

IV. Rights and Liabilities of Parties.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 272-359.]

V. Rights and Remedies of Creditors.

⌚ 180. Creditors entitled to attack mortgage.

182. — Necessity of lien.

184. Retention of possession by mortgagor.

187. — Effect of possession or control by mortgagor in general.

190. — Disposition of proceeds of property.

191. — Sufficiency of transfer of possession.

193. Failure to file or record mortgage.

194. — Necessity of filing or recording as against creditors.

196. — Effect of failure to file or record or to renew filing or record.

197. — Creditors entitled to protection.

VI. Assignment of Mortgage or Debt.

⌚ 204. Filing or recording assignment.

207. Rights and liabilities of parties.

208. — In general.

VII. Removal or Transfer of Property by Mortgagor.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 496-514.]

VIII. Payment or Performance of Condition, Release, and Satisfaction.

⌚ 240. Conveyance or disposition of property mortgaged.

IX. Foreclosure.

268. Actions to foreclose.
 275. — Parties.
 281. — Injunction and receiver.

X. Redemption.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 581-590.]

Cross-References.

See—
 Assignment for Benefit of Creditors, 14.
 Bankruptcy, 152, 161, 166, 188, 207, 298.
 Pledges.
 Appellate jurisdiction of suit involving constitutionality of usury laws, see Courts, 394(10).
 Declarations of mortgagor as evidence against mortgagee and privies, see Evidence, 231.
 Exemption from usury laws as denial of equal

protection of law, see Constitutional Law, 242.
 Liability of United States to mortgagee for use of mortgaged chattel, see United States, 69.
 Married woman's separate property, see Husband and Wife, 168-171.
 Transfers operating to hinder, delay, or defraud creditors in general, see Fraudulent Conveyances.

I. REQUISITES AND VALIDITY.

Pledge distinguished, see Pledges, 4.

(A) NATURE AND ESSENTIALS OF TRANSFERS OF CHATTELS AS SECURITY.**4. Mortgage distinguished from other transactions.**

See 9 Cent. Dig. Chat. Mtg. §§ 4-16, 18, 41; 32 Cent. Dig. Land. & Ten. § 5; 33 Cent. Dig. Logs, § 112.

5. — In general.

See 9 Cent. Dig. Chat. Mtg. §§ 4-13, 16; 33 Cent. Dig. Logs, § 112.

An instrument was in scope and form a chattel mortgage, and recited that it was "intended as a chattel mortgage to secure the debts herein mentioned," and that it was made to three creditors mentioned, in behalf of themselves and the other creditors named, because, on account of their great number, it would be inconvenient for all to act in its execution. It contained no condition of defeasance, but directed the mortgagees to sell the mortgaged property. *Held*, that this was a chattel mortgage.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892.

6. — Sale.

See 9 Cent. Dig. Chat. Mtg. §§ 22-41; 43 Cent. Dig. Sales, § 12, 1322.

Goods were delivered to a person, and he gave notes in payment therefor, in which it was stipulated that title should not pass until the notes and interest were paid; that the vendor might take back the property whenever he deemed himself unsafe, and that, if he did take it back, he might sell it, or, without sale, indorse its true value on the note, in which case the vendee should pay the balance as damages and rental for the goods. *Held*, that the transaction was not a mortgage, but a conditional sale.—*Harkness v. Russell*, 118 U. S. 663, 7 S. Ct. 51, 30 L. Ed. 285, affirming judgment *Russell v. Harkness*, 4 Utah, 197, 7 P. 865.

35. Evidence as to character of transaction or instrument.

See 9 Cent. Dig. Chat. Mtg. §§ 42-45.

38. — Parol evidence.

See 9 Cent. Dig. Chat. Mtg. § 44.

Evidence to show that a bill of sale which appears on its face to have been given in discharge of a debt was really intended to give the creditor additional security is admissible

under the Porto Rico law of evidence (section 101) declaring that the rule which raises a conclusive presumption of the truth of the facts recited in a written instrument does not apply to the recital of a consideration.—*Cabrera v. American Colonial Bank*, 29 S. Ct. 623, 214 U. S. 224, 53 L. Ed. 974.

(B) FORM AND CONTENTS OF INSTRUMENTS.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 83-109.]

(C) EXECUTION AND DELIVERY.

See 9 Cent. Dig. Chat. Mtg. §§ 110-140.

Power of partner to bind firm, see Partnership, 142.

(D) VALIDITY.**75. Estoppel or waiver as to defects or objections.**

See 9 Cent. Dig. Chat. Mtg. § 146.

Misrepresentation by a corporate chattel mortgagor as to its principal place of business, and the fact that the mortgage was given for purchase money, *held* not to estop the mortgagor's trustee in bankruptcy from asserting that the mortgage was invalid because not recorded in the county of the mortgagor's residence, as required by Hurd's Rev. St. Ill. 1909, c. 95.—*Fairbanks Steam Shovel Co. v. Wills*, 36 S. Ct. 466, 240 U. S. 642, 60 L. Ed. 841, affirming decree *In re Federal Contracting Co.*, 212 F. 688, 129 C. C. A. 224.

II. FILING, RECORDING, AND REGISTRATION.**(A) ORIGINAL.****87. Place.**

See 9 Cent. Dig. Chat. Mtg. §§ 162-165.

The lien of a chattel mortgage recorded at Muskogee with the clerk of the United States court ex officio recorder was not lost because not recorded at Vinita and transferred to the indexes at Pryor Creek under Acts May 27, 1902, and Feb. 19, 1903, creating new districts with recording officers at these two places.—*First Nat. Bank of Claremore v. Keys*, 33 S. Ct. 642, 229 U. S. 179, 57 L. Ed. 1140, affirming judgment *C. M. Keys & Co. v. First Nat. Bank of Claremore*, 104 P. 346, 22 Okl. 174, 18 Ann. Cas. 152.

(B) RENEWAL.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 175-183.]

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 184-188.]

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 189-197.]

(C) PROPERTY MORTGAGED, AND ESTATES AND INTERESTS OF PARTIES THEREIN.

117. Crops.

See 9 Cent. Dig. Chat. Mtg. § 202.

Mortgage construed and held to cover the crops only and not the land itself.—Gallardo v. Noble, 35 S. Ct. 280, 238 U. S. 135, 59 L. Ed. 503.

118. Animals and increase.

See 9 Cent. Dig. Chat. Mtg. §§ 203, 204.

A mortgage of domestic animals covers their increase, though silent as to such increase.—Northwestern Nat. Bank v. Freeman, 19 S. Ct. 38, 171 U. S. 620, 43 L. Ed. 307, affirming decree 81 P. 1127, 5 Ariz. 106.

125. Change in character or identity of property.

See 9 Cent. Dig. Chat. Mtg. §§ 210-212.

Where a newspaper, whose entire plant and good will have been mortgaged, is consolidated with another, the name of the paper changed, and a new corporation formed to publish it, which, in the course of business, entirely uses up the mortgaged plant, the lien of the mortgage does not apply to the existing plant, substituted for that so consumed, nor to the good will of the newspaper, even though the new corporation occupied for some years the old place of business, and paid interest for 10 months on the mortgage debt.—Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 436, 13 S. Ct. 944, 37 L. Ed. 799, affirming decree (C. C.) 36 F. 722.

(D) LIEN AND PRIORITY.

Priority of lien for supplies to mortgage of vessel, see Maritime Liens, 38.

133. Nature and existence of lien in general.

See 9 Cent. Dig. Chat. Mtg. § 219.

135. Duration of lien.

See 9 Cent. Dig. Chat. Mtg. § 219.

Comp. Laws, §§ 2801, 2805, declare that when a chattel mortgage, made and filed in accordance with the statutory provisions, specially states that the mortgagor is to retain possession, and is accompanied by an affidavit of good faith, it shall be valid as against creditors and subsequent mortgagees, even though unaccompanied by change of possession, from the time it is filed until the maturity of the debt secured, and 90 days thereafter, provided the entire time does not exceed one year. Section 3460 limits the remedy upon a debt secured by mortgage of personal property to an action of foreclosure, and sections 3206, 3209, provide that purchasers or incumbancers shall be deemed to have constructive notice of suits affecting the title or possession of personal prop-

erty only when a notice is filed with the county recorder giving the names of the parties, the object of the action, and a description of the property affected. Held, that when all these requirements have been complied with an action of foreclosure commenced before the expiration of the 90 days preserves the mortgage lien until final judgment, and it is superior to the title conferred by an execution sale made after the 90 days, notwithstanding the provision of section 2837 that every sale or assignment of chattels not followed by continuous change of possession shall be conclusive evidence of fraud, as against creditors or bona fide purchasers.—Broom v. Armstrong, 137 U. S. 266, 11 S. Ct. 73, 34 L. Ed. 648, affirming judgment 5 Utah, 176, 13 P. 364.

In absence of a construction by Illinois courts of Hurd's Rev. St. 1913, c. 95, §§ 1, 4, as to continuation of chattel mortgage after three years, the mortgage lien will be deemed to expire as to judgment creditors 3 years after recordation subject to extension of 12 months from filing of affidavit in conformity with such act.—Fallows v. Continental & Commercial Trust & Savings Bank, 35 S. Ct. 29, 235 U. S. 300, 59 L. Ed. 238, affirming decree in re Tengel Co., 201 F. 82, 119 C. C. A. 420.

139. Mortgagee as bona fide purchaser.

See 9 Cent. Dig. Chat. Mtg. § 238.

The giving of a chattel mortgage merely as collateral security for past indebtedness will not constitute the mortgagee a mortgagee for value.—People's Savings Bank v. Bates, 7 S. Ct. 679, 120 U. S. 556, 30 L. Ed. 754.

145. Notice affecting priority.

See 9 Cent. Dig. Chat. Mtg. §§ 242, 243, 245-253.

146. — In general.

See 9 Cent. Dig. Chat. Mtg. § 253.

A mortgage covering a specified number of sheep out of a larger number owned by the mortgagor, there being no way of identifying those mortgaged, is nevertheless valid as against a subsequent mortgagee having knowledge of the facts.—Northwestern Nat. Bank v. Freeman, 19 S. Ct. 38, 171 U. S. 620, 43 L. Ed. 307, affirming decree 81 P. 1127, 5 Ariz. 106.

151. Failure to file or record mortgage.

See 9 Cent. Dig. Chat. Mtg. §§ 254-271; 33 Cent. Dig. Logs, § 112.

152. — Effect in general.

See 9 Cent. Dig. Chat. Mtg. §§ 254, 266; 33 Cent. Dig. Logs, § 112.

The county of the principal office of a corporate mortgagor, as stated in its certificate of incorporation, is the residence of the mortgagor within Hurd's Rev. St. Ill. 1909, c. 95, rendering unrecorded chattel mortgages invalid, in absence of change of possession.—Fairbanks Steam Shovel Co. v. Wills, 36 S. Ct. 466, 240 U. S. 642, 60 L. Ed. 841, affirming decree in re Federal Contracting Co., 212 F. 688, 129 C. C. A. 224.

153. — Subsequent bona fide purchasers or mortgagees.

See 9 Cent. Dig. Chat. Mtg. §§ 255-262, 267, 268.

The words "purchaser or mortgagee in good faith," as used in 2 How. Ann. St. § 6193, providing that, as to such a purchaser or mortgagee, a prior mortgage, unaccompanied by delivery, shall be void unless filed, mean a purchaser or mortgagee for valuable consideration without notice.—People's Sav. Bank v. Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. Ed. 754.

Under Code 1876, § 2170, requiring conveyances of personal property to be recorded within three months, mortgage notes for the purchase price, if unrecorded, would convey no

title, as against the holder of a duly-recorded subsequent mortgage, without notice of the note-holder's claim.—*Van Winkle v. Crowell*, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880.

IV. RIGHTS AND LIABILITIES OF PARTIES.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 272-359.]

V. RIGHTS AND REMEDIES OF CREDITORS.

Retention of possession as affecting title of trustee in bankruptcy, see Bankruptcy, ¶184.

¶180. Creditors entitled to attack mortgage.

See 9 Cent. Dig. Chat. Mtg. §§ 365, 366.

In replevin brought by a prior against a subsequent mortgagee of chattels consisting of the mortgagor's stock in trade, in which defendant sought to defeat the plaintiff's mortgage as fraudulent, *held*, that defendant, although in possession, was to be considered as a creditor at large, and that the plaintiff's mortgage was not open to attack by him.—*People's Sav. Bank v. Bates*, 120 U. S. 556, 7 S. Ct. 679, 30 L. Ed. 754.

¶182. — Necessity of lien.

See 9 Cent. Dig. Chat. Mtg. § 366.

Subsequent creditors without notice of unrecorded chattel mortgage, who have not secured any specific lien on the mortgaged property, are not within the term "creditors," as used in *Ky. St. 1903, § 496*.—(1912) *Holt v. Crucible Steel Co. of America*, 32 S. Ct. 414, 224 U. S. 262, 56 L. Ed. 756, affirming decree (1909) *Crucible Steel Co. of America v. Holt*, 174 F. 127, 98 C. C. A. 101.

¶184. Retention of possession by mortgagor.

See 9 Cent. Dig. Chat. Mtg. §§ 367-425.

¶187. — Effect of possession or control by mortgagor in general.

See 9 Cent. Dig. Chat. Mtg. §§ 372-392.

A chattel mortgage on a stock of goods is not, as matter of law, fraudulent as to creditors, or void because the mortgagor is to remain in possession and prosecute the business in the ordinary mode.—*People's Savings Bank v. Bates*, 7 S. Ct. 679, 120 U. S. 556, 30 L. Ed. 754.

¶190. — Disposition of proceeds of property.

See 9 Cent. Dig. Chat. Mtg. §§ 407-416.

Where a chattel mortgage on a stock of goods provides that the mortgagee may take possession of them and apply them to the satisfaction of the debt, a verbal agreement that the mortgagor may use the proceeds of his daily sales to support himself and keep up the stock, applying the whole of the surplus to the payment of the debt, will not, in Iowa, render the mortgage fraudulent as a matter of law.—*Etheridge v. Sperry*, 139 U. S. 266, 11 S. Ct. 565, 35 L. Ed. 171, affirming judgment *Sperry v. Etheridge*, 63 Iowa, 543, 19 N. W. 657.

¶191. — Sufficiency of transfer of possession.

See 9 Cent. Dig. Chat. Mtg. §§ 417-425.

Property covered by an unrecorded chattel mortgage is delivered to and retained by the mortgagee within *Rev. Laws Mass. c. 198, § 1*, where, the mortgaged property having been attached, the mortgagee on the same day put a

keeper in possession, and notified the deputy sheriff the next day of his claim, and gave notice of intent to foreclose.—*Duffy v. Charak*, 35 S. Ct. 264, 236 U. S. 97, 59 L. Ed. 483, reversing decree 200 F. 747, 119 C. C. A. 191.

¶193. Failure to file or record mortgage.

See 9 Cent. Dig. Chat. Mtg. §§ 426-433, 438-441; 33 Cent. Dig. Logs, § 112.

¶194. — Necessity of filing or recording as against creditors.

See 9 Cent. Dig. Chat. Mtg. §§ 426, 427; 33 Cent. Dig. Logs, § 112.

Pledge of personalty so situated that the owner cannot deliver it to the pledgee, he having no such apparent ownership as would be relied on by creditors and mortgagees, will not, in absence of a controlling decision of the state court, be regarded as embraced in *Gen. Code Ohio, § 8560*, providing that chattel mortgages not accompanied by actual change of possession shall be invalid as to certain persons unless recorded.—*Dale v. Pattison*, 34 S. Ct. 785, 234 U. S. 399, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754, affirming decree 199 F. 987, 117 C. C. A. 663.

¶196. — Effect of failure to file or record or to renew filing or record.

See 9 Cent. Dig. Chat. Mtg. §§ 429, 438-441.

A lien on property covered by unfiled chattel mortgage was not created in favor of creditors of mortgagor becoming such after its execution, by *Comp. Laws Mich. 1897, § 9523*.—*Detroit Trust Co. v. Pontiac Sav. Bank*, 35 S. Ct. 509, 237 U. S. 186, 59 L. Ed. 907, affirming decree 196 F. 29, 115 C. C. A. 663.

¶197. — Creditors entitled to protection.

See 9 Cent. Dig. Chat. Mtg. §§ 430-433.

One who takes, from the executors of an estate, as part of his patrimony, a note made by a third person, to the testator, becomes, on that date, a creditor of the maker, within the meaning of the Michigan statute, which declares void, as against creditors, all unrecorded chattel mortgages which are unaccompanied by immediate change of possession. *Iow. Ann. St. § 6193*.—*Cutler v. Huston*, 158 U. S. 423, 15 S. Ct. 868, 39 L. Ed. 1040.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

¶204. Filing or recording assignment.

See 9 Cent. Dig. Chat. Mtg. § 451.

The failure of the Kansas laws to prohibit the recording of the assignment of a chattel mortgage given to secure a negotiable note does not make such action necessary in order to protect the assignee, but, in order to compel such action, there must be a law which provides for such record, either in express terms or by plain and necessary implication. Judgment (1905) 79 P. 1134, affirmed.—*National Live Stock Bank of Chicago v. First Nat. Bank*, 27 S. Ct. 79, 203 U. S. 296, 51 L. Ed. 192.

The provision for recording the satisfaction of a chattel mortgage by the mortgagee, his assigns, or personal representative, which is made by *Gen. St. Kan. 1901, § 4251, par. 36*, does not make it necessary to record or file the assignment of a chattel mortgage in order to protect the assignee.—*Id.*

¶207. Rights and liabilities of parties.

See 9 Cent. Dig. Chat. Mtg. §§ 455-460, 462.

208. — In general.

See 9 Cent. Dig. Chat. Mtg. §§ 455, 460, 462.

The purchaser of a chattel mortgage given to secure the renewal of a debt secured by a former mortgage between the same parties, and covering the same property, which is not surrendered or satisfied of record, is charged by the record with notice of, and is bound by, recitals in such former mortgage.—*Northwestern Nat. Bank v. Freeman*, 19 S. Ct. 36, 171 U. S. 620, 43 L. Ed. 307, affirming decree 81 P. 1127, 5 Ariz. 106.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 496-514.]

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

240. Conveyance or disposition of property mortgaged.

See 9 Cent. Dig. Chat. Mtg. §§ 506, 508.

A delay of three and a half years before questioning the completeness of the title acquired by a mortgagee by virtue of a delivery to him of the mortgaged property, during which time he has successfully dealt with it as his own, is fatal to the right to rescind the contract under which the delivery was made, and to treat him as a mortgagee in possession because of the breach of his agreement to cancel the mortgage and surrender certain notes, although he has brought an action upon one of the notes to recover a sum equal to the value of that portion of the property which was not delivered as agreed, instead of an action in form for the value of such undelivered property. *Judgment (Ariz.) 64 P. 434, reversed.*—*Ward v. Sherman*, 24 S. Ct. 227, 192 U. S. 168, 48 L. Ed. 391.

The right to rescind a contract under which certain mortgaged property was delivered to the mortgagee, and to treat him as a mortgagee in possession, after he has successfully dealt with the property for several years, cannot be founded upon his failure to cancel the mortgage and surrender certain notes, where a delivery of all the property described in the contract was not made, and his duty to surrender and cancel the notes and mortgage was conditioned upon a complete delivery.—*Id.*

IX. FORECLOSURE.

268. Actions to foreclose.

See 9 Cent. Dig. Chat. Mtg. §§ 529, 553-580.

275. — Parties.

See 9 Cent. Dig. Chat. Mtg. § 562.

Since a membership in the Western Associated Press can, under its by-laws, only be sold to publishers of newspapers, and a transfer of such membership would not entitle the transferee to the privileges of a member, unless voluntarily accorded him by the association, a bill will not be entertained to foreclose a mortgage on a certificate of membership in such association unless the association is made a party defendant.—*Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 13 S. Ct. 944, 149 U. S. 436, 37 L. Ed. 799, affirming decree (C. C.) 36 F. 722.

281. — Injunction and receiver.

See 9 Cent. Dig. Chat. Mtg. § 529.

The court may properly authorize a receiver appointed in a suit to foreclose a mortgage upon the furniture, etc., of an hotel, to carry on the business, and to borrow money for that purpose, where the temporary closing of the hotel would probably result in serious loss to the

good will of its business.—*Cake v. Mohun*, 17 St. Ct. 100, 164 U. S. 311, 41 L. Ed. 447.

X. REDEMPTION.

[No paragraphs or references in this Digest. But see 9 Cent. Dig. Chat. Mtg. §§ 581-590.]

CHEAT.

See False Personation.

CHECKS.

See—

Assignments, 49.
Banks and Banking, 137-142.
Bills and Notes.
Bribery, 1.
Depositories, 9.
Forgery.

CHEESE.

See Internal Revenue, 17.

CHEMICALS.

Duties on, see Customs Duties, 24.

CHEMISTS.

As laborers within exclusion laws, see Aliens, 50.

CHIEF JUSTICE.

Allowance of writs of error, see Appeal and Error, 399.

CHIEF SUPERVISOR.

Of elections, see Elections, 53.

CHILDREN.

See—

Adoption.
Bastards.
Guardian and Ward.
Infants.
Parent and Child.

Beneficiaries of trusts, see Trusts, 124.

Care required of children as against negligence of others, see Negligence, 85.

Contributory negligence of parent or custodian imputable to child, see Negligence, 94-96.

Enlistment in army, see Army and Navy, 19.

Naturalization, see Aliens, 63, 70.

CHINESE.

Equal protection of laws, see Constitutional Law, 222, 223.

Exclusion or expulsion, see Aliens, 18-32.

CHOSE IN ACTION.

Assets of estate of decedent, see Executors and Administrators, 48, 49.

CHURCHES.

See Religious Societies.

CIGARETTES.

License tax as denial of equal protection of laws, see Constitutional Law, 230; due process of law, see Constitutional Law, 287.

Regulation as interference with commerce, see Commerce, 53.

Traffic in original packages, see Commerce, 41.

CIRCUIT COURTS.

See Courts, ◀408-417, 418½.

CIRCUIT COURTS OF APPEALS.

See Courts, ◀401-407.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, ◀784.

CITATION.

On appeal, see Appeal and Error, ◀396, 404-409.

CITIES.

See Municipal Corporations.

CITIZENS.*Scope-Note.*

[INCLUDES persons within the allegiance of the United States or of any of the several states; nature and incidents of citizenship; and rights, privileges, and immunities of citizens in general, as distinguished from mere residents or aliens.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ◀1. Who are citizens.
- 2. — In general.
- 3. — Persons born within the jurisdiction.
- 5. — Foreign subjects or citizens in territory acquired by United States.
- 6. — Inhabitants of territory admitted as state.
- 8. — Women married to aliens.
- 9. — Children of citizens.

Cross-References.

See—
 Aliens.
 Indians.
 Citizenship as ground of jurisdiction of United States courts, see—
 Courts, ◀301-325, 382.
 Removal of Causes, ◀26-61.
 Citizenship as qualification for location of mining claim, see Mines and Minerals, ◀12.

Deportation of alien prostitutes married to citizens, see Aliens, ◀23.
 Equal protection of laws, see Constitutional Law, ◀209-250.
 Extradition of citizens to foreign country, see Extradition, ◀2.
 Privileges and immunities, see Constitutional Law, ◀204-208.
 Protection of civil rights, see Civil Rights.

◀1. Who are citizens.

See 10 Cent. Dig. Citiz. §§ 1-16.

◀2. — In general.

See 10 Cent. Dig. Citiz. §§ 1, 12-16.

An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognized as a citizen, either by the United States or by the state, is not a citizen of the United States, within Const. Amend. 14, § 1, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside."—*Elk v. Wilkins*, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643.

The word "citizen," as it occurs in Rev. St. U. S. § 5508, relative to conspiracies, is used in its strict sense, as contrasted with "alien," and not as synonymous with "resident," "inhabitant," or "person."—*Baldwin v. Franks*, 120 U. S. 678, 7 S. Ct. 656, 763, 32 L. Ed. 766.

A corporation aggregate is not considered as a citizen, or entitled to the privileges of a citizen, except for the purpose of giving jurisdiction, for which a corporation may be considered a citizen of the state by which it is incorporated.—*Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650; *Norfolk & W. R. Co. v. Commonwealth*, 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394.

The fourteenth amendment to the constitution, which declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the states wherein they reside," is affirmative and declaratory, intended to allay doubts and settle controversies, and is not intended to impose any new restrictions upon citizenship. *Order (D. C.) 71 F. 382*, affirmed.—*United States v. Wong Kim Ark*, 18 S. Ct. 456, 169 U. S. 649, 42 L. Ed. 890.

As the constitution nowhere defines the meaning of the words "citizen of the United States," except by the declaration in the fourteenth amendment that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States," resort must be had to the common law, the principles of which were familiar to the framers of the constitution.—Id.

☞3. — **Persons born within the jurisdiction.**

See 10 Cent. Dig. Citiz. §§ 2, 13.

Before the Civil Rights Act, April 9, 1868, c. 31, § 1 (14 Stat. 27), or the fourteenth amendment to the constitution, all white persons born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were natural-born citizens of the United States. Order (D. C.) in re Wong Kim Ark, 71 F. 382, affirmed.—United States v. Wong Kim Ark, 18 S. Ct. 456, 169 U. S. 649, 42 L. Ed. 890.

The refusal of congress to permit the naturalization of Chinese persons cannot exclude Chinese persons born in this country from the operation of the constitutional declaration that all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.—Id.

A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes, at the time of his birth, a citizen of the United States.—Id.

The fourteenth amendment affirms the ancient rule of citizenship by birth within the territory in the allegiance and under the protection of the country, including all children here born of resident aliens, except the children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies during a hostile occupation, and children of Indian tribes owing direct tribal allegiance. It includes the children of all other persons, of whatever race or color, domiciled within the United States.—Id.

The laws conferring citizenship on foreign-born children of citizens do not supersede or restrict, the established rule of citizenship by birth.—Id.

☞5. — **Foreign subjects or citizens in territory acquired by United States.**

See 10 Cent. Dig. Citiz. § 4.

An alien minor who had resided in Texas less than six months before the admission of that state into the Union, and was not a resident at the time of its Declaration of Independence, and had never taken the oath of allegiance to Texas, was not a citizen of Texas at the time of its admission, or, irrespective of the citizenship of his parents, "one of the people of Texas" who became citizens of the United States without naturalization. Coutzen v. United States, 33 Ct. Cl. 475, affirmed.—Coutzen v. United States, 21 S. Ct. 98, 179 U. S. 191, 45 L. Ed. 148.

The absence of a Spanish subject from the Philippine Islands during the entire period allowed by article 9 of the treaty of peace with Spain of December 10, 1898 (30 Stat. 1759),

for making a declaration of his intention to preserve his allegiance to the crown of Spain, prevents the loss of his Spanish nationality by reason of his failure to make such declaration.—Bosque v. United States, 28 S. Ct. 501, 209 U. S. 91, 52 L. Ed. 698.

☞6. — **Inhabitants of territory admitted as state.**

See 10 Cent. Dig. Citiz. § 5.

When a state is admitted into the Union upon an equal footing with the original states, all residents thereof who are endowed by congress with political rights and privileges, or who, with the consent of congress, are permitted to participate in the formation of the new state, become citizens of the United States by adoption, even though, being foreigners, they have never complied with the requirements of the naturalization laws.—Boyd v. State of Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment State v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

The Nebraska enabling act (13 Stat. 47) declared that all persons qualified to vote for representatives of the territorial legislature should be eligible to election as members of the convention, and should be entitled to vote upon the acceptance or rejection of the constitution. By the existing laws of the territory, foreigners who had declared an intention to become citizens were entitled to vote at elections, and this provision was carried into the constitution of the new state, as ratified by congress. Held that, upon the admission of the state into the Union, all persons of this class became citizens of the United States.—Id.

☞8. — **Women married to aliens.**

See 10 Cent. Dig. Citiz. § 7.

No exception as to citizenship is given an American woman who marries a resident foreigner and remains within the jurisdiction of the United States by Act March 2, 1907.—MacKenzie v. Hare, 36 S. Ct. 108, 239 U. S. 299, 60 L. Ed. 297, affirming decree 134 P. 713, 165 Cal. 776, Ann. Cas. 1915B, 261.

Congress could validly enact provisions of Act March 2, 1907, under which an American woman who marries a foreigner forfeits her citizenship, though she remains within the United States.—Id.

☞9. — **Children of citizens.**

See 10 Cent. Dig. Citiz. §§ 8-12; 2 Cent. Dig. Aliens, § 156.

When a foreigner takes the oath declaring an intention to become a citizen of the United States, his minor sons thereby acquire an inchoate status as citizens; and, if they attain majority before their father completes his naturalization, that status is capable of being converted into complete citizenship by other means than the direct application provided for by the naturalization laws.—Boyd v. State of Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment State v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

CIVIL DAMAGE LAWS.

See Intoxicating Liquors, ☞283.

CIVIL RIGHTS.

Scope-Note.

[INCLUDES protection of general rights of a personal nature, independent of class distinctions or personal relations.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⌚2. Constitutional and statutory provisions against discrimination.
- 10. Discrimination as to service on juries.

Cross-References.

Constitutional guaranty of civil rights, see Constitutional Law, ⌚82-90.
Constitutional guaranty of trial by jury, see Jury, ⌚9-37.
Denial of civil right as ground for removal of prosecution from state court to federal court, see Removal of Causes, ⌚70.
Denial of equal protection of laws, see Constitutional Law, ⌚200-250.
Deprivation of life, liberty, or property without

due process of law, see Constitutional Law, ⌚251-320.
Privileges or immunities and class legislation, see Constitutional Law, ⌚204-208.
Protection of contract obligations, see Constitutional Law, ⌚113-183.
Protection of vested rights, see Constitutional Law, ⌚92-111.
Right of suffrage and regulation thereof, see Elections, ⌚2-19.

⌚2. Constitutional and statutory provisions against discrimination.

See 10 Cent. Dig. Civil R. §§ 1-10.

Const. U. S. Amend. 13, relates only to slavery and involuntary servitude; and, although it establishes universal freedom, it does not authorize congress to legislate upon subjects which are within the domain of state legislation; and therefore Act Cong. March 1, 1875, providing that any person who shall deny to any citizen the full enjoyment of any of the accommodations and advantages of inns, public conveyances, etc., shall be subject to a penalty, is unauthorized and void.—Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

Congress has no power to legislate upon subjects which are within the domain of state legislation, but only to provide modes of redress against the operation of state laws and the action of state officers when these are subversive of the fundamental rights specified in the constitution; and therefore Act Cong. March 1, 1875, providing that all persons shall be entitled to full and equal enjoyment of the accommodations and advantages of inns, public conveyances, etc., and imposing penalties upon any person who shall violate said act, is unconstitutional.—Id.

The first and second sections of the civil rights act, passed March 1, 1875, in effect declaring that in all inns, public conveyances, and places of amusement colored citizens, whether slaves or not, and citizens of other races, shall

have the same accommodations and privileges as are enjoyed by white citizens, and making it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the said accommodations or privileges, are unconstitutional enactments as applied to the several states, not being authorized by either the thirteenth or fourteenth amendment to the constitution of the United States.—Id.

⌚10. Discrimination as to service on juries.

See 10 Cent. Dig. Civil R. § 5.

A motion to set aside a panel of petit jurors, on the ground of the exclusion from the panel of qualified citizens of African descent, is properly overruled, where it is not clearly and distinctly shown that they were excluded because of their race or color.—Bush v. Commonwealth of Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354.

Where a state court of final resort had held that state laws excluding from grand and petit juries citizens of African descent were unconstitutional and void, it could not be presumed in advance of a trial that the officers summoning the juries would disregard the law so declared, and the case was not removable under Rev. St. § 641, on the ground that defendant was denied the equal protection of the laws guaranteed him by the fourteenth amendment, because such statutes had not been formally repealed.—Id.

CIVIL SERVICE.

See United States, ⌚35, 36, 39, 52.

Application of law to merchant appraisers, see Customs Duties, ⌚59.

Forging vouchers on examination, see Forgery, ⌚14.

CIVIL WAR.

Claims against United States, see United States, ⌚102.

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CLAIMS.

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Counties, ⌚197.

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Against particular persons or estates, see—

Assignments for Benefit of Creditors, ⌚297-317.

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Against particular persons or estates, see—
 Homestead, ¶105-107.
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 Assignment of claim against foreign govern-
 ment, see Assignments, ¶10.
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 9-38.
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 To property levied on, see—
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CLASS LEGISLATION.

See Constitutional Law, ¶208.

CLEARING HOUSES.

See Banks and Banking, ¶320.

CLERKS.

Of federal government, see United States, ¶
 36.

CLERKS OF COURTS.

Scope-Note.

[INCLUDES officers of civil tribunals authorized to perform clerical functions, with incidental judicial powers, whether designated as clerks, prothonotaries, or by other titles; appointment, qualification, tenure, and removal of such officers, and ex officio and de facto clerks of courts; and their rights, powers, duties, and liabilities.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶10. Compensation and fees of clerks of state courts.
- 35. — Accounting as to fees.
- 38. Compensation and fees of clerks of United States courts.
- 39. — Right in general.
- 40. — Statutory provisions.
- 41. — Services in different courts.
- 43. — Writs, process, and notices.
- 44. — Oaths and affirmations.
- 46. — Recognizances, bonds, undertakings, and acknowledgments.
- 47. — Filing papers.
- 48. — Entries and records.
- 49. — Docket fees.
- 50. — Certificates, returns, and reports in general.
- 51. — Certificates as to attendance or fees of jurors or witnesses.
- 52. — Copies, duplicates, and exemplifications.
- 54. — Commissions.
- 55. — Per diem compensation.
- 59. — Liability of United States.
- 62. — Recovery of fees or salary.
- 63. Fees of clerks of territorial courts.
- 70. Custody and care of funds.
- 73. Liabilities on official bonds.
- 74. — Breach or fulfillment of conditions.
- 75. — Actions on bonds.

Cross-References.

Deposit with clerks, see Deposits in Court, ¶
 8.
 Embezzlement by clerk, see Embezzlement, ¶
 11, 21.

Signature to writ of error, see Appeal and
 Error, ¶400, 401.

¶10. Compensation and fees of clerks of state courts.

See 10 Cent. Dig. Clerks of C. §§ 33-65; 13 Cent.
 Dig. Counties, §§ 106, 116.

¶35. — Accounting as to fees.

See 10 Cent. Dig. Clerks of C. § 62.

The county clerk of the city and county of San Francisco cannot retain for his own use that portion of the fees collected by him as clerk of the superior court in naturalization proceedings which the clerk of court is authorized by Naturalization Act June 29, 1906, § 13, to retain, where his salary is fixed at a specified

sum by the charter in full compensation for all services rendered.—*Mulcrevy v. City and County of San Francisco*, 34 S. Ct. 260, 231 U. S. 689, 58 L. Ed. 425, affirming judgment *City & County of San Francisco v. Mulcrevy*, 113 P. 339, 15 Cal. App. 11.

⚡38. **Compensation and fees of clerks of United States courts.**

See 10 Cent. Dig. Clerks of C. § 66-87.

⚡39. — **Right in general.**

See 10 Cent. Dig. Clerks of C. § 68.

Charges for services of a clerk of a federal court on behalf of indigent defendants in criminal cases, which consist in administering oaths by order of court to defendant's witnesses, in administering oaths to affidavits of poverty, and affixing jurats, in filing and entering applications for process, in filing and entering motions of defendants for new trial, and in rendering services to defendant in a capital case, by order of court, in prosecution of writ of error, are properly allowed under Rev. St. U. S. § 823, 878 [U. S. Comp. St. 1901, pp. 635, 648], and Act Feb. 6, 1889, c. 113, 25 Stat. 655 [U. S. Comp. St. 1901, p. 492]. Judgments 37 Ct. Cl. 565, modified and 37 Ct. Cl. 571, affirmed.—*United States v. Jones*, 24 S. Ct. 561, 193 U. S. 528, 48 L. Ed. 776.

⚡40. — **Statutory provisions.**

See 10 Cent. Dig. Clerks of C. §§ 66, 71, 74, 75.

The clerk is entitled to fees for copies of orders for marshals to pay supervisors of election, as such orders are clearly within the act of February 22, 1875, making an order necessary before any account in favor of court officers is paid; and, even though such orders are not within the statute, if the court assumed to make them, and the clerk enters them, he is entitled to his fees thereof.—*United States v. Jones*, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325.

Rev. St. § 1765, precludes a clerk of the United States court from claiming any compensation for extra work germane to his office imposed on him by law, and he is not entitled to any fee or compensation for services as clerk in selecting juries in connection with the jury commissioners.—*United States v. King*, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328; *Same v. Payne*, 147 U. S. 687, 13 S. Ct. 442, 37 L. Ed. 332, applying *Same v. Saunders*, 120 U. S. 126, 7 S. Ct. 467, 30 L. Ed. 594.

⚡41. — **Services in different courts.**

See 10 Cent. Dig. Clerks of C. § 88.

Under Rev. St. §§ 624, 626, 796, 839, the clerk is entitled to charge a per diem fee for attendance on court by one of his deputies; and, where simultaneous sessions are held in separate divisions of the district, he is entitled to fees for personal attendance at one and attendance by deputy at the other. Section 831, declaring that only one fee shall be charged when the circuit and district courts sit at the same time, should be construed to mean when they sit at the same time and place.—*United States v. King*, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328.

⚡43. — **Writs, process, and notices.**

See 10 Cent. Dig. Clerks of C. § 69.

A clerk's claim for fees for issuing commitments to jail in addition to copy of the order of removal is too general, and cannot be allowed unless it appears that the writ was not issued to bring a prisoner into court, or for remanding him from the court, for in such cases commitments are declared to be unnecessary by Rev. St. § 1030.—*United States v. McCandless*, 147 U. S. 692, 13 S. Ct. 465, 37 L. Ed. 334.

A clerk of a federal court is properly allowed charges for issuing subpoenas for grand and petit jurors by order of the court. Judgments 37 Ct. Cl. 565, modified, and 37 Ct. Cl. 571, affirmed.—*United States v. Jones*, 24 S. Ct. 561, 193 U. S. 528, 48 L. Ed. 776.

⚡44. — **Oaths and affirmations.**

See 10 Cent. Dig. Clerks of C. § 72.

The clerk is entitled to a fee of 10 cents for administering the oath to witnesses respecting their mileage and attendance, but not for preserving the affidavit as a part of the records of the court.—*United States v. Taylor*, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, reversing judgment (C. C.) *Taylor v. United States*, 45 F. 531.

A clerk of a federal court is not entitled to fees for administering oaths and affixing jurats to accounts of United States marshals, in view of the provision of Act Feb. 22, 1875, c. 95, 18 Stat. 333 [U. S. Comp. St. 1901, p. 648], requiring clerks, marshals, and district attorneys to render their accounts duly sworn to for approval. Judgments 37 Ct. Cl. 565, modified, and 37 Ct. Cl. 571, affirmed.—*United States v. Jones*, 24 S. Ct. 561, 193 U. S. 528, 48 L. Ed. 776.

Compensation is properly allowed a clerk of a federal court for services in connection with affidavits of defendants in criminal cases of inability to pay costs.—*Id.*

An allowance to a clerk of a federal court of charges for administering oaths on the voir dire of grand and petit jurors cannot be justified under Rev. St. U. S. § 823, cl. 4 [U. S. Comp. St. 1901, p. 635].—*Id.*

⚡46. — **Recognizances, bonds, undertakings, and acknowledgments.**

See 10 Cent. Dig. Clerks of C. §§ 66, 81, 82.

The clerk of a federal court is not entitled to fees for drawing more than one recognizance in a criminal case, unless it appears that the witnesses could not conveniently have recognized together.—*United States v. King*, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328.

The comptroller of the treasury cannot prescribe the length of capias or bonds, or limit the clerk in his charge to a certain number of folios. Such matters are to be determined by the practice of the court.—*United States v. Taylor*, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, reversing judgment (C. C.) *Taylor v. United States*, 45 F. 531.

The clerk of a federal court can charge but one fee for taking the acknowledgment of a defendant in a criminal case and his sureties, unless it be made to appear that it was necessary to take them separately.—*United States v. Taylor*, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, following *Same v. Ewing*, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388, and reversing judgment (C. C.) *Taylor v. United States*, 45 F. 531.

⚡47. — **Filing papers.**

See 10 Cent. Dig. Clerks of C. § 63.

After sentence, no præcipes for commitment are necessary, and no allowance should be made for filing them.—*United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) *Van Duzee v. United States*, 41 F. 571.

Charges for filing præcipes for bench warrants are proper, since it is the practice for the clerk to wait for instructions from the district attorney, in the form of a præcipe, before issuing such warrants, and to file the præcipes.—*Id.*

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The clerk is entitled to fees for filing marshals' accounts current, but not for filing vouchers to such accounts, as under the act of 1875 the vouchers are deemed a part of the account.—*United States v. Jones*, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325; *Same v. King*, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328; *Same v. Payne*, 147 U. S. 687, 13 S. Ct. 442, 37 L. Ed. 332.

The clerk of a federal court is entitled to fees for filing duplicate accounts of officers of the court, on entry of orders approving the same, but not for filing vouchers.—*United States v. Jones*, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325; *Same v. Payne*, 147 U. S. 687, 13 S. Ct. 442, 37 L. Ed. 332.

The clerk is not entitled to a fee for filing orders from the district attorney discharging witnesses from attendance. Under Rev. St. § 877, it is proper that the district attorney should officially inform the clerk of the discharge of a witness, but the discharge should not be filed.—*United States v. Taylor*, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, reversing judgment (C. C.) *Taylor v. United States*, 45 F. 531.

A clerk of a circuit court of the United States is not entitled to any fee for filing the various papers surrendered to his custody by the circuit court commissioners in compliance with Act May 28, 1896, c. 252, 29 Stat. 184 [U. S. Comp. St. 1901, p. 499], abolishing their office and requiring them to "deposit" the official documents in their possession with the "clerk of the circuit court by which they were appointed," as such filing was authorized neither by this requirement nor by a standing court rule directing the clerk to file papers and transcripts of proceedings before a commissioner upon their receipt by him, which rule plainly had reference only to the current business of such commissioner. *Decree, Van Duzee v. United States*, 35 Ct. Cl. 214, reversed.—*United States v. Van Duzee*, 22 S. Ct. 648, 185 U. S. 278, 46 L. Ed. 909.

48. — Entries and records.

See 10 Cent. Dig. Clerks of C. § 76.

The allowance to the clerk of three dollars "for making dockets and indexes, issuing venire, taxing costs, and all other services on the trial or argument of a cause," includes entering the order for trial and recording the verdict.—*United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) *Van Duzee v. United States*, 41 F. 571.

Under a rule of court that in all criminal cases, unless otherwise specially ordered, the final record shall include the order made by the commissioner binding the party to appear before the grand jury, the clerk is entitled to an allowance for incorporating in the final record the transcript from the commissioner.—*Id.*

Under Rev. St. § 828, allowing the clerk of the circuit court 10 cents for "filing and entering every declaration, plea, or other paper," the clerk is not required to fasten together all the papers in a case sent up by the commissioner, and file the bundle as one paper, but may file them as received; nor is he required to enter every paper that he files on the court docket, but may make the entry on any proper book kept for the purpose.—*Id.*

The clerk of the federal district court is entitled to fees for entering orders approving marshals' accounts; and such fees are not "additional pay," within the meaning of Rev. St. § 1765, but are distinctly allowed by section 828, as folio fees.—*United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) *Van Duzee v. United States*, 41 F. 571; *Same v. Jones*, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325.

Fees are properly allowed for entering orders for trial, and recording the verdicts in criminal cases, as for "making a record," and

these services are not covered by the docket fee.—*United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399.

The clerk is entitled to fees for making final records in criminal cases; such records including the indictment and other pleadings, the processes, journal entries, and the order of commitment.—*United States v. Jones*, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325.

The proceedings before the committing magistrate properly constitute no part of the final record in a criminal case, and hence the clerk of the federal court is not entitled to any fee for copying therein the papers sent up by the commissioner.—*United States v. King*, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328.

While a writ of alias *fi. fa.* is ordinarily issued on a simple precept, it is competent for the district attorney to apply to the court for an order therefor, and, if such order is made, the clerk is bound to enter it, and is entitled to a fee therefor, whether or not such order was necessary.—*United States v. Payne*, 147 U. S. 687, 13 S. Ct. 442, 37 L. Ed. 332.

The clerk of a federal court is entitled to a fee for entering a recognizance taken in open court; but where the recognizance is taken out of court, by a separate instrument, he is only entitled to a fee for drawing and filing the same, and not for entering it on the record.—*Id.*

The best definition of a common-law record in a criminal case under the American practice is as follows: "The record should consist of the indictment properly indorsed, as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict, and the judgment of the court." And this is all that is required, unless it is designed for use in the review by the appellate court of the rulings below; and hence, in the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record, neither do affidavits, warrants, subpoenas, or capiases, except the one on which the arrest was made.—*United States v. Taylor*, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, reversing judgment (C. C.) *Taylor v. United States*, 45 F. 531.

The clerk is entitled to fees for services actually and necessarily performed in the making up of a criminal record, when the practice of a particular state or district requires a judgment record to be made.—*United States v. Taylor*, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, following *Same v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, and reversing judgment (C. C.) *Taylor v. United States*, 45 F. 531.

Where the practice in the court requires the clerk to make a record of the names of jurors, with their residences, or to do any other incidental work in connection with the names of the jurors drawn, he is entitled to charge for that, as for making a record.—*United States v. Kurtz*, 17 S. Ct. 15, 164 U. S. 49, 41 L. Ed. 346.

The provision of Rev. St. § 828, entitling the clerk to a fee of 15 cents per folio, does not authorize him, in computing his fees for making up a record, to treat each document, judgment, or order separately, for the enumeration of folios, instead of counting the folios of the record as one instrument continuously from beginning to end.—*Id.*

The services of a clerk of a federal court for recording abstracts of judgments, as required by a rule of court, are not covered by the docket fees prescribed by Rev. St. U. S. § 828, par. 10 [U. S. Comp. St. 1901, p. 635], and separate charges therefor are justified by paragraph 8 of that section, prescribing the fees which such clerk may receive for "making

any record."—United States v. Keatley, 27 S. Ct. 404, 204 U. S. 562, 51 L. Ed. 618.

◀49. — Docket fees.

See 10 Cent. Dig. Clerks of C. § 70.

The act allowing a fee for "making dockets and indexes, taxing costs, and other services in a cause which is dismissed or discontinued," does not entitle the clerk to an allowance for docketing, indexing, and taxing costs in cases sent up from the commissioner, in which defendant was bound over to the grand jury, but where the grand jury fails to find an indictment. The cases should not be docketed until the grand jury or district attorney has taken affirmative action.—United States v. Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) Van Duzee v. United States, 41 F. 571.

Proceedings for the removal of a prisoner from one district to another for trial are not "a cause," within the meaning of Rev. St. § 828, and the clerk is not entitled to fees for docketing and indexing the same.—United States v. King, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328.

A scire facias on a recognizance is an original action, and is therefore a "cause," within the meaning of Rev. St. § 828, allowing fees for docket entries and indexes upon the trial of a cause; but an indictment which has been ignored by the grand jury is not a cause, and such fees cannot be allowed thereon.—United States v. Payne, 147 U. S. 687, 13 S. Ct. 442, 37 L. Ed. 332.

A clerk of a federal court claimed a fee of three dollars for making docket entries under Rev. St. § 828, which allows that sum for making such entry "on the trial or argument of a cause where issue is joined and testimony given." The record showed that issue was joined and testimony given. *Held*, that he was entitled to the fee, although the record failed to show that the testimony was given on the "trial or argument."—*Id.*

The clerk of a federal court is not entitled to docket fees in cases where the grand jury have ignored the indictment.—United States v. Payne, 147 U. S. 687, 13 S. Ct. 442, 37 L. Ed. 332; Same v. McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. Ed. 334.

Docket fees cannot be taxed until the case is finally disposed of, and no such fee can be allowed where the jury disagrees, unless it appears that the case has terminated.—United States v. McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. Ed. 334.

Rev. St. § 828, restricting the docket fee to one dollar in a case which is dismissed or discontinued, applies only in case of dismissal or discontinuance before issue has been joined.—United States v. Kurtz, 17 S. Ct. 15, 164 U. S. 49, 41 L. Ed. 346.

The clerk's right to a docket fee, under Rev. St. § 828, "where issue is joined," attaches at the time such issue is in fact joined, and is not lost by the subsequent withdrawal of the plea constituting the issue.—*Id.*

Separate trials under one indictment against several defendants are separate causes, within the meaning of Rev. St. U. S. § 828 [U. S. Comp. St. 1901, p. 635], prescribing the docket fees which the clerk of a federal court may charge in a cause.—United States v. Keatley, 27 S. Ct. 404, 204 U. S. 562, 51 L. Ed. 618.

◀50. — Certificates, returns, and reports in general.

See 10 Cent. Dig. Clerks of C. § 79.

Unless the treasury department requires authentication by seal of the court of orders for

payment by the marshal of sums due to jurors and witnesses under Rev. St. § 855, the clerk has no right to attach the seal and charge therefor.—United States v. Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) Van Duzee v. United States, 41 F. 571.

The clerk of a federal court is entitled to fees for certifying copies of orders approving the accounts of marshals and other officers to be forwarded to the department with the accounts, but not for affixing seals thereto, unless the department requires the copy to be so authenticated.—United States v. Jones, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325.

A claim by a clerk for "miscellaneous fees, entering orders of court, making copies, certificates, and seals," is objectionable as being too general; for, while the clerk is undoubtedly entitled to fees for entering the orders of court, he is not entitled to fees for making copies, certificates, and seals, unless they are required by law or the practice of the department.—United States v. McCandless, 147 U. S. 692, 13 S. Ct. 465, 37 L. Ed. 334.

Charges of a clerk of the federal court for certificates to copies of *sci. fa.* and copies of orders of the court for furnishing meals to jurors are properly disallowed, where no direction of the court as to such certificates is shown. Judgments 37 Ct. Cl. 565, modified, and 37 Ct. Cl. 571, affirmed.—United States v. Jones, 24 S. Ct. 561, 193 U. S. 523, 48 L. Ed. 776.

◀51. — Certificates as to attendance or fees of jurors or witnesses.

See 10 Cent. Dig. Clerks of C. § 80.

The practice which obtains in the Southern district of Georgia of making separate reports to the court of the amount of fees due from the United States to witnesses and jurors, and obtaining separate orders for the payment of each claim, is unnecessary, burdensome, and oppressive, and the clerk is not entitled to fees for making such reports, or for filing the orders made thereon.—United States v. King, 147 U. S. 676, 13 S. Ct. 439, 37 L. Ed. 328.

The clerk is entitled to fees for copies of orders directing the marshal to pay witnesses and jurors, and for certificates thereto, but not for seals to the copies.—United States v. Taylor, 147 U. S. 695, 13 S. Ct. 479, 37 L. Ed. 335, following Same v. Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, and reversing judgment (C. C.) Taylor v. United States, 45 F. 531.

◀52. — Copies, duplicates, and exemplifications.

See 10 Cent. Dig. Clerks of C. §§ 78, 79.

Though Rev. St. § 829, fixing the marshal's fee for service of subpoenas, forbids him to make a further charge for copy, the clerk, being required by rule of court to make copies to be left with witnesses, is entitled to an allowance therefor.—United States v. Van Duzee, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) Van Duzee v. United States, 41 F. 571.

Though Const. Amend. art. 6, entitles the accused in all criminal cases to be informed of the nature and cause of the accusation, he is not entitled, without an order of the court, to a copy of the indictment against him at the expense of the government, except in capital cases, as expressly provided by Rev. St. § 1033, and clerks who have furnished such copies cannot charge the government therefor.—*Id.*

An allowance to a clerk of a federal court of charges for a transcript of record on writ of error in criminal proceedings, ordered by the court on behalf of an indigent defendant, is not precluded on the theory that Rev. St. U. S. §

878 [U. S. Comp. St. 1901, p. 688], providing for payment under order of court of fees and costs when defendant under indictment is without means, is exclusive, and does not cover the charge for such service. Judgments 37 Ct. Cl. 565, modified, and 37 Ct. Cl. 571, affirmed.—United States v. Jones, 24 S. Ct. 561, 193 U. S. 528, 48 L. Ed. 776.

A clerk of a federal Circuit Court of Appeals on appeal from final judgment or decree can make no charge for preparing the record for the printer, or indexing same, or supervising the printing and distributing, by virtue of fee bill prescribed by federal Supreme Court under authority of Act Feb. 19, 1897, where, conformably to Act Feb. 13, 1911, plaintiff in error has caused the transcript to be printed and indexed under rule of the District Court, and has filed with the clerk of the Circuit Court of Appeals 25 printed copies thereof.—*Rainey v. W. R. Grace & Co.*, 34 S. Ct. 242, 231 U. S. 703, 58 L. Ed. 445.

654. — **Commissions.**

See 10 Cent. Dig. Clerks of C. § 77.

The statutory fee of 1 per cent. "for receiving, keeping and paying out money in pursuance of any statute or order of court," does not deprive the clerk of fees to which he would have been entitled if the money had been kept and disbursed by another officer.—*United States v. Kurtz*, 17 S. Ct. 15, 164 U. S. 49, 41 L. Ed. 346.

655. — **Per diem compensation.**

See 10 Cent. Dig. Clerks of C. § 85.

Under Rev. St. § 828, allowing the clerk of the federal courts "five dollars a day for his attendance on the court while actually in session," the clerk is entitled to the fee, not only when the judge is present in person, but when in obedience to his written order, under Rev. St. §§ 583, 672, the court is adjourned by the marshal or clerk, the journal being first opened, and the other officers being present.—*United States v. Pitman*, 147 U. S. 669, 13 S. Ct. 425, 37 L. Ed. 324, affirming judgment (D. C.) *Pitman v. United States*, 45 F. 159.

The same person may hold the office of clerk of the United States district and circuit courts and also commissioner of the circuit court, and is entitled to the per diem fee of five dollars for attendance on court when in session, and also "for hearing and deciding on criminal charges" as commissioner, although both functions were discharged on the same day.—*United States v. McCandless*, 147 U. S. 692, 13 S. Ct. 465, 37 L. Ed. 334.

A clerk of a district and circuit court of the United States must be deemed entitled to the per diem compensation recognized as his right by Act March 3, 1887, c. 362, 24 Stat. 509, 541 [U. S. Comp. St. 1901, pp. 2437, 640], "when the court is open for business or business is actually transacted in court," for those days on which, in the absence of any judge, he entered on the journal certain orders, decrees, and other proceedings transmitted to him for that purpose by the different judges composing the courts of such district, since to decide otherwise would be to overrule a uniform construction given to this statute by the treasury department, which is not obviously or clearly wrong, but is, at the most, subject to a doubt of its soundness.—*United States v. Fennell*, 22 S. Ct. 633, 185 U. S. 236, 46 L. Ed. 890.

A clerk of a federal district and circuit court is entitled to his statutory per diem compensation for days on which he refers to the referee in bankruptcy voluntary petitions in bankruptcy filed during the absence of the judge from the district, though without written orders to open the court for that or any other purpose.

—*United States v. Marvin*, 29 S. Ct. 297, 212 U. S. 275, 53 L. Ed. 510.

659. — **Liability of United States.**

See 10 Cent. Dig. Clerks of C. § 67.

Though the expense of taking the oaths and executing the bonds of deputy marshals, jury commissioners, bailiffs, district attorneys, and their assistants must be paid by themselves, the fees for filing them are chargeable against the government.—*United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758, 35 L. Ed. 399, reversing judgment (D. C.) *Van Duzee v. United States*, 41 F. 571.

So, also, are fees properly chargeable for improving the accounts of such officers.—*Id.*

662. — **Recovery of fees or salary.**

See 10 Cent. Dig. Clerks of C. § 87.

A judgment against the United States for fees alleged to be due a clerk of court cannot be reversed on the ground that the record fails to show that the amount of the judgment, together with the amount already paid the clerk, would not increase his emoluments beyond the maximum allowed by law. This is a matter to be determined by the department when the whole account is stated and settled.—*United States v. Jones*, 147 U. S. 672, 13 S. Ct. 437, 37 L. Ed. 325, following *Same v. Harmon*, 147 U. S. 263, 13 S. Ct. 327, 37 L. Ed. 164.

663. **Fees of clerks of territorial courts.**

See 10 Cent. Dig. Clerks of C. § 83.

The fees to be retained by the clerks of the district courts for the territory of Utah, as compensation for their services, are limited to \$3,500, the amount fixed by Rev. St. §§ 823, 839.—*United States v. Averill*, 130 U. S. 335, 9 S. Ct. 546, 32 L. Ed. 977.

The federal fee bill (Rev. St. U. S. § 823 et seq.) fixing the compensation of clerks of the district courts, applies to cases in the territorial courts to which the United States is not a party; and fees received by the clerk of a territorial district court from private parties in civil actions, and from the territory on account of territorial business, must be included in his returns and considered in computing his compensation. (Utah) 37 P. 263 reversed.—*United States v. McMillan*, 17 S. Ct. 395, 165 U. S. 504, 41 L. Ed. 805.

But such a clerk is not bound to account for moneys received by him for services in naturalization proceedings.—*Id.*

670. **Custody and care of funds.**

See 10 Cent. Dig. Clerks of C. §§ 109-113.

Under the act making appropriations for the expenses of the government, for the year ending June 30, 1884 (22 Stat. 631), the clerk of the United States supreme court is required to pay into the treasury the fees of his office over and above expenses, and his fees should be paid in advance, if demanded.—*Steever v. Rickman*, 109 U. S. 74, 3 S. Ct. 67, 27 L. Ed. 861.

In an action on the bond of a clerk of a United States district court, held, that he was not liable for fees received by him for the naturalization of aliens, which had not been included by him in the returns of the "fees and emoluments of his office," required by Rev. St. § 833, to be made; it appearing that it had been the custom in the district for not less than 45 years for the clerks to charge a fee in naturalization cases, although no fee is provided in the fee bill established by act of February 26, 1853, c. 80 (Rev. St. § 823 et seq.), and that it had never been customary to account for such fees, and that defendant's accounts during his term of office had been duly certified by the judge, with knowledge of the omission, and audited and adjusted by the proper accounting officers

of the government.—United States v. Hill, 120 U. S. 169, 7 S. Ct. 510, 30 L. Ed. 627.

—73. **Liabilities on official bonds.**

See 10 Cent. Dig. Clerks of C. §§ 127-142; 13 Cent. Dig. Counties, §§ 142, 146.

—74. **Breach or fulfillment of conditions.**

See 10 Cent. Dig. Clerks of C. §§ 127-134; 13 Cent. Dig. Counties, §§ 142, 146.

A clerk of a court of the United States, who fails to deposit as required by law, but appropriates to his own use, money deposited with him by a private suitor with the sanction of the court in a pending cause, is liable for the amount so appropriated on the bond given by him to the United States, under Rev. St. U. S. § 795, as amended by the act of February 22, 1875, c. 95, 18 Stat. 333 [U. S. Comp. St. 1901, p. 619], to insure the faithful discharge of the duties of his office. Judgment, United States v. Howard (C. C.) 93 F. 719, and Howard v. United States, 102 F. 77, 42 C. C. A. 169, affirmed.—Howard v. United States, 22 S. Ct. 543, 184 U. S. 676, 46 L. Ed. 754.

—75. **Actions on bonds.**

See 10 Cent. Dig. Clerks of C. §§ 135-142; 45 Cent. Dig. Tax. § 1442.

A bond of a clerk of a circuit court of the United States, given to the United States in compliance with Rev. St. U. S. § 795, as amended by Act Feb. 22, 1875, c. 95, 18 Stat. 333 [U. S. Comp. St. 1901, p. 619], providing that such bond may be required for the amount not exceeding \$40,000, to insure the faithful discharge of the duties of his office and the seasonable record of the decrees, judgments, and determinations of the court, is for the protection of any suitor injured by the failure of the clerk to comply with its conditions. Judgment, United States v. Howard (C. C.) 93 F. 719, and Howard v. United States, 102 F. 77, 42 C. C. A. 169, affirmed.—Howard v. United States, 22 S. Ct. 543, 184 U. S. 676, 46 L. Ed. 754.

A private suitor has the right, without express statutory authority, to sue in the name of the United States for his benefit on the bond of a clerk of a circuit court of the United States, given to the United States in compliance with Rev. St. U. S. § 795, as amended by Act Feb. 22, 1875, c. 95, 18 Stat. 333 [U. S. Comp. St. 1901, p. 619], to insure the faithful discharge of his duties and the seasonable record of the decrees, judgments, and determinations of the court, since the court, which by the terms of the statute retains custody of the bond, is to be regarded as the trustee for any party injured by a breach of its conditions.—Id.

CLIENTS.

See Attorney and Client.

CLOTH.

Duty on, see Customs Duties, —32, 84.

CLOUD ON TITLE.

See Quieting Title.

CLUBS.

See 10 Cent. Dig. Clubs.

Due process of law, see Constitutional Law, —303.

Impairing obligation of charter, see Constitutional Law, —129.

Matters relating to unincorporated associations in general, see Associations.

CO-ADMINISTRATORS.

See Executors and Administrators, —123-127.

COAL.

See Mines and Minerals, —8, 11.

Due process of law as applied to determination of width of barrier pillars in coal mines, see Constitutional Law, —318.

Monopoly of transportation facilities, see Monopolies, —16.

Regulations, liberty to contract, see Constitutional Law, —275.

COAL LANDS.

Location and acquisition of claims, see Mines and Minerals, —35.

COAL OIL.

See Explosives, —2, 9.

CO-DEFENDANTS.

See Criminal Law, —793.

CODES.

Codification of statutes, as constituting implied repeal, see Statutes, —167.

Construction, see Statutes, —231.

Joinder of causes of action under codes, see Action, —43-50.

Nature of actions under codes, see Action, —25.

Sufficiency of denials in pleading under codes, see Pleading, —119-120.

CODICIL.

See Wills, —184.

COERCION.

See Extortion.

Agreement by jury, see Criminal Law, —865.

COEXECUTORS.

See Executors and Administrators, —123-127.

COIN.

Prohibition against exportation, due process of law, see Constitutional Law, —278.

COLLATERAL ATTACK.

Judgment, order, or other proceedings, see—

Army and Navy, —49.

Bankruptcy, —100, 270, 419.

Corporations, —29, 559.

District of Columbia, —16.

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Levees, —28.

Mines and Minerals, —40, 44.

Municipal Corporations, —324.

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COLLATERAL SECURITY.

See—

Banks and Banking, —179.

Pledges.

COLLECTION.

See Banks and Banking, —164-175, 268.

COLLECTORS.

Of customs, see Customs Duties, —55.

Of taxes, see Taxation, —550-570.

COLLEGES AND UNIVERSITIES.

Scope-Note.

[INCLUDES bodies, incorporated or unincorporated, formed for the instruction of students in one or more courses of study more advanced than those pursued in the ordinary schools or academies.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ☞2. Constitutional and statutory provisions.
- 4. Public aid.
- 6. Property and funds.
- 10. Actions.

Cross-References.

Acts constituting carrying on business within state by foreign corporation conducting correspondence school, see Corporations, ☞642.
Impairing obligation of contract, see Constitutional Law, ☞138, 154.
Laws prohibiting teaching of negroes and white pupils in same institution, due process of law, see Constitutional Law, ☞278.
Military and naval academies, see Army and Navy, ☞16.

Privileges and immunities of citizens, see Constitutional Law, ☞206.
Regulation of correspondence schools as regulation of commerce, see Commerce, ☞46.
Review of decision of state court construing law forbidding teaching of white and negro pupils in same institution, see Courts, ☞391.
Schools in general, see Schools and School Districts.
University lands, see Public Lands, ☞51-54.

☞2. Constitutional and statutory provisions.

See 10 Cent. Dig. Colleges, § 2.

The state may require a member of a Greek letter fraternity at another college to renounce his allegiance with such fraternity before admitting him as a student to the state university.—*Waugh v. Board of Trustees of University of Mississippi*, 35 S. Ct. 720, 237 U. S. 589, 59 L. Ed. 1131, affirming judgment Board of Trustees of University of Mississippi *v. Waugh*, 62 So. 827, 105 Miss. 623.

☞4. Public aid.

See 10 Cent. Dig. Colleges, §§ 7-10.

Under Act Cong. July 2, 1862 (12 Stat. c. 130), donating public lands to such of the states as might provide colleges for the benefit of agriculture and the mechanic arts, which authorized the secretary of the interior to issue land scrip to those states within which there was no land subject to entry, but prohibited any state to which such scrip was issued from locating it in any other state, the state receiving the scrip had only the right to sell it, and could not locate the land, nor could any agent locate such scrip on behalf of the state which held it, or obtain patents for the land represented by it.—*Cornell University v. Fiske*, 136 U. S. 152, 10 S. Ct. 775, 34 L. Ed. 427, affirming *In re Fiske's Estate*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387.

No particular institutions are entitled to the grants and appropriations made respectively by Act July 2, 1862, c. 130, 12 Stat. 503, granting lands or land scrip to the several states for the endowment, support, and maintenance of at least one college, where the leading object shall be to teach agriculture and the mechanic arts, and by Act Aug. 30, 1890, c. 841, 26 Stat. 417 [U. S. Comp. St. 1901, p. 3214], appropriating annually certain sums to each state and territory for the more complete endowment and maintenance of such colleges; but the states take the property, charged with the duty to devote it to the purpose named. Judgment (1906) 94 P. 90, 14 Wyo. 318, affirmed.—*State of Wyo-*

ming ex rel. Wyoming Agricultural College v. Irvine, 27 S. Ct. 613, 206 U. S. 278, 51 L. Ed. 1063.

☞6. Property and funds.

See 10 Cent. Dig. Colleges, §§ 6, 11-15.

The power conferred upon Georgetown College by Act June 10, 1844, c. 41, 6 Stat. 912, to give instruction in the liberal arts and sciences, enables it to take a bequest to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia, and the obtaining and preserving of archives and papers relating to that subject. Judgment, *Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 26 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

☞10. Actions.

See 10 Cent. Dig. Colleges, §§ 29-31.

A public corporation such as an agricultural college receiving state aid and invested with municipal powers cannot avail itself of the state's constitutional immunity from suit in a proceeding against it for constructing, under state authority, but for its own corporate purposes and advantages, a dyke upon land owned by the state, but in the use, possession, and enjoyment of the college, so as to damage or take private property without due process of law.—(1911) *Hopkins v. Clemson Agricultural College of South Carolina*, 31 S. Ct. 654, 221 U. S. 636, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, reversing judgment (1907) 57 S. E. 551, 77 S. C. 12.

The possibility that the judgment cannot be enforced by levy and sale under execution affords no reason why a court should decline jurisdiction of a suit against a state college for taking private property for its corporate purposes without due process of law.—*Id.*

COLLIERS.

Subject to capture, see War, ☞23.

COLLISION.

Scope-Note.

[INCLUDES striking together or other contact of vessels causing injury to person or property; rules of navigation for preventing such collisions; nature and extent of liability of vessels and their owners, claimants, etc., for such injuries; and suits for damages therefor.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Rules and Precautions for Preventing Collisions in General.

- ⚡ 2. What law governs.
- 5. International regulations.
- 6. Statutory regulations.
- 7. Supervising inspectors' rules.
- 11. Operation and effect of regulations.
- 12. Structure and condition of vessel.
- 16. Control and management of vessel in general.
- 24. Statutory limitation of liability.
- 26. — Harter act.

II. Sail Vessels Meeting or Crossing.

- ⚡ 27. Relative positions and courses.
- 28. Duties of vessels meeting end on.

III. Steam Vessels Meeting or Crossing.

- ⚡ 37. Duty to keep out of the way.
- 38. Duty of vessel having right of way.
- 40. Both vessels in fault.

IV. Steam Vessels and Sail Vessels.

- ⚡ 43. Duty of steam vessel.
- 44. Duty of sail vessel.
- 45. Fault as cause of collision.

V. Overtaking Vessels.

[No paragraphs or references in this Digest. But see 10 Cent. Dig. Collision, §§ 56-64.]

VI. Vessels in Tow.

- ⚡ 60. Duty of other vessels as to passing tow.
- 61. Fault as cause of collision.

VII. Vessels at Rest, at Anchor, or at Piers.

- ⚡ 70. Vessels moored.
- 71. Fault as cause of collision.
- 73. Presumptions and burden of proof as to fault.

VIII. Lights, Signals, and Lookouts.

- ⚡ 75. Lights and other visible signals.
- 76. Sound signals.
- 77. Lookouts.
- 78. Presumptions and burden of proof as to fault.
- 79. Evidence as to fault.

IX. Fog or Thick Weather.

- ⚡ 80. Precautions in general.
- 81. Signals and lookouts.
- 82. Speed and course.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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X. Narrow Channels, Harbors, Rivers, and Canals.

- 86. Entrance to channel or harbor.
- 90. Navigation in channel or river in general.
- 91. Vessels meeting.
- 93. Vessels crossing channel or river.
- 96. Vessels approaching or leaving wharves or slips.
- 98. Signals.
- 99. Lookouts.
- 100. Fog.
- 104. Presumptions and burden of proof as to fault.
- 105. Evidence as to fault.

XI. Special Circumstances and Errors in Extremis.

- 107. Departures from rules.
- 108. Errors in extremis.

XII. Suits for Damages.

(A) RIGHT OF ACTION AND DEFENSES.

- 112. Grounds of action.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

- 117. Libel or complaint at law.
- 118. Answer.
- 121. Issues, proof, and variance.

(C) EVIDENCE.

- 122. Presumptions.
- 124. Admissibility.
- 125. Weight and sufficiency.

(D) DAMAGES.

- 128. Loss of profits or freight.
- 130. Interest.
- 143. Division of damages.
- 144. — Grounds in general.
- 145. — Damages to be divided.
- 146. — Mode of apportionment.

(E) TRIAL OR HEARING, JUDGMENT, AND REVIEW.

- 149. Course and conduct of hearing.
- 151. Decree.
- 154. Costs.

Cross-References.

Limitation of liability of owner of vessel, see Shipping, 205.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

2. What law governs.

See 10 Cent. Dig. Collision, § 2.

The navigation of the Mississippi below New Orleans was subject, in January, 1897, to the original rules and regulations of the act of congress of 1864, reproduced in Rev. St. U. S. § 4233. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

5. International regulations.

See 10 Cent. Dig. Collision, § 4.

The rules of the international code are to be regarded as sufficient protection for a vessel under ordinary circumstances; and one vessel meeting another, whether of the same or a different nationality, has a right to assume that

both are governed by the same laws, and may regulate her conduct accordingly.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

By Act March 3, 1885, the revised international regulations are applicable to the navigation of vessels on the high seas and all coast waters, and all laws inconsistent with these rules were repealed, except as to the navigation within harbors and inland waters, as to which the original code, supplemented by the supervising inspectors' rules, still remains in force. *Held*, that the dredged entrance to a harbor is a part of the inland waters, so that a collision within the entrance to Gedney's Channel, which is the main entrance to New York Harbor, is governed by the old international code and the inspectors' rules.—*The Delaware*, 161 U. S. 459, 16 S. Ct. 516, 40 L. Ed. 771.

Under article 21 of the international regulations adopted March 3, 1885, and also under the inspectors' rules, steamers approaching each other in narrow channels are ordinarily bound

to keep to port, and pass to the right, whatever the occasional effect of the sinuosity of the channel; and the rule that when two vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way, is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other.—*The Victory and The Plymothian*, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519.

—6. Statutory regulations.

See 10 Cent. Dig. Collision, § 5.

The statutory provision directing collectors and other chief officers of the customs to require all sailing vessels to be furnished with proper signal lights, and that such vessels shall show a lighted torch to steam vessels approaching at night (Rev. St. § 4234), is strictly no part of the international code, originally adopted in 1864, and applies only to American vessels.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943 (D. C.) reversing decree 45 F. 62.

—7. Supervising inspectors' rules.

See 10 Cent. Dig. Collision, § 6.

The supervising inspectors' rules applicable to the Mississippi below New Orleans are those for the Atlantic and Pacific inland waters, notwithstanding the title thereof excepts "rivers emptying into the Gulf of Mexico," since rule 9 of those pilot rules and rule 14 of the pilot rules for Western rivers both contain a clause stating that "the line dividing jurisdiction between the pilot rules on Western rivers and harbors, rivers, and inland waters at New Orleans shall be the lower limits of the city," and it cannot be supposed that the river below that point was intended to be exempt altogether from the jurisdiction of the supervising inspectors. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

—11. Operation and effect of regulations.

See 10 Cent. Dig. Collision, § 10.

In an action at law for a collision between steamers under such circumstances that their duties, respectively, were prescribed by the rules of the supervising inspectors, where a departure from the rules by plaintiff's vessel is alleged to have contributed to the collision, refusal of defendant's requests for instructions on the question whether such departure from the rules was justified, and leaving to the jury to determine whether, upon the whole, there was negligence in what was done or left undone, is erroneous, as ignoring the obligatory force of the rules.—*Belden v. Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218, reversing judgment *Chase v. Belden*, 117 N. Y. 637, 22 N. E. 963.

—12. Structure and condition of vessel.

See 10 Cent. Dig. Collision, § 11.

A vessel cannot be excused from stopping and reversing, when required by the rules of navigation, merely because her own construction is so faulty that she cannot stop in time to prevent collision. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

—16. Control and management of vessel in general.

See 10 Cent. Dig. Collision, § 15.

Deficiencies in the watch, consisting in failure to maintain the number of lookouts which prudence requires, and the failure of the master

to supervise the men on duty while the vessel is in charge of a pilot, are to be regarded as evidences of negligence, and illustrative of lax management in the navigation of the vessel, rather than as distinct faults in themselves, and would not suffice to condemn her in the absence of proof that they contributed to the collision.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

—24. Statutory limitation of liability.

See 10 Cent. Dig. Collision, §§ 21, 22.

—26. — Harter act.

See 10 Cent. Dig. Collision, § 22.

The whole object of the act of February 13, 1893, known as the "Harter Act," is to modify the relations previously existing between the vessel and her cargo; and, notwithstanding the broad language used in section 3 in respect to relieving the vessel and her owners from liability resulting from faults of navigation, etc., when due diligence has been used to make her seaworthy, the statute does not affect the liability of a vessel to other vessels with which she may come in collision.—*The Delaware*, 161 U. S. 459, 16 S. Ct. 516, 40 L. Ed. 771.

In a case of collision by mutual fault, resulting in the total loss of one vessel and her cargo, the third section of the Harter act (27 Stat. 445), which exempts the owner of a seaworthy vessel from responsibility to the cargo for loss or damage occurring through faults or errors of navigation or management, does not prevent the other vessel, which alone is sued by the cargo owners for the full amount of their loss from recouping one-half the amount awarded from the half damages awarded to the owners of the lost vessel. Decree, 74 F. 899, 21 C. C. A. 162, affirmed.—*The Chattahoochee*, 19 S. Ct. 491, 173 U. S. 540, 43 L. Ed. 801.

II. SAIL VESSELS MEETING OR CROSSING.

—27. Relative positions and courses.

See 10 Cent. Dig. Collision, §§ 22-23.

A schooner was sailing E. by N., with the wind S., and a bark was closehauled on the port tack. The schooner sighted the green light of the bark about half a point on the starboard bow, about three miles off, and starboarded a point. At two miles off she starboarded another point. As a result the light of the bark opened about two points. The schooner continued to see the green light of the bark till the vessels were within a length of each other, when the bark opened her red light. At the moment the vessels were approaching collision, the schooner put her helm hard a-starboard, and headed N. E. At that juncture the bark ported, and her stem struck the starboard side of the schooner amidships, at about a right angle. Held, that the bark was in fault, and the schooner free from fault.—*The Elizabeth Jones*, 112 U. S. 514, 5 S. Ct. 468, 28 L. Ed. 812.

—28. Duties of vessels meeting end on.

See 10 Cent. Dig. Collision, § 23.

Rev. St. § 4283, rule 16, provides that if two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the other. The court found that the S. and the R. were approaching end on, that the R. ported immediately after discovering the S., that the S. starboarded, and that this starboarding was the immediate cause of the collision. Held, that the S. was liable.—*The Maggie J. Smith*, 123 U. S. 349, 8 S. Ct. 159, 31 L. Ed. 175.

III. STEAM VESSELS MEETING OR CROSSING.

37. Duty to keep out of the way.

See 10 Cent. Dig. Collision, §§ 34-36.

A steamer, when approaching another steamer on a crossing course where the latter has the right of way, has the right to assume that she will keep on her course, and to shape her own course so as to pass under the stern of the other if the latter kept on.—*The Northfield*, 154 U. S. 629, 14 S. Ct. 1184, 24 L. Ed. 680, affirming decree (D. C.) Fed. Cas. No. 10,326.

The inability of a steamer going at a speed of from 10 to 12 knots an hour to at once reverse her engines after stopping them is not a fault.—*Id.*

38. Duty of vessel having right of way.

See 10 Cent. Dig. Collision, §§ 37, 38.

The preferred steamer will not be held in fault for maintaining her course and speed so long as it is possible for the other to avoid her by porting.—*The Northfield*, 154 U. S. 629, 14 S. Ct. 1184, 24 L. Ed. 680, affirming decree (D. C.) Fed. Cas. No. 10,326; *The Britannia*, 153 U. S. 130, 14 S. Ct. 795, 38 L. Ed. 660; *The Delaware*, 161 U. S. 459, 16 S. Ct. 516, 40 L. Ed. 771.

40. Both vessels in fault.

See 10 Cent. Dig. Collision, § 40.

Two steamers, the C. and the M., approaching one another on nearly parallel, opposite, but slightly converging lines, at a speed, the one of 9 and the other of 11 miles an hour, showing their green and white lights, collided, the C. becoming a total loss. When about two miles apart, the M. had starboarded her wheel half a point. When within 450 feet of each other the C. suddenly ported, showed her red light, and sheered across the course of the M., which starboarded, but did not reverse until the moment of the collision. Neither vessel signaled. *Held*, (1) that, as the vessels were not meeting end on, the M. was not in fault for starboarding prior to the collision, but was in fault for not signaling, slowing up, and reversing, when the collision became imminent; (2) that the C. was in fault for endeavoring to cross on the port side of the M.—*The Manitoba*, 122 U. S. 97, 7 S. Ct. 1158, 30 L. Ed. 1095.

A steamer which fails to stop and reverse when meeting another steamer end on, or nearly so, which commits the fault of starboarding, is guilty of a contributory fault for failing to observe rule 21, which requires her to stop when risk of collision is involved, as well as the third rule of the supervising inspectors to the same effect. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

IV. STEAM VESSELS AND SAIL VESSELS.

43. Duty of steam vessel.

See 10 Cent. Dig. Collision, §§ 43-47.

In a case of collision between a steamer and ship, on nearly opposite courses, in the Irish Channel, in which the ship was sunk, with all on board, it appeared that the ship's green light was first seen by the steamer two points on her starboard bow. The steamer was going 12 knots an hour, the ship $8\frac{1}{2}$ knots an hour. The steamer kept her course for four minutes, until the ship's green light was some $3\frac{1}{2}$ points on the starboard bow, when the ship shut in her green light and showed her red light, whereupon the steamer ported and slowed, and so continued about a minute, when the ship showed her green light again, and the steamer stopped and backed, and had sternway at the time of

the collision. Before the collision the ship made another change, and showed her red light, and the steamer struck her port bow. The steamer was properly officered and manned. *Held*, that the steamer was not in fault, though, had she kept her first course she would have passed in safety.—*Marshall v. The Adriatic*, 107 U. S. 512, 2 S. Ct. 355, 27 L. Ed. 497.

44. Duty of sail vessel.

See 10 Cent. Dig. Collision, §§ 48-50.

Where a steamer and sail vessel are sailing in opposite courses, it is the duty of both to keep their courses and pass each other in parallel lines by keeping the green lights in view; and if the sail vessel, by her vacillating movements, alternately shows her green and red lights, and the steamer takes the necessary precaution to stop and reverse her engines to avoid a collision, the sail vessel will be held in fault, in case of a collision.—*Marshall v. The Adriatic*, 107 U. S. 512, 2 S. Ct. 355, 27 L. Ed. 497.

45. Fault as cause of collision.

See 10 Cent. Dig. Collision, § 51.

A tug with a tow, moving along a path of W. $\frac{1}{2}$ S. and at the rate of about two miles an hour, met a ship in the Straits of Fuca. The tug first discovered the red light of the ship about three-tenths of a point on her port bow, and when the ship was some two miles off. The ship, sailing on a mean course of E. N. E.,—her actual course being a swinging one, deviating half a point each way from her mean course,—made the masthead lights of the tug half a point on her starboard bow when the tug was some five miles away, and afterwards, and 10 or 12 minutes before the collision, made the red lights of the tug and the tow. Two and a half minutes before the collision, when the tug was one-third of a mile from the ship and half a point off her port bow, the ship bearing one and three-eighths points off the port bow of the tug, and showing her red light to the tug and both her lights to the tug's tow, and the latter being dead ahead of the ship, the tug hard a-ported and swung to starboard. The ship, with no special circumstances existing which required it, immediately afterwards starboarded her wheel, and kept it in that position, thereby swinging to port and colliding with the tug. *Held*, that the ship alone caused the collision, by altering her helm to starboard.—*The Blue Jacket*, 144 U. S. 371, 12 S. Ct. 711, 36 L. Ed. 469, distinguishing *The Manitoba*, 122 U. S. 97, 7 S. Ct. 1158, 30 L. Ed. 1095.

V. OVERTAKING VESSELS.

[No paragraphs or references in this Digest. But see 10 Cent. Dig. Collision, §§ 56-64.]

VI. VESSELS IN TOW.

60. Duty of other vessels as to passing tow.

See 10 Cent. Dig. Collision, §§ 73-77.

A steamer is not liable for collision with a tug and its tow where the tug stopped within 800 feet of the steamer, and the steamer was unable to check its speed in time to avoid the collision, where the accident could not have occurred had the tug kept on its course; and the failure of the steamer's engine to reverse promptly is immaterial.—*The Northfield*, 154 U. S. 629, 14 S. Ct. 1184, 24 L. Ed. 680, affirming decree (D. C.) Fed. Cas. No. 10,326.

61. Fault as cause of collision.

See 10 Cent. Dig. Collision, § 78.

The tug P., with a tow alongside, going around the Battery from the North into the East river, against the ebb tide, met the tug W. coming from the East river, and bound for Jersey City, with a tow on a hawser. The P. had the W. on her starboard bow, and signaled

an intention to keep to port and cross her bow, thereby availing herself of the slack water near the piers. The W. paid no attention to the signal, but kept her course and speed, and soon after ported, and a collision resulted between the P. and the W.'s tow. *Held*, that whether or not the P. was in fault depended on whether her starboarding was likely to involve risk of collision, and that the W. was clearly in fault both in porting and failing to check her speed or stop.—*The E. A. Packer*, 140 U. S. 360, 11 S. Ct. 794, 35 L. Ed. 453, reversing decree (D. C.) 20 F. 327.

A car float in tow of a tug is not responsible to a scow for damages resulting from a collision between the scow and the float, where the tug alone was at fault.—(1909) *The Eugene F. Moran v. New York Cent. & H. R. R. Co.*, 29 S. Ct. 339, 212 U. S. 466, 53 L. Ed. 600, answering certified questions *The Eugene F. Moran* (1906) 154 F. 41, 83 C. C. A. 153, which is affirmed (1909) 170 F. 928, 96 C. C. A. 144, decree amended (1909) *The Charles E. Matthews*, 173 F. 1020, 97 C. C. A. 667. Writ of certiorari denied (1909) *Henry Du Bois Sons Co. v. The Eugene F. Moran*, 30 S. Ct. 399, 215 U. S. 596, 54 L. Ed. 342.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

670. Vessels moored.

See 10 Cent. Dig. Collision, §§ 91-100.

The motion of the propeller of an ocean steamer starting from a crowded slip caused a canal boat to break her fastenings, and swing around against the propeller, whereby she was sunk. *Held*, that the steamer was in fault for not having a lookout at her stern, by whom the peril of the canal boat could have been seen in time to stop the propeller and prevent the collision, while those in charge of the canal boat, having done all that reasonable prudence required of them by properly fastening their boat, were free from blame.—*The Nevada v. Quick*, 106 U. S. 154, 1 S. Ct. 234, 27 L. Ed. 149, affirming Fed. Cas. No. 10,131.

671. Fault as cause of collision.

See 10 Cent. Dig. Collision, § 101.

A vessel with barges in tow is not chargeable with contributory negligence in case of a collision between war vessels of the United States and some of the barges in tow, when the war vessels were anchored in an improper place in a harbor, where vessels had never anchored before, and were concealed from view by a projecting point of land until the vessel with the tow had come so near that it was impossible to prevent some of the barges from being carried by their headway and by the current into collision with the vessels at anchor. Judgment, *St. Louis & M. V. Transp. Co. v. United States*, 33 Ct. Cl. 251, affirmed.—*United States v. St. Louis & M. V. Transp. Co.*, 22 S. Ct. 350, 184 U. S. 247, 46 L. Ed. 520.

Anchoring vessels of the United States in an unusual and improper position in a harbor, in total disregard of the usages and regulations of the port requiring notice to the harbor master of the intention to anchor, constitutes negligence on the part of the officers of the vessel, which will render the United States liable in the court of claims for damages thereby caused to other vessels navigating the harbor.—*Id.*

673. Presumptions and burden of proof as to fault.

See 10 Cent. Dig. Collision, § 103.

The rule that, where a vessel which is clearly shown to have been guilty of a fault sufficient to account for the collision seeks to im-

pugn the management of the other vessel, there is a presumption in favor of the latter that can only be rebutted by clear proof of contributing fault, is peculiarly applicable to the case of a vessel run into while anchored, because there is not only a presumption in her favor, but a presumption of fault on the part of the other vessel.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

Where a vessel anchored in a river on the edge of the ship channel, well out of the usual track of ocean steamers plying up and down the river, and provided with an anchor watch and a proper statutory anchor light, is run into by a steamship, the presumption is that the latter is in fault, and the burden is upon her to exonerate herself from liability.—*Id.*

VIII. LIGHTS, SIGNALS, AND LOOK-OUTS.

675. Lights and other visible signals.

See 10 Cent. Dig. Collision, §§ 105-121, 207.

A steam yacht carrying sail, and constructed and adapted for ocean navigation, although enrolled under Rev. St. tit. 50, entitled "Regulation of Vessels in Domestic Commerce," and licensed under section 4212, as a pleasure vessel designed as a model of naval architecture, to proceed from port to port of the United States, and by sea to foreign ports, is required to carry only the lights provided by rule 3 of the navigation rules for "ocean-going steamers and steamers carrying sail," even when she is navigating the Hudson river above New York, and need not carry the range lights prescribed by rule 7 for "coasting steam vessels." *Mr. Justice Brown* not concurring on this point.—*Belden v. Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218, reversing judgment *Chase v. Belden*, 117 N. Y. 637, 22 N. E. 963.

The statute requiring all sailing vessels to be furnished with proper signal lights, and to show a lighted torch to steam vessels approaching at night (Rev. St. § 4234), has no application to vessels at anchor, but was designed to supply a deficiency in the international code with respect to vessels under way, by providing a means of warning a vessel coming up astern or approaching from either side.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

676. Sound signals.

See 10 Cent. Dig. Collision, §§ 124-137.

The supervising inspectors' rules, in so far as they require the whistle to be sounded, are applicable rather to vessels meeting end on, or nearly end on; and the signals provided for are designed to apprise the other vessel of an intention to port or starboard, as the case may be. As applied to vessels upon crossing courses, the rule means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligations to keep her course, and throw on the other steamer the duty of avoiding her.—*The Delaware*, 161 U. S. 459, 16 S. Ct. 516, 40 L. Ed. 771.

The fact that a steamer is entitled to hold her course does not excuse her from attending to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty.—*The New York*, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126, reversing decrees 82 F. 819, 27 C. C. A. 154 and 86 F. 814, 30 C. C. A. 628.

An obligated steamer, proposing by whistle to deviate from the customary course, should receive an immediate reply.—*Id.*

77. Lookouts.

See 10 Cent. Dig. Collision, §§ 140-149.

The absence of a lookout on a vessel is not material, if the presence of one would not have availed to prevent a collision.—*The Blue Jacket*, 144 U. S. 371, 12 S. Ct. 711, 36 L. Ed. 469.

A steamship which ran into a vessel anchored in the Columbia river well out of the usual track of steamers, on a dark night, held in fault because her lookout was not such as prudence required under the circumstances, and because negligence was shown in keeping too close in shore, and either mistaking the anchor light for a beacon light on the shore, or failing to see it at all, and steering directly upon the anchored vessel, without perceiving her or hearing the cries of the watchman on her deck until too late to avoid collision.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

78. Presumptions and burden of proof as to fault.

See 10 Cent. Dig. Collision, §§ 122, 133, 150.

Where the findings show that the signals of approaching boats were understood, and there is no complaint in the pleadings touching the point, it will be presumed that they were made at the proper distance.—*The Charles Morgan v. Kouns*, 115 U. S. 69, 5 S. Ct. 1172, 29 L. Ed. 316.

Failure to put the officers and crew of a vessel on the stand to explain why the lights of another vessel were not seen or her signals heard in a clear night, when the vessels were not more than a mile apart, greatly strengthens the presumption of a defective lookout. Decrees 82 F. 819, 27 C. C. A. 154, and 86 F. 814, 30 C. C. A. 623, reversed.—*The New York*, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126.

79. Evidence as to fault.

See 10 Cent. Dig. Collision, §§ 123, 133, 151.

The failure of a vessel to see the lights of another vessel or hear signals blown by her on a clear night, when they are not more than a mile apart, is conclusive evidence of a defective lookout. Decrees 82 F. 819, 27 C. C. A. 154, and 86 F. 814, 30 C. C. A. 623, reversed.—*The New York*, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126.

IX. FOG OR THICK WEATHER.

80. Precautions in general.

See 10 Cent. Dig. Collision, §§ 152-155.

A steamer cannot, because she had but one wheelsman, be held liable for a collision in a fog, there having been no fault on her part by reason of any inability of the wheelsman to turn the wheel with sufficient promptness.—*The Ludvig Holberg*, 157 U. S. 60, 15 S. Ct. 477, 39 L. Ed. 620.

A steamer is bound to use only such precautions during a fog as will enable her to stop in time to avoid collision after the approaching vessel comes in sight, provided the latter is going at the moderate speed required by law.—*The Umbria*, 17 S. Ct. 610, 166 U. S. 404, 41 L. Ed. 1053, reversing decree *Fahre v. Cunard Steamship Co.*, 53 F. 288, 3 C. C. A. 534, and affirming decree (D. C.) 40 F. 893.

81. Signals and lookouts.

See 10 Cent. Dig. Collision, §§ 157-166.

The fact that a schooner which was in collision with a steamer in a fog had but one lookout, and that he was also engaged in blowing the fog horn, does not put her in fault, as there was nothing to show that the one duty interfered with the other, or that he did not sight the steamer as soon as possible.—*The Nacoochee v. Mosley*, 137 U. S. 330, 11 S.

Ct. 122, 34 L. Ed. 687; reversing decree (C. C.) 28 F. 462.

Under the requirements of article 12 of the revised international regulations, that a steamship be provided with a fog horn, "to be sounded by a bellows or other mechanical means," and a sailing ship with "a similar fog horn," a sailing vessel must be provided with a mechanical fog horn.—*The Martello v. The Willey*, 153 U. S. 64, 14 S. Ct. 723, 38 L. Ed. 637, reversing decree (C. C.) 39 F. 505.

The failure of a vessel to provide herself with the mechanical fog horn prescribed by the regulations is a fault for which she will be held liable for collision with another vessel in a fog, unless she shows that the absence of the horn could not possibly have contributed to the collision.—*Id.*

82. Speed and course.

See 10 Cent. Dig. Collision, §§ 170-174.

A steamer, after passing a schooner going in the same general direction in a fog, thought she heard cries of distress, and swung round at half speed,—about 7 knots,—until the schooner was discovered about 500 feet away, when the engines were reversed full speed, but too late to prevent collision, as the steamer would still forge ahead 600 or 800 feet. Held, that she was in fault, as she could not stop in the distance at which the schooner whose presence was known could be discovered through the fog.—*The Nacoochee v. Mosley*, 137 U. S. 330, 11 S. Ct. 122, 34 L. Ed. 687, reversing decree (C. C.) 28 F. 462.

A steamship running in a fog at her usual speed of 10 or 11 knots held in fault for collision with a bark, because of excessive speed, and because, after she heard the bark's fog horn but one point on her starboard bow, she did not stop or reverse until the location of the bark was ascertained.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, 85, affirming decree (C. C.) *The City of New York*, 35 F. 604.

A steamboat proceeding in a fog at sea, hearing a fog horn on her bow indicating the approach of another vessel on a course crossing her own, is bound immediately to stop, until, by repeated blasts of the horn, she can assure herself of the exact bearing, course, and distance of the approaching vessel.—*The Martello v. The Willey*, 153 U. S. 64, 14 S. Ct. 723, 38 L. Ed. 637, reversing decree (C. C.) 39 F. 505.

For a steamship proceeding to sea from New York Harbor in such a fog that vessels cannot be seen more than a quarter of a mile away, six miles an hour is excessive speed, where three miles would give good steerage way.—*Id.*

Fault cannot be imputed to a steamer for previous speed in a fog, where for four or five minutes before collision she had been running "dead slow."—*The Ludvig Holberg*, 157 U. S. 60, 15 S. Ct. 477, 39 L. Ed. 620.

Where a steamer, running "dead slow" in a fog, heard a blast right ahead, then another a little more to the starboard, and almost immediately thereafter the tug which had given the signals came in sight, only a few hundred feet away, and gave a signal that she was coming down on the steamer's starboard bow, but gave no signal that she had a tow nearly 500 feet behind her, and neither the tow nor the hawser was visible, the steamer was not at fault for proceeding, she having stopped and reversed as soon as she saw that there was a tow, though not in time to avoid a collision.—*Id.*

A speed of 16 to 19 knots in the track of vessels, within 12 miles of a frequented harbor like that of New York, during an intermittent fog, sometimes so dense that vessels cannot be seen more than one or two lengths off, is excessive; and a steamer so running, which, after hearing fog signals, goes full speed ahead without waiting to definitely locate the other vessel,

is so grossly in fault for an ensuing collision as to justify the court in applying the rule that any doubts as to the management of the other vessel, or the contribution of her faults, should be resolved in her favor.—*The Umbria*, 17 S. Ct. 610, 166 U. S. 404, 41 L. Ed. 1053, reversing decree *Fahre v. Cunard Steamship Co.*, 58 F. 288, 3 C. C. A. 534, and affirming decree (D. C.) 40 F. 893.

While the solution of the question of speed should not depend on the state of facts afterwards ascertained, unless there was enough to tell both parties at the time what those facts were, yet, if the facts afterwards ascertained indicate that a particular maneuver could not have subserved any useful purpose, the steamer should not be held in fault for the nonobservance of the rule. Thus, where two vessels have collided in a fog, and it turns out that one was going at such speed that the other could not have avoided collision by stopping and reversing she will not be held in fault for keeping her engines going slowly ahead.—*Id.*

A speed of about seven miles an hour under nearly full canvas held excessive for a schooner which collided with a steamer some distance southeast of Nantucket Shoals, where vessels are frequently met with, in a fog so thick that the hull of a vessel could only be seen at a distance of a few hundred feet. Decree 74 F. 899, 21 C. C. A. 162, affirmed.—*The Chattahoochee*, 19 S. Ct. 491, 173 U. S. 540, 43 L. Ed. 801.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

—86. Entrance to channel or harbor.

See 10 Cent. Dig. Collision, § 177.

A steamer was entering Gedney's Channel, New York Harbor, on a course which, if continued, would have carried her across the southerly side of it, as marked by the buoys. At the same time a tug and tow were crossing the channel from the northerly to the southerly side, so as to approach the starboard side of the steamer. Held, that the tug, having the right of way, had every reason to suppose that the steamer would port, and take her proper course up the channel, as soon as she had fairly entered it; and if for any reason the steamer was unable to do this, it was her plain duty to apprise the tug of the fact, either by blowing the starboard signal of two whistles, or an alarm whistle; and that the tug was not in fault for continuing her course until collision.—*The Delaware*, 161 U. S. 459, 16 S. Ct. 516, 40 L. Ed. 771.

—90. Navigation in channel or river in general.

See 10 Cent. Dig. Collision, §§ 181-186, 196.

A steamer going with the tide, $7\frac{1}{2}$ to 9 knots per hour, over the ground up the Elizabeth river towards Norfolk, Va., held in fault for excessive speed at a time when she must be held to have known that she was approaching another vessel so as to involve risk of collision.—*The Victory and The Plymouthian*, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519.

—91. Vessels meeting.

See 10 Cent. Dig. Collision, §§ 187-192.

The steamship *Britannia*, going up New York Harbor into the East river, rounded Governor's Island so closely that it became necessary to go full speed ahead to avoid grounding. At this time she saw, on her starboard hand, the steamer *Beaconsfield* coming outward from the East river, and both vessels signaled that she should go under the latter's stern. The tide was running outward on the south side of the channel between the island and the Battery, but there was an inward eddy on the north

side. The tidal current prevented the *Britannia* from swinging promptly to starboard. Both vessels then reversed, the *Beaconsfield* coming to a dead stop, and lying still until she was struck. If she had continued ahead, she would have passed by a small margin. Held, that both vessels were in fault,—the *Britannia*, for rounding the island so closely that it became necessary to go at high speed into a well-known cross current, where she was liable to meet outgoing vessels, which would probably be on her starboard hand, and have the right of way (Rev. St. § 4233, rule 19); and the *Beaconsfield*, for stopping and lying still, when, having the right of way, she was bound, in the absence of special circumstances, to continue on her course (rule 23). Mr. Justice Brown and Mr. Justice Jackson dissenting as to the *Beaconsfield*, on the ground that she was not in fault.—*The Britannia*, 153 U. S. 130, 14 S. Ct. 795, 38 L. Ed. 660.

So long as steamers approaching each other in a channel are port to port, and one of them is proceeding at moderate speed on her own side of the channel, she is not bound to stop and reverse on the chance that the other vessel may depart from the rules of navigation.—*The Victory*, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519.

When two steamers are approaching each other in a channel where there is nothing to relieve them from the rule requiring each to keep to the right, each is entitled to presume that the other will act lawfully, and will keep to its own side; that, if temporarily crowded out of her course, she will return to it as soon as possible; and that she will pursue the customary track of vessels in the channel, regulating her action so as to avoid danger.—*Id.*

The rule that every vessel, when approaching another so as to involve risk of collision, shall slacken her speed, or, if necessary, shall stop and reverse, clearly applies to a vessel going with the stream, which has signified an intention to pass to the left, which involves danger of collision. Decrees 82 F. 819, 27 C. C. A. 154, and 86 F. 814, 30 C. C. A. 628, reversed.—*The New York*, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126.

—93. Vessels crossing channel or river.

See 10 Cent. Dig. Collision, §§ 194, 195.

A ferryboat coming into collision, soon after starting on her regular trip from New York across the North river, with a steamship coming up the river, held not in fault for leaving her slip in a strong ebb tide and northwest wind when the steamship was approaching; it being clear that the collision might have been avoided by prompt action on the part of the steamship in keeping out of the way of the ferryboat, as required under the rules.—*The Breakwater*, 155 U. S. 252, 15 S. Ct. 99, 39 L. Ed. 139, affirming decree (D. C.) 39 F. 511.

Though a ferryboat, coming into collision, soon after starting on her regular trip from New York across the North river, with a steamship coming up the river, previously had been at rest in her slip, held, that rule 19 became operative from the moment she got under way, and the steamship, failing to reverse with sufficient promptness to prevent the collision, was in fault.—*Id.*

Failure of the ferryboat to stop and reverse held not a fault, as slackening speed would have increased her tendency to sag down the river.—*Id.*

The rule that a steamer approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, is bound to stop until her course be ascertained with certainty, is peculiarly applicable when a vessel going up a narrow river channel is about

to meet a descending vessel upon cross courses, and signals of the latter are given three times without reply. Decrees 82 F. 819, 27 C. C. A. 154, and 86 F. 814, 30 C. C. A. 628, reversed.—The New York, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126.

96. **Vessels approaching or leaving wharves or slips.**

See 10 Cent. Dig. Collision, §§ 203-205.

A steamship backing out from her slip at Jersey City preparatory to straightening down the North river to go to sea cannot be deemed, while so backing, as being on a definite course, so as to give her the right of way over a steamer coming down the river, which has her on her starboard end. The case is rather one for the application of the "special circumstances" rule.—The Servia, 149 U. S. 144, 13 S. Ct. 817, 37 L. Ed. 681, affirming decree (D. C.) 30 F. 502.

When a steamer, having left her slip, is coming slowly down the Hudson river, and another steamer is backing out of her slip at Jersey City, some distance below, preparatory to straightening down the river to go to sea, each steamer is bound to conform to her own customary course and maneuvers under similar circumstances, and take notice of the customary course and maneuvers, and observe the movements, of the other, and each has the right to assume that the other will do so.—Id.

A steamship backing from her slip at Jersey City to go to sea held in fault for collision with another steamship coming down near the New York shore, because, while backing at from five to six knots, she did not start her engines ahead until some time after passing mid-river, thereby crowding upon the course of the other; and also for failing to observe the movements of the latter with due attention; and the latter held not in fault, having reversed as soon as collision became probable.—Id.

Steamers plying up and down the rivers at New York should keep a sufficient distance from the docks, and hold themselves under such control, as to enable them to avoid ferryboats leaving their slips on their usual schedules of time.—The Breakwater, 155 U. S. 252, 15 S. Ct. 99, 39 L. Ed. 139, affirming decree (D. C.) 39 F. 511.

98. **Signals.**

See 10 Cent. Dig. Collision, §§ 208-210.

When an ascending boat, having given two whistles, was hit on the port bow, and the other boat was injured on the starboard bow, there is convincing evidence that the ascending boat was at fault.—The Des Moines, 154 U. S. 584, 14 S. Ct. 1168, 20 L. Ed. 821.

Where a river steamer coming downstream sees a tug with barges coming up and about rounding a point, and thereupon blows two whistles, instead of taking the usual course to the right, she is bound to hug the left shore, and for a collision in mid-channel she alone is liable.—The St. John, 154 U. S. 586, 14 S. Ct. 1170, 20 L. Ed. 645.

99. **Lookouts.**

See 10 Cent. Dig. Collision, §§ 211, 212.

Where the circumstances require more than ordinary care, as in the case of a steamer running at a speed of 15 miles an hour, on a dark night, in a narrow channel like that of the Columbia river, where there is great probability of meeting other vessels, a deck watch composed of the river pilot in command, stationed upon the bridge just above the pilot house, a man at the wheel, and a lookout upon the fore-castle head, is insufficient, and prudent navigation requires a lookout to be stationed on either bow.—The Oregon, 158 U. S. 186, 15 S. Ct.

804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

100. **Fog.**

See 10 Cent. Dig. Collision, §§ 213-215.

There is no rigid rule that, where two steamships are approaching each other in a fog, so as to involve risk of collision, neither shall change her helm until the signals of the other give a clear indication of her direction. Each case must depend on its own circumstances, which may afford reasonable ground for believing what the direction may be. Held, therefore, that a steamer slowly approaching New York harbor in a fog, and hearing a fog whistle about two points on her port bow, apparently broadening off as they approached, was not in fault for porting so as to go two points to starboard, though the more prudent course would have been to hold her course until more definite information.—The Umbria, 17 S. Ct. 610, 166 U. S. 404, 41 L. Ed. 1053, reversing decree Fabre v. Cunard Steamboat Co., 3 C. C. A. 534, 53 F. 288, and affirming decree 40 F. 893.

104. **Presumptions and burden of proof as to fault.**

The burden of proof is upon each vessel to establish fault on the part of the other.—The Victory and The Plymothian, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519.

The fact that a vessel was shorthanded and running without a proper lookout, though not decisive of a fault contributing to a collision in a river, may be taken into consideration as bearing upon the probabilities of the case and raising a presumption against her. Decree, Jakobsen v. Springer, 87 F. 948, 31 C. C. A. 315, affirmed.—The Albert Dumois, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

105. **Evidence as to fault.**

In a collision suit, where the fault of one of the vessels is shown to be obvious and inexcusable, the evidence to establish fault on the part of the other must be clear and convincing, in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.—The Victory and The Plymothian, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519.

XI. **SPECIAL CIRCUMSTANCES AND ERRORS IN EXTREMIS.**

107. **Departures from rules.**

See 10 Cent. Dig. Collision, § 224.

Exceptions to the international rules, though provided for by rule 24, relating to "special circumstances," should be admitted with great caution, and only when imperatively required by the particular circumstances. Therefore, under all ordinary circumstances, a vessel discharges her full duty and obligations to another by a faithful and literal observance of these rules.—The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

A vessel coming up a river at a speed of about 9 miles an hour and from 200 to 500 feet from the east bank, which sees directly ahead and about half a mile away the white and colored lights of a descending steamer, cannot be justified for violating rule 18 by putting the wheel to starboard and signaling an intent to pass starboard to starboard, by reason of her own proximity to the east bank and a cluster of white lights belonging to a tug and two luggers inside of the approaching vessel, and in fact moored to the east bank, on the theory that this was a special circumstance within the meaning of rule 24, rendering a departure from rule 18

necessary to avoid immediate danger, since, if there was any danger at all, it was not an immediate one, or one which could not have been provided against by easing her engine and slackening her speed. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

108. Errors in extremis.

See 10 Cent. Dig. Collision, §§ 225-231.

A false maneuver of a vessel to be excusable as being done in extremis, must be produced by the fault of the other vessel.—*The Elizabeth Jones*, 112 U. S. 514, 5 S. Ct. 468, 28 L. Ed. 812.

A schooner was not in fault for keeping her course and not porting her helm as soon as she saw a steamer bearing down on her in a fog; for, even if it were an error of judgment to hold her course, it was an act resolved on in extremis, and a compliance with the statute.—*The Nacoochee v. Moseley*, 137 U. S. 330, 11 S. Ct. 122, 34 L. Ed. 687, reversing decree (C. C.) 28 F. 462.

A tug observed a sailing vessel approaching, and took measures to avoid her by altering her wheel. She did not at the time stop and reverse. When the vessels were close together, the ship also altered her helm. Thereupon the bells of the tug were rung to stop, but not to reverse; the pilot leaving the pilot house by reason of the imminence of a collision. Held, that the tug was not obliged to stop and back until there was risk of collision; and, there being no risk of collision until the ship altered her wheel, and the situation then becoming one in extremis, and caused by the wrong maneuver of the ship, the failure of the tug to stop sooner, and her failure to back at any time, were no faults.—*The Blue Jacket*, 144 U. S. 371, 12 S. Ct. 711, 36 L. Ed. 469, distinguishing *The Manitoba*, 122 U. S. 97, 7 S. Ct. 1153, 30 L. Ed. 1095.

Where a bark, which was struck by a steamer running at excessive speed in a fog at night, luffed only after the steamer's masthead light came in view, and changed her course but one or two points before collision, held, that the change was made in extremis.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, 85, affirming decree *The City of New York* (C. C.) 35 F. 604.

Where a steamer, through the fault of a tug in failing to give signals in a fog that she had a tow, is brought into imminent danger of a collision with the tow, she should not be blamed for the result of an attempt to pass between the tug and tow rather than around the tow, the choice being largely a matter of discretion with her master, and the error, if any, being one committed in extremis.—*The Ludvig Holberg*, 157 U. S. 60, 15 S. Ct. 477, 39 L. Ed. 620.

A vessel at anchor in the Columbia river, on a clear night, well out of the ordinary track of steamers, with her anchor light properly set and clearly burning, as required by the international rules, and with a lookout on deck, held not in fault for failure to show a flare-up light or to sound a bell upon the approach of a steamer. The action of her lookout in hailing the steamer, which approached at a speed of 15 miles an hour, instead of showing a light or sounding a bell, being regarded as action in extremis, and therefore not to be impugned.—*The Oregon*, 153 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

XII. SUITS FOR DAMAGES.

(A) RIGHT OF ACTION AND DEFENSES.

112. Grounds of action.

See 10 Cent. Dig. Collision, §§ 235-238.

The right of one of two vessels which were both in fault for a collision to enforce contribution, where it has paid the entire damage to the cargo of the other vessel, is not affected by provisions in the latter vessel's bills of lading, giving her the benefit of insurance, and fixing the time within which claims for damage must be made and suits therefor instituted. Decree, *Erie & W. Transp. Co. v. Erie R. Co.* (C. C. A. 1905), 142 F. 9, 73 C. C. A. 195, reversed.—*Erie R. Co. v. Erie & W. Transp. Co.*, 27 S. Ct. 246, 204 U. S. 220, 51 L. Ed. 450.

The law of France which authorizes a recovery for loss of life against a vessel in fault, will be enforced by the courts of the United States in a proceeding to limit liability for claims against a French vessel found to be at fault for a collision in a fog on the high seas, although the French courts, in applying to the facts found the international rule as to the speed of vessels in a fog, might not have held such vessels to be at fault. Decree, *La Bourgogne* (1906) 144 F. 781, 75 C. C. A. 647, affirmed.—*Deslions v. La Compagnie Generale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

117. Libel or complaint at law.

See 10 Cent. Dig. Collision, §§ 251, 254.

A tow was sunk in a collision between two tugs, to the side of one of which she was lashed, and the collision was alleged to have occurred in consequence of the change of course by one of the tugs, which, after signaling a change, attempted to run across the bows of the other. Held, in a suit by the tow, a libel charging both tugs with negligence and each tug denying, but alleging negligence on the part of the other, the tow was not entitled to a decree upon the pleadings.—*The L. P. Dayton*, 120 U. S. 337, 7 S. Ct. 568, 30 L. Ed. 669, affirming decree (C. C.) 4 F. 834.

118. Answer.

See 10 Cent. Dig. Collision, § 251.

A tow was sunk in a collision between two tugs, to the side of one of which she was lashed, and the collision was alleged to have occurred in consequence of the change of course by one of the tugs; which, after signaling a change, attempted to run across the bows of the other. Held, in a suit by the tow, (1) that the answer of the first tug did not clearly show that she had the other on her starboard hand, and that there had been any violation of rule 19 (Rev. St. § 4233).—*The L. P. Dayton*, 120 U. S. 337, 7 S. Ct. 568, 30 L. Ed. 669, affirming decree 4 F. 834.

121. Issues, proof, and variance.

See 10 Cent. Dig. Collision, § 256.

A tow was sunk in a collision between two tugs, to the side of one of which she was lashed, and the collision was alleged to have occurred in consequence of the change of course by one of the tugs, which after signaling a change, attempted to run across the bows of the other. Held, in a suit by the tow, that it was necessary for the tow to allege and prove negligence against one or the other of the tugs.—*The L. P. Dayton*, 120 U. S. 337, 7 S. Ct. 568, 30 L. Ed. 669, affirming decree 4 F. 834.

(C) EVIDENCE.

122. Presumptions.

See 10 Cent. Dig. Collision, §§ 257, 258.

A bark bound for New York from Havana, and sailing with a free wind, was sunk in a collision with a steamer off the New Jersey coast, between Absecon and Barnegat. *Held*, that the court below was warranted in finding that the course of the bark was "about N. E.," on the ground that the usual course of vessels in that vicinity, bound to and from the same ports, and sailing with a free wind, is N. E. or N. E. by N., and a deviation from such course would not be presumed without some controlling reason.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, affirming decree (D. C.) *The City of New York*, 35 F. 604.

124. Admissibility.

See 10 Cent. Dig. Collision, §§ 262-265.

A statement made in another suit by a part owner of a vessel injured by collision, giving his opinion as to the extent and value of her repairs, is not binding on his co-owners, and not admissible as evidence against them.—*Clark v. Weeks*, 106 U. S. 13, 1 S. Ct. 90, 27 L. Ed. 96.

The finding of a board of local inspectors, and documents connected therewith, are not admissible "as tending to affect the evidence offered by the libelants to show that" one of the vessels "was in her proper position in the river, and had proper watches and lights set at the time of the collision."—*The Charles Morgan v. Kouns*, 115 U. S. 69, 5 S. Ct. 1172, 29 L. Ed. 316.

125. Weight and sufficiency.

See 10 Cent. Dig. Collision, §§ 266-273.

Where fault on the part of one vessel, sufficient to account for a collision, is established by uncontradicted evidence, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel, but the latter should have the benefit of any reasonable doubt with regard to the propriety of its conduct.—*The Ludvig Holberg*, 157 U. S. 60, 15 S. Ct. 477, 39 L. Ed. 620.

(D) DAMAGES.

Jurisdiction of admiralty to enforce contribution, see Admiralty, 7, 19.
Priority of lien for damage from collision to lien for supplies, see Maritime Liens, 37.

128. Loss of profits or freight.

See 10 Cent. Dig. Collision, § 282.

Where a vessel is sunk in collision, and damages are awarded the owner on the basis of her total loss, he is not entitled to recover in addition for the loss of earnings under an unexpired time charter.—*The Umbria*, 17 S. Ct. 610, 166 U. S. 404, 41 L. Ed. 1053, reversing decree (D. C.) 46 F. 301, and *Fabre v. Cunard S. S. Co.*, 53 F. 288, 3 C. C. A. 534.

130. Interest.

See 10 Cent. Dig. Collision, § 284.

Where strippings from the injured vessel were rescued before she went down, from which the owners have realized several thousand dollars, in awarding damages against the owners, limited to the amount of their interest in the ship, the court is not bound to allow interest on the proceeds of the wreck or strippings.—*Dyer v. National Steam-Nav. Co.*, 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153.

The allowance of interest by way of damages in cases of collision is in the discretion of the court.—*Id.*

143. Division of damages.

See 10 Cent. Dig. Collision, §§ 286-292.

144. — Grounds in general.

See 10 Cent. Dig. Collision, § 296.

The damages sustained by a car float in tow of a tug hired to carry her from place to place in a harbor as the result of a collision with one of two scows in tow of another tug, for which both scows and both tugs were severally at fault, should be assessed equally upon the four offending vessels, although the scows are the property of the same owner.—(1909) *The Eugene F. Moran v. New York Cent. & H. R. R. Co.*, 29 S. Ct. 339, 212 U. S. 466, 53 L. Ed. 600, answering certified questions (1906) 154 F. 41, 83 C. C. A. 153, which is affirmed (1909) 170 F. 928, 96 C. C. A. 144, decree amended (1909) *The Charles E. Matthews*, 173 F. 1020, 97 C. C. A. 667. Writ of certiorari denied (1909) *Henry Du Bois Sons Co. v. The Eugene F. Moran*, 30 S. Ct. 399, 215 U. S. 596, 54 L. Ed. 342.

145. — Damages to be divided.

See 10 Cent. Dig. Collision, § 297.

The amount awarded to the owner of a vessel which was totally lost in a collision, when both vessels were in fault and proceedings had been taken by the owners of both for limitation of liability, is subject to a deduction of one-half of the amount payable for the loss of the life of passengers in the collision, although no recovery could have been had on libels filed against such owner because of the total loss of his vessel and her freight and the extinguishment of his personal liability. Decree, *Jakobson v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

146. — Mode of apportionment.

See 10 Cent. Dig. Collision, § 298.

Where both parties were at fault, the damages to both vessels should be added together, the sum equally divided, and a decree be pronounced in favor of the owners of the vessel which suffered most against the vessel which suffered least for one-half the difference between the amounts of their respective losses.—*The Manitoba*, 122 U. S. 97, 7 S. Ct. 1158, 30 L. Ed. 1095.

The damages sustained by one of two scows in tow of a tug as a result of a collision with a car float in tow of another tug, for which both scows and both tugs were severally at fault, should be assessed equally on all four offending vessels, the libellant's two scows each bearing its proportion of the loss.—(1909) *The Eugene F. Moran v. New York Cent. & H. R. R. Co.*, 29 S. Ct. 339, 212 U. S. 466, 53 L. Ed. 600, answering certified questions (1906) 154 F. 41, 83 C. C. A. 153, which is affirmed (1909) 170 F. 928, 96 C. C. A. 144, decree amended (1909) *The Charles E. Matthews*, 173 F. 1020, 97 C. C. A. 667. Writ of certiorari denied (1909) *Henry Du Bois Sons Co. v. The Eugene F. Moran*, 30 S. Ct. 399, 215 U. S. 596, 54 L. Ed. 342.

(E) TRIAL OR HEARING, JUDGMENT, AND REVIEW.

Appellate jurisdiction of federal supreme court of libel for contribution, see Courts, 385(4).

Remedy by appeal affecting right to mandamus, see Mandamus, 4.

149. Course and conduct of hearing.

See 10 Cent. Dig. Collision, §§ 149, 299-301, 309, 310.

Where the evidence was conflicting as to whether the wind was S. W. or S. S. W. at the time of a collision between a steamer and a bark, a finding that "the wind was blowing from the southwest or the south-southwest" is sufficiently exact.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, 85, affirming decree (C. C.) *The City of New York*, 35 F. 604.

151. Decree.

See 10 Cent. Dig. Collision, § 303.

In collision cases, where both parties are in fault, the rule is to divide the entire damage equally between them, and to make a decree for half the difference between their respective losses in favor of the one that suffered most, so as to equalize the burden, and the obligation to pay the difference is the legal liability growing out of the transaction.—*The North Star* and *The Ella Warley*, 106 U. S. 17, 1 S. Ct. 41, 27 L. Ed. 91.

A collision occurred at sea, in the night, between the steamers *W.* and *N.*, pursuing nearly opposite courses, and both were held in fault. The *W.* was sunk, and the *N.* much damaged. Cross actions were brought and heard together, and one decree was made, being in favor of the owners of the *W.* for one-half the difference of damage sustained by the two vessels, that of the *W.* being the greatest. *Held*, that the decree was proper.—*Id.*

In a suit for a collision caused by two vessels, where both vessels have been found in fault, and the decree was entered against both vessels for the full amount of the loss, it should be modified so as to be against each severally for one-half of the entire damage and costs, the right being reserved to appellant to collect any balance of each half which he shall not be able to enforce against either vessel from the other.—*The Sterling v. Peterson*, 106 U. S. 647, 1 S. Ct. 89, 27 L. Ed. 98.

Interest on the amount awarded against the owner is chargeable only from the date of the decree.—*The Manitoba*, 122 U. S. 97, 7 S. Ct. 1158, 30 L. Ed. 1095.

154. Costs.

See 10 Cent. Dig. Collision, § 303.

Cross libels for a collision were filed in admiralty; one in personam, the other in rem. Libellant obtained a decree in one suit, and the other was dismissed. The losing party in each case appealed, and the damages were apportioned. *Held*, that the aggregate costs in both courts should be divided between the parties.—*The North Star* and *The Ella Warley*, 106 U. S. 17, 1 S. Ct. 41, 27 L. Ed. 91.

COLLUSION.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

SUP.CT.DIG.—24

COMMERCE.

Scope-Note.

[INCLUDES promotion and regulation of commerce in general, and, more particularly, the power to regulate commerce with foreign nations, among the several states, with the Indian tribes, and the internal commerce of the states, and means and methods of exercise of the power.

[For related matters under other topics, see cross-references after analysis.]

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I. POWER TO REGULATE IN GENERAL.**1. Nature and grounds of power.**

See 10 Cent. Dig. Commerce, §§ 1, 2.

The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by

congressional enactments. Judgment 78 N. W. 519, 58 Neb. 192, affirmed.—Western Union Tel. Co. v. Call Pub. Co., 21 S. Ct. 561, 181 U. S. 92, 45 L. Ed. 765.

2. Constitutional grant of power to Congress.

See 10 Cent. Dig. Commerce, §§ 3-6, 8.

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3. — In general.

See 10 Cent. Dig. Commerce, § 2.

The anti-trust law, construed as applying only to contracts whose direct and immediate effect is a restraint upon interstate commerce, and not to such as are made to promote legitimate business, though they may indirectly or incidentally affect such commerce, is a legitimate exercise by congress of its power to regulate interstate commerce.—*United States v. Joint-Traffic Ass'n*, 19 S. Ct. 25, 171 U. S. 505, 43 L. Ed. 259, reversing judgment (C. C.) 76 F. 895, and 89 F. 1020, 32 C. C. A. 491.

The power of congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce. Judgment *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 29 C. C. A. 141, modified.—*Addyston Pipe & Steel Co. v. United States*, 20 S. Ct. 96, 175 U. S. 211, 44 L. Ed. 136.

Congress did not exceed its power under the commerce clause of the federal Constitution in enacting Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies. Decree, *United States v. Northern Securities Co. (C. C.)* 120 F. 721, affirmed.—*Northern Securities Co. v. United States*, 24 S. Ct. 436, 193 U. S. 197, 48 L. Ed. 679.

5. — Commerce among the states.

See 10 Cent. Dig. Commerce, §§ 3, 5.

A carrier, by engaging in interstate commerce, does not thereby submit all its business affairs to the regulating power of Congress. Judgments (C. C. 1906) *Brooks v. Southern Pac. Co.*, 148 F. 986, and (C. C. 1907) *Howard v. Illinois Cent. R. Co.*, Id. 997, affirmed.—*Howard v. Illinois Cent. R. Co.*, 28 S. Ct. 141, 207 U. S. 463, 52 L. Ed. 297.

No question with reference to the power of Congress to enact a regulation of interstate commerce can arise if the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the federal Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided.—*Atlantic Coast Line R. Co. v. Riverside Mills*, 31 S. Ct. 164, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, affirming judgment *Riverside Mills v. Atlantic Coast Line R. Co. (C. C.)* 168 F. 990; *Louisville & N. R. Co. v. Scott*, 31 S. Ct. 171, 219 U. S. 209, 55 L. Ed. 183, affirming judgment 118 S. W. 990, 133 Ky. 724.

If a congressional enactment is a valid exercise of the power of Congress to regulate interstate commerce, how it may affect persons or states is immaterial.—*Hoke v. United States*, 33 S. Ct. 281, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, affirming judgment (D. C.) *United States v. Hoke*, 187 F. 992.

Congress may adopt means necessary and convenient to regulation of interstate commerce, and they may have the quality of police regulations.—Id.

Congress may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate com-

merce.—*Houston, E. & W. T. R. Co. v. United States*, 34 S. Ct. 833, 234 U. S. 342, 58 L. Ed. 1841, affirming decree (Com. Ct.) *Texas & P. Ry. Co. v. Same*, 205 F. 380, and *Houston, E. & W. T. Ry. Co. v. Same*, Id. 391.

Congress under the commerce clause had power to amend Food and Drugs Act, § 8, as it did by the Act Aug. 23, 1912, so as to declare misbranded drugs which bear labels containing false statements as to curative powers.—*Seven Cases v. United States*, 36 S. Ct. 190, 239 U. S. 510, 60 L. Ed. 411.

Under the commerce clause of the federal Constitution, Congress had power to enact the safety appliance acts, though such acts were operative in favor of an employe not at the time of his injury engaged in interstate commerce.—*Texas & P. Ry. Co. v. Rigsby*, 36 S. Ct. 482, 241 U. S. 83, 60 L. Ed. 874, affirming judgment 222 F. 221, 138 C. C. A. 51.

7. — Internal commerce of states.

See 10 Cent. Dig. Commerce, §§ 3, 5.

Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of Act Feb. 2, 1903, c. 349, 32 Stat. 791 [U. S. Comp. St. Supp. 1905, p. 613], entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," are void as in excess of the powers conferred by that act, where, on their face, they apply as well to intrastate as to interstate commerce.—*Illinois Cent. R. Co. v. McKendree*, 27 S. Ct. 153, 203 U. S. 514, 51 L. Ed. 298; *Same v. Edwards*, 27 S. Ct. 159, 203 U. S. 531, 51 L. Ed. 305.

Taking of sponges from land under water within state territory limits held not subject to congressional control.—*The Abby Dodge v. United States*, 32 S. Ct. 310, 223 U. S. 168, 56 L. Ed. 390.

8. — Exclusive or concurrent powers of Congress and the states.

See 10 Cent. Dig. Commerce, § 5.

A state statute authorizing a railway company incorporated under the laws of the state to issue transportation in payment for printing and advertising must give way, so far as interstate transportation is concerned, before the provisions of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138], and Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149], amendatory thereof, under which a carrier can accept nothing but money in exchange for interstate transportation.—(1911) *Chicago, I. & L. Ry. Co. v. United States*, 31 S. Ct. 272, 219 U. S. 486, 55 L. Ed. 305, affirming judgment *United States v. Chicago, I. & L. Ry. Co. (C. C. 1908)* 163 F. 114.

Inhibitive congressional legislation is not essential to exclude state legislation upon incidental matters relating to interstate commerce with respect to which the states and Congress have a concurrent power. It is sufficient if the congressional legislation occupies the field of regulation.—(1912) *Southern Ry. Co. v. Reid*, 32 S. Ct. 140, 222 U. S. 424, 56 L. Ed. 257, reversing judgment (1910) *Reid v. Southern Ry. Co.*, 69 S. E. 618, 153 N. C. 490; (1912) *Southern Ry. Co. v. Reid & Beam*, 32 S. Ct. 145, 222 U. S. 444, 56 L. Ed. 263, reversing judgment (1909) *Reid & Beam v. Southern Ry. Co.*, 64 S. E. 874, 150 N. C. 753, 17 Ann. Cas. 247.

Congress has so completely taken control of the subject of rate making and charging by the provisions of the act to regulate commerce and the amendments thereof as to invalidate the provisions of Code N. C. 1905, § 2631, so

far as they penalize the refusal of a carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state where no rate for such shipment has been established, filed, or published.—Id.

Congress had so acted upon the subject of the hours of labor of interstate railway employes by enacting the hours of service act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]), as to preclude a state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to such employes a local regulation limiting hours of labor.—(1912) *Northern Pac. Ry. Co. v. State of Washington ex rel. Atkinson*, 32 S. Ct. 160, 222 U. S. 370, 58 L. Ed. 237, reversing judgment (1909) *State v. Northern Pac. Ry. Co.*, 102 P. 876, 53 Wash. 673, 17 Ann. Cas. 1013.

The clause in the hours of service act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]), regulating the hours of labor of interstate railway employes, by which its operation is postponed for one year, precludes a state from making or enforcing during the interim a local regulation affecting the hours of labor of such employes.—Id.

The laws of the several states, in so far as they cover the same field, were superseded by the enactment by Congress of Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), regulating the liability of interstate railway carriers for the death or injury of their employes while engaged in interstate commerce.—(1912) *Mondou v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, reversing judgment (1909) 73 A. 762, 82 Conn. 373.

Congress has so taken control of railroad rate making as to invalidate provisions of a state statute penalizing refusal of carrier to receive freight for transportation to a point on line of another carrier outside the state, where it had no rate therefor.—(1912) *Southern R. Co. v. Burlington Lumber Co.*, 32 S. Ct. 657, 225 U. S. 99, 56 L. Ed. 1001, reversing judgment (1910) *Burlington Lumber Co. v. Southern R. Co.*, 67 S. E. 167, 152 N. C. 70.

Congress did not by passage of the Food and Drugs Act June 30, 1906, for the prevention of adulteration and misbranding of foods and drugs when the subject of interstate commerce, prohibit the enactment of Acts Ind. 1907, c. 206, relating to sales of foodstuffs in original packages.—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.

There is no conflict between the provisions of the Food and Drugs Act of June 30, 1906, for the prevention of adulteration and misbranding of foods and drugs when the subject of interstate commerce, and Code Supp. Iowa 1907, §§ 5077a6–5077a24, as applied to sales by importers in original packages of concentrated commercial feeding stuffs.—*Standard Stock Food Co. v. Wright*, 32 S. Ct. 784, 225 U. S. 540, 56 L. Ed. 1197.

Intent of Congress to take possession of the subject of the liability of a carrier under contracts for interstate commerce so clearly appears from Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, as to invalidate as to interstate shipments, the provisions of any state law nullifying contracts limiting liability of carrier to the agreed or declared value.—*Adams Exp. Co. v. Croninger*, 83 S. Ct. 148, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328, reversing judgments *Latta v. Chicago, St. P., M. & O. Ry. Co.*, 172 F. 850, 97 C. C. A.

198 and *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 184 F. 987, 106 C. C. A. 664.

Rights and remedies conferred by existing state laws, where a shipment accepted by carrier for interstate transportation has been lost or damaged, were not continued in force by proviso in Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20.—Id.

Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, supersedes all state regulations on the subject of liability of railway carrier for injury to interstate shipment, and of all state laws invalidating contracts limiting liability of carrier to an agreed value.—*Chicago, B. & Q. Ry. Co. v. Miller*, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 323, reversing judgment *Miller v. Chicago, B. & Q. R. Co.*, 123 N. W. 449, 85 Neb. 458; *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328, reversing judgments *Latta v. Chicago, St. P., M. & O. Ry. Co.*, 172 F. 850, 97 C. C. A. 198, and *Chicago, St. P., M. & O. Ry. Co. v. Latta*, 184 F. 987, 106 C. C. A. 664.

Any power which a state has over interstate commerce because of congressional inaction ceases the moment Congress exerts its paramount authority.—*Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers' Elevator Co.*, 33 S. Ct. 174, 226 U. S. 426, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203, reversing judgment *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, 124 N. W. 819, 110 Minn. 25, 19 Ann. Cas. 1088.

Congress has so taken possession of the subject of delivery of railroad cars for interstate commerce under Act June 29, 1906, as to invalidate, when applied to cars demanded for interstate commerce, provisions of Laws Minn. 1907, c. 23 (Rev. Laws Supp. 1909, §§ 2023–1 to 2023–13), requiring railroad companies to furnish freight cars on demand under penalty.—Id.

The subject of the delivery of an interstate shipment to the consignee is so embraced by Act June 29, 1906, amendatory of Act Feb. 4, 1887, § 1, as to invalidate, when applied to interstate shipments, provisions of Demurrage Law of Arkansas April 19, 1907 (Laws 1907, p. 457) § 3, exacting per diem penalty from carrier failing to notify consignee of arrival of shipment.—*St. Louis, I. M. & S. R. Co. v. Edwards*, 33 S. Ct. 262, 227 U. S. 265, 57 L. Ed. 506, reversing judgment 127 S. W. 713, 94 Ark. 394.

Inclusion of railroad ferries in Act Feb. 4, 1887, § 1, regulating interstate commerce, invalidates any regulation under state authority of the rates charged by a railway company of a ferry on navigable stream forming the boundary between two states.—*New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders of Hudson County*, 33 S. Ct. 269, 227 U. S. 248, 57 L. Ed. 499, reversing judgment 74 A. 954, 76 N. J. Law, 664, 16 Ann. Cas. 858.

State laws nullifying contracts limiting liability of carrier for loss or damage to agreed value was superseded, so far as interstate shipments are concerned, by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20.—*Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690, reversing judgment (Tex. Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Same*, 128 S. W. 932.

State laws, declaring contracts invalid, which require actions against carrier for injuries to shipment in less than the statutory time, were superseded as to interstate shipments by Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, which furnishes the exclusive rule on such subject.—Id.

Construing the word "package" as used in the Food and Drug Act, §§ 7, 8, as referring to the immediate container of the article, and not

to the outside wrapping, does not render the statute invalid as in excess of the power of Congress over interstate commerce.—*McDermott v. State of Wisconsin*, 33 S. Ct. 431, 228 U. S. 115, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, reversing judgment 126 N. W. 888, 143 Wis. 18, 21 Ann. Cas. 1315.

Permitting a sale of cans of a mixture of glucose and refiner's syrup shipped into the state only when the labels prescribed by Laws Wis. 1907, c. 557, are substituted for those affixed in an attempt to comply with the Food and Drug Act, is an unlawful attempt by the state to burden legitimate federal regulations of interstate commerce, and to destroy rights arising out of the federal statute which have accrued to the government and the shipper.—*Id.*

Congress, having by Food and Drug Act made adulterated and misbranded articles contraband of interstate commerce could authorize, as it did in section 10, seizures for confiscation of unsold articles whether in the original package or not; and such means of enforcement cannot be thwarted by Laws Wis. 1907, c. 557, under which cans of a mixture of glucose and refiner's syrup which have been removed from the original boxes and are held on the shelves of the importers for sale must bear only the labels required by the state, to the exclusion of those affixed under the federal law.—*Id.*

The liability of an interstate railway carrier in injuries to an employé engaged in interstate commerce is measured by the federal Employer's Liability Act of April 22, 1908.—*St. Louis, I. M. & S. R. Co. v. Hesterly*, 33 S. Ct. 703, 228 U. S. 702, 57 L. Ed. 1031, reversing judgment 135 S. W. 874, 98 Ark. 240.

The states continued to possess the right to prescribe reasonable rates for the exclusively internal traffic on interstate carriers after the passage of Interstate Commerce Act Feb. 4, 1887, and the amendment of June 29, 1906 though by reason of the interblending of the interstate and intrastate operations of such carriers adequate regulation of interstate rates cannot be maintained without imposing requirements as to their intrastate rates which substantially affect the former.—*Simpson v. Shepard*, 33 S. Ct. 729, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, modifying decree (C. C.) *Shepard v. Northern Pac. Ry. Co.*, 184 F. 765.

Nothing in congressional legislation creating the Mississippi River Commission justifies the conclusion that Congress assumed the control of the entire work of protection from overflow by levees, to the displacement of local authorities.—*Jackson v. United States*, 33 S. Ct. 1011, 230 U. S. 1, 57 L. Ed. 1363, affirming judgment 47 Ct. Cl. 579.

Congress has not taken over the whole subject of terminals, switching, etc., of interstate railways so as to invalidate all state regulations as to interchange of traffic.—*Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 34 S. Ct. 152, 231 U. S. 457, 58 L. Ed. 310, affirming decree (D. C.) 198 F. 1009.

Act June 29, 1906, covers the field of regulation of interstate express carriers, and hence renders invalid an ordinance requiring express companies, doing interstate business, to give a bond for each vehicle conditioned for the safe and prompt delivery of baggage.—*Barrett v. City of New York*, 34 S. Ct. 203, 232 U. S. 14, 58 L. Ed. 483, reversing decree (C. C.) 189 F. 268.

Nothing in the state statute for the distribution of personal property can defeat the rights of the childless widow of an interstate railway employé to the proceeds of a judgment obtained by her as administratrix against the carrier under Employers' Liability Act April 22, 1908, § 1, or section 9 as added by Act April 5, 1910, § 2.—*Taylor v. Taylor*, 34 S. Ct. 350, 232 U. S. 363, 58 L. Ed. 638, reversing judg-

ment *In re Taylor*, 97 N. E. 502, 204 N. Y. 135, which affirmed 129 N. Y. S. 378, 144 App. Div. 634.

State statutes which, like Code Iowa, § 2074, nullify contracts limiting the liability of a carrier for loss or damage to the agreed value, were superseded, as far as interstate shipments are concerned, by Carmack Amendment, § 7, to Act Feb. 4, 1887, § 20, which furnishes the exclusive rule on the subject of the liability of a carrier under contracts for interstate shipments.—*Chicago, R. I. & P. R. Co. v. Cramer*, 34 S. Ct. 383, 232 U. S. 490, 58 L. Ed. 697, reversing judgment *Cramer v. Chicago, R. I. & P. R. Co.*, 133 N. W. 387, 153 Iowa, 103.

The exclusive rule as to the liability of carrier under contracts for interstate shipment is furnished by the Carmack Amendment of June 29, 1906, § 7, to Interstate Commerce Act Feb. 4, 1887, § 20, under which a carrier of property for interstate transportation is liable for any injury caused by it or any connecting carrier.—*Atchison, T. & S. F. Ry. Co. v. Robinson*, 34 S. Ct. 556, 233 U. S. 173, 58 L. Ed. 901, reversing judgment 129 P. 20, 36 Okl. 435; *Same v. Moore*, 34 S. Ct. 558, 233 U. S. 182, 58 L. Ed. 906, reversing judgment 129 P. 24, 36 Okl. 433.

Since Congress by Act April 22, 1908, took possession of the field of the employers' liability in interstate transportation, all state laws on the subject are superseded.—*Seaboard Air Line Ry. v. Horton*, 34 S. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, reversing judgment *Horton v. Seaboard Air Line R. Co.*, 78 S. E. 494, 162 N. C. 424.

The limitation and responsibility of a railway carrier under Employers' Liability Act April 22, 1908, § 1, for injuries caused by defects due to negligence, governs an action under that statute regardless of the responsibility prescribed by the local statutes.—*Id.*

The common-law rule as to assumption of risk from the defective appliance governs an action under Employers' Liability Act April 22, 1908, where such appliance is not covered by any federal statute to the exclusion of any state statute, which like Revised N. C. 1905, § 2646, abolished assumption of risk as a bar to the action by a railroad employé for an injury caused by defective appliance, since otherwise the subject-matter would be controlled by the state laws and not by the federal statute, which in section 4 abolishes assumption of risk when the violation of a federal state contributed to the injury of an employé.—*Id.*

A declaration stating a good cause of action under the federal Employers' Liability Act of April 22, 1908, may afford a basis for a recovery under the state law after eliminating allegations that the injury occurred in interstate commerce, which was not sustained by the proof.—*Wabash R. Co. v. Hayes*, 34 S. Ct. 729, 234 U. S. 86, 58 L. Ed. 1226, dismissing writ of error *Hayes v. Wabash R. Co.*, 180 Ill. App. 511.

The subject of the hours of labor of employes of interstate railway carriers using the telegraph or telephone in connection with trains is so far removed from state regulation by the Hours of Service Act of March 4, 1907, as to invalidate the provisions of Laws N. Y. 1897, c. 415, as amended by Laws 1907, c. 627, prescribing shorter day's work for certain telegraph and telephone operators.—*Erie R. Co. v. People of State of New York*, 34 S. Ct. 756, 233 U. S. 671, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138, reversing judgment *People v. Erie R. Co.*, 91 N. E. 849, 198 N. Y. 369, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811.

Congress has so acted on the subject of the hours of labor of interstate railway employes by Hours of Service Act of March 4, 1907, as to

prevent the state, during the period between the date of the act and the time it should go into effect, from enforcing, as to such employes, a local regulation limiting the hours of labor.—*Id.*

A state law enacted under any of the reserved powers will not be set aside as inconsistent with an act of Congress regulating commerce, unless there is actual repugnancy, or Congress has manifested a purpose to exercise its paramount authority over the subject.—*Missouri, K. & T. Ry. Co. of Texas v. Harris*, 34 S. Ct. 790, 234 U. S. 412, 58 L. Ed. 1377, L. R. A. 1915E, 942.

Congress does not exercise its paramount authority by enacting the Carmack amendment of June 29, 1906, § 7, pars. 11, 12, to the act of Feb. 4, 1887, § 20, regulating the liability of a carrier for loss or damage to interstate shipment, as to prevent the application to a claim against a carrier, for loss of such shipment, of the provisions of Acts Tex. 31st Leg. c. 47, for the allowance of an attorney's fee of not over \$20 to the successful plaintiff, where such claim is not paid within 30 days after demand and the recovery is for the full claim.—*Id.*

Congress may control intrastate rates of a carrier under state authority when necessary to remove the resulting unjust discrimination against interstate commerce from the relation between intrastate rates and interstate rates which are unreasonable in themselves.—*Houston, E. & W. T. R. Co. v. United States*, 34 S. Ct. 833, 234 U. S. 342, 58 L. Ed. 1341, affirming decrees (Com. Ct.) *Texas & P. Ry. Co. v. Same*, 205 F. 380, and *Houston, E. & W. T. Ry. Co. v. Same*, *Id.* 391.

Act March 2, 1893, invalidates, as applied to freight cars between points within the state on an interstate railway, the provisions of Burns' Ann. St. Ind. 1908, § 5280, relating to handholds on railway cars.—*Southern Ry. Co. v. Railroad Commission of Indiana*, 35 S. Ct. 304, 236 U. S. 439, 59 L. Ed. 661, reversing judgment 100 N. E. 337, 179 Ind. 23.

Employers' Liability Act governs action of injured employe against an interstate carrier, to exclusion of applicable state statutes, where the train on which plaintiff was riding was engaged in interstate commerce.—*Toledo, St. L. & W. R. Co. v. Slavin*, 35 S. Ct. 306, 236 U. S. 454, 59 L. Ed. 671, reversing judgment *Slavin v. Toledo, St. L. & W. R. Co.*, 106 N. E. 1077, 88 Ohio St. 536.

State statutes of limitation otherwise applicable to reparation claims already accrued, as well as those thereafter accruing under Act June 29, 1906, § 5, amending Act Feb. 4, 1887, § 16, by limiting to two years from the accrual of the claim the time for invoking action by Interstate Commerce Commission on complaints by shippers, were superseded by such acts of Congress.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

Congress has so far taken over the subject of carrier's liability for loss or damage to interstate shipments by Act June 18, 1910, and Act June 29, 1906, amending sections 1, 20, Act Feb. 4, 1887, as to invalidate Civ. Code S. C. 1912, § 2573, subjecting terminal carrier to penalty for failure to pay promptly claims for damages to interstate shipment.—*Charleston & W. C. Ry. Co. v. Varnville Furniture Co.*, 35 S. Ct. 715, 237 U. S. 597, 59 L. Ed. 1137, reversing judgment *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.

Laws N. D. 1911, p. 355, prohibiting the sale of lard not in bulk unless put up in packages of specified weights, is not repugnant to

the Pure Food and Drugs Act, which has reference merely to adulteration and misbranding.—*Armour & Co. v. State of North Dakota*, 36 S. Ct. 440, 240 U. S. 510, 60 L. Ed. 771, affirming judgment *State v. Armour & Co.*, 145 N. W. 1033, 27 N. D. 177.

Carmack Amendment to Act of Feb. 4, 1887, § 20, precludes application to interstate shipment of a local law investing innocent holder of bill of lading with rights not available to shipper.—*Atchison, T. & S. F. Ry. Co. v. Harold*, 36 S. Ct. 665, 241 U. S. 371, 60 L. Ed. 1050, reversing judgment *Harold v. Atchison, T. & S. F. Ry. Co.*, 144 P. 823, 93 Kan. 456.

2 Rev. Codes Idaho, §§ 6909, 6926, making willful conduct causing collision of trains and death of a human being a criminal offense, do not affect right of motorman of interstate interurban railway to recover for injuries in a collision by defective brakes under Employers' Liability Act and Safety Appliance Act.—*Spo- kane & I. E. R. Co. v. Campbell*, 36 S. Ct. 683, 241 U. S. 497, 60 L. Ed. 1125, affirming judgment 217 F. 518, 133 C. C. A. 370.

§9. — Delegation of power by Congress.

See 10 Cent. Dig. Commerce, § 6.

The provision of the federal constitution vesting in congress the exclusive power to regulate interstate commerce does not guaranty the absolute freedom of such commerce; and hence the "Wilson Bill" (Act Cong. Aug. 8, 1890, 26 Stat. 313), which provides that intoxicating liquors brought into any state shall be subject to the laws enacted in the exercise of its police power "to the same extent and in the same manner as though such liquors had been produced in such state, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is not an unconstitutional restriction.—*Wilkerson v. Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, reversing decree (C. C.) 43 F. 556.

The effect of the law is to subject to the operation of the police power certain subjects which were before excluded from its operation by reason of their being subjects of interstate commerce, and is not a delegation to the states of the power to regulate commerce, nor an adoption of state laws as a regulation of such commerce.—*Id.*

§10. — Nonexercise of power of Congress.

See 10 Cent. Dig. Commerce, § 2.

The commercial power of congress is exclusive of state authority only where the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the states; and when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until congress intervenes and supercedes their action.—*Cardwell v. American River Bridge Co.*, 113 U. S. 205, 5 S. Ct. 423, 28 L. Ed. 959, affirming (C. C.) 19 F. 562, 9 Sawy. 662.

The states have full power as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by congress of authority to the contrary.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 17 S. Ct. 357, 165 U. S. 365, 41 L. Ed. 747.

A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce, at least until congress shall take action in the matter. Judgment, 56 P. 133, 60 Kan. 251,—affirmed.—*Erb*

v. Morasch, 20 S. Ct. 819, 177 U. S. 584, 44 L. Ed. 897.

No unlawful regulation of interstate commerce is made by the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon, in the absence of congressional action providing a different measure of liability. Judgment, *Hughes v. Pennsylvania R. Co.*, 51 A. 990, 202 Pa. 222, 63 L. R. A. 513, 97 Am. St. Rep. 713, affirmed.—*Pennsylvania R. Co. v. Hughes*, 24 S. Ct. 132, 191 U. S. 477, 48 L. Ed. 268.

Applying to a claim for a death on the high seas, due to a tortious collision of two vessels belonging to Delaware corporations, the provision of Act Del. Jan. 26, 1886, as amended by Act March 9, 1901, authorizing personal representatives to maintain an action and recover damages for a death occasioned by unlawful violence or negligence, does not render such provision repugnant to either the commerce or admiralty clauses of the federal Constitution, where Congress has not legislated upon the subject. Decree (1906) *The Hamilton*, 146 F. 724, 77 C. C. A. 150, affirmed.—*Old Dominion S. S. Co. v. Gilmore*, 28 S. Ct. 133, 207 U. S. 398, 52 L. Ed. 264.

Compelling a carrier by mandamus to discharge its common-law duty to treat all shippers alike by resuming the transfer of cars loaded and unloaded between the line of a connecting carrier and the flour mill and elevator of a particular shipper is not beyond the power of the state court, at least, until Congress or the Interstate Commerce Commission takes specific action, although both carriers are engaged in interstate commerce, and three-fifths of the output of the mill are shipped out of the state. Judgment (1906) *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 88 F. 72, 74 Kan. 808, affirmed.—*Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 29 S. Ct. 214, 211 U. S. 612, 53 L. Ed. 352.

The mere delegation by Congress to the Interstate Commerce Commission of certain powers is not equivalent to specific action by Congress in respect to the particular matters involved, which prevents a state from making regulations conducive to the welfare of its citizens that may indirectly affect commerce.—*Id.*

A state statute under which a penalty is incurred by a telegraph company which negligently fails to transmit within the state as promptly as practicable a message received at an office in the state, for transmission to a person in another state, is a valid exercise of the power of the state, in the absence of any legislation by Congress on the subject.—*Western Union Telegraph Co. v. Crovo*, 31 S. Ct. 399, 220 U. S. 364, 55 L. Ed. 498.

Until Congress acted there was no repugnancy to the commerce clause of the federal Constitution of Comp. St. Neb. 1911, c. 21, § 4, providing that contributory negligence of a railroad employé while engaged in interstate commerce did not bar recovery, where his negligence was slight and that of the company was gross.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

The intent of Congress to take control of the subject so as to invalidate existing state statutory regulations cannot be based on the Employer's Liability Act, since that statute has been held invalid.—*Chicago, I. & L. R. Co. v. Hackett*, 33 S. Ct. 581, 228 U. S. 559, 57 L. Ed. 966, affirming judgment *Hackett v. Chicago, I. & L. R. Co.*, 170 Ill. App. 140.

Congressional inaction leaves each state free to establish maximum intrastate rates for interstate carriers, which are reasonable in themselves.—*Simpson v. Shepard*, 33 S. Ct. 729, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1161, Ann. Cas. 1916A, 18, modifying decree (C.

C.) *Shepard v. Northern Pac. Ry. Co.*, 184 F. 765.

Congressional inaction leaves each state free to establish reasonable maximum intrastate rates for interstate carriers, though the state's requirements may disturb existing relations between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.—*Knott v. Chicago, B. & Q. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, modifying decree (C. C.) *St. Louis & S. F. R. Co. v. Hadley*, 168 F. 317.

Congressional inaction leaves each state free to establish maximum intrastate rates for interstate carriers reasonable in themselves, though they may disturb existing relations between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.—*Chesapeake & O. R. Co. v. Conley*, 33 S. Ct. 985, 230 U. S. 513, 57 L. Ed. 1597.

Congressional inaction on a subject leaves each state free to establish reasonable maximum intrastate rates, though the state's requirements may disturb existing relations between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.—*Oregon R. & Nav. Co. v. Campbell*, 33 S. Ct. 1026, 230 U. S. 525, 57 L. Ed. 1604, affirming decrees (C. C.) 173 F. 957, 177 F. 318.

Congressional inaction on a subject leaves each state free to establish reasonable maximum intrastate rates, though the state's requirements may disturb existing relations between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.—*Southern Pac. Co. v. Campbell*, 33 S. Ct. 1027, 230 U. S. 537, 57 L. Ed. 1610, affirming decree (C. C.) 189 F. 182.

Congressional inaction leaves each state free to establish maximum reasonable intrastate rates for interstate carriers, though it may disturb existing relations between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.—*Allen v. St. Louis, I. M. & S. Ry. Co.*, 33 S. Ct. 1030, 230 U. S. 553, 57 L. Ed. 1625, reversing decree (C. C.) 187 F. 290.

Congressional inaction leaves the state free to establish maximum intrastate rates for interstate carriers, though state requirements may disturb existing relations between interstate and intrastate rates as to places within zones of competition crossed by the state boundary line.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

Requiring an interstate railway to pay its employes semimonthly as done by Laws N. Y. 1897, c. 415, § 10, as amended by Laws 1908, c. 442, held, until Congress acts, not an unlawful burden on interstate commerce.—*Erie R. Co. v. Williams*, 34 S. Ct. 761, 233 U. S. 685, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, affirming judgment 92 N. E. 1084, 199 N. Y. 525.

The application to a claim against a carrier for loss of freight in interstate commerce, of the provisions of Acts Tex. 31st Leg. c. 47, for the allowance of a reasonable attorney's fee to plaintiff of not over \$20 in certain cases where the claim is not paid within 30 days after demand and the recovery is for the full claim, is not repugnant to the commerce clause of the federal Constitution or otherwise in conflict with federal authority, in absence of congressional legislation covering the subject.—*Missouri, K. & T. Ry. Co. of Texas v. Harris*, 34 S. Ct. 790, 234 U. S. 412, 58 L. Ed. 1377, L. R. A. 1915E, 942.

A state may fix reasonable rates for ferriage from its shore to the shore of another state over a boundary stream, until Congress regulates such rates.—*Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 34 S. Ct. 821, 234 U.

S. 317, 58 L. Ed. 1330, affirming judgment (Err. & App.) *Same v. Freeholders of Hudson County*, 82 A. 729, 82 N. J. Law, 536.

That ferry rates over a boundary stream were fixed by the state of incorporation of the ferry company did not preclude the state on the other side of the stream from establishing, subject to paramount authority of Congress, the rates to be charged for ferriage from its own shore to the shore of the other state.—Id.

State regulation of the rates to be charged for a ticket for a round trip over an interstate ferry from the shore of such state to the shore of another state, and return, is valid until Congress regulates such rates, where the ferry company is not thereby required to issue round-trip tickets at its office within the state.—Id.

Application to railway locomotives, equipped with oil headlights, used in hauling interstate freight trains over the carrier's main line, of Pub. Laws Ga. 1908, pp. 50, 51, requiring locomotives to be equipped with headlights of a certain capacity, does not render such statute invalid, in absence of congressional legislation, as constituting an unwarrantable interference with interstate commerce.—*Atlantic Coast Line R. Co. v. State of Georgia*, 34 S. Ct. 829, 234 U. S. 280, 58 L. Ed. 1312, affirming judgment 69 S. E. 725, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

The subject of electric headlights for locomotives has not been covered by acts of Congress, relating to safety appliances and to Interstate Commerce Commission Act March 2, 1893, Act March 2, 1908, Act May 27, 1908, Act May 30, 1908, Act April 14, 1910, Act May 6, 1910, Act Feb. 17, 1911, or by any regulation established by the commission so as to invalidate, as applied to railway locomotives equipped with oil headlights, and used in hauling interstate freight trains over the carrier's main line, the provisions of Pub. Laws Ga. 1908, pp. 50, 51, relating to headlights on locomotives running on the main line.—Id.

In the absence of federal legislation, the state can prescribe uniform regulations reasonably necessary as to operation on their highways of automobiles moving in interstate commerce.—*Hendrick v. State of Maryland*, 35 S. Ct. 140, 235 U. S. 610, 59 L. Ed. 385.

Absence of federal regulation does not justify the city of Covington, Ky., in regulating interstate business of a street railway company transporting passengers from that city to Cincinnati, Ohio, by restricting the number of passengers which the company may admit to its cars and requiring it to operate sufficient cars to accommodate the public within the limits of such restriction.—*South Covington & C. St. R. Co. v. City of Covington*, 35 S. Ct. 158, 235 U. S. 537, 59 L. Ed. 350, L. R. A. 1915F, 792, reversing decree *South Covington & C. R. Co. v. Same*, 143 S. W. 28, 146 Ky. 592.

Absence of federal regulation of rates for water transportation unconnected by transportation by railroad leaves the state free to prescribe reasonable rates for transportation of passengers and goods wholly by water between two ports in the same state though over the high seas.—*Wilmington Transp. Co. v. Railroad Commission of California*, 35 S. Ct. 276, 236 U. S. 151, 59 L. Ed. 508, affirming judgment 137 P. 1153, 166 Cal. 741.

◀11. Powers remaining in the states.
See 10 Cent. Dig. Commerce, §§ 7, 9, 30, 92.

◀12. — In general.

See 10 Cent. Dig. Commerce, §§ 7, 9.

The commercial power of congress is exclusive only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulation, affect-

ing alike all of the states; and when the subjects within that power are local in their nature, or constitute mere aids to commerce, the states may provide for their regulation until congress intervenes.—*Cardwell v. American River Bridge Co.*, 113 U. S. 205, 5 S. Ct. 423, 28 L. Ed. 959, affirming (C. C.) 19 F. 562, 9 Sawy. 662.

The delegation to the secretary of war by Act Sept. 12, 1890 (26 Stat. 453, §§ 4, 5, 7), of authority to direct changes in existing bridges over any navigable waters of the United States, or of bridges to be erected under legislative authority of any state, for the purpose of preventing obstructions to navigation, showed no intention by congress to exercise exclusive control over navigable waters entirely within the jurisdiction of a state; and consequently this act did not deprive the states of power to compel the removal or alteration of bridges erected over such waters without authority.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 17 S. Ct. 357, 165 U. S. 365, 41 L. Ed. 747.

The question as to the nature and extent of the rights of riparian owners upon navigable waters, including the right to the continued flowage of the stream, is one to be decided by the courts of the state as a matter of local law, subject to the right of congress to regulate public navigation and commerce.—*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 18 S. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

The provision of the Minnesota enabling act (11 Stat. 166) declaring the Mississippi river a common highway for the inhabitants of the state, and all other citizens of the United States, does not impair the title and jurisdiction of the state over the navigable waters within her boundaries any more than rights of that nature are limited with regard to the thirteen original states.—Id.

A regulation of interstate commerce which would be valid if rested upon the common law of the state is no less valid because made by a state statute.—(1910) *Western Union Telegraph Co. v. Commercial Milling Co.*, 31 S. Ct. 59, 218 U. S. 403, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, affirming judgment (1908) *Commercial Milling Co. v. Western Union Telegraph Co.*, 115 N. W. 698, 151 Mich. 425.

◀13. — Internal commerce.

See 10 Cent. Dig. Commerce, § 7.

The exclusive control over interstate commerce, vested in Congress by the federal Constitution or laws, is not infringed by the enforcement against a vessel engaged in interstate commerce of a lien given by a state statute for materials furnished for her construction. Judgment, *De Laney Forge & Iron Co. v. Iroquois Transp. Co.* (1905) 105 N. W. 527, 142 Mich. 84; *The Winnebago, Id.*, affirmed.—*Iroquois Transp. Co. v. De Laney Forge & Iron Co.*, 27 S. Ct. 509, 205 U. S. 354, 51 L. Ed. 836.

◀14. — Traffic in intoxicating liquors.

See 10 Cent. Dig. Commerce, §§ 30, 92.

The state may absolutely prohibit the sale or manufacture of intoxicating liquors.—*Foster v. Kansas*, 112 U. S. 201, 5 S. Ct. 8, 97, 28 L. Ed. 629, 696.

Code Iowa, tit. 11, c. 6, as amended by Acts 1884, c. 143, §§ 1523-1530, 1543, which prohibits the manufacture or sale of intoxicating liquors within that state, except for medicinal, medicinal, culinary, or sacramental purposes, and provide for the abatement of the unlawful sale or manufacture as a nuisance, is not in conflict with Const. U. S. art. 1, § 8, as an attempt to regulate commerce between the states, though it prohibits the manufacture and sale

within the state of liquor for exportation, except for mechanical, medicinal, culinary, or sacramental purposes.—*Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346.

The exaction by a state of a license fee from a person engaged in selling intoxicating liquors within the state, over the bar, on board a ferryboat employed in interstate commerce, is authorized by Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]; subjecting to state laws enacted in the exercise of the police power all intoxicating liquors arriving in the state. Judgment 82 S. W. 222, 113 Tenn. 167, affirmed.—*Foppiano v. Speed*, 26 S. Ct. 138, 199 U. S. 501, 50 L. Ed. 288.

Shipments into a state of intoxicating liquors intended for the personal use of consignees were not subjected to a law of such state forbidding carriers to bring intoxicating liquors into any dry territory by Webb-Kenyon Act March 1, 1913.—*Adams Exp. Co. v. Commonwealth of Kentucky*, 35 S. Ct. 824, 238 U. S. 190, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167.

II. SUBJECTS OF REGULATION.

Partial invalidity of employers' liability act, see Statutes, ¶64.

Validity of employers' liability act, as applied to territories, see Territories, ¶11; as dependent on superseding law governing territory, see Statutes, ¶55.

¶15. Property subject of commerce in general.

See 10 Cent. Dig. Commerce, §§ 17, 34, 35.

Const. art. 1, § 8, cl. 2, which confers on congress the power to regulate commerce with foreign nations and among the states, does not prohibit a state from regulating fisheries in the navigable waters within its territory, where such regulation makes no discrimination in favor of its own citizens and against those of other states, and where there is no federal statute or treaty on the subject.—*Manchester v. Massachusetts*, 139 U. S. 240, 11 S. Ct. 559, 35 L. Ed. 159, affirming judgment 152 Mass. 230, 25 N. E. 113.

A product, such as tobacco, that has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of federal regulation and taxation, must be recognized as a legitimate article of commerce, although it may, to a certain extent, be within the police power of the states. Judgment (Sup.) 48 S. W. 305, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, affirmed.—*Austin v. State of Tennessee*, 21 S. Ct. 132, 179 U. S. 343, 45 L. Ed. 224.

Natural gas, when reduced to possession, is a commodity which belongs to the owner of the land, and may be the subject of both intrastate and interstate commerce.—(1911) *West v. Kansas Natural Gas Co.*, 31 S. Ct. 564, 221 U. S. 229, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, affirming decree (C. C. 1909) *Kansas Natural Gas Co. v. Haskell*, 172 F. 545.

¶18. Navigable waters.

See 10 Cent. Dig. Commerce, §§ 12, 13.

The American river, in California, is a navigable water of the United States, and as such under the control of the general government, so far as may be necessary to insure its free navigation.—*Cardwell v. American River Bridge Co.*, 113 U. S. 205, 5 S. Ct. 423, 28 L. Ed. 959.

The power of congress over water ways connected with the great rivers of the country is supreme, whenever it chooses to exercise the same; but, before it has acted, the legislative power of the state within whose borders the stream flows is competent to charter a corporation to improve the same, and to give it a

franchise to collect tolls. A franchise thus granted is a vested right, and if congress thereafter, by condemnation, takes such improvements, it is bound to make just compensation for the value of the franchise, as well as for the physical property taken.—*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463, distinguishing *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 26 L. Ed. 1143.

In the absence of legislation by Congress, a state may improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. Judgment (C. C.) *Manigault v. S. M. Ward & Co.*, 123 F. 707, affirmed.—*Manigault v. Springs*, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

Commerce between the states of New York and New Jersey is not unlawfully interfered with by Laws N. J. 1905, p. 461, c. 238, under which a riparian owner may be forbidden to divert the waters of the Passaic river beyond the state, under a contract to furnish a water supply for the city of New York. Decree, *McCarter v. Hudson County Water Co.* (1906) 65 A. 489, 70 N. J. Eq. 695, affirmed.—*Hudson County Water Co. v. McCarter*, 28 S. Ct. 529, 209 U. S. 349, 52 L. Ed. 828, 14 Ann. Cas. 560.

¶21. Shipping.

See 10 Cent. Dig. Commerce, §§ 10-21, 26, 37-39.

Where a vessel engaged in domestic commerce among the states injures plaintiff's building, erected on the bank of a river upon which the vessel is plying, and plaintiff brings a suit in personam against the owners for the damage, the state court has jurisdiction to enforce the lien given by Rev. St. Ill. 1881, c. 12, p. 137, against water craft, by attachment of the vessel, and such proceeding is not invalid as a regulation of commerce among the states.—*Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447.

The creation and enforcement of a lien for a nonmaritime tort against a foreign vessel engaged in interstate commerce, under *Balinger's Ann. Codes & St. Wash.* §§ 5953, 5954, which embrace all vessels, whether domestic or foreign, and whether engaged in intrastate or interstate commerce, does not offend against the commerce clause of the federal Constitution.—(1911) *Martin v. West*, 32 S. Ct. 42, 222 U. S. 191, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592, affirming judgment (1908) *West v. Martin*, 97 P. 1102, 51 Wash. 85, 21 L. R. A. (N. S.) 324.

¶23. Pilots.

See 10 Cent. Dig. Commerce, § 18.

State legislation concerning pilotage is not necessarily repugnant to the commerce clause of the federal Constitution. Judgment (Tex. Civ. App.) 68 S. W. 320, affirmed.—*Olsen v. Smith*, 25 S. Ct. 52, 195 U. S. 332, 49 L. Ed. 224.

The adoption of compulsory pilotage regulations by a state, under the authority of Rev. St. U. S. § 4235 [U. S. Comp. St. 1901, p. 2903], does not violate Const. U. S. art. 1, § 9, cl. 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another. Judgment, *Darden v. Thompson*, 44 S. E. 755, 101 Va. 635, affirmed.—*Thompson v. Darden*, 25 S. Ct. 660, 198 U. S. 310, 49 L. Ed. 1064.

¶26. Bridges.

See 10 Cent. Dig. Commerce, § 15.

The states may authorize all structures over navigable waters which may either impede or improve navigation, in the absence of federal legislation; but, when congress has legislated, its action is conclusive.—*Escanaba & Lake Mich.*

igan Transp. Co. v. City of Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. Ed. 442.

Laws Miss. 1867, p. 332, requiring a certain railroad company to construct and maintain a drawbridge over Pearl river, between Louisiana and Mississippi, does not violate the federal constitution.—New Orleans, M. & T. Ry. Co. v. Mississippi, 112 U. S. 12, 5 S. Ct. 19, 28 L. Ed. 619.

In the absence of federal legislation, the state may, by authorizing the erection of a bridge, obstruct a navigable river.—Willamette Iron-Bridge Co. v. Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. Ed. 629, reversing decree (C. C.) Wallamet Iron Bridge Co. v. Same, 19 F. 347.

Congress has power, directly or through a corporation created for the purpose, to construct bridges over navigable waters between states, for the accommodation of interstate commerce by land.—Luxton v. North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. Ed. 508.

A bridge over an interstate waterway, though erected under the sanction of a state, and not an illegal structure, or an unreasonable obstruction to navigation in the condition of commerce and navigation when erected, must be taken as having been constructed with knowledge of the paramount power of Congress to regulate commerce among the states, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions. Judgment, United States v. Monongahela Bridge Co. (D. C. 1908) 160 F. 712, affirmed.—President, etc., of Monongahela Bridge Co. v. United States, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435.

27. Railroads.

See 10 Cent. Dig. Commerce, § 25.

Congress has authority, in the exercise of its power to regulate commerce among the several states, to construct, or authorize individuals or corporations to construct, railroads across the states and territories of the United States.—State of California v. Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. Ed. 150.

A state railroad corporation, when it voluntarily engages in interstate commerce, by making an arrangement for a continuous carriage of goods, becomes subject, so far as such traffic is concerned, to the provisions of the interstate commerce law.—Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co., 17 S. Ct. 986, 167 U. S. 633, 42 L. Ed. 306, affirming decree Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission, 74 F. 803, 21 C. C. A. 103.

Railroads which share in an agreed rate on traffic to a certain point, and in a precisely equal rate on traffic to an intermediate point, although on traffic to this point there is added an amount equal to the local rate from that point to the end of the longer haul, which additional exaction is received by the local road alone, are to be regarded as constituting a continuous line, subject to the act to regulate commerce (24 Stat. 379). Decree Behlmer v. Louisville & N. R. Co., 83 F. 898, 28 C. C. A. 229, reversed.—Louisville & N. R. Co. v. Behlmer, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

A freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to await simple repairs to the automatic coupler, is used in moving interstate commerce within the meaning of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations.—(1911) Delk v. St.

Louis & S. F. R. Co., 31 S. Ct. 617, 220 U. S. 580, 55 L. Ed. 590, reversing judgment (1908) St. Louis & S. F. R. Co. v. Delk, 158 F. 931, 86 C. C. A. 95, 14 Ann. Cas. 233.

Intrastate railroads and employes wholly engaged in local business were not affected by the provisions of Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employes are defined in section 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease, and "employes" as meaning persons actually engaged in, or connected with, the movement of any train.—Baltimore & O. R. Co. v. Interstate Commerce Commission, 31 S. Ct. 621, 221 U. S. 612, 55 L. Ed. 878.

Congress had the power, under the commerce clause of the federal Constitution, to require, as it did in Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), that all locomotives, cars, and similar vehicles used on any railway engaged in interstate commerce shall be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic.—(1911) Southern R. Co. v. United States, 32 S. Ct. 2, 222 U. S. 20, 56 L. Ed. 72, affirming judgment (D. C. 1908) United States v. Southern R. Co., 164 F. 347.

Cars used in moving intrastate traffic on a railway which is a highway of interstate commerce are comprehended by the provisions of Safety-Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), declaring, inter alia, that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."—Id.

Congress, in the exercise of its power over interstate commerce, may regulate the relations of railway carriers and their employes while both are engaged in such commerce, subject always to the limitations prescribed in the federal Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and employes are engaged.—(1912) Mondou v. New York, N. H. & H. R. Co., 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, reversing judgment (1909) 73 A. 762, 82 Conn. 373.

Congress did not exceed its power to regulate the relations of interstate railway carriers and their employes engaged in interstate commerce by enacting Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), which abrogates the fellow servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right in any rule of the common law, and the

natural tendency of such changes is to promote the safety of the employes and to advance the commerce in which they are engaged.—Id.

The power of Congress, under the commerce clause, to regulate the liability of an interstate railway carrier for the death or injury of an employe engaged in interstate commerce, which may result from the negligence of a fellow servant, is not exceeded by the enactment of Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), although that act embraces instances where the causal negligence is that of an employe engaged in intrastate commerce.—Id.

Congress had power to enforce regulations prescribed by Employer's Liability Act April 22, 1908, § 5, by preventing acceptance of benefits in a railway relief department from operating as a bar to recovery of damages for injury or death of an employe.—(1912) Philadelphia, B. & W. R. Co. v. Schubert, 32 S. Ct. 589, 224 U. S. 603, 56 L. Ed. 911, affirming judgment (1911) 36 App. D. C. 565.

Construing condemnation in Employer's Liability Act April 22, 1908, § 5, of any contract or regulation intended to enable a common carrier to exempt himself from liability under the act, as embracing an existing agreement under contract of membership in a relief department, does not render the section invalid, as such agreement must be regarded as made subject to the possibility that Congress might so regulate commerce as to render the agreement unenforceable.—Id.

Instances where the causal negligence is that of a fellow servant engaged in intrastate commerce are embraced by Employer's Liability Act April 22, 1908.—Pedersen v. Delaware, L. & W. R. Co., 33 S. Ct. 648, 229 U. S. 146, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, reversing judgment 197 F. 537, 117 C. C. A. 33.

An employe of an interstate railway carrier, killed while carrying material to repair a bridge used in both interstate and intrastate commerce, was employed in interstate commerce within Employer's Liability Act April 22, 1908.—Id.

A yard clerk killed in the railway yards while meeting an incoming interstate freight train was employed in interstate commerce within Employer's Liability Act April 22, 1908.—St. Louis, S. F. & T. R. Co. v. Seale, 33 S. Ct. 651, 229 U. S. 156, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, reversing judgment (Tex. Civ. App.) 148 S. W. 1099.

The lessor of an intrastate railway to an interstate railway carrier is, through its lessee, a common carrier engaged in interstate commerce, within the Employers' Liability Act, where it is responsible for the negligence of its lessee.—North Carolina R. Co. v. Zachary, 34 S. Ct. 305, 232 U. S. 248, 58 L. Ed. 591, Ann. Cas. 1914C, 159, reversing judgment Zachary v. North Carolina R. Co., 72 S. E. 858, 156 N. C. 496.

The hauling of empty cars from one state to another is interstate commerce within Employers' Liability Act.—Id.

Congress intended by the Employers' Liability Act April 22, 1908, making every common carrier engaged in interstate commerce liable to any person suffering injury in its employ to confine its action to injuries when the employe was engaged in interstate commerce.—Illinois Cent. R. Co. v. Behrens, 34 S. Ct. 646, 233 U. S. 473, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

A fireman employed by an interstate carrier on a switching engine while moving cars loaded with intrastate freight between two points in the same city was not employed in interstate commerce within federal Employers' Liability Act April 22, 1908.—Id.

A brakeman on a pick-up freight running between points in the same state containing cars loaded with interstate freight, injured in setting a brake on an intrastate car, held employed in interstate commerce within the federal Employers' Liability Act April 22, 1908.—New York Cent. & H. R. R. Co. v. Carr, 35 S. Ct. 780, 238 U. S. 260, 59 L. Ed. 1298, affirming judgment Carr v. New York Cent. & H. R. R. Co., 142 N. Y. S. 1111, 157 App. Div. 941.

Car in interstate train marked for repairs and to be switched to repair track was not withdrawn from interstate commerce so as to relieve carrier from liability for injuries to a switch foreman under the Safety Appliance Acts and the Employers' Liability Act.—Great Northern Ry. Co. v. Otos, 36 S. Ct. 124, 239 U. S. 349, 60 L. Ed. 322, affirming judgments Otos v. Great Northern Ry. Co., 150 N. W. 922, 128 Minn. 283, and 151 N. W. 1102, 129 Minn. 523.

Whether or not the absolute liability of a carrier under Safety Appliance Act March 2, 1893, extends to moving a car defectively equipped for repair, the Supplementary Act April 14, 1910, imports that the liability exists.—Id.

Railway employe injured while switching was employed in interstate commerce within Employers' Liability Act, where he was distributing cars from an interstate train and clearing track for another interstate train.—Seaboard Air Line Ry. v. Koennecke, 36 S. Ct. 126, 239 U. S. 352, 60 L. Ed. 324, affirming judgment Koennecke v. Seaboard Air Line Ry., 85 S. E. 374, 101 S. C. 86.

An employe of an interstate carrier while taking a road engine from one state to a repair shop in another was engaged in interstate commerce within the federal Employers' Liability Act, though the train order directed that his engine be run "extra" between two points in the same state.—Chicago, R. I. & P. Ry. Co. v. Wright, 36 S. Ct. 185, 239 U. S. 548, 60 L. Ed. 431, affirming judgments Wright v. Chicago, R. I. & P. R. Co., 143 N. W. 220, 94 Neb. 317, and 146 N. W. 1024, 96 Neb. 87.

An employe in a machine shop in which locomotives used both in interstate and intrastate transportation are repaired is not employed in interstate commerce within the federal Employers' Liability Act, while merely changing the location of a countershaft connected with the machinery.—Shanks v. Delaware, L. & W. R. Co., 36 S. Ct. 188, 239 U. S. 556, 60 L. Ed. 436, L. R. A. 1916C, 797, affirming judgment 108 N. E. 644, 214 N. Y. 413.

A switchman on an interstate railway, injured through a defect in a handhold on a box car which he used on descending after setting a brake operated from the roof of the car, is within the safety appliance act as amended by Act April 14, 1910, § 2.—Texas & P. Ry. Co. v. Rigsby, 36 S. Ct. 482, 241 U. S. 33, 60 L. Ed. 874, affirming judgment 222 F. 221, 138 C. C. A. 51.

An employe of an interstate railway company, though not himself engaged in interstate commerce, is within the federal safety appliance acts.—Id.

The liability of an interstate railway company under the federal safety appliance acts exists though the injured employe was engaged in taking a defective car to the shops for repair.—Id.

Member of crew switching loaded coal cars belonging to a railroad from a storage track to a coal shed was not engaged in interstate commerce within Employers' Liability Act, although coal was to be used by locomotives in interstate hauls.—Chicago, B. & Q. R. Co. v. Harrington, 36 S. Ct. 517, 241 U. S. 177, 60 L. Ed. 941, affirming judgment (Mo.) Harrington v. Chicago, B. & Q. R. Co., 180 S. W. 443.

—28. Telegraphs and telephones.

See 10 Cent. Dig. Commerce, § 22.

Act July 24, 1866, giving telegraph companies the right against arbitrary interference by the state to construct their lines over the military or post roads of the United States, did not exceed powers of Congress under the commerce clause of the federal Constitution.—*Town of Essex v. New England Tel. Co. of Massachusetts*, 36 S. Ct. 102, 239 U. S. 313, 60 L. Ed. 301, modifying decree (D. C.) *New England Telegraph Co. of Massachusetts v. Town of Essex*, 206 F. 926.

—29. Trade associations.

The rules and regulations of a live stock exchange, whose members are commission merchants, relating to the conduct of the business of such members in buying or selling stock for others in a given market, and fixing their charges for such services, are not agreements affecting interstate commerce, within the meaning of the anti-trust law, having no direct or necessary relation to such commerce, though some of the sales themselves may constitute interstate commerce, and the cost of such transactions may be indirectly and incidentally affected by such regulations.—*Hopkins v. United States*, 19 S. Ct. 40, 171 U. S. 578, 43 L. Ed. 290, reversing order (C. C.) 82 F. 529.

By-laws of such a stock exchange limiting the number of persons who may be employed by any member to solicit the consignment to him of stock shipped to that market, or prohibiting members from sending prepaid telegrams giving market quotations, are but regulations or agreements relating to their business, and are not in restraint of interstate commerce.—*Id.*

A combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stock-yards, is an interference with interstate commerce, forbidden by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies, where such dealers and their slaughtering establishments are largely in different states from those of the stock-yards, and the sellers of the cattle largely in different states from either. Decree (C. C.) *United States v. Swift & Co.*, 122 F. 529, modified.—*Swift & Co. v. United States*, 25 S. Ct. 276, 196 U. S. 375, 49 L. Ed. 518.

—31. Imports.

See 10 Cent. Dig. Commerce, § 24.

The cash on hand and notes owned by a foreign corporation, doing business in the state as importers, which are the proceeds of the sale of imported goods in the unbroken original packages, may be taxed under Laws N. Y. 1896, p. 800, c. 908, § 7, as capital employed in business within the state, without infringing the prohibition of Const. U. S. art. 1, § 10, against taxing imports, although the bulk of the proceeds of such sales are remitted to the home office in Ireland, where it is customary to hold the notes in New York for collection, and to retain there sufficient sums to meet the local expenses of the business, and to pay the duties on subsequent importations. Judgment (1906) 77 N. E. 19, 184 N. Y. 275, affirmed.—*People of State of New York ex rel. Edward & John Burke v. Wells*, 28 S. Ct. 193, 208 U. S. 14, 52 L. Ed. 370.

Congress could validly prohibit by Act June 20, 1906, the landing in the United States of sponges taken between certain dates outside of state waters.—*The Abby Dodge v. United States*, 32 S. Ct. 310, 223 U. S. 166, 56 L. Ed. 390.

Act July 31, 1912, § 1, making it unlawful to bring into the United States any film of any prize fight for purposes of public exhibition, is not beyond the powers of Congress under the commerce clause of the federal Constitution.—*Weber v. Freed*, 36 S. Ct. 131, 239 U. S. 325, 60 L. Ed. 306, Ann. Cas. 1916C, 317.

—32. Transportation of goods.

See 10 Cent. Dig. Commerce, §§ 26, 31, 32.

—33. — In general.

See 10 Cent. Dig. Commerce, §§ 26, 31.

Transportation of freight from one state to another, or through more than one state, either by land or water, is interstate.—*Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 S. Ct. 4, 30 L. Ed. 244.

Code Iowa 1873, § 1553, as amended by Laws 1886, c. 66, § 10, forbidding any common carrier to bring within the state, for any person or persons or corporation, any liquor from any other state or territory, without first having been furnished with a certificate under the seal of the county auditor of the county to which such liquor is to be transported, or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be delivered is authorized to sell liquor in such county, is an attempt to regulate commerce among the several states.—*Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. Ed. 700.

The transportation of goods by continuous carriage from one point in a state to another point in the same state is not interstate commerce, within the meaning of the federal constitution, although for a part of the route it is over the soil of another state; and therefore it is within the power of the state wherein it begins and ends to impose a tax on its gross receipts.—*Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 S. Ct. 806, 36 L. Ed. 672; *Id.*, 145 U. S. 205, 12 S. Ct. 809, 36 L. Ed. 676, affirming judgment 17 Atl. 179, 1 Monag. 45.

The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets so to be carried.—*Champion v. Ames*, 23 S. Ct. 321, 188 U. S. 321, 47 L. Ed. 492.

The intention or purpose of the owners of an interstate shipment of a car load of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such two points, when performed by a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one, and, as such, exempt from the regulations of the state railroad commission. Judgment (1904) 78 S. W. 495, 97 Tex. 274, affirmed.—*Gulf, C. & S. F. Ry. Co. v. State of Texas*, 27 S. Ct. 360, 204 U. S. 403, 51 L. Ed. 540.

The agreement of the local agent of an express company to hold for a few days a C. O. D. interstate shipment of intoxicating liquors, to suit the convenience of the consignee in paying for such liquor and taking it away, does not destroy the character of the transaction as interstate commerce, so as to render the express company amenable to prosecution for violating a state local option law.—(1907) *Adams Express Co. v. Commonwealth of Kentucky*, 27 S. Ct. 606, 206 U. S. 129, 51 L. Ed. 987, reversing judgment (1905) 87 S. W. 1111, 27 Ky. Law Rep. 1096; *Id.*, 27 S. Ct. 608, 206 U. S. 138, 51 L. Ed. 992, reversing judgment (1906) 92 S. W. 932, 29 Ky. Law Rep. 224, 5 L. R. A. (N. S.) 630; *American Express Co.*

of *New York v. Same*, 27 S. Ct. 609, 206 U. S. 139, 51 L. Ed. 993, reversing judgment (1906) 97 S. W. 807, 30 Ky. Law Rep. 207.

The offense of furnishing intoxicating liquor to an inebriate, created by Ky. St. 1903, § 1307, is, as applied to the transportation of liquor from state to state, a regulation of interstate commerce.—*Adams Express Co. v. Commonwealth of Kentucky*, 29 S. Ct. 633, 214 U. S. 218, 53 L. Ed. 972.

Commerce, in the constitutional sense, includes the instrumentalities by which commerce is carried on, and extends to the coal cars owned by a railway company engaged in interstate commerce, in which it receives from the tipple of the coal mines along its line coal purchased by it and used solely for its own fuel purposes. *Decree, Chicago & A. R. Co. v. Interstate Commerce Commission* (C. C. 1908) 173 F. 930, reversed.—*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 30 S. Ct. 155, 215 U. S. 452, 54 L. Ed. 280; *Same v. Chicago & A. R. Co.*, 30 S. Ct. 163, 215 U. S. 479, 54 L. Ed. 291.

The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss which is made by Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce.—(Sup., Ga., 1911) *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 S. Ct. 164, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, affirming judgment *Riverside Mills v. Atlantic Coast Line R. Co.* (C. C. 1909) 168 F. 990; (Sup., Ky., 1911) *Louisville & N. R. Co. v. Scott*, 31 S. Ct. 171, 219 U. S. 209, 55 L. Ed. 183, affirming judgment (1909) 118 S. W. 990, 133 Ky. 724.

Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), regulating liability of connecting carrier, is a valid regulation of interstate commerce.—(1912) *Galveston, H. & S. A. Ry. Co. v. Wallace*, 32 S. Ct. 205, 223 U. S. 481, 56 L. Ed. 516, affirming judgment (Civ. App. 1909) 117 S. W. 169, and *Same v. Crow* (Civ. App. 1909) id. 170.

A shipment of lumber for export, under a local bill of lading to a Texas Gulf port, held foreign commerce governed by the tariffs on file with the Interstate Commerce Commission.—*Texas & N. O. R. Co. v. Sabine Tram Co.*, 33 S. Ct. 229, 227 U. S. 111, 57 L. Ed. 442, reversing judgment (Tex. Civ. App.) 121 S. W. 256.

A carrier receiving property for transportation from a point in one state to a point in another, is within Carmack Amendment June 29, 1906, § 7, to Interstate Commerce Act Feb. 4, 1887, § 20, making it liable for loss en route, notwithstanding stipulation to the contrary, where it accepts such shipment over route selected by shipper, as to which the carrier has no established through rate.—*Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 33 S. Ct. 609, 228 U. S. 593, 57 L. Ed. 980, affirming judgment 69 S. E. 1106, 111 Va. 813.

The reshipment by the consignee to other points within the state of coal consigned to it on interstate shipments to a distributing point in the state, though made in cars in which the coal is received, does not place such reshipments outside the pale of state regulation, where the consignee paid the freight to the point of reshipment to the initial carrier.—*Chicago, M. & St. P. Ry. Co. v. State of Iowa*, 34 S. Ct. 592,

233 U. S. 334, 58 L. Ed. 988, affirming judgment *State v. Chicago, M. & St. P. Ry. Co.*, 130 N. W. 802, 152 Iowa, 317.

An order of the State Railroad Commission, requiring railroad company to accept without unloading and reloading into its own cars coal in car load lots in cars of other railroads by which the coal had been brought into the state, is not an interference with interstate commerce, where transportation at point of reshipment is purely intrastate service.—Id.

Transportation of oil in pipe lines between points in different states is interstate commerce, though the oil transferred may belong to the owners of the pipe lines.—*United States v. Ohio Oil Co.*, 34 S. Ct. 956, 234 U. S. 548, 58 L. Ed. 1459, modifying decree (Com. Ct.) *Prairie Oil & Gas Co. v. United States*, 204 F. 798.

An oil company using a pipe line solely to conduct its own oil from its own wells in one state to its own refinery in another state is not within Act June 29, 1906, extending the operation of interstate commerce act.—Id.

Carload shipped from Yanka, Neb., consigned to Topeka, Kan., care of "Santa Fé for shipment" to order of a grain company at Kansas City moved in a continuous interstate commerce shipment from its departure to termination over Santa Fé Railroad from Topeka, Kan., to Elk Falls, Kan., so that its delivery to Santa Fé at Topeka was not a new shipment in intrastate commerce.—*Atchison, T. & S. F. Ry. Co. v. Harold*, 36 S. Ct. 665, 241 U. S. 371, 60 L. Ed. 1050, reversing judgment *Harold v. Atchison, T. & S. F. Ry. Co.*, 144 P. 823, 93 Kan. 456.

34. — Charges.

See 10 Cent. Dig. Commerce, §§ 26, 82.

Where a railroad extends through several states, and is incorporated in each, it is, as far as concerns the regulation of its business within the state, a domestic corporation; and the establishment of a board of railroad commissioners, with power to regulate traffic, fix charges, and prevent discriminations (Act March 11, 1884) but prohibited from interfering with charges for transportation of persons or property from one state to another (Act March 15, 1884), is not invalid as being a regulation of interstate commerce.—*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636; *Same v. Illinois Cent. R. Co.*, 116 U. S. 347, 6 S. Ct. 348, 29 L. Ed. 650; *Same v. New Orleans & N. E. R. Co.*, 116 U. S. 352, 6 S. Ct. 349, 391, 29 L. Ed. 651.

A statute of Texas (May 6, 1882) provides that no railway company in the state shall charge or collect, for the transportation of any freight, a greater sum than is specified in the bill of lading, and any railway company refusing to deliver freight to the consignee on payment or tender of the charges stated in the bill of lading shall be liable to a penalty, equal to the amount of such charges, for each day's delay. Held, that such statute is inconsistent with the provisions of the interstate commerce act (24 Stat. 379; 25 Stat. 855) requiring railway companies engaged in interstate commerce, under penalties prescribed, to charge and collect the rates of freight specified in their published tariff schedules, and is therefore void as to interstate shipments of freight.—*Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910.

Any interference with interstate commerce by the enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote and indirect to be regarded as an unconstitutional interference with interstate commerce. Judgment 51 S. W. 164, 1012, 106 Ky. 633, 21 Ky. Law Rep. 232, 90 Am. St. Rep. 236, affirmed.—*Louisville & N. R. Co. v.*

Commonwealth of Kentucky, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

An unconstitutional regulation of interstate commerce is made by Const. Ky. § 218, prohibiting common carriers from charging more for a shorter than for a longer haul, so far as its provisions extend to a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state, as the carrier is thus compelled to adjust, regulate, or fix his interstate rates with some reference to his rates within the state.—*Louisville & N. R. Co. v. Eubank*, 22 S. Ct. 277, 184 U. S. 27, 46 L. Ed. 416.

The railroad commission of Arkansas cannot, without violating the commerce clause of the federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the state of Arkansas, where a large part of the route is outside of the state, through the Indian Territory or Texas. Decree, *Kansas City S. Ry. Co. v. Board of R. Com'rs of Arkansas* (C. C.) 106 F. 353, affirmed.—*Hanley v. Kansas City Southern Ry. Co.*, 23 S. Ct. 214, 187 U. S. 617, 47 L. Ed. 333.

An unconstitutional attempt to regulate interstate commerce is made by the Ohio railroad commission establishing a freight rate on "lake-cargo coal" billed from Ohio coal fields to Ohio ports on Lake Erie, applicable only to such coal as is placed on vessels at those ports for carriage to points outside the state.—(1912) *Railroad Commission of Ohio v. Worthington*, 32 S. Ct. 653, 225 U. S. 101, 56 L. Ed. 1004, affirming decree (1911) 187 F. 965, 110 C. C. A. 85.

Shipment of freight under local bills of lading from interior points in Louisiana to New Orleans, to be delivered to the shipper's or consignee's order, but intended for export, held foreign commerce, governed as to the intrastate transportation by the tariffs on file with the Interstate Commerce Commission.—*Railroad Commission of Louisiana v. Texas & P. Ry. Co.*, 33 S. Ct. 837, 229 U. S. 336, 57 L. Ed. 1215, affirming decree 184 F. 989, 106 C. C. A. 660.

§35. Importation or transportation of animals.

See 10 Cent. Dig. Commerce, §§ 23, 26, 89.

The provision of Code Iowa 1873, § 4059, that any one who has in his possession in the state Texas cattle which have not wintered north of the southern boundary of Missouri or Kansas shall be liable for any damages that may accrue from allowing them to run at large, and so spreading Texas fever, is not an attempted regulation of interstate commerce.—*Kimmish v. Ball*, 129 U. S. 217, 9 S. Ct. 277, 32 L. Ed. 695.

§40. Sale of goods.

See 10 Cent. Dig. Commerce, §§ 29, 30.

Defendant, a liquor dealer of New York, received from persons in Vermont, by telegraph and mail, express orders for liquors, which he filled by selecting the liquors and delivering them to an express company of New York for delivery in Vermont C. O. D. Held, that the transaction was one of interstate commerce.—*O'Neil v. Vermont*, 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450.

A contract made in New York by residents thereof for the sale to residents of another state of coffee to be shipped from Rio Janeiro to New York City by a designated steamer, the buyers to have free storage and fire insurance for the first month after the arrival of the steamer, and the storage of the coffee in New York, is a New York contract, and as such is governed by the prohibition made by Laws N. Y. 1893, p. 1510, c. 661, § 41, against the sale

within the state of adulterated food products. Judgment 63 N. E. 1097, 171 N. Y. 329, 98 Am. St. Rep. 599, affirmed.—*Crossman v. Lurman*, 24 S. Ct. 234, 192 U. S. 189, 48 L. Ed. 401.

A state is not precluded by the commerce clause of the federal Constitution from imposing a merchants' tax upon a nonresident manufacturing corporation which has selected a city of that state as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the state for sale. Judgment 75 S. W. 1037, 110 Tenn. 524, 100 Am. St. Rep. 814, affirmed.—*American Steel & Wire Co. v. Speed*, 24 S. Ct. 365, 192 U. S. 500, 48 L. Ed. 538.

The tax imposed by Pub. Laws N. C. 1903, c. 247, as construed by the state courts, upon such local business of a foreign meat-packing house as its sales within the state of products already stored there on orders received after these products are thus stored, is not invalid as an interference with interstate commerce. Judgment, *Lacy v. Armour Packing Co.*, 47 S. E. 53, 134 N. C. 567, affirmed.—*Armour Packing Co. v. Lacy*, 26 S. Ct. 232, 200 U. S. 226, 50 L. Ed. 451.

The business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and transmitting them to other states, is not interstate commerce, so as to be exempt from state taxation, where, in those cases in which contracts for purchases for future delivery result in an actual delivery, the property is bought in the state to which the orders are transmitted, and there held for the purchaser, and in those cases in which there is a delivery upon a contract of sale made by the broker, the seller is at liberty to acquire the property in the market where delivery is required or elsewhere. Judgment, *Ware v. Mobile County* (1906) 41 So. 153, 146 Ala. 163, affirmed.—*Ware & Leland v. Mobile County*, 28 S. Ct. 526, 209 U. S. 405, 52 L. Ed. 855, 14 Ann. Cas. 1031.

The sale within the state of a frame for a portrait, made in another state, to fill an order taken by a solicitor in the former state, cannot be so separated from the rest of the dealings between the nonresident maker and the purchaser as to sustain the imposition of a license tax, under Act Ala. March 7, 1907 (Acts 1907, p. 469) § 17, where the order for the portrait contemplated its delivery in an appropriate frame, which the purchaser of the portrait should have the option of buying at the factory price.—(1910) *Dozier v. State of Alabama*, 30 S. Ct. 649, 218 U. S. 124, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264, reversing judgment (1908) 46 So. 9, 154 Ala. 83, 129 Am. St. Rep. 51.

A state does not tax interstate transactions by imposing a tax upon a domestic corporation selling within a designated territory in the state automobiles built by a foreign corporation under an arrangement by which the latter agreed to build for and sell to the former, for cash, at a specified less than list price, deliveries to be made as soon as practicable after orders should be received, the domestic corporation customarily making payment through drafts attached to the bills of lading and there being nothing connecting the ultimate buyer with the manufacturer other than a warranty direct from manufacturer to buyer, and

such buyer's agreement "to pay the list price f. o. b. factory," since such sales are not interstate ones; the relation of principal and agent between the foreign and domestic corporations not existing so far as the buyer is concerned.—(1911) *Banker Bros. Co. v. Commonwealth of Pennsylvania*, 32 S. Ct. 38, 222 U. S. 210, 56 L. Ed. 163, affirming judgment (1909) *Commonwealth v. Banker Bros. Co.*, 38 Pa. Super. Ct. 101.

A corporation manufacturing its product in New Jersey and buying from other manufacturers, which shipped from there to its warehouses in Massachusetts and New York, from which sales are made and in Connecticut, is engaged in interstate commerce within the prohibition of the Sherman Anti-Trust Act July 2, 1890.—*Standard Sanitary Mfg. Co. v. United States*, 33 S. Ct. 9, 226 U. S. 20, 57 L. Ed. 107, affirming decree (C. C.) *United States v. Standard Sanitary Mfg. Co.*, 191 F. 172.

A decision of a state court sustaining the defense of illegality under Laws Miss. 1908, c. 115, prohibiting the sale of malt liquors, in a suit by a nonresident manufacturer of a beverage, to recover the amount due for the right to make local sales, *held* not to affect any right incident to interstate commerce.—*Purity Extract & Tonic Co. v. Lynch*, 33 S. Ct. 44, 226 U. S. 192, 57 L. Ed. 184, affirming judgment 56 So. 318, 100 Miss. 660.

Right of foreign corporation to enforce payment for goods sold in interstate commerce is so directly connected with it that the imposition of unreasonable conditions on this right operates as a restraint of interstate commerce.—*Sioux Remedy Co. v. Cope*, 35 S. Ct. 57, 235 U. S. 197, 59 L. Ed. 193, reversing judgment 133 N. W. 683, 28 S. D. 397.

Business carried on in Kansas by a liquor dealer maintaining warehouse on the Missouri side of the Missouri river, filling orders for liquors for Kansas customers by deliveries in his own wagon or by freight, *held* interstate business, though such dealer is a citizen of Kansas.—*Kirmeyer v. State of Kansas*, 35 S. Ct. 419, 236 U. S. 568, 59 L. Ed. 721, reversing decree *State v. Kirmeyer*, 128 P. 1114, 88 Kan. 589.

Agent of nonresident portrait manufacturer, to whom the latter ships portraits made to fill orders and frames for such portraits, cannot be required to take out a peddler's license, when putting the portraits into the frames and delivering them.—*Davis v. Commonwealth of Virginia*, 35 S. Ct. 479, 236 U. S. 697, 59 L. Ed. 795, reversing judgment 75 S. E. 1135, 113 Va. 562.

Delivery in Pennsylvania of liquors in interstate commerce on sales made in the state may not be punished under Act Pa. May 13, 1887 (P. L. 113), forbidding sale of liquors without license, though Wilson Act August 8, 1890, subjects liquors on their arrival in the state to the operation of its laws, as though produced in the state.—*Rossi v. Commonwealth of Pennsylvania*, 35 S. Ct. 677, 238 U. S. 62, 59 L. Ed. 1201, reversing judgment *Commonwealth v. Rossi*, 53 Pa. Super. Ct. 210.

41. Traffic in original packages.

See 10 Cent. Dig. Commerce, §§ 30, 31.

Since the enactment of Act August 8, 1890, a state may lawfully prohibit or regulate the sale of liquors brought from another state, even while in the original package.—*Vance v. W. A. Vandercook Co.*, 18 S. Ct. 874, 170 U. S. 438, 42 L. Ed. 1100, modifying judgment (C. C.) *W. A. Vandercook Co. v. Vance*, 80 F. 786.

The right of one importing into a state a proper article of interstate commerce, to sell it in the original package, does not depend on whether the package is suitable for retail trade or not; the right to sell it is the same whether to consumers or retail dealers.—*Schollenberger*

v. Commonwealth of Pennsylvania, 18 S. Ct. 757, 171 U. S. 1, 43 L. Ed. 49.

Act Pa. May 21, 1885, forbidding the manufacture or sale of any oleaginous substance or compound designed to take the place of butter or cheese made from pure milk or cream, is void as an interference with interstate commerce, as applied to pure oleomargarine brought into the state and sold in original packages.—*Id.*

One importing a proper article of interstate commerce into a state may sell it in the original package, not only in person, but through an agent having a store in the state.—*Id.*

Paper packages of cigarettes, each 3 inches in length and 1½ inches in width, containing 10 cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company, in a basket which it furnishes, in which it carries them, and from which it empties them on the counter of a consignee in another state, do not constitute original packages of interstate commerce; but, if there is any original package in the shipment, it is the basket. Judgment (Sup.) 48 S. W. 305, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, affirmed.—*Austin v. State of Tennessee*, 21 S. Ct. 132, 179 U. S. 343, 45 L. Ed. 224.

Intoxicating liquors shipped C. O. D. from one state into another cannot be subjected to seizure, under the laws of the latter state, while in the hands of the express company, without infringing the commerce clause of the federal Constitution.—*American Express Co. v. State of Iowa*, 25 S. Ct. 182, 196 U. S. 133, 49 L. Ed. 417, reversing judgment *State v. American Express Co.*, 92 N. W. 66, 118 Iowa. 447; *Adams Express Co. v. Same*, 25 S. Ct. 185, 196 U. S. 147, 49 L. Ed. 424, reversing judgment *State v. Adams Express Co.*, 95 N. W. 1129.

The tax imposed on cigarette selling by Code Iowa, § 5007, is not an invalid regulation of commerce as applied to sales at retail of packages of ten cigarettes in small pasteboard boxes, sealed and stamped with the revenue stamp, which had been shipped loose to the retailer from another state by an express company which merely issued a receipt in duplicate, showing the number of packages and the name of the consignee, the packages not being separately or otherwise addressed, since such a box can in no just sense be considered an original package. Judgment 98 N. W. 372, 119 Iowa. 384, 104 Am. St. Rep. 238, affirmed.—*Cook v. Marshall County*, 25 S. Ct. 233, 196 U. S. 261, 49 L. Ed. 471.

Trade in fresh meat is sufficiently shown to be commerce among the states, protected from restraint by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passing of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales, and by allegations charging sales of such meat by their agents in other states, which indicate that some, at least, of the sales were in the original packages. Decree (C. C.) *United States v. Swift & Co.*, 122 F. 529, modified.—*Swift & Co. v. United States*, 25 S. Ct. 276, 196 U. S. 375, 49 L. Ed. 518.

Delivery of an interstate shipment of intoxicating liquors to the consignees is essential to constitute their arrival in the state within the meaning of Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power. Judgment, *Heyman v. Southern Ry. Co.* (1905) 50 S. E. 342, 122 Ga. 608, reversed.—*Heymann v. South-*

ern Ry. Co., 27 S. Ct. 104, 203 U. S. 270, 51 L. Ed. 178, 7 Ann. Cas. 1130.

The mere placing of an interstate shipment of intoxicating liquors in the carrier's warehouse to await delivery to the consignees does not constitute their arrival in the state within the meaning of Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power.—Id.

A license tax imposed under municipal ordinance upon those engaged in selling beer in the city by the barrel, half barrel, or quarter barrel must be regarded, even when applied to interstate transactions in the original packages, as an exercise of the police power permitted by Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177), subjecting intoxicating liquors arriving in a state to the laws of such state enacted in the exercise of its police powers, although the city may derive more or less revenue from the ordinance in question.—*Phillips v. City of Mobile*, 28 S. Ct. 370, 208 U. S. 472, 52 L. Ed. 578, affirming judgment *City of Mobile v. Phillips* (1906) 40 So. 826, 148 Ala. 138; *Richard v. Same*, 28 S. Ct. 372, 208 U. S. 480, 52 L. Ed. 581.

Each separate bottle shipped by a manufacturer to a local dealer under a contract for an agreed price per cask and per case is not an original package exempt from the interdiction of Laws Miss. 1908, c. 115, prohibiting sales of malt liquors.—*Purity Extract & Tonic Co. v. Lynch*, 33 S. Ct. 44, 226 U. S. 192, 57 L. Ed. 184, affirming judgment 56 So. 316, 100 Miss. 650.

A sale in original package of intoxicating liquors from foreign countries held subject to a state license tax under Wilson Act Aug. 8, 1890.—*Frederick De Bary & Co. v. State of Louisiana*, 33 S. Ct. 239, 227 U. S. 108, 57 L. Ed. 441, affirming judgment *State v. Frederick De Bary & Co.*, 58 So. 892, 130 La. 1090.

Censorship by a state board, under Act April 16, 1913 (103 Ohio Laws, p. 399), of motion picture films to be displayed in the state, is not an unlawful burden on interstate commerce, as applied to films brought in from another state.—*Mutual Film Corp. v. Industrial Commission of Ohio*, 35 S. Ct. 387, 236 U. S. 230, 59 L. Ed. 552; *Mutual Film Co. v. Same*, 35 S. Ct. 393, 236 U. S. 247, 59 L. Ed. 561, affirming decree (D. C.) 215 F. 138.

Interstate commerce in renting and delivery of motion picture films is not unlawfully burdened by Laws Kan. 1913, c. 294, making it unlawful to exhibit motion picture films not first examined by the superintendent of public instruction.—*Mutual Film Corporation of Missouri v. Hodges*, 35 S. Ct. 393, 236 U. S. 248, 59 L. Ed. 561.

Small packages of a food preservative, suitable for consumer and sold separately in various lots, held not original packages, though respectively in original envelopes, so as to escape prohibition of Hurd's Rev. St. Ill. 1913, c. 127b, §§ 8, 22, against sale of food preservatives containing boric acid.—*Price v. People of State of Illinois*, 35 S. Ct. 892, 238 U. S. 446, 59 L. Ed. 1400, affirming judgment *People v. Price*, 101 N. E. 196, 257 Ill. 587, Ann. Cas. 1914A, 1154.

◀42. Trade-marks.

See 10 Cent. Dig. Commerce, § 23.

The remedies afforded by Act March 3, 1881, c. 138, § 7, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401], in case of the "wrongful use" of a trade-mark registered under that act

as used in commerce with foreign nations or with the Indian tribes, are only available when the infringement of such trade-mark consists in the use of a counterfeit or imitation on goods intended for such commerce. Decree, *Searle & Hereth Co. v. Warner*, 112 F. 674, 50 C. C. A. 321, affirmed.—*Warner v. Searle & Hereth Co.*, 24 S. Ct. 79, 191 U. S. 196, 48 L. Ed. 145.

◀43, 44. Occupations in general.

See 10 Cent. Dig. Commerce, §§ 32, 35.

A live-stock commission merchant, whose place of business is at certain stock yards in a city, and who there buys and sells stock for others, is not engaged in interstate commerce, within the meaning of the anti-trust statute, although the stock may have been shipped from another state or territory, consigned to him for sale, and may be sold for shipment to another state or a foreign country. Nor is the nature of his business affected in that regard by the fact that he pays drafts drawn against consignments of stock to him for sale, nor because he may have previously loaned money to aid in the preparation of the stock for market, and taken a mortgage thereon, the amount of which he deducts from the proceeds of the sale.—*Hopkins v. United States*, 19 S. Ct. 40, 171 U. S. 578, 43 L. Ed. 290, reversing order *United States v. Hopkins* (C. C.) 82 F. 529.

The circumstance that a state line runs through stock yards, and that a lot of stock there sold may be at the time partly in each of two states, is immaterial, so far as concerns any question of interstate commerce involved in the transaction.—Id.

Interstate commerce is not unconstitutionally regulated by the requirement of Laws N. Y. 1910, c. 348, that a license from the Comptroller be obtained by individuals or partnerships desiring to engage in the business of private banking, as applied to one whose business chiefly consists in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other states and foreign countries.—(1911) *Engel v. O'Malley*, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128, affirming decree (C. C. 1910) 182 F. 865.

◀45. Insurance.

See 10 Cent. Dig. Commerce, § 32.

The business of marine insurance, like other insurance business, is not commerce, or an instrumentality thereof, but merely an incident.—*Hooper v. People of State of California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297.

The interstate character of a contract of life insurance made by a resident of one state with a corporation of another state does not give it immunity from the control of the state in which the insured resides and in which the corporation does business. Judgment, *Cravens v. New York Life Ins. Co.*, 50 S. W. 519, 148 Mo. 583, 71 Am. St. Rep. 628, affirmed.—*New York Life Ins. Co. v. Cravens*, 20 S. Ct. 962, 178 U. S. 389, 44 L. Ed. 1116.

The business of life insurance is not commerce, and therefore a state statute regulating contracts of life insurance made between residents of the state and corporations of other states is not invalid as a regulation of interstate commerce.—Id.

Insurance is not commerce, and a foreign life insurance company may be subject to the annual tax imposed under Rev. Codes Mont. § 4073, on the basis of the excess of premiums over losses and expenses within the state during the previous year.—*New York Life Ins. Co. v. Deer Lodge County*, 34 S. Ct. 167, 231 U. S. 495, 58 L. Ed. 332, affirming judgment 115 P. 911, 43 Mont. 243.

46. Foreign corporations.

See 10 Cent. Dig. Commerce, §§ 100, 113, 126.

A statute of Colorado of 1877, entitled "An act to provide for the formation of corporations," cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of congress to regulate commerce between the states.—*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 S. Ct. 739, 28 L. Ed. 1137.

Act Pa. June 7, 1879, prohibiting foreign corporations, except insurance companies, which do not invest or use their capital in that state, from keeping an office in that state for the use of its officers, stockholders, agents, or employes, unless it have obtained a license by paying one mill on each dollar of its authorized capital stock, is not an attempt to regulate commerce among the states, since it does not prohibit the transportation or sale of the corporation's products in the state.—*Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650.

Act N. Y. May 26, 1881, exacting from all corporations doing business in the state a tax proportioned to the total amount of their capital stock, without regard to what part thereof is employed within the state, or to the amount or kind of business done there, imposes purely a franchise tax, and, even as applied to a corporation engaged in bringing the products of other states into New York for sale, cannot be considered as a tax upon interstate commerce.—*Horn Silver Min. Co. v. People of State of New York*, 143 U. S. 305, 12 S. Ct. 403, 36 L. Ed. 164.

The exaction on a consolidation of an Ohio corporation with corporations of other states, of the fees required by Rev. St. Ohio, § 148a, to be collected on filing articles of agreement of consolidation of corporations, proportioned to the capital stock of the new corporation, constitutes no tax on interstate commerce, or the right to carry on the same, or the instruments thereof, and involves no attempt on the part of the state to extend its taxing power beyond its territorial limits; the charge being a condition imposed by the state on the grant of privileges dependent solely on its will, and the liability therefor being entirely optional.—*Ashley v. Ryan*, 153 U. S. 436, 14 S. Ct. 865, 38 L. Ed. 773, affirming judgment 49 Ohio St. 504, 31 N. E. 721.

A contract under which a foreign corporation was to superintend the operation of a factory within the state, and control; handle, and sell its output, is not relieved from the operations of Rev. St. Wis. 1898; §§ 1770b, 4978, prohibiting foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, because the contemplated traffic in the product might extend beyond the limits of the state.—*Diamond Glue Co. v. United States Glue Co.*, 23 S. Ct. 206, 187 U. S. 611, 47 L. Ed. 328.

Interstate commerce is unconstitutionally regulated by the provisions of Gen. St. Kan. 1901, § 1283, under which the filing of a statement of financial condition is made a prerequisite to the right of a foreign corporation engaged in imparting instruction by correspondence to do business in the state, where such business involves the solicitation of students in Kansas by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse by correspondence between the company and its students and agents, wherever situated, and the transportation of the needful books, apparatus, and papers. Judgment (1907) 91 P. 74, 76 Kan. 328, reversed.—*International Text-Book Co. v.*

Pigg, 30 S. Ct. 481, 217 U. S. 91, 54 L. Ed. 678. 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

Commerce is conducted among the states, within the meaning of the federal Constitution, by a corporation engaged in imparting instruction by correspondence, whose business involves the solicitation of students in other states by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse between the corporation and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers.—*Id.*

47. Transportation of passengers.

See 10 Cent. Dig. Commerce, § 26.

Transportation of passengers from one state to another, or through more than one state, either by land or water, is interstate commerce.—*Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 S. Ct. 4, 30 L. Ed. 244.

Act Miss. March 2, 1888, providing that "all railroads carrying passengers in this state, other than street railroads, shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations," since it operates only on the carriage of passengers from one point to another within the state, is not an interference with interstate commerce.—*Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 S. Ct. 348, 33 L. Ed. 784.

The transportation of passengers by continuous carriage from one point in a state to another point in the same state is not interstate commerce, within the meaning of the federal constitution, although for a part of the route it is over the soil of another state; and therefore it is within the power of the state wherein it begins and ends to impose a tax on its gross receipts.—*Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 S. Ct. 806, 36 L. Ed. 672; *Id.*, 145 U. S. 205, 12 S. Ct. 809, 36 L. Ed. 676, affirming judgment 17 A. 179, 1 Monag. 45.

Congress had power to enact White Slave Act June 25, 1910, making criminal transportation of women in interstate commerce for purposes of prostitution.—*Hoke v. United States*, 33 S. Ct. 281, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, affirming judgment (D. C.) *United States v. Hoke*, 187 F. 992; *Athanasaw v. United States*, 33 S. Ct. 285, 227 U. S. 326, 57 L. Ed. 528, Ann. Cas. 1913E, 911; *Bennett v. Same*, 33 S. Ct. 288, 227 U. S. 333, 57 L. Ed. 531, affirming judgment 194 F. 630, 114 C. C. A. 402; *Harris v. Same*, 33 S. Ct. 289, 227 U. S. 340, 57 L. Ed. 534, affirming judgment 194 F. 634, 114 C. C. A. 406.

Transportation by a common carrier is not essential to constitute the offense denounced by the white slave act of June 25, 1910.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

Traffic carried on by a Kentucky street railway in connection with an Ohio corporation operating on the Ohio side of the Ohio river in transporting passengers across an interstate bridge between Kentucky and Ohio by a continuous trip and a single fare is interstate commerce.—*South Covington & C. St. R. Co. v. City of Covington*, 35 S. Ct. 158, 235 U. S. 537, 59 L. Ed. 350, L. R. A. 1915F, 792, reversing decree *South Covington & C. R. Co. v. Same*, 143 S. W. 28, 146 Ky. 592.

III. MEANS AND METHODS OF REGULATION.

Due process of law, see Constitutional Law, 283.

Jurisdiction of United States Supreme Court on appeal for conviction of peddling without license, see Courts, 394(10).

§48. Nature and scope in general.

See 10 Cent. Dig. Commerce, §§ 36-44, 46.

An ordinance of Chicago in the exercise of its police powers, regulating the opening and closing of draws on bridges over the Chicago river, is not invalid, as an attempt to regulate interstate commerce, within the meaning of Const. art. 1, § 8.—*Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 S. Ct. 185, 27 L. Ed. 442.

A state has no power to fix tolls on a bridge connecting it with another state, thereby regulating charges on interstate commerce, without the assent of congress or the concurrence of such other state. Mr. Chief Justice Fuller, Mr. Justice Field, Mr. Justice Gray, and Mr. Justice White concurring, on the ground that concurrent acts of the states incorporating the bridge company and authorizing it to fix tolls constituted a contract between the corporation and both states, which could not be altered by one state without consent of the other. 22 S. W. 851, reversed.—*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962, reversing judgment *Same v. Commonwealth*, 22 S. W. 851; *Covington & C. Elevated Railroad & Transfer & Bridge Co. v. Same*, 154 U. S. 224, 14 S. Ct. 1094, 38 L. Ed. 970.

The police power of the state cannot justify a direct interference with interstate commerce.—*Kansas City Southern Ry. Co. v. Kaw Valley Drainage Dist. of Wyandotte County, Kan.*, 34 S. Ct. 564, 233 U. S. 75, 58 L. Ed. 857, reversing judgment *Kaw Valley Drainage Dist. of Wyandotte Co. v. Kansas City Terminal Ry. Co.*, 123 P. 991, 87 Kan. 272.

§49. Inspection.

See 10 Cent. Dig. Commerce, §§ 48-53.

§50. — In general.

See 10 Cent. Dig. Commerce, §§ 48-53.

Laws Md. 1864, c. 346, § 41, as amended by Laws Md. 1870, c. 291, prohibits, under penalties, the export from the state of tobacco raised therein, except in hogsheds which shall have been inspected, passed, and marked according to the provisions of the act, with the proviso that nothing therein "contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this state any such tobacco without having the same opened for inspection; but such tobacco, so exported or carried out of this state without inspection, shall in all cases be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases." *Held*, that the proviso permitting tobacco to be shipped from the state without "being opened for inspection" did not deprive the statute of its character as an inspection law, and render it obnoxious to Const. U. S. art. 1, § 8, giving congress power to regulate commerce among the several states.—*Turner v. State of Maryland*, 107 U. S. 38, 2 S. Ct. 44, 27 L. Ed. 370.

The Maryland tobacco inspection law provides that no tobacco of the growth of the state shall be passed or accounted lawful tobacco, unless it be packed in hogsheds of a specified size. With reference to tobacco to be exported, the further provision is made that the hogsheds shall be examined by an officer appointed for that purpose, to ascertain if they are of the prescribed size, and that a tax shall be paid for such inspection. *Held*, that the law is not unconstitutional, as discriminating between the state buyer of tobacco and the purchaser who

buys for the purpose of transportation to another state.—*Id.*

Laws Md. 1864, c. 346, § 41, as amended by Laws 1870, c. 291, requiring tobacco packed for export to be inspected and branded, but exempting from the provisions thereof any grower of tobacco who may pack the same at the place where grown, is not a regulation of commerce.—*Id.*

Gen. Laws Minn. 1889, p. 51, c. 8, which prohibits the sale of dressed meat within any municipal division of the state unless the animal was inspected there within 24 hours before it was slaughtered, and makes its violation a misdemeanor, though it purports to be for the protection of the public health, in effect prohibits the importation of meats slaughtered in other states, whose citizens cannot reasonably conform to the mode of inspection prescribed; and hence it is in violation both of that clause of the constitution vesting in congress the power to regulate interstate commerce, and of that declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.—*State of Minnesota v. Barber*, 136 U. S. 313, 10 S. Ct. 862, 34 L. Ed. 455, affirming (C. C.) 39 F. 641.

Act Va. 1889-90, p. 63, c. 80, which prohibits the offering for sale of fresh meat at places 100 miles or more distant from the place of slaughter, unless it has been inspected by the local authorities, for which inspection the owner of the meat is to pay one cent per pound, is in effect a prohibition on the sale in Virginia of fresh meat, although entirely wholesome, if from animals slaughtered 100 miles or over from the place of sale; and, though enacted under the guise of the police power of the state, as a means of protecting its citizens from unwholesome meats, the act is unconstitutional, as being a regulation in restraint of interstate commerce.—*Brimmer v. Rehman*, 138 U. S. 78, 11 S. Ct. 213, 35 L. Ed. 862, affirming judgment (C. C.) *In re Rehman*, 41 F. 867.

The act, being a burden on interstate commerce, is not to be sustained simply because it applies alike to the people of all states, including the people of Virginia.—*Id.*

Since the act, by reason of the onerous inspection fee, goes far beyond the purpose of legitimate inspection to determine quality and quantity, and practically prevents citizens of distant states, dealing in fresh meat, from coming into competition on terms of equality with local dealers in Virginia, the supreme court will not assume, for the purpose of sustaining the act, that fresh meat will or may become unwholesome if transported 100 miles or more from the place where slaughtered before it is offered for sale.—*Id.*

Act Va. March, 1867, requiring all flour brought into the state to be inspected, the owner to pay therefor, and providing a penalty for any person selling such flour without inspection, is discriminating, no such inspection being required for flour manufactured in the state, and is therefore unconstitutional, as imposing a direct burden on commerce among the states.—*Voight v. Wright*, 141 U. S. 62, 11 S. Ct. 855, 35 L. Ed. 638.

Act La. 1888, No. 147, providing that the governor shall appoint two coal gaugers to gauge any coal or coke boat or barge in the state, and ascertain the number of bushels in each load; that no boat load of coal or coke shall be sold in the state until gauged, etc., when applied to boat loads of coal brought from a foreign state, on the navigable waters of the United States, is not in conflict with Const. U. S. art. 1, § 8, relating to interstate commerce.—*Pittsburgh & S. Coal Co. v. State of Louisiana*, 156 U. S. 530, 15 S. Ct. 459, 39 L. Ed. 544.

A statute absolutely prohibiting the importation by citizens for their own use of intoxicating liquors, without regard to the question of their purity, is not an inspection law because it provides for the examination by a state chemist of all liquors sold in the state.—*Scott v. Donald*, 17 S. Ct. 265, 165 U. S. 58, 41 L. Ed. 632.

A state inspection law may operate upon imported as well as exported articles.—*Patapsco Guano Co. v. Board of Agriculture of North Carolina*, 18 S. Ct. 862, 171 U. S. 345, 43 L. Ed. 191, affirming decree (C. C.) 52 F. 690.

An inspection law, enacted by a state "in the exercise of its police powers," within the meaning of *Wilson Act* Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], subjecting to laws so enacted all intoxicating liquors arriving in the state, is not void as an interference with interstate commerce because it operates to deter shipments into the state. Decree (C. C.) 120 F. 144, affirmed.—*Pabst Brewing Co. v. Crenshaw*, 25 S. Ct. 552, 198 U. S. 17, 49 L. Ed. 925.

The prohibition against the receipt by common carriers for transportation beyond the limits of the territory of hides which do not bear the evidence of inspection required by Act N. M. March 19, 1901, is a valid exercise of the police power, and does not, there being no congressional legislation covering the subject and making a different provision, violate the commerce clause of the federal Constitution, although hides not offered for transportation are not required to be inspected after 30 days in slaughterhouses, and not at all outside of the slaughterhouses, and although the incidental effect of the statute may be to levy a tax upon this class of property. Judgment (N. M. 1904) 78 P. 74, affirmed.—*Territory of New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co.*, 27 S. Ct. 1, 203 U. S. 38, 51 L. Ed. 78.

Nothing in the provision of Act Feb. 2, 1903, c. 349, 32 Stat. 791 (U. S. Comp. St. Supp. 1907, p. 923), that, when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected animals and found them free from disease, such animals may be introduced into any state without further inspection, or exaction of fees of any kind except such as may be ordered or exacted by the Secretary of Agriculture, precluded the enactment of Laws Kan. 1905, p. 823, c. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States. Judgment, *State v. Asbell* (1906) 86 P. 457, 74 Kan. 397, affirmed.—*Asbell v. State of Kansas*, 28 S. Ct. 485, 209 U. S. 251, 52 L. Ed. 778, 14 Ann. Cas. 1101.

A regulation promulgated by the Secretary of Agriculture under the authority of Act Feb. 2, 1903, c. 349, 32 Stat. 791 (U. S. Comp. St. Supp. 1907, p. 923), which is directed to the transportation of cattle from quarantined states, and which in terms recognizes restrictions imposed by the state of destination, does not invalidate—at least, where no quarantined areas are involved—the provision of Laws Kan. 1905, p. 823, c. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.—Id.

Interstate commerce is not unlawfully regulated, in the absence of controlling federal legislation, by Laws Kan. 1905, p. 823, c. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point

south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.—Id.

Subjecting all kerosene or other illuminating oils sold or offered for sale in the state to an inspection for the purpose of determining the safety and value of such oils for illuminating purposes, as is done by the North Carolina act of March 8, 1909 (Acts 1909, c. 554), is a proper exercise of the police power, and does not violate the commerce clause of the federal Constitution (Const. art. 1, § 8).—(1912) Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, 32 S. Ct. 152, 222 U. S. 380, 56 L. Ed. 240, affirming decree (C. C. 1909) 172 F. 695.

Prohibition against sales by importing purchasers of concentrated commercial feeding stuffs in original packages, under Laws Ind. 1907, c. 206, without compliance with its requirements as to inspection, is a proper exercise of the police power and not an unconstitutional regulation of interstate commerce.—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.

§51. — Fees.

See 10 Cent. Dig. Commerce, §§ 48, 49, 53, 53.

Act N. C. Jan. 21, 1891, amending certain sections of the Code providing for the inspection of fertilizers, operated to repeal all previous laws making any substantial diversion of the money to be derived from the charge of 25 cents per ton on fertilizers to any other purposes than those connected with the necessary expenses of inspection.—*Patapsco Guano Co. v. Board of Agriculture of North Carolina*, 18 S. Ct. 862, 171 U. S. 345, 43 L. Ed. 191, affirming decree (C. C.) 52 F. 690.

A state inspection law imposing a charge which it declares to be for defraying the cost of inspection will not be held unconstitutional, as an unwarranted tax on interstate commerce, merely because some of the revenue derived therefrom has in fact been applied to other purposes.—Id.

Act N. C. Jan. 21, 1891, imposing an inspection tax of 25 cents per ton on fertilizers, is not so excessive as to make the act a mere levying law, obnoxious to the objection of being an unwarrantable interference with interstate commerce.—Id.

Interstate commerce in intoxicating liquors is not unlawfully burdened by an inspection law enacted by a state "in the exercise of its police powers," within the meaning of *Wilson Act* Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], subjecting to laws so enacted intoxicating liquors arriving in the state, because the statute does not provide for an adequate inspection, and imposes a burden beyond the cost of inspection. Decree (C. C.) 120 F. 144, affirmed.—*Pabst Brewing Co. v. Crenshaw*, 25 S. Ct. 552, 198 U. S. 17, 49 L. Ed. 925.

The amount of the fee imposed by Act N. M. March 19, 1901, for the inspection of hides offered for transportation beyond the limits of the territory, does not render that statute, if otherwise valid, repugnant to the commerce clause of the federal Constitution, where it is not so unreasonable and disproportionate to the services rendered as to challenge the good faith of the law. Judgment (N. M. 1904) 78 P. 74, affirmed.—*Territory of New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co.*, 27 S. Ct. 1, 203 U. S. 38, 51 L. Ed. 78.

A charge of $\frac{1}{4}$ cent per gallon, made by the North Carolina oil inspection act of March 8, 1909 (Acts 1909, c. 554), for the avowed purpose of defraying the expense connected with

the inspection, cannot be said, in advance of the experience gained from the actual operation of the act, to be so seriously in excess of what is necessary as to justify the imputation that the real purpose of the statute was to raise a revenue, in violation of the commerce clause of the federal Constitution.—(1912) Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, 32 S. Ct. 152, 222 U. S. 380, 56 L. Ed. 240, affirming decree (C. C. 1909) 172 F. 695.

An inspection charge of 80 cents per hundred for stamps to be affixed to commercial feeding stuffs, under Laws Ind. 1907, c. 206, is not so unreasonably in excess of the cost of inspection as to invalidate the statutes, when applied to sales by importers in original packages.—Savage v. Jones, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.

Imposition by Code Supp. Iowa 1907, §§ 5077a6-5077a24, governing the inspection and analysis of concentrated feeding stuffs, of an inspection fee of ten cents per ton when sold within the state, or, in lieu thereof, of an annual license fee of \$100, does not render the statute invalid as applying to sales by importers in original packages.—Standard Stock Food Co. v. Wright, 32 S. Ct. 784, 225 U. S. 540, 56 L. Ed. 1197.

The charge of 1 cent per bushel on oysters coming from other states levied by Oyster Law Md. § 69, to defray the expenses of inspection and other expenses of the State Fishery Force violates Const. U. S. art. 1, § 8, as unlawfully interfering with interstate commerce, where such tax regularly yields a revenue largely in excess of the amount required to pay the salaries of the inspectors.—D. E. Foote & Co. v. Stanley, 34 S. Ct. 377, 232 U. S. 494, 58 L. Ed. 698, reversing decree 82 A. 380, 117 Md. 335.

52. Quarantine and other sanitary regulations.

See 10 Cent. Dig. Commerce, §§ 43, 49, 52, 53.

While some of the rules of a system of quarantine laws established by a state may amount to regulations of commerce with foreign nations or among the states, though not so designed, they belong to that class which the states may establish until congress acts in the matter by covering the same ground or forbidding state laws.—Morgan's Louisiana & T. R. & S. S. Co. v. State Board of Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. Ed. 237.

The Idaho sheep quarantine act of March 13, 1899, authorizing the governor, when he has reason to believe that there is an epidemic infectious disease of sheep in localities outside the state, to investigate the matter, and, if he finds that the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper, is within the police power of the state, and is not in violation of the federal constitution as a regulation of interstate commerce. Judgment, State v. Rasmussen, 59 P. 933, 7 Idaho, 1, 52 L. R. A. 78, 97 Am. St. Rep. 234, affirmed.—Rasmussen v. State of Idaho, 21 S. Ct. 594, 181 U. S. 198, 45 L. Ed. 820.

Proper quarantine regulations restricting the importation of cattle from another state on account of the danger of disease do not make unconstitutional regulations of commerce. Judgment, St. Louis S. W. Ry. Co. v. Smith, 49 S. W. 627, 20 Tex. Civ. App. 451, affirmed.—Smith v. St. Louis & S. W. Ry. Co. of Texas, 21 S. Ct. 603, 181 U. S. 248, 45 L. Ed. 847.

The overthrow of the existing state quarantine systems, and the abrogation of the power on the subject of health and quarantine

exercised by the states, because the enactment of state laws on these subjects would in particular instances affect interstate and foreign commerce, were not contemplated by the act of congress of Feb. 15, 1893, c. 114, 27 Stat. 449 [U. S. Comp. St. 1901, p. 3312], "granting additional quarantine powers and imposing additional duties upon the Marine Hospital service," in view of the provisions of section 3 of that act (27 Stat. 450 [U. S. Comp. St. 1901, p. 3314]), directing the supervising surgeon general to co-operate with and aid state and municipal boards of health in the execution and enforcement of their rules and regulations, and those made by the secretary of the treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries. Judgment, 25 So. 591, 51 La. Ann. 645, affirmed.—Compagnie Francaise De Navigation A Vapeur v. Board of Health of State of Louisiana, 22 S. Ct. 811, 186 U. S. 380, 46 L. Ed. 1209.

No unconstitutional regulation of commerce is made by Acts La. 1898, No. 192, § 8, under which the state board of health may exclude healthy persons from entering a locality infested with a contagious or infectious disease, whether such persons come from within or without the state.—Id.

No unconstitutional burden on interstate commerce is made by the provisions of Sess. Laws Colo. 1885, p. 335, prohibiting the importing of cattle from south of the thirty-sixth parallel of north latitude between April 1st and November 1st, unless first kept for 90 days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board. Judgment, 68 P. 228, affirmed.—Reid v. People of State of Colorado, 23 S. Ct. 92, 187 U. S. 137, 47 L. Ed. 108.

The subject of transportation of cattle from one state to another is not so far covered by the provisions of the animal industry act of May 29, 1884 (23 Stat. 31, c. 60; U. S. Comp. St. 1901, p. 299), for the investigation and suppression of diseases of cattle, or those relating to the exportation of diseased cattle to ports in foreign countries and the transportation between the states of live stock known to be diseased, as to preclude the enactment of Sess. Laws Colo. 1885, p. 335, prohibiting the importation of cattle from south of the thirty-sixth parallel of north latitude between April 1st and November 1st, unless first kept for 90 days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board.—Id.

54. Preferences and discriminations.

See 10 Cent. Dig. Commerce, §§ 71, 100, 106, 108, 111, 134.

A state statute discriminating between vessels sailing between ports of the same state and the ports of different states is invalid.—Sprague v. Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. Ed. 115, reversing, 69 Ga. 409.

Act La. July 1, 1882, requiring all vessels to pay a fee for examination as to their sanitary condition when they pass the quarantine station, is not objectionable, under Const. U. S. art. 1, § 9, as giving a preference for a port of one state over those of another, as that section is a restraint upon powers of the general government, and not of the states, and can have no application to the quarantine laws of Louisiana.—Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. Ed. 237.

Rev. St. Ill. 1881, p. 137, c. 12, giving a lien, in certain cases, against water crafts, for damages done by them in Illinois, is not un-

constitutional, as against subdivision 6 of section 9 of article 1 of the United States constitution, forbidding the enactment of laws giving the ports of one state preference over those of another.—*Johnson v. Chicago & P. El. Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447.

The provision of the dispensary law of South Carolina giving to the state officers exclusive right to purchase all the liquor to be sold in the state, thereby vesting in them the power to restrict sales in the state to the products of one or more states, to the exclusion of the products of other states, does not create or authorize a discrimination which unlawfully interferes with interstate commerce, since every resident of the state has the right, which cannot be affected by state legislation, to purchase from a nonresident liquors which are the product of any state, and to have the same transported into the state for his own use.—*Vance v. W. A. Vandercook Co.*, 18 S. Ct. 674, 170 U. S. 438, 42 L. Ed. 1100, modifying judgment *W. A. Vandercook Co. v. Vance* (C. C.) 80 F. 786.

The provision of the South Carolina dispensary law which authorizes the use by a resident of the state of wine or liquors made by him for such purpose is not discrimination against the products of other states, which interferes with interstate commerce, such liquors being subject to all restrictions as to sales imposed on other liquors.—*Id.*

The exemption of sales of intoxicating liquors by the manufacturer at the manufactory in quantities of one gallon or more, which is made by 92 Ohio Laws, p. 34, known as the "Dow Law," being applicable to such sales made at any manufactory in the state, without regard to the residence, citizenship, or domicile of the person, co-partnership, or corporation which owns the plant, does not constitute an illegal discrimination against a foreign corporation which has its manufactory in another state. Decree, *Reymann Brewing Co. v. Brister* (C. C.) 92 F. 28, affirmed.—*Reymann Brewing Co. v. Brister*, 21 S. Ct. 201, 179 U. S. 445, 45 L. Ed. 269.

The specifications of a municipal council, in its resolutions and ordinances for street improvements, that Trinidad Lake asphalt shall be the material used, does not constitute such a direct interference with the interstate commerce as to be repugnant to the commerce clause of the federal Constitution, because the particular kind of asphalt is a product of a foreign country and there are deposits in several of the United States from which suitable asphalt can be had. Decree (C. C.) 117 F. 925, modified.—*Field v. Barber Asphalt Pav. Co.*, 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

A tax upon property within the state which is the product of the soil of other states, imposed under the authority of Const. Tenn. 1870, art. 2, §§ 28-30, and Acts Tenn. 1903, p. 632, c. 258, §§ 1, 2, which exempt like property when produced from the soil of Tennessee, violates Const. U. S. art. 1, § 8, as directly interfering with interstate commerce. Decree (1906) 95 S. W. 816, 116 Tenn. 424, reversed.—*I. M. Darnell & Son Co. v. City of Memphis*, 28 S. Ct. 247, 208 U. S. 113, 52 L. Ed. 413.

Preference is not given to the ports of one state over those of another by applying to articles intended for foreign export the provisions of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. Stat. Supp. 1907, p. 880), making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates.—*Armour Packing Co. v. United States*, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681; *Morris & Co. v. Same, Id.*; *Cudahy Packing Co. v. Same, Id.* Affirming judgment (1907) 153 F. 1, 82 C. C. 135, 14 L. R. A. (N. S.) 400; *Chicago, B. & Q. Ry. Co. v. Same*, 28 S.

Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment (C. C. A. 1907) 157 F. 830, 85 C. C. A. 194.

§ 55. Prohibitory acts and ordinances.

See 10 Cent. Dig. Commerce, §§ 72-102.

In regulating pilotage, the state cannot discriminate between vessels sailing between the ports of the state and vessels sailing between the ports of different states.—*Sprague v. Thompson*, 118 U. S. 90, 6 S. Ct. 988, 30 L. Ed. 115.

The interstate commerce clause of the constitution does not affect the right of a state to prohibit the transportation outside its limits of game killed in the state.—*Geer v. State of Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793.

The provision of Act Cong. Aug. 8, 1890, that all intoxicating liquors transported into any state, or remaining there for use, consumption, sale, or storage, shall be "subject to the operation and effect of the laws of such state enacted in the exercise of its police powers," to the same extent as if they had been produced in such state, does not confer upon any state power to prohibit the importation of such liquors by any one except certain officers appointed by the state.—*Scott v. Donald*, 17 S. Ct. 265, 165 U. S. 58, 41 L. Ed. 632.

The provisions of the South Carolina dispensary act of January 2, 1895, forbidding the importation of intoxicating liquors by any one except certain state officers appointed under the act, are invalid, as being a restriction on interstate commerce.—*Id.*

Oleomargarine has become a proper subject of interstate commerce, and no state has authority to entirely forbid its importation on the ground that it is a newly discovered or invented article, whose wholesomeness as a food product the state is entitled to determine for itself.—*Schollenberger v. Commonwealth of Pennsylvania*, 18 S. Ct. 757, 171 U. S. 1, 43 L. Ed. 49.

An article which congress taxes, and recognizes as a proper subject of foreign and interstate commerce, cannot be totally excluded from a state merely because it is subject to adulteration with substances injurious to health.—*Id.*

The fact that an article of food, which is wholesome in its pure state, is subject to be adulterated with other substances, so as to be deleterious to health, gives a state legislature no right to forbid the introduction of the pure article into the state.—*Id.*

A legislative restriction on or prohibition of the sale of cigarettes, the use of which is somewhat generally believed to be deleterious, particularly to young people, is within the police power of the legislature provided it does not apply to original packages or make any discrimination against cigarettes imported from other states, and if there is no doubt that the statute is designed for the protection of the public health. Judgment 48 S. W. 305, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, affirmed.—*Austin v. State of Tennessee*, 21 S. Ct. 132, 179 U. S. 343, 45 L. Ed. 224.

The prohibition against the sale within the state of adulterated food products which is made by Laws N. Y. 1893, p. 1510, c. 661, § 41, does not, as applied to food products imported into the United States through the channels of foreign commerce, violate the commerce clause of the federal Constitution, but is a valid exercise of the police power of the state to legislate for the benefit of its people in the prevention of deception and fraud. Judgment 63 N. E. 1097, 171 N. Y. 329, 98 Am. St. Rep. 599, affirmed.—*Crossman v. Lurman*, 24 S. Ct. 234, 192 U. S. 189, 48 L. Ed. 401.

Rights under the commerce clause of the federal Constitution are not infringed by the provisions of Act N. J. March 24, 1899, p. 514,

§ 20, as amended by Act March 22, 1901, p. 317, under which a conviction may be had for using a dredge in tidal waters of the state for the purpose of catching oysters upon leased lands without the consent of the lessees. Judgment, *State v. Lee* (1905) 59 A. 1118, affirmed.—*Lee v. State of New Jersey*, 28 S. Ct. 22, 207 U. S. 67, 52 L. Ed. 106.

Foreign commerce is not unconstitutionally regulated by the provisions of Laws N. Y. 1900, p. 22, c. 20, under which the possession of game within the state during the closed season—except upon giving the bond provided by the statute against its sale—is forbidden, although the game may have been lawfully taken in foreign countries during the open season there. Judgment (1906) 76 N. E. 1032, 184 N. Y. 126, 3 L. R. A. (N. S.) 163, affirmed.—*People of State of New York v. Hesterberg*, 29 S. Ct. 10, 211 U. S. 31, 53 L. Ed. 75.

Delivery for shipment in interstate commerce of citrus fruits unfit for consumption may be made a criminal offense, as is done by Laws Fla. 1911, c. 6236, under the police power of the state.—*Sligh v. Kirkwood*, 35 S. Ct. 501, 237 U. S. 52, 59 L. Ed. 835, affirming judgment 61 So. 185, 65 Fla. 123.

◀56. Regulation of conduct of business.

See 10 Cent. Dig. Commerce, §§ 72-102.

◀57. — In general.

See 10 Cent. Dig. Commerce, §§ 72-76, 88, 90, 97-102.

Though the regulation of public wharves and wharfage on navigable waters may properly fall within the commercial powers of congress, still, in the absence of national legislation, the powers of the state therein are complete, and an ordinance of a city requiring vessels discharging or receiving freight at a wharf built and owned by it to pay certain rates is not in conflict with Const. art. 1, § 8, as being a regulation of interstate commerce.—*Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 S. Ct. 732, 27 L. Ed. 584.

The ordinance of the city of New Orleans of January 17, 1875, passed in pursuance of authority conferred by the Louisiana statute (Act March 16, 1870, No. 7, § 12), fixing rates of wharfage, is not in conflict with the provisions of the United States constitution conferring power upon congress to regulate commerce, although the ordinance of May 17, 1881, authorized a sale of the revenue of the wharves for five years, on condition of the purchaser keeping them in repair, constructing new wharves, lighting the wharves, and paying a certain amount, a part of which should be used for maintaining a harbor police.—*Ouachita & Mississippi River Packet Co. v. Aiken*, 121 U. S. 444, 7 S. Ct. 907, 30 L. Ed. 976.

Laws N. Y. 1888, c. 581, fixes a maximum charge of five-eighths of a cent per bushel for elevating, receiving, weighing, and discharging grain by means of floating or stationary elevators, in any city of the state containing a population of 130,000 or over. *Held*, that the fact that the elevators are largely employed in the transfer of grain which is in course of transportation from the western states to the seaboard does not render the act obnoxious, as a regulation of interstate commerce.—*Budd v. People of State of New York*, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247.

Laws N. D. 1891, c. 126, declaring all buildings, elevators, or warehouses in the state erected and operated "for the purpose of buying, selling, storing, shipping, or handling grain for profit," public warehouses (section 4), and prescribing maximum rates of charges for storing and handling grain therein (section 11), does not amount to a regulation of commerce among the states.—*Brass v. State of North Dakota*, 153

U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, affirming judgment *State v. Brass*, 2 N. D. 482, 52 N. W. 408.

The requirement of the South Carolina dispensary law that a resident of the state intending to have liquors shipped into the state for his own use shall certify such intention to the state chemist, who shall be furnished with a sample for testing, and, if found pure, shall issue a certificate to the proposed consignor authorizing the shipment, and providing that any package brought into the state without such certificate attached shall be seized and confiscated, is void, as an unauthorized interference by the state with interstate commerce.—*Vance v. W. A. Vandercook Co.*, 18 S. Ct. 674, 170 U. S. 438, 42 L. Ed. 1100, modifying judgment *W. A. Vandercook v. Vance* (C. C.) 80 F. 786.

Interstate commerce is not unlawfully regulated, at least, in the absence of congressional action, by the Tennessee anti-trust act of March 16, 1903 (Laws 1903, c. 140), under which, as construed by the state court, a foreign oil company may be excluded from doing domestic business in the state because it has induced merchants in that state, by a gift of oil, to revoke orders on a rival company for oil to be shipped into the state.—(1910) *Standard Oil Co. of Kentucky v. State of Tennessee ex rel. Cates*, 30 S. Ct. 543, 217 U. S. 413, 54 L. Ed. 817, affirming decree, *State v. Standard Oil Co. of Kentucky* (1908) 110 S. W. 565, 120 Tenn. 86.

Congress did not exceed its powers under the commerce clause by enacting Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, compelling carriers by water in Great Lakes engaged in transportation of passengers and property, partly by water under a joint arrangement for continuous carriage, to make annual reports embracing joint rail and water business and other business of the carriers as well.—(1912) *Interstate Commerce Commission v. Goodrich Transit Co.*, 32 S. Ct. 436, 224 U. S. 194, 56 L. Ed. 729, reversing judgment (Com. C. 1911) *Goodrich Transit Co. v. Interstate Commerce Commission*, 190 F. 943.

The right of foreign corporations to do an interstate business cannot under the commerce clause be restricted as is attempted by Gen. St. Kan. 1905, § 1358, requiring such corporation, as a condition to doing business, to file a statement of their financial condition.—*Buck Stove & Range Co. v. Vickers*, 33 S. Ct. 41, 226 U. S. 205, 57 L. Ed. 189, reversing judgment 101 P. 668, 80 Kan. 29.

A foreign corporation doing local business within the state may, within the commerce clause of the Constitution, be required to file a copy of its charter conformably to Laws Tenn. 1895, c. 81, as a condition to its right to sue in the state courts.—*Interstate Amusement Co. v. Albert*, 36 S. Ct. 168, 239 U. S. 560, 60 L. Ed. 439, affirming judgment 161 S. W. 488, 128 Tenn. 417.

◀58. — Railroads.

See 10 Cent. Dig. Commerce, §§ 77-86, 100.

Act Ala. Feb. 28, 1887, requiring locomotive engineers to be examined and licensed by a board appointed by the governor, and prescribing penalties for its violation, is not unconstitutional, as a regulation of interstate commerce, even in the case of an engineer operating a locomotive attached to a train running from a point in that state to points in other states.—*Smith v. Alabama*, 124 U. S. 465, 8 S. Ct. 504, 31 L. Ed. 508.

Act Ala. June 1, 1887, providing that engineers and other railroad employes shall be examined by a medical board, to determine whether or not they are "colorblind," and making their employment penal unless they have certificates of fitness, is not repugnant to the pow-

er vested in congress to regulate commerce, as applied to a railway company having its lines, on which the engineer runs, in different states.—*Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 9 S. Ct. 28, 32 L. Ed. 352.

Const. Ky. 1891, § 201, prohibiting consolidation by a railroad with a parallel or competing road, is not an interference with the power of congress over interstate commerce.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 S. Ct. 714, 40 L. Ed. 849, affirming decree 97 Ky. 675, 31 S. W. 476.

A police regulation of a state prohibiting the running of freight trains on the Sabbath is not invalid, as interfering with interstate commerce, though in effect preventing freight trains from passing through the state on that day from and to adjacent states.—*Hennington v. State of Georgia*, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166, affirming judgment 90 Ga. 396, 17 S. E. 1009.

Rev. St. Ill. 1889, c. 114, § 88, providing that all regular passenger trains shall stop a sufficient length of time at the railroad stations and county seats to receive and let off passengers with safety, as construed by the state supreme court, requiring a fast-mail train, carrying interstate passengers and the United States mail from Chicago to places south of the Ohio river, over an interstate highway established by authority of congress, to turn aside from the direct interstate route, and run to the station in Cairo, three miles and a half away from that route, and back again, in order to receive and discharge passengers at that station, for the interstate travel to and from which the railroad company furnishes other and ample accommodation, is an unconstitutional obstruction of interstate commerce, and of the passage of the United States mails.—*Illinois Cent. R. Co. v. People of State of Illinois*, 163 U. S. 142, 16 S. Ct. 1096, 41 L. Ed. 107.

A state statute requiring every regular passenger train running wholly within the state to stop at all stations at county seats directly in its course is not an interference with interstate commerce. 59 N. W. 487, 57 Minn. 385, affirmed.—*Gladson v. State of Minnesota*, 17 S. Ct. 627, 166 U. S. 427, 41 L. Ed. 1064.

Rev. St. Ohio 1890, § 3320, requiring all railroad companies operating lines within the state to cause three, each way, of its regular passenger trains, if so many are run daily, to stop at a city or village containing over 3,000 inhabitants to receive and discharge passengers, is not inconsistent with Rev. St. U. S. § 5258, authorizing every railroad company to carry over its road, etc., all passengers, troops, government supplies, mails, freight, and property, on their way from one state to another, and to connect with roads of other states so as to form continuous lines for transportation to the place of destination, since that section was not intended to interfere with the state's authority to enact regulations designed to subserve public convenience, which only incidentally or remotely affected interstate commerce, and were not in themselves regulations thereof.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 19 S. Ct. 465, 173 U. S. 285, 43 L. Ed. 702.

The requirement that all regular passenger trains must stop at county seats, which is made by Act III. March 21, 1874, § 26, constitutes a direct burden upon interstate commerce, in violation of the United States constitution, so far, at least, as that statute requires through interstate passenger trains to stop at such stations, when adequate train service has been provided for local traffic. Judgment, 51 N. E. 842, 175 Ill. 359, reversed.—*Cleveland, C., C. & St. L. Ry. Co. v. People of State of Illinois*, 20 S. Ct. 722, 177 U. S. 514, 44 L. Ed. 868.

The requirement of track connections and facilities for the interchange of cars and traf-

fic at railroad intersections, which is made by Gen. Laws Minn. 1895, c. 91, § 3, does not constitute an unconstitutional regulation of commerce. Judgment, *Jacobson v. Wisconsin M. & P. R. Co.*, 74 N. W. 893, 71 Minn. 519, 40 L. R. A. 389, 70 Am. St. Rep. 353, affirmed.—*Wisconsin, M. & P. R. Co. v. Jacobson*, 21 S. Ct. 115, 179 U. S. 287, 45 L. Ed. 194.

When applied to interstate shipments, the provision of Rev. St. Tex. arts. 4497-4500, as amended by Acts 1899, p. 67, which penalizes the failure of a railway company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing in the sum of \$25 per day for each car not so furnished, and admits of no excuse except such as arises from "strikes or other public calamity," is an unconstitutional regulation of interstate commerce. Judgment, 83 S. W. 53, 36 Tex. Civ. App. 606, reversed.—*Houston & T. C. R. Co. v. Mayes*, 26 S. Ct. 491, 201 U. S. 321, 50 L. Ed. 772.

Interstate commerce is unconstitutionally interfered with by an order of the Mississippi railroad commission, made in the exercise of its discretionary authority, under Code Miss. 1892, §§ 3550, 4302, requiring a railway company to stop its interstate mail trains at a specified county seat, where proper and adequate railway passenger facilities are otherwise afforded that station. Judgment, *Illinois Cent. R. Co. v. Mississippi Railroad Commission* (1905) 138 F. 327, 70 C. C. A. 617, affirmed.—*Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 27 S. Ct. 90, 203 U. S. 335, 51 L. Ed. 209.

An order made under state authority, requiring a railroad company to stop on signal two of its through fast mail trains running between Jersey City, New Jersey, and Tampa, Florida, at a small town in South Carolina which is also the junction point with a small branch road, is void as a direct regulation of interstate commerce, where, in addition to several local trains daily, the residents of such town are furnished daily one slower through train each way. Judgment, *Railroad Com'rs v. Atlantic Coast Line R. Co.* (1906) 54 S. E. 224, 74 S. C. 80, reversed.—*Atlantic Coast Line R. Co. v. Wharton*, 28 S. Ct. 121, 207 U. S. 328, 52 L. Ed. 230.

Congress may prescribe, as between an interstate carrier and such of its employees as are engaged in interstate commerce, that the carrier shall be liable for the death or injury of any such employé while so engaged which may result from the negligence of a fellow servant. Judgments (*C. C.* 1906) 148 F. 986, and (*C. C.* 1907) 148 F. 997, affirmed.—*Howard v. Illinois Cent. R. Co.*, 28 S. Ct. 141, 207 U. S. 463, 52 L. Ed. 297; *Brooks v. Southern Pac. Co.*, Id.

A regulation of intrastate as well as of interstate commerce, and therefore one beyond the power of Congress to enact, is made by the provision of Employer's Liability Act July 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891], that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employés" which may result from the negligence of "any of its officers, agents, or employes."—Id.

There is no such connection between interstate commerce and membership in a labor organization as to authorize Congress, by Act June 1, 1898, c. 370, § 10, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employé from service to such carrier because of such membership on his part. Judgment, *United States v. Adair* (D. C. 1907) 152 F. 737, reversed.—*Adair v. United States*,

28 S. Ct. 277, 208 U. S. 161, 52 L. Ed. 436, 13 Ann. Cas. 764.

Interstate commerce is not burdened by requiring railroad companies to operate a particular line which they selected, or represented that they had selected, in a petition to the state railroad commission for approval of a consolidation, although compliance may entail expense, or require the exercise of eminent domain. Judgment (1906) 41 So. 259, 89 Miss. 724, affirmed.—*Mobile, J. & K. C. R. Co. v. State of Mississippi*, 28 S. Ct. 650, 210 U. S. 187, 52 L. Ed. 1016.

A state may regulate, at least, in the absence of congressional action upon the same subject-matter, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the trains which shall be required under such circumstances.—(1910) *Southern Ry. Co. v. King*, 30 S. Ct. 594, 217 U. S. 524, 54 L. Ed. 868, affirming judgment (1908) 160 F. 332, 87 C. C. A. 284.

Prescribing a minimum of 3 brakemen for freight trains of more than 25 cars, operated in the state, as is done by Laws Ark. 1907, No. 116, does not amount to an unconstitutional regulation of interstate commerce when applied to a foreign railway company engaged in such commerce.—(1911) *Chicago, R. I. & P. Ry. Co. v. State of Arkansas*, 31 S. Ct. 275, 219 U. S. 453, 55 L. Ed. 290, affirming judgment (1908) 111 S. W. 456, 86 Ark. 312.

The restrictions upon the hours of labor of railway employes connected with the movement of trains in interstate transportation, made by Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), are not unconstitutional because many of such employes are, by virtue of practical necessity, also employed in intrastate transportation.—*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 S. Ct. 621, 221 U. S. 612, 55 L. Ed. 878.

Congress, in the exercise of its power over commerce, could enact the provisions of Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170) restricting the hours of labor of railway employes who are connected with the movement of trains in interstate or foreign commerce.—Id.

Removal of existing railway bridges over a navigable stream which formed necessary parts of an interstate commerce railroad cannot be ordered by a state court, even in the expectation that such order will lead to the elevation of the bridges, which the state court could not order without authority of the Secretary of War.—*Kansas City Southern Ry. Co. v. Kaw Valley Drainage Dist. Wyandotte County, Kan.*, 34 S. Ct. 564, 233 U. S. 75, 58 L. Ed. 857, reversing judgment *Kaw Valley Drainage Dist. of Wyandotte Co. v. Kansas City Terminal Ry. Co.*, 123 P. 991, 87 Kan. 272.

An order of the state railroad commission requiring a carrier, on demand of a carrier or shipper, to switch empty cars from any connection with an interstate railroad to a designated side track within its own terminals to be loaded with goods for interstate commerce and to move the same back to the competitor's line, is invalid as a regulation of interstate commerce.—*Illinois Cent. R. Co. v. De Fuentes*, 35 S. Ct. 275, 236 U. S. 157, 59 L. Ed. 517.

The federal Supreme Court will assume that no disregard of interstate commerce needs is involved by order of the state Railroad Commission applying to intrastate traffic, as to interchange of cars between railroad and electric railway company in a specified town, in accordance with Pub. Acts Mich. 1907, No. 312, § 7.—*Michigan Cent. R. Co. v. Michigan R. R. Commission*, 35 S. Ct. 422, 236 U. S. 615, 59

L. Ed. 750, affirming judgment *Michigan R. Commission v. Michigan Cent. R. Co.*, 132 N. W. 1068, 168 Mich. 230.

Requirement that certain villages must be given two passenger trains each way each day under St. Wis. 1898, § 1801, as amended by Laws Wis. 1911, c. 483, without regard to the adequacy of the existing passenger service, is an unlawful burden on interstate commerce as applied to road running only interstate trains.—*Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 35 S. Ct. 560, 237 U. S. 220, 59 L. Ed. 928, reversing judgment 140 N. W. 296, 152 Wis. 654.

A state statute forbidding the switching of cars over public crossings in cities of the first and second class with a crew containing less than a specified number of employes is not violative of the commerce clause of the federal Constitution.—*St. Louis, I. M. & S. Ry. Co. v. State of Arkansas*, 36 S. Ct. 443, 240 U. S. 518, 60 L. Ed. 776, affirming judgment 170 S. W. 580, 114 Ark. 486.

◀ 59. — Telegraphs and telephones.

See 10 Cent. Dig. Commerce, §§ 87, 100.

Rev. St. Ind. 1881, § 4176, prescribing the order in which telegraphic dispatches shall be sent, and section 4178, requiring the delivery, by messenger, of such dispatches, if the persons to whom they are addressed, or their agents, reside within one mile of the station, or within the city or town in which it is located, are invalid with respect to dispatches to be delivered in other states.—*Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. 1126, 30 L. Ed. 1187.

A state statute requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith, and due diligence, under penalty of \$100 in each case (Act Ga. Oct. 22, 1887), is not void, as to messages coming from without the state, as an unwarrantable interference with interstate commerce, in the absence of any legislation by congress on the subject.—*Western Union Tel. Co. v. James*, 162 U. S. 650, 16 S. Ct. 934, 40 L. Ed. 1105.

Interstate commerce is not unconstitutionally regulated by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state.—(1910) *Western Union Telegraph Co. v. Commercial Milling Co.*, 31 S. Ct. 59, 218 U. S. 406, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, affirming judgment *Commercial Milling Co. v. Western Union Telegraph Co.* (1909) 115 N. W. 698, 151 Mich. 425.

A recovery in a South Carolina court of damages for mental anguish from failure to deliver a telegram in the city of Washington forwarded from South Carolina, where received, cannot be authorized, as is done by Civ. Code S. C. 1902, § 2223, as construed by the state courts, without violating the commerce clause of the federal Constitution.—*Western Union Tel. Co. v. Brown*, 34 S. Ct. 955, 234 U. S. 542, 58 L. Ed. 1457, reversing judgment *Brown v. Western Union Telegraph Co.*, 75 S. E. 542, 92 S. C. 354.

◀ 60. — Manufacture and sale of goods.

See 10 Cent. Dig. Commerce, §§ 91-95.

Laws 1888, c. 71, which prohibits the sale of intoxicating liquors within the state, except by a registered pharmacist holding a permit to sell for certain specified purposes, and repeals Code 1873, § 1524, which allowed importers of foreign liquors to sell the same in original packages, is void, in so far as it prohibits the sale of liquors by a foreign or nonresident importer

in original packages, being in conflict with the provision of the constitution giving congress power to regulate interstate commerce.—*Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128.

An original package of intoxicating liquors was transported by rail from another state, and upon being unloaded on the depot platform, and before delivery to the consignee, was seized under a search warrant. The condemnation proceedings were begun before the enactment by congress of the "Wilson Bill." *Held*, that the shipment was a lawful act of interstate commerce, and the liquors were not liable to seizure under the law of Iowa relating to intoxicating liquors.—*Id.*

The Wilson bill, which provides that intoxicating liquors brought into a state shall be subject to the laws enacted in the exercise of its police power, "to the same extent and in the same manner as though such liquors had been produced in such state, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is within the power of congress.—*Wilkerson v. Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, reversing decree (C. C.) 43 F. 556.

Acts & Resolves Mass. 1891, c. 58, entitled "An Act to prevent deception in the manufacture and sale of imitation butter," prohibits the manufacture or sale, etc., of any article not produced from unadulterated milk or cream which shall be in imitation of yellow butter produced from unadulterated milk or cream, provided that nothing in the act shall prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, "free from coloration or ingredient that causes it to look like butter." *Held*, that such statute, in its application to sales of oleomargarine brought into Massachusetts from other states, is not in conflict with the clause of the United States constitution giving congress power to regulate commerce among the states.—*Plumley v. Commonwealth of Massachusetts*, 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223, affirming judgment *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

Act Aug. 2, 1886 (24 Stat. 209, c. 840; Supp. Rev. St. 505), entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," was not intended as a regulation of commerce among the states.—*Id.*

A state law prohibiting the sale of liquors by others, though, by authorizing and providing for the establishment of dispensaries for their sale by agents of the state, it recognizes such liquors as the subject of legitimate commerce, is a regulation of their sale, which is a proper exercise of the police powers of the state.—*Vance v. W. A. Vandercook Co.*, 18 S. Ct. 674, 170 U. S. 438, 42 L. Ed. 1100, modifying judgment *W. A. Vandercook Co. v. Vance* (C. C.) 80 F. 786.

The provisions of Pub. St. N. H. 1891, c. 127, §§ 19, 20, which require oleomargarine sold within the state to be colored pink, are, in effect, prohibitory of its sale, and are void as applied in interstate commercial transactions.—*Collins v. State of New Hampshire*, 18 S. Ct. 768, 171 U. S. 30, 43 L. Ed. 60.

The commerce clause of the federal constitution is not violated by the provisions of the statutes of Ohio relating to the manufacture and sale of oleomargarine within the state by a corporation created by its laws. Judgment, *State v. Capital City Dairy Co.*, 57 N. E. 62, 62 Ohio St. 350, 57 L. R. A. 181, affirmed.—*Capital City Dairy Co. v. State of Ohio*, 22 S. Ct. 120, 183 U. S. 238, 46 L. Ed. 171.

The exclusion of evidence of a demand in some portions of the United States for arti-

ficially colored coffee, on the issue whether such coffee was adulterated within the prohibition of Laws N. Y. 1893, p. 1510, c. 661, § 41, against the sale within the state of adulterated food products, will not require a reversal of the judgment of a state court on writ of error from the United States Supreme Court, on the theory that the effect of such evidence would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, the right to deal in which was protected by the commerce clause of the federal Constitution. Judgment 63 N. E. 1097, 171 N. Y. 329, 98 Am. St. Rep. 599, affirmed.—*Crossman v. Lurman*, 24 S. Ct. 234, 192 U. S. 189, 48 L. Ed. 401.

Congress could lawfully enact the provisions of the food and drugs act (Act June 30, 1906, c. 3015, § 10, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]), under which adulterated articles of food, the subjects of interstate commerce, may be confiscated by a proceeding in rem in the federal courts after they have reached their destination, and there remain in the hands of the consignee in the original unbroken packages.—*Hipolite Egg Co. v. United States*, 31 S. Ct. 364, 220 U. S. 45, 55 L. Ed. 364.

The prohibitions of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), against restraints or monopolization of trade or commerce, do not exceed the authority of Congress to regulate commerce, as applied to undue restraints of interstate or foreign commerce in petroleum and its products, by contract, combination, or conspiracy, or monopolization, or attempts to monopolize any part of such commerce.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

The use of the words "original packages" in Laws Kan. 1907, c. 250, making it unlawful to sell, offer for sale, or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, does not necessitate the conclusion that the statute prohibits the importation of black powder from other states in other than 12½-pound packages.—(1912) *Williams v. Walsh*, 32 S. Ct. 137, 222 U. S. 415, 56 L. Ed. 253, affirming order (1908) *Ex parte Williams*, 98 F. 777, 79 Kan. 212.

The requirement that the name and percentage of the diluents shall be stated in the labels, under Code Supp. Iowa 1907, §§ 5077a6-5077a24, relating to the sale in the state of concentrated commercial feeding stuffs, does not, as applied to sales by importers in original packages, amount to an unconstitutional regulation of interstate commerce.—*Standard Stock Food Co. v. Wright*, 32 S. Ct. 784, 225 U. S. 540, 56 L. Ed. 1197.

The commerce clause of the federal Constitution is not violated by Laws N. D. 1911, p. 355, prohibiting the sale of lard not in bulk unless put up in packages of specified weights as applied to retail sales not in the package of importation.—*Armour & Co. v. State of North Dakota*, 36 S. Ct. 440, 240 U. S. 510, 60 L. Ed. 771 affirming judgment *State v. Armour & Co.*, 145 N. W. 1033, 27 N. D. 177.

61. — Transportation of property.

See 10 Cent. Dig. Commerce, §§ 81-84, 89.

Rev. St. c. 114, § 112, provides that "if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within this state, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation, in the same direction, of

any passenger, or like quantity of freight of the same class, over a greater distance of the same railroad," this shall be taken as prima facie evidence of unjust discrimination, and subject such railroad company to a penalty. Defendant charged more for transporting freight from G., in Illinois, to New York City, than it did for transporting the same quantity and class of freight from P., in Illinois, to New York City, though the distance from G. was 86 miles less. *Held*, that the statute is void as to the transportation in question; for it is commerce between the states, and, as such, within the sole control and regulation of congress, under the provisions of the federal constitution.—*Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 S. Ct. 4, 30 L. Ed. 244.

A state statute declaring that a common carrier accepting goods for transportation to a point beyond its own terminus assumes an obligation for their safe carriage to that point, unless otherwise provided by a written contract signed by the shipper (Code Va. 1887, § 1295), merely establishes a rule of evidence, and does not restrict the right of the carrier to limit his obligation by contract, and hence is not, as applied to interstate commerce, a regulation thereof so as to be void under the federal constitution. 24 S. E. 261, 92 Va. 670, affirmed.—*Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 18 S. Ct. 335, 169 U. S. 311, 42 L. Ed. 759.

Act Aug. 8, 1890, providing that intoxicating liquors transported into any state, or remaining therein "for use, consumption, sale or storage therein shall upon arrival in such state" be subject to the operation of its laws enacted in the exercise of its police powers, attaches to the subject of an interstate shipment only after such shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee, and a state law which makes a carrier liable to a penalty for transporting such goods within the state before their delivery, except in cases where a certificate has been obtained from state authorities (McClain's Code Iowa, § 2410), is an attempted regulation of interstate commerce, and void. 58 N. W. 887, 90 Iowa, 496, reversed.—*Rhodes v. State of Iowa*, 18 S. Ct. 664, 170 U. S. 412, 42 L. Ed. 1088.

Rev. St. Mo. 1889, c. 26, § 944, provides that "whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass." The supreme court of the state construed this statute as not preventing a carrier engaged in interstate commerce traffic, receiving goods for shipment, and issuing a through bill of lading therefor, from limiting its liability, either as to carriage or for negligence, to its own lines, by contract, but that its purpose was to regulate the form in which such contract should be expressed, so as to require the carrier to embody the limitation directly, and in unambiguous terms, in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract in order to reach a proper understanding of its meaning. *Held* that, as thus construed, the statute was not unconstitutional, as imposing a burden on interstate commerce, it being within the power of the state to legislate as to

the form of contracts for interstate commerce carriage.—*Missouri, K. & T. Ry. Co. v. McCann*, 19 S. Ct. 755, 174 U. S. 580, 43 L. Ed. 1093.

Any state statute which in its direct result regulates the interstate transportation of a single individual carrier violates the commerce clause of the United States constitution.—*Louisville & N. R. Co. v. Eubank*, 22 S. Ct. 277, 184 U. S. 27, 46 L. Ed. 416.

The imposition upon the initial or any connecting carrier by Code Ga. 1895, §§ 2317, 2318, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, of the duty of tracing the freight, and informing the shipper, in writing, when, where, and how, and by which carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official positions, if any, by whom the truth of the facts set out in the information can be established, is, when applied to an interstate shipment, a violation of the commerce clause of the federal Constitution. Judgment 43 S. E. 265, 116 Ga. 863, 60 L. R. A. 817, reversed.—*Central of Georgia Ry. Co. v. Murphey*, 25 S. Ct. 218, 196 U. S. 194, 49 L. Ed. 444, 2 Ann. Cas. 514.

An order of a state corporation commission compelling a railway company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding is an unlawful interference with interstate commerce, whether viewed as an assertion by the commission of its general powers over carriers, or of its power to make the order in a particular case in favor of a given person or corporation. Decree (C. C.) *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 F. 82, modified.—*McNeill v. Southern Ry. Co.*, 28 S. Ct. 722, 202 U. S. 543, 50 L. Ed. 1142.

Congress could properly enact, as a regulation of commerce, so much of the Hepburn Act June 29, 1906, c. 3591, § 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), as forbids a carrier from transporting articles or commodities in interstate commerce when they have been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate. Judgment and decree (C. C. 1908) 164 F. 215, reversed.—*United States v. Delaware & H. Co.*, 29 S. Ct. 527, 213 U. S. 366, 53 L. Ed. 836.

Penalizing the failure to adjust and pay within a specified time claims for loss or damage, as is done by Act S. C. Feb. 23, 1903 (24 St. at Large, p. 81) § 2, does not unlawfully interfere with interstate commerce, even as applied to shipments from without the state, where the statute is construed by the state courts as affecting only the liability of carriers doing business in the state, for property lost or damaged while in their possession.—(1910) *Atlantic Coast Line R. Co. v. Mazursky*, 30 S. Ct. 378, 216 U. S. 122, 54 L. Ed. 411, affirming judgments (1907) *Charles v. Atlantic Coast Line R. Co.*, 58 S. E. 927; *McTeer v. Southern Express Co.*, 58 S. E. 930; *Mazursky v. Atlantic Coast Line R. Co.*, 58 S. E. 931; *Von Lehe v. Atlantic Coast Line R. Co.*, 59 S. E. 1135.

Interstate commerce is unconstitutionally regulated by Kirby's Dig. Ark. §§ 6803, 6804, making it the carrier's duty to supply cars to

shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving interstate commerce because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent. of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute. Judgment (1907) 107 S. W. 1180, 85 Ark. 311, 122 Am. St. Rep. 33, reversed.—*St. Louis Southwestern Ry. Co. v. State of Arkansas*, 30 S. Ct. 476, 217 U. S. 136, 54 L. Ed. 693, 29 L. R. A. (N. S.) 802.

Prohibiting the construction of pipe lines for natural gas, or the transportation of the gas by such lines except by domestic corporations, whose charters shall provide that the gas shall only be transported between points in the state, and shall not be transported to, nor delivered to, any person or corporation engaged in transporting or furnishing gas to points outside of the state, and giving to such domestic corporations the exclusive right of eminent domain, and the use of the highways, all of which is attempted by Laws Okl. 1907, c. 67, unconstitutionally interferes with interstate commerce, and cannot be justified as an exercise of the police power of the state to conserve its natural resources.—(1911) *West v. Kansas Natural Gas Co.*, 31 S. Ct. 564, 221 U. S. 229, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, affirming decree (C. C. 1909) *Kansas Natural Gas Co. v. Haskell*, 172 F. 545.

A carrier incorporated in Kentucky cannot justify refusal to accept interstate shipments of liquors for local option points created under Acts Ky. 1906, c. 63; such statute being an unlawful regulation of interstate commerce.—(1912) *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 32 S. Ct. 189, 223 U. S. 70, 56 L. Ed. 355, affirming judgment (1909) 172 F. 117, 96 C. C. A. 322, 40 L. R. A. (N. S.) 798.

Only sponges taken outside of the state territorial limits held included in Act June 20, 1906, making it unlawful to offer for sale in United States sponges from waters of the Gulf of Mexico or Straits of Florida.—*The Abby Dodge v. United States*, 32 S. Ct. 310, 223 U. S. 166, 56 L. Ed. 390.

Rule of state railroad commission under which a per diem penalty may be exacted from an interstate carrier for delay in delivering cars to the consignee held an unreasonable burden on interstate commerce, where the requirement as to delivery is absolute, and makes no allowance for any unavoidable cause for failure to deliver.—*Yazoo & M. V. R. Co. v. Greenwood Grocery Co.*, 33 S. Ct. 213, 227 U. S. 1, 57 L. Ed. 389, reversing judgment 51 So. 450, 96 Miss. 403.

Forbidding a railroad to transport in interstate commerce an article purchased by it for its private business, as is done by Hepburn Act June 29, 1906, is a valid exercise of the power to regulate commerce.—*Delaware, L. & W. R. Co. v. United States*, 34 S. Ct. 65, 231 U. S. 363, 58 L. Ed. 269.

The effect on interstate commerce of requiring under state authority that an interstate carrier move local freight between private spurs in the same city is so indirect that it cannot be deemed to deprive the carrier of rights secured by the commerce clause of the federal Constitution.—*Louisville & N. R. Co. v. Higdon*, 34 S. Ct. 948, 234 U. S. 592, 58 L. Ed. 1484, affirming judgment 148 S. W. 26, 149 Ky. 321.

Requiring an interstate railroad to furnish cars for shippers within a reasonable time after demand required by Hurd's Rev. St. Ill. 1913,

c. 114, § 84, held not to directly burden interstate commerce so as to render the statute invalid.—*Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 35 S. Ct. 760, 238 U. S. 275, 59 L. Ed. 1306, affirming judgment *Mulberry Hill Coal Co. v. Illinois Cent. R. Co.*, 100 N. E. 151, 257 Ill. 80.

62. — Transportation of passengers. See 10 Cent. Dig. Commerce, § 81.

It is within the power of a state, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars, or suspended therefrom (Laws N. Y. 1887, c. 616), though such cars may be employed in interstate commerce. This power cannot be affected by possible inconveniences resulting from the adoption of conflicting regulations by adjoining states.—*New York, N. H. & H. R. Co. v. People of the State of New York*, 17 S. Ct. 418, 165 U. S. 628, 41 L. Ed. 853.

Rev. St. § 5258, authorizing all steam-railroad companies in the United States to carry freight, passengers, etc., from one state to another, and to connect with other roads so as to form continuous lines of transportation, does not in any wise interfere with the enactment of laws by the states to promote the safety of passengers, while traveling, within their respective limits, from one state to another, in cars propelled by steam.—Id.

A state statute providing that no contract or regulation shall exempt any corporation carrying persons or property by rail from its liability as a common carrier (Code Iowa 1873, § 1308) is not void as an attempt to regulate interstate commerce, as applied to a contract of interstate transportation, whereby the carrier attempts to limit its liability for personal injuries resulting from the negligence of its servants to the sum of \$500. Judgment 63 N. W. 692, 95 Iowa, 260, affirmed.—*Chicago, M. & St. P. Ry. Co. v. Solan*, 18 S. Ct. 289, 169 U. S. 133, 42 L. Ed. 688.

Interstate commerce is not directly burdened, in violation of the federal Constitution, by an order of a state railroad commission, directing an interstate railway company to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the state and the point of intersection with the state line, although, to avoid the useless expense of establishing terminal facilities at that point, the passenger service directed by the order must be operated not only to the state line, but some 20 miles beyond, where such facilities do exist. Judgment, *State v. Missouri Pac. Ry. Co.* (1907) 92 P. 606, 76 Kan. 487, affirmed.—*Missouri Pac. Ry. Co. v. State of Kansas ex rel. Taylor*, 30 S. Ct. 330, 216 U. S. 262, 54 L. Ed. 472.

The requirement that passenger trains shall stop at all junction points of other roads, which is made by Act Mo. March 19, 1907 (Laws 1907, p. 185), amending Rev. St. Mo. 1899, § 1075 (Ann. St. 1906, p. 923), amounts to an unnecessary and unlawful burden upon interstate commerce if such requirement is construed to necessitate the stoppage of through interstate trains for the transfer of passengers from one road to another, when ample facilities for the traveling public are already provided, and severe detriment and hindrance to interstate traffic will result.—*Herndon v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; *Swanger v. Atchison, T. & S. F. Ry. Co.*, 30 S. Ct. 639, 218 U. S. 159, 54 L. Ed. 978. Affirming decree *Chicago, R. I. & P. Ry. Co. v. Swanger* (C. C.) 157 F. 783.

A limitation of the means of prohibited transportation of women for purposes of prostitution to common carriers need not be implied to sustain the validity of the white slave act of

June 25, 1910.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

Separate coach provisions of Act Okl. Dec. 18, 1907 (Rev. Laws 1910, § 860, et seq.), apply to transportation wholly intrastate in absence of a different construction by the state courts and do not contravene the commerce clause of the federal Constitution.—*McCabe v. Atchison, T. & S. F. R. Co.*, 35 S. Ct. 69, 235 U. S. 151, 59 L. Ed. 169, affirming decree 186 F. 966, 109 C. C. A. 110.

Municipal regulation of a street railway company principally engaged in interstate commerce, as to passengers riding on platforms, unless provided with suitable barriers and with reference to cleanliness, does not infringe on the federal authority over such commerce.—*South Covington & C. St. R. Co. v. City of Covington*, 35 S. Ct. 158, 235 U. S. 537, 59 L. Ed. 350, L. R. A. 1915F, 792, reversing decree *South Covington & C. R. Co. v. Same*, 143 S. W. 28, 146 Ky. 592.

An ordinance providing that the temperature of cars of a street railway engaged in interstate commerce shall never be permitted to be below 50 degrees Fahrenheit is invalid, as unreasonable, where it is impossible so to do, owing to the opening of the doors and other interferences.—*Id.*

◀ 63. Licenses and privilege taxes.

See 10 Cent. Dig. Commerce, §§ 100, 103-122.

The New Orleans city ordinance imposing a license tax on "every agency, person, or corporation owning or running towboats to and from the Gulf of Mexico" violates Const. art. 1, § 8, par. 3, giving congress power to regulate commerce between the states.—*Moran v. City of New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. Ed. 653.

Steam tugs engaged in the business of towing vessels from the Chicago river into the harbor and lake, and in bringing vessels from the lake into the river, are engaged in interstate and foreign commerce; and if they possess a license to engage in the coasting and foreign trade, under Rev. St. § 4921, they cannot be compelled to pay any further license fee to the city of Chicago, and a city ordinance requiring the same is void.—*Harmon v. City of Chicago*, 147 U. S. 896, 13 S. Ct. 306, 37 L. Ed. 216, reversing judgment 140 Ill. 374, 29 N. E. 732.

The exaction of such a license fee cannot be supported upon the ground that the city of Chicago had from time to time expended money in deepening the Chicago river for navigation purposes, when the ordinance does not profess to require the license fee on any such ground, and no suggestion is made that any special benefit has arisen, or can arise, to such tugs, by such deepening of the river.—*Id.*

A burden on interstate commerce is not imposed by Laws Ga. 1898, p. 21, par. 10, § 4, imposing a license tax on emigrant agents engaged in the business of hiring persons to labor outside the state. Judgment, 35 S. E. 699, 110 Ga. 584, 50 L. R. A. 685, affirmed.—*Williams v. Fears*, 21 S. Ct. 128, 179 U. S. 270, 45 L. Ed. 183.

Requirements of Laws Md. 1910, c. 207, for registering automobiles at a cost varying according to the horse power, and for the driver to obtain a license, and that nonresidents, to have a limited use of the highways without cost, must have complied with a similar law in their respective states and have secured a tag, are not unreasonable as to vehicles moving in interstate commerce.—*Hendrick v. State of Maryland*, 35 S. Ct. 140, 235 U. S. 610, 59 L. Ed. 385.

Rights of citizens to pass through the several states held not unconstitutionally interfered

with by Laws Md. 1910, c. 207, § 140a, relating to use of highways of the state by nonresident owners of automobiles.—*Id.*

◀ 64. — Mercantile business in general.

See 10 Cent. Dig. Commerce, §§ 104-106.

The provision of the Maryland Code, as amended in 1880, requiring any one, not the grower, maker, or manufacturer, selling goods within the state, to pay a licence tax proportioned to the amount of his stock in trade, whether situated in the state or out of it, is a regulation of interstate commerce, invalid as applied to persons living out of the state, and selling by sample within it.—*Corson v. Maryland*, 120 U. S. 502, 7 S. Ct. 655, 30 L. Ed. 699.

The fact that grain stored in an elevator is to be shipped out of the state does not make a state statute requiring a license for conducting the business of such elevator in the state amount to a regulation of interstate commerce. Judgment, *State v. W. W. Cargill Co.*, 79 N. W. 962, 77 Minn. 223, affirmed.—*W. W. Cargill Co. v. State of Minnesota*, 21 S. Ct. 423, 180 U. S. 452, 45 L. Ed. 619.

The tax of \$200 upon resident managing agents of nonresident meat-packing houses which is imposed by Act Ga. Dec. 21, 1900, regardless of the fact that the greater portion of the business may be interstate in its character, does not conflict with the commerce clause of the federal Constitution, where the tax is construed by the highest state court to apply only to the business of selling to local customers from the stock of original packages shipped into the state without a previous sale or contract to sell, and kept and held for sale in the ordinary course of trade, and this domestic business is not shown to be a mere incident to the interstate business. Judgment, 44 S. E. 854, 117 Ga. 969, affirmed.—*Kehrer v. Stewart*, 25 S. Ct. 403, 197 U. S. 60, 49 L. Ed. 663.

Interstate character of business prevents a state from imposing privilege tax on business of soliciting by mail orders for intoxicating liquors from persons in other states and delivery to a carrier within the state from the stock on hand in the state.—*Heyman v. Hays*, 35 S. Ct. 403, 236 U. S. 178, 59 L. Ed. 527; *Southern Operating Co. v. Same*, 35 S. Ct. 405, 236 U. S. 188, 59 L. Ed. 531.

The delivery of coupons, etc., redeemable in premiums in connection with retail sales of merchandise, held not interstate commerce so as to be protected against imposition of state license tax, though coupons are inserted in the retail packages, and are redeemable, outside of the state.—*Rast v. Van Deman & Lewis Co.*, 36 S. Ct. 370, 240 U. S. 342, 60 L. Ed. 679, reversing order *Van Deman & Lewis Co. v. Rast*, 214 F. 827; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

A prohibitive state license tax on each place of business of an express company where liquors are delivered and price collected on interstate shipments imposes direct burden on interstate commerce, contrary to Const. art. 1, § 8, and which is not permitted by Wilson Act.—*Rosenberger v. Pacific Exp. Co.*, 36 S. Ct. 510, 241 U. S. 48, 60 L. Ed. 880, reversing judgment 167 S. W. 429, 258 Mo. 97.

◀ 65. — Brokers and factors.

See 10 Cent. Dig. Commerce, § 110.

A privilege tax imposed by a state statute upon residents of that state as merchandise brokers, whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the state, as agents for nonresi-

dent parties, firms, or corporations, for goods to be shipped by such nonresident principals to such jobbers or dealers, is an unconstitutional invasion of the commerce clause of the constitution of the United States. Judgment, 58 S. W. 1061, 105 Tenn. 412, reversed.—*Stockard v. Morgan*, 22 S. Ct. 576, 185 U. S. 27, 46 L. Ed. 785.

Interstate commerce is not unconstitutionally regulated by Act March 8, 1907 (Acts Mo. 1907, p. 392), under which the keeping of a place where corporate stocks and bonds, and grains, provisions, and other commodities are bought and sold, but not paid for and delivered at the time, is made criminal unless a complete record of the transaction, including a minute of the time of delivery, is made in a book kept for the purpose, and the purchaser is given a memorandum of the sale, properly stamped, although the grains, provisions, and other commodities sold may be, at the time of sale, in the course of transportation as articles of interstate commerce.—(1911) *Broadnax v. State of Missouri*, 31 S. Ct. 238, 219 U. S. 285, 55 L. Ed. 219, affirming judgment *State v. Broadnax* (1910) 128 S. W. 177, 228 Mo. 25.

66. — Commercial agents.

See 10 Cent. Dig. Commerce, § 111.

The annual license charge imposed by a state law upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicits orders in quantities of less than five gallons cannot be regarded, when applied to interstate transactions, repugnant to the commerce clause of the federal Constitution, in view of the provisions of *Wilson Act* Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein. Judgment *State v. Delamater* (S. D. 1906) 104 N. W. 537, affirmed.—*Delamater v. State of South Dakota*, 27 S. Ct. 447, 205 U. S. 93, 51 L. Ed. 724, 10 Ann. Cas. 733.

The business of traveling and taking orders and transmitting them to a nonresident manufacturer, when the articles are shipped in interstate commerce, cannot under commerce clause of the Constitution be subjected to the license tax authorized by Act Ark. April 1, 1909 (Laws 1909, p. 292).—*Crenshaw v. State of Arkansas*, 33 S. Ct. 294, 227 U. S. 389, 57 L. Ed. 565, reversing judgment 130 S. W. 569, 95 Ark. 464; *Rogers v. Same*, 33 S. Ct. 298, 227 U. S. 401, 57 L. Ed. 569.

Attorneys on guaranteed list of foreign corporation furnished to subscribers who were to report on the credit of persons doing business in the state are not engaged in interstate commerce, so as to relieve the corporation from liability for license tax imposed under Ky. St. § 4224, on commercial agencies, though some inquiries may be received from nonresident merchants in anticipation of interstate transactions.—*United States Fidelity & Guaranty Co. of Baltimore, Md., v. Commonwealth of Kentucky*, 34 S. Ct. 122, 231 U. S. 394, 58 L. Ed. 283, affirming judgment 129 S. W. 314, 139 Ky. 27.

The license or occupation tax imposed in each county on the business of selling or delivering sewing machines, under Act Ala. March 31, 1911 (Laws 1911, p. 180) § 32, held not an unconstitutional interference with interstate commerce as applied to a foreign corporation, maintaining a store in each county from which local agents of such county were supplied with sewing machines; all transactions being completed within a single county.—*Singer Sewing Mach. Co. v. Brickell*, 34 S. Ct. 493, 233 U. S. 304, 58 L. Ed. 974.

The license tax imposed in each county by Act Ala. March 31, 1911 (Laws 1911, p. 180) §§ 32, 33f, on business of selling sewing machines, may be construed to avoid an uncon-

stitutional meaning, as not applying to that proportion of the business of a foreign corporation involving transactions in interstate commerce, where its business generally is wholly intrastate.—Id.

The business of selling lightning rods within corporate limits as the agent of a nonresident manufacturer from whom the agent had received the rods may be subjected to a municipal license tax without violating the commerce clause of the federal Constitution, though the contract required the seller at his own expense to attach them to the house of the person who ordered them.—*Browning v. City of Waycross*, 34 S. Ct. 578, 233 U. S. 18, 58 L. Ed. 828, affirming judgment 74 S. E. 564, 11 Ga. App. 46.

67. — Canvassers and solicitors.

See 10 Cent. Dig. Commerce, § 111.

A state statute, imposing a license tax upon drummers selling by sample within a certain "taxing district," is unconstitutional, as a regulation of interstate commerce, though applied equally to citizens of the state enacting the statute.—*Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694.

Act Tex. May 4, 1882, imposing a license tax on drummers and others selling goods by sample or otherwise, or soliciting trade, is a regulation of commerce, and unconstitutional as applied to citizens of other states.—*Asher v. Texas*, 128 U. S. 129, 9 S. Ct. 1, 32 L. Ed. 368.

The District of Columbia has no power to impose a license upon persons soliciting the sale of goods on behalf of individuals doing business outside of the District.—*Stoutenburgh v. Henrick*, 129 U. S. 141, 9 S. Ct. 256, 32 L. Ed. 637.

A city ordinance which requires payment of a license tax for soliciting or taking orders for goods, books, paintings, wares, or merchandise from persons other than manufacturers or licensed merchants, and which on its face declares the same to be a license for "general revenue purposes," is not, in its application to an agent soliciting for a nonresident manufacturer, a mere police regulation, simply inconveniencing one engaged in interstate commerce, but is a direct burden on such commerce, and therefore invalid.—*Brennan v. City of Titusville*, 153 U. S. 289, 14 S. Ct. 829, 38 L. Ed. 719, reversing judgment *Titusville v. Brennan*, 145 Pa. St. 504, 22 Atl. 893.

An ordinance under which a license fee may be required from an agent of a nonresident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce. Judgment, *State v. Caldwell*, 37 S. E. 138, 127 N. C. 521, reversed.—*Caldwell v. State of North Carolina*, 23 S. Ct. 229, 187 U. S. 622, 47 L. Ed. 336.

The license tax imposed by Laws N. C. 1901, p. 116, c. 9, § 52, upon all those "engaged in the business of selling" sewing machines in the state, is an unconstitutional interference with interstate commerce, so far as applied to the sale of a single machine shipped into the state by a nonresident manufacturing corporation, upon the written order of a customer, under an ordinary C. O. D. consignment. Judgment, *Sims v. Norfolk & W. R. Co.*, 41 S. E. 673, 130 N. C. 556, reversed.—*Norfolk & W. Ry. Co. v. Sims*, 24 S. Ct. 151, 191 U. S. 441, 48 L. Ed. 254.

Interstate commerce is unlawfully burdened by a municipal ordinance exacting a license fee from a person employed by a foreign corporation to solicit, within the municipality, orders for groceries, which the company fills by shipping goods to him for the delivery to, and

collection of the purchase price from the customer, who has the right to refuse the goods if not equal to samples; such goods always being shipped in distinct packages, corresponding to the several orders, except in the case of brooms, which, after being tagged and marked, like the other articles, according to the number ordered, are then tied together in bundles of about a dozen, and wrapped up conveniently for shipment. Judgment, Commonwealth v. Rearick (1904) 26 Pa. Super. Ct. 384, reversed.—Rearick v. Commonwealth of Pennsylvania, 27 S. Ct. 159, 203 U. S. 507, 51 L. Ed. 295.

A state may not, under the commerce clause of the federal Constitution, impose a license tax on a nonresident merchant traveling and soliciting orders by sample and catalogues for goods shipped into the state in car load lots to his order, and which he delivers to the person ordering them.—Stewart v. People of State of Michigan, 34 S. Ct. 476, 232 U. S. 665, 58 L. Ed. 786, reversing judgment People v. Stewart, 132 N. W. 1071, 167 Mich. 417.

68. — Hawkers and peddlers.

See 10 Cent. Dig. Commerce, §§ 107-109.

Rev. St. Mo. § 6471, declaring any person who deals in selling goods, by going from place to place to sell the same, to be a peddler, and section 6472, prohibiting peddling without a license, which section 6473 provides shall state how the dealing is to be carried on, and which, by section 6479, must be exhibited on demand of a sheriff, collector, constable, or citizen householder of the county, is not an invasion of the power of congress to regulate interstate commerce, as applied to one who, as agent of a manufacturer in another state, thus sells and delivers sewing machines which he has with him at the time of soliciting purchases.—Emert v. State of Missouri, 156 U. S. 298, 15 S. Ct. 367, 39 L. Ed. 430, affirming judgment State v. Emert, 103 Mo. 241, 15 S. W. 81, 11 L. R. A. 219, 23 Am. St. Rep. 874.

69. — Corporate franchises and privileges.

See 10 Cent. Dig. Commerce, §§ 100, 113-119.

An annual license tax of a fixed sum, imposed by a municipal corporation on each boat of a ferry company located within its limits, is a valid exercise of the police power, and, though the other landing of the ferry is in another state, cannot be considered as a regulation of interstate commerce, within Const. art. 1, § 8.—Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. Ed. 419.

Act Tenn. March 18, 1877, § 6 (Laws 1877, c. 16, p. 26), imposing a privilege tax upon sleeping cars owned by a foreign corporation, and leased to a Tennessee railroad corporation, which received the transit fare, while the fee for sleeping accommodation was paid to the owner, and used for the transportation of passengers into or out of or across the state, is void, as an interference with interstate commerce.—Pickard v. Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. Ed. 785; State of Tennessee v. Same, 117 U. S. 51, 6 S. Ct. 643, 29 L. Ed. 791.

Where a telegraph company is doing the business of transmitting messages between different states, and has accepted and is acting under the telegraph law passed by congress July 24, 1866, no state within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business.—Leloup v. Port of Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311.

Order No. 1589 of the board of supervisors of the city and county of San Francisco, which imposes a license tax of \$25 per quarter on ev-

ery railroad agency, is a regulation of interstate commerce, in so far as it applies to an agent who solicits passenger traffic in San Francisco over a railroad operated between Chicago and New York, but who sells no tickets, and neither receives nor pays out any money or other valuable consideration on account thereof. The agent's business, being carried on to assist, or with the purpose to assist, the traffic of his road, is within the protection of the commerce clause of the federal constitution (Const. art. 1, § 8, cl. 3), though it may not be essential to such traffic.—McCall v. California, 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 391, distinguishing Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650.

Act Ky. March, 1860, as amended by Act 1866, requiring the agent of a foreign express company doing business in the state to pay a license fee of \$5, and deposit with the auditor a statement of the company's assets and liabilities, showing that it has an actual capital of at least \$150,000, is unconstitutional, as an interference with interstate commerce, in so far as it applies to companies transporting goods between points in the state and points in other states, though the company may also transport between points within the state.—Crutcher v. Commonwealth, 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649, reversing judgment 89 Ky. 6, 12 S. W. 141.

An ordinance compelling a telegraph company to pay five dollars per annum for every pole within the city "for the privilege of using the streets, alleys, and public places" is a charge in the nature of a rental, and is not a privilege or license tax, which would be invalid as applied to a corporation doing interstate business.—City of St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. Ed. 380, reversing judgment (C. C.) 39 F. 59.

A license tax imposed by a city upon telegraph companies "for business done exclusively within the city, * * * and not including any business done to or from points without the state" or "for the United States," is not invalid as applied to a company partly engaged in transmitting interstate messages, and which has accepted the provisions of the act of July 24, 1866, and thereby become an agency of the United States.—Postal Tel. Cable Co. v. City Council of Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. Ed. 871, affirming decree (C. C.) Western Union Tel. v. City Council of Charleston, 56 F. 419.

Pen. Code Cal. § 439, declaring "every person who in this state procures or agrees to procure any insurance for a resident of this state" from a foreign insurance company, which has not complied with the insurance laws of the state guilty of a misdemeanor, does not attempt to prevent the procurement outside of the state of insurance.—Hooper v. People of State of California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297.

The business of marine insurance, like other insurance business, is not commerce, or an instrumentality thereof, but merely an incident, and therefore the constitutional provision as to interstate commerce does not prevent a state from prescribing conditions on which a foreign insurance company may do business in the state, or from enforcing such conditions.—Id.

A statute which in effect imposes a license tax on express companies doing any local business, but none on those doing interstate business only, is not void as regulating interstate commerce. 14 So. 538, affirmed.—Osborne v. State of Florida, 17 S. Ct. 214, 164 U. S. 650, 41 L. Ed. 586.

Ky. St. 1894, §§ 4077, 4081, taxing the intangible property of express companies in proportion to mileage in the state, as compared with

total mileage, is not an interference with interstate commerce.—*Weir v. Norman*, 17 S. Ct. 527, 166 U. S. 171, 41 L. Ed. 980.

A proportional state tax on the intangible property, within the state, of a bridge company owning a bridge over a river between adjoining states, is not a tax on interstate commerce, when the business of transportation is not carried on by the bridge company, but by persons and corporations who pay tolls to the bridge company. The fact that the tax may tend to increase the tolls is too remote and incidental to make it a tax on the business transacted.—*Henderson Bridge Co. v. Commonwealth of Kentucky*, 17 S. Ct. 532, 166 U. S. 150, 41 L. Ed. 953, affirming judgment 31 S. W. 486.

The acts of congress prescribing the height, width of span, etc., of bridges to be erected over the Ohio, and declaring that they shall be post roads, do not affect the power of the states to tax the intangible property of the bridge companies.—*Id.*

A state franchise tax upon private corporations, based on the amount of capital employed by the corporation in the state, is not affected by the character of the property in which the capital is invested, and is therefore not rendered illegal by the fact that such capital is employed in interstate or foreign commerce.—*People of State of New York ex rel. Parke, Davis & Co. v. Roberts*, 19 S. Ct. 58, 70, 171 U. S. 658, 43 L. Ed. 323, affirming judgment 44 N. E. 1127, 149 N. Y. 608, which affirms 36 N. Y. S. 368, 91 Hun, 158.

An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the federal constitution, when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection. Judgment, Borough of New Hope v. Western Union Tel. Co., 16 Pa. Super. Ct. 306, affirmed.—*Western Union Tel. Co. v. Borough of New Hope*, 23 S. Ct. 204, 187 U. S. 419, 47 L. Ed. 240.

The privilege tax imposed by Code Miss. 1892, §§ 3317, 3387, on sleeping and palace car companies carrying passengers from one point to another within the state, cannot be deemed an unconstitutional regulation of commerce, because of the declaration in Const. Miss. § 195, that sleeping car companies are common carriers and subject to liability as such, where such provision is regarded by the state courts as imposing no obligation on the company to transport local passengers. Judgment, Pullman Palace Car Co. v. Adams, 30 So. 757, 78 Miss. 814, 84 Am. St. Rep. 647, affirmed.—*Pullman Co. v. Adams*, 23 S. Ct. 494, 189 U. S. 420, 47 L. Ed. 877.

A telegraph company, though engaged in interstate commerce, may be compelled by a municipality to pay a reasonable license fee for the enforcement of local government supervision of its poles and wires.—*Atlantic & Pacific Telegraph Co. v. City of Philadelphia*, 23 S. Ct. 817, 190 U. S. 160, 47 L. Ed. 995.

The annual tax of \$3,000 imposed by a state statute upon sleeping car companies which carry one or more local passengers on cars operating within the state is not void as a burden on interstate commerce, where the company is free to decline all local business if it sees fit.—*Allen v. Pullman's Palace Car Co.*, 24 S. Ct. 39, 191 U. S. 171, 48 L. Ed. 134.

Taxes exacted from a sleeping car company engaged in both interstate and intrastate traffic, under a state statute imposing an annual tax of \$500 per car upon sleeping car companies doing business in the state, which makes no distinction between cars used in interstate traffic or in traffic wholly within the borders of the state, are

void as an attempt by the state to impose a burden upon interstate commerce.—*Id.*

A franchise tax, imposed under appropriate statutes of the state of New York upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state, for the purpose of conveying its passengers to and from its ferry landing in New York City, the charges for which are entirely separate from those for other transportation, is not an unconstitutional burden on interstate commerce, but is a tax upon an independent local service, preliminary or subsequent to any interstate transportation. Judgment 64 N. E. 152, 171 N. Y. 354, 98 Am. St. Rep. 610, affirmed.—*People of State of New York ex rel. Pennsylvania R. Co. v. Knight*, 24 S. Ct. 202, 192 U. S. 21, 48 L. Ed. 325.

An unconstitutional burden is imposed on interstate commerce by Rev. Laws Ill. 1874, c. 55, penalizing the carrying on of a ferry without a license, when applied to the transportation of loaded or unloaded railroad cars across the Mississippi river from the Illinois to the Missouri shore, even assuming that a state may regulate a ferry upon a navigable stream forming the boundary between two states, where such statute makes the granting of the license discretionary, with citizens of Illinois preferred, and compels the licensee to conduct a general ferry business. Judgment, St. Clair County v. Interstate Car Transfer Co. (C. C.) 109 F. 741, affirmed.—*St. Clair County v. Interstate Sand & Car Transfer Co.*, 24 S. Ct. 300, 192 U. S. 454, 48 L. Ed. 518.

Interstate commerce is not unconstitutionally interfered with by the franchise tax imposed upon a domestic railway corporation by Laws N. Y. 1896, c. 908, § 182, because no deduction is allowed from the capital stock, taken as the basis of the tax, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state. Judgments 69 N. E. 1129, 177 N. Y. 584, and 76 N. E. 1104, affirmed.—*People of State of New York ex rel. New York Cent. & H. R. R. Co. v. Miller*, 28 S. Ct. 714, 202 U. S. 584, 50 L. Ed. 1155.

The exaction from a foreign telegraph company for the benefit of the permanent school fund, under the authority of Gen. St. Kan. 1901, p. 280, § 1261, of a "charter fee" of a given per cent. of its entire authorized capital stock, as a condition of continuing to do local business in the state, is invalid under the commerce clause of the federal Constitution, as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside the state. Decree, State v. Western Union Telegraph Co. (1907) 90 P. 299, 75 Kan. 609, reversed.—*Western Union Telegraph Co. v. State of Kansas ex rel. Coleman*, 30 S. Ct. 190, 216 U. S. 1, 54 L. Ed. 855.

A foreign sleeping car company cannot be restrained from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent. of its entire capital stock, imposed by Gen. St. Kan. 1901, § 1264, for the benefit of the permanent school fund, as a condition of doing such business, since such requirement amounts to a burden or tax on the company's interstate business and on its property located and used outside the state. Judgment, State v. Pullman Co. (1907) 90 P. 319, 75 Kan. 604, reversed.—*Pullman Co. v. State of Kansas ex rel. Coleman*, 30 S. Ct. 232, 216 U. S. 56, 54 L. Ed. 678.

An illegal burden on the interstate business of a foreign telegraph company, as well as a tax on its property beyond the jurisdiction of the state, is imposed by Laws Ark. 1907, p. 744, under which such company, as a condition of continuing to do a local business in the state, and of escaping the heavy penalties therein pre-

scribed, must pay a given amount, based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State. *Decree, Chicago, R. I. & P. Ry. Co. v. Ludwig* (C. C. 1907) 156 F. 152, affirmed.—*Ludwig v. Western Union Telegraph Co.*, 30 S. Ct. 280, 216 U. S. 148, 54 L. Ed. 423.

A city license tax on right of interstate telegraph company to do local business does not impose unconstitutional burden on its interstate business because its intrastate business was done at the loss of 86 cents.—*Williams v. City of Talladega*, 33 S. Ct. 116, 226 U. S. 404, 57 L. Ed. 275, reversing judgment 51 So. 330, 164 Ala. 633.

Annual privilege tax levied by city on business of express company, excluding interstate business, is not invalid because transportation is over a route for a short distance passing out of the state.—*Ewing v. City of Leavenworth*, 33 S. Ct. 157, 226 U. S. 464, 57 L. Ed. 303, affirming judgment *City of Leavenworth v. Ewing*, 101 P. 664, 80 Kan. 58.

Excise tax exacted from foreign corporations under St. Mass. 1909, c. 490, for the privilege of doing business in the state, as applied to corporations carrying on a business not of itself interstate commerce, though their products are sold and shipped in such commerce and which are carrying on a local business, is not invalid under the commerce clause of the federal Constitution.—*Baltic Min. Co. v. Commonwealth of Massachusetts*, 34 S. Ct. 15, 231 U. S. 68, 58 L. Ed. 127, affirming judgments 93 N. E. 831, 207 Mass. 381; *S. S. White Dental Mfg. Co. v. Same*, 98 N. E. 1056, 212 Mass. 35.

An ordinance imposing a local license on an express business will be construed as not applying to interstate business.—*Barrett v. City of New York*, 34 S. Ct. 203, 232 U. S. 14, 58 L. Ed. 483, reversing decree (C. C.) 189 F. 268.

A municipality cannot exact a local license from an express company doing an interstate business either as a condition precedent to its transacting business within the city, or as an annual license fee.—*Id.*

A state, or a municipality, acting under its authority, may not, consistently with the commerce clause of the federal Constitution, require a Canadian corporation, operating a ferry over the boundary stream between such state and Canada, to take out a license and pay a license fee as a condition precedent to receiving and landing persons and property at its wharf in such municipality.—*City of Sault Ste. Marie v. International Transit Co.*, 34 S. Ct. 826, 234 U. S. 333, 58 L. Ed. 1837, 52 L. R. A. (N. S.) 574, affirming decree (D. C.) *International Transit Co. v. City of Sault Ste. Marie*, 194 F. 522.

Annual tax on capital stock on domestic corporations imposed by Laws Kan. 1913, c. 185, is not a violation of commerce clause of federal Constitution as applied to a railroad with a paid-up capital whose lines extend into other states.—*Kansas City, F. S. & M. Ry. Co. v. Botkin*, 36 S. Ct. 261, 240 U. S. 227, 60 L. Ed. 617, affirming judgment *Same v. Sessions*, 147 P. 791, 95 Kan. 201.

◀70. — Corporate receipts, earnings, and dividends.

See 10 Cent. Dig. Commerce, § 114.

Act Ma. 1881, requires every corporation, etc., operating a railroad in the state, to pay "an annual excise tax for the privilege of exercising its franchises"; the amount of the tax to be determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the year preceding the levy of the tax. *Held*, that the method of determining

the amount of the tax is merely a way of ascertaining the value of the privilege, and does not render the tax a tax upon the receipts themselves, and hence, in its application to railroads which enter the state from another state or from Canada, the act does not operate as a regulation of interstate or foreign commerce.—*State of Maine v. Grand Trunk Ry. Co. of Canada*, 142 U. S. 217, 12 S. Ct. 121, 35 L. Ed. 994; *Id.*, 142 U. S. 217, 12 S. Ct. 163, 35 L. Ed. 994.

No unconstitutional interference with interstate commerce is made by Act Mich. June 4, 1897, p. 292, No. 228, levying a specific tax upon the property and business of any railroad corporation operated within the state and providing that "when the railroad lies partly within and partly without this state, prima facie the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried."—*Wisconsin & M. Ry. Co. v. Powers*, 24 S. Ct. 107, 191 U. S. 379, 48 L. Ed. 229.

Intention to tax receipts from foreign commerce will not be imputed to Act May 31, 1911 (102 Ohio Laws, p. 224), imposing excise tax on gross receipts of railroads because such commerce is not expressly excepted by the provisions of sections 83 and 88 in view of section 97, providing for measuring the tax only by the earnings on intrastate business.—*Ohio Tax Cases*, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 787, affirming decree (D. C.) *Ohio River & W. Ry. Co. v. Dittney*, 203 F. 537.

Amending a state law imposing excise tax on gross railway earnings so as to exclude interstate earnings while making an increase in the tax decimal is not evidence of an unlawful effort to burden a privilege not a proper subject of state taxation.—*Id.*

Annual excise tax equal to five-tenths of 1 per cent. on gross earnings from transportation originating and terminating within the state, imposed by Tax Law N. Y. § 184, is not an invalid regulation of commerce as applied to a navigation company engaged in towing on the Hudson river under a license granted by the United States.—*People of State of New York ex rel. Cornell Steamboat Co. v. Sohmer*, 35 S. Ct. 162, 235 U. S. 549, 59 L. Ed. 355, affirming judgment 99 N. E. 1115, 206 N. Y. 651.

No taxation of interstate commerce results from including the earnings by a New York corporation from towing vessels between ports in that state over the Hudson river lying partly in the state of New Jersey in computing the annual tax equal to five-tenths of 1 per cent. on the gross earnings from transportation originating and terminating within the state imposed by Tax Law N. Y. § 184.—*Id.*

◀71. Taxation of property.

See 10 Cent. Dig. Commerce, §§ 96, 122-126.

◀72. — Property employed in commerce in general.

See 10 Cent. Dig. Commerce, §§ 122-126.

The statute of New York of May 31, 1881, imposing a tax on every passenger from a foreign country landing in the port of New York who is not a citizen of the United States, and holding the vessel which brings him liable for the tax, is a regulation of commerce. The tax is not relieved from this constitutional objection by calling in an inspection law.—*People of State of New York v. Compagnie Generale Transat-*

lantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. Ed. 383, affirming judgment (C. C.) 10 F. 357.

Act Cong. Aug. 3, 1882 (22 Stat. 214), entitled "An act to regulate immigration," imposes on the owners of vessels who shall bring passengers from a foreign port into a port of the United States a duty of 50 cents for every such passenger not a citizen of the United States, and is not a tax subject to the limitations imposed by the constitution on the general taxing power of congress.—*Eddy v. Robertson*, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798, affirming (C. C.) 18 F. 135.

Act Cong. Aug. 3, 1882 (22 Stat. 214), "to regulate immigration," which imposes on the owners of steam or sailing vessels who shall bring passengers from a foreign port into a port of the United States a duty of 50 cents for every such passenger not a citizen of this country, to constitute a fund "to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress," etc., is a valid exercise of the power to regulate commerce with foreign nations.—*Id.*

The taxation in one state, under general laws imposing such tax on all property alike, of goods from another state, arrived in the taxing state as their place of destination, is not a regulation of commerce, within Const. U. S. art. 1, § 8, cl. 3, giving congress power to regulate commerce among the states, although such goods are, on arrival, sold from the vessel on which they were transported, without being landed, for the purpose of being shipped on a vessel bound to a foreign port.—*Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257.

Sess. Laws Mich. 1875, No. 226, which imposes a specific tax on persons selling liquors at wholesale, to be shipped into the state from places out of the state, not having their principal place of business in the state, without imposing a like tax upon persons engaged in such sale of liquors manufactured in the state is a regulation of commerce between the states, and unconstitutional and void.—*Walling v. Michigan*, 116 U. S. 446, 6 S. Ct. 454, 29 L. Ed. 691.

Pub. Acts Mich. 1887, No. 313, imposing an annual tax of \$300 on the business of selling only brewed or malt liquors at wholesale or retail, and a tax of \$65 on the business of manufacturing such liquors, and providing that a manufacturer may sell without paying anything but the manufacturers' license, is a regulation of interstate commerce in so far as it prevents a nonresident manufacturer from sending such liquor into the state, and their disposing of it, in the original packages, through a clerk located there.—*Lyng v. Michigan*, 135 U. S. 161, 10 S. Ct. 725, 34 L. Ed. 150, following *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128.

Coal transported to Louisiana from a foreign state on the navigable waters of the United States, and owned by a citizen of such foreign state, may be taxed while afloat in barges on the Mississippi river, in Louisiana, as other property in such state is taxed, without violating Const. U. S. art. 1, § 8, cl. 3, providing that congress shall have power to regulate commerce among the states, where it has reached its destination for the purpose of use or sale.—*Pittsburgh & S. Coal Co. v. Bates*, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538.

An assessment for taxation, under state authority, of the original packages in which goods are imported, before they have, by the act of the importer, become incorporated into the mass of property of the state and are held for use or sale, is void as a violation of Const. U. S. art. 1, §§ 8, 10, prohibiting the states to lay imposts or duties on imports, and giving congress power to regulate foreign commerce. Judgment, *May v. City of New Orleans*, 25

So. 950, 51 La. Ann. 1064, reversed.—*F. May & Co. v. City of New Orleans*, 20 S. Ct. 976, 178 U. S. 496, 44 L. Ed. 1165.

Original packages of imported goods, which cannot be assessed for local taxation, consist of the boxes, cases, or bales in which the goods were shipped, and not the smaller packages therein contained, although these are the packages in which the goods are put up by the manufacturer; and when the packages in which the goods are shipped reach their destination for use or trade, and are opened and the separate packages therein exposed or offered for sale, these become subject to local taxation like other property in the state.—*Id.*

A flock of 10,000 sheep which is being driven from the territory of Utah by a direct route across the state of Wyoming to the state of Nebraska at a rate of about nine miles per day, is the subject of interstate commerce, and is therefore exempt from taxation under Laws Wyo. 1895, c. 61, authorizing the taxing of live stock brought into the state for grazing purposes, although the sheep may, while actually in transit, have been permitted incidentally to support themselves by grazing over land one-fourth of a mile in width, and might have been transported by rail. Judgment 63 P. 935, 9 Wyo. 352, 87 Am. St. Rep. 959, reversed.—*Kelley v. Rhoads*, 23 S. Ct. 259, 188 U. S. 1, 47 L. Ed. 359.

Logs which have been cut and floated down a stream and its tributaries to a boom or sorting gap, from which they are to be shipped by rail as needed to a point outside the state, are not, while awaiting delivery to the railroad company, the subject of interstate commerce, so as to be exempt from state taxation.—*Diamond Match Co. v. Village of Ontonagon*, 23 S. Ct. 266, 188 U. S. 82, 47 L. Ed. 349.

Goods brought into one state from another are not imported, within the meaning of Const. U. S. art. 1, § 10, par. 3, forbidding state taxation of imports, and are therefore, though still in the original packages, subject to state taxation after they have reached their destination and are held in the state for sale. Judgment (1903) 75 S. W. 1037, 110 Tenn. 524, 100 Am. St. Rep. 814, affirmed.—*American Steel & Wire Co. v. Speed*, 24 S. Ct. 365, 192 U. S. 500, 48 L. Ed. 538.

Oil shipped from Pennsylvania and Ohio, and destined ultimately for points in Arkansas, Louisiana, and Mississippi, is not property in interstate commerce, so as to be exempt from state tax or inspection laws while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels, and other receptacles, and from which it is forwarded to its final destination. Judgment (1906) 95 S. W. 824, 117 Tenn. 82, affirmed.—*General Oil Co. v. Crain*, 28 S. Ct. 475, 209 U. S. 211, 52 L. Ed. 754.

The earnings of nonresident express company carrying goods between two points within the state over route incidentally traversing portion of another state, derived from carriage within the state, held within the gross receipts upon which tax under Rev. Laws Minn. 1905, §§ 794-1038, is based, without burdening interstate commerce.—(1912) *United States Express Co. v. State of Minnesota*, 32 S. Ct. 211, 223 U. S. 335, 56 L. Ed. 459, affirming judgment (1911) *State v. United States Express Co.*, 131 N. W. 489, 114 Minn. 346.

Including in gross receipts of nonresident express company under Rev. Laws Minn. 1905, §§ 794-1038, earnings from interstate shipments, where transportation was performed wholly within the state, held not an unconstitutional burden on interstate commerce.—*Id.*

A nonresident express company, whose receipts are largely derived from interstate com-

merce and investments in bonds and lands outside the state, *held* not subject to the gross revenue tax exacted by Laws Okl. 1910, c. 44.—*Meyer v. Wells Fargo & Co.*, 32 S. Ct. 218, 223 U. S. 298, 56 L. Ed. 445.

Personal property in transit in interstate commerce is not subject to local taxation because within the limits of a county in which the owner resides.—*Bacon v. People of the State of Illinois*, 33 S. Ct. 299, 227 U. S. 504, 57 L. Ed. 615, affirming judgment *People v. Bacon*, 90 N. E. 606, 243 Ill. 313.

Grain shipped from Western states to Eastern cities, purchased in transit by a resident of Illinois to have forwarded according to shipping contracts, after removal from cars at Chicago for inspection, etc., may be assessed for local taxation while actually in his private grain elevator in Chicago.—*Id.*

Pennsylvania coal shipped by its owner to its own order at a New Jersey tide-water port, where if no vessels were available for its transportation it was dumped into a storage yard to be transferred to vessels, as occasion required, *held* subject to local taxation while in such yard, though it was destined ultimately for ports in other states.—*Susquehanna Coal Co. v. City of South Amboy*, 33 S. Ct. 712, 228 U. S. 665, 57 L. Ed. 1015, affirming judgment (C. C.) 184 F. 941.

◀73. — Means and instrumentalities of commerce.

See 10 Cent. Dig. Commerce, §§ 124-134.

The state board of equalization of California included in their assessment all the franchises of a railroad company, among which were franchises conferred by the United States, of constructing a railroad from the Pacific Ocean across the state as well as across the territories of the United States, and of taking toll thereon. *Held* repugnant to the constitution and laws of the United States, and the power given to congress to regulate interstate commerce.—*People of State of California v. Central Pac. R. Co.*, 127 U. S. 1, 8 S. Ct. 1073, 32 L. Ed. 150.

Where a tax levied by a state upon a telegraph company consists of taxes on messages between points within the state and on messages between points out of the state and points in the state, and on messages between points in different states, but passing through the state, and the record discloses the amount assessed on each class, no recovery can be had, except in respect to messages transmitted wholly within the state.—*Western Union Tel. Co. v. Commonwealth of Pennsylvania*, 128 U. S. 39, 9 S. Ct. 6, 32 L. Ed. 345, following *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229.

Telegraph companies which have accepted the provisions of Rev. St. §§ 5263-5268, in regard to the use of the public domain by telegraph companies, cannot be taxed by the state authorities on messages and receipts therefrom between points within and points without the state, as this is interstate commerce, but may be so taxed on messages carried wholly within the state.—*Western Union Tel. Co. v. Seay*, 132 U. S. 472, 10 S. Ct. 161, 33 L. Ed. 409.

The fact that a road represented by an agent is wholly outside the state of California does not justify imposing a tax on its traffic. The limitation on the power of a state to tax interstate commerce extends to all such commerce, though it may not actually pass through its territory.—*McCall v. California*, 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 391.

A tax assessed against a railroad company which is a link in a through line of road, and carries freight and passengers in and out of the state, by the state through which the through

line passes, as a condition precedent to its keeping an office in such state for the use of its officers, agents, and employes, is a tax on the means by which the company is enabled to carry on its business of interstate commerce, and is therefore in violation of Const. art. 1, § 8, giving the power to regulate interstate commerce to congress.—*Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394, reversing 114 Pa. 256, 6 Atl. 45.

The city of Henderson, Ky., whose corporate limits extend to low water on the Indiana shore of the Ohio river, by an ordinance granted to a Kentucky bridge company the right to build a railroad bridge within its boundaries, and made certain stipulations as to taxation thereof. *Held*, that the taxation of the bridge was not a regulation of interstate commerce, or the taxation of an agency of the federal government.—*Henderson Bridge Co. v. City of Henderson*, 141 U. S. 679, 12 S. Ct. 114, 35 L. Ed. 900.

Assessment of the part within one state of a railroad which extends into another state, and a valuation on a mileage basis, does not place a burden on interstate commerce, although the value of the road as a whole is created partly by its interstate commerce.—*Cleveland C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 S. Ct. 1122, 38 L. Ed. 1041, affirming judgment 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

A state privilege tax of a certain amount per mile of wires operated within the state, imposed on all telegraph companies therein operating, in lieu of all other state, county, and municipal taxes, and amounting to less than the ordinary ad valorem tax, is substantially a mere tax on property, to which a foreign corporation operating within the state is subject, notwithstanding it is engaged in interstate commerce, and has accepted the rights conferred on telegraph companies by Rev. St. § 5263.—*Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 15 S. Ct. 268, 39 L. Ed. 311, affirming judgment 71 Miss. 555, 14 South. 36, 42 Am. St. Rep. 476.

Where a foreign corporation owns a railroad lying partly within and partly without a state, the state may tax such portion of the tolls received for the use of the road as was received for the use of the portion within the state.—*New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043, affirming judgment 22 A. 212, 145 Pa. 38.

A state may tax telegraph property within its borders, though it is employed in interstate or foreign commerce.—*Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 S. Ct. 1054, 41 L. Ed. 49.

A state tax on the property of an express company within the state, the taxable value of which is determined with reference to the whole capital of the company ("Nichols Law," Rev. St. Ohio, §§ 2777-2780), is not an unconstitutional interference with interstate commerce.—*Sanford v. Poe*, 17 S. Ct. 305, 165 U. S. 194, 41 L. Ed. 683, affirming decree 69 F. 546, 16 C. C. A. 305.

The fact that a bridge across a navigable stream between two states is an instrument of interstate commerce does not exempt so much of it as is within one of the states from taxation by such state.—*Pittsburgh, C. & St. L. Ry. Co. v. Board of Public Works of West Virginia*, 19 S. Ct. 90, 172 U. S. 32, 43 L. Ed. 354.

A state may constitutionally tax refrigerator cars used on railroads of the state, and required in their business, though owned by a corporation of another state, which furnishes them for the transportation of perishable products, as required by a shipper or railroad com-

pany for a particular shipment or trip,—being paid by the railroad company on a mileage basis,—and though such cars are used within the state entirely in carrying on interstate commerce; and such tax may properly be fixed upon the value of the average number of cars employed within the state. Judgment *Hall v. American Refrigerator Transit Co.*, 51 P. 421, 24 Colo. 291, 65 Am. St. Rep. 223, affirmed.—*American Refrigerator Transit Co. v. Hall*, 19 S. Ct. 599, 174 U. S. 70, 43 L. Ed. 899.

The state may tax the average number of refrigerator cars used by railroads within the state, but owned by a foreign corporation which has no office or place of business within the state, and employed as vehicles of transportation in the interchange of interstate commerce. Judgment, 55 P. 639, 18 Utah, 378, affirmed.—*Union Refrigerator Transit Co. v. Lynch*, 20 S. Ct. 631, 177 U. S. 149, 44 L. Ed. 708.

A state tax on the property within the state belonging to a foreign telegraph corporation, the value of which was determined by regarding it as a part of a system operated in other states, is not invalid because such corporation is engaged in interstate business, and has accepted the provisions of Act July 24, 1866, c. 230, 14 Stat. 221 [U. S. Comp. St. 1901, p. 3579], giving it the privilege of operating a line over military and post roads, and was not created by such state or given any franchise by it. Judgment, *State ex rel. Gottlieb v. Western Union Tel. Co.*, 65 S. W. 775, 165 Mo. 502, affirmed.—*Western Union Tel. Co. v. State of Missouri*, 23 S. Ct. 730, 190 U. S. 412, 47 L. Ed. 1116.

Vessels, which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, are subject to taxation in that state, although they may have been registered or enrolled, under Rev. St. U. S. §§ 4141, 4311 [U. S. Comp. St. 1901, pp. 2808, 2859], at a port outside the limits of the state. Judgment, 46 S. E. 783, 102 Va. 576, 102 Am. St. Rep. 855, affirmed.—*Old Dominion S. S. Co. v. Commonwealth of Virginia*, 25 S. Ct. 686, 198 U. S. 299, 49 L. Ed. 1059, 3 Ann. Cas. 1100.

The state cannot impose the tax levied by Act Tex. April 17, 1905, p. 336, c. 141, upon railway companies whose lines lie wholly within the state, "equal to 1 per centum of their gross receipts," where a part, and, in some cases, much the larger part, of these gross receipts, is derived from the carriage of passengers and freight coming from, or destined to, points without the state. Judgment, *State v. Galveston, H. & S. A. Ry. Co.* (Tex. 1906) 97 S. W. 71, reversed.—*Galveston, H. & S. A. Ry. Co. v. State of Texas*, 28 S. Ct. 638, 210 U. S. 217, 52 L. Ed. 1031.

Annual franchise tax imposed by Laws Ark. 1911, p. 67, on a foreign corporation on a percentage of the outstanding capital stock represented by the property used in business in the state, held not repugnant to the commerce clause of the federal Constitution.—*St. Louis Southwestern Ry. Co. v. State of Arkansas ex rel. Norwood*, 35 S. Ct. 99, 235 U. S. 350, 59 L. Ed. 265, affirming decree 152 S. W. 110, 106 Ark. 321.

74. — Corporate capital and securities.

See 10 Cent. Dig. Commerce, §§ 96, 124-133.

A ferry company engaged in transporting freight and passengers across the Delaware river from P., in Pennsylvania, to G., N. J., was incorporated under the laws of the latter state, and had all its boats registered there. It had no property in Pennsylvania, other than the lease of a wharf, and did no other business there than the landing and receiving of freight and passengers at said wharf. Held, that a tax

imposed by Pennsylvania upon the capital stock of said company was void, as an interference with interstate commerce.—*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 S. Ct. 826, 29 L. Ed. 158.

A state statute which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the state, is a tax upon commerce between the states.—*Fargo v. Stevens*, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888.

The imposition of a tax, under the acts of Pennsylvania of March 20, 1877, and June 7, 1879, upon a steamship company incorporated under the laws of Pennsylvania, upon the gross receipts of such company, derived from the transportation of persons and property by sea between different states, and to and from foreign countries, is an invalid regulation of interstate and foreign commerce.—*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200.

A single tax assessed under the laws of Ohio upon the receipts of a telegraph company, derived partly from interstate commerce and partly from commerce within the state of Ohio, but returned and assessed in gross, and without separation or apportionment, is invalid only in proportion to the extent that such receipts were derived from interstate commerce.—*Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229.

Since a state has the right to tax personal property within its jurisdiction, even though it is employed in interstate commerce, a state tax on such proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the state bears to the whole number of miles over which its cars are operated, is valid and constitutional, though such cars run into, through, and out of the state.—*Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613; Same *v. Hayward*, 141 U. S. 36, 11 S. Ct. 883, 35 L. Ed. 621, affirming decree, 107 Pa. St. 156.

Pub. St. Mass. c. 13, § 40, providing that every telegraph company owning a line in the state shall be taxed on such proportion of the whole value of its capital stock as the length of its line in the state bears to the whole length of its line, is not in violation of the interstate commerce clause of the constitution.—*Attorney General of Commonwealth of Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 S. Ct. 889, 35 L. Ed. 628.

Act Mo. May 16, 1889, which imposes on companies carrying goods "by express, on contract with any railroad or steamboat company," a tax on their "receipts for business done within this state," is not an interference with interstate commerce.—*Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

The state may impose a tax on the gross receipts on the transportation of goods and passengers by continuous carriage from one point in the state to another point in the same state, although part of the route is over the soil of another state.—*Lehigh Val. Ry. Co. v. Pennsylvania*, 145 U. S. 192, 12 S. Ct. 806, 36 L. Ed. 672; *Id.*, 12 S. Ct. 809, 36 L. Ed. 676, 145 U. S. 205, affirming judgment 17 A. 179, 1 Monag. 45.

The provision of Act Ind. March 6, 1891, in regard to taxation of railroad property, that rolling stock shall be listed and taxed in the several counties in the proportion that the main track used or operated in such county bears to the length of the main track used or operated by the company, in connection with the requirement of a statement of the amount of capital stock and indebtedness, is not invalid as requiring assessment and valuation of property outside the state, as the intent of the act to

reach simply property of the railroad company within the state is obvious from its other provisions and its general scope, and it does not require the valuation of such property to be determined absolutely on a mileage basis.—*Pittsburgh, C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031; *Indianapolis & V. R. Co. v. Same*, 154 U. S. 438, 14 S. Ct. 1114, 38 L. Ed. 1040, affirming judgment 133 Ind. 625, 33 N. E. 432.

Act Pa. June 7, 1879, imposing a tax on the gross receipts of transportation companies for tolls and transportation, is not, in so far as it imposes a tax on tolls paid by a company engaged in interstate transportation to another company for the use of its railroad in the state, an interference with interstate commerce.—*New York, L. E. & W. R. Co. v. Commonwealth of Pennsylvania*, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043, affirming judgment 145 Pa. 38, 22 Atl. 212.

Interstate commerce is not taxed by taxing the capital stock of a bridge company which owns an interstate bridge, but does not transact any interstate business over it. Judgment, 52 N. E. 117, 176 Ill. 267, affirmed.—*Keokuk & H. Bridge Co. v. People of State of Illinois*, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299.

An unconstitutional interference with interstate commerce is not made by the tax on transfers of corporate stock imposed by Laws N. Y. 1905, c. 241, as applied to a sale in New York, between two nonresidents, of the stock of foreign railway corporations. Order (1906) 77 N. E. 970, 184 N. Y. 431, affirmed.—*People of State of New York ex rel. Hatch v. Reardon*, 27 S. Ct. 188, 204 U. S. 152, 51 L. Ed. 415, 9 Ann. Cas. 736.

Tax imposed under Laws Colo. 1907, p. 548, on capital stock of foreign railway company, held invalid under the commerce clause of the federal Constitution.—*Atchison, T. & S. F. Ry. Co. v. O'Connor*, 32 S. Ct. 216, 223 U. S. 280, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

Taxation of shares in foreign corporations owned by citizens under Burns' Ann. St. Ind. 1908, §§ 10,143, 10,233, 10,234, while shares in domestic corporations are only taxable when property of the corporation is not exempt, does not violate commerce clause of the Constitution.—*Darnell v. State of Indiana*, 33 S. Ct. 120, 226 U. S. 390, 57 L. Ed. 267, affirming judgment 90 N. E. 769, 174 Ind. 143.

☞75. Duties, imports, and excises.

See 10 Cent. Dig. Commerce, §§ 54-70.

☞76. — Revenue measures in general.

See 10 Cent. Dig. Commerce, §§ 54-70, 90.

Internal Revenue Act 1898, Schedule A, par. 2 (30 Stat. 458), taxing sales at exchanges, boards of trade, etc., and requiring the execution and delivery by the seller to the buyer of a written bill or memorandum showing the date, seller's name, amount of sale, and the matter or thing sold, to which should be attached revenue stamps, in value equal to the tax on the sale, is not invalid as an illegal interference with commerce within the states, in requiring a written note or memorandum of the contract not required by the state laws, since the tax is not on the memorandum, which is required merely to identify the sale and furnish a means for the collection of the tax, which, in the manner provided, does not interfere with internal state commerce. Order (C. C.) 89 F. 144, affirmed.—*Nicol v. Ames*, 19 S. Ct. 522, 173 U. S. 509, 43 L. Ed. 786.

☞77. — Imports or exports.

See 10 Cent. Dig. Commerce, §§ 61-70.

Laws Md. 1864, c. 346, § 41, as amended by Laws 1870, c. 291, requiring tobacco exported

from the state to be inspected, but providing that tobacco packed at the place where grown shall be exempt from such inspection, is not a law levying a duty on exports.—*Turner v. State of Maryland*, 2 S. Ct. 44, 107 U. S. 38, 27 L. Ed. 370.

Inspection laws and the words "imports and exports," have reference to property, and not to persons.—*People of State of New York v. Compagnie Generale Transatlantique*, 2 S. Ct. 87, 107 U. S. 59, 27 L. Ed. 383, affirming judgment (C. C.) 10 F. 357.

The provision of Const. art. 1, § 10, cl. 2, that "no state shall, without the consent of congress, lay any imposts or duties upon imports or exports," has reference to goods brought from or carried to foreign countries alone, and not to goods transported from one state to another.—*Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257.

A general tax laid by a state upon all property alike cannot be construed as a duty on exports, within the prohibition of that clause, when falling upon goods not then intended for exportation, when they afterwards happen to be exported.—*Id.*

Where logs cut in the forests of New Hampshire are deposited at a point therein to await transportation to Maine, they are still a part of the wealth of the state, though owned by persons residing in Maine; and a tax levied on them by the town where deposited is not invalid, as being in violation of Const. art. 1, § 9, par. 5, prohibiting any tax or duty to be laid on articles exported from any state.—*Coe v. Town of Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715.

The acts of congress of July 20, 1868 (15 Stat. 157), and June 6, 1872 (17 Stat. 254), so far as they relate to manufactured tobacco intended for exportation, do not impose a tax or duty on exports, within the meaning of that clause of the constitution which declares that "no tax or duty shall be laid on articles exported from any state." The stamp thereby required was a means devised for the prevention of fraud, by separating and identifying the tobacco intended for exportation, thus relieving it from the taxation to which other tobacco was subjected. The proper fees accruing in the due administration of the laws, and regulations necessary for the protection of the government against imposition and frauds likely to be committed under the pretext of exportation, are, in no sense, a duty on exports. They are simply the compensation given for services properly rendered.—*Turpin v. Burgess*, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988.

Act La. 1888, No. 147, providing that the governor shall appoint two coal gaugers to gauge any coal or coke boat or barge in the state, and ascertain the number of bushels in each load; that no boat load of coal or coke shall be sold in the state until gauged, etc., when applied to boat loads of coal brought from a foreign state on the navigable waters of the United States, is not in conflict with the constitution, prohibiting the states from laying imposts or duties on imports or exports.—*Pittsburg & S. Coal Co. v. State of Louisiana*, 156 U. S. 590, 15 S. Ct. 459, 39 L. Ed. 544.

The stamp tax imposed on a foreign bill of lading by Act Cong. June 13, 1898, c. 448, § 6, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2291], is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, prohibited by Const. U. S. art. 1, § 9.—*Fairbank v. United States*, 21 S. Ct. 648, 181 U. S. 283, 45 L. Ed. 862.

The imposition, under the sanction of Act June 6, 1896, c. 337, § 9, 29 Stat. 253 [U. S.

Comp. St. 1901, p. 2236], of the same manufacturing tax on filled cheese manufactured for export, and in fact exported, as upon other filled cheese, is not obnoxious to the prohibition of Const. U. S. art. 1, § 9, par. 5, against the levy of a tax or duty on articles exported from any state.—*Cornell v. Coyne*, 24 S. Ct. 383, 192 U. S. 418, 48 L. Ed. 504.

Only articles imported from, or exported to, foreign countries, are within the purview of Const. U. S. art. 1, § 10, forbidding any state, without the consent of Congress, to lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. Judgment (N. M. 1904) 78 P. 74, affirmed.—*Territory of New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co.*, 27 S. Ct. 1, 203 U. S. 38, 51 L. Ed. 78.

The mere incidental effect upon exports which may be produced by applying to a shipment from an interior point of the United States to a foreign port the provisions of *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates, does not render such provisions repugnant to Const. U. S. art. 1, § 9, par. 5, forbidding the levying of export taxes or duties.—*Armour Packing Co. v. United States*, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681; *Swift & Co. v. Same*, *Id.*; *Morris & Co. v. Same*, *Id.*; *Cudahy Packing Co. v. Same*, *Id.* Affirming judgment (1907) 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; *Chicago, B. & Q. Ry. Co. v. Same*, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment (C. C. A. 1907) 157 F. 830, 85 C. C. A. 194.

A state cannot tax German warehouse receipts, valuing them at the value of the whisky they represent, where it cannot tax the whisky itself, either because it was exported from the United States or because of its situs. Judgment (1907) *Commonwealth v. Selliger*, 98 S. W. 1040, 39 Ky. Law Rep. 451, reversed.—*Selliger v. Commonwealth of Kentucky*, 29 S. Ct. 449, 213 U. S. 200, 53 L. Ed. 761.

Stamp tax assessed under War Revenue Act June 13, 1898, § 25, on charter parties for carriage of goods from state ports to foreign ports, held a violation of Const. U. S. art. 1, § 9, forbidding tax or duty on articles exported.—*United States v. Hvoslef*, 35 S. Ct. 459, 237 U. S. 1, 59 L. Ed. 813, Ann. Cas. 1916A, 288, affirming judgment (D. C.) *Hvoslef v. United States*, 217 F. 680.

Stamp tax on charter parties under War Revenue Act June 13, 1898, § 25, is a violation of Const. U. S. art. 1, § 9, as a duty on exports, though the goods were not on the vessel when the charter party was made.—*Id.*

The stamp tax imposed under Act June 13, 1898, on marine policies, held invalid as being a tax on exportation, in violation of Const. U. S. art. 1, § 9.—*Thames & Mersey Marine Ins. Co. v. United States*, 35 S. Ct. 496, 237 U. S. 19, 59 L. Ed. 821, Ann. Cas. 1915D, 1087, reversing judgment (D. C.) 217 F. 685.

78. — Tonnage.

See 10 Cent. Dig. Commerce, §§ 54-60.

An ordinance of a city requiring keepers of ferries to pay an annual license tax of a fixed sum for each ferryboat plying between the city and a point in another state does not impose a tonnage tax, within Const. U. S. art. 1, § 10.—*Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 2 S. Ct. 257, 27 L. Ed. 419.

The fact that wharfage collected by a city for the use of a wharf which it has built and owns is regulated by the tonnage of the vessels, and is exorbitant in amount, will not render its collection a violation of Const. art. 1, § 10,

prohibiting a tonnage tax by the states, and of Rev. St. § 4220, in pursuance thereof.—*Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 S. Ct. 732, 27 L. Ed. 584.

The requirement of Act La. July 1, 1882, that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, and the ports from which she came, the fee to be fixed by the character and not the size of the vessel, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax, within the meaning of the constitution prohibiting the imposition of a tonnage tax by the states.—*Morgan's Louisiana & T. R. & S. S. Co. v. State Board of Health*, 118 U. S. 455, 6 S. Ct. 1114, 30 L. Ed. 237.

The ordinance for the government of the territory of the United States northwest of the Ohio river, passed July 13, 1787, cannot control or limit the authority of a state after its admission; and the fourth section, declaring that the navigable waters leading into the Mississippi, and the carrying places between the same, shall be common highways, and forever free, does not incapacitate the state of Illinois to levy tonnage duties for a canal and dam it has constructed in improving the Illinois river.—*Huse v. Glover*, 119 U. S. 543, 7 S. Ct. 313, 30 L. Ed. 487, affirming (C. C.) 15 F. 292, 11 Biss. 550.

Such a toll is not in violation of the clause in the constitution prohibiting the imposing of tonnage duty by a state without the consent of congress, since it is in no sense a hindrance or impediment to free commerce.—*Id.*

That a surplus not used in keeping the locks in repair, or in collecting tolls, goes into the state treasury, does not alter the character of the toll as a compensation and not a tax.—*Id.*

80. Creation of or exemption from civil liabilities or remedies.

Laws Kan. 1891, c. 201, giving a right of action for damages to persons injured by the communication of Texas fever to their cattle, and prescribing a rule of evidence in certain cases, is not a regulation of interstate commerce, so as to be void under the federal constitution. Judgment 44 P. 632, 56 Kan. 694, affirmed.—*Missouri, K. & T. Ry. Co. v. Haber*, 18 S. Ct. 488, 109 U. S. 613, 42 L. Ed. 878.

A lien given by state statute on logs cut in another state for surveying and scaling them by the surveyor general while in a log boom does not constitute a burden on interstate commerce, but is a lawful charge imposed by the state for furnishing additional facilities for navigation of a water way.—*Lindsay & Phelps Co. v. Mullen*, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

The refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], making it obligatory to provide proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines. Judgment *Hughes v. Pennsylvania R. Co.*, 51 A. 990, 202 Pa. 222, 63 L. R. A. 513, 97 Am. St. Rep. 713, affirmed.—*Pennsylvania R. Co. v. Hughes*, 24 S. Ct. 132, 191 U. S. 477, 48 L. Ed. 268.

Applying to interstate transportation the provisions of Act Pa. April 4, 1863, restricting, as against a railway company, the rights of persons injured in the course of their employment in or about the railroad to those which an employé of the railway company would have under like circumstances, does not make such statute repugnant to the commerce clause of the federal Constitution. Judgment (1905) 76 N. E. 1129, 72 Ohio St. 659, affirmed.—*Martin v.*

Pittsburg & L. E. R. Co., 27 S. Ct. 100, 203 U. S. 284, 51 L. Ed. 184, 8 Ann. Cas. 87.

Civ. Code S. D. §§ 883, 885, under which the right of a foreign corporation to enforce payment in a state court of the price of merchandise sold within the state in interstate commerce is conditioned on compliance with the requirement that such foreign corporation, before it can sue, must appoint a resident agent for service of process and file a copy of such appointment and its charter and pay the fees therefor, are an unconstitutional burden on interstate commerce.—*Sioux Remedy Co. v. Cope*, 35 S. Ct. 57, 235 U. S. 197, 59 L. Ed. 193, reversing judgment 133 N. W. 683, 28 S. D. 397.

—81. Execution of judicial process.

See 10 Cent. Dig. Commerce, § 46.

Sums due to a foreign railway carrier from other carriers as the former's share of freight on interstate shipments may be garnished under the state laws, despite the provisions of the interstate commerce act and of Rev. St. § 5258 (U. S. Comp. St. 1901, p. 3564), securing continuity of transportation.—*Davis v. Cleveland, C., C. & St. L. Ry. Co.*, 30 S. Ct. 463, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

Cars owned by a foreign railway company, which have temporarily come into the state in the course of interstate transportation, through the agency of other carriers, are subject to attachment under the state laws, despite the provisions of the interstate commerce act and of Rev. St. § 5258 (U. S. Comp. St. 1901, p. 3564), securing continuity of transportation.—*Id.*

A foreign corporation engaged in interstate commerce is not for that reason immune from service of process under the laws of the state in which it is carrying on business.—*International Harvester Co. of America v. Commonwealth of Kentucky*, 34 S. Ct. 944, 234 U. S. 579, 58 L. Ed. 1479, affirming judgment *Same v. Commonwealth*, 145 S. W. 393, 147 Ky. 655.

—82. Punishment of offenses against commerce.

See 10 Cent. Dig. Commerce, § 47.

Congress, under its authority to define and punish offenses against the law of nations and to regulate commerce with foreign nations, may provide for punishing as a crime the counterfeiting within the United States of the notes of foreign banks or corporations, although such notes are not the issue of the foreign government.—*United States v. Arjona*, 120 U. S. 479, 7 S. Ct. 628, 30 L. Ed. 728.

Under the powers given to congress by Const. art. 1, § 8, to regulate commerce between the states and to establish post offices and post roads, and exercised by that body in various acts, the national government may remove all obstructions to interstate commerce and the transportation of the mails, either by force operating through the executive or by process emanating from the courts.—*In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092.

IV. INTERSTATE COMMERCE COMMISSION.

Delegation of legislative powers, see Constitutional Law, —62.

Dismissal of appeal, see Appeal and Error, —781.

Due process of law, see Constitutional Law, —298, 318.

Exclusive or concurrent jurisdiction to prevent enforcement of orders, see Courts, —489.

Judicial notice of decision, see Evidence, —48.

Judicial power to set aside orders, see Constitutional Law, —73.

Mandamus to commission, see Mandamus, —73.

Regulation of rates, see Carriers, —32.

—83. Creation and organization.

See 10 Cent. Dig. Commerce, § 137.

The language of the interstate commerce act, in the sections creating the commission (24 Stat. 379, §§ 11, 17), and providing that it may apply by petition to the circuit court sitting in equity for the purpose of enforcing its orders (section 16), implies an intention on the part of congress to make it a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 F. 948, 6 C. C. A. 653.

—84. Compensation and expenses.

Substantial compliance with the requirements of the comptroller of the treasury that the original telegrams relating to the business of the interstate commerce commission, or copies thereof, or certificates that such telegrams are of a confidential nature, shall accompany telegraph vouchers for which credit is asked, is made by an order of the commission, filed by the secretary with his accounts, which directs him to disregard such requirement as to copies of telegrams, and declares that such messages are so far confidential as to justify the refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest. Judgment, 36 Ct. Cl. 599, affirmed.—*United States v. Moseley*, 23 S. Ct. 90, 187 U. S. 322, 47 L. Ed. 198.

—85. Authority and functions in general.

See 10 Cent. Dig. Commerce, § 138.

If the commission, instead of confining its action to redressing, on complaint made by a particular person, firm, corporation, or locality, some specific disregard by common carriers of the provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce and the welfare of all to be affected, as well the carriers as the traders and consumers of the country. If it appears that this would require the commission to enter upon so wide a field of investigation as to preclude it from framing general orders at all, this result would seem to show that, in attempting to make such orders, it was exercising legislative powers which are not conferred upon it by the statute.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 F. 948, 6 C. C. A. 653.

A state carrier which has subjected itself to the control of the interstate commerce commission by entering into the carriage of interstate freights under through bills of lading cannot limit that control, in respect to interstate traffic, to certain points or stations on its road, by means of a notice to connecting carriers, requesting them not to issue bills of lading to stations other than those named in the notice; and it is within the jurisdiction of the commission to determine whether such carrier, in charging a higher rate for a shorter than for a longer haul, was or was not transporting the property under "substantially similar circumstances and conditions."—*Cincinnati, N. O. & T. P. Ry.*

Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935.

The interstate commerce commission has no express power to fix maximum rates, nor is such power implied from its power to pass upon the reasonableness of existing rates; and subject to the two prohibitions that charges shall not be unjust or unreasonable, and that there shall not be unjust discrimination between persons or traffic similarly circumstanced, the act leaves common carriers free, as at common law, to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their interests upon the same principles which are adopted in other trades and pursuits.—Id.

The powers of the interstate commerce commission are judicial and administrative, but not legislative; and it has no power, after it has determined judicially that an existing rate of tariff charged by a carrier is unreasonable, to prescribe a rate to control in the future, and to enforce its order by proceedings in mandamus.—Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 17 S. Ct. 896, 167 U. S. 479, 42 L. Ed. 243, certifying and determining questions (C. C.) 76 F. 183.

The interstate commerce commission has no power to prescribe rates, either maximum, minimum, or absolute; nor can it effect the same result indirectly, by first determining what were reasonable and just rates in the past, and then procuring from the courts a peremptory order that in the future the carriers shall follow those rates.—Interstate Commerce Commission v. Alabama Midland Ry. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414, affirming decree 74 F. 715, 21 C. O. A. 51.

An order of the Interstate Commerce Commission, based on a finding that the action of certain railroad companies in changing their classification by advancing hay and straw in car loads from the sixth to the fifth class was unlawful, commanding them to cease and desist "from classifying hay and straw in car loads as fifth-class freight, and from charging and exacting fifth-class rates for the transportation of such commodities in car load quantities," and requiring them "to wholly cease and desist * * * from failing and neglecting to properly classify hay and straw in car loads as sixth-class freight, * * * and from failing and neglecting to apply sixth-class rates for the transportation of hay and straw when shipped in car loads," is invalid as an attempt to fix rates and beyond the power of the commission. Decree (C. C.) Interstate Commerce Commission v. Lake Shore & M. S. Ry. Co., 134 F. 942, affirmed.—Interstate Commerce Commission v. Lake Shore & M. C. Ry. Co., 26 S. Ct. 766, 202 U. S. 613, 50 L. Ed. 1171.

The Interstate Commerce Commission is acting within its powers under the act to regulate commerce in ordering carriers to desist from further enforcing a classification by percentage of common soap in less than car-load lots, operating throughout official classification territory, which it finds has brought about a general disturbance in relations previously existing in that territory, and has created discriminations and preferences among manufacturers and shippers of the commodity, and between localities in such territory. Decree, Interstate Commerce Commission v. Cincinnati, H. & D. Ry. Co. (C. C. 1905) 146 F. 559, affirmed.—Cincinnati, H. & D. Ry. Co. v. Interstate Commerce Commission, 27 S. Ct. 648, 206 U. S. 142, 51 L. Ed. 995.

An order of the Interstate Commerce Commission commanding a railway company to desist from its practice not to take into account the company's fuel cars in the daily distribution of coal cars in times of car shortage to the bi-

tuminous coal mines on its line, and requiring it for a future period of two years to count such cars against the share of the mine receiving them, is within the authority delegated by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), upon complaint duly made, to declare a rate or practice affecting rates illegal, and to determine and prescribe for a term not exceeding two years what will be a just and reasonable rate, and what regulation or practice in respect to transportation is just, fair, and reasonable thereafter to be followed.—Decree, Chicago & A. R. Co. v. Interstate Commerce Commission (C. C. 1908) 173 F. 930, reversed.—Interstate Commerce Commission v. Illinois Cent. R. Co., 30 S. Ct. 155, 215 U. S. 452, 54 L. Ed. 280 and Same v. Chicago & A. R. Co., 30 S. Ct. 163, 215 U. S. 479, 54 L. Ed. 291.

Authority to regulate the distribution of a railway company's fuel cars in times of car shortage to the bituminous coal mines along its line was delegated to the Interstate Commerce Commission by the act to regulate commerce (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as a means of prohibiting the unjust preferences or undue discriminations forbidden by section 3 of that act.—Id.

An order of the Interstate Commerce Commission forbidding a carrier to give an undue preference in the use of its wharves at a seaport to an exporter of cotton seed products is not a regulation of purely intrastate or purely foreign commerce, which would be beyond the power of the commission, where the cotton seed products purchased by him, whether at points within or without the state, are all destined for export, and the concentration and manufacture of cotton seed cake into meal on the wharves are but incidents in the transshipment of the products in export trade.—Southern Pac. Terminal Co. v. Interstate Commerce Commission, 31 S. Ct. 279, 219 U. S. 498, 55 L. Ed. 310.

A corporation created to carry on, conformably to a municipal ordinance and a confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport and to furnish terminal facilities for a railway and steamship system of which it forms a part and by which it is controlled through a holding company, is a common carrier, and as such is subject to the jurisdiction of the Interstate Commerce Commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences.—Id.

An order of the Interstate Commerce Commission setting aside new rates on lumber from Willamette Valley points to San Francisco and bay points, and restoring substantially the old rates, is void as beyond its powers, where, from the record and the opinion of the commission, and from the express exclusion of Portland from the benefit of the reduced rate, and the reasons assigned for such exclusion, it is clear that the commission was not exercising its authority to condemn unjust and unreasonable rates and fix reasonable ones, but was acting upon the assumption that it had the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low, for the purpose of encouraging the industry, to a higher rate which is not in itself unjust or unreasonable.—(1911) Southern Pac. Co. v. Interstate Commerce Commission, 31 S. Ct. 288, 219 U. S. 433, 55 L. Ed. 283, reversing decree (C. C. 1910) 177 F. 963.

Authority to require the secretary or similar officer of the carriers subject to Act March 4, 1907, c. 2989, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of employes, to make monthly reports under oath, showing the instances where employes subject to the act have rendered excess

service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect in lieu of the form to be used in detailing excess service, was conferred upon the Interstate Commerce Commission by the provision of section 4, empowering it to call to its aid in the enforcement of the act "all powers granted to it," when read in connection with Act June 18, 1910, c. 309, § 14, 36 Stat. 555, authorizing the Commission to require the carriers to file periodical or special reports under oath concerning any matter about which it is by law authorized or required to keep itself informed, or which it is required to enforce.—*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 S. Ct. 621, 221 U. S. 612, 55 L. Ed. 878.

Confining the allowance by a carrier to the owner of an elevator for elevating grain in transit in which he has an interest, to such grain as shall be reshipped within ten days, is within the power of the Interstate Commerce Commission.—(1911) *Interstate Commerce Commission v. Dittenbaugh*, 32 S. Ct. 22, 222 U. S. 42, 56 L. Ed. 83, modifying decree (C. C. 1910) *F. H. Peavey & Co. v. Union Pac. R. Co.*, 176 F. 409.

Fixing rates under substantially similar traffic conditions so as to allow a higher rate for a shorter route is not so palpably unjust and unreasonable as to be beyond the substance, if not beyond the form, of the power of the Interstate Commerce Commission, where the commission was simply maintaining the same ratio of difference as that made by the carriers themselves.—*Interstate Commerce Commission v. Union Pac. R. Co.*, 32 S. Ct. 108, 222 U. S. 541, 56 L. Ed. 308.

Interstate Commerce Commission did not exceed its authority under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, in prescribing a uniform system of accounting and calling for annual reports of common-carriers by water on the Great Lakes engaged in transportation of passengers and property, partly by railroad and partly by water, under a joint arrangement.—(1912) *Interstate Commerce Commission v. Goodrich Transit Co.*, 32 S. Ct. 436, 224 U. S. 194, 56 L. Ed. 729, reversing judgment (Com. C. 1911) *Goodrich Transit Co. v. Interstate Commerce Commission*, 190 F. 943.

Corporations organized under state laws, engaged in interstate commerce, are subject to control by Interstate Commerce Commission under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, relating to uniform system of accounting and annual reports.—Id.

Authority of the Secretary of the Interior to review railway rates in Alaska, conferred on him by Act May 14, 1898, § 2, was superseded by the amendment of June 29, 1906, to the interstate commerce act, giving the Interstate Commerce Commission power to prescribe rates.—(1912) *Interstate Commerce Commission v. United States ex rel. Humbolt S. S. Co.*, 32 S. Ct. 556, 224 U. S. 474, 56 L. Ed. 849, affirming judgment (1911) *United States v. Interstate Commerce Commission*, 37 App. D. C. 266.

Section 15 of the Interstate Commerce Act, as amended by Act June 29, 1906, does not confer on the Interstate Commerce Commission power to make an order fixing rates, unless on a hearing there is substantial evidence to sustain it.—(Com. C.) *Louisville & N. R. v. Interstate Commerce Commission*, 195 F. 541, decree reversed *Interstate Commerce Commission v. Louisville & N. R. Co.*, 33 S. Ct. 185, 227 U. S. 88, 57 L. Ed. 431.

An order made by the Interstate Commerce Commission prescribing reduced rates to be charged by the Louisville & Nashville Railroad between certain points held beyond its powers

and invalid, as not supported by any substantial evidence showing that the rates established by the company were unjust or unreasonable.—Id.

Street railroads carrying passengers across a state line are not governed by the Interstate Commerce Act of Feb. 4, 1887, which applies to carriers engaged in transportation of passengers or property by railroad.—*Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 33 S. Ct. 890, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, reversing decree (Com. Ct.) 191 F. 40.

The authority of the Interstate Commerce Commission under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, prescribing a system of accounting for carriers, is not exceeded because it tends to control the conduct of the carrier as a public servant in interstate commerce.—*Kansas City Southern R. Co. v. United States*, 34 S. Ct. 125, 231 U. S. 423, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1, affirming decree (Com. Ct.) 204 F. 641.

The regulations of the Interstate Commerce Commission adopted under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, are not an abuse of power because they reject the theory that the cost of property abandoned on a permanent improvement should remain in the property account, rather than be charged to operating expenses.—Id.

The powers of the Interstate Commerce Commission under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, were not abused by regulations under which a railroad cannot carry into its property account the full cost of reducing grades but is required to deduct from such costs the replacement cost of portions of track less salvage, carrying the difference only into the property account and charging the replacement cost to operating expenses.—Id.

A carrier is not relieved from compliance with the regulations of interstate commerce adopted under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, because they reject the theory that the cost of property abandoned on permanent improvement should remain in property account because they were promulgated after the carrier had issued bonds to finance such improvement.—Id.

Judicial belief that the cost of property abandoned as an incident to permanent improvements should be charged to accumulated surplus or to profit and loss, does not authorize a holding that the Interstate Commerce Commission abused their powers given by Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, because under these regulations the cost must be charged to operating expenses.—Id.

The Interstate Commerce Commission, acting under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, did not abuse its powers because a railway company under its regulations on erecting a new shop and permanent plant on a new location cannot charge the value of the property thereupon abandoned against the accumulated surplus in the profit and loss account, but must charge the estimated replacement cost less salvage to operating expenses.—Id.

Carriers of citrus fruits from California to Eastern points may be compelled by the Interstate Commerce Commission to permit the consignors to ice the car bunkers at their warehouses, until the carriers shall offer to furnish ice at the time and place needed at practically the same cost.—*Atchison, T. & S. F. R. Co. v. United States*, 34 S. Ct. 291, 232 U. S. 199, 58 L. Ed. 568, affirming decree (Com. C.) 204 F. 647.

The withdrawal by carriers' tariffs of shippers' pre-cooling privileges for which a fixed

charge was made and approved by order of the Interstate Commerce Commission, affects a rate within Act Feb. 4, 1887, § 15, as amended by Act June 29, 1906, § 4, and the commission is acting within its powers in ordering the cancellation of the withdrawal and requiring the carriers to conform to the prior order.—Id.

The Interstate Commerce Commission can determine the reasonableness of the Denver & Rio Grande Railroad Company's freight rate from Pueblo to Leadville in Colorado on beer received at St. Louis by the Missouri Pacific Railroad to be delivered in Leadville, though no through rate or through route had been established, and though the freight was received by the first named carrier at Pueblo as an independent shipment and was forwarded as an intrastate shipment.—*Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 34 S. Ct. 641, 233 U. S. 479, 58 L. Ed. 1055, reversing judgment *Denver & R. G. R. Co. v. Baer Bros. Mercantile Co.*, 187 F. 485, 109 C. C. A. 337.

The question whether there is at any point an additional service performed in the receipt and delivery on industrial spur tracks within the switching limits in a city of car load freight in interstate commerce, justifying an extra charge in addition to the line-haul rate to or from such city, or whether there is a substituted service like that included in the line-haul rate, is a question of fact on which the Interstate Commerce Commission can pass.—*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 814, 234 U. S. 294, 58 L. Ed. 1319, reversing orders (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission*, 188 F. 229, 929; *Same v. Southern Pac. Co.*, 34 S. Ct. 820, 234 U. S. 315, 58 L. Ed. 1329, reversing order (Com. C.) *Southern Pac. Co. v. Interstate Commerce Commission*, 188 F. 241.

The authority of the Interstate Commerce Commission to remove discriminations against interstate traffic under Act Feb. 4, 1887, includes power to control intrastate rates by a carrier under state authority, necessary to remove resulting unjust discrimination against interstate commerce, notwithstanding the proviso in section 1 of that act that its provisions shall not apply to purely intrastate traffic.—*Houston, E. & W. T. R. Co. v. United States*, 34 S. Ct. 833, 234 U. S. 342, 58 L. Ed. 1341, affirming decrees (Com. C.) *Texas & P. Ry. Co. v. Same*, 205 F. 380, and *Houston E. & W. T. Ry. Co. v. Same*, Id. 391.

The omission of the substantially similar circumstances and conditions clause from the long and short haul provisions of section 4, Act Feb. 4, 1887, made by the amendatory Act June 18, 1910, § 8, takes from carriers their power to determine whether conditions are substantially dissimilar so as to justify the charge of a lesser rate for a longer than for a shorter haul, and vests in the Interstate Commerce Commission the power to determine, in view of the preference and discrimination clauses of sections 2 and 3, whether a petitioning carrier shall be relieved from the operation of the long and short haul clause.—*United States v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; *Same v. Union Pac. R. Co.*, 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. United States*, 191 F. 856.

The authority of the Interstate Commerce Commission on an application by carriers under Act Feb. 4, 1887, § 4, as amended by Act June 18, 1910, § 8, for relief from the long and short haul clause of that section, extends to establishing by percentages the relation to be maintained between the lower rate for longer hauls and the higher rate to intermediate points, and to adopting zones of influence for the purpose of establishing percentages which, as to such zones, vary on the basis of the influence of the competition in such areas.—Id.

Right of examiners for Interstate Commerce Commission to inspect carriers' accounts and memoranda was not conferred by Act Feb. 4, 1887, § 12, dealing with evidence in certain cases.—*United States v. Louisville & N. R. Co.*, 35 S. Ct. 363, 236 U. S. 318, 59 L. Ed. 598, affirming judgment (D. C.) 212 F. 486.

Compulsory inspection of correspondence of interstate carrier as to its business was not contemplated by Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7; nor is there anything in the use of the word "documents" in the amendment of that section by Act Feb. 25, 1909, making such section include correspondence.—Id.

Right to inspect accounts, etc., of interstate carriers given to Interstate Commerce Commission by Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, was not limited to such accounts, etc., as were made after the passage of the act.—Id.

Unjust discrimination in matter of coal car distribution to a mine owner may be redressed by Interstate Commerce Commission, where the coal, although sold f. o. b. cars at the mines, was to be transported to other states.—*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 35 S. Ct. 896, 238 U. S. 456, 59 L. Ed. 1406, reversing judgment *Clark Bros. Coal Mining Co. v. Pennsylvania R. Co.*, 88 A. 754, 241 Pa. 515.

The ascertainment of damages by the carrier's rules as to car distribution, which are unduly discriminatory, held within the Interstate Commerce Commission's authority, under Act Feb. 4, 1887, §§ 8, 9, 13, 16.—Id.

86. Conduct of proceedings in general.

See 10 Cent. Dig. Commerce, § 140.

In considering questions of the reasonableness of rates, the commission is to consider not only the wishes and interests of the shippers and merchants of large cities, but also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 F. 948, 6 C. C. A. 653.

The question of what constitutes an undue preference or advantage under the third section of the act is a question not of law, but of fact; and, before the commission can adjudge that a carrier has acted unlawfully, it must ascertain the facts. In so doing it must consider, among others, those facts and matters which carriers, apart from the statute, would treat as calling for a preference or advantage in the particular case.—Id.

In considering questions of discrimination between localities, the commission must regard, not only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars, but also the welfare of the locality to which the goods are sent. The same matters are also to be considered in the determination of questions arising under the provisions of the fourth section, relating to long and short hauls.—Id.

87. Complaints and investigations.

See 10 Cent. Dig. Commerce, § 139.

In determining questions of the reasonableness of rates, and of discrimination, in respect to traffic originating in foreign countries, the commission and the courts may and should take into consideration, as constituting dissimilar conditions, circumstances existing beyond the seaboard of the United States (such as competition by ocean freights), as well as conditions prevailing within the United States.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*,

162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree Interstate Commerce Commission v. Texas & P. Ry. Co., 57 F. 948, 6 C. C. A. 653.

Contracts of railroad companies or coal companies owned by the railroads, which are otherwise relevant and competent, are not inadmissible in evidence in a proceeding before the interstate commerce commission on a complaint charging such companies with violations of Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to regulate commerce, because they are made with third persons not parties to the proceeding. Order (C. C.) Interstate Commerce Commission v. Philadelphia & R. Ry. Co., 123 F. 969, reversed.—Interstate Commerce Commission v. Baird, 24 S. Ct. 563, 194 U. S. 25, 48 L. Ed. 860.

The production of contracts under which railroad companies engaged in interstate carriage of anthracite coal, who had acquired certain collieries whose proprietors were about to build a competing line, guaranteed the stock and bonds issued in payment therefor by a corporation whose charter they had purchased for that purpose, may be compelled in a proceeding before the interstate commerce commission on a complaint charging such railroad companies with violations of Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to regulate commerce, by the pooling of freights and the charging of unreasonable rates in carrying anthracite coal.—Id.

The refusal to produce contracts under which railroad companies engaged in carrying coal from the anthracite regions in Pennsylvania to tidewater, or coal companies owned by the railroads, purchase coal from independent operators engaged in mining in that district, for which payment is made on the basis of a fixed percentage of the average price at certain tide points of coal of the same quality and size, cannot be justified on the ground of irrelevancy, in a proceeding before the interstate commerce commission on a complaint charging the railroad companies with violating Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to regulate commerce, by unfair discrimination and by charging unreasonable and unjust rates in carrying anthracite coal.—Id.

The Interstate Commerce Commission, in making an investigation of a complaint filed by soap manufacturers as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory, had the power, in the public interest, unembarrassed by any supposed admissions contained in the complaint, to consider the whole subject, and the operation of a classification in the entire territory, and also how far its going into effect would be just and reasonable, would create preferences, or would engender discrimination. Decree, Interstate Commerce Commission v. Cincinnati, H. & D. Ry. Co. (C. C. 1905) 146 F. 559, affirmed.—Cincinnati, H. & D. Ry. Co. v. Interstate Commerce Commission, 27 S. Ct. 648, 206 U. S. 142, 51 L. Ed. 995.

Witnesses cannot be required to testify before the interstate commerce commission except in connection with complaints for violation of the interstate commerce act or with the investigation by the Commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of section 12 of that act, giving the Commission power to require testimony "for the purposes of this act," which power cannot be exercised by the Commission in performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers is conducted, nor in connection with the enforcement of the require-

ment of section 20 respecting reports by carriers, nor to aid the Commission in recommending, pursuant to section 21, additional legislation to Congress. Order (C. C.) Interstate Commerce Commission v. Harriman, 157 F. 432, modified.—Harriman v. Interstate Commerce Commission, 29 S. Ct. 115, 211 U. S. 407, 53 L. Ed. 253.

The remedy given by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), on complaint by the shipper to the Interstate Commerce Commission when an interstate railway carrier refuses to establish a switch connection with a lateral, branch line, is exclusive, and the general powers given by other sections of the statute cannot be deemed to authorize a complaint to the commission by the lateral, branch railway company. Decree, Delaware, L. & W. R. Co. v. Interstate Commerce Commission (C. C. 1909) 166 F. 498, affirmed.—Interstate Commerce Commission v. Delaware, L. & W. R. Co., 30 S. Ct. 415, 216 U. S. 531, 54 L. Ed. 605.

Shippers subjected to discriminatory charges for delivery and receipt on industrial spur tracks within the switching limits in a city of car load freight in interstate commerce are not estopped to bring the matter before the Interstate Commerce Commission, because, when making the contracts under which the spur tracks were constructed, the shippers consented to a special charge when freight should be received and delivered thereon.—Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 34 S. Ct. 814, 234 U. S. 294, 58 L. Ed. 1319, reversing orders (Com. Ct.) Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission, 188 F. 229, 929; Interstate Commerce Commission v. Southern Pac. Co., 34 S. Ct. 820, 234 U. S. 315, 58 L. Ed. 1329, reversing order (Com. Ct.) Southern Pac. Co. v. Interstate Commerce Commission, 188 F. 241.

All accrued claims for damages to a shipper through a carrier's violation of Act Feb. 4, 1887, §§ 1, 2, if not barred by state statutes of limitation, were saved, though accruing more than two years before Act June 29, 1906, § 5, amending section 16 of the earlier act.—Meeker v. Lehigh Valley R. Co., 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment Lehigh Val. R. Co. v. Meeker, 211 F. 785, 128 C. C. A. 311.

The year granted by amendment of Act June 29, 1906, § 5, to Act Feb. 4, 1887, § 16, for presentment of claims to Interstate Commerce Commission which accrued before passage of the amendatory act, for damages to a shipper for violation of sections 1 and 2 of the earlier act, must be deemed to have begun to run August 28, 1906.—Id.

Ultimate facts are to be stated by the Interstate Commerce Commission in the report which it must make under Act Feb. 4, 1887, § 14, as amended by Act June 29, 1906, § 3.—Id.

The Interstate Commerce Commission cannot conduct a fishing expedition into the affairs of a stranger to an investigation proceeding for the chance that something discreditable may be disclosed.—Ellis v. Interstate Commerce Commission, 35 S. Ct. 645, 237 U. S. 434, 59 L. Ed. 1036.

The Interstate Commerce Commission cannot enlarge its powers to compel testimony from a corporation not subject to a regulation by the Commission and a stranger to the inquiry.—Id.

Corporate builder and owner of refrigerator and other cars, which he leases to railway companies, has the immunities of an ordinary witness against inquiry into its private business in an investigation by the Interstate Commerce Commission to determine whether the allowances where private cars are used violate

Act Feb. 4, 1887, §§ 1-3, 15, as unduly discriminatory.—Id.

—88. Orders of commission.

See 10 Cent. Dig. Commerce, §§ 139, 141.

An order of the interstate commerce commissioners requiring goods brought from foreign countries under through bills of lading to be carried from the seaboard to interior points at the same rates charged on domestic traffic originating in the seaboard cities cannot be justified on the ground that the interstate commerce act was intended by congress to reinforce the provisions of the tariff laws, or to co-operate with the assumed policy thereof.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 F. 948, 6 C. C. A. 653.

The Interstate Commerce Commission cannot be said to have ordered a reduction in the rates on lumber because of the effect upon the lumber industry of the carriers' action in advancing the rates, where, although the commission considered that subject, its opinion, taken as a whole, affirmatively shows that it confined itself to the exercise of its statutory power to condemn unjust and unreasonable rates and fix reasonable ones.—*Interstate Commerce Commission v. Union Pac. R. Co.*, 32 S. Ct. 108, 222 U. S. 541, 56 L. Ed. 308.

There is no such connection between the subjects of reparation for unreasonable interstate freight rates collected and the fixing of new rates for the future as will render void a reparation order of the Interstate Commerce Commission because of any error in omitting any concurrent jurisdiction fixing future rates.—*Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 34 S. Ct. 641, 233 U. S. 479, 58 L. Ed. 1055, reversing judgment *Denver & R. G. R. Co. v. Baer Bros. Mercantile Co.*, 187 F. 485, 109 C. C. A. 337.

—89. Jurisdiction of courts in advance of or pending proceedings.

A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that Commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violations of the act, conferred by Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159], must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission, and the provision of section 22 [U. S. Comp. St. 1901, p. 3170], that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute. Judgment, *Abilene Cotton Oil Co. v. Texas & P. Ry. Co.* (Tex. Civ. App. 1905) 85 S. W. 1052, reversed.—*Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553, 9 Ann. Cas. 1075.

The rule that an action at law to recover excessive interstate freight charges cannot be maintained in advance of action by the Interstate Commerce Commission will not prevent a federal Circuit Court which has suspended pro-

ceedings on a bill seeking relief from an advance in freight rates, pending action by the Commission, from granting relief in the exercise of its powers under Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], as a court of equity, on a petition filed after the Commission has acted, stating the substance of the findings of the Commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made. Decree, *Tift v. Southern Ry. Co.* (C. C. 1905) 138 F. 753, affirmed.—*Southern Ry. Co. v. Tift*, 27 S. Ct. 709, 206 U. S. 428, 51 L. Ed. 1124, 11 Ann. Cas. 846.

The grievances produced by regulations adopted by a railway company for the distribution of coal cars in times of car shortage to the bituminous coal mines served by it, which are alleged to violate the provisions of the act to regulate commerce (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1907, p. 3155]), prohibiting unjust preferences or undue discriminations, cannot be redressed, in advance of the action of the Interstate Commerce Commission, by mandamus to prohibit the acts complained of and prescribe a rule or regulation for the future, since the provisions of Act March 2, 1889, c. 382, § 10, 25 Stat. 862 (U. S. Comp. St. 1901, p. 3172), authorizing mandamus to compel the furnishing of cars and other facilities for transportation, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to the orders of the Commission, rendered within the lawful scope of its authority, until set aside by the Commission or enjoined by the courts. Judgment, *United States v. Baltimore & O. R. Co.* (1908) 165 F. 113, 91 C. C. A. 147, reversed.—*Baltimore & O. R. Co. v. United States ex rel. Pilcavin Coal Co.*, 30 S. Ct. 164, 215 U. S. 481, 54 L. Ed. 292.

Investigation by the Interstate Commerce Commission and an appropriate finding and order are prerequisite to the right of a shipper to maintain an action to recover from a carrier the excess which he claims to have paid under a regularly established and published rate which is attacked as unjustly discriminatory, notwithstanding the provisions of Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3170), that nothing therein contained "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."—(1912) *Robinson v. Baltimore & O. R. Co.*, 32 S. Ct. 114, 222 U. S. 506, 56 L. Ed. 288, affirming judgment (1908) 63 S. E. 323, 64 W. Va. 406.

A shipper seeking relief for refusal of carrier to accept interstate shipments of intoxicating liquors to local option points may invoke the jurisdiction of the courts without first applying to the Interstate Commerce Commission.—(1912) *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 32 S. Ct. 189, 223 U. S. 70, 56 L. Ed. 355, affirming judgment (1909) 172 F. 117, 96 C. C. A. 322, 40 L. R. A. (N. S.) 798.

Discriminations practiced in the giving or refusing of joint traffic arrangements contrary to the act regulating commerce cannot be redressed by the courts in advance of action by the Interstate Commerce Commission.—*United States v. Pacific & A. Ry. & Nav. Co.*, 33 S. Ct. 443, 228 U. S. 87, 57 L. Ed. 742.

The question whether an undue preference to any locality forbidden by Interstate Commerce Act Feb. 4, 1887, § 3, arose from the operation of the intrastate rate as compared

with an interstate rate, or whether any locality was unreasonably prejudiced, would be for the determination of the Interstate Commerce Commission and not for the courts.—*Simpson v. Shepard*, 33 S. Ct. 729, 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, modifying decree (C. C.) *Shepard v. Northern Pac. Ry. Co.*, 184 F. 765.

Previous action by the Interstate Commerce Commission is not a condition precedent to maintenance of an action under Interstate Commerce Act Feb. 4, 1887, § 8, to recover damage sustained by a shipper who has paid the lawful published freight rates for shipments of free coal, while lower rates resulting from rebates have been allowed other shippers of contract coal at the same time; the published tariffs making no distinction between contract coal and free coal.—*Pennsylvania R. Co. v. International Coal Min. Co.*, 33 S. Ct. 893, 230 U. S. 184, 57 L. Ed. 1448, Ann. Cas. 1915A, 815.

A shipper of coal and coke cannot in advance of action by the Interstate Commerce Commission sue the carrier for damages from rebates given his competitors doing their own hauling to the station, in the form of allowances from the published tariff, which, though naming the rate from the station, has been construed to include the haul from the mine, as such allowances would be unlawful only when unreasonable, and it is a question for the commission notwithstanding Act Feb. 4, 1887, giving a right of action for violations of the act, and section 22, providing that nothing shall alter existing common-law or statutory remedies.—*Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 33 S. Ct. 916, 230 U. S. 247, 57 L. Ed. 1472, modifying judgment (C. C.) 183 F. 908.

Allowing shippers of coal a rebate from published tariff which named the rate as from station to destination, but which was uniformly construed to include the haul from the mine to the station, being forbidden by Act Feb. 4, 1887, § 2, where the carrier does the hauling, previous action by the Commission is not a condition precedent for maintenance by another shipper under sections 8, 9, to recover damages for such illegal allowances to his competitors.—*Id.*

A suit by a shipper to recover damages from a carrier by unlawful distribution of cars and an undue allotment to its competitors, contrary to Act Feb. 4, 1887, § 3, cannot be maintained in advance of the ruling by the Interstate Commerce Commission that the method of distribution was unreasonable.—*Morrisdale Coal Co. v. Pennsylvania R. Co.*, 33 S. Ct. 938, 230 U. S. 304, 57 L. Ed. 1494, affirming judgment 183 F. 929, 106 C. C. A. 269.

A suit against a railway company to recover for its refusal to accept shipments of cross-ties for a point beyond its own line cannot be maintained in the absence of previous action of the Interstate Commerce Commission, when based on the want of any published rate; its position being that such cross-ties were a distinct commodity, not embraced by its filed tariff fixing joint through lumber rates.—*Texas & P. R. Co. v. American Tie & Timber Co.*, 34 S. Ct. 885, 234 U. S. 138, 58 L. Ed. 1255, reversing judgment 190 F. 1022, 111 C. C. A. 673.

Acceptance by a railway company of three interstate car load shipments of cross-ties for a point beyond its own line under its joint through lumber rate does not dispense with previous action by the Interstate Commerce Commission before the shipper may maintain a suit to recover damages for failure to accept further shipments, based on want of any applicable and published rate.—*Id.*

A carrier's insistence as a pretext to prevent an interstate shipment over its line on the ab-

sence of any published rate does not justify a resort by the shipper to the courts, in advance of action by the Interstate Commerce Commission, to recover damages resulting from the carrier's refusal to furnish cars for such shipment.—*Id.*

A state court has jurisdiction without action by Interstate Commerce Commission under Act Feb. 4, 1887, §§ 8, 9, 22, giving shippers new rights but preserving existing ones, which are not affected by Act June 29, 1906, of a suit by a shipper against the interstate carrier to recover damages by failure to furnish cars to a shipper within a reasonable time on demand under *Hurd's Rev. St. Ill.* 1913, c. 114, § 84.—*Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 35 S. Ct. 760, 238 U. S. 275, 59 L. Ed. 1308, affirming judgment *Mulberry Hill Coal Co. v. Illinois Cent. R. Co.*, 100 N. E. 151, 257 Ill. 80.

Shipper, who obtained ruling from Interstate Commerce Commission that distribution of cars for interstate transportation of coal was unjustly discriminatory, cannot sue for damages under state statute, although Commission may not have made its award, since under Act Feb. 4, 1887, § 9, there is no option to resort to a state court in the first instance, and the suit on reparation orders, authorized by section 16, as amended June 18, 1910, either in state or federal court, may be brought only after the Commission's award.—*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 35 S. Ct. 896, 238 U. S. 456, 59 L. Ed. 1406, reversing judgment *Clark Bros. Coal Mining Co. v. Pennsylvania R. Co.*, 88 A. 754, 241 Pa. 515.

Without action by Interstate Commerce Commission a state court has no jurisdiction of action by shippers to recover from interstate carrier sums expended in constructing grain doors or bulkheads in cars furnished for interstate carload shipments in bulk, the interstate rate schedules making no reference to allowances therefor.—*Loomis v. Lehigh Valley R. Co.*, 36 S. Ct. 228, 240 U. S. 43, 60 L. Ed. 517, affirming judgment 101 N. E. 907, 208 N. Y. 312.

◀90. Enforcement or prevention of enforcement by courts of orders of commission.

See 10 Cent. Dig. Commerce, §§ 142-148.

◀91. — Nature and scope of proceedings.

See 10 Cent. Dig. Commerce, § 143.

On application to the courts to enforce an order of the interstate commerce commission which is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the commission to make a further investigation of the facts.—(Ga.) *Interstate Commerce Commission v. Clyde S. S. Co.*, 21 S. Ct. 512, 181 U. S. 29, 45 L. Ed. 729, modifying decree 93 F. 83, 35 C. C. A. 217; (Tenn.) *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 21 S. Ct. 516, 181 U. S. 1, 45 L. Ed. 719, reversing decree 99 F. 52, 39 C. C. A. 413.

The enforcement of an order of the Interstate Commerce Commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a federal Circuit Court if it finds such rule is, for any reason, in violation of Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St.

1901, pp. 3154-3165], although such reason may not have been the one relied upon by the commission itself to invalidate the rule. Decree (C. C.) Interstate Commerce Commission v. Southern Pac. Co., 132 F. 829, reversed.—Southern Pac. Co. v. Interstate Commerce Commission, 26 S. Ct. 330, 200 U. S. 536, 50 L. Ed. 585.

In a proceeding in a Circuit Court under section 16 of the interstate commerce act (Act March 2, 1889, c. 382, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]) to enforce an order of the Interstate Commerce Commission, the court has no power to amend or modify such order, or to sever from the remainder a part which is illegal, but must enforce the same, if at all, in its entirety as made by the commission. Decree (C. C.) Interstate Commerce Commission v. Lake Shore & M. S. Ry. Co., 134 F. 942, affirmed.—Interstate Commerce Commission v. Lake Shore & M. C. Ry. Co., 26 S. Ct. 766, 202 U. S. 613, 50 L. Ed. 1171.

The courts may review the determination of the Interstate Commerce Commission upon the question whether "no reasonable or satisfactory through route exists" within the meaning of Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), conditioning the authority of the commission to establish through routes and joint rates upon the nonexistence of such route.—Interstate Commerce Commission v. Northern Pac. Ry. Co., 30 S. Ct. 417, 216 U. S. 538, 54 L. Ed. 608.

An order of the Interstate Commerce Commission relating to street railroads, made prior to Act June 18, 1910, amendatory of Act Feb. 4, 1887, and therefore without lawful authority, cannot be made effective by the courts as of the date of the amendatory act.—Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission, 33 S. Ct. 890, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, reversing decree (Com. Ct.) 191 F. 40.

The jurisdiction given by Act June 18, 1910, § 1, to the Commerce Court of suits to enjoin orders of the Interstate Commerce Commission, is not defeated so far as an order on application by carriers under section 8 of that act, amending Act Feb. 4, 1887, § 4, for relief against the long and short haul clause of that act is concerned, on the theory that the consequence would be to enjoin a criminal prosecution.—United States v. Atchison, T. & S. F. Ry. Co., 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; Same v. Union Pac. Ry. Co., 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) Atchison, T. & S. F. Ry. Co. v. United States, 191 F. 856.

An order of the Interstate Commerce Commission not unconstitutional and within its authority and supported by evidence cannot be set aside by the courts.—Pennsylvania Co. v. United States, 35 S. Ct. 370, 236 U. S. 351, 59 L. Ed. 616, affirming decree (D. C.) 214 F. 445.

92. — Jurisdiction.

See 10 Cent. Dig. Commerce, § 142.

Any supposed admissions in a complaint filed by soap manufacturers with the Interstate Commerce Commission as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory are ineffectual to deprive a federal Circuit Court, in a proceeding to enforce an order of the Commission directing the carriers to desist from enforcing this classification as to soap in less than car-load lots, of the power to test the validity of such order by the scope of the act to regulate commerce. Decree, Interstate Commerce Commission v. Cincinnati, H. & C. Ry. Co. (U. C. 1905) 146 F. 559, affirmed.—Cincinnati, H. & D. Ry. Co. v. Interstate Commerce Commission, 27 S. Ct. 648, 206 U. S. 142, 51 L. Ed. 995.

The Commerce Court, under Act June 18, 1910, § 3, can enjoin an order of the Commission requiring railroad companies to cease charging lower rates for coal intended for railway consumption than is accorded to other shippers.—Interstate Commerce Commission v. Baltimore & O. R. Co., 32 S. Ct. 742, 225 U. S. 326, 56 L. Ed. 1107, Ann. Cas. 1914A, 504.

The jurisdiction of the Commerce Court, under Judicial Code March 3, 1911, c. 231, § 207, 36 Stat. 1148 (U. S. Comp. St. Supp. 1911, p. 216), of cases to enjoin or set aside any order of the Interstate Commerce Commission, does not confer jurisdiction to redress a complaint based on refusal of Commission to award relief to a shipper against demurrage regulations.—(1912) Procter & Gamble Co. v. United States of America, 32 S. Ct. 761, 225 U. S. 282, 56 L. Ed. 1091, reversing judgment (Com. C. 1911) 188 F. 221.

The Commerce Court has no jurisdiction of a complaint by shippers of refusal of Interstate Commerce Commission to reduce maximum rates to full extent asked.—(1912) Hooker v. Knapp, 32 S. Ct. 769, 225 U. S. 302, 56 L. Ed. 1099, reversing judgments (Com. C. 1911) Same v. Interstate Commerce Commission, 188 F. 242, and (Com. C. 1911) Eagle White Lead Co. v. Same, Id. 256.

The limitation of the jurisdiction of the Commerce Court by Act June 18, 1910, § 1, to that "now possessed" by the Circuit Courts, did not prevent that court from reviewing an order of the Interstate Commerce Commission on an application under section 8 of that act amending Act Feb. 4, 1887, § 4, for relief from the short and long haul clause of that section.—United States v. Atchison, T. & S. F. Ry. Co., 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; Same v. Union Pac. Ry. Co., 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) Atchison, T. & S. F. Ry. Co. v. United States, 191 F. 856.

An order of the Interstate Commerce Commission refusing an application made by carriers under Act June 18, 1910, § 8, amending Act Feb. 4, 1887, § 4, for relief against the long and short haul clause of that section, is not excluded from the revisory power of the Commerce Court.—Id.

93. — Parties.

See 10 Cent. Dig. Commerce, § 144.

In proceeding against a carrier of interstate commerce to enforce an order of the commission, another carrier concerned with the defendant in jointly making the forbidden rate is a proper, but not a necessary, party defendant.—Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree Interstate Commerce Commission v. Texas & P. Ry. Co., 57 F. 948, 6 C. C. A. 653.

95. — Findings of commission, and further proofs.

See 10 Cent. Dig. Commerce, § 145.

The determination of the commission upon questions of discrimination, under the third section, and on questions as to the similarity of circumstances and conditions, as affecting the right to charge a greater amount for a longer than for a shorter haul, under the fourth section, is not conclusive upon the courts; but, when the power of the courts is invoked to enforce the commission's orders, such courts are entitled to determine these questions upon the pleadings and the evidence adduced before the commission, and to hear additional evidence, giving effect, however, to the commission's finding of facts as prima facie evidence of the matters therein stated.—Interstate Commerce Commission v. Alabama Midland Ry. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414, affirming decree, 74 F. 715, 21 C. C. A. 51.

Evidence cannot be weighed by the supreme court, as a matter of first impression, in a suit to enforce an order of the interstate commerce commission, for the purpose of ascertaining whether it establishes such substantial and material competition as justified a carrier in concluding that dissimilarity of circumstance and condition was brought about. *Decree Behlmer v. Louisville & N. R. Co.*, 83 F. 898, 28 C. C. A. 229, reversed.—*Louisville & N. R. Co. v. Behlmer*, 20 S. Ct. 209, 175 U. S. 648, 44 L. Ed. 309.

Findings of the Interstate Commerce Commission that certain through rates are unreasonable in themselves carry with them a presumption of correctness.—(1910) *Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 651, 218 U. S. 88, 54 L. Ed. 946; *Same v. Chicago, B. & Q. R. Co.*, 30 S. Ct. 660, 218 U. S. 113, 54 L. Ed. 959. Reversing decrees *Chicago, R. I. & P. Ry. Co. v. Interstate Commerce Commission* (C. C. 1909) 171 F. 680.

Findings of fact made by the Interstate Commerce Commission in a proceeding for redress for unlawful discrimination in railway rates are not open to review in the courts.—(1911) *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 31 S. Ct. 392, 220 U. S. 235, 55 L. Ed. 448, reversing decree (C. C. 1908) *Delaware, L. & W. R. Co. v. Interstate Commerce Commission*, 166 F. 499.

The courts will not examine the facts on which the Interstate Commerce Commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order.—*Interstate Commerce Commission v. Union Pac. R. Co.*, 32 S. Ct. 108, 222 U. S. 541, 56 L. Ed. 308.

An order of the Interstate Commerce Commission reducing rates cannot be said to have been made without substantial evidence to support it, where, although there is no direct testimony that the old rate was unreasonably high, there were facts in evidence from which experts could have named a rate.—*Id.*

The Interstate Commerce Commission cannot be said to have based its order reducing rates upon a mistake of law in regarding the long maintenance by the carriers of a lower rate while earning dividends as raising a presumption of reasonableness, where the reduced rate fixed by the commission was higher than such earlier rate.—*Id.*

An appeal will not lie to the Commerce Court to review act of the Interstate Commerce Commission in refusing to entertain a petition, upon the ground that the subject-matter was not within the scope of its powers.—(1912) *Interstate Commerce Commission v. United States ex rel. Humbolt S. S. Co.*, 32 S. Ct. 556, 224 U. S. 474, 56 L. Ed. 849, affirming judgment (1911) *United States v. Interstate Commerce Commission*, 37 App. D. C. 206.

The findings of the Interstate Commerce Commission that industrial spur tracks within switching limits in a city were part of the carrier's terminals, and that the receipt and delivery on these tracks of car load freight in interstate commerce was a like service as compared with such receipt and delivery at team tracks and freight sheds within such switching limits, are conclusive on the courts.—*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 814, 234 U. S. 294, 58 L. Ed. 1319, reversing orders (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission*, 188 F. 229, 929; *Interstate Commerce Commission v. Southern Pac. Co.*, 34 S. Ct. 820, 234 U. S. 315, 58 L. Ed. 1329, reversing order (Com. Ct.) *Southern Pac. Co. v. Interstate Commerce Commission*, 188 F. 241.

Findings of the Interstate Commerce Commission on a claim by a shipper because of rebating and unreasonable rates must be presumed, in absence of evidence to the contrary, to have been justified by the evidence.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

Rebuttal presumption established by Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, that findings and order of the Interstate Commerce Commission shall be prima facie evidence of the facts therein stated, does not violate constitutional rights.—*Id.*

Burden is on complainant, attacking existing freight rate, to establish that it is unreasonable in fact.—*Louisville & N. R. Co. v. United States*, 35 S. Ct. 696, 238 U. S. 1, 59 L. Ed. 1177, affirming judgment (D. C.) 216 F. 672.

The ultimate facts, rather than the evidential facts, are to be stated by the Interstate Commerce Commission in report which that Commission, under Act Feb. 4, 1887, § 14, as amended by Act June 29, 1906, must make on investigating a complaint.—*Mills v. Lehigh Valley R. Co.*, 35 S. Ct. 888, 238 U. S. 473, 59 L. Ed. 1414, affirming judgment *Lehigh Valley R. Co. v. Clark*, 207 F. 717, 125 C. C. A. 235.

A report of the Interstate Commerce Commission after investigation of a shipper's complaint held to satisfy requirement of Act Feb. 4, 1887, § 14, as amended by Act June 29, 1906.—*Id.*

§96. — Injunction.

See 10 Cent. Dig. Commerce, § 146.

Only temporary restraining orders of the Commerce Court, issued under Act June 18, 1910, § 3, staying operation of order of the Interstate Commerce Commission, for not more than sixty days, are affected by requirement as to statement of fact as to irreparable damage, and do not apply to a preliminary injunction.—*United States v. Baltimore & O. R. Co.*, 32 S. Ct. 817, 225 U. S. 306, 56 L. Ed. 1100.

The granting by the Commerce Court of an injunction pendente lite, suspending, until determination of the suit, an order of the Interstate Commerce Commission, requiring carriers to desist from alleged discriminatory allowances, is not in excess of its power under Act June 18, 1910, § 3, unless plainly unnecessary.—*Id.*

Enforcement of an order of the Interstate Commerce Commission, reducing gathering rates for citrus fruits and vegetables from production points in Florida to a basing point in the same state, will be enjoined where rendered without any evidence to support it; this being a question of law, which it is the duty of the courts to decide.—*Florida East Coast R. Co. v. United States*, 34 S. Ct. 867, 234 U. S. 167, 58 L. Ed. 1267, reversing decree (Com. Ct.) 200 F. 797.

§97. — Trial or hearing.

See 10 Cent. Dig. Commerce, § 147.

Parties, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may make a valid stipulation, in the subsequent proceedings had in the federal court under Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], that such court may adjudge the amount of the reparation. Decree, *Tift v. Southern Ry. Co.* (C. C. 1906) 138 F. 753, affirmed.—*Southern Ry. Co. v. Tift*, 27 S. Ct. 709, 206 U. S. 428, 51 L. Ed. 1124, 11 Ann. Cas. 846.

The final decree of a federal Circuit Court in the proceedings prosecuted under Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], after action by the

Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made.—Id.

—98. — Review of proceedings.

See 10 Cent. Dig. Commerce, § 143.

Section 16 of the interstate commerce law, as amended by the act of March 2, 1889 (25 Stat. 855, c. 383), which gives to the interstate commerce commission a summary proceeding in the circuit court to enforce its orders, was repealed by the judiciary act of March 3, 1891 (26 Stat. 828, c. 517), in so far as it allowed an appeal direct to the supreme court when the matter in dispute exceeded \$2,000, and the appeal should now be taken to the circuit court of appeals.—*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264, 13 S. Ct. 837, 37 L. Ed. 727.

In a proceeding before the commission to require a railroad company to desist from charging a less rate on merchandise brought from Europe, under through bills of lading, than it charged for domestic traffic originating at the port of entry, the commission held that it could not take into consideration, as constituting dissimilar conditions, the matter of competition in ocean freights, or any other circumstances, existing beyond the seaboard, and accordingly granted the order prayed for. On a proceeding brought by the commission, the circuit court entered a decree sustaining and enforcing the order. On appeal, the circuit court of appeals expressed great doubt as to the correctness of the commission's ruling excluding from consideration conditions beyond the seaboard, but decided that, even if such conditions were taken into consideration, they did not create such a dissimilarity as to justify the great disparity of rates made by the defendant in that case, and therefore affirmed the decree of the circuit court. *Held*, that the defendant was entitled to have all the legitimate circumstances and conditions which could properly be considered passed upon in the first instance by the commission, and, if the circuit court of appeals were of opinion that the commission erred in excluding ocean competition from consideration, it should have reversed the decree, set aside the commission's order, and remanded the cause to the commission, to be proceeded in according to law.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 F. 948, 6 C. C. A. 653.

The supreme court will not feel disposed to review the question of fact whether the circumstances and conditions were so dissimilar as to justify the rates charged in a particular case, when the finding of the commission thereon has been accepted and approved by the circuit court of appeals, or to review a question as to the reasonableness of rates charged, when the circuit court and the circuit court of appeals have concurred in finding the existing rate reasonable.—*Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935.

On an appeal to the circuit court of appeals from a decree in proceedings to enforce an order of the interstate commerce commission, the decree of the circuit court is not superseded; but, if an appeal be taken to the supreme court from the decree of the circuit court of appeals, the latter decree is superseded, so that the decree of the circuit court remains in force in any event.—*Louisville & N. R. Co. v. Behlmer*, 18 S. Ct. 502, 169 U. S. 644, 42 L. Ed. 889.

An independent investigation of the facts cannot be entered upon by the supreme court of the United States on appeal from a decree refusing to demand compliance with an order of the interstate commerce commission, in order to evolve new and substantive findings of fact upon which the order of the commission may be sustained, even if the record is in such condition as to permit such a course. Decree 103 F. 249, 43 C. C. A. 209, affirmed.—*Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 22 S. Ct. 824, 186 U. S. 320, 46 L. Ed. 1182.

Findings of the Interstate Commerce Commission that a classification of freight rates adopted to govern in official classification territory produces preferences and discriminations will not be interfered with on appeal when concurred in by a federal Circuit Court, unless the record establishes that clear and unmistakable error has been committed. Decree, *Interstate Commerce Commission v. Cincinnati, H. & D. Ry. Co.* (C. C. 1905) 146 F. 559, affirmed.—*Cincinnati, H. & D. Ry. Co. v. Interstate Commerce Commission*, 27 S. Ct. 648, 206 U. S. 142, 51 L. Ed. 995.

Findings of fact made by the Interstate Commerce Commission, when concurred in by a federal Circuit Court, will not be disturbed unless the record establishes that clear and unmistakable error has been committed.—*Illinois Cent. R. Co. v. Interstate Commerce Commission*, 27 S. Ct. 700, 206 U. S. 441, 51 L. Ed. 1128.

A concerted advance by interstate carriers in the freight rate upon a particular commodity may be held unreasonable and unjust by the Interstate Commerce Commission and by a federal Circuit Court in the subsequent proceedings to enforce the order of the Commission, although such rate may be but a mere division of a through rate.—Id.

Even if error could be attributed to the Interstate Commerce Commission in deciding that expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate, such error would not require the reversal of a decree enforcing an order of the Commission, requiring carriers to desist from enforcing such rate, where the findings show that the old rates were profitable, and that dividends were declared even when permanent improvements and equipment were charged to operating expenses.—Id.

The federal Supreme Court will not disturb, on appeal, the granting by the Commerce Court of an injunction pendente lite, until final determination of the suit, suspending an order of the Interstate Commerce Commission requiring carriers to desist from alleged discriminatory allowances, unless an abuse of discretion appears.—*United States v. Baltimore & O. R. Co.*, 32 S. Ct. 817, 225 U. S. 306, 56 L. Ed. 1100.

An order of the Interstate Commerce Commission reducing railway rates under the power given by Act June 29, 1906, § 4, to set it aside after hearing of unreasonable charges, may be reversed by the commerce court if there was no evidence to sustain the order, in view of Act March 2, 1889, § 6, providing for procedure before the commission, and of Act June 18, 1910, § 12, providing that such orders may be set aside by a court of competent jurisdiction.—*Interstate Commerce Commission v. Louisville & N. R. Co.*, 33 S. Ct. 185, 227 U. S. 88, 57 L. Ed. 431, reversing decree (Com. C.) *Louisville & N. R. Co. v. Interstate Commerce Commission*, 195 F. 541.

Lack of formal proof to sustain order of Interstate Commerce Commission reducing rates cannot be supplied by a presumption that its findings were supported by the information which the commission is required by Act Feb.

10, 1891, § 12, to obtain in order to carry out the objects for which it was created.—Id.

An order of the Interstate Commerce Commission restoring an old local rate raised by the carrier to make the sum of locals equal to through rate, and reducing such through rate, held made on substantial evidence.—Id.

The contention that an arrangement between a terminal company and interstate carriers violates the commodity clause of Act June 29, 1906, will not be considered on appeal from the Commerce Court to review an order enjoining an order of the Interstate Commerce Commission, where such contention is not shown to have been raised before the commission.—United States v. Baltimore & O. R. Co., 34 S. Ct. 75, 231 U. S. 274, 58 L. Ed. 218, affirming decree (Com. C.) Baltimore & O. R. Co. v. United States, 200 F. 779.

An order of the Interstate Commerce Commission which, amending a prior order refusing to compel certain trunk line railroads to establish or re-establish through routes and joint rates to certain tap lines, and which required the trunk line to desist from making allowances to the tap lines, is affirmative in character and reviewable in the commerce court.—United States v. Louisiana & P. R. Co., 34 S. Ct. 741, 234 U. S. 1, 58 L. Ed. 1185, affirming judgment (Com. Ct.) Louisiana & P. Ry. Co. v. United States, 209 F. 244.

The commerce court exceeded its authority in substituting its judgment as to a preference by carriers for that of the Interstate Commerce Commission on the ground that as the facts are undisputed it had a right so to do.—United States v. Louisville & N. R. Co., 35 S. Ct. 113, 235 U. S. 314, 59 L. Ed. 245, reversing order (Com. C.) Louisville & N. R. Co. v. United States, 197 F. 58.

The federal Supreme Court on appeal, under Act Oct. 22, 1913, from denial of an interlocutory injunction restraining enforcement of order of Interstate Commerce Commission, will determine whether, as a matter of law, findings of fact sustain the order.—Louisville & N. R. Co. v. United States, 35 S. Ct. 696, 238 U. S. 1, 59 L. Ed. 1177, affirming judgment (D. C.) 216 F. 672.

COMMERCE COURT.

See Commerce, ¶92, 98.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

Officer in navy, see Army and Navy, ¶7.

COMMISSION AND COMMISSIONERS.

See United States Commissioners.

Appointment of water commissioners by court as encroachment on executive power, see Constitutional Law, ¶72.

Condemnation proceedings to assess compensation, see Eminent Domain, ¶225-239.

County commissioners, see Counties, ¶47.

Delegation of legislative powers, see Constitutional Law, ¶62.

Deportation proceedings, see Aliens, ¶32.

Due process of law, see Constitutional Law, ¶297.

Equity, see Equity, ¶401-410.

Interstate commerce commission, see Commerce, ¶83-98.

Loan commissioners, see Territories, ¶23.

Mandamus to interstate commerce commission, see Mandamus, ¶73.

Municipal commissioners, see Municipal Corporations, ¶453.

Orders, impairing contract, see Constitutional Law, ¶154.

Patents, mandamus to compel issuance of letters patent, see Mandamus, ¶86; appeals from decisions, see Patents, ¶113.

Railroad commission, see—

Carriers, ¶12.

Commerce, ¶38.

Courts, ¶366.

Statutes, ¶64.

State Dispensary Commission's immunity from suit in federal courts, see Courts, ¶303.

To take depositions, see Depositions, ¶39.

COMMISSION MERCHANTS.

See Factors.

COMMISSIONS.

See—

Brokers, ¶41-69, 88.

Executors and Administrators, ¶495.

Principal and Agent, ¶81-85.

United States, ¶39.

Usury, ¶56, 57, 86.

COMMITTEE.

Habeas corpus to obtain release of person refusing to give information to Congressional Committee, see Habeas Corpus, ¶25.

Insane person, see Insane Persons, ¶30.

COMMIXTURE.

See Confusion of Goods.

COMMODITIES.

Act forbidding railroads to transport interstate commodities mined or procured under their authority, determination and constitutionality, see Constitutional Law, ¶46; as denial of due process of law, see Constitutional Law, ¶297; construction and operation, see Carriers, ¶25; effect of partial invalidity, see Statutes, ¶64.

Regulation of interstate transportation, see Carriers, ¶25.

COMMON CARRIERS.

See Carriers

COMMON COUNTS.

See Assumpsit, Action of.

COMMON LANDS.

See 10 Cent. Dig. Com. Lands.

See Tenancy in Common.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

COMMON LAW.

Scope-Note.

[INCLUDES the body of customary and statutory law recognized and adopted in the several states as the basis of their jurisprudence, not created by express enactment by the state Legislatures; presumptions as to its existence, and proof of its rules; its sources, principles, and maxims; and its application in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

⌚10. Adoption and repeal.

12. — Constitutions and statutes of particular states.

Cross-References.

See—
International Law.
Literary Property, ⌚4, 5.
Application to interstate transactions, see Commerce, ⌚1.
Fencing animals, see Animals, ⌚90.

Part of law of United States, see Criminal Law, ⌚9.
Sale of bill or note, see Bills and Notes, ⌚311.
Saving common-law remedy in admiralty, see Admiralty, ⌚2.

⌚10. Adoption and repeal.

See 10 Cent. Dig. Com. Law, §§ 9-12.

⌚12. — Constitutions and statutes of particular states.

See 10 Cent. Dig. Com. Law, § 10.

The adoption of the common law by Laws Ariz. 1885, No. 68, so far as not repugnant to or inconsistent with the constitution of the United States, bill of rights, or laws and cus-

toms of the territory, does not include an adoption of the common-law rule precluding a husband from making a conveyance directly to his wife without the intervention of a trustee, since the pre-existing laws of the territory provide for community property of husband and wife, allowing the wife to have separate property and the absolute disposition thereof. Judgment (Ariz.) 57 P. 605, affirmed.—Luhrs v. Hancock, 21 S. Ct. 726, 181 U. S. 567, 45 L. Ed. 1005.

COMMON SCHOOLS.

See Schools and School Districts, ⌚22-105.

COMMON SCOLD.

[No paragraphs or references in this Digest. But see 10 Cent. Dig. Common Scold.]

COMMONWEALTH:

See States.

COMMUNISTEE SOCIETY.

See Associations, ⌚15, 25.

COMMUNITY PROPERTY.

See Husband and Wife, ⌚247-276.

Vested rights, see Constitutional Law, ⌚96.

COMPACTS.

See Treaties.

COMPANIES.

See—
Associations.
Corporations.
Partnership.

COMPARATIVE NEGLIGENCE.

See Negligence, ⌚101.

COMPARISON.

Handwritings, see Evidence, ⌚563-566.

COMPENSATION.

Compensatory damages, see Damages, ⌚17-62.
Performance of contract, see Contracts, ⌚228-234.
Property taken for public use, see Eminent Domain, ⌚69-153.
Salvage services, see Salvage.
Workmen's Compensation Act, see Master and Servant, ⌚347.

Of particular classes of officers or other persons.

See—
Ambassadors and Consuls, ⌚2.
Army and Navy, ⌚13, 23.
Attorney and Client, ⌚133-192.
Brokers, ⌚41-69, 88.
Clerks of Courts, ⌚10-35.
Corporations, ⌚308.
Courts, ⌚56.
Customs Duties, ⌚60.
District and Prosecuting Attorneys, ⌚4-6.
Elections, ⌚53.
Executors and Administrator, ⌚491-495.
Factors, ⌚46.
Internal Revenue, ⌚22.
Judges, ⌚22.
Master and Servant, ⌚69-82.
Officers, ⌚93-101.
Principal and Agent, ⌚81-85.
Receivers, ⌚195-200.
Seamen, ⌚15-23.
Shipping, ⌚49.
United States, ⌚39.
United States Marshals, ⌚5-27.
War, ⌚14.

COMPENSATORY DAMAGES.

See Damages.

COMPETENCY.

Evidence, see Evidence, ¶155.
 Expert witnesses, see Evidence, ¶536-546.
 Fellow servant, see Master and Servant, ¶167-170.
 Impeaching testimony, see Witnesses, ¶352.
 Juror, see Jury, ¶83-139.
 Witnesses, see Witnesses, ¶41-219.

COMPETITION.

Combinations, see Monopolies, ¶9-31.
 Contracts of municipal corporations to be submitted to competition, see Municipal Corporations, ¶330.

Contracts preventing competition in trade, see Contracts, ¶115-118.
 Unfair competition, see Trade-Marks and Trade-Names, ¶68-75, 80-98.

COMPLAINT.

See—
 Commerce, ¶87.
 Criminal Law, ¶208-211.
 Equity, ¶128-150.
 Evidence, ¶128.
 Extradition, ¶11.
 Indictment and Information.
 Pleading.

COMPLICATED ACCOUNTS.

See Account, ¶6.

COMPOSITIONS WITH CREDITORS.*Scope-Note.*

[INCLUDES agreements by creditors of the same debtor to accept part of the sums due them from him in satisfaction of the whole; nature, requisites, validity, incidents, operation, and effect of such agreements in general; and rights, liabilities, and remedies of the parties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

¶9. Validity.

11. — Fraudulent representations by debtor.

Cross-References.

See—
 Bankruptcy, ¶380-387.
 Compromise and Settlement.

¶9. Validity.

See 10 Cent. Dig. Comp. w. Cred. §§ 9-37, 87-94.

¶11. — Fraudulent representations by debtor.

See 10 Cent. Dig. Comp. w. Cred. § 19.

Where the attorney has made such suggestion, and has been told by one of the plaintiffs that they dealt with defendants in the belief that such partner was only a special partner, there is no duty on the part of the attorney to make any statement as to such partner's actual or reputed financial ability.—*Cleaveland v. Richardson*, 132 U. S. 318, 10 S. Ct. 100, 33 L. Ed. 384.

Defendants' attorney, in negotiating a compromise of a debt due plaintiffs, stated that defendants' assets were only sufficient to pay 60 per cent. of their indebtedness, and that in regard to the liability of one of defendants, supposed to be a special partner in the firm, for the debts of the firm, he was uninformed, but that plaintiffs might investigate the matter for themselves. *Held*, that this suggestion was sufficient to put plaintiffs upon inquiry as to such partner's liability.—*Id.*

Nor is he bound to communicate the fact that such partner had signed a paper setting forth that the liabilities of defendants' firm were to be assumed by a proposed new firm, where such new firm was never formed; and hence the paper was of no effective force.—*Id.*

COMPOUNDING FELONY.

See 10 Cent. Dig. Comp. Fel.
 See Obstructing Justice.

COMPOUND INTEREST.

As usury, see Banks and Banking, ¶270.

COMPROMISE AND SETTLEMENT.

Scope-Note.

[INCLUDES adjustment of matters in dispute, before or pending suit, by mutual concessions and agreement, or of mutual accounts or debts by agreement as to the balance, and discharge from liability thereon; nature, requisites, validity, incidents, operation, and effect of such adjustment and discharge in general; and rights, liabilities, and remedies of the parties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④1. Nature and requisites.
 - 3. — Subject-matter.
 - 6. — Consideration.
 - 7. Validity.
 - 8. — Reality of assent.
- 10. Construction of agreement.
- 12. — Matters included.
- 14. Operation and effect.
 - 15. — In general.
 - 16. — Discharge from liability.
 - 17. — Conclusiveness.
- 18. Modification or rescission by parties.
- 20. Performance or breach of agreement.
- 23. Evidence.

Cross-References.

See—
Accord and Satisfaction.
Compositions with Creditors.
Payment.
Release.
Authority of district attorney to compromise judgment, see District and Prosecuting Attorneys, ④9.
Claim assigned, see Assignments, ④92.

Compelling debtor to accept compromise as denying due process of law, see Constitutional Law, ④306.
Effect on attorney's right to fee, see Attorney and Client, ④150.
Ground for estoppel on appeal, see Appeal and Error, ④161.
Supplemental bill raising compromise agreement, see Equity, ④296, 830.

④1. Nature and requisites.

See 10 Cent. Dig. Compromise, §§ 1-16, 35-50.

④3. — Subject-matter.

See 10 Cent. Dig. Compromise, §§ 5, 6.

The right of one of the parties to appeal from a decree in admiralty, and the fact that they had declared their intention of so doing, creates such a dispute in respect to liability as to make it the proper subject of compromise.—*Boffinger v. Tuyes*, 120 U. S. 198, 7 S. Ct. 529, 30 L. Ed. 649.

④6. — Consideration.

See 10 Cent. Dig. Compromise, §§ 35-50; 11 Cent. Dig. Contracts, § 329.

The compromise of a disputed or unliquidated claim is founded on a sufficient consideration.—*Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 5 S. Ct. 422, 28 L. Ed. 948.

④7. Validity.

See 10 Cent. Dig. Compromise, §§ 17-34.

④8. — Reality of assent.

See 10 Cent. Dig. Compromise, §§ 17-31, 33.

H. advanced money to O. to carry on the cattle business, in Texas, and to secure the indebtedness took a bill of sale from O. of the cattle, giving a defeasance back. The papers were not recorded as required in Texas to render them valid against subsequent mortgagees. O., being indebted to a bank for money advanced, as the latter claimed, under a promise of H. to pay the same, gave the bank a mortgage

on the same cattle and other property, which was recorded. O. disputed a part of the claim of H., but by agreement of all the parties the cattle were sold to D., who gave his note in payment to the amount of the debt of O. to the bank and the undisputed portion of the claim of H.; D. agreeing, as sales of the cattle were made by him, to pay the proceeds on his note, to be divided pro rata between H. and the bank. *Held*, that neither H. nor the bank could thereafter insist on superiority of lien as between themselves, nor could H. rescind the contract of settlement on the ground of fraud in obtaining its execution, where the evidence preponderates that there were no misrepresentations on the part of O. to induce H. to enter into the agreement; and, at any rate, the bank and D. would not be bound by any fraud on the part of O., without proof that they knew of and acquiesced in it.—*City Nat. Bank v. Hunter*, 129 U. S. 537, 9 S. Ct. 346, 32 L. Ed. 752.

Defendants' attorney, in negotiating a compromise of a debt due plaintiffs, stated that defendants' assets were only sufficient to pay 60 per cent. of their indebtedness, and that in regard to the liability of one of defendants, supposed to be a special partner in the firm, for the debts of the firm, he was uninformed, but that plaintiffs might investigate the matter for themselves. *Held*, that this suggestion was sufficient to put plaintiffs upon inquiry as to such partner's liability.—*Cleaveland v. Richardson*, 132 U. S. 318, 10 S. Ct. 100, 33 L. Ed. 384.

A contract to convey lands by warranty deed on payment of the price on or before a

fixed date, "time to be of the essence of the contract," was assigned, and on the last day the assignee tendered the purchase money. A deed was afterwards made; but, the vendor's title proving defective, it was refused, and a clear title demanded. Three years later, the vendor, without giving notice of a rescission of the contract, conveyed to a third person, who knew all the facts. Afterwards, the purchaser and the assignee of the contract, each insisting that he had an absolute right to the lands, compromised their claims by conveying to each other an undivided one-half interest in the property. *Held*, that the purchaser's failure to disclose a prior agreement to convey to the original vendee under the contract one-half the lands upon securing a good title did not constitute a fraudulent suppression of a fact; and the compromise was binding, even though the assignee parted with rights which the law would have sustained.—*Hennessy v. Bacon*, 137 U. S. 73, 11 S. Ct. 17, 34 L. Ed. 606, affirming decree (C. C.) *Bacon v. Hennessy*, 35 F. 174.

◀10. Construction of agreement.

See 10 Cent. Dig. Compromise, §§ 51-74.

◀12. — Matters included.

See 10 Cent. Dig. Compromise, §§ 54-74.

Where an effort is made to compromise litigation upon two bills and two cross bills setting up various conflicting claims, all growing out of a connected series of transactions, and from the whole course of the negotiations, embracing various propositions and counter propositions, it appears that the parties intended to include all matters of difference between them, the compromise ultimately reached will be held to embrace all the claims, though one claim was not specially mentioned in the proposition that was accepted.—*Coburn v. Cedar Valley Land & Cattle Co.*, 138 U. S. 196, 11 S. Ct. 258, 34 L. Ed. 876, affirming decree (C. C.) 29 F. 584.

A settlement whereby the owner of land releases from personal liability for fruits and revenues a vendee who has purchased such land from one who warranted the title, though he had no title, does not release such warrantor from liability to the owner for such fruits and revenues, where it is shown to be the intention of the parties to the settlement that such warrantor should not be released, since he is the principal debtor, and the warrantee is merely his surety.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (C. C.) *Whitney v. City of New Orleans*, 43 F. 215.

◀14. Operation and effect.

See 10 Cent. Dig. Compromise, §§ 51-74.

◀15. — In general.

See 10 Cent. Dig. Compromise, §§ 51-53.

A decree in admiralty having been entered against defendants, they declared their intention of appealing therefrom. A compromise, however, was made between the parties, and fully performed by the defendants. *Held*, that the plaintiffs could not treat the payments made by defendants under the agreement merely as credit on account to hold them to their original liabilities.—*Boffinger v. Tuyes*, 120 U. S. 198, 7 S. Ct. 529, 30 L. Ed. 649.

◀16. — Discharge from liability.

See 10 Cent. Dig. Compromise, §§ 54-65; 24 Cent. Dig. Fraud. Conv. § 656.

Defendant was bound by contract to use reasonable diligence to collect from its licensees royalties on patented goods made and sold by them, and pay the same over to complainant. In order to maintain its control of the market, defendant made a settlement of litigation with a competing and alleged infringing manufacturer, purchasing his patents, and granting him

a license. Complainant assented to this contract, agreeing to release defendant from all obligation to account for any part of moneys received from such manufacturer either for past infringements or for future royalties under the license granted to him, which moneys might be required to be expended or remitted in making such settlement. An unforeseen result of the settlement was to release certain other licensees of defendant from payment of their full royalties, and to make defendant liable to refund to them certain moneys already collected. *Held*, that the losses thus accruing were in a legal sense in the contemplation of complainant when it assented to the settlement, and consequently defendant was not bound to make good to it the amount thereof; and that, on the other hand, complainant was not liable to defendant for any part of the sums which defendant was obliged to refund to its licensees.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

◀17. — Conclusiveness.

See 10 Cent. Dig. Compromise, §§ 66-74.

Where, after the rendition of a judgment sought to be reversed, the matter in controversy has been the subject of a valid compromise between the parties, which leaves nothing of the controversy presented by the record in the supreme court to be decided, the writ of error will be dismissed on motion.—*Dakota County v. Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981.

◀18. Modification or rescission by parties.

See 10 Cent. Dig. Compromise, §§ 75-82.

The state of Iowa granted its swamp lands to the counties, respectively, in which they lay. The county of Mills claimed that certain lands were of this character, and the same lands were claimed by a railroad company under its grant. Suit was instituted between the parties, and a decision had in the state courts in favor of the county. While the case was pending in the United States supreme court on writ of error, a compromise agreement was made, by which the county was to make certain conveyances to the railroad company, and to pay the sum of \$10,000 for lands previously disposed of. The conveyances were executed accordingly. Afterwards the county instituted suit to have the agreement declared void, and the railroad company sued for the \$10,000. The state courts sustained the compromise, and decided against the county in both suits; writs of error being brought to the United States supreme court. *Held* that, although after the compromise was made the suit then pending was submitted to the supreme court, and decided in favor of the county, that did not abrogate the compromise, as the persons continued to act under it.—*Mills County v. Burlington & M. R. R. Co.*, 107 U. S. 557, 2 S. Ct. 654, 27 L. Ed. 578.

Plaintiffs agreed to furnish defendant money to carry on his business of manufacturing tobacco, on condition that he would secure the loan by mortgage on his farm, and ship all his tobacco to plaintiffs to sell. On finding thereafter that defendant was indebted to them in the sum of \$15,000, which he represented that he could not pay in full, it was agreed that they should take a conveyance of the mortgaged property, and release the debt, and should then convey to defendant's brothers for 18,000 pounds of tobacco. This was done, and shortly afterwards defendant's brothers reconveyed to him for \$8,000. Twelve years afterwards plaintiffs filed a bill against defendant and his brothers to set aside the compromise, on the ground that it was induced by defendant's representation that the property was all he had in the world, and his threat that he would take the benefit of the bankrupt law if plaintiffs refused the compro-

mise. The bill alleged that at that time defendant had \$12,000 in his possession, which he had fraudulently retained for his own use out of the money furnished him by plaintiff for the purpose of manufacturing tobacco, and which they supposed had been so used. It further alleged that the property received by them was much less than the amount of the debt, and that defendant's brothers were parties to the fraud. The only evidence in support of these allegations was that of conversations had with defendant at a time when he had become insane. *Held*, that such evidence was not sufficient to warrant the setting aside of a compromise that had stood so long.—*Hoffman v. Overboy*, 137 U. S. 465, 11 S. Ct. 157, 34 L. Ed. 754.

One who has accepted conveyances of certain lands in settlement of a prior indebtedness cannot afterwards set up a repudiation of the settlement on the ground of fraud, when it appears that subject to the alleged repudiation he made conveyances of part of the lands, and that he is still in possession and collecting rents from the remainder.—*McLean v. Clapp*, 141 U. S. 429, 12 S. Ct. 29, 35 L. Ed. 804.

Complainant was entitled, under existing contracts, to receive from defendant, which owned numerous barbed fence wire patents, and had granted licenses thereunder, 15 cents for each 100 pounds of such wire made by defendant's licensees, where the license fees were actually collected by defendant; and defendant was bound to use reasonable diligence to collect the same, but (according to the court's construction of the contracts) did not guaranty their collection. Thereafter, by a supplementary contract, the amount of the royalty was reduced to 5 cents per 100 pounds, payable only when collected, the reduction to go into effect on June 1, 1883. Defendant in fact paid only 5 cents per 100 pounds for the preceding month of May, which payment was accepted and receipted for by complainant. *Held*, that after a delay of six years this settlement should not be set aside, it appearing that 5 cents was all that defendant in fact collected.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

20. Performance or breach of agreement.

See 10 Cent. Dig. Compromise, §§ 83-88.

The payment of a debt upon which a suit by attachment has been brought, to which there can be no defense, is not a voluntary payment; and, where such payment is 80 per cent. of the debt, it is not in violation of an agreement between defendants and one of their creditors, whose claim had been compromised, not to pay voluntarily to any of their creditors more than 60 per cent. of their debts in settlement.—*Cleveland v. Richardson*, 132 U. S. 318, 10 S. Ct. 100, 33 L. Ed. 384.

23. Evidence.

See 10 Cent. Dig. Compromise, §§ 91-94.

Complainant was entitled, under existing contracts, to receive from defendant, which owned numerous barbed fence wire patents, and had granted licenses thereunder, 15 cents for each 100 pounds of such wire made by defendant's licensees, where the license fees were actually collected by defendant; and defendant was bound to use reasonable diligence to collect the same, but (according to the court's construction of the contracts) did not guaranty their collection. Thereafter, by a supplementary contract, the amount of the royalty was reduced to 5 cents per 100 pounds, payable only when collected, the reduction to go into effect on June 1, 1883. Defendant in fact paid only 5 cents per 100 pounds for the preceding month of May, which payment was accepted and receipted for by complainant. *Held*, that it was permissible to infer, after a delay of six years, that complainant acquiesced in defendant's claim that the

provision in the supplementary contract, making payment of the royalty dependent upon its collection, extended to royalties falling due in May.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

COMPUTATION.

See—
Interest, 39-53.
Limitation of Actions, 44-130.
Time.

CONCEALMENT.

Avoidance of insurance, see Insurance, 259.
Cause of action as affecting limitation, see Limitation of Actions, 104.

CONCLUSION.

Formal conclusion of indictment, see Indictment and Information, 32.
Of law on trial by court, see Trial, 388-404.
Of witness, see—
Criminal Law, 449-456.
Evidence, 470-502.
Pleading conclusions, see Pleading, 8.

CONCLUSIVENESS.

Judgment, see Judgment, 643-750, 822, and other heads involving particular questions or proceedings.

CONCURRENT JURISDICTION.

See Courts, 489-518.

CONCURRENT NEGLIGENCE.

See—
Master and Servant, 201.
Negligence, 61.

CONCURRENT REMEDIES.

See Election of Remedies.

CONDEMNATION.

Property as punishment for violation of law, see Forfeitures.
Taking property for public use, see Eminent Domain.

CONDITIONAL FEE.

See Estates, 7.

CONDITIONAL SALES.

See Sales, 450-479.

CONDITIONS.

Admission of new state, see States, 9.
Conditional delivery, see—
Bills and Notes, 64.
Escrows.
Granting leave to file cross-bill, see Equity, 198.
In pardon, see Pardon, 14.
On affirming judgment, see Appeal and Error, 1140.
On granting or refusing new trial, see New Trial, 162.
On opening or vacating judgment, see Judgment, 166, 167.
Parol or extrinsic evidence to show existence of condition or contingency, see Evidence, 420.

In contracts and conveyances.

See—

Arbitration and Award, ¶9.
 Bills and Notes, ¶132.
 Bonds, ¶109, 110.
 Carriers, ¶254.
 Contracts, ¶221, 222.
 Costs, ¶10.
 Deeds, ¶159-162.
 Frauds, Statute of.
 Insurance, ¶250-300, 306-366.
 Sales, ¶450-479.
 Vendor and Purchaser, ¶79.
 Wills, ¶640-665.

Precedent to actions or other proceedings.

See—

Arbitration and Award, ¶9.
 Attorney and Client, ¶50.
 Bankruptcy, ¶284, 311.
 Banks and Banking, ¶250.
 Cancellation of Instruments, ¶19-24.
 Contracts, ¶327.
 Counties, ¶211-213.
 Corporations, ¶206.
 Creditors' Suit, ¶8-14.
 Customs Duties, ¶105.
 Detinue, ¶14.
 Divorce, ¶161.
 Eminent Domain, ¶73-76.
 Food, ¶19.
 Insurance, ¶612.
 Limitation of Actions, ¶65, 66, 149.
 Logs and Logging, ¶28.
 Public Lands, ¶120.
 Quieting Title, ¶14.
 Receivers, ¶174.
 Specific Performance, ¶87-101.
 Taxation, ¶610, 800.
 United States, ¶67.
 Vendor and Purchaser, ¶303.

CONDUCTORS.

Fellow servant of engineer, see Master and Servant, ¶198.

CONFEDERACY.

Investments by guardian in Confederate bonds, see Guardian and Ward, ¶53.

CONFESSION.

Admissibility in evidence, see Criminal Law, ¶517-521.
 Voluntary character as question for jury, see Criminal Law, ¶736.

CONFIDENTIAL COMMUNICATIONS.

See Witnesses, ¶187-219.

CONFIDENTIAL RELATIONS.

See—

Account, ¶4.
 Bankruptcy, ¶426.
 Brokers.
 Factors.
 Fraudulent Conveyances, ¶102-108.
 Guardian and Ward.
 Partnership.
 Principal and Agent.
 Trusts.
 Witnesses, ¶187-219.

CONFIRMATION.

Assessment for public improvements, see Municipal Corporations, ¶493.
 Judicial sales, see Judicial Sales, ¶31.
 Tax title, see Taxation, ¶793-805.

CONFISCATION.

Adulterated food, see Food, ¶24.
 Enemy's property, see War, ¶29.
 Office of solicitor of courts, see Eminent Domain, ¶86.

CONFISCATORY RATES.

See Carriers, ¶12.

CONFLICTING CLAIMS.

See—

Execution, ¶187-202.
 Interpleader.
 Mines and Minerals, ¶27.
 Quieting Title.

CONFLICTING TITLES.

See Adverse Possession, ¶103.

CONFLICT OF LAWS.

See—

International Law.
 Marriage, ¶54.
 Adoption of children, see Adoption, ¶25.
 Judicial notice of laws of other states, see Evidence, ¶35.
 Rules of navigation, see Collision, ¶2.

Contracts and conveyances.

See—

Assignments for Benefit of Creditors, ¶19, 21, 199.
 Bills and Notes, ¶67.
 Building and Loan Associations, ¶27.
 Carriers, ¶148.
 Contracts, ¶101.
 Gaming, ¶2.
 Insurance, ¶125, 147, 351.
 Interest, ¶27.
 Usury, ¶2.
 Vendor and Purchaser, ¶2.

Estates and interests in property.

See—

Conversion, ¶2.
 Dower, ¶2.
 Exemptions, ¶2.

Inheritance, wills, and administration.

See Guardian and Ward, ¶3.

Liabilities for torts.

See—

Collision, ¶112.
 Death, ¶35.
 Master and Servant, ¶85, 160, 250¼.

Remedies, and jurisdiction and procedure.

See—

Abatement and Revival, ¶49.
 Action, ¶17.
 Contracts, ¶325.
 Corporations, ¶216.
 Courts, ¶489-518.
 Death, ¶8.
 Divorce, ¶325-331.
 Husband and Wife, ¶203.
 Limitation of Actions, ¶2.

CONFRONTING WITNESSES.

See Criminal Law, ¶662.

CONFUSION OF GOODS.

Scope-Note.

[INCLUDES intermixture of goods of the same kind belonging to different owners.
[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Effect.

[No paragraphs or references in this Digest. But see 10 Cent. Dig. Confusion of G. §§ 1-4.]

II. Rights and Remedies of Persons Interested.

6. Rights as to property.

7. — Owners in general.

12. Remedies of owners and others interested.

Cross-References.

See Accession.

I. NATURE AND EFFECT.

[No paragraphs or references in this Digest. But see 10 Cent. Dig. Confusion of G. §§ 1-4.]

II. RIGHTS AND REMEDIES OF PERSONS INTERESTED.

6. Rights as to property.

See 10 Cent. Dig. Confusion of G. §§ 5-10, 12, 13.

7. — Owners in general.

See 10 Cent. Dig. Confusion of G. §§ 5-10.

The distillation by the trespasser of crude turpentine taken from government lands is a continuing trespass, that does not divest the United States of its property, but permits it to recover the manufactured product.—Union Na-

val Stores Co. v. United States, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

12. Remedies of owners and others interested.

See 10 Cent. Dig. Confusion of G. §§ 5-14; 42 Cent. Dig. Replev. § 15; 47 Cent. Dig. Trover, § 71.

A demand by the United States for spirits of turpentine and rosin manufactured from crude gum unlawfully taken from public lands is unnecessary, where defendant received the gum from the trespasser mixed with other gum belonging to the trespasser, and has sold the entire product and accounted to the trespasser.—Union Naval Stores Co. v. United States, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

CONGRESS.

See—

District of Columbia, 3.

Territories, 11.

United States, 10-23.

Origin of revenue laws, see Statutes, 6.

Power to confer and regulate suffrage, see Elections, 4.

Power to make treaties, see Treaties, 2.

Power to regulate commerce, see Commerce, 2-10.

Recognition of claims by Congress, see United States, 116.

CONGRESSIONAL COMMITTEES.

Habeas corpus to secure release of person refusing to give information, see Habeas Corpus, 25.

CONGRESSIONAL DEBATES.

Aid to construction of statutes, see Statutes, 117, 216.

CONGRESSMEN.

See False Personation, 1.

CONNECTING CARRIERS.

See Carriers, 12, 173-185, 219.

CONSENT.

Consignor or owner of goods to limitation of carrier's liability, see Carriers, 155.

Debtor to assignment, see Assignments, 58.

Jurisdiction, see—

Army and Navy, 44.

Bankruptcy, 293.

Courts, 379.

Owner of property to improvements thereon as affecting right to lien, see Mechanics' Liens, 56-72.

Parties to contracts, see Contracts, 94, 95.

State to be sued, see States, 191.

To alteration of instrument, see Alteration of Instruments, 12.

United States to be sued, see United States, 125.

CONSEQUENTIAL DAMAGES.

See Damages, 17-50.

CONSERVATORS.

See—

Guardian and Ward.

Insane Persons, 30.

CONSIDERATION.

See Contracts, ¶48-88, and cross-references preceding those sections.

CONSIGNMENT.

See Factors.

CONSOLIDATION.

Actions, see—
 Actions, ¶54-57.
 Admiralty, ¶37.
 Courts, ¶352.
 Corporations or associations, see—
 Corporations, ¶582-591, 690.
 Insurance, ¶705.
 Railroads, ¶140-144.
 Indictments, see Criminal Law, ¶619.

CONSPIRACY.*Scope-Note.*

[INCLUDES combinations of two or more persons to do an unlawful act, whether such act be the object of the combination or means of accomplishing that object, and whether it be injurious to private persons only or to the public; nature and extent of liability for injuries caused by such conspiracies; actions for damages therefor; and criminal responsibility for conspiracies in general, and prosecution and punishment thereof as public offenses.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Civil Liability.****(A) ACTS CONSTITUTING CONSPIRACY AND LIABILITY THEREFOR.**

- ¶1. Nature and elements in general.
- 5. — Overt act.

(B) ACTIONS.

- ¶19. Evidence.

II. Criminal Responsibility.**(A) OFFENSES.**

- ¶23. Nature and elements of criminal conspiracy in general.
- 28. Conspiracy to commit crime.
- 29. Conspiracy to injure in person or reputation.
- 30. Conspiracy to injure in property or business.
- 31. Conspiracy to blackmail or extort money.
- 33. Conspiracy to defraud government.
- 34. Conspiracy to obstruct or pervert justice.
- 37. Merger in offense committed.
- 38. Defenses.

(B) PROSECUTION AND PUNISHMENT.

- ¶43. Indictment or information.
- 44. Evidence.
- 45. — Admissibility in general.
- 48. Trial.

Cross-References.

Acts and declarations of conspirators as evidence against co-conspirators, see—
 Criminal Law, ¶422-427.
 Evidence, ¶253.

Combinations to monopolize trade, see Monopolies, ¶9-31.
 Restraining combinations, see Injunction, ¶101.

I. CIVIL LIABILITY.**(A) ACTS CONSTITUTING CONSPIRACY AND LIABILITY THEREFOR.****¶1. Nature and elements in general.**

See 10 Cent. Dig. Consp. §§ 1-5.

¶5. — Overt act.

See 10 Cent. Dig. Consp. § 4.

Trespass on the case for a conspiracy will not lie, where the only overt act charged is the filing of alleged libelous matter in the answer of the board of education in mandamus to com-

pel. plaintiff's reinstatement as a teacher, which by judgment in favor of the board was determined to be true and privileged.—*Nalle v. Oyster*, 33 S. Ct. 1043, 230 U. S. 165, 57 L. Ed. 1430, modifying judgment 36 App. D. C. 36.

(B) ACTIONS.

Equitable remedies, existence of remedy at law, see Equity, 43.

19. Evidence.

See 10 Cent. Dig. Consp. §§ 25, 26.

The officers of an insurance company, in furtherance of a conspiracy to wreck it, transferred its assets to and reinsured its risks in a second company, whose franchise they had obtained. This scheme was carried out by temporarily borrowing a large amount of negotiable securities, and representing them as the property of the second company, on the strength of which representations the directors of the first company agreed to the transfer. In an action by the receiver of the first company to charge defendant, one of the lenders of the negotiable securities, with having knowingly participated in the fraudulent transaction, the undisputed evidence showed that he permitted one of the conspirators to appear for a few days as the owner of the securities, with a distinct understanding that they were not to be withdrawn from the bank in which they were deposited, and that for this service he received a suspiciously large compensation. His knowledge of the formation of the second company was also shown. *Held*, that it was error to direct a verdict in defendant's favor.—*Russell v. Post*, 11 S. Ct. 353, 138 U. S. 425, 34 L. Ed. 1009.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

23. Nature and elements of criminal conspiracy in general.

See 10 Cent. Dig. Consp. §§ 30-39.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means.—*Pettibone v. United States*, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

28. Conspiracy to commit crime.

See 10 Cent. Dig. Consp. §§ 40, 41; 1 Cent. Dig. Adultery, § 5; 6 Cent. Dig. Banks, §§ 907, 909.

As the procuring of a dividend by a banking association when there are no net profits to pay it is not a willful misapplication of the money of the bank, within Rev. St. § 5209, a conspiracy to commit such is not indictable as a conspiracy to commit the crime created by such section.—*United States v. Britton*, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698.

A woman may conspire to commit an offense against the United States within Cr. Code March 4, 1909, § 37, though the object of the conspiracy is her own transportation in interstate commerce for purposes of prostitution, contrary to Act June 25, 1910.—*United States v. Holte*, 35 S. Ct. 271, 236 U. S. 140, 59 L. Ed. 504, L. R. A. 1915D, 281.

A conspiracy of state election officers to omit returns from certain precincts at election of Congressmen from their count and from their return is indictable under Cr. Code, March 4, 1909, § 19.—*United States v. Mosley*, 35 S. Ct. 904, 238 U. S. 383, 59 L. Ed. 1355.

State election officials, who conspire to deprive legal citizens of their right to vote under Const. U. S. Amend. 15, are indictable under Pen. Code, § 19.—*Guinn v. United States*, 35 S. Ct. 926, 238 U. S. 347, 59 L. Ed. 1340, L. R. A. 1916A, 1124.

29. Conspiracy to injure in person or reputation.

See 10 Cent. Dig. Consp. §§ 42-52.

Rev. St. § 5519, prohibiting conspiracies to deprive any person of rights or privileges secured by state laws, is beyond the legislative power of the United States, and is void.—*United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290.

Rev. St. § 5520, punishing conspiracy to prevent voters from giving support to candidates to federal offices, protects a right secured by the federal constitution and laws, and is valid.—*The Ku-Klux Cases*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274.

The word "citizen," as it occurs in Rev. St. U. S. § 5508, providing for the punishment of those who "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States," is used in its strict sense, as contrasted with "alien," and not as synonymous with "resident," "inhabitant," or "person."—*Baldwin v. Franks*, 120 U. S. 678, 7 S. Ct. 656, 763, 32 L. Ed. 766.

Rev. St. § 5519, imposing a punishment upon those who "in any state or territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws," being, as heretofore decided, unconstitutional as applied to conspiracies within a state against a citizen, is unconstitutional altogether as applied to conspiracies within a state, and cannot be sustained as applied to conspiracies within a state against aliens, to deprive them of treaty rights, the statute not being capable of separation into parts corresponding to this distinction.—*Id.*

It is the right of every private citizen of the United States to inform a marshal of the United States or his deputy of a violation of the internal revenue laws of the United States. This right is secured to the citizen by the constitution of the United States; and a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, is punishable, under section 5508 of the Revised Statutes.—*In re Quarles*, 158 U. S. 532, 15 S. Ct. 959, 39 L. Ed. 1080.

Where private individuals take a prisoner from the custody of the state officers and murder him to prevent his trial, they did not deprive him of the enjoyment, in the constitutional sense, of any right secured to him by the Constitution and laws, in violation of Const. U. S. Amend. 14, and therefore were not indictable, under Rev. St. §§ 5508, 5509 [U. S. Comp. St. 1901, p. 3712], for conspiracy to injure such person. Judgment (C. C. 1907) 151 F. 648, affirmed.—*United States v. Powell*, 29 S. Ct. 690, 212 U. S. 564, 53 L. Ed. 653.

30. Conspiracy to injure in property or business.

See 10 Cent. Dig. Consp. §§ 53-57.

Rights under Const. U. S. Amend. 14, are not infringed by the provisions of Rev. St. Wis. 1898, § 4466a, for the punishment of combining for the purpose of willfully or maliciously injuring another in his business, as applied to a combination of newspaper managers maliciously to injure a rival paper by agreeing to refuse space to advertisers who should pay the increased rate fixed by such rival, except at a corresponding increase, but to permit those to advertise in their papers at the old rate who should refuse to pay their rival the new rate, whatever may be the force of the constitutional objection if the statute be construed to embrace combining to effect willful, as distinguished from malicious, injury. Judgment, 89 N. W.

1135, 113 Wis. 419, affirmed.—*Aikens v. State of Wisconsin*, 25 S. Ct. 3, 195 U. S. 194, 49 L. Ed. 154.

⚡31. **Conspiracy to blackmail or extort money.**

See 10 Cent. Dig. Cons. § 58.

A conspiracy between the directors of a banking association to misapply its moneys by procuring the declaration of a dividend greater than the net profits, in violation of Rev. St. § 5204, is not a criminal offense.—*United States v. Britton*, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698.

⚡33. **Conspiracy to defraud government.**

See 10 Cent. Dig. Cons. § 60.

A conspiracy to obtain school lands from the states of California and Oregon in the names of fictitious or disqualified persons by the use of forged affidavits, assignments, and other documents, and to relinquish them to the United States under Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541], in exchange for other public lands, cannot escape condemnation under Rev. St. U. S. § 5440 [U. S. Comp. St. 1901, p. 3676], forbidding conspiracies to defraud the United States, on the theory that the United States, having received the school lands in lieu of the other lands patented, has not been defrauded, even assuming that the United States stands in the position of a bona fide purchaser in respect to the school lands.—*Hyde v. Shine*, 25 S. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, affirming judgment (D. C.) *United States v. Hyde*, 132 F. 545; *Dimond v. Shine*, 25 S. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

A conspiracy to obtain title to coal lands of the United States, in clear violation of the prohibition of the coal land laws against making more than one entry, is embraced by the provision of Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676), making criminal conspiracies "to defraud the United States in any manner or for any purpose."—*United States v. Keitel*, 29 S. Ct. 123, 211 U. S. 370, 53 L. Ed. 230, reversing order (D. C. 1907) 157 F. 396; *Same v. Herr*, 29 S. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; *Id.*, 29 S. Ct. 135, 211 U. S. 406, 53 L. Ed. 252.

A conspiracy to induce entrymen who have made application under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89), as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1545), to agree to convey after patent, is not one to defraud the United States "in any manner or for any purpose," within the meaning of Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676).—*United States v. Biggs*, 29 S. Ct. 181, 211 U. S. 507, 53 L. Ed. 305, affirming judgment (D. C. 1907) 157 F. 264; *Same v. Freeman*, 29 S. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; *Same v. Sullenberger*, 29 S. Ct. 186, 211 U. S. 522, 53 L. Ed. 311.

Assisting the importation of alien contract laborers is an "offense against the United States," within the meaning of Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676), providing for the criminal punishment of persons conspiring to commit such offenses, since Congress, in making it a misdemeanor, by Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (U. S. Comp. St. Supp. 1907, p. 393), to assist the immigration of such persons, has made such action a crime, indictable as such, although, by section 5 of that act, it has provided a remedy in the nature of a civil action for the recovery of a penalty for a violation of the act.—*United States v. Stevenson*, 30 S. Ct. 37, 215 U. S. 200, 54 L. Ed. 157.

No valid objection to construing Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676), providing for the criminal punishment of per-

sons conspiring to commit an offense against the United States as embracing assisting the importation of alien contract laborers, in violation of Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (U. S. Comp. St. Supp. 1907, p. 393), can be founded upon the fact that a greater punishment may thereby be affixed to the conspiracy to commit the offense than is provided for the offense itself.—*Id.*

The union in the unlawful purpose does not constitute the crime of conspiracy to defraud the United States, within Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), which requires not only the unlawful conspiracy, but that some party must do an act to effect its object.—*Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment 35 App. D. C. 451.

A conspiracy to increase the gross receipts of a post office upon which the postmaster's salary is to be fixed by the purchase of large quantities of stamps to be used in mailing matter outside of such post office is one to defraud the United States.—*United States v. Foster*, 34 S. Ct. 666, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C.) 211 F. 206.

⚡34. **Conspiracy to obstruct or pervert justice.**

See 10 Cent. Dig. Cons. §§ 61-67.

The ill treatment of Chinese in this country, and their expulsion from a town where they reside, is not, in itself, opposing by force the authority of the United States, or preventing the execution of any law thereof, within Rev. St. § 5336, and such acts are not punishable under that section.—*Baldwin v. Franks*, 120 U. S. 678, 7 S. Ct. 656, 763, 32 L. Ed. 766.

The authority of congress to protect the pollbooks which contain the vote for a member of congress, from the danger which might arise from the exposure of these papers to the chance of falsification or other tampering, is beyond question, and this danger is not removed because the purpose of the conspirators was to falsify the returns as to state officers found in the same pollbooks and certificates, and not those of the member of congress.—*Ex parte Coy*, 127 U. S. 731, 8 S. Ct. 1263, 32 L. Ed. 274.

The right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment, to answer for an offense against the United States, to be protected against lawless violence, is a right "secured to him by the constitution or laws of the United States," within the meaning of Rev. St. § 5508, making it a crime to conspire to injure, etc., any citizen in the free exercise or enjoyment of such right.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

A conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is punishable under the criminal laws of the United States, even though it be conceded that an attempt by one person to suborn another to commit perjury may not be so punishable, since under Rev. St. U. S. § 5440 [U. S. Comp. St. 1901, p. 3676], it is clearly criminal for two or more persons to conspire to commit any offense against the United States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

The precise persons to be suborned, or the time and place of such suborning, need not be agreed upon in the minds of the conspirators, in order to constitute the crime of conspiracy to

suborn perjury in proceedings for the purchase of public land under the timber and stone act.—*Id.*

37. Merger in offense committed.

See 10 Cent. Dig. Consp. §§ 68-70.

A person cannot escape liability for conspiracy against the United States because he may have committed the substantive offense at which the conspiracy aims.—*Heike v. United States*, 33 S. Ct. 226, 227 U. S. 131, 57 L. Ed. 450, Ann. Cas. 1914C, 128, affirming judgment 192 F. 83, 112 C. C. A. 615.

38. Defenses.

See 10 Cent. Dig. Consp. §§ 71, 72.

Persons conspiring to acquire fraudulently, school lands of the states of California and Oregon, and to corrupt officers of the General Land Office to facilitate their selection, under Act June 4, 1897, in exchange for other public lands, cannot urge, to escape conviction under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), that the titles obtained from the state were valid, except as to the particular state which had given the title, and which alone could assail it.—*Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment 35 App. D. C. 451.

(B) PROSECUTION AND PUNISHMENT.

Admissibility of private account books of accused, see Criminal Law, 434.

Allegations of place of offense in indictment, see Indictment and Information, 86.

Consolidation of indictments, see Criminal Law, 619.

Cruel and unusual punishment, see Criminal Law, 1213.

Limitations, see Criminal Law, 147, 150.

Plea of limitations, see Criminal Law, 288.

Power of legislature to punish, see Constitutional Law, 50.

Venue, see Criminal Law, 113.

Waiver of defects in indictment, see Indictment and Information, 193.

43. Indictment or information.

See 10 Cent. Dig. Consp. §§ 79, 80, 84-99; 40 Cent. Dig. P. O. § 66.

An indictment for conspiracy, under Rev. St. § 5440, must sufficiently charge the conspiracy, and cannot be aided by the averment of acts done in pursuance of the conspiracy.—*United States v. Britton*, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698.

An information charged that one L. made a homestead entry on land; that, while residing on and cultivating said land for the purpose of perfecting his right to the same, defendants conspired to prevent him from exercising his rights, went upon said land in disguise, and with force and arms drove him from the same. Held, that an offense was charged, under Rev. St. § 5508, which declares it penal for any two or more persons to "conspire to injure, oppose, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution and laws of the United States."—*United States v. Waddell*, 112 U. S. 76, 5 S. Ct. 35, 28 L. Ed. 673.

The acts of congress and the statutes of Indiana make it a crime for an inspector of elections, or other election officer, at an election for a member of congress, to whom is committed the safekeeping and delivery to the board of canvassers of the poll books, the tally sheets, and the certificates of the votes, to fail or omit to perform this duty of safe-keeping and delivery. Held, that an indictment in a federal court for a conspiracy to induce these officers to omit such duty, that the documents mentioned might come to the hands of improper persons, who

tampered with and falsified the returns, need not allege that the conspirators intended to affect the election of the member of congress who was voted for at that place, the returns of which were in the same poll books, tally sheets, and certificates with those for state officers.—*Ex parte Coy*, 127 U. S. 731, 8 S. Ct. 1263, 32 L. Ed. 274.

An injunction issued out of the United States circuit court, restraining defendants from endeavoring, by force or fraud, to procure a certain master to discharge his servants, or the servants to quit the employment of their master. Defendants were thereafter indicted, under Rev. St. §§ 5399, 5440, for conspiring to obstruct the administration of justice in the federal courts. The indictment charged that defendants conspired to use force and fraud to break up the relation between the master and servants aforesaid, and did so do, pending the existence of such injunction; and, as a legal conclusion from this allegation, it stated that they conspired to obstruct the administration of justice by the violation of the injunction. The act charged was an offense against the laws of the state, but not against those of the United States. Held, that the indictment was fatally defective, in failing to aver, in terms, that the object of the conspiracy was to obstruct the administration of justice in the federal courts, and to aver that defendants were served with process, or in any manner notified of the issue of the writ.—*Pettibone v. United States*, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

Under Rev. St. § 5440, punishing conspiracy to defraud the United States where "any act to effect the object of the conspiracy" is done by any of the parties, the gist of the offense being the conspiracy, an indictment charging such a conspiracy entered into within the United States and the jurisdiction of the court is sufficient, although it does not allege the overt acts charged to have been done within the United States.—*Dealy v. United States*, 152 U. S. 539, 14 S. Ct. 680, 38 L. Ed. 545.

An indictment under Rev. St. § 5440, charged a conspiracy to defraud the United States, and certain overt acts "according to and in pursuance" thereof. Held, that this met the requirement of the statute of an act "to effect the object of the conspiracy."—*Id.*

An indictment under Rev. St. § 5440, charged conspiracy to defraud the United States of public lands by means of false entries under the homestead laws. The description of the overt acts charged included matters subsequent to the "entry" of the lands, in the technical sense of the preliminary application under the homestead laws. Held, that the word "entries" was not to be taken with such technical meaning, but in its popular sense, as meaning the proceedings as a whole.—*Id.*

An indictment under Rev. St. § 5440, charged conspiracy to defraud the United States "of the title and possession of large tracts of land" in a certain county, said lands "being public lands of the United States, open to entry" under the homestead laws at a certain local land office. Held, that this was sufficient as a description of the conspiracy, without specifying any particular tract.—*Id.*

An allegation that an overt act was "according to and in pursuance" of the conspiracy showed that it was subsequent thereto, and, the date of the conspiracy being alleged, the time at which the overt act was done need not be specifically stated.—*Id.*

An indictment under Rev. St. § 5440, for conspiracy to commit an offense against the United States, setting forth various acts performed by several of the defendants in furtherance of the conspiracy, is not defective as to a defendant as against whom it fails to aver the commission of any such act, the gist of the of-

fense being the unlawful combination, although an overt act by one or more of the parties must be alleged and proved.—*Bannon v. United States*, 156 U. S. 464, 15 S. Ct. 467, 39 L. Ed. 494.

An indictment charging a defendant with a conspiracy to "commit an offense against the United States" must state an agreement to do acts which, if done, would constitute a specific offense; and where an intent is an essential part of such offense, as defined by the statute, such intent must be averred. *Order (D. C.) United States v. Green*, 136 F. 618, affirmed.—*Green v. MacDougall*, 26 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for conspiracy to defraud the United States, which avers that defendant and an officer of the United States "unlawfully did conspire, combine, confederate, and agree together * * * knowingly to defraud the said United States in the manner following, that is to say," followed by an averment that defendant promised and agreed with said officer to pay him a commission on the price of each and every one of certain articles which should be purchased by the United States by procurement of such officer, fairly imports an assent or agreement on the part of the officer, and is sufficient in such respect to charge conspiracy, although the officer's assent is not directly averred.—*Id.*

An indictment alleging a conspiracy to suborn perjury need not, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and of perjury.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

The object of the conspiracy is sufficiently charged in an indictment for conspiracy to suborn perjury, where its allegations plainly import that the unlawful agreement contemplates a future solicitation of unnamed individuals to enter public lands under the timber and stone act, who in so doing will necessarily knowingly state and subscribe under oath, before a named person, stated to be a United States commissioner of the district of Oregon, material false statements as to their purpose in respect to entering the land, known to be such by the conspirators.—*Id.*

An indictment for a conspiracy to defraud the United States, in violation of Rev. St. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676), which charges a corrupt agreement by which an officer of the United States is, in substance, to have a secret interest in a public contract as to the fulfilling of which by the contractor that officer is to be the judge, is sufficient without averring that the interest was given him or the money paid to him to influence his official conduct upon the very contract in question, or alleging which of the various ways of defrauding the government was in the minds of the conspirators, or that they all were. Judgment, 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 392.

Clauses in indictment charging a conspiracy to commit an offense against the United States cannot be resorted to in aid of averments of the clause setting forth the conspiracy.—*Joplin Mer-*

cantile Co. v. United States, 35 S. Ct. 291, 236 U. S. 531, 59 L. Ed. 705, affirming judgment 213 F. 926, 131 C. C. A. 160.

Indictment charging a conspiracy to introduce liquors into the Indian country *held* to relate to intrastate shipments only.—*Id.*

§44. Evidence.

See 10 Cent. Dig. Cons. §§ 100-107.

§45. — Admissibility in general.

See 10 Cent. Dig. Cons. §§ 100-104.

On a prosecution of certain participants in a railroad strike for conspiracy to obstruct the passage of the United States mails, telegrams exchanged by defendants and other participants in the strike, showing an intentional stopping of trains by defendants, and announcing to them a boycott of a certain class of cars, were admissible.—*Clune v. United States*, 159 U. S. 590, 16 S. Ct. 125, 40 L. Ed. 269.

Testimony as to the character, in respect to suitability for grazing purposes, of land sought to be acquired under the timber and stone act, is admissible on a trial for conspiracy to suborn perjury in the proceedings, where it is insisted that the motive which impelled the formation of the alleged conspiracy was the desire to acquire a large tract of land for sheep-grazing purposes, which acquisition had become necessary by reason of the fact that a rival had obtained a leasehold interest in a considerable portion of the land which the alleged conspirators had theretofore used in their sheep-raising business.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

Evidence as to how the entrymen of timber and stone lands understood their arrangement with one of the defendants charged with a conspiracy to suborn perjury, and of their purpose in applying for the land, is admissible where no formal contracts were executed between the alleged conspirators and the proposed entrymen, the alleged understandings being of an ambiguous nature, and proof of the conspiracy depending upon a variety of circumstances tending to show motive or intent.—*Id.*

§48. Trial.

See 10 Cent. Dig. Cons. §§ 108-111.

Refusal to instruct on trial for conspiracy to defraud the United States by fraudulently obtaining California and Oregon state lands and exchanging them under Act June 4, 1897, for other public lands, that want of knowledge of the character of the land applied for or that it was not adversely occupied, did not make the application void, *held* not error.—*Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment 35 App. D. C. 451.

No error was committed in instructing the jury in a prosecution of state election officials under Pen. Code, § 19, for conspiring to deprive legal citizens of their right to vote that the 1910 amendment of Const. Okl. art. 3, § 4a, was repugnant to Const. U. S. Amend. 15.—*Guinn v. United States*, 35 S. Ct. 928, 238 U. S. 347, 59 L. Ed. 1340, L. R. A. 1916A, 1124.

CONSTABLES.

See Sheriffs and Constables.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

CONSTITUTIONAL LAW.

Scope-Note.

[INCLUDES the organic and fundamental law regulating the structure and frame and methods of administration of government, and the relations between governments and those subject to them in general, and, more particularly, written instruments enacted as the supreme and paramount law; establishment, adoption, amendment, and abrogation of written constitutions; their construction, operation, effect, and enforcement in general; distribution of powers and functions of government among different departments, officers, and agencies; police power inherent in government and its exercise in general; and protection of life, liberty, and other civil and political rights of persons, rights of property, and obligations of contracts by constitutional guaranties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

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II. Construction, Operation, and Enforcement of Constitutional Provisions.

- 11. General rules of construction.
 - 16. — Matters extrinsic to instrument in general.
 - 20. — Subsequent legislative or executive construction.
 - 21. — Provisions adopted from another state.
 - 24. Operation as to laws previously in force.
 - 25. Grant or limitation of powers.
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 - 28. Self-executing provisions.
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 - 37. Validity of statutory provisions.
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 - 41. Persons entitled to raise constitutional questions.
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 - 48. — Presumptions and construction in favor of constitutionality.
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- 70. Encroachment on Legislature.
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III. Distribution of Governmental Powers and Functions—Continued.**(B) JUDICIAL POWERS AND FUNCTIONS—Continued.**

- ⇨72. — In general.
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- 75. Delegation of powers by judiciary.

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- ⇨78. Encroachment on judiciary.
- 80. — Powers, duties, and acts under legislative authority.

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- ⇨81. Nature and scope in general.

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- ⇨82. Constitutional guaranties in general.
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- 231. Local improvements.
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- 237. Regulation of keeping and use of animals.
- 238. Occupation and employment in general.
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- 240. Regulation of trade or business in general.
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- 242. Regulation of charges or prices.
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- 248. Imposition of liability for costs or fees.
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 Authority in federal courts of decisions of state courts as to validity and construction of state constitutions, see Courts, ☞366.
 Jurisdiction of federal courts in cases arising under Constitution of United States, see Courts, ☞282.
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I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

See 10 Cent. Dig. Const. Law, §§ 1-8.

Jurisdiction to determine constitutional questions, see Courts, §§ 282, 385 (1½, 5, 7), 388, 394(10).

Jurisdiction to review decision of state court, denying validity of act for submission of constitution to popular vote, see Courts, §§ 394(1).

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

Cruel and unusual punishment, construction and operation of provision, see Criminal Law, §§ 1213.

Operation of statute unconstitutional in part, see Statutes, § 64.

Review of constitutional questions on habeas corpus, see Habeas Corpus, § 32.

§ 11. General rules of construction.

See 10 Cent. Dig. Const. Law, §§ 9-17.

§ 16. — Matters extrinsic to instrument in general.

See 10 Cent. Dig. Const. Law, §§ 12, 16.

The language of a constitutional amendment should be read in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then construed, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.—*Maxwell v. Dow*, 20 S. Ct. 448, 494, 176 U. S. 581, 44 L. Ed. 597.

§ 20. — Subsequent legislative or executive construction.

See 10 Cent. Dig. Const. Law, §§ 14, 15.

The practical construction of a constitutional provision by legislative action is entitled to no force, except in cases of doubt.—*Fairbank v. United States*, 21 S. Ct. 648, 181 U. S. 283, 45 L. Ed. 862.

§ 21. — Provisions adopted from another state.

See 10 Cent. Dig. Const. Law, § 17.

The object of the first eight amendments to the constitution of the United States was to incorporate into it certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, and therefore the construction given to those principles by the English courts is cogent evidence of what they were designed to secure, and of the limitations that should be put upon them.—*Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819, affirming judgment (C. C.) 70 F. 46.

§ 24. Operation as to laws previously in force.

See 10 Cent. Dig. Const. Law, §§ 21-29.

The ordinance of 1787 governing the Northwest Territory is not in force in the states formed from such territory, being superseded by the constitutions of the states.—*Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 S. Ct. 185, 27 L. Ed. 442; *Huse v. Glover*, 119 U. S. 543, 7 S. Ct. 313, 30 L. Ed. 487, affirming decree (C. C.) 15 F. 292; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 8 S. Ct. 113, 31 L. Ed. 149.

The provision of the fourteenth amendment, forbidding the states to deprive any person of his property without due process of law, applies to a taking after the amendment under authority

of a statute passed prior thereto.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

§ 25. Grant or limitation of powers.

See 10 Cent. Dig. Const. Law, §§ 30, 31.

§ 27. — Constitution of United States.

See 10 Cent. Dig. Const. Law, § 31.

The fourteenth amendment is not intended to protect individual rights against individual invasion, but to nullify and make void all state legislation and state action which impairs the privileges of citizens of the United States, etc.; and therefore congress has no authority to create a code of municipal law for the regulation of private rights.—*The Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

§ 28. Self-executing provisions.

See 10 Cent. Dig. Const. Law, §§ 32-34.

§ 29. — In general.

See 10 Cent. Dig. Const. Law, § 32.

The provision for prosecution on an information of the public prosecutor after a commitment by a magistrate, contained in Const. Idaho, art. 1, § 8, is self-executing.—*Davis v. Burke*, 21 S. Ct. 210, 179 U. S. 399, 45 L. Ed. 249.

A constitutional provision which is complete in itself needs no further legislation to put it in force, but is self-executing.—*Id.*

A provision of a state Constitution giving the Legislature full power to correct abuses, and prevent unjust discrimination and excessive charges, is self-executing to the extent that contracts made after it went into effect are subject to the possibility of the exercise of such power. Judgment (Fla.) 36 So. 174, 47 Fla. 333, affirmed.—*Tampa Waterworks Co. v. City of Tampa*, 26 S. Ct. 23, 199 U. S. 241, 50 L. Ed. 170.

§ 34. — Imposing liabilities.

See 10 Cent. Dig. Const. Law, § 34.

The words "shall be secured," in Const. Kan. art. 12, § 2, declaring the liability of stockholders in corporations, are not merely directory to the legislature to make provision for such liability, but of themselves declare it; and to this extent the constitution is self-executing. Judgment 83 F. 288, 23 C. C. A. 404, affirmed.—*Whitman v. National Bank of Oxford*, 20 S. Ct. 477, 176 U. S. 559, 44 L. Ed. 587.

§ 37. Validity of statutory provisions.

See 10 Cent. Dig. Const. Law, §§ 35-38.

§ 38. — Constitutionality in general.

See 10 Cent. Dig. Const. Law, § 36.

The Montana Legislature must act in subordination to the state Constitution in executing the authority intrusted to it by Congress in Enabling Act Feb. 22, 1889, c. 180, § 17, 25 Stat. 676, which granted certain public lands to the state for a normal school, to be held, appropriated, and disposed of exclusively for that purpose, in such manner as the Legislature should provide. Judgment (Mont. 1906) 83 P. 874, affirmed.—*State of Montana v. Rice*, 27 S. Ct. 281, 204 U. S. 291, 51 L. Ed. 490.

There is nothing in the federal Constitution which directly or impliedly forbids a state to confer judicial functions upon nonjudicial bodies. Judgment, *In re Consolidated Rendering Co.* (Vt. 1907) 66 A. 790, affirmed.—*Consolidated Rendering Co. v. State of Vermont*, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

40. — Contravention of spirit of Constitution.

See 10 Cent. Dig. Const. Law, § 32.

The spirit of the federal Constitution or its preamble cannot be invoked, apart from the words of that instrument, to invalidate a state statute. Judgment, *Commonwealth v. Pear*, 68 N. E. 719, 183 Mass. 242, 67 L. R. A. 935, and *Same v. Jacobson, Id.*, affirmed.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765.

41. Persons entitled to raise constitutional questions.

See 10 Cent. Dig. Const. Law, §§ 39-41.

42. — In general.

See 10 Cent. Dig. Const. Law, §§ 39, 40; 39 Cent. Dig. Penalties, § 11.

The owner of land granted to the state of California under the swamp-land act (9 Stat. 519) is not entitled to set up, against proceedings to enforce an assessment on the land under a law of the state for the purpose of draining it, that such law impairs the obligation of a contract created between the state and the United States by the state's acceptance of the swamp-land act, that the proceeds of the lands should be applied to reclaiming them, since it is for the United States to complain of the breach of such contract, not a third party, and the appropriation of the proceeds of the lands granted rests solely in the good faith of the state.—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 683, 28 L. Ed. 569, affirming (C. C.) *Reclamation Dist. No. 108 v. Hagar*, 4 F. 366.

A party whose interests are affected by a state statute cannot set up that the statute is void under the federal constitution, as impairing the obligation of a contract to which he is not a party.—*Williams v. Eggleston*, 18 S. Ct. 617, 170 U. S. 304, 42 L. Ed. 1047.

A voter who does not allege that he ever was registered or ever made any application to be registered, but who, so far as appears, may have been entitled to apply for registration, is not in a position to impugn the constitutionality of a statute for registration on the ground that it in effect required a longer residence in the county than was required by the constitution of the state, and otherwise unreasonably impeded the exercise of the constitutional right of voting.—*Wiley v. Sinkler*, 21 S. Ct. 17, 179 U. S. 58, 45 L. Ed. 84.

A party will not be heard to question the constitutionality of a statute unless he shows that some right of his is impaired or prejudiced thereby.—*Red River Val. Nat. Bank v. Craig*, 21 S. Ct. 703, 181 U. S. 548, 45 L. Ed. 994.

The conjectural effect upon the property rights of an owner of property abutting on a street improvement of an ordinance confining the right to labor on such improvement to resident citizens is too remote and uncertain to be available as a defense to a suit to enforce payment of a lien on such property for its proportion of the cost of the improvement. Judgment, *Kelly v. Chadwick*, 29 So. 295, 104 La. 719, affirmed.—*Chadwick v. Kelly*, 23 S. Ct. 175, 187 U. S. 540, 47 L. Ed. 293.

The objection that the privileges and immunities of citizens of the several states, secured to the citizens of each state by the federal constitution, are infringed by a municipal ordinance confining the right to labor on works of municipal improvement to resident citizens, is not available as a defense to a suit to enforce the payment of a lien on abutting property for its proportion of the cost of the improvement.—*Id.*

An objection that a state statute violates the federal Constitution because it does not provide for notice to those who may be affected

by it is not available to a party who was in fact given notice, and who at the hearing objected to the action proposed to be taken under such statute. Judgment, *Detroit, Ft. W. & B. I. Ry. v. Commissioner of Railroads*, 86 N. W. 842, 127 Mich. 219, 62 L. R. A. 149, affirmed.—*Detroit, Ft. W. & B. I. Ry. v. Osborn*, 23 S. Ct. 540, 189 U. S. 383, 47 L. Ed. 860.

Nonresident owners of lands within the levee district created by Act Ark. Feb. 15, 1893, p. 31, who do not assert the existence of conditions which, under section 11 of that act, as amended in Act Ark. April 2, 1895, p. 88, § 1, would entitle them to personal service of summons in a suit to enforce the payment of levee taxes, cannot object that they were deprived of their property without due process of law by a decree of sale because the verified complaint in a suit to collect such taxes was insufficient, by reason of its failure to deny the existence of such conditions, to sustain service by publication. Decree (1905) 85 S. W. 252, 74 Ark. 174, affirmed.—*Ballard v. Hunter*, 27 S. Ct. 261, 204 U. S. 241, 51 L. Ed. 461.

The question whether a state statute giving a lien upon a vessel, enforceable in a state court, for materials and supplies furnished on the credit of the vessel, is an unconstitutional infringement upon the exclusive admiralty jurisdiction of the federal courts of liens of a maritime character, is not open in a case in which no maritime lien is asserted. Judgment, *De-laney Forge & Iron Co. v. Iroquois Transp. Co.* (1905) 105 N. W. 527, 142 Mich. 84; *The Winnebago, Id.*, affirmed.—*Iroquois Transp. Co. v. De Laney Forge & Iron Co.*, 27 S. Ct. 509, 205 U. S. 354, 51 L. Ed. 836.

A judgment of a state court which does not so enforce a state statute as to deprive the party complaining of rights which are protected by the federal Constitution will not be reversed in the Supreme Court of the United States because such statute, when enforced against a class to which the party complaining does not belong, may work a deprivation of such constitutional rights. Judgment, *State v. Lee* (1905) 59 A. 1118, affirmed.—*Lee v. State of New Jersey*, 28 S. Ct. 22, 207 U. S. 67, 52 L. Ed. 106.

An abutting owner of property on which dwellings have been erected cannot deny the validity of Act May 19, 1896, 29 Stat. 125, c. 206, creating a drainage system in the District of Columbia, which affects only owners of unimproved property. Judgment (1907) 29 App. D. C. 563, reversed.—*District of Columbia v. Brooke*, 29 S. Ct. 560, 214 U. S. 138, 53 L. Ed. 941.

The availability for burial purposes of large tracts of land within the limits of the city of San Francisco cannot be alleged by a cemetery association owning a burial ground within those limits, to invalidate, under the federal Constitution, an ordinance forbidding the burial of the dead within the city and county of San Francisco. Decree (1907) 93 P. 70, 152 Cal. 464, 14 A. & E. Ann. Cas. 1080, affirmed.—*Laurel Hill Cemetery v. City and County of San Francisco*, 30 S. Ct. 801, 216 U. S. 358, 54 L. Ed. 515.

Only nonresident shareholders in a national bank can complain of the supposed invalidity, as to them, of the retroactive features of Act Ky. March 21, 1900 (Acts 1900, c. 23), making it the duty of certain officers of the bank to list its shares of stock for taxation, and requiring the bank to pay the tax, and a penalty for delinquency.—*Citizens' Nat. Bank v. Commonwealth of Kentucky*, to use of Boyle County, 30 S. Ct. 532, 217 U. S. 443, 54 L. Ed. 832.

One not affected by the provisions of a statute cannot urge its unconstitutionality.—(1910) *Brown-Forman Company v. Commonwealth of Kentucky*, 30 S. Ct. 578, 217 U. S. 563, 54 L. Ed. 883, affirming judgment *Brown-Forman*

man Co. v. Same (1907) 101 S. W. 321, 125 Ky. 402.

The directors of a corporation do not represent the bondholders, so as to urge the invalidity as to them of a statute repealing the corporate charter.—(1910) *Calder v. People of State of Michigan ex rel. Attorney General*, 31 S. Ct. 122, 218 U. S. 591, 54 L. Ed. 1163, affirming judgment *People v. Calder* (1908) 117 N. W. 314, 153 Mich. 724, 128 Am. St. Rep. 550.

One who can satisfy the requirement of Laws N. Y. 1910, c. 348, for licensing private bankers, that the applicant for license must have been continuously for five years immediately preceding his application a resident of the United States, cannot complain that such provision is unconstitutional.—(1911) *Engel v. O'Malley*, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128, affirming decree (C. C. 1910) 182 F. 365.

A savings bank, so far, at least, as its rights are involved in those of its depositors, may raise the objection that property is taken without due process of law by Laws Mass. 1907, c. 340, providing that deposits which have remained inactive and unclaimed for 30 years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.—(1911) *Provident Institution for Savings in Town of Boston v. Malone*, 31 S. Ct. 661, 221 U. S. 680, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129, affirming judgment (1909) *Malone v. Provident Institution for Savings in Boston*, 86 N. E. 912, 201 Mass. 23.

A corporation operating a railroad in the state cannot challenge the validity of Act Ark. March 8, 1907, p. 162, abolishing the fellow servant rule, because such statute may make an unconstitutional discrimination between individuals and corporations engaged in mining, but not operating railroads.—(1911) *Aluminum Co. of America v. Ramsey*, 32 S. Ct. 76, 222 U. S. 251, 56 L. Ed. 185, affirming judgment (1909) 117 S. W. 568, 89 Ark. 522.

Children of a decedent, who, because of their relationship, are assessed at the lowest rate fixed by Laws N. Y. 1896, c. 908, imposing a tax when property is transferred by deed intended to take effect at the death of the grantor, cannot urge that such statute operates to deny the equal protection of the laws because transfers to collaterals and strangers in blood are taxed a higher rate.—(1912) *Keeney v. Comptroller of State of New York*, 32 S. Ct. 105, 222 U. S. 525, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1189, affirming judgment (1909) *In re Keeney's Estate*, 87 N. E. 428, 194 N. Y. 281.

One who does not appear to have imported black powder from outside the state cannot raise the question of the validity under the commerce clause of the federal Constitution of the provisions of Laws Kan. 1907, c. 250, making it unlawful to sell, offer for sale, or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder.—(1912) *Williams v. Walsh*, 32 S. Ct. 137, 222 U. S. 415, 56 L. Ed. 253, affirming order (1908) *Ex parte Williams*, 98 P. 777, 79 Kan. 212.

Requirements of Laws Tex. 1907, c. 123, as to licensing and registering medical practitioners, which do not contemplate inquiry into applicant's knowledge, held not to infringe the rights, under Const. U. S. Amend. 14, of a person holding a diploma from a school of osteopathy, who has not presented this diploma to the board of medical examiners created by statute.—(1912) *Collins v. State of Tex-*

as, 32 S. Ct. 286, 223 U. S. 288, 56 L. Ed. 439, affirming judgment (1909) *Ex parte Collins*, 121 S. W. 501, 57 Tex. Cr. R. 2.

An osteopath whose constitutional rights are not infringed by Laws Tex. 1907, c. 123, as to registration and licenses, cannot complain that the statute may be unconstitutional in other cases.—*Id.*

Only hotel keepers having less than 25 bedrooms can assail validity of discrimination in favor of larger hotels by an ordinance forbidding the keeping of billiard tables for hire, except by hotel keepers having 25 or more bedrooms.—*Murphy v. People of State of California*, 32 S. Ct. 697, 225 U. S. 623, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153.

Reduction in interstate sales of nonresident manufacturer by reason of state registration and inspection laws affecting the right of importing purchasers to sell in original packages gives him standing to challenge the validity of such act as unconstitutional regulation of interstate commerce.—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.

Only those injuriously affected by discriminatory features of a state statute can urge its invalidity under Const. U. S. Amend. 14, as denying equal protection of the laws.—*Standard Stock Food Co. v. Wright*, 32 S. Ct. 781, 225 U. S. 540, 56 L. Ed. 1197.

A resident owner of shares in a foreign corporation having no taxable property in the state cannot complain that Burns' Ann. St. Ind. 1908, §§ 10,143, 10,233, 10,234, providing for taxation of such shares, deny equal protection of the laws, because making no allowance where the corporation has property taxed in the state as they do in case of domestic corporations.—*Darnell v. State of Indiana*, 33 S. Ct. 120, 226 U. S. 390, 57 L. Ed. 267, affirming judgment 90 N. E. 769, 174 Ind. 143.

One whose rights are not affected by the period of limitation established by a statute cannot question the constitutionality of such limitation.—*Pittsburg Steel Co. v. Baltimore Equitable Soc.*, 33 S. Ct. 167, 226 U. S. 455, 57 L. Ed. 297, affirming judgment 77 A. 255, 113 Md. 77.

An interstate carrier who has refused to furnish cars for intrastate transportation, as required by Act Ark. April 19, 1907 (Laws 1907, pp. 454, 463) §§ 1, 17, cannot test the constitutionality of the act as affecting interstate commerce in a suit to enjoin actions to recover penalties for violation of its provisions, where provisions affecting interstate commerce are separable from the remaining provisions.—*Hampton v. St. Louis, I. M. & S. R. Co.*, 33 S. Ct. 263, 227 U. S. 456, 57 L. Ed. 596, reversing decree (C. C.) *St. Louis, I. M. & S. Ry. Co. v. Hampton*, 162 F. 693.

An owner of the bed and shore of the St. Marys river, having no property right in the flow of the river which has been taken by the United States under Act March 3, 1909, § 11, cannot complain because under section 12 of that act the Secretary of War may lease any water power resulting from the conservation of the flow of the river and the works the government may construct.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1066.

Penal provisions of Laws W. Va. 1907, c. 41 (Code Supp. 1909, c. 54, §§ 2496a1, 2496a2), fixing maximum fare at two cents per mile, are not open to constitutional attack, where the highest state court has held that a railroad is excepted from the operation of the penalty clause pending prosecution in good faith of a suit to determine whether the statute is confiscatory as applied to such company.—*Chesapeake & O. R.*

Co. v. Conley, 33 S. Ct. 985, 230 U. S. 513, 57 L. Ed. 1597.

A territorial statute governing tax sales cannot be attacked because it may be so construed as to deny due process of law, but plaintiff must show that in his case, the effect of the statute is to deprive him of his property without due process of law.—*Straus v. Foxworth*, 34 S. Ct. 42, 231 U. S. 162, 58 L. Ed. 168.

One against whom judgment was rendered on a claim not arising in interstate commerce may not urge invalidity, under commerce clause of federal Constitution and Interstate Commerce Act Feb. 4, 1887, and its amendments, of Acts Tex. 31st Leg. c. 47, allowing attorney's fee to plaintiff in a suit for overcharges on freight, or for lost or damaged freight, or for stock killed by negligence of the railroad company and not paid within 30 days.—*Missouri, K. & T. Ry. Co. of Texas v. Cade*, 34 S. Ct. 678, 233 U. S. 642, 58 L. Ed. 1135.

The validity of Acts Tex. 31st Leg. c. 47, allowing attorney's fee to successful plaintiff in suits against railroads on certain designated claims, may not be assailed by defendant on the ground that natural persons only may avail themselves of its benefits.—*Id.*

A railway company cannot complain for its employees of the repugnancy to the due process of law and equal protection of the laws clauses of the federal Constitution of Laws N. Y. 1897, c. 415, § 10, as amended by Laws 1908, c. 442, requiring semimonthly payment of wages of railway employees.—*Erie R. Co. v. Williams*, 34 S. Ct. 761, 233 U. S. 685, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, affirming judgment 92 N. E. 1084, 199 N. Y. 525.

A resident of the District of Columbia, failing to show compliance with the laws of the District as to registering automobiles and licensing operators, or that he has applied for local identifying tags, required by Laws Md. 1910, c. 207, § 140a, to a limited use of the highways by non-residents, cannot complain that residents of the District are not among those to whom this privilege is granted.—*Hendrick v. State of Maryland*, 35 S. Ct. 140, 235 U. S. 610, 59 L. Ed. 385.

An automobile owner cannot complain of discrimination, under Laws Md. 1910, c. 207, for licensing automobiles because the fee is graduated according to the horse power where the power of his car does not appear.—*Id.*

A carrier cannot object on constitutional grounds to procedure under Ky. St. § 829, to recover payments in excess of rates found by State Railroad Commission to be reasonable, because it cannot produce evidence other than that presented to the Commission at a trial in the court, unless the court is satisfied that the evidence could not have been produced before the Commission with reasonable diligence, where no defense is shown that the carrier has not either interposed or waived before the Commission.—*Louisville & N. R. Co. v. Finn*, 35 S. Ct. 146, 235 U. S. 601, 59 L. Ed. 379, affirming order (D. C.) Same v. Kentucky Railroad Commission, 214 F. 465.

An employer cannot object to discrimination, so far as it affects employees, which the Ohio Workmen's Compensation Act (Page & A. Gen. Code, § 1465-37 et seq.) makes between employees in shops with five or more employees and those in shops having a lesser number.—*Jeffrey Mfg. Co. v. Blagg*, 35 S. Ct. 167, 235 U. S. 571, 59 L. Ed. 364.

A person is not precluded from complaining that taking of his property to satisfy an alleged debt was without notice and hearing, necessary, under Const. U. S. Amend. 14, because he had no adequate defense on the merits.—*Coe v. Armour Fertilizer Works*, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027, reversing judg-

ment *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 58 So. 231, 63 Fla. 64.

Validity under due process of law clause of Const. U. S. Amend. 14, of Rev. St. Mo. 1909, § 10322, requiring affidavit from officers that corporation has not issued and does not own trust certificates, cannot be attacked for uncertain meaning of such term, by corporation refusing to file affidavit on theory that it was not obliged to make any such disclosure.—*Mallinckrodt Chemical Works v. State of Missouri ex rel. Jones*, 35 S. Ct. 671, 238 U. S. 41, 59 L. Ed. 1192, affirming judgment State ex rel. Jones v. Mallinckrodt Chemical Works, 156 S. W. 967, 249 Mo. 702.

43. — Estoppel or waiver.

See 10 Cent. Dig. Const. Law, § 41.

Where a landowner actively assists in the religious dedication of his property as a cemetery, and permits himself to be held out to the public as one of the officers of the cemetery company, for which a charter is enacted, but which is never formally organized, and to which no conveyance of the land is ever made, and who for 20 years, during which he is the manager of the cemetery, treats the land as the property of the company, giving deeds to burial lots, signed by himself as president thereof, he is estopped to deny the right of Congress to exercise the power of amendment reserved in the charter, and change the regulations controlling the property, on the ground that, as his title has never been conveyed to the company, such amendatory act would have the effect to deprive him of his property without due compensation.—*Close v. Glenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

After instituting proceedings in a court, plaintiff cannot be heard to say that the law establishing the court is unconstitutional because it establishes a court unknown to the constitution, though plaintiff invoked the jurisdiction of that court from fear that otherwise it might lose its rights.—*Great Falls Mfg. Co. v. Garland*, 124 U. S. 581, 8 S. Ct. 631, 31 L. Ed. 527, affirming decree (C. C.) 25 F. 521.

Acts Tenn. 1881, c. 96, § 9, relating to the taxing district of Shelby county, requires every dealer in merchandise of whatever kind to pay an annual license tax, and, in addition thereto, if he employ no capital, a percentage on his gross yearly commissions or charges; payment of such percentage to be secured by a bond given on the issuance of the license. *Held*, that one who takes out a license and gives the bond cannot afterwards escape payment of the percentage tax on the ground that his business for the year consisted entirely in taking orders for nonresident merchants, and that the tax would therefore be a burden on interstate commerce.—*Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601, distinguishing *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694.

Const. Colo. art. 11, § 6, forbids a county, under any circumstances, to issue bonds beyond a certain amount, and limits the right to issue bonds, without a previous vote of the qualified electors of the county, to half such amount. Gen. Laws 1877, p. 218, § 30, provides that the board of county commissioners of each county shall make out semiannual statements showing the debt owed by the county, payments thereon, and rate of interest, and shall cause such statements to be entered on their records, open to the inspection of the public at all times. Lake county, being already indebted beyond the constitutional limit, issued bonds containing a recital that the issue was by virtue of a vote of the qualified voters of the county, in compliance with the general statute. *Held*, that the

recital in the bonds did not estop the county to prove by the county records that the bonds were issued in violation of the constitution, and were therefore void.—*Sutliff v. Lake County Com'rs*, 147 U. S. 230, 13 S. Ct. 318, 37 L. Ed. 145, following *Dixon County v. Field*, 111 U. S. 83, 4 S. Ct. 315, 28 L. Ed. 360, and *Lake County v. Graham*, 130 U. S. 674, 9 S. Ct. 654, 32 L. Ed. 1065, and distinguishing *Chaffee County Com'rs v. Potter*, 142 U. S. 355, 12 S. Ct. 216, 35 L. Ed. 1040.

The act of October 1, 1890, offered to sugar producers a certain bounty on sugar. The act of August 19, 1894, repealed the former act, and forbade the payment of bounties. The act of March 2, 1895, appropriated money for the payment of the bounty on sugar produced previous to August 28, 1894. *Held*, that the equitable obligation of the government to pay the bounty was not affected by the question of the constitutionality of the bounty provision; no attack thereon having been made by any government officer during three years of its operation, and the payments thereunder having been made without objection.—*United States v. Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 215.

A person may, by his acts or omission to act, waive a right which he might otherwise have under the constitution of the United States.—*Pierce v. Somerset Ry.*, 19 S. Ct. 64, 171 U. S. 641, 43 L. Ed. 318.

Landowners are not estopped to deny the constitutionality of a statute authorizing assessments for a local improvement, as against one who purchased, in the open market and on the advice of counsel, bonds which such assessments, if valid, would be used to pay, merely because they, or some of them, had secured the passage of the act providing for the improvement, had participated in the organization of the assessment district, and in various ways proceeded under the assumption that the act was valid. Decree 95 F. 883, 37 C. C. A. 309, affirmed.—*O'Brien v. Wheelock*, 22 S. Ct. 354, 184 U. S. 450, 46 L. Ed. 636.

A railroad company, by incorporating under a general act, is estopped to contest the validity, under the federal Constitution, of the provisions of that act regulating railroad rates, which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body. Judgment, Commissioner of Railroads v. Grand Rapids & I. Ry. Co., 89 N. W. 967, 130 Mich. 248, 9 Detroit Leg. N. 10, affirmed.—*Grand Rapids & I. Ry. Co. v. Osborn*, 24 S. Ct. 310, 193 U. S. 17, 48 L. Ed. 598.

An objection that the frontage rule of assessment for a public improvement, prescribed by 87 Ohio Laws, p. 113, operated as a denial of due process of law, cannot be urged to defeat the collection of the assessments, by abutting owners who petitioned for the improvement under the act, actively participated in carrying out the work, recognized the justice of the assessments from time to time during its progress, and signed a statement, for the purpose of inducing the issuance and purchase of county improvement bonds, practically to the effect that the work had been properly done and that there was no defense to the bonds.—*Shepard v. Barron*, 24 S. Ct. 737, 194 U. S. 553, 48 L. Ed. 1115.

A waiver of the objection that vested rights of the railroad company under the Northern Pacific land grant are interfered with by the provisions of Act July 1, 1898, c. 546 (30 Stat. 597, 620), enacted to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting its land grant, results from the acceptance of that act by the successor in interest of the railway grantee.—*Humbird v.*

Avery, 25 S. Ct. 123, 195 U. S. 480, 49 L. Ed. 288.

An agreement between rival gas companies to fix the price for gas, in violation of the Illinois anti-trust act of June 11, 1891 (Laws Ill. 1891, p. 206), does not, after they cease to act under it, defeat their right to invoke the due process of law clause of the federal Constitution to prevent the enforcement of a municipal ordinance which, by establishing unremunerative rates, has the effect of taking private property for public use without just compensation.—*Peoria Gas & Electric Co. v. City of Peoria*, 26 S. Ct. 214, 200 U. S. 48, 50 L. Ed. 365.

One who has not appeared and been heard on classification given by an ordinance providing for licensing occupations cannot urge on the federal Supreme Court that he has been unjustly discriminated against, in that he has been classified so as to subject him and his business to a higher license tax than that required of others in the same business.—*Bradley v. City of Richmond*, 33 S. Ct. 318, 227 U. S. 477, 57 L. Ed. 603, affirming judgment 66 S. E. 872, 110 Va. 521.

44. Determination of constitutional questions.

See 10 Cent. Dig. Const. Law, §§ 42-47; 44 Cent. Dig. Statut. § 56.

46. — Necessity of determination.

See 10 Cent. Dig. Const. Law, §§ 43-45.

The power of a court to pass upon the constitutionality of an act of the legislature should not be invoked by means of an amicable suit, especially where there is an agreed statement of facts. This power is the supreme judicial function, and its exercise is only legitimate in the last resort, in the determination of an earnest and vital controversy.—*Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176, affirming judgment *Wellman v. Chicago & G. T. Ry. Co.*, 83 Mich. 592, 47 N. W. 489.

Act Tenn. March 29, 1887, § 3, declares that, when a foreign corporation does business in the state, process may be served on any of its agents found in the county where suit is brought, "no matter what character of agent such person may be." *Held*, that it was immaterial whether the quoted clause violates the provision of the fourteenth amendment relating to due process of law, where the agent on whom process was served in the case at bar was sufficiently representative to give the court jurisdiction over the corporation.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 19 S. Ct. 308, 172 U. S. 602, 43 L. Ed. 569.

A bill to set aside a tax sale, which does not charge that the statutory procedure was not strictly pursued, but relies on the failure of the sheriff's return of sale to set forth a compliance with such procedure, cannot be maintained on the theory that, as the statute validated tax deeds notwithstanding any irregularities in the sale not appearing on the record, plaintiff was deprived of his property without due process of law, as this is an attempt to test the constitutionality of the law without showing that plaintiff was injured by its application.—*Turpin v. Lemon*, 23 S. Ct. 20, 187 U. S. 51, 47 L. Ed. 70.

An objection that the equal protection of the laws is denied to alleged violators of a state local option law because the selection of the jurors for the trial of such offenses is not restricted, as in other cases, to the district in which they are committed, cannot be raised in advance of the trial. Judgment 70 N. E. 1131, 68 Ohio St. 688, affirmed.—*State of Ohio ex rel. Lloyd v. Dollison*, 24 S. Ct. 703, 194 U. S. 445, 48 L. Ed. 1062.

The objection that due process of law is not afforded an owner of property used for gaming purposes by Rev. St. Ohio, § 4275, under which a judgment against those who won money there at gambling, when not impeached for fraud or collusion, is made conclusive evidence of the amount of money lost in an action to charge the property of the owner, is not open to such an owner where there is proof outside the record of the judgment, showing the amount of money lost, given against his objection that the fact was not in issue. Judgments 72 N. E. 1161, 1162, 70 Ohio St. 437, affirmed.—Marvin v. Trout, 26 S. Ct. 31, 199 U. S. 212, 50 L. Ed. 157.

The federal Supreme Court will not consider the question of the constitutionality of the clause of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought. Judgment and decree (C. C.) 164 F. 215, reversed.—United States v. Delaware & H. Co., 29 S. Ct. 527, 213 U. S. 366, 53 L. Ed. 836.

Objections to the invalidity under the federal Constitution of the provisions as to penalties in Gen. Laws Tex. 1905, c. 148, § 9, taxing wholesale dealers in oils, are not open in a civil suit brought by the state to recover the taxes so imposed. Judgment 103 S. W. 489, 100 Tex. 647, affirmed.—Southwestern Oil Co. v. State of Texas, 30 S. Ct. 496, 217 U. S. 114, 54 L. Ed. 688.

The validity of the penalties prescribed by the Mississippi anti-trust laws cannot be challenged in a suit in which the state contents itself with a bill in equity to dissolve an association which those laws condemn as a combination in restraint of trade.—Grenada Lumber Co. v. State of Mississippi, 30 S. Ct. 535, 217 U. S. 433, 54 L. Ed. 826, affirming decree (Miss.) Retail Lumber Dealers' Ass'n v. State, 48 So. 1021.

No objections to the validity of a statute will be considered which do not properly arise in the case before the court.—Flint v. Stone Tracy Co., 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

The possible unconstitutionality of penalties imposed by Act May 31, 1911 (102 Ohio Laws, p. 224), for withholding the excise tax levied on gross railway earnings, will not be considered in actions not involving an attempt to enforce such penalties, especially in view of section 160, relating to the severability of the various sections in the act.—Ohio Tax Cases, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 737, affirming decree (D. C.) 208 F. 537.

The question of the possible invalidity of the ad valorem duty of 35 per cent. prescribed by Tariff Act, § 37, as an optional alternative to the annual excise tax based on gross tonnage, will not be considered in an action for the recovery of the annual tonnage tax, since the provisions are separable.—Rainey v. United States, 34 S. Ct. 429, 232 U. S. 310, 58 L. Ed. 617, affirming order (C. C.) United States v. Billings, 190 F. 359, and modifying judgment (C. C.) Same v. Blair, Id. 372.

The tax on gross receipts of sleeping and parlor car companies imposed under Laws Fla. 1907, c. 5596, § 47, held not discriminatory because not affecting railroads operating their own sleeping cars, where there does not appear to be any such railroad in the state.—Pullman Co. v. Knott, 35 S. Ct. 2, 235 U. S. 23, 59 L. Ed. 105.

On appeal from a District Court refusing interlocutory injunction to restrain enforce-

ment of order of State Corporation Commission, validity of the penalty provision of the Arizona Constitution in advance of an attempt to enforce it will not be determined.—Phoenix Ry. Co. of Arizona v. Geary, 36 S. Ct. 45, 239 U. S. 277, 60 L. Ed. 287, affirming decree (D. C.) 209 F. 694.

47. — Scope of inquiry in general.

See 10 Cent. Dig. Const. Law, § 43-45.
One claiming that a state statute is void, for want of due process of law, is limited solely to the inquiry whether, in the case presented by himself, the statute has operated to deprive him of his property without due process; and the court will not consider whether, in a different case, the act might so operate.—Del Castillo v. McConnico, 18 S. Ct. 229, 168 U. S. 674, 42 L. Ed. 622.

Expert testimony that a certain employment is not attended with danger to the health of those engaged in it is not admissible to prove that a statute enacted in the exercise of the police power to preserve the health and safety of the employes engaged therein is not necessary. Judgment, State v. Cantwell (Mo.) 78 S. W. 569, 179 Mo. 245, affirmed.—Cantwell v. State of Missouri, 26 S. Ct. 749, 199 U. S. 602, 50 L. Ed. 329.

48. — Presumptions and construction in favor of constitutionality.

See 10 Cent. Dig. Const. Law, § 46; 41 Cent. Dig. Statut. § 54.

A local regulation, under which taxes are imposed, should not be held by the courts of the Union to be inconsistent with the national constitution, unless that conclusion be unavoidable.—Henderson Bridge Co. v. City of Henderson, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

No injunction ought to be awarded by a federal court against the enforcement of a state railroad rate law which is alleged to violate the federal Constitution, unless the case is reasonably free from doubt.—Ex parte Young, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

An act of a state Legislature, fixing rates for either passenger or freight transportation is to be regarded as prima facie valid, and the onus rests upon the carrier to prove its assertion to the contrary.—Id.

It is the court's duty to uphold a statute when it is fairly susceptible of two interpretations, one which will uphold its constitutionality, and the other defeat it, though the former be the less natural.—(1909) United States v. Delaware & H. Co., 29 S. Ct. 527, 213 U. S. 366, 53 L. Ed. 836, reversing judgment and decree (C. C. 1908) 164 F. 215.

49. — Effect of decision.

See 10 Cent. Dig. Const. Law, § 47.

The decisions of the supreme court of the United States that the state prohibitory laws were not operative on liquors imported and sold in the original packages did not have the effect to annul those laws, and hence their re-enactment was not necessary in order to make them immediately operative upon such liquors after the passage of the "Wilson Bill."—Wilkerson v. Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, reversing decree (C. C.) 43 F. 556.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.

Acts granting divorce as assumption of judicial powers, see Divorce, 45.
Appellate jurisdiction in cases involving delegation of legislative power, see Courts, 385(1½).

50. Nature and scope in general.

See 10 Cent. Dig. Const. Law, §§ 48, 49.

A legislative body has full power to make a conspiracy to do an act punishable more severely than the doing of the act itself.—*Clune v. United States*, 159 U. S. 590, 16 S. Ct. 125, 40 L. Ed. 269.

51. Encroachment on judiciary.

See 10 Cent. Dig. Const. Law, §§ 50-55.

54. — Disposition of property and adjudication of rights.

See 10 Cent. Dig. Const. Law, §§ 55-57.

Act June 29, 1906, § 15, authorizing certificates of naturalization issued ex parte, to be impeached where fraudulently procured, is not unconstitutional as an exercise of judicial power.—*Johannessen v. United States*, 32 S. Ct. 613, 225 U. S. 227, 56 L. Ed. 1066.

55. — Remedies and procedure.

See 10 Cent. Dig. Const. Law, §§ 58-69, 71, 80, 81, 83; 40 Cent. Dig. Prohib. § 2.

The provision of the Chinese deportation act of May 5, 1892, which puts the burden of proof upon a Chinese laborer arrested for having no certificate, as well as the requirement of proof by one credible white witness that he was a resident of the United States at the time of the passage of the act, is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government.—*Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905.

Rev. St. §§ 5151, 5234, empowering the comptroller to appoint receivers for insolvent national banks, and to make ratable assessments upon the stockholders, does not vest in him a judicial power, in violation of the constitution.—*Bushnell v. Leland*, 17 S. Ct. 209, 164 U. S. 684, 41 L. Ed. 598.

An unconstitutional assumption of judicial functions was not made by the enactment of Rev. St. Ariz. 1887, par. 837, which discharges a motion for a new trial by operation of law, if not acted upon at the same term.—*James v. Appel*, 24 S. Ct. 222, 192 U. S. 129, 48 L. Ed. 377.

58. Encroachment on executive.

See 10 Cent. Dig. Const. Law, §§ 86-88.

Act Sept. 27, 1890 (26 Stat. 492), authorizing the establishment of a public park in the District of Columbia, provided that the chief of engineers of the United States army, and the engineer commissioner of the District of Columbia, with three citizens appointed by the president, should be a park commission. *Held*, that the act was constitutional, and not an attempt by congress to exercise the appointing power since its effect was merely to lay upon the two engineers, being officers already appointed, new duties germane to their offices.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

Although the constitution vests in the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this does not prevent congress from granting amnesty, either before legal proceedings are taken, during their pendency, or after conviction and judgment; and it is therefore competent for congress to provide that a witness who is required to give evidence tending to incriminate himself shall never be prosecuted for the offense to which the testimony relates.—*Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819, affirming judgment (C. C.) 70 F. 46.

No interference with the constitutional functions of the president, in connection with

matters involved in the relations between this country and the republic of Mexico, is made by the act of congress of December 28, 1892, providing for a suit in the court of claims to determine as to the matter of fraud in obtaining an award against Mexico, the amount of which had been paid by Mexico to the United States for the claimants. Decree *United States v. La Abra Silver Min. Co.*, 32 Ct. Cl. 462, affirmed.—*La Abra Silver Min. Co. v. United States*, 20 S. Ct. 168, 175 U. S. 423, 44 L. Ed. 223.

59. Delegation of powers.

See 10 Cent. Dig. Const. Law, §§ 89-121.

60. — In general.

See 10 Cent. Dig. Const. Law, §§ 89, 90, 93.

The recognition of the local law by the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], in the matter of exemptions, dower, priority of payments, and the like, does not render the act void as an attempt by congress unlawfully to delegate its legislative power.—*Hanover Nat. Bank v. Moyses*, 22 S. Ct. 857, 186 U. S. 181, 46 L. Ed. 1113.

Supplementary regulations concerning the location of mining claims, prescribed by a state in addition to the congressional regulations, are not invalid on the theory that they were enacted in the exercise of an unlawful delegation by Congress of legislative power. Judgment, *Baker v. Butte City Water Co.*, 72 P. 617, 28 Mont. 222, 104 Am. St. Rep. 683, affirmed.—*Butte City Water Co. v. Baker*, 25 S. Ct. 211, 196 U. S. 119, 49 L. Ed. 409.

Congress, in dealing with the Philippine Islands, may delegate legislative authority to such agencies as it may select.—*United States v. Heinzen*, 27 S. Ct. 742, 206 U. S. 370, 51 L. Ed. 1098, 11 Ann. Cas. 688, reversing judgment *Heinzen v. United States*, 42 Ct. Cl. 58.

61. — To judiciary.

See 10 Cent. Dig. Const. Law, §§ 103-107.

Rev. St. § 102, making it a misdemeanor punishable by indictment to refuse to give testimony before either house of congress or any committee thereof, is not unconstitutional, as delegating to the courts the powers of the houses to punish for contempt.—*In re Chapman*, 17 S. Ct. 677, 166 U. S. 661, 41 L. Ed. 1154.

The power to appoint extradition commissioners is conferred upon the courts by congress, in Rev. St. § 5270, under the authority of Const. art. 2, § 2, par. 2, since such commissioners are not judges in the constitutional sense.—*Rice v. Ames*, 21 S. Ct. 406, 180 U. S. 371, 45 L. Ed. 577.

Legislative power is not unconstitutionally delegated to the courts by the provisions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempt to monopolize any part of such commerce, because the general language of these provisions leaves it to the judiciary to decide whether in a given case the particular acts come within the condemnation of the statute.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

62. — To executive.

See 10 Cent. Dig. Const. Law, §§ 94-102.

An act providing for the regulation of railroads, and creating a commission to supervise the same, is not subject to the constitutional objection that it confers legislative and judicial

powers on the commission.—*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636; *Reagan v. Same*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014.

Act Cong. Oct. 1, 1890, § 3, authorizing the president to suspend, "for such time as he shall deem just," the provisions of that act allowing the free importation of sugars, molasses, coffee, tea, and hides, as to any countries, which impose upon the products of the United States duties which he "may deem to be reciprocally unequal and unjust," cannot be considered a delegation of legislative or treaty-making power; especially in view of the fact that, from the foundation of the government, congress has frequently invested the president with similar discretion.—*Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294.

The provisions in the act of congress of August 2, 1886, defining butter, and imposing a tax upon the manufacture, etc., of oleomargarine (24 Stat. 209, c. 840), that the marks, brands, and stamps required by the act to be placed on packages of oleomargarine, and the omission of which is made by the act a criminal offense, shall be designated by the commissioner of internal revenue, involve no unconstitutional delegation of power to determine what acts shall be criminal, since the criminal offense is fully and completely defined by the act, and the designation of the marks, brands, and stamps is merely the discharge of an administrative function, needful to the operation of the machinery of the law.—*In re Kollock*, 17 S. Ct. 444, 165 U. S. 526, 41 L. Ed. 813.

An unconstitutional delegation of legislative power to the Secretary of the Treasury is not made by the provision of Tea Inspection Act March 2, 1897, c. 358, 29 Stat. 604 [U. S. Comp. St. 1901, p. 3194], forbidding the importation of teas inferior to the government standards of purity, quality, and fitness for consumption, which authorizes him to establish such standards upon the recommendation of a board of tea experts, but such provision merely leaves to the Secretary the executive duty to effectuate the legislative policy declared in the statute.—*Buttfield v. Stranahan*, 24 S. Ct. 349, 192 U. S. 470, 48 L. Ed. 525; *Same v. Bidwell*, 24 S. Ct. 356, 192 U. S. 498, 48 L. Ed. 536; *Same v. United States*, 24 S. Ct. 356, 192 U. S. 499, 48 L. Ed. 537.

Legislative functions are not unlawfully delegated by the provisions of Pub Acts Mich. 1901, Act. No. 173, for the taxation of railroad and certain other corporate property at the average rate of taxation imposed on all other property within the state subject to ad valorem taxes because such average rate is to be ascertained by the state board of assessors by dividing the total tax levied on such other property by the value of such property as returned by the local assessors and board of state tax commissioners. Decree (C. C.) *Michigan Railroad Tax Cases*, 138 F. 223, affirmed.—*Michigan Cent. R. Co. v. Powers*, 26 S. Ct. 459, 201 U. S. 245, 50 L. Ed. 744.

Legislative powers are not unconstitutionally delegated to the Secretary of War by the provision of River and Harbor Act March 3, 1899, c. 425, § 18, 30 Stat. 1121, 1153 [U. S. Comp. St. 1901, p. 3545], empowering that official, when satisfied, after a hearing of the parties interested, that a bridge over a navigable waterway of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably safe, easy, and unobstructed. Judgment, *United States v. Union Bridge Co.* (D. C. 1906) 143 F. 377, affirmed.—(1907) *Union Bridge Co. v. United States*, 27 S. Ct. 367, 204 U. S. 364, 51 L. Ed. 523; (1910) President, etc., of *Monongahela Bridge Co. v. United States*, 30 S. Ct. 356, 216 U. S. 177,

54 L. Ed. 435, judgment affirmed *United States v. Monongahela Bridge Co.* (D. C. 1908) 160 F. 712.

Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed, by the association and declared by the commission. Judgment, *St. Louis, I. M. & S. Ry. Co. v. Neal* (1906) 98 S. W. 953, 83 Ark. 591, reversed.—*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 28 S. Ct. 616, 210 U. S. 281, 52 L. Ed. 1061.

Legislative power was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the forest reserve act (Act June 4, 1897, c. 2, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1539]) and Act Feb. 1, 1905, c. 288, § 5, 33 Stat. 628 [U. S. Comp. St. Supp. 1909, p. 577], making criminal the violation of the rules and regulations covering forest reservations, made and promulgated by him under authority of those statutes.—(1911) *United States v. Grimaud*, 31 S. Ct. 480, 220 U. S. 506, 55 L. Ed. 563, reversing judgment (D. C. 1909) 170 F. 205.

Legislative power was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the forest reserve acts of June 4, 1897 (30 Stat. 35, c. 2 [U. S. Comp. St. 1901, p. 1539]), and February 1, 1905 (33 Stat. 628, c. 288, § 5 [U. S. Comp. St. Supp. 1909, p. 577]), making criminal the violation of the rules and regulations covering forest reservations, made and promulgated by him under authority of those statutes.—*Light v. United States*, 31 S. Ct. 485, 220 U. S. 523, 55 L. Ed. 570.

Legislative powers are not unconstitutionally delegated to the board of agriculture by the provisions of the North Carolina oil inspection act of March 8, 1909 (Acts 1909, c. 554), which requires that illuminating oils sold or offered for sale in the state be safe, pure, and afforded a satisfactory light, leaving it to the board to determine what oils will measure up to these standards.—(1912) *Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina*, 32 S. Ct. 152, 222 U. S. 380, 56 L. Ed. 240, affirming decree (C. C. 1909) 172 F. 695.

Leaving to Interstate Commerce Commission the carrying out of details under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, prescribing a uniform system of accounting for carriers under that act, is not illegal as a delegation of legislative authority.—(1912) *Interstate Commerce Commission v. Goodrich Transit Co.*, 32 S. Ct. 436, 224 U. S. 194, 56 L. Ed. 729, reversing judgment (Com. C. 1911) *Goodrich Transit Co. v. Interstate Commerce Commission*, 190 F. 943.

Legislative power is not unconstitutionally delegated to the Interstate Commerce Commission by Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, authorizing the commission to prescribe a uniform system of accounting for carriers subject to the act.—*Kansas City Southern R. Co. v. United States*, 34 S. Ct. 125, 231 U. S. 423, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1, affirming decree (Com. C.) 204 F. 641.

Congress may delegate to the Interstate Commerce Commission authority to control the intrastate rates maintained by a carrier under state authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce.—*Houston, E. & W. T. R. Co. v. United States*, 34 S. Ct. 833, 234 U. S. 342, 58 L. Ed. 1341, affirming decrees (Com. Ct.) *Texas & P. Ry. Co. v. Same*, 205 F. 390, and *Houston, E. & W. Ry. Co. v. Same*, Id. 391.

Legislative power is not unlawfully delegated to the Interstate Commerce Commission by Act June 18, 1910, § 8, amending Act Feb. 4, 1887, § 4, vesting in the Interstate Commerce Commission power to determine whether, in view of the preference and discrimination clauses of sections 2 and 3, a petitioning carrier shall be relieved of the operation of the long and short haul clause.—*United States v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; *Same v. Union Pac. R. Co.*, 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. United States*, 191 F. 856.

Legislative power is not unlawfully delegated by Act April 16, 1913 (103 Ohio Laws, p. 399), creating board of censors to examine motion picture films to be publicly exhibited, and to approve only such as are of an educational or harmless character.—*Mutual Film Corp. v. Industrial Commission of Ohio*, 35 S. Ct. 387, 236 U. S. 230, 59 L. Ed. 552; *Mutual Film Co. v. Same*, 35 S. Ct. 393, 236 U. S. 247, 59 L. Ed. 561. Affirming decree (D. C.) 215 F. 138.

Administrative officers are not unlawfully given legislative power, by Laws Kansas 1913, c. 294, requiring motion picture films to be first approved by superintendent of public instruction, before exhibition; his disapproval being reviewable by a commission.—*Mutual Film Corp. of Missouri v. Hodges*, 35 S. Ct. 393, 236 U. S. 248, 59 L. Ed. 561.

An unwarrantable delegation of legislative authority was not made by provisions of the Tariff Act because administrative powers to enforce the act were conferred on the Secretary of the Treasury.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

63. — To local authorities.

See 10 Cent. Dig. Const. Law, §§ 108-114.

A state is not forbidden by Const. U. S. Amend. 14, to delegate to a city council, or a board appointed for that purpose, the power to divide occupations into classes or subclasses, and prescribe a tax to be paid by the members of each class.—*Bradley v. City of Richmond*, 33 S. Ct. 318, 227 U. S. 477, 57 L. Ed. 603, affirming judgment 66 S. E. 872, 110 Va. 521.

65. — Local option, and submission to popular vote.

See 10 Cent. Dig. Const. Law, § 116; 29 Cent. Dig. Int. Lq. § 16.

A provision, in a statute governing the incorporation of irrigation districts, that the question whether a proposed district shall be organized under the statute shall be determined by vote of the citizens of the district, is not a delegation by the legislature of the power to create a public corporation.—*Fallbrook Irrigation Dist. v. Bradley*, 17 S. Ct. 56, 164 U. S. 112, 41 L. Ed. 369, reversing judgment (C. C.) *Bradley v. Fallbrook Irrigation Dist.*, 68 F. 948.

(B) JUDICIAL POWERS AND FUNCTIONS.

67. Nature and scope in general.

See 10 Cent. Dig. Const. Law, § 123.

The review of rulings of the trial court in a criminal case by the appeal taken under Code of Laws D. C. 1901, § 935, on behalf of the government after acquittal, on which the court has no power to set aside the verdict, involves a determination of moot questions only, which is not a judicial function, and cannot be required of a federal court by Congress.—*United States v. Evans*, 29 S. Ct. 507, 213 U. S. 297, 53 L. Ed. 803.

68. Political questions.

See 10 Cent. Dig. Const. Law, §§ 125-127.

By Act No. 3, 1874, the state of Louisiana funded her bonded debt at 60 cents on the dollar, formally stipulating with holders of the new bonds for the levy of a certain annual tax, and the continuing annual appropriation thereof to the payment of principal and interest of the bonds, and that no further authority should be necessary to enable its taxing officers to levy and collect the tax, and its disbursing officers to pay out the money collected in discharge of the bonds. In 1880 a new constitution went into effect, by a portion of which, called the "Debt Ordinance," the levy of the tax was stopped, and the taxes collected transferred to defray the expenses of the state government. *Held*, in proceedings by bondholders against the taxing and disbursing officers, seeking to charge them as trustees on the ground that the debt ordinance was void, as impairing the obligation of a contract, and praying for a mandamus to compel them to proceed to levy and collect the tax, and apply the proceeds as provided in the act of 1874, that it is not competent for the court to coerce the agents of the state whose authority has been withdrawn, in violation of the contract, without the state itself being a party to the proceedings; that the officers are in no sense trustees, but owe duty to the state alone, having no contract relation with the bondholders; and that the court cannot control them, as against the political power, in their administration of the finances of the state.—*State of Louisiana v. Jumel*, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448.

The constitutional power of congress to make treasury notes of the United States legal tender in payment of private debts may be exercised in time of peace as well as time of war; the question whether the exigency is such as to require the exercise of such power being a political question, to be determined by congress, and not a judicial question.—*The Legal Tender Cases*, 110 U. S. 421; 4 S. Ct. 122, 28 L. Ed. 204.

The United States supreme court has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.—*Botiller v. Dominguez*, 130 U. S. 238, 9 S. Ct. 525, 32 L. Ed. 926.

Who is the sovereign de jure or de facto of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the courts.—*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691.

A controversy between the United States and a state concerning the boundary between the state and a territory of the United States does not fall within the principle of the cases which hold that the courts have no jurisdiction to determine "political questions." That principle only applies to controversies with independent nations, the determination of which is committed to the executive department of the government.—*United States v. Texas*, 143 U. S. 621, 12 S. Ct. 483, 36 L. Ed. 285.

Whether or not Pub. Acts Mich. 1891, No. 50, providing for the election of presidential electors by congressional districts, instead of by the people of the state at large, is repugnant to the constitution and laws of the United States, is a judicial, and not a political, question, which the supreme court has power to determine; the validity of the act having been sustained by the Michigan supreme court.—*McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, affirming judgment *Same v. Secretary of State*, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

The action of the political departments of the government in reserving the whole tract comprising the Ft. Leavenworth military reservation for military purposes is conclusive upon the courts as to the character of the occupation, and they cannot inquire, for the purpose of determining jurisdiction in a criminal case, whether the place of the crime was then in actual use for military purposes.—*Benson v. United States*, 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991.

The decision of congress recognizing a claim as an equitable obligation of the government, and appropriating money for its payment, can rarely, if every, be the subject of review by the judicial branch.—*United States v. Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 215.

It is within the province of the political department of the government to provide the mode in which imperfect rights of property under treaties such as that by which territory was ceded by Mexico to the United States may be secured, and the courts have no jurisdiction to enforce such rights, except as delegated to them by congress.—*United States v. Sandoval*, 17 S. Ct. 868, 167 U. S. 278, 42 L. Ed. 168.

It is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification, as it is the function of the political branch of the government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba.—*Neely v. Henkel*, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448, affirming judgment (C. C.) *In re Neely* (C. C.) 103 F. 631; *Neely v. Henkel*, 21 S. Ct. 306, 180 U. S. 126, 45 L. Ed. 457, affirming judgment (C. C.) *In re Neely*, 103 F. 626.

The legislative determination as to what is a proper exercise of the police power is not final, but is subject to the supervision of the courts.—*Moeschen v. Tenement House Dept. of City of New York*, 27 S. Ct. 781, 203 U. S. 583, 51 L. Ed. 328, affirming *Tenement House Dept. of City of New York v. Moeschén* (1903) 84 N. Y. S. 577, (1904) 85 N. Y. S. 1148, 90 App. Div. 605, and (1904) 72 N. E. 231, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910.

Whether a state has ceased to be republican in form, within guaranty in Const. U. S. art. 4, § 4, because of its adoption of the initiative and referendum, is a political question, solely for Congress.—(1912) *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 32 S. Ct. 224, 223 U. S. 118, 56 L. Ed. 377, dismissing writ of error (1909) *State v. Pacific States Telephone & Telegraph Co.*, 99 P. 427, 53 Or. 162; (1912) *Kiernan v. City of Portland*, 32 S. Ct. 231, 223 U. S. 151, 56 L. Ed. 386, dismissing writ of error (1910) 111 P. 379.

Whether and to what extent Indian communities within the United States shall be dealt with as dependent tribes requiring the protection of the United States are questions for Congress.—*United States v. Sandoval*, 34 S. Ct. 1, 231 U. S. 28, 58 L. Ed. 107, reversing judgment (D. C.) 198 F. 539.

Whether the prohibition in the Chippewa Treaty Feb. 22, 1855, art. 7, against the introduction, manufacture, and sale of intoxicating liquors within the territory ceded to the United States, until otherwise provided for by Congress, shall now be enforced in view of the few Indians entitled to protection therein in comparison with the great majority of inhabitants, and in view of the high development of the territory in question, is a legislative and not a judicial question.—*Johnson v. Gearlds*, 34 S. Ct. 794, 234 U. S. 422, 58 L. Ed. 1383.

Guaranty to each state under Const. art. 4, § 4, of a republican form of government, cannot affect proceedings in connection with the organization of a drainage district.—*O'Neill v. Leamer*, 36 S. Ct. 54, 239 U. S. 244, 60 L. Ed. 249, affirming judgment 142 N. W. 112, 93 Neb. 786.

Whether a state has ceased to be republican in form within Const. art. 4, § 4, because it has made the referendum a part of the legislative power, is a political question for Congress to determine.—*State of Ohio ex rel. Davis v. Hildebrandt*, 36 S. Ct. 708, 241 U. S. 565, 60 L. Ed. 1172.

Courts may not treat provisions of congressional apportionment act under which referendum is recognized as repugnant to republican form of government guaranteed by Const. art. 4, § 4, since Congress has exclusive authority to uphold the guaranty.—*Id.*

70. Encroachment on Legislature.

See 10 Cent. Dig. Const. Law, §§ 129-132, 137.

There being nothing in the treaties between China and the United States to prevent congress from modifying or repealing the same, the question whether such modification or repeal is wise or just is not a judicial question.—*Chae Chan Ping v. United States*, 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068, affirming (C. C.) *In re Chae Chan Ping*, 36 F. 431.

Public policy is whatever a statute constitutionally passed declares, without regard to prior judicial utterances.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. O. A. 15, 24 L. R. A. 73.

Act Cong. July 30, 1886 (24 Stat. 170, c. 818), prohibits territorial legislatures from passing local or special laws in regard to certain enumerated subjects, and provides that no local or special laws shall be passed where a general law can be made applicable. Held that, outside the subjects enumerated, the question whether a general law can be made applicable to a certain subject was a matter confined to the judgment of the legislature.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

No valid objection founded upon 14th Amendment to the Federal Constitution can be urged against the action of a state court in so construing a state law as to bring it into harmony with the Federal and state Constitutions on the theory that the court so far neglected the obvious meaning of the statute as to make its judgment an exercise of legislative power. Judgment, *City of Denver v. Londoner* (1905) 80 P. 117, 33 Colo. 104, reversed.—*Londoner v. City and County of Denver*, 28 S. Ct. 708, 210 U. S. 373, 52 L. Ed. 1103.

The knowledge, negligence, methods, or motives of the Legislature will not be inquired into by the courts in determining the validity of a statute repealing a corporate charter, if the statute is passed in due form.—(1910) *Calder v. People of State of Michigan*, 31 S. Ct. 122, 218 U. S. 591, 54 L. Ed. 1163, affirming judgment *People v. Calder* (1908) 117 N. W. 314, 153 Mich. 724, 126 Am. St. Rep. 550.

Courts cannot interfere with the exercise of the police power by enjoining regulations in the interest of public safety which the Legislature has duly enacted, if the means employed have a substantial relation to the purpose to be accomplished.—*Missouri Pac. R. Co. v. City of Omaha*, 35 S. Ct. 82, 235 U. S. 121, 59 L. Ed. 157, affirming decree 197 F. 516, 117 C. C. A. 12.

71. Encroachment on executive.

See 10 Cent. Dig. Const. Law, §§ 134, 135-137.

◀72. — In general.

See 10 Cent. Dig. Const. Law, § 133.

Where a claim for fees as marshal is presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken or is deferred for an unreasonable time.—*United States v. Fletcher*, 147 U. S. 664, 13 S. Ct. 434, 37 L. Ed. 322, following *City of New Orleans v. Paine*, 147 U. S. 261, 13 S. Ct. 303, 37 L. Ed. 162, and affirming judgment (C. C.) *Fletcher v. United States*, 45 F. 213.

The enforcement of the continuance by a Hawaiian street railway company of a 10-minute schedule on certain of its lines, upon the ground that the public convenience demands such a schedule, is not within the limits of the judicial power, and is totally inconsistent with the power to regulate the management of the street railway in this respect, which is ultimately vested by Haw. Rev. Laws, § 843 (Sess. Laws 1905, Act No. 78), in the executive authorities.—*Honolulu Rapid Transit & Land Co. v. Territory of Hawaii*, 29 S. Ct. 55, 211 U. S. 282, 53 L. Ed. 186.

The bounds of judicial authority are not transcended by the appointment by a court of a water commissioner charged with the duty of distributing the waters of a river among the various irrigation canals according to the adjudged priorities, and imposing upon the parties a pro rata liability for his salary.—(1910) *Montezuma Canal Co. v. Smithville Canal Co.*, 31 S. Ct. 67, 218 U. S. 371, 54 L. Ed. 1074, reversing decree (1907) 89 P. 512, 11 Ariz. 99.

◀73. — Interference with executive action.

See 10 Cent. Dig. Const. Law, §§ 134-137.

A surveyor acting under special instructions, based upon an opinion of the secretary of the interior, surveyed an old French grant, and reported the same to the surveyor general. Protests were filed against the survey; but the surveyor general approved the same, and forwarded it, together with the protests and evidence, to the commissioner of the general land office. The latter accepted the survey in part, but reserved the remainder for further consideration, meantime directing the surveyor general to withhold the filing of the triplicate plats from the local land office. The matter was then referred to the secretary of the interior, who held that the survey did not comply with the decision of his predecessor, and directed a new survey. *Held*, that the action of the surveyor general and the commissioner did not exhaust the authority of the land department, but that the matter was still lawfully pending therein, and the courts, therefore, had no authority to enjoin the obliteration of the old survey, or the making of the new one.—*City of New Orleans v. Paine*, 147 U. S. 261, 13 S. Ct. 303, 37 L. Ed. 162, affirming decree 61 F. 833, 2 C. C. A. 516.

The courts cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or inexpediently exercised. Decree, *Chicago & A. R. Co. v. Interstate Commerce Commission* (C. C. 1908) 173 F. 930, reversed.—*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 30 S. Ct. 155, 215 U. S. 452, 54 L. Ed. 280; *Same v. Chicago & A. R. Co.*, 30 S. Ct. 163, 215 U. S. 479, 54 L. Ed. 291.

◀74. — Powers, duties, and acts under legislative authority.

See 10 Cent. Dig. Const. Law, § 124.

While it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of the property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014.

Section 12 of the interstate commerce act, in authorizing circuit courts to make orders enforcing subpoenas issued by the interstate commerce commission, is not unconstitutional, as imposing on the courts functions not judicial in their nature.—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047; *Id.*, 15 S. Ct. 19, 155 U. S. 3, 39 L. Ed. 49.

Power of appointment and confirmation vested by federal Constitution in President and Senate is not usurped by assignment under Judicial Code, § 18, as amended October 3, 1913, of a judge of one federal district and circuit to duty in another district and circuit.—*Lamar v. United States*, 36 S. Ct. 535, 241 U. S. 103, 60 L. Ed. 912, affirming judgment (C. C.) 227 F. 1019.

◀75. Delegation of powers by judiciary.

See 10 Cent. Dig. Const. Law, § 133.

A preliminary finding of probable cause for arrest is a quasi judicial act, not such that it must necessarily be confined to a strictly judicial officer or tribunal.—*Ocampo v. United States*, 34 S. Ct. 712, 234 U. S. 91, 58 L. Ed. 1231.

(C) EXECUTIVE POWERS AND FUNCTIONS.

◀78. Encroachment on judiciary.

See 10 Cent. Dig. Const. Law, §§ 140, 142-147.

◀80. — Powers, duties, and acts under legislative authority.

See 10 Cent. Dig. Const. Law, §§ 140, 143-147.

A statute requiring the auditor of state to certify bonds, after due inquiry into the circumstances under which they are issued, does not contravene the provision of the Missouri constitution against the delegation of judicial power to an executive officer.—*Hoff v. Jasper County*, 110 U. S. 53, 3 S. Ct. 476, 28 L. Ed. 68.

Act Sept. 27, 1890 (26 Stat. p. 492), authorizing the establishment of a public park in the District of Columbia, provided for condemning land for such park if the owners thereof and the park commissioners could not agree upon the price, and in such case the value fixed by appraisers was to be submitted to the president of the United States, and, if by him approved as reasonable, was to be binding. *Held*, that the act was constitutional, and did not impose a judicial function upon the president, whose duty was merely to decide whether the United States would take the land at the appraised value, and not to decide whether such value was reasonable, as respects the property owner.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

It was within the power of Congress to provide by Act June 10, 1890 (26 Stat. 131), that the decision of the Board of General Appraisers should be final as to the dutiable value of

merchandise without a right of appeal to the courts.—*Passavant v. United States*, 13 S. Ct. 572, 148 U. S. 214, 37 L. Ed. 426.

Act May 5, 1892, § 4, provides for the punishment of Chinese persons unlawfully in the United States by imprisonment at hard labor. A Chinaman was convicted by summary proceeding before a commissioner as authorized by the act. Held, that "it is not consistent with the theories of our government that the Legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents."—*Wong Wing v. United States*, 16 S. Ct. 977, 163 U. S. 228, 41 L. Ed. 140.

Judicial powers are not unconstitutionally delegated to the Secretary of War by the provision of River and Harbor Act March 3, 1899, c. 425, § 18, 30 Stat. 1121, 1153 [U. S. Comp. St. 1901, p. 3545], empowering that official, when satisfied after a hearing of the parties interested, that a bridge over a navigable waterway of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably safe, easy, and unobstructed. Judgment, *United States v. Union Bridge Co.* (D. C. 1906) 143 F. 377, affirmed.—(1907) *Union Bridge Co. v. United States*, 27 S. Ct. 367, 204 U. S. 364, 51 L. Ed. 523; (1910) *President, etc., v. Monongahela Bridge Co. v. United States*, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435, affirming judgment *United States v. Monongahela Bridge Co.* (D. C. 1908) 160 F. 712.

Congress could empower the Secretary of Commerce and Labor to enforce, without invoking the judicial power, the penalty imposed by Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease. Judgment, *International Mercantile Marine Co. v. Stranahan* (C. C.) 155 F. 428, affirmed.—*Oceanic Steam Nav. Co. v. Stranahan*, 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013; *International Mercantile Marine Co. v. Same*, 29 S. Ct. 678, 214 U. S. 344, 53 L. Ed. 1024.

Congress had power to confide to the Secretary of Commerce and Labor the enforcement of the penalty for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, in violation of Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, and, when the official medical examination at the port of arrival shows that the alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made as the statute requires, does not render such statute open to the objection that it defines a criminal offense, and authorizes a purely administrative officer to determine whether the defined crime has been committed, and, if so, to inflict a punishment.—*Id.*

Judicial powers are not unconstitutionally vested in the executive branch of the government by Act Feb. 20, 1907, § 3, for deportation of an alien for practicing prostitution within three years after entry, though the inquiry devolves on Department of Commerce, and its finding are conclusive.—*Zakonaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

Judicial powers were not conferred on the Kentucky Railroad Commission contrary to Const. Ky. §§ 27, 28, 109, 135, by Act March 10, 1900 (Ky. St. § 820a), authorizing it to fix reasonable rates after hearing.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

IV. POLICE POWER IN GENERAL.

Interference with interstate commerce, see Commerce, 48.

Particular subjects of regulation.

See—

- Animals, 30, 44.
- Banks and Banking, 3, 4.
- Carriers, 1, 2.
- Game, 3½.
- Health, 21.
- Intoxicating Liquors, 9, 10.
- Licenses, 2-5½.
- Taxation, 3-24.

81. Nature and scope in general.

See 10 Cent. Dig. Const. Law, § 148; 38 Cent. Dig. Mun. Corp. § 1464.

The police power embraces the protection of the lives, health, and property of citizens, the maintenance of good order, and the preservation of good morals.—*Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The power of the states to regulate matters of internal police within their limits applies not only to the health, morals, and safety of the public, but also to whatever promotes the public peace, comfort, and convenience.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 19 S. Ct. 465, 173 U. S. 285, 43 L. Ed. 702.

The police power vested in the state must be exercised in subordination to the federal Constitution. Judgment (Mich.) *Smith v. Lake Shore & M. S. Ry. Co.*, 72 N. W. 328, 114 Mich. 460, reversed.—*Lake Shore & M. S. Ry. Co. v. Smith*, 19 S. Ct. 565, 173 U. S. 684, 43 L. Ed. 858.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety.—*Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 26 S. Ct. 341, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175.

The police power of a state is not confined to the suppression of what is offensive, disorderly, or unsanitary, but embraces regulations designed to promote the public convenience or the general prosperity.—*Bacon v. Walker*, 27 S. Ct. 289, 204 U. S. 311, 51 L. Ed. 499, affirming judgment *Walker v. Bacon* (Idaho, 1905) 81 P. 155; *Bown v. Walling*, 27 S. Ct. 292, 204 U. S. 320, 51 L. Ed. 503, affirming judgment *Walling v. Bown* (1904) 76 P. 318, 9 Idaho, 740.

A business may be so far affected with a public interest as to permit legislative regulation of its rates, though the public may have no legal right to demand and receive service.—*German Alliance Ins. Co. v. Lewis*, 34 S. Ct. 612, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, affirming decree (C. C.) 189 F. 769.

A statutory provision not a lawful police regulation cannot be made such by being placed in the same act with a police regulation, or by enactment under title declaring a proper purpose for the exercise of such power.—*Coppage v. State of Kansas*, 35 S. Ct. 240, 236 U. S. 1, 59 L. Ed. 441, L. R. A. 1915C, 960, affirming judgment *State v. Coppage*, 125 P. 8, 87 Kan. 752.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

Right of suffrage and regulation thereof, see Elections, 2-19.

82. Constitutional guaranties in general.

See 10 Cent. Dig. Const. Law, § 149.

Constitutional provisions for the security of person or property should be liberally construed.—*Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

Section 12 of the interstate commerce act, in authorizing circuit courts to make orders en-

forcing subpoenas issued by the interstate commerce commission, is not unconstitutional, as in derogation of guaranties of personal rights.—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047; *Id.*, 15 S. Ct. 19, 155 U. S. 3, 39 L. Ed. 49.

The first 10 amendments to the constitution of the United States, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply embodied certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the constitution, there was no intention of disregarding the exceptions, which have continued to be recognized as if formally expressed.—*Robertson v. Baldwin*, 17 S. Ct. 326, 165 U. S. 275, 41 L. Ed. 715.

The fundamental guaranties of life, liberty, and property made by the federal constitution, such as those relating to the writ of habeas corpus, bills of attainder, ex post facto laws, and trial by jury for crimes, have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.—*Neely v. Henkel*, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448, affirming judgment (C. C.) *In re Neely*, 103 F. 631; *Neely v. Henkel*, 21 S. Ct. 308, 180 U. S. 126, 45 L. Ed. 457, affirming judgment (C. C.) *In re Neely*, 103 F. 626.

None of the guaranties of Const. U. S. Amend. 1, respecting freedom to worship, speak, publish, or petition are infringed by the provisions of Immigration Act March 3, 1903, c. 1012, § 2, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, pp. 172, 180], for the exclusion and deportation of alien anarchists, whether such statute is construed to apply to persons whose opposition to all organized government is professed as a political ideal, or simply to include those who advocate the forcible overthrow of government or assassination of officials. *Order (C. C.)* 126 F. 253, affirmed.—*United States ex rel. Turner v. Williams*, 24 S. Ct. 719, 194 U. S. 279, 48 L. Ed. 979.

Under Const. Amend. 14, the restriction of liberty or of property rights cannot be denominated public welfare and treated as a legitimate object of the police power.—*Coppage v. State of Kansas*, 35 S. Ct. 240, 236 U. S. 1, 59 L. Ed. 441, L. R. A. 1915C, 960, affirming judgment *State v. Coppage*, 125 P. 8, 87 Kan. 752.

◀ 83. Personal liberty and security.

See 10 Cent. Dig. Const. Law, §§ 150-151½; 6 Cent. Dig. Bast. § 211.

Act La. 1890, No. 111, p. 152, enacting that all railway companies carrying passengers shall provide equal, but separate, accommodations for the white or colored races, by providing two or more passenger coaches for each train, or by dividing passenger coaches, and prohibiting persons from occupying seats in any coaches other than the ones assigned to them on account of the race to which they belong, does not violate Const. Amend. 13, abolishing slavery and involuntary servitude.—*Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, affirming judgment *Ex parte Plessy*, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

Rev. St. §§ 4598, 4599, authorizing the apprehension, imprisonment, and return on board of deserting seamen in the merchant service, are not invalidated by the prohibition of "involuntary servitude," in the thirteenth amendment.—*Robertson v. Baldwin*, 17 S. Ct. 326, 165 U. S. 275, 41 L. Ed. 715.

A person is not imprisoned for debt by an order of the bankruptcy court directing his

imprisonment until he pays over to the trustee in bankruptcy money adjudged to be in his hands belonging to the bankrupt's estate. Decree, *In re Nugent*, 105 F. 581, 44 C. C. A. 620, reversed.—*Mueller v. Nugent*, 22 S. Ct. 269, 184 U. S. 1, 46 L. Ed. 405.

An adult cannot claim to have been deprived of the liberty secured by Const. U. S. Amend. 14, against state deprivation, by the enforcement against him of a compulsory vaccination law, at least, where he does not show, with reasonable certainty, that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, will seriously impair his health, or possibly cause his death. Judgment, *Commonwealth v. Pear*, 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935, affirmed.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765.

So far as the refusal without just cause to perform the labor called for in a written contract of employment under which the employé has obtained money which was not refunded, or property which was not paid for, is made prima facie evidence of an intent to defraud by Code Ala. 1896, § 4730, as amended by Gen. Acts Ala. 1903, p. 345, and Gen. Acts Ala. 1907, p. 636, and therefore punishable as a criminal offense, such legislation offends against the prohibition of the thirteenth amendment to the federal Constitution against involuntary servitude, except as punishment for crime, and against the provisions forbidding peonage, found in Rev. St. U. S. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), enacted to secure the enforcement of such amendment—especially since, under the local practice, the accused may not, for the purpose of rebutting the statutory presumption, testify as to his uncommunicated motives, purposes, or intentions.—(1911) *Bailey v. State of Alabama*, 31 S. Ct. 145, 219 U. S. 219, 55 L. Ed. 191, reversing judgment (1909) 49 So. 886, 161 Ala. 75.

A condition of peonage forbidden by Const. U. S. Amend. 13, and Rev. St. U. S. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), results from Code Ala. § 6846, under which a person fined for a misdemeanor may confess judgment with a surety in the amount of the fine and agreeing with the surety on payment of the judgment to reimburse him by working for him on terms approved by the court.—*United States v. Reynolds*, 35 S. Ct. 86, 235 U. S. 133, 59 L. Ed. 162, reversing judgments (D. C.) 213 F. 352, and (D. C.) *Same v. Broughton*, 213 F. 345.

Involuntary servitude is not imposed, contrary to Const. Amend. 13, by Laws Fla. 1913, c. 6537, §§ 10, 12, making it a misdemeanor punishable by fine or imprisonment to fail to perform labor on the highways.—*Butler v. Perry*, 36 S. Ct. 258, 240 U. S. 323, 60 L. Ed. 672, affirming judgment 66 So. 150, 67 Fla. 405.

◀ 84. Religious liberty and freedom of conscience.

See 10 Cent. Dig. Const. Law, §§ 152-154.

Rev. St. §§ 501, 504, which provide that no person "who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, * * * or to enter into what is known as plural or celestial marriage, or who is a member of any order * * * which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order * * * or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory," and require every person desiring to register as a voter to take an

oath that he does not belong to such an order, are valid, and not unconstitutional, as being a "law respecting an establishment of religion."—*Davis v. Beason*, 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637.

88. Liberty to choose occupation.

See 10 Cent. Dig. Const. Law, §§ 164, 166.

An ordinance prohibiting the doing of work in public laundries in a city between the hours of 10 o'clock at night and 6 in the morning is not void on the ground that it deprives a man of the right to work at all times.—*Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145.

89. Liberty to contract.

See 10 Cent. Dig. Const. Law, § 157.

Const. Amend. 14, does not guaranty to a citizen the right to contract, either by himself or agent, within his state, in violation of its laws.—*Hooper v. People of State of California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297.

Act June 27, 1890, § 4 (26 Stat. 182), making it misdemeanor for more than eight hours a day in mines, and in the smelting, reduction, or refining of ores or metals, is not an unconstitutional interference with the right of private contract.—*Holden v. Hardy*, 18 S. Ct. 383, 169 U. S. 366, 42 L. Ed. 780.

The Utah statute forbidding the employment of workmen for more than eight hours a day in mines, and in the smelting, reduction, or refining of ores or metals, is not an unconstitutional interference with the right of private contract.—*Holden v. Hardy*, 18 S. Ct. 383, 169 U. S. 366, 42 L. Ed. 780.

The anti-trust act of congress, rendering unlawful contracts the direct effect of which is to shut out from interstate commerce the operation of the general law of competition, is not an interference with the general liberty of contract, guarantied under the fifth amendment to the constitution of the United States.—*United States v. Joint-Traffic Ass'n*, 19 S. Ct. 25, 171 U. S. 506, 43 L. Ed. 259, reversing judgments (C. C.) 76 F. 895, and 89 F. 1020, 32 C. C. A. 491.

The constitutional guaranty of liberty of the individual to enter into private contracts does not limit the power of congress, so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce. Judgment *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 29 C. C. A. 141, 46 L. R. A. 122, modified.—*Addyston Pipe & Steel Co. v. United States*, 20 S. Ct. 96, 175 U. S. 211, 44 L. Ed. 136.

An exemption of policies of life insurance issued by corporations of other states, which stipulate that they shall be governed by the law of another state, from the operation of the Missouri statute (section 5983) making policies nonforfeitable for default in payment of premiums, cannot be claimed by virtue of the constitution of the United States, and on the ground that it interferes with the contractual liberty of the corporation, since the state has power to compel such corporations to be subject to such statute as a condition of the right to do business in the state. Judgment. *Cravens v. New York Life Ins. Co.*, 50 S. W. 519, 148 Mo. 583, 71 Am. St. Rep. 628, affirmed.—*New York Life Ins. Co. v. Cravens*, 20 S. Ct. 962, 178 U. S. 389, 44 L. Ed. 1116.

Liberty of contract is not unreasonably interfered with by Rev. St. Ohio, §§ 3184, 3185, 3185a, giving a lien on the property of the owner to subcontractors, laborers, and those who furnished materials to be used by the contractor in the execution of his contract with the owner. Decree, 116 F. 793, 54 C. C. A. 165, affirmed.—*Great Southern Fire Proof Hotel Co. v. Jones*, 24 S. Ct. 576, 193 U. S. 532, 48 L. Ed. 778.

Laws N. Y. 1903, c. 326, amending Pen. Code, § 550, making it a criminal offense for a secondhand dealer to buy or receive stolen materials belonging to railroads, telephone and electric light companies without diligent inquiry, is not an unconstitutional interference with the liberty of contract.—*Rosenthal v. People of State of New York*, 33 S. Ct. 27, 226 U. S. 260, 57 L. Ed. 212, Ann. Cas. 1914B, 71, affirming judgment *People v. Rosenthal*, 90 N. E. 991, 197 N. Y. 394.

90. Freedom of speech and of the press.

See 10 Cent. Dig. Const. Law, § 172.

The additional conditions on the right to enjoy second-class mail privileges imposed by the Post Office Appropriation Act of August 24, 1912, § 2, are incidental to the purpose to be secured by the second-class classification, and do not infringe the freedom of the press.—*Lewis Pub. Co. v. Morgan*, 33 S. Ct. 867, 229 U. S. 288, 57 L. Ed. 1190.

The freedom of speech and publication under Const. Ohio art. 1, § 11, with responsibility only for abuse, is not violated by April 16, 1913 (103 Ohio Laws, p. 399), creating a board of censors of motion picture films.—*Mutual Film Corp. v. Industrial Commission of Ohio*, 35 S. Ct. 387, 236 U. S. 230, 59 L. Ed. 552; *Mutual Film Co. v. Same*, 35 S. Ct. 393, 236 U. S. 247, 59 L. Ed. 561. Affirming decree (D. C.) 215 F. 138.

Constitutional freedom of speech is not violated by Laws Kan. 1913, c. 294, requiring motion picture films to be first examined before exhibition by superintendent of public instruction.—*Mutual Film Corp. of Missouri v. Lodges*, 35 S. Ct. 393, 236 U. S. 248, 59 L. Ed. 561.

VI. VESTED RIGHTS.

92. Constitutional guaranties in general.

See 10 Cent. Dig. Const. Law, §§ 174, 175, 178-180, 207, 225-227, 237.

Pensioners of the United States have no vested legal rights to their pensions, and it was competent for congress by Act July 25, 1882, c. 349, § 5, to provide that no person receiving a pension under a special act should receive in addition a pension under the general law.—*United States v. Teller*, 107 U. S. 64, 2 S. Ct. 39, 27 L. Ed. 352.

McClain's Code Iowa 1882, c. 93, §§ 9, 15, prohibiting persons from practicing medicine in the state if they are not graduates of a medical college, or have not practiced medicine in the state for 10 years, or have not been found qualified on examination by the board of health, does not deprive persons engaged in the practice of medicine at the time of its passage of any vested right.—*Dent v. West Virginia*, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623.

Neither the provisions of the Indian appropriation acts of 1896 and 1897, which authorized the Dawes commission to determine claims to citizenship in any of the Five Civilized Tribes of the Indian Territory, nor the Curtis act of June 23, 1898, authorizing the completion of the rolls of citizens in such tribes, and making them final when so completed and approved by the secretary of the interior, and by which the tribal laws and courts were abolished and superseded by those of the United States, and other comprehensive changes made in the government of the territory, is in excess of the powers of congress, or unconstitutional as an impairment of vested rights.—*Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174 U. S. 445, 43 L. Ed. 1041.

Prohibition against practice of medicine by persons not licensed or registered, under Laws Tex. 1907, c. 123, held not invalid as to one who had an established business when the law

was passed.—(1912) *Collins v. State of Texas*, 32 S. Ct. 286, 223 U. S. 288, 58 L. Ed. 439, affirming judgment (1900) *Ex parte Collins*, 121 S. W. 501, 57 Tex. Cr. R. 2.

◀93. Estates and interests in property in general.

See 10 Cent. Dig. Const. Law, §§ 176, 177, 181-185, 190-192, 194-200, 206, 213-224, 236.

Acts Tenn. March 23, 1883, authorizing municipal corporations to compromise their debts and issue new bonds therefor at the rate of 50 per cent., the acceptance of the compromise to work a transfer of the creditors' debt, with a right to the municipality to enforce it, and that such new bonds and their matured coupons should be received in payment of back taxes at double their face value, although these provisions changed the rate at which outstanding indebtedness had been made receivable for back taxes by Act March 13, 1879, did not divest the holders of debts of such a corporation, not secured by any lien or claim on such back taxes, of any vested right.—*Amy v. Taxing Dist. of Shelby County*, 114 U. S. 387, 5 S. Ct. 895, 29 L. Ed. 172.

A state law which authorizes a person owing taxes to a municipal corporation to procure obligations of the municipality, and use them as a set-off against his own debt, is not unconstitutional, as divesting creditors of the municipality of vested rights.—*Id.*

No vested rights of owners of land adjacent to a tidal stream were disturbed by the Alabama act of January 31, 1867, granting to the city of Mobile so much of the shore and soil under such stream as is within the city boundaries, since such act amounts to no more than a declaration that the rights possessed by the state in such shore and soil were granted to such city. Judgment 30 So. 645, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143, affirmed.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 266.

Vested rights of Cherokee Indians living September 1, 1902, and enrolled under Act July 1, 1902, to participate in distribution of remaining tribal lands and funds, were not destroyed by provision of Act April 26, 1906, as amended by Act June 21, 1906, providing for admitting newly born members of the tribe to allotment from which they were excluded by earlier act if born after September 1, 1902.—(1912) *Gritts v. Fisher*, 32 S. Ct. 580, 224 U. S. 640, 56 L. Ed. 928, affirming decree (1911) 37 App. D. C. 473.

The right of abutting owners to compensation for consequential damages from an original grading under municipal direction given by Laws Wash. 1898, c. 840, and Laws 1907, c. 153, is a vested property right which cannot be destroyed by repeal of the compensatory provision after the damage is done.—*Ettor v. City of Tacoma*, 33 S. Ct. 428, 228 U. S. 148, 57 L. Ed. 773. Reversing judgments *Id.*, 106 P. 478, 57 Wash. 50; *Id.*, 107 P. 1061, 57 Wash. 50; *Howard v. City of Tacoma*, 106 P. 481, 57 Wash. 698, and 107 P. 1064, 57 Wash. 698.

◀96. Community property.

See 10 Cent. Dig. Const. Law, § 200.

A husband had no vested rights in the community property acquired prior to the passage of Laws N. M. 1901, c. 62, § 6 (a), of which he would be deprived by applying to such property the provision of that section that neither husband nor wife shall dispose of real estate acquired during coverture by onerous title unless both join in the execution of the deed.—(1911) *Arnett v. Reade*, 31 S. Ct. 425, 220 U. S. 311, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, reversing judgment *Reade v. De Lea* (1908) 95 P. 131, 14 N. M. 442.

◀100. Exemptions from taxation.

See 10 Cent. Dig. Const. Law, § 206.

Act Feb. 14, 1856, § 1 (Gen. St. Ky. c. 68, § 8), authorizes the amendment or repeal of corporate charters, grants, etc., at the will of the legislature, but provides that no amendments or repeal shall impair other rights previously vested. *Held*, that charter exemption from taxation for a designated period was not a vested right, within such provision, so as to invalidate a subsequent act, imposing an additional tax on such a corporation, since the exemption must be read as existing for the time designated, unless sooner repealed.—*Citizens' Sav. Bank v. City of Owensboro*, 19 S. Ct. 530, 571, 173 U. S. 636, 43 L. Ed. 840.

Choctaw and Chickasaw allottees under the Atoka agreement embodied in Act June 28, 1898, whereby, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments in severalty, which were nontaxable while title remained in original allottees, acquired vested rights of exemption from state taxation, protected by Const. U. S. Amend. 5, from abrogation, as was attempted by Act May 27, 1908.—(1912) *Choate v. Trapp*, 32 S. Ct. 565, 224 U. S. 665, 56 L. Ed. 941, reversing decree (1911) 114 P. 709, 28 Okl. 517; (1912) *Gleason v. Wood*, 32 S. Ct. 571, 224 U. S. 679, 56 L. Ed. 947, reversing decree (1911) 114 P. 703, 28 Okl. 502.

A Creek homestead allottee under an agreement incorporated in congressional legislation by which, in consideration of relinquishment by Indians of their claim to tribal property, they were to receive nontaxable homestead allotments inalienable for a specified period, acquired a vested right to exemption from state taxation, protected by the federal Constitution against abrogation by Congress.—(1912) *English v. Richardson*, 32 S. Ct. 571, 224 U. S. 680, 56 L. Ed. 949, reversing decree (1911) 114 P. 710, 28 Okl. 408.

◀101. Franchises and privileges.

See 10 Cent. Dig. Const. Law, §§ 209-211.

A general power given a railroad by its charter, to consolidate with, purchase, lease, or acquire the stock of other roads, may, while it remains unexecuted, be limited by the legislature, without impairing any vested right, to cases where the other roads are not parallel or competing.—*Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 S. Ct. 705, 40 L. Ed. 838, reversing decree (C. C.) 73 F. 933.

◀105. Rights of action and defenses.

See 10 Cent. Dig. Const. Law, §§ 223-235.

The repeal of the usury law without a saving clause, thus operating retrospectively, so as to cut off the defense, for the future, in actions on contracts previously made, does not deprive parties of vested rights.—*Ewell v. Daggs*, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682.

◀106. Remedies.

See 10 Cent. Dig. Const. Law, §§ 186, 212, 233-245, 252-257, 259.

A state may adopt new remedies for the collection of taxes, and apply such remedies to taxes already delinquent, without any violation of the federal constitution, since the taxpayer has no vested right in the existing mode of collecting taxes. Judgment 57 S. W. 34, 93 Tex. 553, affirmed.—*League v. State of Texas*, 22 S. Ct. 475, 184 U. S. 156, 46 L. Ed. 478.

◀107. Statutes of limitation.

See 10 Cent. Dig. Const. Law, §§ 246-251.

The bar of the statute of limitations as a defense to an action on a contract cannot become a vested right, and therefore a law taking

it away after it has become perfected is not unconstitutional, as impairing vested rights.—*Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483.

110. Verdicts and judgments.

See 10 Cent. Dig. Const. Law, §§ 264-266.

The provision of the Indian appropriation act of July 1, 1898 (30 Stat. c. 545), giving a right of appeal from the United States courts in the Indian Territory direct to the supreme court by either party in all citizenship cases, including in express terms cases in which judgments had previously been rendered, was within the powers of congress, which had constituted the territorial courts, as appellate tribunals, a part of the machinery by means of which it discharged its own duties with reference to the Indian tribes, although the legislation under which such judgments were rendered made them final. It cannot be said that the rendition of such judgments gave the successful parties any vested right that they should not be subjected to review by subsequent legislation, nor that they vested such litigants with absolute property rights which precluded a re-examination of the original cause of action, which was in all cases the right of citizenship in a tribe.—*Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174 U. S. 445, 43 L. Ed. 1041.

No vested rights of the owners of realty are interfered with by overruling earlier decisions so as to render property liable for an assessment for the widening of a street after damages for the part taken have been fixed.—*Willoughby v. City of Chicago*, 35 S. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error *City of Chicago v. Willoughby*, 94 N. E. 513, 249 Ill. 249.

111. Appeal or other proceeding for review.

See 10 Cent. Dig. Const. Law, §§ 267-269.

Where a judgment has been rendered in favor of a plaintiff in a suit brought under a statute giving the remedy, the rights of the plaintiff become thereby vested, and cannot be affected by a subsequent repeal of the statute; nor does its repeal affect proceedings in error to review such judgment, the question for determination in such proceedings being the validity of the judgment when rendered.—*McCullough v. Commonwealth of Virginia*, 19 S. Ct. 134, 172 U. S. 102, 43 L. Ed. 382, reversing judgment *Commonwealth of Virginia v. McCullough*, 19 S. E. 114, 90 Va. 597.

VII. OBLIGATION OF CONTRACTS.

Decisions of state courts as authority in federal courts, see Courts, 369.

Jurisdiction of actions involving question of impairment, see Courts, 282, 394(9).

(A) POWERS OF STATES IN GENERAL.

113. Constitutional guaranties in general.

See 10 Cent. Dig. Const. Law, §§ 271-273, 285.

By the "obligation of a contract" is meant the means which, at the time of its creation, the law affords for its enforcement.—*State of Louisiana v. Police Jury of Parish of St. Martin*, 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574.

A state statute cannot be said to unconstitutionally impair the obligation of contracts made after its enactment.—*Chicago, B. & Q. R. Co. v. Cram*, 33 S. Ct. 437, 228 U. S. 70, 57 L. Ed. 734, affirming judgments *Cram v. Chicago, B. & Q. R. Co.*, 122 N. W. 31, 84 Neb. 607, 26 L. R. A. (N. S.) 1022, and 123 N. W. 1045, 85 Neb. 586, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170; *Chicago, B. & Q. R. Co. v. Kyle*, 33 S. Ct. 440, 228 U. S. 85, 57 L. Ed. 741, affirm-

ing judgment *Kyle v. Chicago, B. & Q. R. Co.*, 122 N. W. 37, 84 Neb. 621.

114. The law impairing the obligation.

See 10 Cent. Dig. Const. Law, §§ 274-278, 290.

115. — In general.

See 10 Cent. Dig. Const. Law, §§ 274-277, 290.

A statute passed in 1867 cannot be said to impair the obligation of a contract because it impairs the value of privileges acquired under an act passed in 1874.—*Lehigh Water Co. v. Borough of Easton*, 121 U. S. 388, 7 S. Ct. 916, 30 L. Ed. 1059.

A contract authorized by the existing state constitution as then construed by the highest court of the state cannot be affected by subsequent change in the decisions of that court, or by the adoption of a new constitution. Judgment, *Los Angeles City Water Co. v. City of Los Angeles* (C. C.) 88 F. 720, affirmed.—*City of Los Angeles v. Los Angeles City Water Co.*, 20 S. Ct. 736, 177 U. S. 558, 44 L. Ed. 886.

116. — Judicial decisions.

See 10 Cent. Dig. Const. Law, § 278.

In 1871, the supreme court of Ohio declared valid and constitutional Act Ohio May 4, 1869, which authorized the city of Cincinnati, a municipal corporation proper, to construct and equip a continuous line of railroad. Held, that this adjudication is not a judicial guaranty of the validity of Laws Ohio 1880, p. 157, which authorizes a designated township, a quasi corporation, to construct through its territory a few miles of railroad forming part of a line intended to be ultimately owned and operated by private capital, especially where that court, in 1872, declared invalid a general act empowering counties, cities, and municipalities to issue bonds and build railroads; and a purchaser of bonds issued by the township under the act of 1880 takes them subject to the risk of having the act declared unconstitutional.—*Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 S. Ct. 215, 34 L. Ed. 864.

A decision by a state supreme court that under the state statutes an extension of time for doing public work, granted after expiration of the time limited in the contract therefor, was invalid, did not impair the obligation of the contract, although at the time the contract was made the supreme court had held such extension valid.—*Wood v. Brady*, 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981.

Assuming that, where a state supreme court has erroneously construed a state statute, contracts made on the faith thereof would be "impaired," in the sense prohibited by the federal constitution, by a subsequent, different interpretation, this doctrine would only extend to a construction of the same statute, and would not bind the court to give the same construction to a subsequent statute couched in similar, but not identical, terms.—*Id.*

No impairment of the obligation of a contract arises from the fact that the state court erroneously decided that an amendment to the state constitution repealed the court's authority to examine and recommend a claim against the state presented to it.—*Baltzer v. State of North Carolina*, 161 U. S. 240, 16 S. Ct. 500, 40 L. Ed. 684.

A construction by a state court of a state statute, whereby a cause of action under the statute for default of payments is enforced on the ground that payments previously made and accepted by the state are void, operates to impair the obligation of the implied contract arising out of the acceptance of the payments, and therefore violates the federal constitution, although the state court does not mention the statute. Judgment (Tex. Civ. App.) 41 S. W. 157, reversed.—*Houston & T. C. R. Co. v.*

State of Texas, 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

A decision of a state court may give effect to a state statute, and thereby impair the obligation of a contract with the state, although the court does not mention the statute.—Id.

The contract clause of the federal Constitution cannot be invoked against a change of decision by a state court. Judgment 31 So. 840, 80 Miss. 407, 57 L. R. A. 793, affirmed.—National Mut. Building & Loan Ass'n v. Brakan, 24 S. Ct. 532, 193 U. S. 635, 48 L. Ed. 823.

117. Exercise of police power.

See 10 Cent. Dig. Const. Law, § 286.

The power of the legislature to subserve the general welfare of the people by all needful and proper regulations, in the interest of health and safety, is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise.—New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516.

When corporations, created for a public purpose, such as railroad companies, enter into contracts affecting the safety and welfare of the public, the presumption is that they do so with the knowledge that their agreements cannot withdraw such subjects from the police power of the state; and hence such contracts are not necessarily protected by the federal constitution from subsequent state legislation modifying or annulling their provisions.—Chicago, B. & Q. R. Co. v. State of Nebraska, 18 S. Ct. 513, 170 U. S. 57, 42 L. Ed. 943.

A provision in a railway charter exempting the company from liability for the death of any person in its service, even if caused by its negligence, creates no contract right protected by the contract clause of the federal Constitution, since the subject is one over which the Legislature possesses a regulating but not a contracting power.—(1911) Texas & N. O. R. Co. v. Miller, 31 S. Ct. 534, 221 U. S. 408, 55 L. Ed. 789, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1165; (1911) Same v. Gross, 31 S. Ct. 536, 221 U. S. 417, 55 L. Ed. 796, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1173.

118. Exercise of power of eminent domain.

See 10 Cent. Dig. Const. Law, § 287.

The inhibition of the federal constitution against laws impairing the obligation of contracts does not prevent a state from authorizing a city to condemn a water-supply system, though the city have a contract with the water company to pay it for the use of hydrants for a term of years, the only condition of the exercise of the power being that compensation shall be made for the contract as well as for the tangible property.—Long Island Water-Supply Co. v. City of Brooklyn, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

Contract obligations are not impaired by the proceedings taken under Gen. St. Conn. §§ 3694, 3695, by the New York, New Haven & Hartford Railroad Company, which is the lessee of the New Haven & Derby Railroad, and the owner of three-fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree on the terms of purchase. Judgment, New York, N. H. & H. R. Co. v. Offield (1905) 60 A. 740, 78 Conn. 1, affirmed.—Offield v. New York, N. H. & H. R. Co., 27 S. Ct. 72, 203 U. S. 372, 51 L. Ed. 231.

Obligations of contract by which a river front strip at Cincinnati was dedicated to public use held not impaired by condemnation, conformably to Rev. St. Ohio, § 3283a, as added by Act May 9, 1908 (99 Ohio Laws, p. 590),

of a right of way for an elevated road across such strip, though the then existing law of eminent domain, including provisions of Ordinance of 1787 (Rev. St. p. 15 [U. S. Comp. St. 1901, p. 1x]) § 14, art. 2, for the government of the Northwest Territory, is to be read into the contract.—(1912) City of Cincinnati v. Louisville & N. R. Co., 32 S. Ct. 267, 223 U. S. 390, 56 L. Ed. 481, affirming judgment (1910) 92 N. E. 1111, 82 Ohio St. 466.

119. Exercise of power of taxation.

See 10 Cent. Dig. Const. Law, §§ 288, 289.

The provision of the national constitution in regard to the obligation of contracts does not enable a contract between individuals to prevent a municipal corporation from exerting, as between it and one of the individuals, any power of taxation it legally possesses.—Henderson Bridge Co. v. City of Henderson, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

There is no contract between the citizens and taxpayers of a municipal corporation and the corporation itself that the former shall be taxed only for the uses of that corporation, which is impaired by subjecting them to taxation for the uses of the enlarged municipality formed by annexation, under the authority of Act Pa. Feb. 7, 1906, §§ 1-9 (P. L. 7-11), to an adjoining and larger municipality. Judgment, In re City of Pittsburgh, 66 A. 348, 217 Pa. 227; Appeal of Hunter, Id., affirmed.—Hunter v. City of Pittsburgh, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151.

(B) CONTRACTS OF STATES AND MUNICIPALITIES.

120. Nature of contracts protected in general.

See 10 Cent. Dig. Const. Law, §§ 279-285, 292.

A state constitution is not a contract, within Const. art. 1, § 10, cl. 1, prohibiting the impairment of the obligation of contracts.—Church v. Kelsey, 121 U. S. 282, 7 S. Ct. 897, 30 L. Ed. 960.

A statute of Michigan authorized the improvement of a river wholly within that state, and the exaction of tolls for the use of the river so improved. Held, that the statute did not impair the contract contained in the ordinance of 1787 for the government of the territory of the United States northwest of the river Ohio, giving to the people the right to use the waters leading into St. Lawrence, free of duty, tax, or impost.—Sands v. Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. Ed. 149; Ruggles v. Same, 123 U. S. 297, 8 S. Ct. 117, 31 L. Ed. 152, affirming decree 53 Mich. 593, 19 N. W. 199.

By concurrent acts of the legislatures of two states, a bridge company was made a corporation of each state, and authorized to fix rates of toll over a bridge to be constructed by it over a navigable river between the states; and congress afterwards declared the bridge a lawful structure, but made no provision as to tolls. Held, that congress thereby manifested the intention that the rates of tolls should be as established by the two states, and that the acts of incorporation constituted a contract between the corporation and both states, which could not be altered by one state without the consent of the other.—Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962, reversing judgment (Ky.) Same v. Commonwealth, 22 S. W. 851.

Contract obligations are not impaired by the creation by Laws Mich. 1901, Loc. Acts No. 315, of a new school district, to which was given the property within its limits which had belonged to the districts from which it was created. Judgment 92 N. W. 289, 131 Mich.

639, affirmed.—Attorney General of State of Michigan v. Lowrey, 28 S. Ct. 27, 199 U. S. 233, 50 L. Ed. 167.

The exercise by a state of its right to alter or destroy its municipal corporations is ineffectual to impair the obligation of municipal contracts. Judgments (C. C.) Ex parte Folsom, 131 F. 496, affirmed.—Graham v. Folsom, 26 S. Ct. 245, 200 U. S. 248, 50 L. Ed. 464.

121. Contracts of state or municipality with individuals in general.

See 10 Cent. Dig. Const. Law, §§ 285, 304-311, 342-348.

After a township had subscribed for the stock of a railroad company, and had agreed to pay for it in valid, negotiable bonds, an act was passed by the legislature requiring the bonds to be registered and certified before they should be issued. Held, that the statute did not impair the obligation of the contract, as nothing was changed but the form of the execution of the bonds.—Hoff v. Jasper County, 110 U. S. 53, 3 S. Ct. 476, 28 L. Ed. 68.

Rev. St. Mo. 1879, §§ 6798-6800, which require the county court, under a penalty, not to assess certain taxes, among which are taxes for the payment of the bonded debt of townships created in aid of railroads, until the circuit court has been satisfied of the necessity of such tax, and has made an order commanding the county court to assess and levy such tax, is not an equivalent for the provisions of the Missouri act of March 23, 1868 (Laws Mo. 1868, p. 92), as amended by the act of March 10, 1871 (1st Wag. St. 1872, p. 313, § 52), by which the county court was directed to impose such assessments on all real estate and personal property within the township making the assessment; and the former statute cannot be allowed to operate so as to impair the obligation of a judgment obtained, while the latter acts were in force, by holders of bonds of the townships issued in aid of railroads.—Seibert v. United States, 122 U. S. 284, 7 S. Ct. 1190, 30 L. Ed. 1161; Id., 129 U. S. 192, 9 S. Ct. 271, 32 L. Ed. 643.

Const. La. 1879, art. 209, providing that no parish or municipal tax for all purposes should exceed 10 mills on a dollar of valuation, had no retroactive effect, so as to prevent the enforcement of improvement contracts prior to its adoption, and hence was not a violation of the federal constitution, prohibiting the state from passing any law impairing the obligation of contracts.—City of Shreveport v. Cole, 129 U. S. 36, 9 S. Ct. 210, 32 L. Ed. 589.

A contract between a city and a railroad company for sharing the expense of maintaining and repairing a viaduct carrying a street over the railroad tracks is one affecting the safety of the community; and the subject-matter is in the police power of the state, so that it may, by a subsequent statute, impose greater burdens upon the company without violating the contract clause of the federal constitution.—Chicago, B. & Q. R. Co. v. State of Nebraska, 18 S. Ct. 513, 170 U. S. 57, 42 L. Ed. 948.

A municipality which for nearly 30 years has allowed a water company to divert from a stream an amount of water greatly in excess of the quantity specified in a contract between them, and to expend vast sums of money upon the faith of a continuance of the right to take such water, cannot during the life of the contract withdraw its consent to a continuance of such taking of the larger quantity. Judgment, Los Angeles City Water Co. v. City of Los Angeles (C. C.) 88 F. 720, affirmed.—City of Los Angeles v. Los Angeles City Water Co., 20 S. Ct. 736, 177 U. S. 558, 44 L. Ed. 886.

Provision, in an ordinance granting a renewal of a franchise to a gas company, that the company shall furnish gas at a certain price with a certain discount to consumers paying before a certain date, held not a contract that

the price should be kept high enough to allow a discount for prompt payment.—(1912) Cedar Rapids Gas Light Co. v. City of Cedar Rapids, 32 S. Ct. 339, 223 U. S. 655, 56 L. Ed. 594, affirming decree (1909) 120 N. W. 966, 144 Iowa, 428, 138 Am. St. Rep. 299.

The removal by the South Carolina Dispensary Commission under Act S. C. Feb. 23, 1910, of funds in the hands of county dispensaries due to a corporation indebted to the state, does not impair contract obligations, though the state has not consented to be sued.—Carolina Glass Co. v. State of South Carolina, 36 S. Ct. 293, 240 U. S. 305, 60 L. Ed. 658, affirming judgments 69 S. E. 391, 87 S. E. 270, and (D. C.) Same v. Murray, 197 F. 392, reversing judgment 206 F. 635, 124 C. C. A. 423.

122. Securities issued by state.

See 10 Cent. Dig. Const. Law, §§ 312, 313.

Since Acts Va. March 30, 1871, and March 28, 1879, intended that coupons issued thereunder, and made payable to bearer, and receivable for taxes and debts due the state, should be circulated from hand to hand, the act of March 15, 1884, as amended by act of May 23, 1887, requiring a person selling such tax-receivable coupons, or tendering or passing such coupons for another, to pay a certain high license, place an undue restraint on the negotiability of such coupons, and is therefore in violation of the constitution of the United States, prohibiting state legislation impairing the obligation of a contract.—McGahey v. Virginia, 135 U. S. 662, 10 S. Ct. 972, 34 L. Ed. 304.

Const. La. 1879, art. 233, declared the consolidated bonds of the state, held by the state for the Agricultural and Mechanical College and the Louisiana Seminary fund, to be null and void. The state treasurer thereafter fraudulently reissued and put such bonds in circulation. Held, that there was no contract between a subsequent purchaser and the state, the obligation of which was impaired by article 233.—Bier v. McGehee, 148 U. S. 137, 13 S. Ct. 580, 37 L. Ed. 397.

The obligation of the contract which the law raises from the transaction itself when a state actually receives in payment of an obligation treasury warrants which were void, and thereupon cancels them, would be impaired by any subsequent statute of the state which repudiated or permitted the repudiation of the payments. Judgment 41 S. W. 157, reversed.—Houston & T. C. R. Co. v. State of Texas, 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

123. Grants and sales of land by state.

See 10 Cent. Dig. Const. Law, §§ 233-237.

A statute of California providing for the reclamation of swamp lands, and for an assessment on lands reclaimed of the costs in proportion to the benefit accruing to such lands, was not an impairment of any contract between the United States and the state, or the United States and her patentees, or grantees, or of the contract created by Spanish land grants; for there is no contract that the United States or Mexican grants shall be exempt from the burdens which are imposed on other lands within the state under the police or taxation powers thereof, and there was no contract created between the state and the United States that in accepting certain grants of swamp lands under the Arkansas act the state would limit her right to reclaim other swamp lands not covered by that act.—Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, affirming (C. C.) Reclamation Dist. No. 108 v. Hagar, 4 F. 366.

The statute of California providing for taxation upon swamp lands, and authorizing that the assessments be collected in gold coin, does not impair the obligation of any contract, since

the states are authorized to require taxes and assessments to be collected in coin if deemed expedient.—Id.

An applicant bought swamp land, under Act Or. Oct. 26, 1870, which gave the applicant 90 days after publication of the notice of the filing of the map of such lands in the office of the county clerk to make payment of the 20 per centum. Such map was not filed or notice given until after October 18, 1878, and the applicant paid the 20 per centum within the 90 days thereafter. *Held*, that he had a binding contract with the state, which was impaired by Act Or. Feb. 16, 1887, § 1, declaring all certificates of sale of swamp lands void on which the 20 per centum of the purchase price was not paid prior to January 17, 1879, and in so far the act is unconstitutional.—*Pennoyer v. McConaughy*, 140 U. S. 1, 11 S. Ct. 699, 35 L. Ed. 363, affirming decree (C. C.) 43 F. 196.

A statute providing for escheat proceedings, and a determination of the rights of the state as against all possible claimants, after actual notice to all known claimants and constructive notice to all unknown ones, does not impair the obligation of any contract contained in the grant under which the deceased owner held, whether that grant was from the state or from a private person.—*Hamilton v. Brown*, 161 U. S. 256, 16 S. Ct. 585, 40 L. Ed. 691.

Act Tex. Jan. 30, 1854, made grants of land to certain railroad companies; and subsequently the charter of a particular company was so amended as to make the privileges and benefits of this grant applicable to it, provided it confined itself to a prescribed route. The road having been sold in foreclosure proceedings, a new company was incorporated to operate it, and by the act of July 27, 1870, this company was authorized to change the route of the original line, and construct a different road from that originally authorized. In the meantime the constitution of 1869 had been adopted, which entirely prohibited land grants to railroad companies. *Held*, that this prohibition was applicable to the road constructed by the new company, and did not impair the contract existing between the state and the old company, within the meaning of the federal constitution.—*Galveston, H. & S. A. Ry. Co. v. State of Texas*, 18 S. Ct. 603, 170 U. S. 226, 42 L. Ed. 1017.

The Texas act of September 21, 1866, granting 16 sections of land per mile to the Houston & Texas Central Railway Company, applied to its Austin branch as well as its main line; and, having constructed part of its roads thereunder, it acquired a vested right to the land grant; so that the application by the state courts to the Austin branch of the provisions of the constitution of 1869 forbidding land grants to railroads impaired the obligation of the contract between the road and the state.—*Houston & T. C. Ry. Co. v. State of Texas*, 18 S. Ct. 610, 170 U. S. 243, 42 L. Ed. 1023.

The judicial proceeding to forfeit lands bought of the state, provided by Act Tex. July 8, 1879, § 12, in case of a default in the payment of interest, is not a contract right of the purchaser, and therefore his contract with the state is not impaired by the enactment of the act of March 25, 1897, which authorizes forfeiture in such cases without any judicial proceeding, but which provides that at any time within six months after forfeiture the purchaser may institute a suit to establish the fact of payment, which was the sole defense allowed to him by the former statute. Judgment (Tex.) *Standefer v. Wilson*, 55 S. W. 1135, affirmed.—*Wilson v. Standefer*, 22 S. Ct. 384, 184 U. S. 390, 46 L. Ed. 612.

The obligation of the contract of the state of Texas with a purchaser of public lands was not impaired by Laws Tex. 1897, p. 39, c. 37,

which repealed a statute in force when the contract was made, denying the remedy of forfeiture for nonpayment of interest as agreed upon, and provided such a forfeiture as a remedy, since the prior act did not amount to a contract that the state would not enlarge the remedy, or grant another on account of the purchaser's violation of his contract. Judgment 52 S. W. 584, 21 Tex. Civ. App. 449, affirmed.—*Waggoner v. Flack*, 23 S. Ct. 345, 188 U. S. 595, 47 L. Ed. 609.

The substantial elements of a contract between the claimant under a Mexican land grant by metes and bounds and the state which is alleged to arise out of Act Tex. Feb. 10, 1852, confirming such grant and imposing upon the claimant the duty of having the land surveyed by the district or county surveyor of the county in which it is situated, and of returning the field notes to the land office, which is then required to issue a patent, are so far lacking as to defeat the contention that contract obligations are unconstitutionally impaired by the subsequent Act Sept. 3, 1901 (Ex. Sess.) p. 6, c. 4, § 11, under which the state has recovered from such claimant a portion of the land which, though called for by the survey, is outside the boundaries of the original Mexican grant. Judgment (Tex. Civ. App. 1906) 95 S. W. 645, affirmed.—*Sullivan v. State of Texas*, 28 S. Ct. 215, 207 U. S. 416, 52 L. Ed. 274.

Compliance with Act Cal. April 27, 1863, governing the sale of tide lands by making application, etc., does not constitute a contract with the state, protected by Const. U. S. art. 1, § 10, which could not be impaired by subsequent legislation, there having been no payment on the price.—*Banning Co. v. People of State of California*, 36 S. Ct. 338, 240 U. S. 142, 60 L. Ed. 569.

124. Grants of water rights by state. See 10 Cent. Dig. Const. Law, § 298.

The Minnesota territorial statutes incorporating, respectively, the St. Anthony Falls Water-Power Company and the Minneapolis Mill Company, and authorizing them to maintain and construct dams, sluices, etc., for improving the water power owned or possessed by them at St. Anthony falls, did not give them a contract right to all the natural flow of the water in the river, forever afterwards, so as to prevent the state from thereafter authorizing its municipalities to take water from the river for public and municipal uses.—*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 18 S. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

An act of the South Carolina legislature authorized the sale and conveyance of the Columbia Canal and its appurtenances, subject to certain conditions, among which was one that the state should be furnished free of charge with 500 horse power of water power on the line of the canal. It also contained a further proviso that "the right of the state to the free use of the said 500 horse power shall be absolute." *Held*, that such proviso was not limited by prior acts relative to the canal by which water power had been reserved for the use of the state penitentiary, but that the word "absolute," as used therein, meant "unrestricted and unconditional," and the state might, without impairing the rights of the grantee, grant the right to third parties to use any part of the water power so reserved. Decree 20 S. W. 1002, 43 S. C. 154, affirmed.—*Columbia Water-Power Co. v. Columbia Electric Street-Railway, Light & Power Co.*, 19 S. Ct. 247, 172 U. S. 475, 43 L. Ed. 521.

Act May 18, 1894, providing for the abandonment of the Hocking Canal, and for leasing it to a certain railroad company, and also providing that the company shall not disturb any

vested right of abutting property owners, is not invalid on the ground that it impairs a contract entered into by the state to keep a dam at a certain place to furnish water for a mill. Judgment 50 N. E. 442, 58 Ohio St. 123, affirmed.—*Vought v. Columbus, H. V. & A. R. Co.*, 20 S. Ct. 398, 176 U. S. 481, 44 L. Ed. 554.

125. Protection of charter rights in general.

See 10 Cent. Dig. Const. Law, §§ 362-413.

Though a public service, such as supplying gas or water for public or private uses in a city, is a matter within the control of the state, which it may perform itself or may delegate to appropriate agencies, and though, even after it has granted an exclusive franchise for the performance of such service, it may, in the exercise of its police power, retain control and regulation thereof, as far as it affects public health, safety, and morals, yet such a grant, after a due compliance with the conditions on which it is made, becomes a contract, the obligation of which is within the protection of the constitution of the United States.—*New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 S. Ct. 273, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 S. Ct. 265, 29 L. Ed. 510.

The charter giving the New Orleans Waterworks Company an exclusive privilege of supplying New Orleans with water is a contract within Const. U. S., prohibiting an impairment of the obligation of contracts.—*New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 S. Ct. 273, 29 L. Ed. 525.

An ordinance of a municipal corporation regulating the exercise of the franchise of a private corporation within its limits, adopted in pursuance of authority delegated by the legislature of the state, is the act of the state, and, if in excess of its power to regulate or modify such franchise, is void, as impairing the obligation of a contract.—*New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 S. Ct. 741, 31 L. Ed. 607.

The right to issue stock in exchange for deposits granted in a bank charter is not a valuable franchise, of a contractual nature, which cannot be impaired by subsequent state legislation.—*Bank of Commerce v. State of Tennessee*, 163 U. S. 416, 16 S. Ct. 1113, 41 L. Ed. 211.

A state bank charter provided for the payment of a certain tax on shares of stock, which should be in lieu of all other taxes, and also authorized the taking of "stock" deposits, the person making them to have the right to take stock for the amount of such deposit, and it gave the bank an unlimited right to increase the stock. Held, that the contract obligation not to tax shares of stock beyond the amount named in the charter did not apply to stock issued to depositors after the adoption of a state constitution providing for a greater rate of taxation on all property.—*Id.*

Charter of drainage district as public corporation is not a contract with its members, so that the law it was created to administer will not be changed.—*Houck v. Little River Drainage Dist.*, 36 S. Ct. 58, 239 U. S. 254, 60 L. Ed. 266, affirming judgment 154 S. W. 739, 248 Mo. 373.

126. Reservation of power to alter or amend charter.

See 10 Cent. Dig. Const. Law, §§ 325, 366-369; 12 Cent. Dig. Corp. § 119.

Act Cong. 1854, incorporating Glenwood Cemetery, provided that it should be lawful for congress to alter, amend, or repeal the act, and in 1877 congress amended the charter by an act

providing that the corporation's property and affairs should be managed by a board of five trustees, to be elected, three by owners of lots in which burials had been made, and two by the original proprietors, and that of the gross receipts from the future sale of lots one-fourth should be paid to the original proprietors and the balance devoted to the improvement of the cemetery. Held, that the act of 1877 was a constitutional exercise of the power of amendment reserved by the act of 1854, and was valid.—*Close v. Glenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

Const. Ohio, art. 1, § 2, and art. 13, §§ 1, 2, provide that corporations may be formed under general laws, and that all such laws may from time to time be altered or repealed. Held, that this reservation of power became a part of the charter of every corporation formed under such general laws, and that such laws could be repealed or amended at the pleasure of the legislature.—*Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 S. Ct. 90, 36 L. Ed. 963, affirming judgment (C. C.) 37 F. 832.

Act Ky. Feb. 14, 1856, declares that all charters and grants to corporations, and all other statutes, "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." By the act of May 1, 1886, authorizing the city of Covington to construct waterworks, it was declared (section 31) that such works and the lands on which they were situated "shall be and remain forever exempt from taxation." Held, that this was not a "clearly-expressed" intention never to amend or repeal the provision for exemption, and hence such provision did not constitute a contract between the city and the state, the obligation of which is protected by the federal constitution.—*City of Covington v. Commonwealth of Kentucky*, 19 S. Ct. 383, 173 U. S. 231, 43 L. Ed. 679.

Sess. Acts Ky. 1885-86, pp. 144-147, 201, provided for the taxation of banks, and section 1 fixed a stated rate of taxation on stock and surplus. Section 4 declared that such banks as should consent thereto, and waive and release all rights under acts of congress and state charters, and agree to pay the tax provided, should, in consideration thereof, be exempt from all other taxation so long as said tax should be paid, during their corporate existence. Section 6 incorporated into the act section 8, c. 68, Gen. St. Ky. (Act Feb. 14, 1856, § 1), which made all subsequent corporate charters, grants, and amendments thereto, and all other statutes, subject to amendment or repeal, unless a contrary intent was therein plainly expressed. Held, that the acceptance of the act by a bank whose charter provided a tax limitation rate less than that required thereby, and payment of taxes thereunder, did not constitute a contract whose obligation the state was prohibited from impairing, and hence Const. Ky. 1891, § 174, and Act 1892, imposing additional taxation on such banks, were not invalid.—*Citizens' Sav. Bank v. City of Owensboro*, 19 S. Ct. 530, 571, 173 U. S. 636, 43 L. Ed. 840.

A railroad company's right to take lands by eminent domain, so long as it is unexecuted except by merely filing a map of a proposed route, is not vested, so as to make the condemnation of the land by the state for other purposes operate as an impairment of the obligation of the contract with the railroad company, when the company was organized under general statutes, which provided for the alteration, amendment, or repeal of corporate charters. Judgment *People v. Adirondack Ry. Co.*, 54 N. E. 689, 160 N. Y. 225, affirmed.—*Adirondack Ry. Co. v. People of State of New York*, 20 S. Ct. 460, 176 U. S. 335, 44 L. Ed. 492.

A statute permitting each stockholder of a corporation to cumulate his votes upon any one or more candidates for directors (St. Mich. 1885,

c. 112; Pub. Acts 1885, p. 116) is within the power reserved by the state constitution to its legislature to alter, amend, or repeal future acts of incorporation, and therefore does not impair the obligation of the contract made between the state and the corporation by its original organization. Judgment, *Attorney General v. Looker*, 69 N. W. 929, 111 Mich. 498, 56 L. R. A. 947, affirmed.—*Looker v. Maynard*, 21 S. Ct. 21, 179 U. S. 46, 45 L. Ed. 79.

The power to alter, amend, or repeal by vote of the people a statute exempting a railroad company from all other taxes on payment of a percentage of its gross earnings, which is reserved by the Minnesota constitutional amendment of 1871 (Laws Minn. 1871, p. 41), cannot be exercised so as to continue in full the obligation as to payment of the percentage of gross earnings, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract. Judgment, *State v. Stearns*, 75 N. W. 210, 72 Minn. 200, reversed.—*Stearns v. State of Minnesota*, 21 S. Ct. 73, 179 U. S. 223, 45 L. Ed. 162.

The reserved power to alter, amend, or repeal a statute constituting a contract with a corporation, exempting it from ordinary taxes, cannot be exercised so as to relieve the state from the effect of the constitutional provision against impairing the obligation of contracts, by a statute which attempts to preserve all the obligations of the corporation in favor of the state, and to take away from the corporation the consideration on the part of the state upon which the duty of the corporation to pay a gross-receipt tax rested, as such statute is a mere arbitrary exercise of power in denial of the equal protection of the laws, and amounts to a deprivation of property without due process of law. Judgment, *St. Louis County v. Duluth & I. R. R. Co.*, 80 N. W. 626, 77 Minn. 433, reversed.—*Duluth & I. R. R. Co. v. St. Louis County*, 21 S. Ct. 124, 179 U. S. 302, 45 L. Ed. 201.

A state statute fixing the rate of taxation on the gross receipts of a railroad company, enacted for the purpose of settling by agreement a pending controversy as to a charter right of the company to exemption from taxation, must, notwithstanding its contractual form, be regarded as an amendment to such charter, and therefore subject to repeal by reason of a provision of the state constitution in force at the time of its passage, reserving the power to repeal, alter, or amend corporate charters. Judgment, 51 A. 1108, 93 Md. 737, affirmed.—*Northern Cent. Ry. Co. v. State of Maryland*, 23 S. Ct. 62, 187 U. S. 258, 47 L. Ed. 167.

The requirement that street railway companies shall issue half-fare tickets to school children, which is made by Act Tex. April 10, 1903, § 2, does not impair the obligation of any contract with the municipality, fixing the rates which such company might charge, entered into after the adoption of Const. Tex. 1876, which, by Bill of Rights, § 17, subjects to the control of the Legislature all privileges and franchises granted by it or created under its authority. Judgment (Tex. Civ. App.) 81 S. W. 106, affirmed.—*San Antonio Traction Co. v. Altgelt*, 26 S. Ct. 261, 200 U. S. 304, 50 L. Ed. 491.

Any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of Const. Tex. 1876, which by Bill of Rights, § 17, subjects to the control of the Legislature all privileges and franchises granted by it or created under its authority, was lost by the sale of its property on foreclosure, and the acquisition of its franchise, under a municipal ordinance, together with that of another company, by a new corporation, incorporated since the adoption of such Constitution, although such ordinance provides that all the rights and priv-

ileges previously granted to the old corporations were conferred on the new one, including all the limitations, contracts, and obligations.—Id.

Impairment of the contract rights acquired by a corporation under a foreclosure sale of the franchise and rights conferred upon the mortgagor by a municipal ordinance adopted prior to Const. Miss. 1890 cannot be justified as an exercise of the right to alter, amend, or repeal corporate charters, reserved in section 178 of that Constitution, although the corporation in question was organized after the Constitution went into effect.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 26 S. Ct. 660, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

The reserved right to alter, amend, or repeal corporate charters, given by Const. Miss. 1890, § 178, "provided, however, that no injustice shall be done to the stockholders," does not authorize the Legislature to empower a municipality to construct waterworks of its own during the term of an exclusive waterworks franchise, possessed by a private corporation under a municipal ordinance adopted with legislative sanction.—Id.

The imposition upon street railway companies by Act Conn. July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and two feet on each side in good and sufficient repair. Judgment (1903) 53 A. 960, 75 Conn. 442, affirmed.—*Fair Haven & W. R. Co. v. City of New Haven*, 27 S. Ct. 74, 203 U. S. 379, 51 L. Ed. 237.

The power to amend or repeal, reserved by the state Constitution in force when an association insuring lives upon the co-operative plan was incorporated under general law, will sustain, as against an objection founded on the contract clause of the federal Constitution, so much of Laws N. Y. 1901, p. 1779, c. 722, as authorized the reorganization of such association under a new name as a mutual level premium company without the consent of the members, although the association may have been insolvent and the scheme of reincorporation may have been devised, and legislation authorizing it procured, by its officers with the intent to defraud the members.—*Polk v. Mutual Reserve Fund Life Ass'n of New York*, 28 S. Ct. 65, 207 U. S. 310, 52 L. Ed. 222.

No contract rights of domestic corporations are impaired by the provisions of Act Ark. Jan. 23, 1905 (Acts 1905, p. 2) § 1, imposing a penalty on corporations doing business in the state while members of a trust or combination to control prices, where the state Constitution reserves to the Legislature the power to repeal, alter, or amend corporate charters, provided no injustice be done to the incorporators. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

The right of future control, reserved to the municipality in a street railway franchise, as respects the "construction, maintenance, and operation" of the line of a street railway company, does not include the power to reduce fares below the rate prescribed in an existing contract between the municipality and the company, but such provision has reference only to the manner of carrying on the business of the road, the laying of its tracks, the use of its streets, the keeping up of the equipment, the safety of the passengers and the public, and similar matters not involving the right to charge fares. Decree, *Minneapolis St. Ry. Co.*

v. City of Minneapolis (Minn. 1907) 155 F. 989, modified.—City of Minneapolis v. Minneapolis St. Ry. Co., 30 S. Ct. 118, 215 U. S. 417, 54 L. Ed. 259.

A charter right held subject to the power of the state to repeal, alter, or amend is not protected by the contract clause of the federal Constitution against subsequent impairment. Judgment, State v. Missouri Pac. Ry. Co. (1907) 92 P. 606, 76 Kan. 467, affirmed.—Missouri Pac. Ry. Co. v. State of Kansas ex rel. Taylor, 30 S. Ct. 330, 216 U. S. 262, 54 L. Ed. 472.

An irrevocable contract was not created between the state and a national bank accepting the provisions of Acts Ky., 1885–86, c. 1233, known as the "Hewitt Act," fixing the rate of taxation, since that act expressly provided that it should be subject to a general law reserving the right to repeal, alter, or amend all grants to corporations.—Citizens' Nat. Bank v. Commonwealth of Kentucky, 30 S. Ct. 532, 217 U. S. 443, 54 L. Ed. 832.

The bonded indebtedness of a corporation is subject, not paramount, to the reservation in the corporate charter of the power to repeal.—(1910) Calder v. People of State of Michigan, 31 S. Ct. 122, 218 U. S. 591, 54 L. Ed. 1163, affirming judgment People v. Calder (1908) 117 N. W. 314, 153 Mich. 724, 126 Am. St. Rep. 550.

The existence of an unexpired franchise granted by a municipality to a waterworks company, which is included in the company's bonded debt, did not prevent the exercise, by Mich. Local Acts 1905, No. 492, of the state's reserved right to repeal the company's charter, under which the corporate directors may be ousted from acting as a body corporate, under the corporate name.—Id.

General authority given by a city charter to repeal all ordinances, including the power to regulate streets, is not a reservation of a power to destroy contract rights under an ordinance granting to an incorporated telephone company the right to maintain poles in the city streets.—City of Owensboro v. Cumberland Telephone & Telegraph Co., 33 S. Ct. 988, 230 U. S. 58, 57 L. Ed. 1389.

127. Charters of municipal corporations.

See 10 Cent. Dig. Const. Law, §§ 325–341.

Act N. J. March 31, 1869 (Laws 1869, p. 957), creating the Essex public road board, for constructing public roads, provided for assessments on land benefited by a road, and empowered the board, if they should not be paid, to sell the land for a term of 50 years. Act N. J. March 31, 1875 (Laws 1875, p. 420), provided that, if the land should not be bid off, the board might hold or dispose of it for the benefit of the county, with all the rights of a purchaser. Held, that the board, being a governmental agency wholly for public purposes, could not hold the land acquired under the act of 1875, in a proprietary sense, but was subject to the plenary power of the legislature; and Act N. J. March 31, 1882 (Laws 1882, p. 256), providing a mode by which the owner of land so held by the board might have the assessment compounded and discharged, is not unconstitutional, as impairing the obligation of contracts, and taking for the owner's use property vested in the board.—Essex Public Road Board v. Skinkle, 11 S. Ct. 790, 140 U. S. 334, 35 L. Ed. 446, affirming judgment, 49 N. J. Law, 641, 10 A. 379.

A municipal corporation, being a mere creature of the legislature, established for the purposes of government, is entirely subject to the legislative will, and cannot claim protection under the provision of the federal constitution prohibiting the states from passing any laws impairing the obligation of contracts.—City of New

Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943.

The fact that a contract made by a city with a water company has received final judicial interpretation does not, so far as the city's rights are concerned, in any way affect the power of the state to change the same by subsequent legislation.—Id.

Neither a municipal charter nor any statute regulating the use of property held by the municipality for governmental or public purposes is a contract, within the meaning and protection of the federal constitution.—City of Covington v. Commonwealth of Kentucky, 19 S. Ct. 383, 173 U. S. 231, 43 L. Ed. 679.

The obligation of contracts with a municipality is not impaired by subsequent changes in its charter, which protect it from suit upon claims against it which have not first been presented to the city council and wholly or partly disallowed, either by affirmative action or by the failure of that body for more than 60 days to pass thereon, and provide that disallowance is final and conclusive unless within 20 days an appeal therefrom be perfected to the proper circuit court, in which the case is to be tried as though originally commenced therein. Judgment, 85 N. W. 376, 109 Wis. 208, 95 Am. St. Rep. 870, affirmed.—Oshkosh Waterworks Co. v. City of Oshkosh, 23 S. Ct. 234, 187 U. S. 437, 47 L. Ed. 249.

128. Monopolies and exclusive franchises.

See 10 Cent. Dig. Const. Law, §§ 372–379.

Const. La. 1879, arts. 248, 253, giving to the authorities of municipalities of the state power to regulate slaughtering of live stock within their respective limits, and forbidding monopolies in such business, and repealing such monopoly features in charters of existing corporations, and city ordinances made under authority of those provisions, are not void as impairing the obligation of a contract made by a previous legislature of the state with a slaughter-house company, by which they were given the exclusive right of having all stock landed at their stock landing place and butchered at their slaughter house.—Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585, reversing (C. C.) Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Live-Stock Landing & Slaughter-House Co., 9 F. 743.

The constitution of Louisiana, abrogating a monopoly previously conferred on a certain corporation by its charter, is repugnant to Const. U. S., prohibiting the impairment of the obligation of contracts.—New Orleans Gaslight Co. v. Louisiana Light & Heat-Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516.

A charter giving a gaslight company the exclusive privilege of supplying a certain city with gas creates a contract that cannot be impaired by a state law.—Id.

An ordinance of New Orleans giving the lessees of a hotel a right to supply the hotel with water passing through mains extending under the streets of the city many blocks from the Mississippi river impairs the obligation of the charter previously given to the New Orleans Waterworks Company, giving it the exclusive right to supply the city with water from the Mississippi river, except to persons contiguous thereto.—New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. Ed. 525.

The grant to the New Orleans Waterworks Company, by Louisiana act of March 31, 1877, of the exclusive privilege to use the streets of New Orleans to lay water pipes in, and thus supply the city with water, is a contract, the

obligation of which cannot be impaired by the state. The state constitution of 1879, abolishing the monopoly features in charters of then existing corporations, is therefore inoperative as regards it.—*St. Tammany Waterworks Co. v. New Orleans Waterworks Co.*, 120 U. S. 64, 7 S. Ct. 405, 30 L. Ed. 563.

The constitution of Louisiana of 1879, which abrogates the monopoly features of existing corporations, is inoperative, to affect the obligation of contract incurred by the state in granting to the New Orleans Waterworks Company the exclusive privilege of using the streets of New Orleans to lay water pipes; and another company, which, by virtue of the state constitution, attempts to lay pipes, cannot justify its action, under the police power of the state to regulate the public supply of water, by simply showing that it will supply purer and more suitable water than the New Orleans Waterworks Company, neither the legislature nor the city having taken any steps in the matter.—*Id.*

Where an act of the legislature has granted to an individual and his assigns the exclusive right of supplying water for a period of years to the inhabitants of a city, from a stream known as "Three-Mile Creek," the obligation of the contract thus made is not impaired by the subsequent grant to another of the right to supply the same city with water from streams other than Three-Mile creek.—*Stein v. Bienville Water-Supply Co.*, 141 U. S. 67, 11 S. Ct. 892, 35 L. Ed. 622, affirming decree (C. C.) 34 F. 145.

An ordinance granting a street-railway franchise for a fixed period, during which the city is not to grant interfering privileges to any other company, constitutes a contract between the city and the company.—*City Ry. Co. v. Citizens' St. R. Co.*, 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree (C. C.) *Citizens' St. R. Co. v. City Ry. Co.*, 64 F. 647.

A ferry license granted by the county court under Act Va. March 5, 1840 (Code Va. 1873, c. 64, § 23), which was an act of general legislation making it unlawful for the court to grant a license for a ferry within one-half mile of any other ferry, does not constitute a contract the obligation of which is impaired by Act Va. March 5, 1894, which specially authorizes the establishment of a ferry within less than one-half mile of the former ferry.—*Williams v. Wingo*, 20 S. Ct. 793, 177 U. S. 601, 44 L. Ed. 906.

The right granted to a corporation by a municipal ordinance to construct and maintain an electric light plant, even assuming such right was exclusive, was not impaired by Laws Fla. c. 4600, or Act Fla. May 27, 1899, empowering the city to construct and maintain its own electric light plant, where nothing had been done by the grantee looking toward the erection and operation of such a plant, although it had erected and operated the gas plant which it was authorized by the same ordinance to construct and maintain. Judgment 28 So. 810, 42 Fla. 462, affirmed.—*Capital City Light & Fuel Co. v. City of Tallahassee*, 22 S. Ct. 866, 186 U. S. 401, 46 L. Ed. 1219.

The imposition on a gas company of the cost of changes in the location of its pipes and mains under the city streets, necessitated by the construction of the municipal drainage system authorized by Act La. July 9, 1896, does not impair any contract rights acquired under its exclusive franchise to supply gas to the city and its inhabitants through pipes and mains laid in the city streets. Judgment 35 So. 929, 111 La. 838, affirmed.—*New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 25 S. Ct. 471, 197 U. S. 453, 49 L. Ed. 831.

The obligation of an agreement by a municipality to give a water company an exclusive

franchise for 30 years as against "any other person or corporation" is not impaired by the municipal establishment of its own independent system of waterworks, under subsequent legislative authority.—*Knoxville Water Co. v. City of Knoxville*, 26 S. Ct. 224, 200 U. S. 22, 50 L. Ed. 353.

—129. Corporate rights and privileges in general.

See 10 Cent. Dig. Const. Law, §§ 296, 301, 362-413.

An act of legislation which imposes on insurance companies the necessity of suspending business at any time when their assets are less than the amount of their outstanding policies, and 4 per cent. thereof, does not bear towards companies chartered by the state the character of an act impairing the obligations of contracts between either the state and the company, or the policy holder and the company, which had to suspend under the legislative condition.—*Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 5 S. Ct. 681, 28 L. Ed. 1084.

The obligation of the contract arising from the charter of an insurance company is not impaired by subsequently enacted police regulations (Rev. St. Ohio, §§ 3654, 3655) requiring every such company to make annually a statement of its condition, where making such statement would not subject the charter to any conditions or modifications.—*Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 5 S. Ct. 681, 28 L. Ed. 1084; *Eagle Ins. Co. of Cincinnati v. State of Ohio*, 153 U. S. 446, 14 S. Ct. 863, 38 L. Ed. 778, affirming judgment *State v. Eagle Ins. Co. of Cincinnati*, 33 N. E. 1056.

Under Acts Tenn. 1847-48, p. 195, § 15, granting the railroad company incorporated by that act power to borrow money to complete its road and secure it by mortgage, this power to mortgage is exhausted on the completion of the road; and hence no contract is violated by Acts Tenn. 1877, c. 72, § 3, which was passed after such completion, and provides that no railroad company shall have power to create a mortgage which shall be valid against certain classes of judgments therein enumerated.—*East Tennessee, V. & G. Ry. Co. v. Frazier*, 139 U. S. 288, 11 S. Ct. 517, 35 L. Ed. 193, affirming *Frazier v. East Tennessee, V. & G. Ry. Co.*, 88 Tenn. 138, 12 S. W. 537.

The city of New Orleans granted a franchise to a street-railroad company for a gross money consideration, the charter providing for an annual tax upon its real estate and fixtures according to an assessment to be made in the usual mode. *Held*, that there was no implied exemption from further taxation, and the contract was not impaired by the levy of an annual franchise tax under Acts La. No. 101, § 8.—*New Orleans City & L. R. Co. v. City of New Orleans*, 143 U. S. 192, 12 S. Ct. 406, 36 L. Ed. 121, affirming judgment 40 La. Ann. 587, 4 So. 512, and distinguishing *Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 133, 11 L. Ed. 529.

Laws N. Y. 1885, c. 499, creating a board of commissioners of electrical subways, and requiring all companies to obtain its approval of their plans and specifications, before commencing work, and, during the progress thereof, to submit to such modifications and regulations as the board may prescribe, is applicable to a company organized under the amended act of 1848, though it had previously obtained permission from the city by an ordinance providing minute regulations as to the form, size, and location of the subways, and requiring the work to be done under the supervision of the commissioner of public works; and no substantial right is impaired by the act, since it merely substitutes the board for the single commissioner, and requires it to

see that the plans and specifications submitted correspond with the conditions of the ordinance.—*People of State of New York v. Squire*, 145 U. S. 175, 12 S. Ct. 880, 36 L. Ed. 666, affirming judgment 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893.

Rev. St. Ohio, §§ 2480, 2482, provide that on the failure of a city gas company to extend its lines, make connections, or perform certain other duties, when required to do so by the municipal authorities, the charter of such company shall be forfeited, and the city be at liberty to establish and maintain gas works of its own. *Held*, that the grant of such power to a city by the legislature does not impair the obligation of contracts, within the meaning of the federal constitution, although the value of the existing company's franchise is diminished thereby.—*Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 S. Ct. 90, 36 L. Ed. 963, affirming judgment (C. C.) 37 F. 832.

Even if the act of 1874, as amended by the act of 1876, should be regarded as constituting a contract, the act of 1886 did not impair the obligation thereof, for by the constitution of New York the power is reserved to the legislature to alter, change, or repeal all general laws relating to the formation of corporations.—*People of State of New York v. Cook*, 148 U. S. 397, 13 S. Ct. 645, 37 L. Ed. 498, affirming judgment 110 N. Y. 443, 13 N. E. 113.

The right given by the New York statute to the purchasers of railroad property and franchises at a foreclosure sale to form a new corporation, with all the rights, powers, and privileges of the old one, upon filing with the secretary of state a certificate in the form therein prescribed (Laws 1874, c. 430, as amended by Laws 1876, c. 446), was not a contract right, but was a mere regulation of law, and the subsequent act (Laws 1886, c. 143), requiring, as a condition precedent to obtaining a charter, the payment of a sum equal to one-eighth of 1 per cent. upon the proposed amount of capital stock of the new company, was not, as applied to purchasers at the foreclosure of a pre-existing mortgage, an act impairing the obligation of contracts.—*Id.*

A state statute requiring railroad companies to fence their right of way through the lands of private persons is not in violation of the company's chartered right to buy and hold lands for specified purposes.—*Minneapolis & St. L. Ry. Co. v. Emmons*, 149 U. S. 364, 13 S. Ct. 870, 37 L. Ed. 769; *Same v. Nelson*, 149 U. S. 368, 13 S. Ct. 871, 37 L. Ed. 772.

Pub. Acts Conn. 1889, c. 220, authorizing the railroad commissioners to order any railroad company, if in their opinion its financial condition will warrant, to remove a dangerous grade crossing, which it has failed to remove as required by the act, is within the police power of the state, and does not impair the obligation of contracts by reason of the large expenditure required, and the effect thereof on the contracts of the company with holders of its securities, where its charter is subject to amendment by legislative power.—*New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269, affirming judgment 62 Conn. 527, 26 A. 122.

Act Mo. March 2, 1869, authorizing the consolidation of certain railway corporations, provided that the companies should become one, and that new certificates of stock should be issued in exchange for the stock of the consolidated companies, and that the consolidation agreement should be recorded as the charter of the new company. *Held*, that the corporation formed became at once subject to Const. Mo. 1865, art. 11, § 16, prohibiting the legislature from exempting corporations from taxation, notwithstanding such exemption in the charter of one of the constituent companies was granted prior to the

adoption of the constitution.—*Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 14 S. Ct. 592, 38 L. Ed. 450.

The contract arising from state statutes authorizing a foreign railroad company to construct and operate its road within the state and its acting thereon is impaired by a subsequent statute (Act Pa. June 30, 1885, § 4) requiring the company to collect a tax on its bonds held by residents of the state, by deducting the tax from the interest on such bonds, they having been previously issued under authority of the state by which the company was created, and the interest being payable in that state only.—*New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 14 S. Ct. 962, 38 L. Ed. 854.

A statute annexing a town to a city, and giving the city power to purchase or condemn within two years the property of a water company with which the town had a contract, did not prevent the legislature from enlarging the time, or from subsequently granting, during the life of the contract, a further right of purchase or condemnation.—*Long Island Water-Supply Co. v. City of Brooklyn*, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

A contract between a city and a railroad company for sharing the expense of maintaining and repairing a viaduct, carrying a street over the railroad tracks, is one affecting the safety of the community; and the subject-matter is in the police power of the state, so that it may, by a subsequent statute, impose greater burdens upon the company without violating the contract clause of the federal constitution.—*Chicago, B. & Q. R. Co. v. State of Nebraska*, 18 S. Ct. 513, 170 U. S. 57, 42 L. Ed. 948.

The obligation of the contract between the state and a social club, arising out of the mere granting of the club's charter, is not impaired by the revocation of such charter, which, under Act Va. March 12, 1904, p. 214, c. 116, automatically followed a judgment that such club was being conducted for the purpose of violating and evading the laws of the state regulating the licensing and sale of liquors.—*Cosmopolitan Club v. Commonwealth of Virginia*, 28 S. Ct. 394, 208 U. S. 378, 52 L. Ed. 536.

The obligation of the contract under which the stockholders in a Kansas corporation acquired their stock is not unconstitutionally impaired by Laws Kan. 1898 (Sp. Sess.) p. 32, c. 10, § 12, requiring, as a condition of a legal or binding transfer of stock, that a statement of such transfer shall be filed with the secretary of state by the president, secretary, or managing officer of the corporation, although, when the stock was acquired, the sole requirement of the Kansas statutes in this regard was that corporate stock should be transferable only on the books of the corporation. Judgment (1907) 93 P. 168, 76 Kan. 723, 17 L. R. A. 779, affirmed.—*Henley v. Myers*, 30 S. Ct. 148, 215 U. S. 373, 54 L. Ed. 240.

The substitution for individual actions to enforce the statutory liability of stockholders in a Kansas corporation of a suit in equity by a receiver appointed after judgment against the corporation, which is made by Laws Kan. 1898 (Sp. Sess.) p. 32, c. 10, does not unconstitutionally impair the obligation of the contract under which the stockholders acquired their stock.—*Id.*

The obligation of a valid municipal grant of a special tax of five mills in aid of a specified railway company, effective against all the taxable property in the parish, is not unconstitutionally impaired by the subsequent adoption of a new state Constitution under which any property in the parish passing into the possession of any railroad thereafter constructed becomes exempt from the tax.—(1910) *Arkansas Southern Ry. Co. v. Louisiana & A. Ry. Co.*, 31 S. Ct. 56, 218 U. S. 431, 54 L. Ed. 1097,

affirming decree *Louisiana & A. Ry. Co. v. Shaw* (1908) 46 So. 994, 121 La. 997.

Contract obligations under a bank's charter which is subject to alteration or repeal are not unconstitutionally impaired by the levy and collection, under a state statute, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case it or any other bank existing under the state laws becomes insolvent, unless such statute deprives the bank of liberty or property without due process of law.—(1911) *Noble State Bank v. Haskell*, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, affirming decree (1908) 97 F. 590, 22 Okl. 48. Opinion amended (1911) 31 S. Ct. 290, 219 U. S. 575, 55 L. Ed. 341; (1911) *Shallenberger v. First State Bank of Holstein, Neb.* 31 S. Ct. 189, 219 U. S. 114, 55 L. Ed. 117, reversing decree (C. C. 1909) *First State Bank of Holstein, Neb., v. Shallenberger*, 172 F. 999.

The obligations of the charter of a water company are not unconstitutionally impaired by construing it in the light of statute law and decisions when the charter was granted.—(1912) *Consumers' Co. v. Hatch*, 32 S. Ct. 465, 224 U. S. 148, 56 L. Ed. 703, affirming judgment (1909) *Hatch v. Consumers' Co.*, 104 P. 670, 17 Idaho, 204.

A clause in the charter of a water company that it shall not be required to extend its system in any ungraded street is not impaired by requiring it to connect residents of such a street at its own expense, where it has voluntarily laid its mains in such street.—Id.

Assent of municipality given under charter of telephone company perfects the company's franchise, which cannot be repealed or forfeited by a municipal ordinance.—*City of Louisville v. Cumberland Telephone & Telegraph Co.*, 32 S. Ct. 572, 224 U. S. 649, 56 L. Ed. 934.

The burden of furnishing free water for fire purposes under Rev. St. Idaho, § 2711, on all corporations formed to supply water to cities and towns, could be removed, as was done by amendment of March, 1905, without impairing the obligation of any contract.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 33 S. Ct. 997, 230 U. S. 84, 57 L. Ed. 1400.

Charter power to do a safe deposit business is not impaired by Inheritance Tax Law Ill. July 1, 1909 (Laws 1909, p. 316) § 9, prohibiting the removal of the contents of safe deposit boxes after the death of the renter except on notice to the Attorney General and State Treasurer and the retention of sufficient assets to pay the tax.—*National Safe Deposit Co. v. Stead*, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

A contract right to compensation as a condition for the reversion to the state of the property rights of a canal company acquired under Acts La. No. 309 of 1852, No. 160 of 1857, and No. 74 of 1858, was given by sections 2 and 4 of such latter act.—*Carondelet Canal & Navigation Co. v. State of Louisiana*, 34 S. Ct. 627, 233 U. S. 362, 58 L. Ed. 1001, reversing judgment *State v. Carondelet Canal & Navigation Co.*, 56 So. 137, 129 La. 279.

130. Licenses or privileges to foreign corporations.

See 10 Cent. Dig. Const. Law, § 301.

Compliance with Acts Tenn. 1875, c. 66, requiring a foreign corporation, as a prerequisite to doing business in the state, to file an irrevocable power of attorney authorizing the secretary of state to accept service of process for it, did not create a contract that prevented the state from afterwards making the corporation

amenable to process by service on other agents than the one so appointed.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 19 S. Ct. 308, 172 U. S. 602, 43 L. Ed. 569.

A forfeiture of the permission to a foreign corporation to do business in the state for violation of the provisions of Act Tex. 1889, under which the permit was given, and which provides for the forfeiture, does not violate any contract obligation, as the provision for the forfeiture was a part of the obligation. Judgment 44 S. W. 936, 19 Tex. Civ. App. 1, affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 20 S. Ct. 518, 177 U. S. 28, 44 L. Ed. 657.

The obligation of a contract which calls for the transaction of business within the state by a foreign corporation which has not filed a copy of its charter with the secretary of state is not impaired by Rev. St. Wis. 1898, §§ 1770b, 4978, making such contracts wholly void on the corporation's behalf, but enforceable against it, although such statute was by its terms not to go into effect until after the contract was entered into, at least where it was enacted before the contract was made.—*Diamond Glue Co. v. United States Glue Co.*, 23 S. Ct. 206, 187 U. S. 611, 47 L. Ed. 328.

A contract right to do business in the state during the corporate lifetime of domestic corporations, without being subject to any greater liabilities than then were or might be imposed upon domestic corporations, was acquired by a foreign corporation by virtue of its admission into the state of Colorado with the right to do business therein under the then existing laws of that state, which, inter alia, subjected foreign corporations coming into the state to the liabilities, restrictions, and duties which then were or might thereafter be imposed upon domestic corporations of like character, and such right was unconstitutionally impaired by Act Colo. March 22, 1902, § 65, exacting from such corporation an annual tax or license fee in double the amount of that imposed by section 64 upon domestic corporations. Judgment (Colo.) 82 P. 531, reversed.—*American Smelting & Refining Co. v. People of State of Colorado*, 27 S. Ct. 198, 204 U. S. 103, 51 L. Ed. 393, 9 Ann. Cas. 978.

132. Lottery franchises.

See 10 Cent. Dig. Const. Law, § 363.

A lottery franchise granted by a state is not a contract, within the meaning of the constitutional provision forbidding the states to pass laws impairing the obligation of contracts, but is simply a gratuity and license; and the state, under its police powers, may at any time revoke such license. And no right acquired during the life of the grant, by agreement with the grantee, can be exercised after the revocation of such grant, if its exercise involves a continuance of the lottery as originally authorized.—*Douglas v. Commonwealth of Kentucky*, 18 S. Ct. 199, 168 U. S. 488, 42 L. Ed. 553.

133. Railroad franchises.

See 10 Cent. Dig. Const. Law, §§ 376, 402.

A statute making railroad companies liable for property destroyed by fire communicated by their locomotives, and giving them an insurable interest in the property along their road, does not impair the obligation of the contract between such companies and the state, by which they are impliedly permitted to use fire in the operation of their roads.—*St. Louis & S. F. R. Co. v. Mathews*, 17 S. Ct. 243, 165 U. S. 1, 41 L. Ed. 611.

Contract obligations are not impaired by compelling a street railway company, at its own expense to lower, or, at its option, remove, a tunnel constructed by it under the Chicago river, which, though not an obstruction to nav-

igation when constructed, has since become such by reason of the increased size of the vessels plying on that river where the municipal ordinance under which such tunnel was constructed contains no stipulation that the city will not exert any power it possesses to deepen the channel and improve navigation, and it was adopted while a state statute was in force which, as construed by the state courts, made at a condition of the construction of such a tunnel that navigation should not be unnecessarily interrupted. Judgment 73 N. E. 393, 214 Ill. 9, affirmed.—*West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago*, 26 S. Ct. 518, 201 U. S. 506, 50 L. Ed. 845.

Requiring a railway company to repair, at its own expense, a viaduct and its approaches, built to carry over a railroad a street which was not extended over the right of way until after the railroad was built, cannot be said to impair the obligation of a contract by which the municipality, in consideration of a contribution from the railroad company toward the expense of the original construction, agreed to maintain the viaduct for fifteen years, and to maintain the approaches perpetually, where the highest state court consistently with its earlier decisions, holds that the railway charter, as well as the common law, requires the railway company to construct and maintain suitable crossings at existing and future streets, and that any contract limiting the exercise of legislative power in this regard is void as against public policy, although there may have been some doubt when the contract was made as to what the rights of the parties were, and the contract may have been a compromise. Judgment. *State v. Northern Pac. Ry. Co.* (1906) 108 N. W. 269, 98 Minn. 429, affirmed.—*Northern Pac. Ry. Co. v. State of Minnesota*, 28 S. Ct. 341, 208 U. S. 583, 52 L. Ed. 630.

The common-enemy doctrine as to surface water was not so imported into railroad's irrevocable charter or its contracts with landowners from whom its right of way was acquired, as to be protected by the contract clause of the federal Constitution.—*Chicago & A. R. Co. v. Tranbarger*, 35 S. Ct. 678, 238 U. S. 67, 59 L. Ed. 1204, affirming judgment *Tranbarger v. Chicago & A. R. Co.*, 156 S. W. 694, 250 Mo. 46.

Compelling railroads to construct openings in roadbeds to take care of surface water under amendment Laws Mo. 1907, p. 169, to Rev. St. 1899, § 1110, does not impair obligation of railroad's charters.—Id.

134. Right to use streets.

See 10 Cent. Dig. Const. Law, § 244.

The fact that a street-railway company constructed its track under a franchise granted by a city does not exempt the company from the power reserved to the general assembly by Code Iowa, § 1090, of imposing any conditions on the franchise of a corporation which it deems necessary for the public good; and hence, though the original franchise granted by the city required the company to pave only the space inside the rails, the obligation of the contract is not impaired, within the meaning of the federal constitution, by a subsequent ordinance passed by the city in pursuance of Act Iowa March 15, 1884, requiring the company to pave, in addition, one foot outside of each of the rails.—*Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 S. Ct. 226, 34 L. Ed. 898, affirming judgment 78 Iowa, 367, 43 N. W. 224.

The general telegraphic companies act of New York (Laws 1848, c. 265, § 5) requires that companies organized thereunder shall not construct their lines "so as to incommode the public use" of any highway; and the amendment of 1881 (chapter 483, § 1), authorizing the construction of underground conductors, provides that no such use may be made of streets without first obtaining permission from

the proper municipal authorities. *Held*, that in view of these provisions as well as upon the general theory of the police power, a company which has already obtained permission from a city council to occupy the streets on certain conditions is subject to subsequent regulations prescribed by the legislature, not amounting to an impairment of its substantial rights.—*People of State of New York v. Squire*, 145 U. S. 175, 12 S. Ct. 880, 36 L. Ed. 666, affirming judgment 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893.

A city ordinance granting to a railroad company permission to construct bridges over its track where it crosses public streets, passed pursuant to Rev. St. Ohio, § 2640, giving the common council power to control all streets and bridges within the corporation, and to cause the same to be kept "in repair and free from nuisance," does not constitute a contract, so as to preclude the council from so changing the grade of the street as to necessitate the removal of the bridges.—*Wabash R. Co. v. City of Defiance*, 17 S. Ct. 748, 167 U. S. 88, 42 L. Ed. 87.

An ordinance commanding the removal of gas street-lamp posts which are no longer in use because the streets are lighted by electricity, instead of gas, and declaring that no interest will thereafter be paid to the gas company on account of such posts, does not impair the obligation of a contract under which the gas company erected such posts and the city agreed to pay interest on their cost, since, if the city is still liable under the contract after the substitution of electricity for gaslights, that obligation will not be affected by this ordinance, and the declaration that payment will not be made will be ineffectual.—*St. Paul Gaslight Co. v. City of St. Paul*, 21 S. Ct. 575, 181 U. S. 142, 45 L. Ed. 788.

A municipal corporation cannot invoke the protection of the contract clause of the federal Constitution against the abrogation by Laws Mass. 1898, c. 578, with the consent of the street railway company, of the provisions of a contract between that company and the municipality with reference to paving the streets through which the company was thereby granted the right to extend its tracks, and the substitution which that statute makes of another and different method for paving and repairing such streets. Judgment 64 N. E. 581, 182 Mass. 49, affirmed.—*City of Worcester v. Worcester Consol. St. Ry. Co.*, 25 S. Ct. 827, 196 U. S. 539, 49 L. Ed. 591.

No right to use or appropriate for wharfage purposes a city street or an extension thereof, protected by the contract clause of the federal Constitution from impairment by legislative change of the grade of the street, can be gathered from municipal grants to the owners of property fronting on opposite sides of the street of the right to construct wharves in a river on and in front of such property, reserving to the common council the right to regulate the passageways along the street and any part of the wharves extending therein "as a part of said street and sidewalks." Decree 76 P. 347, 45 Or. 1, affirmed.—*Mead v. City of Portland*, 26 S. Ct. 171, 200 U. S. 148, 50 L. Ed. 413.

The effect of Act Ill. June 9, 1897, ratifying the grants to street railway companies by the proper public officers or authorities of permission to use cable, electric, or other motive power, cannot, as to contracts in existence when enacted, be destroyed by subsequent repeal. Decree, *Govin v. City of Chicago* (C. C.) 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

No grant to a telephone company of the right to occupy the streets of a city without its consent which will be protected by the contract clause of the federal Constitution can be deduced from the amendment of October 10,

1911, to Const. Cal. art. 11, § 19, giving authority to corporations to establish works to supply the inhabitants of a city with telephone service.—(1912) *City of Pomona v. Sunset Telephone & Telegraph Co.*, 32 S. Ct. 477, 224 U. S. 330, 58 L. Ed. 788, reversing decree (1909) *Sunset Telephone & Telegraph Co. v. City of Pomona*, 172 F. 829, 97 C. C. A. 251.

A telephone company can claim no contract right under the amendment of March 20, 1905 (St. 1905, p. 492), to Civ. Code Cal. § 536, to occupy city streets without the city's consent in view of the former passage of Franchise Act March 22, 1905 (St. 1905, p. 777), providing for franchises for telephone lines on conditions named in the act.—*Id.*

A contract right to maintain only interstate telephone lines in city streets is all that is given in the exception in favor of telephone lines doing interstate business, made by Act March 20, 1905 (St. 1905, p. 492), amending Civ. Code Cal. § 536, so as to include telephone companies among corporations which could occupy city streets without consent.—*Id.*

Rights of a railway company under valid municipal ordinance conferring trackage rights in city streets, subject to reasonable police regulation, are protected by contract clause of federal Constitution from destruction by repeal.—*Grand Trunk Western R. Co. v. City of South Bend*, 33 S. Ct. 303, 227 U. S. 544, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405, reversing judgments *Grand Trunk & Western Ry. Co. v. Same*, 89 N. E. 885, 174 Ind. 203, 36 L. R. A. (N. S.) 850, and *Grand Trunk Western Ry. Co. v. Same*, 91 N. E. 809, 174 Ind. 203, 36 L. R. A. (N. S.) 850.

The obligation of a contract created by municipal ordinance granting the right to lay double tracks in a city street held unconstitutionally impaired by subsequent repeal of so much of the ordinance as relates to that part of the street on which a single track only has actually been built, where the company had bought land with view to laying double track.—*Id.*

An ordinance prohibiting the hauling of freight cars on railroads in a city street is not a valid exercise of regulation reserved in ordinance designating, under B. & C. Comp. Or. §§ 5077, 5078, streets on which railroad tracks could be located, as impairing the contract under which tracks were located and terminals built.—*Southern Pac. Co. v. City of Portland*, 33 S. Ct. 308, 227 U. S. 559, 57 L. Ed. 642, affirming decree (C. C.) 177 F. 958.

A street railway company whose franchise has expired has no implied contract right to remain in the streets under reasonable arrangements for public service, which could be impaired contrary to Const. U. S. art. 1, § 10, by requiring the street railway company to cease operating its cars and remove its tracks within a reasonable time.—*Detroit United Ry. v. City of Detroit*, 33 S. Ct. 697, 229 U. S. 39, 57 L. Ed. 1056, affirming judgment (Mich.) *City of Detroit v. Detroit United Ry.*, 137 N. W. 645, 172 Mich. 136.

The obligation of a municipal ordinance granting an irrevocable easement to lay in the city streets and repair pipes of a water distributing system is impaired by a subsequent ordinance requiring payment of a monthly rental for the use of the streets.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 33 S. Ct. 997, 230 U. S. 84, 57 L. Ed. 1400.

Neither the contract nor due process of law clause of the federal Constitution prevents a municipality from forbidding a railroad, through whose acquiescence a part of its right of way through a city has become the city's principal business street to shift cars on the tracks lying in the heart of the city except during specified hours, or permit cars to stand there for more

than five minutes and by requiring the tracks to conform to the street grade and the spaces between the rails to be filled in except at street intersections.—*Atlantic Coast Line R. Co. v. City of Goldsboro*, 34 S. Ct. 364, 232 U. S. 548, 58 L. Ed. 721, affirming decree 71 S. E. 514, 155 N. C. 356.

The grant on acceptance by the establishment of a plant devoted to a public use of the state's offer in Const. Cal. 1879, art. 11, § 19, as amended in 1885, to permit persons or corporation to lay gas pipes in city streets for purposes specified, constituted a contract protected by the federal Constitution against impairment.—*Russell v. Sebastian*, 34 S. Ct. 517, 233 U. S. 195, 58 L. Ed. 912, Ann. Cas. 1914C, 1282, reversing judgment *Ex parte Russell*, 126 P. 875, 163 Cal. 668.

The contract rights of a gas company accepting, by establishment of its plant, the state's offer in Const. Cal. 1879, art. 11, § 19, as amended in 1885, of the privilege of laying pipes in the street of a city as necessary for supplying such city and its inhabitants with gas, include the continuing authority to lay its mains in streets not previously used, subject to the constitutional provision for local superintendence and regulations for indemnity as to damages, and such rights were impaired by the amendment of such provision October 10, 1911, and by municipal ordinances under which extensions could not be made unless the gas company obtained a franchise by purchase.—*Id.*

Acceptance of permit granted by a city under legislative authority to place wires in a city's streets creates a contract which cannot thereafter constitutionally be revoked by resolution or ordinance unless the franchise is lost by misuser or nonuser.—*New York Electric Lines Co. v. Empire City Subway Co.*, 35 S. Ct. 72, 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915A, 906, affirming judgments 125 N. Y. S. 1133, 140 App. Div. 934, and *In re New York Electric Lines*, 94 N. E. 1056, 201 N. Y. 321.

The federal Supreme Court will not disturb a decision of the state court that a municipal ordinance requiring a street railway company to pave its tracks with asphalt did not impair the obligations of its charter, where the state court found that the use of crushed stone by the railway company would interfere with the pavement of the other parts of the street.—*Southern Wisconsin Ry. Co. v. City of Madison*, 36 S. Ct. 400, 240 U. S. 457, 60 L. Ed. 739, affirming judgment *City of Madison v. Southern Wisconsin Ry. Co.*, 146 N. W. 492, 156 Wis. 352.

◀135. Right to charges and tolls.

See 10 Cent. Dig. Const. Law, §§ 360-387.

A statute may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter.—*Ruggles v. People of State of Illinois*, 108 U. S. 526, 2 S. Ct. 832, 27 L. Ed. 812.

Const. Cal. 1849, art. 4, § 31, provided that private corporations might be formed under general laws, but that such laws might be altered or repealed from time to time. Act Cal. April 22, 1858, provided for the organization of companies for the purpose of supplying cities and counties with water, and required them to furnish water to the public at reasonable rates, which should be fixed by a board composed of two members appointed by the municipality and two members appointed by the company. Const. Cal. 1879, art. 14, §§ 1, 2, provided that thereafter the water rates should be fixed by the board of supervisors of the city or county alone. *Held*, that the franchise of a company organized under the act of 1858 was subject to the alteration according to the rights reserved by the constitution of 1849, and was not impaired

by the constitution of 1879.—*Spring Valley Water-Works v. Schottler*, 110 U. S. 347, 4 S. Ct. 48, 28 L. Ed. 173.

The power of a state to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction is a governmental power, and cannot be bargained away, except by words of positive grant or their equivalent. The provisions of the Mississippi charter of the Mobile & Ohio Railroad Company (Act Miss. Feb. 3, 1848) in section 1, authorizing the company to carry persons and property; or in section 7, giving the directors power to make by-laws, rules, and regulations for the management of the affairs of the company, not contrary to the laws of the state; or in section 12, "that it shall be lawful for the company, * * * from time to time, to fix, regulate, and receive the toll and charges by them to be received for transportation,"—are not a surrender of the state's power of declaring what charges shall be deemed reasonable; and a statute authorizing the appointment of a board of railroad commissioners (Act Miss. March 11, 1884) who shall have power, among other things, to fix and regulate charges for transportation of persons and property, is not invalid, as impairing the obligation of a contract.—*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636.

Nor is a charter authorizing the directors to "adopt and establish such a tariff of charges for transportation of persons and property as they may think proper, and the same to alter and change at pleasure," an adequate surrender of the state's right of control and regulation.—*Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, 6 S. Ct. 348, 388, 1191, 29 L. Ed. 650.

A charter (Act Miss. March 30, 1871) authorizing a railroad company to receive "such tolls and charges as shall be from time to time established, fixed, and regulated by the directors," "provided, that nothing in the charter shall be so construed as to prevent the legislature from regulating the rate of transportation for passage and freight over the same in this state," does not amount to a surrender of legislative control.—*Stone v. New Orleans & N. E. R. Co.*, 116 U. S. 352, 6 S. Ct. 349, 391, 29 L. Ed. 651.

A railroad charter giving an exclusive right to transfer persons and property, "provided that the charge of transportation or conveyance shall not exceed" certain specified rates, does not preclude subsequent legislation establishing a commission to regulate railroad tariffs.—*Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 9 S. Ct. 47, 32 L. Ed. 377.

Act Minn. March 3, 1869 (Laws Minn. 1869, c. 78, p. 95), providing that any railroad company may charge for transportation "such reasonable rate as may be from time to time fixed by said corporation, or prescribed by law," and Gen. Laws Minn. 1875, c. 103, § 8, providing that no railroad company shall charge an unreasonable price for transportation or other service, do not constitute such a contract with a corporation created thereunder as deprives the legislature of its power to regulate charges made by it.—*Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. Ed. 970, reversing *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 37 N. W. 782; *Minneapolis E. Ry. Co. v. Same*, 134 U. S. 467, 10 S. Ct. 473, 33 L. Ed. 985.

That a turnpike company, claiming under its charter, exemption from legislation reducing its rates of toll below a certain limit, has collected tolls according to reduced rates fixed by a subsequent statute, is not a recognition by it of the right of the legislature to amend or repeal its charter at will.—*Covington & L. Turnpike Road Co. v. Sandford*, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

A reduction of the income of a water company need not be shown in order to establish the fact that a reduction of its rates by ordinance impairs the obligation of a contract prohibiting such reduction. Judgment, *Los Angeles City Water Co. v. City of Los Angeles* (C. C.) 88 F. 720, affirmed.—*City of Los Angeles v. Los Angeles City Water Co.*, 20 S. Ct. 736, 177 U. S. 558, 44 L. Ed. 886.

A railroad company, accepting its charter subject to the provisions of Const. Ky. § 218, prohibiting greater charges for shorter than for longer hauls, except when permitted by the railroad commission, is as much subject to the provisions for exoneration from that prohibition as to the prohibition itself, and cannot claim that it has any implied contract exemption from these provisions by virtue of its charter and the consequent right to charge reasonable rates for its service. Judgment 51 S. W. 164, 1012, 106 Ky. 633, 90 Am. St. Rep. 236, 21 Ky. Law Rep. 232, affirmed.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

An ordinance adopted under Legislative authority, which provides that the rate of fare to be charged by a street railway company shall not exceed 5 cents, gives the company, when accepted by it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company under the right to prescribe from time to time rules and regulations for the running and operation of the road.—*City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 S. Ct. 410, 184 U. S. 368, 46 L. Ed. 592.

A provision in a contract between a water company and a municipality that the company shall supply water to private consumers at a specified rate does not amount to an implied undertaking by the municipality not to disturb such rates, the obligation of which is impaired by an ordinance reducing them, where the company was incorporated under an act which, while conferring upon it power to charge such rates as might be agreed upon with its consumers, expressly recognized the power of the municipality to regulate water rates. Judgment *City of Knoxville v. Knoxville Water Co.*, 64 S. W. 1075, 107 Tenn. 647, 61 L. R. A. 888, affirmed.—*Knoxville Water Co. v. City of Knoxville*, 23 S. Ct. 531, 189 U. S. 434, 47 L. Ed. 887.

The provision of Acts Mich. 1873, No. 198, for the creation of a new corporation upon the reorganization of a railroad by the purchasers at foreclosure sale, with all the rights, powers, and privileges of the original company, did not create a contract right protected by the federal Constitution against the enforcement of subsequent statutory regulations respecting railroad rates, existing when the new company was incorporated, though not in force when the mortgage was executed. Judgment, *Commissioner of Railroads v. Grand Rapids & I. Ry. Co.*, 89 N. W. 967, 130 Mich. 248, affirmed.—*Grand Rapids & I. Ry. Co. v. Osborn*, 24 S. Ct. 310, 193 U. S. 17, 48 L. Ed. 598.

The requisite written acceptances of various municipal ordinances for the consolidation and extension of street railway lines, which secured to the public, for the limited time during which the privileges therein granted should continue, the benefit of a single fare of not more than 5 cents for a continuous passage over the whole length or any portion of the consolidated and extended lines, created a contract right to charge that rate, which could not afterwards be reduced by the municipality over a portion of the consolidated lines, under the authority of a right to regulate fares, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned that portion of the lines. Decree, *Cleveland City Ry. Co. v. City of Cleveland* (C.

C.) 94 F. 385, and *Cleveland Electric Ry. Co. v. Same, Id.*, affirmed.—*City of Cleveland v. Cleveland City Ry. Co.*, 24 S. Ct. 756, 194 U. S. 517, 48 L. Ed. 1102; *Same v. Cleveland Electric Ry. Co.*, 24 S. Ct. 764, 194 U. S. 538, 48 L. Ed. 1109.

The contract right of a street railway company to charge the rate of fare permitted by a municipal ordinance vests in such company, secure against impairment by subsequent legislation, when ratified by a valid legislative act, notwithstanding the want of power of the city to adopt the ordinance. *Decree Minneapolis St. Ry. Co. v. City of Minneapolis (C. C. 1907) 155 F. 989, modified.*—*City of Minneapolis v. Minneapolis St. Ry. Co.*, 30 S. Ct. 118, 215 U. S. 417, 54 L. Ed. 259.

The authority of a carrier incorporated under General Incorporation Act Or. Oct. 14, 1862 (Laws 1862, p. 12), which in section 34 provides that every corporation formed thereunder shall have power to receive such tolls or freight for the transportation of persons as it may prescribe, is subject to the limitations that the charges shall be reasonable.—*Southern Pac. Co. v. Campbell*, 33 S. Ct. 1027, 230 U. S. 537, 57 L. Ed. 1610, affirming decree (C. C.) 189 F. 183.

A carrier cannot assert as against a rate-making order of the railroad commission, under Act Ky. March 10, 1900 (Ky. St. § 820a), contract right under its charter to charge certain rates where by the carrier's own voluntary act the charter became subject to legislative alteration.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

137. Taxation in general.

See 10 Cent. Dig. Const. Law, § 354.

The special franchise tax imposed by Laws N. Y. 1899, c. 712, does not impair the obligation of the contracts by which the state or municipality granted the right to construct, operate, and maintain street railways in the city of New York in consideration of the payment of a gross sum or of the annual payment of a fixed amount or fixed percentage of earnings, where such payments are nowhere declared to be in lieu of, or as the equivalent or substitute for, taxes. *Judgments*, 67 N. E. 69, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674, affirmed, and 80 N. Y. S. 85, 79 App. Div. 183, and 80 N. Y. S. 1145, reversed.—*People of State of New York ex rel. Metropolitan Street Ry. Co. v. State Board of Tax Com'rs*, 25 S. Ct. 705, 199 U. S. 1, 50 L. Ed. 65, 4 Ann. Cas. 381; *People of State of New York ex rel. Brooklyn City Ry. Co. v. Same*, 25 S. Ct. 713, 199 U. S. 43, 50 L. Ed. 79; *People of State of New York ex rel. Twenty-Third St. R. Co. v. Same*, 25 S. Ct. 715, 199 U. S. 53, 50 L. Ed. 85.

A contract between a state and a railway company, which prevented the subjection of the property of the company to any other than the tax prescribed in Laws Mich. 1855, p. 306, § 9, was created by the provisions of that section that the company shall pay an annual tax of 1 per cent. on the capital stock of said company, paid in, which tax shall be in lieu of all other taxes except for penalties imposed on said company, and shall be estimated upon its last annual report, the statute being a special one, having reference only to the company in question, which formally accepted the taxation provision, and made large expenditures, and completed an unfinished railroad, to induce which was the motive for the enactment. *Decree, Detroit, G. H. & M. Ry. Co. v. Powers (C. C.) 138 F. 264, affirmed.*—*Powers v. Detroit, G. H. & M. Ry. Co.*, 26 S. Ct. 556, 201 U. S. 543, 50 L. Ed. 860.

The enactment of a state statute subjecting an inheritance tax the rights of a sur-

living wife in the community property does not violate the contract clause of the federal Constitution, even if such rights, as they existed when the marriage was celebrated, are contractual, so that they may not be essentially changed or modified by subsequent legislation without impairing contract obligations.—(1910) *Moffitt v. Kelly*, 31 S. Ct. 79, 218 U. S. 400, 54 L. Ed. 1086, 30 L. R. A. (N. S.) 1179, affirming judgments in *re Moffitt's Estate* (1908) 95 P. 653, 1025, 153 Cal. 359, 20 L. R. A. (N. S.) 207.

A fund kept in trust in a foreign state, the creator reserving to himself an absolute control and taking the whole income, may be subjected to an inheritance tax by the domicile state without violating the contract clause of the federal Constitution.—*Bullen v. State of Wisconsin*, 36 S. Ct. 473, 240 U. S. 625, 60 L. Ed. 830, affirming judgment in *re Bullen's Estate*, 128 N. W. 106, 143 Wis. 512, 139 Am. St. Rep. 1114.

138. Exemptions from taxation.

See 10 Cent. Dig. Const. Law, §§ 303, 408.

The grant of a franchise in the charter of a gas company does not imply a contract exempting the company from taxation, and a subsequent statute, imposing a license tax on the privilege so granted, is not invalid, as impairing the obligations of a contract.—*Memphis Gas-light Co. v. Taxing District of Shelby County*, 109 U. S. 398, 3 S. Ct. 205, 27 L. Ed. 976.

Act N. J. Feb. 18, 1862, authorized an old township to convey its poor farm to a new corporation formed from part of the township, and provided that it should still be subject to taxation by the township. The conveyance was made. Act April 11, 1866, exempted from taxation all property used for charitable purposes, thus repealing the act of 1862. *Held*, that the act of 1866 was not unconstitutional, as impairing the obligation of a contract between the township and the corporation.—*Williamson v. New Jersey*, 130 U. S. 189, 9 S. Ct. 453, 32 L. Ed. 915.

Act Ky. Feb. 14, 1856, declaring that all charters and grants to corporations and all other statutes shall be subject to amendment or repeal, unless a contrary intent be therein plainly expressed, is to be read into all charters afterwards granted; and hence the repeal of a subsequent special act, not expressly irrepealable, exempting the property of a water company from taxation, was not a violation of the contract, or of any rights acquired by the company thereunder.—*Louisville Water Co. v. Clark*, 143 U. S. 1, 12 S. Ct. 346, 36 L. Ed. 55, affirming decree *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502.

Act Ky. March 9, 1867, forbidding the city of Louisville to diminish the resources of its sinking fund until all debts were paid, not being expressly irrepealable, was subject to Act Ky. Feb. 14, 1856, declaring that all charters and grants to corporations, and all other statutes, shall be subject to amendment or repeal; and hence, although the sinking fund owned the stock of the Louisville Water Company, the repeal of the act exempting the water company's property from taxation was not in violation of any contract rights of creditors whose debts were chargeable upon the sinking fund.—*Id.*

At the time a corporation organized to maintain a bridge within city limits accepted its charter, there was a general principle, deducible from cases adjudicated by the highest court of the state, to the effect that the taxation, for local purposes, of lands which do not receive any benefit, actual or presumed, from the municipal government imposing the taxation, is a mere taking of private property for public use without compensation, in violation of

a constitutional provision. *Held*, that the acceptance of the charter with reference to that principle created a contract of no greater effect than to prohibit the state, or any municipal corporation acting under it, from subjecting such of the bridge property to local taxation as could not receive any benefit, actual or presumed, from the government of that corporation.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

The exemption from taxation for a term of 20 years, which Act Miss. Feb. 23, 1882, § 18, assumes to give to the railroad company thereby incorporated, must, in the light of the state constitution, providing for the taxation of the property of corporations in proportion to its value, and of the prior decisions of the state courts, be deemed to be subject to the power of the legislature to alter, amend, or repeal it.—*Gulf & S. I. R. Co. v. Hewes*, 22 S. Ct. 26, 183 U. S. 66, 46 L. Ed. 86.

A transfer or succession tax, not being a direct tax upon property, but a charge upon the privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt from taxation by statute, impair the obligation of the contract.—*Orr v. Gilman*, 22 S. Ct. 213, 183 U. S. 278, 46 L. Ed. 196.

No contract exemption from taxation was made by Act Mich. May 27, 1893, p. 217, No. 129, § 3, in favor of a railroad company coming within its provision that the rate of taxation fixed by that act or any other law of the state should not apply to any railway company thereafter building and operating a line of railroad within the state north of the forty-fourth parallel of latitude until the same had been operated for 10 years, unless the gross earnings should equal a specified sum per mile.—*Wisconsin & M. Ry. Co. v. Powers*, 24 S. Ct. 107, 191 U. S. 379, 48 L. Ed. 229.

Contract obligations created by a state statute exempting a bank from any other taxes than those therein prescribed are not impaired by a subsequent statute changing the day when the bank is to report its property for assessment, the effect of which is to impress a lien on its property which continues, notwithstanding the repeal of its charter before liability under the former statute attached, and the transfer of its assets to another bank, organized for the purpose of taking them over. Judgment (1900) 94 S. W. 620, 29 Ky. Law Rep. 643, affirmed.—*Bank of Kentucky v. Commonwealth*, 28 S. Ct. 82, 207 U. S. 258, 52 L. Ed. 187.

The contract exemption from taxation granted to the University of the South by its charter of January 6, 1858, as amended January 19, 1858, to continue as long as the land so exempted belongs to that institution is not impaired by taxing, under the authority of Act Tenn. Jan. 10, 1903, p. 633, c. 258, § 5, the interests of the lessees of such land under leases from the university for a term of years, which, inter alia, require the lessees to pay the rent specified and "all taxes and assessments upon said premises," and reserve the right of reentry for covenant broken, although, when the exemption was granted, the state had not provided for taxation of the interest of a lessee in his own name.—*Jetton v. University of the South*, 28 S. Ct. 375, 208 U. S. 489, 52 L. Ed. 584, reversing decree (C. C. 1907) *University of South v. Jetton*, 155 F. 182.

An inviolable contract between a municipality and street railway companies which will prevent the exaction of a license tax under an acknowledged power of the municipality is not created by ordinances passed in the exercise of authority to grant the use of the streets, under which the companies have agreed to pay certain sums for the use of such streets for a given

period, where such ordinances do not expressly relinquish the right to exact license fees or taxes.—*City of St. Louis v. United Rys. Co.*, 28 S. Ct. 630, 210 U. S. 266, 52 L. Ed. 1054.

A tax upon the franchise of a railway company impairs the obligation of a charter exemption from any property tax other than one based on its net profits. Decree, *Georgia R. & Banking Co. v. Wright* (C. C. 1904) 132 F. 912, affirmed.—*Wright v. Georgia R. & Banking Co.*, 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.

Additional taxation of railway properties and franchises as property of lessee, under leases encouraged by state legislation, held a violation of irrevocable exemptions in contract of lessor railroad company from taxation, notwithstanding distinctions made by Code Ga. 1861, between the usufruct of a tenant and of an estate for years.—*Wright v. Central of Georgia Ry. Co.*, 35 S. Ct. 471, 236 U. S. 674, 59 L. Ed. 781, affirming decree (D. C.) *Central of Georgia R. Co. v. Wright*, 206 F. 107.

140. Public offices.

See 10 Cent. Dig. Const. Law, §§ 336, 356-361.

After services have been rendered by a public officer under a law which fixes the compensation therefor, a contract is implied to pay for them at that rate, the obligation of which is impaired by a provision in the state constitution, restricting the limit of taxation so that such compensation cannot be paid.—*Kisk v. Police Jury of Jefferson*, 116 U. S. 131, 6 S. Ct. 329, 29 L. Ed. 587.

142. Remedies against state.

See 10 Cent. Dig. Const. Law, §§ 317-324.

The state of Virginia issued bonds, with interest coupons attached, which were expressed upon their face to be receivable for taxes and demands due the state. At that time there was a remedy by mandamus to compel the collector to receive the coupons when offered in payment of taxes. Code Va. 1873, c. 151, § 1. Afterwards, by Act Jan. 14, 1882, it was provided that, when coupons are offered in payment of taxes, the collector shall require the taxpayer to pay his taxes in cash, but shall receive the coupons for identification and verification, and deliver them, securely sealed up, to the judge of the county court of the county or hustings court of the city where the taxes are payable; that the taxpayer shall then be at liberty to file his petition against the commonwealth, upon which an issue shall be made up as to whether the coupons are genuine legal coupons, which shall be triable by a jury; that either party shall have a right to exceptions, and to appeal to the circuit court and court of appeals; that, if the issue shall be finally decided in favor of petitioner, the judgment shall be certified to the treasurer, who shall refund the money paid for his taxes out of the first money in the treasury, in preference to all other claims. *Held*, that these provisions furnish an adequate and efficacious remedy to compel the tax collector to receive the coupons; that they are simply changes in the remedy, and do not have the effect to impair the obligation of the contract.—*Antoni v. Greenhow*, 107 U. S. 769, 2 S. Ct. 91, 27 L. Ed. 468.

A law, passed by a state, withdrawing from its officers the power of carrying out the contract embodied in its bonds and coupons or certificates of indebtedness, is unconstitutional, as impairing the obligation thereof.—*State of Louisiana v. Jumel*, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448.

Act Va. March 30, 1871, provided that the coupons for the interest on state bonds issued under the act should be receivable, "at and after maturity, for all taxes" due the state. Act Jan. 26, 1882, provided that only certain things, not including such coupons, should be received for taxes, and further provided that the exclu-

sive remedy of a taxpayer tendering coupons for taxes is to pay in money, under protest, and within 30 days thereafter sue the tax collector for the amount so paid. By an amendment passed March 13, 1884, the coupons tendered are required to be sealed up, and marked for identification, filed with the petition at the commencement of the suit, produced as evidence of the tender, and delivered to be canceled when the auditor issues his warrant for the amount of the judgment. *Held*, in an action of detinue against a tax collector for personalty levied upon by defendant for taxes of plaintiff after the latter had tendered coupons, that the remedy afforded by the act of 1882 did not obviate the objection that the act was unconstitutional, as impairing the obligation of the contract between the state and coupon holder. The action to recover back taxes so paid under protest is no remedy at all for the loss of the specific right to pay taxes with coupons, and the supposed necessity for summary proceedings to collect taxes does not alter the case.—*Poindexter v. Greenhow*, 114 U. S. 270, 5 S. Ct. 908, 962, 29 L. Ed. 185; *White v. Same*, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. Ed. 199; *Chaffin v. Taylor*, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. Ed. 198; *Allen v. Baltimore & O. R. Co.*, 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. Ed. 200; *Chaffin v. Taylor*, 116 U. S. 567, 6 S. Ct. 518, 29 L. Ed. 727.

The revenue license to practice law imposed by Code Va. 1873, tit. 12, c. 34, § 61, is a tax, within Act Va. March 30, 1871, making coupons cut from the bonds of the state receivable for "all taxes, debts, dues, and demands due the state"; and, after a lawful tender and refusal of the proper amount thereof in payment of such license tax, by a person otherwise authorized, he may enter upon the practice at once, and any law imposing penalties therefor is void, as impairing the obligation of a contract.—*Royall v. Virginia*, 116 U. S. 572, 6 S. Ct. 510, 29 L. Ed. 735; *Sands v. Edmunds*, 116 U. S. 585, 6 S. Ct. 516, 29 L. Ed. 739.

Act Va. May 12, 1887, authorizing the institution by the commonwealth of summary proceedings to enforce the payment of taxes due from persons who shall have tendered state coupons in payment thereof, in which proceedings, if defendant relies upon such tender, the burden of proof is placed on him to establish the genuineness of the coupons, is not repugnant to Const. U. S. art. 1, § 10, in that it violates any contract right to have the coupons accepted in payment of taxes.—*Ex parte Ayers*, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216.

Acts Va. March 30, 1871, and March 28, 1879, providing for the funding of the state debt, authorized the issue by the state of bonds with coupons attached, and payable to bearer, and declared that such coupons should be receivable on and after maturity for all taxes, debts, dues, and demands due the state. Act of May 12, 1887, authorized the state to sue for taxes due from taxpayers who had tendered coupons in payment of taxes. *Held*, that the acts of 1871 and 1879 constituted a binding contract between the state and the holders of coupons issued under them that such coupons would be received for taxes and debts due the state, and the subsequent act of January 26, 1886, requiring the holders of such coupons, in a suit involving their genuineness, to produce in court the bonds from which they were cut, and prove that they were actually cut therefrom, impaired the obligation of the contract, in violation of the constitution of the United States.—*McGahey v. Virginia*, 135 U. S. 662, 10 S. Ct. 972, 34 L. Ed. 304.

The obligation of such contract was also impaired by Act, Va. Jan. 21, 1886, in so far

as it provided that expert evidence should not be received as to the genuineness of such coupons.—*Id.*

The obligations of the contract made by the state of Virginia, by the acts of 1871 and 1879, to receive, for taxes, debts, dues, and demands due the state, coupons issued under these acts, are not impaired by Code Va. 1887, §§ 399, 536, 538, requiring license fees to be paid in "lawful money of the United States," in so far as such sections require such payment for licenses to sell intoxicating liquors, since the state has the right, in the case of such licenses, to impose any conditions it may deem most for the public good.—*Id.*

Since the acts of Virginia of 1871 and 1879, under which tax-receivable coupons were issued, provided no limitation of time in which the coupons, after maturity, might be tendered for taxes, etc., and since there is only a certain time in each year during which taxes become due, and the coupons may be tendered therefor, Act Va. Feb. 27, 1886 (Code Va. 1887, § 415), which, in effect, prohibits the tender, for taxes or debts due the state, of coupons which are more than a year past due, is an unreasonable limitation, and is unconstitutional, as impairing the obligation of the contract.—*Id.*

The exercise by a state of the power to repeal a grant of authority to its courts to audit claims against itself does not violate the obligations of contracts entered into by the state at a time when the power existed.—*Baltzer v. State of North Carolina*, 161 U. S. 240, 16 S. Ct. 500, 40 L. Ed. 684.

◀143. Pecuniary obligations of municipality.

See 10 Cent. Dig. Const. Law, §§ 246-248.

If the act of April 13, 1891 (Gen. Laws Tex. 1891, c. 77, p. 95), as to the reincorporation of cities and towns, be construed as requiring a vote of the taxpayers in favor of assuming the debts of the old corporation before the new corporation can be held therefor, it impairs the obligation of contracts then existing whereby debts had been created by cities for which, upon reincorporation, the new corporation would have been liable without any such vote.—*Shapleigh v. City of San Angelo*, 17 S. Ct. 957, 167 U. S. 646, 42 L. Ed. 310.

The sale of city bonds to pay the debts of the New Orleans school board, in obedience to the command of Const. La. 1898, art. 317, does not impair the obligation of prior contracts of the city with the holders of its bonds and other creditors who were entitled to payment out of the proceeds of a 1 per cent. ad valorem tax, from which also the new bonds must be paid, since the rights of the takers of the new bonds will be subject to antecedent contract rights against the proceeds of such tax. Judgment, *State ex rel. Wilder v. Board of Liquidation of City Debt*, 26 So. 679, 51 La. Ann. 1849, affirmed.—*Board of Liquidation of the City Debt v. State of Louisiana*, 21 S. Ct. 263, 179 U. S. 622, 45 L. Ed. 347.

The fact that a comptroller is precluded from auditing the claims of a gas company as a prerequisite to the appropriation of money to pay them, by the passage of an ordinance declaring that no money will be paid on account of them, does not impair the obligation of a contract under which the claims arose, where the auditing by the comptroller would be, at the most, merely advisory, and would not authorize payment without the passage of an appropriation by the city council.—*St. Paul Gaslight Co. v. City of St. Paul*, 21 S. Ct. 575, 181 U. S. 142, 45 L. Ed. 788, dismissing writ of error 80 N. W. 877, 78 Minn. 39.

A purchaser of county bonds issued in aid of a railroad, under the supposed authority of

the act incorporating the road, which is subsequently held unconstitutional by the state courts because the provisions for the transfer to the railroad company of municipal subscriptions in aid of another railroad were not within its title, has no contract rights protected by the federal Constitution against impairment because the purchase was made on the faith of prior decisions that municipal subscriptions to railroad stock were so far germane to railroad incorporation as not to require specific mention in the title of an act providing for the incorporation of a railroad. Judgment, 104 F. 63, 43 C. C. A. 416, affirmed.—*Zane v. Hamilton County, Ill.*, 23 S. Ct. 538, 189 U. S. 370, 47 L. Ed. 858.

The receiver of the metropolitan police board in the state of Louisiana, as representative of the interested creditors, is unconstitutionally deprived of the right of taxation by the city of New Orleans for the payment of their claims, which right existed before the enactment of Acts La. 1870, Ex. Sess. p. 10, No. 5, by the provisions of that act under which the payment of the judgment recovered by such receiver against the city upon outstanding indebtedness of the board, contracted on the faith of the exercise of the city's power to levy taxes for its payment, may be indefinitely postponed until such time as the city is ready and willing to make such payment. Judgment, 44 So. 321, 119 La. 623, reversed.—*State of Louisiana v. City of New Orleans*, 30 S. Ct. 40, 215 U. S. 170, 54 L. Ed. 144.

144. Remedies against municipality.

See 10 Cent. Dig. Const. Law, §§ 349-355.

The limit of a city's power of taxation at the time a judgment for a tort was rendered against it was fixed at a certain rate on the assessed value, which rate was subsequently reduced, making it impossible for plaintiffs to collect their judgment, as the funds receivable thereunder were exhausted by current municipal expenses. Held, that the municipal liability for damages being purely statutory and for a tort, the provision reducing the rate of taxation was not invalid, as impairing the obligation of a contract.—*State of Louisiana ex rel. Hubert v. City of New Orleans*, 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936.

Act La. 1877, repealing Rev. St. La. § 2628, requiring judges, when rendering judgment against a parish of the state for the payment of money, to order the assessors to assess a parish tax at a sufficient rate to pay the judgment, impairs the obligation of contracts made with parishes prior to its enactment.—*State of Louisiana v. Police Jury of the Parish of St. Martin*, 112 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574.

Acts Tenn. March 23, 1883, authorizing municipal corporations to compromise their debts and issue new bonds therefor at the rate of 50 per cent., the acceptance of the compromise to work a transfer of the creditor's debt, with a right to the municipality to enforce it, and that such new bonds and their matured coupons should be received in payment of back taxes at double their face value, although these provisions changed the rate at which outstanding indebtedness had been made receivable for back taxes by Act March 13, 1879, did not, as to holders of debts of such a corporation not secured by any lien or claim on such back taxes, impair the obligation of any contract or do any injustice.—*Amy v. Taxing District of Shelby County*, 114 U. S. 387, 5 S. Ct. 895, 29 L. Ed. 172.

A state law which authorizes a person owing taxes to a municipal corporation to procure obligations of the municipality, and use them as a set-off against his own debt, is not unconstitutional, as impairing the obligation of contracts with creditors of the municipality.—*Id.*

Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing at the time the bonds were issued, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the bonds, impairs the obligation of a contract, and is null and void.—*Port of Mobile v. Watson*, 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620.

Act Mo. March 23, 1868, required the county courts to levy a tax on the real property of a township in order to pay the principal and interest of bonds issued by such township under that act in payment of its subscription to the stock of a railroad company. Act March 10, 1871, authorized the levy of a tax for that purpose on personal property as well. Held that, as to bonds issued before its passage, the latter act was not within the constitutional prohibition of laws impairing the obligation of contracts.—*Cape Girardeau County Court v. United States*, 118 U. S. 68, 6 S. Ct. 951, 30 L. Ed. 73.

Ex. Sess. Acts La. 1877, p. 47, providing that all the revenues of a city of each year "shall" be devoted to the expenditures of that year, provided that any surplus of said revenues "may" be applied to the payment of indebtedness of former years, is merely permissive as to the surplus, and does not contractually dedicate the surplus of any year to payment of claims of years prior to that year, but subsequent to 1877; so that Act 1882, No. 20, §§ 65, 66, and Act 1886, No. 109, authorizing the surplus of any year to be applied to works of public improvement, impair the obligation of no contract right under the act of 1877 in favor of the holders of such claims.—*United States v. Thoman*, 156 U. S. 353, 15 S. Ct. 378, 39 L. Ed. 450, affirming judgment *United States v. City of New Orleans*, 44 F. 590.

(C) CONTRACTS OF INDIVIDUALS AND PRIVATE CORPORATIONS.

145. Nature of contracts protected in general.

See 10 Cent. Dig. Const. Law, §§ 279-281, 285, 414, 417, 421-423.

The issuance of a certificate of stock to a member of a foreign loan association, and his application for a loan, made before the passage of a statute restricting the right of the association to do business in the state, constitute a contract, the obligation of which cannot be impaired by such statute; and therefore a loan made on that application, after the statute was passed, and to which his contract gave him a right, is valid, notwithstanding the statute.—*Bedford v. Eastern Building & Loan Ass'n of Syracuse, N. Y.*, 21 S. Ct. 597, 181 U. S. 227, 45 L. Ed. 834.

The reduction of the estate resulting from the imposition of a transfer tax, under the authority of the amendment of the general transfer tax law by Laws N. Y. 1897, p. 150, c. 284, upon the exercise by will of a power of appointment conferred by a deed executed prior to the passage of the statute, does not render such statute repugnant to Const. U. S. art. 1, § 10, as impairing contract obligations. Order of the surrogate court entered on a remittitur from *In re Delano's Estate* (1903) 68 N. E. 871, 176 N. Y. 486, 64 L. R. A. 279; *State Comptroller v. Carey, Id.*, affirmed.—*Chanler v. Kelsey*, 27 S. Ct. 550, 205 U. S. 460, 51 L. Ed. 882.

Forbidding the enforcement of contracts made in violation of Conn. Pub. Acts 1907, c. 238, prohibiting the exacting of more than 15 per cent. interest on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, is not invalid as the contract clause of the Constitution does not protect contracts which are properly prohibited.—*Griffith v. State of Connecticut*, 31

S. Ct. 132, 218 U. S. 563, 54 L. Ed. 1151; Id., 31 S. Ct. 134, 218 U. S. 572, 54 L. Ed. 1155. Affirming judgment *State v. Griffith*, 74 A. 1068, 83 Conn. 1.

◀146. Contracts for services.

See 10 Cent. Dig. Const. Law, §§ 456, 457, 495.

The obligation of the contract of employment, by a nonresident meat-packing house, of a resident managing agent at a weekly wage, is not unconstitutionally impaired by the imposition upon him, under Act Ga. Dec. 21, 1900, of a license tax of \$200 upon the domestic business carried on by him. Judgment, 44 S. E. 854, 117 Ga. 969, affirmed.—*Kehrer v. Stewart*, 25 S. Ct. 403, 197 U. S. 60, 49 L. Ed. 683.

◀152. Judgments.

See 10 Cent. Dig. Const. Law, §§ 284, 521.

Const. W. Va. 1872, art. 8, § 35, provides that "no citizen of this state who aided or participated in the late war * * * on either side shall be liable in any proceedings, civil or criminal, nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The legislature shall provide by general law for giving full force and effect to this section by due process of law." In 1863 defendant sued plaintiff in a circuit court of West Virginia in trespass *de bonis*, for taking cattle, which action plaintiff defended on the ground that he was a Confederate soldier, and as such took the cattle under military orders, in accordance with the usages of civilized warfare; but judgment was rendered against him, and affirmed by the supreme court of appeals in 1867. *Held*, on bill in chancery to enjoin the execution thereof, that as to such judgment the above constitutional provision is not repugnant to Const. U. S. art. 1, § 10, providing that no state shall pass any law impairing the obligation of contracts. A judgment for a tort is not a contract.—*Freeland v. Williams*, 131 U. S. 405, 9 S. Ct. 763, 33 L. Ed. 193.

Contract rights are not unconstitutionally impaired by a decision of the state court which denies compensation to an abutting owner for the erection, by a municipality, in a city street, of an elevated iron viaduct for general public use, by which travelers are enabled to use such street in connection with other streets from which it had previously been disconnected, where that court, although it had held before such abutting owner acquired his title that the contract of the owner of land abutting on city streets entitled him to the right of unimpaired access and uninterrupted circulation of light and air as against an elevated structure erected for the exclusive use of a private corporation, had carefully refrained from holding that he had the same right as against a similar structure erected for the purpose of public travel, and had pointed out plainly the essential distinction between the two cases. Judgment (1904) 72 N. E. 579, 180 N. Y. 27, 70 L. R. A. 717, affirmed, which affirms 85 N. Y. S. 636, 90 App. Div. 36.—*Sauer v. City of New York*, 27 S. Ct. 686, 206 U. S. 536, 51 L. Ed. 1176.

The refusal of a state court to treat a decree of dismissal in the federal court as conclusive of a point left open did not impair the obligation of that decree as a contract.—*Swift v. McPherson*, 34 S. Ct. 239, 232 U. S. 51, 58 L. Ed. 499, affirming judgment *McPherson v. Swift*, 130 N. W. 768, 27 S. D. 296.

◀153. Marriage and divorce.

See 10 Cent. Dig. Const. Law, § 418.

An act of the legislature decreeing a divorce is not a law "impairing the obligations of

contracts," as the contract of marriage does not come within article 1, § 10, Const. U. S.—*Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

◀154. Impairment of obligation in general.

See 10 Cent. Dig. Const. Law, §§ 426-428, 442-444, 447-455, 458, 459, 461-473.

A mortgage of real estate in Illinois to a New York company was executed at a time when mortgages of realty to foreign corporations were prohibited. A conveyance of the same property was made, subject to the mortgage, a part of the consideration being the assumption of the mortgage debt. Subsequently Act Ill. July 1, 1875, was passed, validating such mortgages theretofore made. *Held*, in a contest between the mortgagee and one claiming under the conveyance, that the validating act is not invalid, as impairing the obligation of contracts.—*Gross v. United States Mortg. Co.*, 108 U. S. 477, 2 S. Ct. 940, 27 L. Ed. 795.

A canal company, which was peculiarly embarrassed, proposed in settlement that its entire liabilities, secured and unsecured, should be converted into a funded debt, secured by mortgage, on which interest was to be paid only out of the net profits of the business, but the right of voting at elections and meetings of the corporation was to be given to bondholders as well as stockholders. Act Pa. April 10, 1862, authorized the agreement, and provided that it should be binding only on such of the bondholders under the original mortgage as should express their assent thereto in writing, and that any bondholder failing to file his refusal in writing to concur in such agreement within three months should be taken to have assented thereto. Plaintiff, a bondholder, did not file his refusal, and many years after brought action on his interest coupons. *Held*, that the statute authorizing the settlement was not invalid, as impairing the obligation of his bonds and the mortgage, and that his action was barred by the agreement.—*Gilfillan v. Union Canal Co.*, 109 U. S. 401, 3 S. Ct. 304, 27 L. Ed. 977.

In Canada, where no constitutional prohibition exists against the passage of laws impairing the obligation of contracts, parliament may by statute compel individual bondholders of a domestic corporation to accept an arrangement or compromise made when the corporation is in financial embarrassment for the benefit of all the bondholders, and accepted by a majority of them.—*Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 3 S. Ct. 363, 27 L. Ed. 1020.

A statute modifying the form of remedy for enforcing the individual liability of stockholders for debts of the corporation, but not annulling their liability, is constitutional, even as applied to debts contracted by the corporation before its enactment.—*Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 S. Ct. 757, 30 L. Ed. 825.

Rev. St. Mo. 1879, § 736, giving judgment creditors of a corporation having no corporate property to be levied on, the right, after notice, to issue execution against a stockholder for the unpaid balance due on his stock, does not impair the obligation of the contract of one who has previously subscribed for stock of a corporation, whose charter makes the amount due on subscriptions to stock subject to the call of the directors, and exempts the stockholders from the levy of an execution on their private property for the debts of the corporation, and provides that such charter shall not be altered by subsequent legislation. It does not increase the stockholder's liability, but merely gives the creditors another way of reaching his unpaid subscription, for which before they had to re-

sort to equity.—*Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 10 S. Ct. 589, 33 L. Ed. 994.

The mere fact that the original promoters of a movement for founding a college, which was to be under the control of the state conference of the Methodist Episcopal Church, South, being mainly resident in the vicinity of a certain town, named such town as the location of the college, and that it was the general belief of those contributing to its foundation that it would remain located at such town, will not, in the absence of an express condition to that effect, warrant the court in implying a contract that it was to remain permanently located there, which contract would be impaired by a subsequent act authorizing its removal to another place.—*Bryan v. Board of Education of Kentucky Annual Conference of Methodist Episcopal Church, South*, 151 U. S. 639, 14 S. Ct. 465, 38 L. Ed. 297, affirming decree 90 Ky. 322, 13 S. W. 276.

There is nothing impairing the obligation of contracts in an act authorizing the original trustees of a college (incorporated by an act reserving the power to alter and repeal) to convey the title of the lands and buildings to the board of education of a certain conference of the Methodist Church, when this merely effectuates the purpose of the founders, which was declared to be that the college, when organized, should be under the control and management of such conference.—*Id.*

The obligation of the contract of the stockholders in a foreign corporation cannot be deemed to be impaired by the provision of Civ. Code Cal. § 322 (which was enacted prior to the incorporation of such corporation), imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations.—*Pinney v. Nelson*, 22 S. Ct. 52, 183 U. S. 144, 46 L. Ed. 125.

The obligation of a contract cannot be said to be impaired by a statute in force when the contract was made.—*Blackstone v. Miller*, 23 S. Ct. 277, 188 U. S. 189, 47 L. Ed. 439, affirming decree in re Blackstone's 64 N. E. 1118, 171 N. Y. 682.

The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. Judgment, *City of Knoxville v. Knoxville Water Co.*, 64 S. W. 1075, 107 Tenn. 647, 61 L. R. A. 888, affirmed.—*Knoxville Water Co. v. City of Knoxville*, 23 S. Ct. 531, 189 U. S. 434, 47 L. Ed. 887.

Legislative authority to change the plan of the business done by a life insurance company from the assessment plan to the legal reserve, flat premium plan of "old line" insurance does not work a violation of the contract with those certificate holders who failed to change to the new plan, although their assessments may have increased because of the lesser number subject to the assessment, and the death of members, where the right of amendment was expressly reserved in the articles of association.—*Wright v. Minnesota Mut. Life Ins. Co.*, 24 S. Ct. 549, 193 U. S. 657, 48 L. Ed. 832.

The obligations of an agreement to remove an existing dam from a navigable stream, and to allow the stream to remain open and unobstructed, are not unconstitutionally impaired by a state statute subsequently enacted in the exercise of the police power to subserve the drainage of lowlands, authorizing the construction of a dam across the stream by the very persons making such agreement. Judgment (C. C.) *Manigault v. S. M. Ward & Co.*, 123 F.

707, affirmed.—*Manigault v. Springs*, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

Contract obligations are not impaired by so much of Act Cong. April 12, 1900, c. 191, § 11, 31 Stat. 77, 80, as requires United States currency at the rate of exchange prescribed by that act, and not at the rate of \$1 for each peso of indebtedness, to be accepted in discharge of an obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso of indebtedness.—*Serralles' Succession v. Esbri*, 26 S. Ct. 176, 200 U. S. 103, 50 L. Ed. 391.

No contract obligations of a foreign benevolent society are impaired by a state statute incorporating a local society with the same name as that of a previously existing voluntary state association whose charter from the foreign corporation had been withdrawn, and conferring upon it the exclusive right of granting subcharters in the state. Decree (1905) 51 S. E. 166, 104 Va. 197, affirmed.—*National Council, Junior Order United American Mechanics of United States v. State Council of Virginia, Junior Order of United American Mechanics of Virginia*, 27 S. Ct. 46, 203 U. S. 151, 51 L. Ed. 132.

Contract obligations between an association insuring lives upon the co-operative plan and its members are not unconstitutionally impaired by the reorganization of such association as a mutual level premium company, pursuant to Laws N. Y. 1901, p. 1779, c. 722, under a new name and without the consent of the members, because such statute provides that outstanding assessment contracts shall be appraised as liabilities as if they were one-year term insurance at the ages attained.—*Folk v. Mutual Reserve Fund Life Ass'n of New York*, 28 S. Ct. 65, 207 U. S. 310, 52 L. Ed. 222.

The obligations of a contract to divert the waters of the Passaic river into another state, for use therein, are not unconstitutionally impaired by the enactment, in the exercise of the police power, of Laws N. J. 1905, p. 461, c. 238, under which such a diversion of water beyond the state is forbidden. Decree, *McCarter v. Hudson County Water Co.* (1906) 65 A. 489, 70 N. J. Eq. 695, affirmed.—*Hudson County Water Co. v. McCarter*, 28 S. Ct. 529, 209 U. S. 349, 52 L. Ed. 828, 14 Ann. Cas. 560.

A contract between two intersecting railway companies, imposing upon the junior road the duty of constructing and properly maintaining the physical crossing of the two roads, and providing and maintaining semaphores or other signals, and the requisite watchman to take charge of and operate the same, is not unconstitutionally impaired by a subsequent order of the state railroad commission, directing the installation and use of an interlocking plant at such crossing, and apportioning between the two companies the expense of executing the order.—(1911) *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 31 S. Ct. 537, 221 U. S. 400, 55 L. Ed. 786, affirming judgment (1907) *Same v. Hunt*, 81 N. E. 524, 40 Ind. App. 168.

The obligation of the contract between a savings bank and its depositor is not unconstitutionally impaired by Laws Mass. 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.—(1911) *Provident Institution for Savings in Town of Boston v. Malone*, 31 S. Ct. 661, 221 U. S. 660, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129, affirming judgment (1909) *Malone v. Provident Institution for Savings in Boston*, 86 N. E. 912, 201 Mass. 23.

Contract obligations are not unconstitutionally impaired by a municipal ordinance under which a domestic corporation operating stage routes in the city streets is forbidden to display exterior advertisements on its stages, where, at the time the advertising contracts were entered into there existed an ordinance almost identical in terms, and the company's charter does not confer any right to use its stages for advertising purposes.—(1911) Fifth Ave. Coach Co. v. City of New York, 31 S. Ct. 709, 221 U. S. 467, 55 L. Ed. 815, affirming decree (1909) 88 N. E. 824, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 16 A. & E. Ann. Cas. 695, which affirms (1908) 110 N. Y. S. 1037, which affirms (1906) 111 N. Y. S. 759.

The obligation of existing contracts between a national bank and its depositors was not unconstitutionally impaired by the tax imposed under P. S. Vt. §§ 804-820, on interest-bearing deposits which the bank may pay, and charge to the depositors.—Clement Nat. Bank v. State of Vermont, 34 S. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment State v. Clement Nat. Bank, 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

The obligations of the contract between a safe deposit company and its box renters are not impaired by Inheritance Tax Law Ill. July 1, 1909 (Laws 1909, p. 316) § 9, prohibiting the removal of the contents of safe deposit boxes after the death of the renter except on notice to the Attorney General and State Treasurer and the retention of sufficient assets to pay the tax.—National Safe Deposit Co. v. Stead, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

All renewals of contract for the rental of safe deposit boxes made after the enactment of Inheritance Tax Law Ill. July 1, 1909 (Laws 1909, p. 316) § 9, prohibiting the removal of the contents of such boxes after the death of the renter except on specified conditions, are to be considered as made in the light of the provisions of such statute, as affecting the question of impairment of the rental contract.—Id.

Laws Fla. 1913, c. 6421, § 35, imposing additional license fee upon merchants offering coupons, etc., redeemable in premiums, does not unconstitutionally impair contract obligations; it not affecting sales completed before its enactment.—Rast v. Ven Deman & Lewis Co., 36 S. Ct. 370, 240 U. S. 342, 60 L. Ed. 679, reversing order Van Deman & Lewis Co. v. Rast, 214 F. 827; Pitney v. State of Washington, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment State v. Pitney, 141 P. 883, 80 Wash. 699.

Laws Wash. 1913, c. 134, imposing prohibitive license tax on use of stamps, etc., redeemable in cash or merchandise, does not unconstitutionally impair contract obligations of merchants with their customers or parties with whom they have contracted for the use of stamps.—Tanner v. Little, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree Little v. Tanner, 208 F. 605; Pitney v. State of Washington, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment State v. Pitney, 141 P. 883, 80 Wash. 699.

155. Making contract invalid.

See 10 Cent. Dig. Const. Law, §§ 291, 431.

Congress, in the exercise of its power over commerce, could enact the provisions of Act June 26, 1906, c. 3591, § 6, 34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1163), which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.—(1911) Louisville & N. R. Co. v. Mottley, 31 S. Ct. 265, 219 U. S. 467, 55 L. Ed. 297, 34

L. R. A. (N. S.) 671, reversing decree (1909) 118 S. W. 982, 133 Ky. 652.

156. Alteration of extent of liability.

See 10 Cent. Dig. Const. Law, §§ 429-436.

The repeal of the usury law without a saving clause, thus operating retrospectively so as to cut off the defense, for the future, in actions on contracts previously made, does not impair the obligation of contracts.—Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682.

The right of a judgment creditor in Tennessee, prior to 1879, to seize the rents and profits of property belonging to his debtor's wife, was not, as to future profits, a contract right, and Act March 26, 1879, taking away such right, was not in contravention of any provisions of the federal constitution.—Neilson v. Kilgore, 145 U. S. 487, 12 S. Ct. 943, 36 L. Ed. 786.

157. Imposition of condition on performance.

See 10 Cent. Dig. Const. Law, §§ 437-441.

Const. La. 1868, art. 123, providing that "tacit mortgages and privileges now existing in this state shall cease to have effect against third persons after January 1, 1870, unless duly recorded," is not invalid, as impairing the obligation of contracts.—Vance v. Vance, 108 U. S. 514, 2 S. Ct. 854, 27 L. Ed. 808.

158. Change in rate of interest.

See 10 Cent. Dig. Const. Law, § 445.

A statute in force at the time the mortgage was executed provided for redemption from foreclosure sale by a judgment creditor of the mortgagor, upon payment of the amount bid, and 10 per cent. interest from the date of sale. A subsequent statute (Act Ill. 1879) reduced the rate of interest to 8 per cent. Held not invalid, as impairing the obligation of the mortgage contract.—Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 S. Ct. 236, 27 L. Ed. 648.

Where a judgment is obtained on a contract which contains no provision for interest, the allowance of interest on the judgment is a matter within the legislative discretion of a state. The judgment is not a contract, and a law reducing the rate of interest thereon does not impair the obligation of contracts, within the meaning of the federal constitution.—Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. Ed. 925.

162. Preference of creditors.

See 10 Cent. Dig. Const. Law, §§ 471, 493.

National banks cannot claim that, as to dealings after the Kansas bank depositors' guaranty law of March 6, 1909 (Laws 1909, c. 61), went into effect, the obligation of their contracts was impaired in that, as creditors, they do not share equally with depositors under that statute in the assets of an insolvent state bank.—Abilene Nat. Bank v. Dolley, 33 S. Ct. 409, 228 U. S. 1, 57 L. Ed. 707.

163. Insolvency laws.

See 10 Cent. Dig. Const. Law, §§ 471, 494-493.

Act Minn. March 7, 1881, providing that when the property of a debtor is seized by attachment or execution he may assign all his property for the equal benefit of all his creditors who shall file releases of their claims, and that thereupon his property shall be equitably distributed, does not violate the constitution of the United States by impairing the obligation of contracts, when applied to debts incurred after its passage.—Denny v. Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. Ed. 491, affirming Bennett v. Denny, 33 Minn. 530, 24 N. W. 193.

Code Md. 1888, art. 47, §§ 14, 22, providing that all conveyances preferring creditors made

by an insolvent within four months before the commencement of proceedings in insolvency shall be void, having been in existence at the time of the execution of a conveyance sought to be set aside, did not impair the obligation of any contract of the insolvent with his nonresident creditors.—*Brown v. Smart*, 145 U. S. 454, 12 S. Ct. 958, 36 L. Ed. 773, affirming judgment 69 Md. 320, 14 A. 468.

164. Sealing laws.

See 10 Cent. Dig. Const. Law, § 497.

Act Va. Feb. 28, 1867 (Sess. Laws 1866-67, p. 694; Code 1873, c. 138, §§ 1, 2), providing that contracts made between January 1, 1862, and April 10, 1865, payable in Confederate money, shall be liquidated and settled by reducing the nominal amount due to its true value at the time the contract was entered into, or at such other time as to the court or jury may seem right, substitutes the judgment of the court for the will of the parties, and is therefore unconstitutional, as impairing the obligation of a contract.—*Effinger v. Kenney*, 115 U. S. 566, 6 S. Ct. 179, 29 L. Ed. 495.

165. Imposition of penalty or forfeiture.

See 10 Cent. Dig. Const. Law, § 460.

A provision in a state statute giving to the person to whom a telegraphic message is addressed a right to recover a penalty for nondelivery does not affect or impair a contract of the company with the sender, which provides against liability for mistakes in transmission, unless the sender orders the message repeated.—*Western Union Tel. Co. v. James*, 162 U. S. 650, 16 S. Ct. 934, 40 L. Ed. 1105.

The obligation of an existing life insurance contract was not unconstitutionally impaired by applying to its provisions of Laws Tenn. 1901, c. 141, subsequently enacted, authorizing additional recovery if refusal to pay loss is found not to have been in good faith.—*Supreme Ruling of the Fraternal Mystic Circle v. Snyder*, 33 S. Ct. 292, 227 U. S. 497, 57 L. Ed. 611, affirming judgment *Snyder v. Supreme Ruler of Fraternal Mystic Circle*, 122 S. W. 981, 122 Tenn. 248.

166. Defenses in general.

See 10 Cent. Dig. Const. Law, §§ 482, 483.

Conceding that by the repeal, as to insurance companies doing business on the assessment plan, of the provisions of Rev. St. Mo. 1879, § 5982, that suicide shall be no defense to a suit on a policy of insurance, a provision in a policy issued prior to such repeal, relieving the company from liability in case of suicide, became effective, no impairment of the obligation of such contract was made by a subsequent enactment specially applying the provisions of the former statute to such companies, since all that the later act purported to do was to reinstate the parties in their original rights prior to the repealing act, which rights had not been affected by anything done during the period which had elapsed between the two statutes. Judgment 104 F. 638, 44 C. C. A. 93, affirmed.—*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 S. Ct. 108, 187 U. S. 197, 47 L. Ed. 139.

169. Change of remedies.

See 10 Cent. Dig. Const. Law, §§ 474, 476, 478-481, 502, 511-514, 522.

A state statute giving to parishes and municipal corporations an additional and more summary remedy for enforcing against private corporations contract obligations in relation to the paving, repairing, reconstructing, or care of any street, highway, bridge, culvert, etc. (Act. La. July 12, 1888), does not affect any substantial right of the other party, and is not

unconstitutional, as impairing the obligation of contracts.—*New Orleans C. & L. R. Co. v. State of Louisiana*, 157 U. S. 219, 15 S. Ct. 581, 39 L. Ed. 679.

An alteration and enlargement of the remedy for enforcing a mechanic's lien after a sale under foreclosure of a mortgage on the premises subject to the lien, by providing, in addition to the right under the former statute to sell the building on the lien claim and remove it from the land, that the court, for the best interests of all the parties, might require the land and improvements to be sold together, and the proceeds distributed so as to secure the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building, does not impair the obligation of the contract with the mortgagee or the purchaser on foreclosure.—*Red River Val. Nat. Bank v. Craig*, 21 S. Ct. 703, 181 U. S. 548, 45 L. Ed. 994.

The obligation of the contract of a mortgagee in possession after condition broken, who afterwards bid in the property for less than the mortgage debt on the sale in foreclosure proceedings initiated by her before Act Ill. March 22, 1872, § 30, went into effect, is impaired by the change in the law made by the requirement of that section that the master's deed be taken out within a specified time after the expiration of the time for redemption, where failure to comply with this requirement is held by the highest state court to destroy the right of possession taken under the mortgage, to avoid the certificate of sale, and to entitle the mortgagor, without payment of the mortgage debt, to recover possession in ejectment, on the strength of a perfect title.—*Bradley v. Lightcap*, 24 S. Ct. 748, 195 U. S. 1, 49 L. Ed. 65, reversing judgment 66 N. E. 546, 201 Ill. 511; *Id.*, 24 S. Ct. 753, 195 U. S. 24, 25, 49 L. Ed. 75, 76, reversing decree (Ill.) 67 N. E. 45, 202 Ill. 154.

The contractual obligations arising out of Gen. St. Minn. 1894, c. 76, adopted to enforce the liability of stockholders prescribed by Const. Minn. art. 10, § 3, are not impaired by Gen. Laws Minn. 1899, p. 315, c. 272, enacted to make the remedy more effectual, because, while under the old law stockholders who could not be reached by personal service were immune from liability, under the new law they need not necessarily be served with process in the action in which the assessment is made, or because the expenses incident to the enforcement of the liability in other states and against other parties are taken into consideration in estimating the amount of the assessment.—*Bernheimer v. Converse*, 27 S. Ct. 755, 206 U. S. 516, 51 L. Ed. 1163.

Existing remedy for breach of contract may be changed without violating the contract clause of Const. U. S. art. 1, § 10, so long as a substantial remedy remains.—*National Surety Co. v. Architectural Decorating Co.*, 33 S. Ct. 17, 226 U. S. 276, 57 L. Ed. 221, affirming judgment *Architectural Decorating Co. v. National Surety Co.*, 132 N. W. 289, 115 Minn. 382.

A change in the remedy is effected by applying to an action on the bond of a public contractor the provision of Gen. Laws Minn. 1909, c. 413 (Rev. Laws Supp. 1909, § 4539), changing the requirements of Rev. Laws 1905, § 4539, in force when the bond was executed, and does not impair contract obligation.—*Id.*

Change in remedy afforded to creditor of corporation, where stockholders have not fully paid their subscription to stock, under Act Md. 1908, c. 305, which abates pending actions, saving to the creditor the right to become a party to a bill in equity in behalf of all the creditors, does not impair the obligation of contract.—*Pittsburg Steel Co. v. Baltimore Equitable Soc.*, 33 S. Ct. 167, 226 U. S. 455, 57 L. Ed. 297, affirming judgment 77 A. 255, 113 Md. 77.

§171. Limitation of actions.

See 10 Cent. Dig. Const. Law, § 503.

In 1854, the charter of the city of Brooklyn (Laws N. Y. 1854, pp. 871, 878-881, c. 384, §§ 24, 26, 29, 30, 33, tit. 5, "of the collection of taxes and assessments") provided that the collector should sell property for unpaid taxes and assessments for the lowest term of years for which any person would purchase it, and that the purchaser should receive a certificate of sale, which, when recorded in the collector's office, should constitute a lien on the premises sold. The owner might redeem within two years by paying the purchase money, any other tax paid by the purchaser, and 15 per cent. in addition. In case the land was not redeemed within the specified time the collector should execute to the purchaser a proper conveyance of the lands sold, and thereupon the purchaser might obtain possession by summary proceedings. In 1885, an act (Laws N. Y. 1885, p. 702, c. 405, § 15) was passed providing that no special proceeding should be maintained to compel the execution of any lease upon any sale for taxes made more than eight years prior to its passage unless brought within six months thereafter, and that after the lapse of the six months all sales made more than eight years prior to the passage of the act should be canceled, and that the liens of the certificates of sale should cease. Prior to the enactment of this statute, there was a longer limitation for suits to enforce the execution of conveyances from the collector. *Held*, that this act was not unconstitutional, as impairing the obligation of contracts, because it prescribed a shorter period within which actions might be brought, it being competent for the legislature to impose such shorter limitation provided it be reasonable.—*Wheeler v. Jackson*, 137 U. S. 245, 11 S. Ct. 76, 34 L. Ed. 659; *MacFarland v. Same*, 137 U. S. 258, 11 S. Ct. 79, 34 L. Ed. 664, affirming judgment 105 N. Y. 681, 13 N. E. 931.

Nor is it unconstitutional because it provides for the cancellation of the sales, and the determination of the lien of the certificates of sale, in case proceedings to compel the execution of leases are not commenced within six months after its passage, since the substantial acquisition of the purchaser is a right to a conveyance, or lease, after the expiration of the period of redemption, and not a right to a permanent lien, irrespective of reasonable limitations prescribed by the legislature.—*Id.*

§175. Rules of evidence.

See 10 Cent. Dig. Const. Law, §§ 519, 520.

No unconstitutional impairment of the obligation of a contract is made by the provision of Act April 27, 1855, § 7, conclusively presuming a release and extinguishment of any irredeemable ground rent on which no payment or demand for payment has been made for 21 years, and of whose existence no acknowledgment has been made during that period, even though such provision is applicable to a ground rent reserved before the passage of the act, as the further provision that "this section shall not go into effect until three years from the passage of this act" gave a reasonable time to the owners of such ground rents for preserving their rights. Judgment, *Clay v. Iseminger*, 41 A. 38, 187 Pa. 108, affirmed.—*Wilson v. Iseminger*, 22 S. Ct. 573, 185 U. S. 55, 46 L. Ed. 804.

Making the entry on the official record of forfeiture of school land for default in payment prima facie evidence that preliminary steps to a forfeiture were properly taken under Laws Kan. 1907, c. 373, does not offend against the contract clause of the federal Constitution.—(1912) *Reitler v. Harris*, 32 S. Ct. 248, 223 U. S. 437, 56 L. Ed. 497, affirming judgment (1909) 102 P. 249, 80 Kan. 148.

§183. Redemption laws.

See 10 Cent. Dig. Const. Law, § 501.

A statute extending the time for redemption of premises sold under mortgage, as applied to mortgages executed before its passage, impairs the obligation of the contract, and is unconstitutional.—*Barnitz v. Beverly*, 163 U. S. 118, 16 S. Ct. 1042, 41 L. Ed. 93, reversing judgment 42 P. 725, 55 Kan. 466.

Laws Kan. 1893, c. 109, providing, in place of the previous mortgage foreclosure law, under which the purchaser took an absolute title and possession upon the confirmation of the sheriff's sale and issue of the sheriff's deed, that the mortgagor shall have 18 months for redemption, with full right of possession during that time, and forbidding another sale of the same land for any deficiency on the first sale, is unconstitutional as applied to a mortgage executed before its passage.—*Id.*

No contract right of an independent purchaser at a foreclosure sale, who has no other connection with the mortgage contract than that arising from his purchase for a sum sufficient to pay the mortgage debt, is impaired by changes in the law subsequent to the execution of the mortgage, but prior to the sale, with reference to the time of redemption and the rate of interest payable in order to redeem. Judgment 70 P. 778, 137 Cal. 663, 99 Am. St. Rep. 17, affirmed.—*Hooker v. Burr*, 24 S. Ct. 706, 194 U. S. 415, 48 L. Ed. 1046.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

Retroactive operation of laws, see Statutes, § 261-278.

§190. Retroactive operation as to rights and obligations.

See 10 Cent. Dig. Const. Law, § 531-533.

A state may provide that taxes which have already become delinquent shall bear interest from the time the delinquency commenced, without conflicting with any provisions of the federal constitution. Judgment 57 S. W. 34, 93 Tex. 553, affirmed.—*League v. State of Texas*, 22 S. Ct. 475, 184 U. S. 156, 46 L. Ed. 478.

The retroactive effect given to Tariff Act, § 37, levying an annual excise tax on the use of every foreign-built pleasure yacht owned by any citizen of the United States by construing it as causing the tax for the first annual period to become due September 1, 1909, does not cause the act to be one beyond the power of Congress to enact.—*Billings v. United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, affirming judgment (C. C.) *United States v. Billings*, 190 F. 359; *United States v. Billings*, 34 S. Ct. 428, 232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *Same v. Blair*, 190 F. 372.

§191. Laws relating to remedies.

See 10 Cent. Dig. Const. Law, § 534.

An invalid retrospective effect is not given to the provision of Act Aug. 15, 1894, c. 290 (28 Stat. 286, 305), authorizing Indians claiming to be entitled to an allotment of land to prosecute, in the proper federal Circuit Court, any action in relation to their right thereto, by construing such act to include a suit by an Indian to obtain an allotment to which she claims she was, at the time of the passage of such act, entitled, under Allotment Act March 3, 1885, c. 319 (23 Stat. 340), and to have canceled the alleged improper allotment of such land to another. Judgment 119 F. 114, 55 C. C. A. 216, affirmed.—*Hy-yu-tse-mil-kin v. Smith*, 24 S. Ct. 676, 194 U. S. 401, 48 L. Ed. 1039.

The retrospective feature of Act June 29, 1906, § 15, for the impeachment of certificates

of citizenship illegally procured, which makes applicable to certificates issued under prior laws the declaration that permanent residence in a foreign country within five years after the issuance of the certificate shall be prima facie evidence of a lack of intent to become a permanent citizen, warranting cancellation of the certificate, does not render such legislation invalid.—*Luria v. United States*, 34 S. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming decree (D. C.) *United States v. Luria*, 184 F. 643.

192. Curative acts.

See 10 Cent. Dig. Const. Law, §§ 536-549.

193. — In general.

See 10 Cent. Dig. Const. Law, §§ 536-541.

If a legislature has power to authorize a subscription to stock of a railroad by a township, and to provide, as a condition precedent to such subscription, that a majority of the legal voters of such township signify their assent thereto, it has the power to legalize an election held for that purpose before the passage of the act of authorization, and to validate a subscription so made.—*Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 S. Ct. 413, 29 L. Ed. 633; *Confarr v. Same*, 116 U. S. 366, 6 S. Ct. 418, 29 L. Ed. 636.

196. — Administrative action.

See 10 Cent. Dig. Const. Law, §§ 542, 544.

Any lack of power in the Governor General of the Philippines, to authorize deportation of an alien, was cured by subsequent enactment of Philippine Act April 19, 1910, ratifying his action, though suits were pending to make the Governor General personally answerable for such action.—*Chuoco Tiaco v. Forbes*, 33 S. Ct. 585, 228 U. S. 549, 57 L. Ed. 960.

197. Nature of ex post facto laws.

See 10 Cent. Dig. Const. Law, § 550.

An ex post facto law is one which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict.—*Kring v. Missouri*, 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506.

The provision against the practice of medicine by unregistered persons, which is made by Pub. Acts Mich. 1899, No. 237, creating a board of registration in medicine, does not render such act ex post facto as to one licensed under a prior act, where provision is made for registration of persons presenting sufficient proof of legal registration under such prior act. Judgment, *People v. Reetz*, 86 N. W. 396, 127 Mich. 87, affirmed.—*Reetz v. People of State of Michigan*, 23 S. Ct. 890, 188 U. S. 505, 47 L. Ed. 563.

Laws 1901, p. 445, c. 254, regulating the practice of medicine, and providing for the revoking of certificates of persons guilty of gross immorality, is not ex post facto, when applied to one whose habits were grossly immoral before the passage of the act. Judgment, *Meffert v. State Board of Medical Registration and Examination*, 72 P. 247, 66 Kan. 710, 1 L. R. A. (N. S.) 811, affirmed.—*Meffert v. Packer*, 25 S. Ct. 790, 195 U. S. 625, 49 L. Ed. 350.

Prohibition of Const. U. S. art. 1, § 9, against ex post facto laws, does not apply to provisions like those of Act Feb. 20, 1907, § 3, and Amendatory Act March 26, 1910, § 2, for deportation of alien woman practicing prostitution after entry into the United States.—*Bugajewitz v. Adams*, 33 S. Ct. 607, 228 U. S. 556, 57 L. Ed. 978; *Schwartz v. Same*, 33 S. Ct. 609, 228 U. S. 592, 57 L. Ed. 980; *Weiner v. Same*, Id.

Erroneous decisions are not reached by the prohibition of Const. U. S. art. 1, § 10, against

ex post facto laws.—*Frank v. Mangum*, 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

Penalty feature of Laws Mo. 1907, p. 169, amending Rev. St. 1899, § 1110, to compel railroads to construct openings in roadbeds for surface water, held not ex post facto as to a railroad already in existence.—*Chicago & A. R. Co. v. Tranbarger*, 35 S. Ct. 678, 238 U. S. 67, 59 L. Ed. 1204, affirming judgment *Tranbarger v. Chicago & A. R. Co.*, 156 S. W. 694, 250 Mo. 46.

198. Retroactive operation of ex post facto laws.

See 10 Cent. Dig. Const. Law, §§ 551-590.

199. — In general.

See 10 Cent. Dig. Const. Law, §§ 551-593, 576-599, 582, 583.

That a law changes the place of trial does not render it ex post facto.—*Cook v. United States*, 138 U. S. 157, 11 S. Ct. 268, 34 L. Ed. 906.

A constitutional amendment is not within the inhibition against ex post facto laws because it confers jurisdiction of a criminal cause upon a division of the supreme court less in numbers and different in personnel from the court as organized when the crime was committed.—*Duncan v. State*, 152 U. S. 377, 14 S. Ct. 570, 38 L. Ed. 455.

The constitution of Mississippi of 1890 requires all grand and petit jurors to be qualified electors, able to read and write, and enjoins the legislature to provide by law for listing and drawing persons so qualified (section 264), but declares that, until otherwise provided by law, all crimes shall be tried as though no change had taken place (section 283). Held, that the provision as to qualifications went into immediate effect; that one who committed a crime thereafter, but before the legislature passed a new jury law, could be tried, after the passage of such a law, by a jury selected under the provisions of the new law; and that, where the new law did not aggravate the crime previously committed, or inflict a greater punishment or alter the rules of evidence, the application thereof to the trial of the accused was not in the nature of ex post facto legislation.—*Gibson v. State of Mississippi*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

It was not competent for the state of Utah, on its admission into the Union, to provide that persons charged with the commission of felony within its limits while a territory should be tried otherwise than by a jury such as is provided for by the constitution of the United States, and provisions of the state constitution for the trial, in courts of general jurisdiction, of criminal cases not capital, by a jury composed of 8 persons, is, in its application to such cases, ex post facto legislation, and void.—*Thompson v. State of Utah*, 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061, reversing judgment *State v. Thompson*, 50 P. 409, 15 Utah, 488.

The provision for an appeal by the state in a criminal case from the grant of a new trial, which was enacted by the North Carolina act of March 6, 1899, is not ex post facto in violation of Const. U. S. art. 1, § 10, as applied to cases in which the trial had been had, though the new trial had not been granted, before the statute was passed. Judgment, *State v. Mallett*, 34 S. E. 651, 125 N. C. 718, affirmed.—*Mallett v. State of North Carolina*, 21 S. Ct. 730, 181 U. S. 589, 45 L. Ed. 1015.

The objection that the retrospective features of Act Ky. March 15, 1906, c. 22, art. 3, forfeiting land titles for failure to list and pay taxes, make the law an ex post facto one, is not valid, where such legislation, as con-

strued by the highest court of the state, imposes no retrospective penalties or punishment of a criminal nature.—(1911) *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 106 S. W. 260, 127 Ky. 667, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law Rep. 857.

Retrospective features of Act June 29, 1906, § 15, authorizing impeachment of naturalization certificates fraudulently procured, do not invalidate that section under Const. U. S. art. 1, § 9, prohibiting ex post facto laws.—*Johannessen v. United States*, 32 S. Ct. 613, 225 U. S. 227, 56 L. Ed. 1066.

—200. — Criminal nature of act.

See 10 Cent. Dig. Const. Law, §§ 570-575.

A state has the right, in guarding the public health, to prescribe good character as one of the necessary qualifications for a practitioner of medicine, and to make a conviction of crime conclusive evidence of lack of the same, irrespective of when the crime may have been committed; hence section 153 of the New York public health law, which provides that any person practicing medicine after conviction of felony shall be guilty of a misdemeanor, is not in conflict with article 1, § 10, of the constitution of the United States, forbidding a state to pass any ex post facto law, when applied to one who had been convicted of a felony prior to its enactment.—*Hawker v. People of New York*, 18 S. Ct. 573, 170 U. S. 189, 42 L. Ed. 1002.

A retroactive effect, in violation of Const. U. S. art. 1, § 10, is not given to the Texas anti-trust laws of May 25, 1899 (Laws 1899, p. 246, c. 146) and of March 31, 1903 (Laws 1903, p. 119, c. 94), by construing them to authorize a conviction of a foreign corporation for carrying out, after the passage of those laws, an agreement for division of territory in suppression of competition, entered into before the enactment of those laws and before the creation of the defendant corporation, and at a time when such agreement was legal. Judgment (Tex. Civ. App.) 106 S. W. 918, affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

—201. — Grade or degree of offense.

See 10 Cent. Dig. Const. Law, § 573.

The plaintiff in error was convicted of murder in the first degree by the judgment of the supreme court of Missouri. He had been previously sentenced to 25 years' imprisonment on his plea of guilty of murder in the second degree, which sentence was, on his appeal, reversed and set aside. By the law of Missouri in force when the homicide was committed, this conviction was an acquittal of the higher crime of murder in the first degree, but that law was changed (Const. Mo. 1875, art. 2, § 23) before the plea of guilty, so that a judgment on that plea, set aside lawfully, should not be held to be an acquittal of the higher crime. Held an ex post facto law, within Const. art. 1, § 10, in that it materially altered the situation of the defendant to his disadvantage after the commission of the crime charged, and that he could not be again tried for murder in the first degree.—*Kring v. Missouri*, 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506.

Though Consolidation Act N. Y. § 2143, adopting Pen. Code N. Y. § 75, increasing the crime of bribery, and making it applicable to bribery committed in New York City before said section 72 took effect, is void, as being an ex post facto law, as to offenses committed before the section went into effect, it is not void as to offenses committed after the Penal Code and the consolidation act both went into effect.

—*Jaehne v. People of New York*, 128 U. S. 189, 9 S. Ct. 70, 32 L. Ed. 398, affirming (C. C.) *In re Jaehne*, 35 F. 357.

—202. — Rules of evidence.

See 10 Cent. Dig. Const. Law, § 581.

A statute which makes competent to testify, at the time of the trial of a criminal case, a person who was incompetent when the crime was committed, is not ex post facto, since it does not make criminal any act previously done which was innocent when done, or aggravate, past crimes or increase the punishment therefor, nor does it alter the degree, or lessen the amount or measure, of the proof made necessary to conviction for past offenses, but it relates to the mode of procedure only, which the state may regulate at pleasure.—*Hopt v. People of Territory of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262.

A state statute authorizing the comparison of disputed handwriting with any writing proved to be genuine is not an ex post facto law in its application to crimes previously committed, as "altering the legal rules of evidence" in existence at the time of the commission of the offense. Judgment *State v. Thompson* (Mo.) 42 S. W. 949, 141 Mo. 408, affirmed.—*Thompson v. State of Missouri*, 18 S. Ct. 922, 171 U. S. 380, 43 L. Ed. 204.

—203. — Nature or extent of punishment.

See 10 Cent. Dig. Const. Law, §§ 584-590.

Act Colo. approved April 19, 1889, repeals all former acts in conflict with it, and provides that a person convicted of a capital crime and under sentence of death, shall be placed in the penitentiary, and their kept in solitary confinement until he is hung, and that only certain persons shall be permitted to see him, and these only in accordance with the prison regulations; whereas, the acts repealed permitted such convict to be kept in the prison of the county where his friends resided, and where the sheriff and his attendants, and his religious adviser and legal counsel, might visit him without hindrance of law. The act further provides that the warden of the penitentiary shall fix the particular day and hour for execution of the sentence, and the prisoner be kept in ignorance of it; whereas, before the passage of the act, the court fixed the day of execution, and it was made known to the prisoner. Held, that the act imposes greater punishment than the acts repealed, and is ex post facto as to crimes committed before it went into effect.—*In re Medley*, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835; *In re Savage*, 134 U. S. 176, 10 S. Ct. 389, 33 L. Ed. 842.

Gen. Laws 1889, c. 20, §§ 3, 5, which require a sentence of death to be executed before sunrise within the walls of a jail or other high inclosure, and which restrict the number of persons who may witness the execution, are regulations which do not affect the substantial rights of the convict, and cannot be regarded as ex post facto legislation, even when applied to offenses committed before the passage of the act.—*Holden v. State of Minnesota*, 137 U. S. 483, 11 S. Ct. 143, 34 L. Ed. 734.

Imposing a heavier punishment on a person convicted of a felony, as prescribed by St. Mass. 1887, c. 435, § 1, if he has twice before been convicted of a crime for which he has been sentenced to imprisonment for not less than three years, is not violative of constitutional provisions against ex post facto laws, as it does not impose any additional punishment for the former crimes.—*McDonald v. Commonwealth of Massachusetts*, 21 S. Ct. 389, 180 U. S. 311, 45 L. Ed. 542.

The substitution in cases of convictions of murder in the first degree, made by Act N. D. March 9, 1903, of close confinement in the penitentiary for not less than six nor more than nine months after judgment and before execution of the death penalty, in lieu of confinement in the county jail for not less than three nor more than six months, and the change of the place of execution from the county jail to the penitentiary, do not render the statute *ex post facto* as applied to a person convicted of that crime before its passage, since it did not alter the existing situation to the material disadvantage of the criminal. *Judgment, State v. Rooney* (1903) 95 N. W. 513, 12 N. D. 144, affirmed.—*Rooney v. State of North Dakota*, 25 S. Ct. 264, 196 U. S. 319, 49 L. Ed. 494, 3 Ann. Cas. 76.

Change in punishment for murder, by Act S. C. Feb. 17, 1912 (27 St. at Large, p. 702), from death by hanging to electrocution, does not render the statute repugnant to Const. U. S. art. 1, § 10, as an *ex post facto* law, when applied to crimes previously committed.—*Malloy v. State of South Carolina*, 35 S. Ct. 507, 237 U. S. 180, 59 L. Ed. 905, affirming judgment *State v. Malloy*, 78 S. E. 995, 95 S. C. 441.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

Ground of jurisdiction of Supreme Court, see Courts, ¶394(9).

Right to practice law as a privilege of citizen of United States, see Attorney and Client, ¶4.

Special or local laws, see Statutes, ¶79-104.

¶204. Constitutional prohibitions in general.

See 10 Cent. Dig. Const. Law, § 591.

A sentence of conviction imposed under authority of Acts Mass. 1851, c. 87 (Pub. St. c. 187, § 13), after the reversal of a former judgment on the application of the convict, because it was imposed under a statute that was passed after the offense was committed, and was therefore unconstitutional so far as it related to that offense, does not abridge the privileges and immunities of the accused as a citizen. *Judgment, Commonwealth of Massachusetts v. Murphy*, 54 N. E. 860, 174 Mass. 369, 48 L. R. A. 393, 75 Am. St. Rep. 353, affirmed.—*Murphy v. Commonwealth of Massachusetts*, 20 S. Ct. 639, 177 U. S. 155, 44 L. Ed. 711.

¶205. Grants of special privileges or immunities.

See 10 Cent. Dig. Const. Law, §§ 591-624; 45 Cent. Dig. Tax. § 311.

Act Ky. Jan. 22, 1869, granting to the Louisville Gas Company the exclusive franchise, upon certain conditions, of furnishing gas to the city of Louisville, is the delegation of a public duty to an appropriate instrumentality, and is not obnoxious to the constitutional provision (Const. Ky. 1850, art. 13, § 1) that "no set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."—*Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 S. Ct. 265, 29 L. Ed. 510, reversing 81 Ky. 263.

Act July 11, 1890, c. 669, incorporating a bridge company, and authorizing it to construct a bridge and approaches across the Hudson river at the city of New York, "in order to facilitate interstate commerce," and providing for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners, is not unconstitutional in conferring the right of eminent domain on the company.—*Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 S. Ct. 891, 38 L. Ed. 808.

The exception of public officers from the provision of Pen. Code N. Y. § 344b, which makes the possession of the record of chances or slips in the game of policy, or the possession of any paper, print, or writing commonly used in playing or promoting that game, *prima facie* evidence of "possession thereof knowingly," in violation of section 344a, making the knowing possession of such papers a crime, does not render the former section unconstitutional, since this provision manifestly is for the purpose of excluding the presumption raised by possession, where such documents are seized and are in the custody of officers of the law. *Judgment, People v. Adams*, 68 N. E. 636, 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, affirmed.—*Adams v. People of State of New York*, 24 S. Ct. 372, 192 U. S. 585, 48 L. Ed. 575.

¶206. Privileges and immunities of citizens of the United States.

See 10 Cent. Dig. Const. Law, §§ 625-648.

Rev. St. § 5508, making amenable to penalty "any two or more persons who may conspire to injure, oppose, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution and laws of the United States," is constitutional.—*The Ku Klux Cases*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274; *United States v. Waddell*, 112 U. S. 76, 5 S. Ct. 35, 28 L. Ed. 673.

Military Code Ill., forbidding unauthorized military associations to parade or drill with arms, does not abridge the privileges or immunities of citizens of the United States.—*Presser v. Illinois*, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615.

Act Kan. Feb. 19, 1881, prohibits the manufacture and sale of intoxicating liquors within that state, except for medical, scientific, and mechanical purposes, and punishes the manufacture and sale thereof, except for those purposes, as a misdemeanor, and declares all places where such liquors are manufactured, sold, bartered, or given away in violation of this law to be common nuisances, and provides for their abatement. Defendant, who had been engaged in the business of brewing beer prior to the passage of this act, and had made extensive improvements peculiarly adapted to such business, was arrested for selling beer manufactured prior to the enactment of the act. *Held*, that the act did not deprive defendant of any right, privilege or immunity as a citizen of the United States, within the meaning of Const. U. S. Amend. 14.—*Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205, affirming decree 29 Kan. 252, 44 Am. Rep. 634.

Laws N. Y. 1888, c. 489, providing for punishment of death by electricity, does not violate the fourteenth amendment to the constitution, which provides that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States.—*In re Kemmler*, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519.

The selling of liquor is not a privilege which inheres in a citizen of the United States, and hence the prohibition of such sales except in a manner prescribed by statute is within the police power of the state.—*Crowley, Chief of Police, v. Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620, reversing order (C. C.) *In re Christensen*, 43 F. 243.

The Texas law (2 Sayles' Civ. St. p. 124, art. 3226a, § 4, requiring an applicant for a liquor license to execute in advance a bond payable to the state, conditioned that he will not sell liquor to any person after having been notified by an officer or by certain relatives of such person not to do so, any of whom are authorized to sue on the bond in case of a breach, and further imposing a state and county occupation tax, and requiring payment of all taxes a year in ad-

vance, is not in conflict with Const. U. S. Amend. 14, providing that the privileges and immunities of citizens of the United States shall not be abridged by state laws.—*Giozza v. Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599.

A state law forbidding the carrying of dangerous weapons on the person, and authorizing the arrest without warrant of persons violating it, does not abridge the privileges or immunities of citizens of the United States (Const. U. S. Amend. 14).—*Miller v. State of Texas*, 153 U. S. 535, 14 S. Ct. 874, 38 L. Ed. 812.

Gen. St. Conn. § 3087, making it unlawful for any person to sell or keep for sale intoxicating liquors without a license, and section 3067, providing that a license to a druggist shall not be granted except on application, and in the manner prescribed, and that the granting of such license shall be discretionary with the county commissioners, are not in conflict with Const. Amend. 14, as abridging the privileges and immunities of citizens.—*Gray v. State of Connecticut*, 159 U. S. 74, 15 S. Ct. 985, 40 L. Ed. 80.

It is not a right, privilege or immunity of a citizen of the United States, within the meaning of Const. Amend. 14, to have a controversy in the state court prosecuted or determined by one form of action, rather than by another.—*Iowa Cent. Ry. Co. v. State of Iowa*, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467.

A corporation is not a "citizen," within the meaning of the constitutional provision prohibiting a state from making any laws which shall abridge the privileges or immunities of citizens of the United States, and cannot invoke the protection of such provision as against a state statute. Judgment *Daggs v. Orient Ins. Co.*, 38 S. W. 85, 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638, affirmed.—*Orient Ins. Co. of Hartford, Conn., v. Daggs*, 19 S. Ct. 281, 172 U. S. 557, 43 L. Ed. 552.

The privileges and immunities of a citizen of the United States do not include the right of trial by jury in a state court for a state offense, or the right to be exempt from any trial in such case for an infamous crime unless upon presentment by a grand jury.—*Maxwell v. Dow*, 20 S. Ct. 448, 494, 176 U. S. 581, 44 L. Ed. 597.

The adoption of the fourteenth amendment to the federal constitution has not had the effect of making all the provisions contained in the first 10 amendments operative in state courts, on the ground that the fundamental rights protected by those amendments are, by virtue of the fourteenth amendment, to be regarded as privileges or immunities of citizens of the United States.—*Id.*

The imposition of a license tax upon emigrant agents by Laws Ga. 1898, p. 21, par. 10, § 4, which leaves laborers free to make their own contracts, and restricts the business of inducing them to enter into labor contracts and to change their location only by imposing a license tax upon it, is not in violation of Const. U. S. Amend. 14, or of Const. U. S. art. 4, § 2, as an abridgment of the privileges and immunities of citizens. Judgment, 35 S. E. 699, 110 Ga. 584, 50 L. R. A. 685, affirmed.—*Williams v. Fears*, 21 S. Ct. 128, 179 U. S. 270, 45 L. Ed. 186.

A transfer tax law, which is construed as subjecting to taxation remainders created by a will before the precedent estates terminate and the remainders vest in possession, is not in violation of Const. U. S. Amend. art. 14, as abridging the privileges and immunities of the owners of such property as citizens of the United States.—*Orr v. Gilman*, 22 S. Ct. 213, 183 U. S. 273, 46 L. Ed. 196.

The New York transfer tax law (Laws 1897, c. 284), providing for the taxation of the

exercise of the power of appointment, derived from the disposition of property made either before or after the passage of that act, as though the property belonged absolutely to the donee of the power and had been bequeathed or devised by him by will, does not infringe Const. U. S. Amend. art. 14, as abridging the privileges and immunities of the owners of such property, though construed by the highest court of the state to apply to the exercise by a son among his children of a power of appointment given him in the will of his father, who, under the law as it stood at the time of his death, had a legal right to transfer by will his property to such appointees, without any limitation then imposed on the exercise of that right.—*Id.*

Liquor sellers are not denied the privileges or immunities of citizens of the United States, under Const. U. S. Amend. 14, because producers or manufacturers of domestic wines are exempted by Rev. Civ. St. Tex. 1895, art. 5060i, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors. Judgment (Tex. Civ. App.) 85 S. W. 34, 37 Tex. Civ. App. 607, affirmed.—*Cox v. State of Texas*, 26 S. Ct. 671, 202 U. S. 446, 50 L. Ed. 1099.

Privileges and immunities of citizens of the United States are not denied by applying to interstate transportation the provisions of Act Pa. April 4, 1868, restricting, as against a railroad company, the rights of persons injured in the course of their employment in or about the railroad to those which an employé of the railway company would have under like circumstances. Judgment (1905) 76 N. E. 1129, 72 Ohio St. 659, affirmed.—*Martin v. Pittsburg & L. E. R. Co.*, 27 S. Ct. 100, 203 U. S. 284, 51 L. Ed. 184, 8 Ann. Cas. 87.

Excluding foreign corporations from the exemption from an inheritance tax in favor of property devised for educational or religious uses, which is made by Act Ill. May 10, 1901 (Laws 1901, p. 268), amending Laws Ill. 1895, p. 301, does not abridge privileges or immunities of citizens of the United States. Judgment, *In re Speed's Estate* (1905) 74 N. E. 809, 216 Ill. 23, affirmed.—*Board of Education of Kentucky Annual Conference of Methodist Episcopal Church v. People of State of Illinois*, 27 S. Ct. 171, 203 U. S. 553, 51 L. Ed. 314, 8 Ann. Cas. 157.

Nonresident owners of lands within the levee district created by Act Ark. Feb. 15, 1893, p. 31, are not denied the privileges and immunities of citizens of the United States because section 11 of that act, as amended in Act Ark. April 2, 1895, p. 88, § 1, while requiring personal service of summons on resident owners or occupants for at least 20 days before rendering a decree of sale for unpaid levee taxes, provides for constructive service by publication upon nonresident owners of only 4 weeks. Decree (1905) 85 S. W. 252, 74 Ark. 174, affirmed.—*Ballard v. Hunter*, 27 S. Ct. 261, 204 U. S. 241, 51 L. Ed. 461.

A corporation cannot claim the protection of the clause of Const. U. S. Amend. 14, which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state. Judgment, *Greenberg v. Western Turf Ass'n* (1905) 82 P. 684, 148 Cal. 126, affirmed.—*Western Turf Ass'n v. Greenberg*, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520.

The privileges and immunities of a mine-owner as a citizen of the United States are not invaded in violation of Const. U. S. Amend. 14, by the provisions of Mining Act Ill. April 18, 1899 (Laws 1899, p. 300), imposing upon mine-owners responsibility for the defaults of mine

managers and mine examiners, who are required by that act to be selected by the mineowners from those holding licenses issued by the state mining board created by such statute, where it is not obligatory upon the mineowner to select a particular individual, or to retain one when selected if found incompetent.—*Wilmington Star Min. Co. v. Fulton*, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

No privilege of American citizenship is denied by the provision of Act Neb. April 8, 1903, p. 644, c. 139, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes. Judgment (Neb. 1905) 105 N. W. 298, affirmed.—*Halter v. State of Nebraska*, 27 S. Ct. 419, 205 U. S. 34, 51 L. Ed. 696, 10 Ann. Cas. 525.

Exemption from self-incrimination, though secured as against federal action by Const. U. S. Amend. 5, is not one of the fundamental rights of national citizenship, so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden by the fourteenth amendment to abridge. Judgment, *State of New Jersey v. Twining* (1906) 64 A. 1073, 73 N. J. Law, 683, affirmed.—*Twining v. State of New Jersey*, 29 S. Ct. 14, 211 U. S. 78, 53 L. Ed. 97.

Privileges and immunities of citizens of the United States are not abridged, contrary to U. S. Const. Amend. 14, by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state.—(1910) *Western Union Telegraph Co. v. Commercial Milling Co.*, 31 S. Ct. 59, 218 U. S. 406, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, affirming judgment *Commercial Milling Co. v. Western Union Telegraph Co.* (1908) 115 N. W. 698, 151 Mich. 425.

Privileges or immunities of a former convict as a citizen of the United States are not abridged by bringing him after conviction before the court of another county under Code W. Va. 1906, c. 165, §§ 1-5, by information charging him with prior convictions and sentencing him on verdict to additional punishment under chapter 152, §§ 23, 24.—(1912) *Graham v. State of West Virginia*, 32 S. Ct. 583, 224 U. S. 616, 56 L. Ed. 917, affirming judgment (1911) *State v. Graham*, 69 S. E. 1010, 68 W. Va. 248.

The privileges and immunities of railway companies as citizens of the United States are not abridged by Comp. St. Neb. 1911, c. 21, § 4, under which contributory negligence of an injured train employé will not bar recovery, where it was slight and that of the company gross.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

Privileges and immunities of citizens are not constitutionally abridged by Laws N. Y. 1903, c. 326, amending Pen. Code, § 550, making it a criminal offense for a secondhand dealer to receive stolen property belonging to railroads, telephone and electric companies without diligent inquiry.—*Rosenthal v. People of State of New York*, 33 S. Ct. 27, 226 U. S. 260, 57 L. Ed. 212, Ann. Cas. 1914B, 71, affirming judgment *People v. Rosenthal*, 90 N. E. 991, 197 N. Y. 394.

A corporation cannot claim the protection of Const. U. S. Amend. 14, securing privileges and immunities of citizens of the United States against abridgment by laws of a state.—*Selover, Bates & Co. v. Walsh*, 33 S. Ct. 69, 226 U. S. 112, 57 L. Ed. 146, affirming judgment *Walsh v. Selover, Bates & Co.*, 123 N. W. 291, 109 Minn. 136.

The state may require a member of a Greek letter fraternity at another college to renounce his allegiance with such fraternity before admitting him as a student to the state university,

without denying him privileges as a citizen, though the fraternity may be a moral and disciplinary force.—*Waugh v. Board of Trustees of University of Mississippi*, 35 S. Ct. 720, 237 U. S. 589, 59 L. Ed. 1181, affirming judgment *Board of Trustees of University of Mississippi v. Waugh*, 62 So. 827, 105 Miss. 623.

Construing Act Aug. 5, 1909, § 38, imposing an excise tax on net income of corporation as preventing a realty corporation from deducting from gross income interest paid on mortgage in excess of its capital stock, held not unconstitutional as an arbitrary and unreasonable classification.—*Anderson v. Forty-Two Broadway Co.*, 36 S. Ct. 17, 239 U. S. 69, 60 L. Ed. 152, reversing judgment 213 F. 777, 130 C. C. A. 338.

Sustaining a demurrer to evidence and entry of decree in suit tried by the court does not abridge plaintiff's privileges and immunities because of Rev. Laws Okl. 1910, § 5039, providing for trials by jury where Oklahoma Supreme Court in affirming the decree decided that it was required to disregard errors not affecting the substantial rights of the parties, where the trial court made finding of fact.—*Porter v. Wilson*, 36 S. Ct. 91, 239 U. S. 170, 60 L. Ed. 204, affirming judgment 135 P. 732, 39 Okl. 500.

Excepting from eminent domain powers of corporation organized to establish a public water power, private residences, and lands of other corporations having similar powers, and cotton factories, is too plainly reasonable to come within condemnation of Const. Amend. 14.—*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 36 S. Ct. 234, 240 U. S. 30, 60 L. Ed. 507, affirming judgment *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 65 So. 287, 186 Ala. 622.

No unconstitutional discrimination results because the Tariff Act does not compel owners of houses to estimate their rental value thereof, but those who live in rented houses are not allowed to deduct the rent paid, nor because farmers are permitted to omit from their income products of farms used by their families during the year.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

Municipal ordinance establishing a tax district where boundary line after running on a line not 100 feet back from the street jumped 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet or 240 feet away, violates Const. Amend. 14.—*Gast Realty & Investment Co. v. Schneider Granite Co.*, 36 S. Ct. 254, 240 U. S. 55, 60 L. Ed. 523, reversing judgment *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 168 S. W. 687, 259 Mo. 153, and rehearing denied *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 36 S. Ct. 400, 240 U. S. 55, 60 L. Ed. 526.

207. Privileges and immunities of citizens of the several states.

See 10 Cent. Dig. Const. Law, §§ 625-642.

A corporation foreign to any given state cannot invoke the provision of Const. U. S. art. 4, § 2, cl. 1, that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," against legislation in that state requiring such corporation to pay a license for the privilege of keeping an office within its limits; corporations not being citizens within the meaning of that clause.—*Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650.

Code 1873, § 4059, making any one in possession, in the state, of any Texas cattle which have not wintered north of the southern boundary of Missouri or Kansas liable for damages resulting from their being allowed to run at large and so spreading Texas fever, does not deny to citizens of other states any rights and

privileges accorded to citizens of Iowa.—*Kim-mish v. Ball*, 129 U. S. 217, 9 S. Ct. 277, 32 L. Ed. 695.

A decree of a state court restraining citizens of that state from prosecuting attachment suits begun in another state, and brought therein in order to evade the laws of the first state, does not violate Const. art. 4, § 2, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."—*Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538, affirming *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657.

Gen. Laws Minn. 1889, p. 51, c. 8, prohibiting the sale of dressed meat within any municipal division of the state unless the animal was inspected there within 24 hours before it was slaughtered, and making the violation thereof a misdemeanor, is repugnant to the constitution, entitling the citizens of each state to all the privileges and immunities of citizens in the several states.—*State of Minnesota v. Barber*, 136 U. S. 313, 10 S. Ct. 862, 34 L. Ed. 455, affirming (C. C.) 39 F. 641.

Gen. Laws Minn. 1889, p. 51, c. 8, which prohibits the sale of dressed meat within any municipal division of the state unless the animal was inspected there within 24 hours before it was slaughtered, and makes its violation a misdemeanor, though it purports to be for the protection of the public health, in effect prohibits the importation of meats slaughtered in other states, whose citizens cannot reasonably conform to the mode of inspection prescribed; and hence it is in violation of that clause of the constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.—*Id.*

A corporation is not a citizen within Const. U. S. art. 4, § 2, giving the citizens of each state all the privileges and immunities of citizens in the several states.—*Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394, reversing 114 Pa. 256, 6 A. 45; *Blake v. McClung*, 19 S. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

The selling of liquor is not a privilege which inheres in a citizen of the state, and hence the prohibition of such sales except in a manner prescribed by statute is within the police power of the state.—*Crowley*, Chief of Police, v. *Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620, reversing order in *re Christensen*, 43 F. 243.

Code Cr. Proc. N. Y. §§ 527, 555, providing that defendant, appealing from a conviction of crime, shall be admitted to bail only in certain contingencies, is not repugnant to Const. U. S. art. 4, § 2, guarantying to citizens of each state all privileges of citizens in the several states.—*McKane v. Durston*, 153 U. S. 684, 14 S. Ct. 913, 38 L. Ed. 867.

The provision of the Tennessee act of March 19, 1877 (Laws 1877, c. 31, § 5), that on the insolvency of a foreign corporation carrying on business in the state, "creditors who may be residents of this state shall have a priority in the distribution of assets * * * over all simple contract creditors being residents of any other country or countries," must be construed as using the word "residents" as meaning the same as "citizens"; and, as applied to creditors, who are residents and citizens of other states, the provision is in contravention of section 2 of article 4 of the constitution of the United States, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.—*Blake v. McClung*, 19 S. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

Giving priority to creditors residing in the state over those who reside out of the state in

distributing the assets of an insolvent corporation is in violation of Const. U. S. art. 4, providing for equal privileges and immunities of citizens in the several states.—*Blake v. McClung*, 20 S. Ct. 307, 176 U. S. 59, 44 L. Ed. 371.

A preference in favor of resident creditors of a foreign corporation over a nonresident mortgagee whose mortgage is not registered when their debts are created, when such preference is not given them over a resident mortgagee, constitutes an illegal discrimination against the nonresident.—*Sully v. American Nat. Bank*, 20 S. Ct. 935, 178 U. S. 289, 44 L. Ed. 1072.

An unsecured nonresident creditor of a foreign corporation is entitled, under Const. U. S. art. 4, giving equal privileges and immunities to the citizens of the several states, to share in the distribution of its assets upon the same level as like creditors of the company who reside within the state.—*Id.*

No discrimination is made between nonresident and resident mortgage creditors by Act Tenn. 1877, § 5, providing for a preference of the creditors of an insolvent foreign corporation "over mortgage * * * creditors" for debts made before the registration of the mortgages.—*Id.*

Rev. St. Ind. § 8560, providing for assessment of omitted property by the county auditor, without provision for notice to any person not a resident of the county in which the omitted property is proposed to be assessed, is not violative of Const. U. S. Amend. art. 14, as denying to a nonresident executor any rights or privileges thereby secured to him, where he not only had an opportunity to appear and set up any defense that he had, but actually did appear, and, after his demurrers and motion to dismiss had been overruled, answered and was fully heard in the trial court, and his objections to the findings and rulings of that court have been heard and considered by the supreme court of the state. Judgment, 56 N. E. 443, 154 Ind. 196, affirmed.—*Gallup v. Schmidt*, 22 S. Ct. 162, 183 U. S. 300, 46 L. Ed. 207.

The privileges and immunities of citizens in the several states are not denied by the provisions of *Sess. Laws Colo.* 1885, p. 335, for the protection of domestic cattle against the communication of disease by cattle from other states, where the statute is equally applicable to citizens of all states. Judgment, 68 P. 228, 29 Colo. 333, affirmed.—*Reid v. People of State of Colorado*, 23 S. Ct. 92, 187 U. S. 137, 47 L. Ed. 108.

None of the privileges and immunities of citizens of the state of New York are denied the beneficiaries under the will of a nonresident by a tax imposed under the New York inheritance tax law, on the transfer, under such will, of debts due the decedent by citizens of that state. Decree, in *re Blackstone's Estate*, 64 N. E. 1118, 171 N. Y. 682, affirmed.—*Blackstone v. Miller*, 23 S. Ct. 277, 188 U. S. 189, 47 L. Ed. 439.

The privileges and immunities of citizens in the several states, secured by Const. U. S. art. 4, § 2, par. 1, to the citizens of each state, are not denied by the provision of an Ohio statute under which, as construed by the highest court of that state, the right of action created by Act Pa. April 15, 1851, p. 674, § 19, in favor of the widow or personal representatives of one whose death is caused by negligence, can be maintained in the Ohio courts, only when the deceased was an Ohio citizen. Judgment, *Baltimore & O. R. Co. v. Chambers* (1905) 76 N. E. 91, 73 Ohio St. 16, affirmed.—*Chambers v. Bal-*

timore & O. R. Co., 28 S. Ct. 34, 207 U. S. 142, 52 L. Ed. 143.

Privileges of citizens of New Jersey are not denied to the citizens of other states by Laws N. J. 1905, p. 461, c. 238, under which a riparian owner may be prevented from diverting the waters of a stream of that state into any other state, for use therein. Decree, *McCarter v. Hudson County Water Co.* (1906) 65 A. 489, 70 N. J. Eq. 695, affirmed.—*Hudson County Water Co. v. McCarter*, 28 S. Ct. 529, 209 U. S. 349, 52 L. Ed. 828, 14 Ann. Cas. 560.

Privileges and immunities of the citizens are not abridged contrary to Const. U. S. art. 4, § 2, by Consol. Laws N. Y. c. 31, § 14, providing that only citizens of the United States may be employed in public works and that citizens of New York state must be preferred.—*Heim v. McCall*, 38 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 206, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

208. Class legislation.

See 10 Cent. Dig. Const. Law, §§ 649-677.

A city ordinance declaring that no person owning or employed in a public laundry "within prescribed limits" shall wash or iron clothes between 10 p. m. and 6 a. m. is not unconstitutional, as unduly discriminating between different classes engaged in the laundry business, because its restrictive provisions are confined to a certain locality.—*Soon Hing v. Crowley*, 113 U. S. 708, 5 S. Ct. 730, 28 L. Ed. 1145.

Act March 23, 1901 (Laws 1901, p. 211), making it unlawful for persons engaged in mining, or making excavations beneath the surface of the earth, while searching for minerals or other valuable substances, to work their employes at such labor more than eight hours a day, is not special or class legislation because applicable only to those engaged in searching for minerals or other valuable substances beneath the surface of the earth. Judgment, *State v. Cantwell* (Mo.) 78 S. W. 569, 179 Mo. 245, affirmed.—*Cantwell v. State of Missouri*, 26 S. Ct. 749, 199 U. S. 602, 50 L. Ed. 329.

An arbitrary discrimination forbidden by Const. Ala. 1875, Bill of Rights, §§ 1, 37, is not made by exemption of merchants selling sewing machines at their places of business from the license tax imposed by Act Ala. March 31, 1911 (Laws 1911, p. 180) §§ 32, 33f, on the business of selling sewing machines.—*Singer Sewing Mach. Co. v. Brickell*, 34 S. Ct. 493, 233 U. S. 304, 58 L. Ed. 974.

Singling out persons, firms, or corporations engaged in mining and manufacturing alone to be forbidden to issue orders for the payment of labor not redeemable in money, as is done by Act Va. Feb. 13, 1888 (Laws 1887-88, c. 118 [Code 1904, § 3657d]), amending and re-enacting Laws 1887, c. 391, § 3, does not render such statute invalid under Const. U. S. Amend. 14, as class legislation.—*Keeke Consol. Coke Co. v. Taylor*, 34 S. Ct. 856, 234 U. S. 224, 58 L. Ed. 1288.

Discrimination between aliens and citizens by Consol. Laws N. Y. c. 31, § 14, making it a misdemeanor to employ aliens on public works, is not a violation of Const. U. S. Amend. 14, relating to classification.—*Crane v. People of State of New York*, 36 S. Ct. 85, 239 U. S. 195, 60 L. Ed. 218, affirming judgment *People v. Crane*, 108 N. E. 427, 214 N. Y. 154, Ann. Cas. 1915B, 1254.

X. EQUAL PROTECTION OF LAWS.

Denial of equal protection of laws as ground of appellate jurisdiction, see Courts, § 394(7) (10).

Protection of civil rights, see Civil Rights.

209. Constitutional guaranties in general.

See 10 Cent. Dig. Const. Law, § 678.

The fourteenth amendment only prohibits state legislation. It is not directed against individual infringements of the rights guaranteed thereby.—*Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

The provision of the fourteenth amendment, forbidding the states to deny to any person within their jurisdiction the equal protection of the laws, does not require that the law shall have equality of operation, in the sense of an indiscriminate operation on persons, merely as such, but on persons according to their relation. It does not prevent the states from distinguishing, selecting, and classifying objects of legislation, within a wide range of discretion; but a classification must be based upon some reasonable ground,—some difference which bears a just and proper relation to the classification, and not a mere arbitrary selection.—*Magoun v. Illinois Trust & Savings Bank*, 18 S. Ct. 594, 170 U. S. 283, 42 L. Ed. 1037.

The Illinois state board of equalization, when making an assessment pursuant to the supposed command of a writ of mandamus, represents the state—there being no method of reviewing its decision except by judicial proceedings for relief from the assessment—and its action is therefore repugnant to Const. U. S. Amend. 14, if it denies any one equal protection of the laws protected by that amendment against impairment by the state. Judgment, *Chicago Union Traction Co. v. State Board of Equalization* (C. C. 1902) 114 F. 557, affirmed.—*Raymond v. Chicago Union Traction Co.*, 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; Same v. *Chicago Edison Co.*, 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

210. Persons protected.

See 10 Cent. Dig. Const. Law, §§ 679, 680.

The fourteenth amendment of the federal constitution, declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not contemplate a foreign corporation doing business within a state as a person who may claim such privilege.—*Philadelphia Fire Ass'n v. People of State of New York*, 119 U. S. 110, 7 S. Ct. 108, 30 L. Ed. 342.

Const. Amend. art. 14, § 1, providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws," does not prohibit a state from imposing such conditions upon foreign corporations as it may choose, as a condition of the admission within its limits.—*Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394, reversing 114 Pa. 256, 6 Atl. 45.

A railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws.—*Smyth v. Ames*, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, affirming decree *Ames v. Union Pac. Ry. Co.* (C. C.) 64 F. 165.

A state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute them or their proceeds among creditors, according to their respective rights; but it cannot, under the constitution of the United States, deny the right of citizens of other states to participate in such distribution on equal terms with its own citizens.—*Blake v. McClung*, 19 S. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

A private corporation not created by the laws of Tennessee, nor doing business therein under conditions that subject it to process issuing from the courts of the state, is not "within its jurisdiction," so as to invoke the protection

of the provision of the fourteenth amendment, declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws.—Id.

A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property of a permanent nature, upon which it has paid all state taxes, is a person within the jurisdiction of the state, and is protected by the equal protection of the laws clause of Const. U. S. Amend. 14, against the imposition, under Code Ala. 1907, §§ 2391-2400, of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on a similar business.—*Southern Ry. Co. v. Greene*, 30 S. Ct. 287, 216 U. S. 400, 54 L. Ed. 536, 17 Ann. Cas. 1247, reversing judgment (1909) 49 So. 404; *Louisville & N. R. Co. v. Gaston*, 30 S. Ct. 291, 216 U. S. 418, 54 L. Ed. 542, reversing judgment (1909) 49 So. 412.

Discrimination against resident aliens under Anti-Alien Labor Law, Ariz. renders the statute invalid under Const. U. S. Amend. 14, as denying the equal protection of the laws.—*Truax v. Raich*, 36 S. Ct. 7, 239 U. S. 33, 60 L. Ed. 131, affirming order (D. C.) *Raich v. Truax*, 219 F. 273.

§211. Nature of discriminations prohibited in general.

See 10 Cent. Dig. Const. Law, § 678.

The thirteenth amendment relates only to slavery and involuntary servitude (which it abolishes); and, although it establishes freedom in the United States, and congress may probably pass laws directly enforcing its provisions, yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances, and places of public amusement (forbidden by Act Cong. March 1, 1875; 18 Stat. 335) imposes no badge of slavery or involuntary servitude upon the party, but, at most, infringes rights which are protected from state aggression by the fourteenth amendment.—*Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

An ordinance whose provisions are within the police power of a city to enact will not be held void on the ground that the motive of its framers was to discriminate against a certain class, where such motive does not appear from the language of the ordinance, nor from its enforcement.—*Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145.

The equal protection of the laws is not denied by a state statute, passed in the exercise of its power over foreign corporations, incorporating a local benevolent society with the same name as that of a voluntary state association whose charter had been withdrawn by the foreign corporation that issued it, and conferring upon such society the exclusive right of granting subcharters in the state. Decree (1905) 51 S. E. 166, 104 Va. 197, affirmed.—*National Council, Junior Order United American Mechanics of United States v. State Council of Virginia, Junior Order United American Mechanics of Virginia*, 27 S. Ct. 46, 203 U. S. 151, 51 L. Ed. 132.

The substantial difference in point of harmful result, which, so far as the case as made shows, may exist, affords a reasonable basis, under the equal protection of the laws clause of the federal Constitution, for the exemption of pumping from wells not penetrating the rock, and such pumping as is done for other purposes than collecting and vending, as a separate commodity, the carbonic acid gas contained in mineral waters, from the operation of the provisions of Laws N. Y. 1908, c. 429, prohibiting the pumping or artificially drawing

of unnatural quantities of mineral waters from a common underground source of supply, and wasting them to the injury and impairment of other proprietors.—(1911) *Lindsley v. Natural Carbonic Gas Co.*, 31 S. Ct. 337, 220 U. S. 61, 55 L. Ed. 369, Ann. Cas. 1912C, 160, affirming decree (C. C. 1909) 170 F. 1023.

There is such a substantial difference between the carrying on of business by corporations and the same business when conducted by a private firm or individual as would justify—even were the principles of the fourteenth amendment to the federal Constitution applicable—the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the carrying on or the doing of business in a corporate or quasi corporate capacity.—*Flint v. Stone Tracy Co.*, 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

A state statute prohibiting existence of Greek letter fraternities in state institutions held not to deny equal protection of the laws, because construed not to apply to students already entered.—*Waugh v. Board of Trustees of University of Mississippi*, 35 S. Ct. 720, 237 U. S. 589, 59 L. Ed. 1131, affirming judgment *Board of Trustees of University of Mississippi v. Waugh*, 62 So. 827, 105 Miss. 623.

§212. Exercise of police power in general.

See 10 Cent. Dig. Const. Law, §§ 684, 705.

Lack of any exception in favor of adults certified by a registered physician to be unfit subjects for vaccination does not render invalid Rev. Laws Mass. c. 75, § 137, authorizing compulsory vaccination by local boards of health, as denying the equal protection of the laws, although an exception in favor of children in like condition is made by section 139 of that act, since the statute is equally applicable to all adults. Judgment, *Commonwealth v. Pear*, 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935, and *Same v. Jacobson*, Id., affirmed.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 353, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765.

The exception in favor of newspapers, periodicals, books, pamphlets, etc., on which shall be printed representations of the national flag, disconnected from any advertisement, which is made by Act Neb. April 8, 1903, p. 644, c. 139, prohibiting the use of representations of the national flag for advertising articles of merchandise, does not make such statute repugnant to Const. U. S. Amend. 14, as denying the equal protection of the laws. Judgment (Neb. 1905) 105 N. W. 298, affirmed.—*Halter v. State of Nebraska*, 27 S. Ct. 419, 205 U. S. 34, 51 L. Ed. 696, 10 Ann. Cas. 525.

Equal protection of the laws is not denied an owner of property in the residential section of Boston by the discrimination or classification made between the commercial and residential sections of that city by Pub. Acts Mass. 1904, p. 283, c. 333, and Acts 1905, p. 309, c. 383, limiting the height of buildings in the commercial district to 125 feet, and in the residential districts to from 80 to 100 feet. Judgment (1907) 79 N. E. 745, 193 Mass. 364, 118 Am. St. Rep. 523.—*Welch v. Swasey*, 29 S. Ct. 567, 214 U. S. 91, 53 L. Ed. 923.

Singling out bituminous coal mines and omitting block coal mines when requiring entries in not less than a prescribed width, as is done by Burns' Ann. St. Ind. 1908, § 8582, does not deny the equal protection of the laws.—*Barrett v. State of Indiana*, 33 S. Ct. 692, 229 U. S. 26, 57 L. Ed. 1050, affirming judgment 93 N. E. 543, 175 Ind. 112.

The legislative assumption that unnaturalized foreign-born residents are peculiarly a source

of danger to wild life is not so unwarranted as to invalidate as denying the full protection of the laws; *P. L. Pa. 1909, p. 466*, prohibiting the killing of any wild bird or animal by any foreign-born person except in defense of person or property and prohibiting any such person from owning or being possessed of a shot gun or rifle.—*Patzone v. Commonwealth of Pennsylvania*, 34 S. Ct. 281, 232 U. S. 138, 58 L. Ed. 539, affirming judgment *Commonwealth v. Patzone*, 79 A. 928, 231 Pa. 46.

A police regulation is subject to equal protection of the laws clause of Const. U. S. Amend. 14.—*Atchison, T. & S. F. Ry. Co. v. Vosburg*, 35 S. Ct. 675, 238 U. S. 56, 59 L. Ed. 1199, L. R. A. 1915E, 953, reversing judgment *Vosburg v. Atchison, T. & S. F. Ry. Co.*, 130 P. 667, 89 Kan. 114.

Equal protection of the laws is not denied by an ordinance prohibiting the emission of dense smoke in portions of a city, where it applies to all coming within its terms, though certain businesses are not included.—*Northwestern Laundry v. City of Des Moines*, 36 S. Ct. 206, 239 U. S. 486, 60 L. Ed. 396.

213. Control over governmental agencies in general.

The prohibitions and guaranties of Const. U. S. Amend. 14, are addressed to and control, not only the state, but also every person, whether natural or juridical, who is repository of state power.—*Home Telephone & Telegraph Co. v. City of Los Angeles*, 33 S. Ct. 312, 227 U. S. 278, 57 L. Ed. 510.

A case where a state officer uses his power to the doing of acts forbidden by Const. U. S. Amend. 14, is within such amendment, if the commission of the wrong is rendered possible, or is aided by state authority lodged in the wrongdoer.—*Id.*

Acts done under an ordinance passed under a power conferred by a state are within the fourteenth amendment to the federal Constitution.—*Id.*

Congress may, by classification or otherwise, favor the widespread circulation of newspapers and periodicals, though the legislation discriminates against the public and in favor of such publications and their publishers.—*Lewis Pub. Co. v. Morgan*, 33 S. Ct. 867, 229 U. S. 288, 57 L. Ed. 1190.

214. Discrimination by reason of race, color, or condition.

See 10 Cent. Dig. Const. Law, §§ 714-724.

215. — In general.

See 10 Cent. Dig. Const. Law, §§ 714, 716, 717, 719, 721.

The surviving brothers and sisters of a colored freedman, dying intestate, who were the children of a born slave and were themselves born slaves, are not denied the equal protection of the laws, contrary to Const. Amend. 14, by a decision of the state court construing *Shannon's Code, Tenn. § 4163*, preferring brothers and sisters of an intestate dying without issue over the husband or widow, as applying only to brothers and sisters born free, with the result that the intestate's real property acquired by him while he was a freedman passed to his widow under section 4165.—*Jones v. Jones*, 34 S. Ct. 937, 234 U. S. 615, 58 L. Ed. 1500.

218. — Public conveyances.

See 10 Cent. Dig. Const. Law, § 715.

A state may without infringing Const. U. S. Amend. 14, require separate but equal accommodations for the white and negro races.—*McCabe v. Atchison, T. & S. F. Ry. Co.*, 35 S. Ct. 69, 235 U. S. 151, 59 L. Ed. 169, affirming decree 186 F. 966, 109 C. C. A. 110.

The doctrine that a state statute, though fair on its face, may be so oppressively administered as to be an unconstitutional discrimina-

tion by the state, is not applicable where it is the administration of the provisions of a separate coach law by carriers which is claimed to produce the discrimination.—*Id.*

So much of the Oklahoma separate coach law as permits carriers to provide sleeping cars, dining cars, and chair cars for white persons, and to provide no similar accommodations for negroes, denies the latter the equal protection of the laws guaranteed by Const. U. S. Amend. 14.—*Id.*

220. — Public schools.

See 10 Cent. Dig. Const. Law, § 723.

A decision by a state court, denying an injunction against the maintenance by a board of education of a high school for white children, while failing to maintain one for colored children also, for the reason that the funds were not sufficient to maintain it in addition to needed primary schools for colored children, does not constitute a denial to colored persons of the equal protection of the law or equal privileges of citizens of the United States. Judgment Board of Education of Richmond County v. Cumming, 29 S. E. 488, 103 Ga. 641, affirmed.—*Cumming v. Board of Education of Richmond County*, 20 S. Ct. 197, 175 U. S. 528, 44 L. Ed. 262.

221. — Constitution of juries.

See 10 Cent. Dig. Const. Law, § 724; 10 Cent. Dig. Civil R. § 5.

The omission or refusal of officers to include negro citizens in a list from which jurors might be drawn is not, as to a negro subsequently brought to trial, a denial of the equal protection of the laws.—*Smith v. State of Mississippi*, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082.

The fact that a law confers on the jury commissioners judicial powers in the selection of citizens for jury services does not involve a conflict with Const. U. S. Amend. art. 14.—*Murray v. State of Louisiana*, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

The provision of the Mississippi constitution and the laws passed pursuant thereto prescribing the qualifications of voters and of grand and petit jurors, and investing the administrative officers with a large discretion in determining what citizens have the necessary qualifications, cannot be held repugnant to the fourteenth amendment merely on a showing that they may operate as a discrimination against the colored race, in the absence of proof of an actual discrimination in the case under consideration.—*Williams v. State of Mississippi*, 18 S. Ct. 583, 170 U. S. 213, 42 L. Ed. 1012.

The exclusion of all persons of the African race from a grand jury which finds an indictment against a negro in a state court, when they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of Const. U. S. Amend. 14, whether such exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the state. Judgment 46 S. W. 236, 48 S. W. 508; 39 Tex. Cr. R. 345, reversed.—*Carter v. State of Texas*, 20 S. Ct. 687, 177 U. S. 442, 44 L. Ed. 839.

A denial of the equal protection of the laws is made by a ruling of a state court upon a motion to quash an indictment because of the exclusion of negroes from the grand jury lists, by which such motion, though but two printed octavo pages in length, was struck from the files under the color of local practice for prolixity, because it contained an allegation that certain provisions of the newly adopted state Constitution, claimed to have the effect of disfranchising negroes because of their race, worked as a reason and consideration in the minds of the jury commissioners for their action.—*Rogers v. State of Alabama*, 24 S. Ct. 257, 192 U. S. 226, 48 L. Ed. 417.

A discrimination against negroes because of their race, in the selection of grand or petit jurors, forbidden by Const. U. S. Amend. 14, is not shown by verified written motions to quash, respectively, the indictment and the panel of petit jurors, charging such discrimination, where no evidence was either introduced or offered to establish the facts stated in the motions. Judgment (Tex. Cr. App.) 83 S. W. 390, affirmed.—*Martin v. State of Texas*, 26 S. Ct. 338, 200 U. S. 316, 50 L. Ed. 497.

No discrimination against negroes because of their race, in the selection of the grand jury, is made by Laws S. C. 1902, p. 1066, § 2, giving the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions.—(1910) *Franklin v. State of South Carolina*, 30 S. Ct. 640, 218 U. S. 161, 54 L. Ed. 980, affirming judgment *State v. Franklin* (1908) 60 S. E. 953, 80 S. C. 332.

222. — Competency as witnesses.

See 10 Cent. Dig. Const. Law, § 720.

The exclusion of Chinese as witnesses under Act Cong. Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], to prove the fact that a Chinaman claiming the right as a merchant to re-enter the United States had been engaged as such for a year before his departure, is not violative of constitutional guaranties. Judgment, *In re Li Sing*, 86 F. 896, 30 C. C. A. 451, affirmed.—*Li Sing v. United States*, 21 S. Ct. 449, 180 U. S. 486, 45 L. Ed. 634.

223. — Punishment of crime.

See 10 Cent. Dig. Const. Law, § 722.

Code Ala. § 4184, fixes the punishment for the crime of adultery or fornication when committed by "any man and woman." Id. § 4189, fixes a much greater punishment when the crime is committed by "any white person and any negro." Held, that the crimes specified are separate and distinct offenses; that the two sections are entirely consistent with each other; and section 4189 is not in conflict with the provision of the fourteenth amendment, that no state shall deny to any person the equal protection of the laws.—*Pace v. State of Alabama*, 106 U. S. 583, 1 S. Ct. 637, 27 L. Ed. 207.

Discrimination against Chinese persons in the administration of a municipal ordinance making it unlawful, either to exhibit gambling implements in a barred or barricaded house or room, or to visit such a house or room where gambling instruments are exhibited, is not sufficiently shown to enable the Supreme Court of the United States to declare such ordinance void, as denying the equal protection of the laws; in reviewing the refusal of a state court to grant habeas corpus to one convicted of a violation of the ordinance, by a stipulation between the parties, recited in the order discharging the writ, that the facts are as set forth in the petition, where such petition merely avers that the ordinance is enforced "solely and exclusively against persons of the Chinese race, and not otherwise," and contains no allegation that the conditions and practices against which the ordinance is directed do not exist exclusively among the Chinese, or that there are other offenders, as to whom it is not enforced.—*Ab Sin v. Wittman*, 25 S. Ct. 750, 198 U. S. 500, 49 L. Ed. 1142.

A person sentenced under the Michigan indeterminate sentence act (Pub. Acts 1903, No. 136), after having been twice before convicted of felony, is not denied the equal protection of the laws because he is deprived by that act, of the privilege therein accorded to other convicts at the end of the minimum term of the sentence to make application for parole, al-

though the statute gives no hearing upon the question of prior conviction.—*Ughbanks v. Armstrong*, 28 S. Ct. 372, 208 U. S. 481, 52 L. Ed. 582.

224. Discrimination by reason of sex.

See 10 Cent. Dig. Const. Law, § 725.

A municipal ordinance which prohibits liquor sellers from providing wine rooms or other places where females may be supplied with liquor, and from permitting females to be or remain for that purpose where liquor is sold or in any place adjacent thereto or connected therewith, and from employing females to wait or attend upon any person therein, and which forbids females from remaining in any such place and waiting and attending upon any person, or soliciting drinks therein, is a valid exercise of the police power, not repugnant to the federal Constitution.—*Cronin v. Adams*, 24 S. Ct. 219, 192 U. S. 108, 48 L. Ed. 365, affirming *Adams v. Cronin*, 69 P. 590, 29 Colo. 488, 63 L. R. A. 61; *Cronin v. City of Denver*, 24 S. Ct. 220, 192 U. S. 115, 48 L. Ed. 368, affirming 69 P. 1125, 29 Colo. 503.

225. Discrimination as to localities.

See 10 Cent. Dig. Const. Law, §§ 681, 682.

A state law which places five towns in a class by themselves, organizes them into a municipal corporation, casts upon them the burden of constructing and maintaining highways and bridges, and subjects them to a different control in respect thereto from other towns, is within the province of the state legislature, and not a denial of the equal protection of the laws.—*Williams v. Eggleston*, 18 S. Ct. 617, 170 U. S. 304, 42 L. Ed. 1047.

A discrimination between agricultural lands and other lands, in respect to the rights of a city to annex them, is not in violation of constitutional guaranty of equal protection of the laws, as it is within the power of the state to classify objects of legislation.—*Clark v. City of Kansas City*, 20 S. Ct. 284, 176 U. S. 114, 44 L. Ed. 392.

A registration law applicable to cities having more than 300,000 inhabitants (Act Mo. May 31, 1895), being held valid by the highest court of the state under the state constitution, does not deny to citizens residing in the only city of the state which has a population of 300,000 the equal protection of the laws, although it may be thought to be less effectual in protecting the right of voting than the statute applicable to other cities. Judgment, *State v. Mason*, 55 S. W. 636, 155 Mo. 480, affirmed.—*Mason v. State of Missouri*, 21 S. Ct. 125, 179 U. S. 328, 45 L. Ed. 214.

The equal protection of the laws is not denied by a state local option law under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere. Judgment, 70 N. E. 1131, 68 Ohio St. 688, affirmed.—*State of Ohio ex rel. Lloyd v. Dollison*, 24 S. Ct. 703, 194 U. S. 445, 48 L. Ed. 1062.

The fact that the tenement house act (Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47) is applicable to tenement houses in cities of the first class only does not render it a violation of the fourteenth amendment to the United States Constitution, forbidding any state to deny to any person within its jurisdiction equal protection of the laws. Judgment, *Tenement House Department of City of New York v. Moeschel* (1904) 72 N. E. 231, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, affirmed.—*Moeschen v. Tenement House Department of City of New York*, 27 S. Ct. 781, 203 U. S. 583, 51 L. Ed. 328.

226. Exercise of power of eminent domain.

228. — Procedure.

Even if the courts of a state have uniformly construed a state statute as requiring condemnation proceedings to be had before a jury of inquest, instead of a common-law jury, presided over by a judge, a subsequent determination by them in a given case that the proceedings must be had before a common-law jury is a mere change in mode of procedure, and not a denial of the equal protection of the laws, contrary to the the fourteenth amendment.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

229. Taxation of property.

See 10 Cent. Dig. Const. Law, § 685.

Act Ky. April 3, 1878 (Bull. & F. Gen. St. Ky. 1881, p. 1019), providing for annual reports of the chief officer of each railroad company of the length of his road, and for a board of equalization to ascertain the value and adjust the assessment thereof, and which, in effect, classifies railroad property as a separate class for the purposes of taxation, is not for that reason invalid, as denying the company the equal protection of the laws, within the meaning of the fourteenth amendment.—*Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414.

Act May, 1879, as amended by Act 1881, imposes a specific tax on persons engaged in selling liquors at wholesale, or in soliciting or taking orders for such liquors to be shipped into the state, without a like tax upon persons engaged in the like business in reference to liquors manufactured in the state. *Held*, that such law is not deprived of its constitutional character by a subsequent law imposing a greater tax upon all persons engaged in the business of manufacturing or selling liquors in the state.—*Walling v. Michigan*, 118 U. S. 446, 6 S. Ct. 454, 29 L. Ed. 691.

Act N. Y. May 26, 1881, c. 361, provides that every corporation, with certain exceptions, doing business in the state, shall be subject to a tax, upon its "corporate franchise or business," to the amount of one-quarter of a mill upon its capital stock for each 1 per cent. of its dividends, where they amount to 6 per cent. on its capital, a less rate to be paid where the dividends are less than 6 per cent. *Held*, that the statute is not unconstitutional, as depriving any person, natural or artificial, of the equal protection of the laws; for, under its provisions, all corporations of the same kind are subject to the same tax.—*Home Ins. Co. v. People of State of New York*, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025, affirming judgment *People v. Home Ins. Co.*, 92 N. Y. 328.

A state statute distributing for purposes of taxation the rolling stock and personal property of railroad companies among the several counties traversed by the road, and subjecting it to the varying rates of taxation prevailing therein (Act Ga. Oct. 16, 1889), instead of taxing it in the county of its principal office, as is done in the case of individuals and other corporations, is not a discrimination, in violation of the fourteenth amendment to the constitution of the United States.—*Columbus Southern Ry. Co. v. Wright*, 151 U. S. 470, 14 S. Ct. 396, 38 L. Ed. 238, affirming judgment 89 Ga. 574, 15 S. E. 293.

Under Act Ind. March 6, 1891, providing for assessment of railroad property for taxation by a state board, the fact that but one hearing before the board is given to railroad companies, while the ordinary taxpayer, whose property is assessed by county officials, after hearing before them, has a right of appeal and a hearing before the state board, does not deny the railroad companies the equal protection of the laws.

—*Pittsburgh, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031, and *Indianapolis & V. R. Co. v. Same*, 154 U. S. 438, 14 S. Ct. 1114, 38 L. Ed. 1040, affirming judgment 183 Ind. 625, 33 N. E. 432.

A citizen of another state, whose land is subject to the law of Louisiana allowing the public to impose servitude on such land, without compensation, for the purpose of making and repairing levees, cannot complain that he was denied the equal protection of the laws, if the state law was impartially administered.—*Eldridge v. Trezevant*, 160 U. S. 452, 16 S. Ct. 345, 40 L. Ed. 490.

The "Nichols Law" (Ohio Rev. St. §§ 2777-2780), providing that the taxable value of the property of telegraph, telephone, and express companies shall be determined with reference to the value of the entire capital stock, does not deny to such companies the equal protection of the laws.—*Sanford v. Poe*, 17 S. Ct. 305, 165 U. S. 194, 41 L. Ed. 683, affirming decree 69 F. 546, 16 C. C. A. 306.

Act Ind. March 6, 1893, imposing on express, telegraph, telephone, and sleeping-car companies a penalty of 5 per cent. for nonpayment of taxes, does not deny such companies the equal protection of the laws.—*Western Union Tel. Co. v. State of Indiana*, 17 S. Ct. 345, 165 U. S. 304, 41 L. Ed. 725.

A state statute (Laws Pa. 1891, p. 240) giving banks the right to elect to collect from shareholders and pay into the state treasury a tax of eight mills on the dollar on the par value of the shares, in lieu of the regular tax of four mills on each dollar of the actual value thereof, does not deny "the equal protection of the laws" guaranteed by the fourteenth amendment to the federal constitution, though it may result in some banks paying less than others on the actual value of their property.—*Merchants' & Manufacturers' Nat. Bank v. Commonwealth of Pennsylvania*, 17 S. Ct. 829, 167 U. S. 461, 42 L. Ed. 236.

Laws Or. 1882, p. 64, providing for the taxation of the mortgagee's interest in land as real estate, regardless of the residence of the mortgagee, does not deny him the equal protection of the laws.—*Savings & Loan Soc. v. Multnomah County*, 18 S. Ct. 392, 169 U. S. 421, 42 L. Ed. 803, affirming decree (C. C.) 60 F. 31.

The amount of property exempted from a state inheritance tax is entirely in the discretion of the state legislature, and, whether much or little, does not render the law invalid, as denying the equal protection secured by the fourteenth amendment.—*Magoun v. Illinois Trust & Savings Bank*, 18 S. Ct. 594, 170 U. S. 283, 42 L. Ed. 1037.

State inheritance tax laws may discriminate between relatives, and between them and strangers, and grant exemptions, without denying the equal protection of the laws, in violation of the fourteenth amendment to the federal constitution.—*Id.*

The provision of the Illinois inheritance tax law, imposing on legacies to strangers to the blood 3 per cent. on legacies of \$10,000 or less, 4 per cent. on legacies between \$10,000 and \$20,000, 5 per cent. on legacies between \$20,000 and \$50,000, and 6 per cent. on all above \$50,000, creates a reasonable classification, and is not a discrimination amounting to a denial of the equal protection of the laws.—*Id.*

The provision of Const. W. Va. art. 13, § 6, exempting tracts of land of less than 1,000 acres from certain forfeitures under the tax laws to which larger tracts are made liable, is not a denial to the owners of larger tracts of the equal protection of the laws guaranteed by the federal constitution.—*King v. Mullins*, 13 S. Ct. 925, 171 U. S. 404, 43 L. Ed. 214.

A corporation is not denied the equal protection of the laws by Laws N. Y. 1857, c. 456, § 3, which, as construed by the highest court of the state, provides an opportunity, in assessing the property of a corporation, to correct an undervaluation first made by the assessors, without giving the same opportunity to correct an undervaluation of the property of individuals, so long as the corporation is not assessed on any property not legally taxable, or taxed beyond the actual value of its property, and there is no proof of any general custom to undervalue the property of individuals. Judgment, 53 N. E. 1130, 158 N. Y. 709, affirmed.—*People of State of New York v. Barker*, 21 S. Ct. 121, 179 U. S. 279, 45 L. Ed. 190.

Where the state reserved the power to alter, amend, or repeal a statute constituting a contract with a corporation exempting it from ordinary taxes, the passage of a statute thereafter which attempted to preserve all the obligations of the corporation in favor of the state, but to take away from the corporation the consideration on the part of the state on which the duty of the corporation to pay a gross-receipt tax rested, was invalid, as denying such corporation the equal protection of the laws. *St. Louis County v. Duluth & I. R. R. Co.*, 80 N. W. 628, 77 Minn. 433, reversed.—*Duluth & I. R. R. Co. v. St. Louis County*, 21 S. Ct. 124, 179 U. S. 302, 45 L. Ed. 201.

The refusal to deduct the value of real estate owned in other states by a national bank from the value of its shares of stock does not make an unlawful discrimination against such banks under Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], or deny them the equal protection of the laws, where such a deduction is not authorized by the laws of the state in valuing shares of stock of other corporations. Judgment 61 P. 560, 21 Utah, 324, 56 L. R. A. 346, affirmed.—*Commercial Nat. Bank v. Chambers*, 21 S. Ct. 863, 182 U. S. 556, 45 L. Ed. 1227.

Rev. St. Ind. § 8560, providing for the assessment of omitted property by the county auditor, without provision for notice to any person not a resident of the county in which such omitted property is proposed to be assessed, is not violative of Const. U. S. Amend. art. 14, as denying a nonresident executor the equal protection of the law, where he not only had an opportunity to appear and set up any defense that he had, but actually did appear, and after his demurrers and motion to dismiss had been overruled, answered and was fully heard in the trial court, and his objections to the findings and rulings of that court have been heard and considered by the supreme court of the state. Judgment 56 N. E. 443, 154 Ind. 196, affirmed.—*Gallup v. Schmidt*, 22 S. Ct. 162, 183 U. S. 300, 46 L. Ed. 207.

Railroad companies are not denied the equal protection of the laws by Laws Fla. 1885, c. 3558, requiring the comptroller to assess the taxes for 1879, 1880, and 1881 upon such railroad property as had escaped taxation for such years, without providing for the assessment of taxes for those years on other property not previously assessed therefor, general legislation having provided that railroad property should be assessed by the comptroller and real estate by the county treasurer. Judgment, *Reynolds v. Florida Cent. & P. R. Co.*, 28 So. 861, 42 Fla. 397, affirmed.—*Florida Cent. & P. R. Co. v. Reynolds*, 22 S. Ct. 176, 183 U. S. 471, 46 L. Ed. 283.

A transfer tax law, which is construed as subjecting to taxation remainders created by a will before the precedent estates terminate and the remainders vest in possession, is not in violation of Const. U. S. Amend. art. 14, as depriving the owners of such property of the

equal protection of the laws.—*Orr v. Gilman*, 22 S. Ct. 213, 183 U. S. 278, 46 L. Ed. 196.

The New York transfer tax law (Laws 1897, c. 284), providing for the taxation of the exercise of the power of appointment derived from the disposition of property made either before or after the passage of that act, as though the property belonged absolutely to the donee of the power and had been bequeathed or devised by him by will, does not infringe Const. U. S. Amend. art. 14, as depriving the owners of such property of the equal protection of the laws of New York, though construed by the highest court of the state to apply to the exercise by a son among his children of a power of appointment given him in the will of his father, who, under the law as it stood at the time of his death, had a legal right to transfer by will his property to such appointees without any limitation then imposed on the exercise of that right.—Id.

No unconstitutional discrimination against nonresident stockholders in domestic corporations is made by Pub. Acts Conn. 1897, c. 153, § 2, providing for the assessment of such stock at its market value, with no deduction on account of real estate held by the corporation, although provision for such deduction in assessing resident stockholders is made by Gen. St. Conn. § 3836, as amended by Pub. Acts Conn. 1889, c. 63, since nonresident stockholders pay no local taxes, but simply contribute so much to the general expenses of the state, while the resident stockholders pay no tax to the state, but only to the municipality in which they reside. Judgment, *State v. Travelers' Ins. Co.*, 47 A. 299, 73 Conn. 255, affirmed.—*Travelers' Ins. Co. v. State of Connecticut*, 22 S. Ct. 673, 185 U. S. 304, 46 L. Ed. 949.

The equal protection of the laws is not denied by the Illinois inheritance tax law because, under that statute as interpreted and enforced by the state courts, certain life estates may be taxed when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers in blood. Judgment 59 N. E. 798, 189 Ill. 472, 59 L. R. A. 807, affirmed.—*Billings v. People of State of Illinois*, 23 S. Ct. 272, 188 U. S. 97, 47 L. Ed. 400.

The imposition of a tax, under the New York inheritance tax law, on the transfer, under the will of a nonresident, of debts due the decedent by residents of that state, does not violate the fourteenth amendment to the federal constitution. Decree, *In re Blackstone's Estate*, 64 N. E. 1118, 171 N. Y. 682, affirmed.—*Blackstone v. Miller*, 23 S. Ct. 277, 188 U. S. 189, 47 L. Ed. 439.

The equal protection of the laws is not denied by the provisions of Code Ala. 1886, § 453, cl. 13, and Code 1896, § 3911, cl. 14, for the taxation of railroad stock, because of the exemption of stock in domestic railroads and in others that list substantially all their property for taxation.—*Kidd v. State of Alabama*, 23 S. Ct. 401, 188 U. S. 730, 47 L. Ed. 669.

A street railway company is not denied the equal protection of the laws by a municipal tax on its business at a rate of \$100 per mile or fraction of a mile of its trackage in the city streets, because a steam railway, making an extra charge for local deliveries of freight brought over its road from outside the city, is not subjected to this tax. Judgment 41 S. E. 592, 115 Ga. 137, affirmed.—*Savannah, T. & I. of H. Ry. v. City of Savannah*, 25 S. Ct. 690, 198 U. S. 392, 49 L. Ed. 1097.

The exemption of the subsurface street railway in New York city from the operation of the special franchise tax authorized by Laws N. Y. 1899, c. 712, does not make that statute invalid, as denying the owners of the

surface street railways in that city the equal protection of the laws. Judgments 87 N. E. 69, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674, affirmed, and 80 N. Y. S. 85, 79 App. Div. 183, reversed.—*People of State of New York ex rel. Metropolitan Street Ry. Co. v. State Board of Tax Com'rs*, 25 S. Ct. 705, 199 U. S. 1, 50 L. Ed. 65, 4 Ann. Cas. 381; *People of State of New York ex rel. Brooklyn City R. Co. v. Same*, 25 S. Ct. 713, 199 U. S. 48, 50 L. Ed. 79; *People of State of New York ex rel. Twenty-Third St. R. Co. v. Same*, 25 S. Ct. 715, 199 U. S. 53, 50 L. Ed. 85.

Brothers and sisters of a decedent may be subjected to the burden of the inheritance tax imposed by St. Cal. 1893, p. 193, as amended by St. Cal. 1899, p. 10, without denying them the equal protection of the laws guaranteed by Const. U. S. Amend. 14, although such legislation does not impose any tax on such strangers to the blood as the wife or widow of a son or the husband of a daughter of the decedent. Decree, in re Campbell's Estate, 77 P. 674, 143 Cal. 623, affirmed.—*Campbell v. State of California*, 26 S. Ct. 182, 200 U. S. 87, 50 L. Ed. 382.

Excluding foreign corporations from the exemption from an inheritance tax in favor of property devised for educational or religious uses, which is made by Act Ill. May 10, 1901 (Laws 1901, p. 268) amending Laws Ill. 1895, p. 301, does not deny the equal protection of the laws. Judgment, in re Speed's Estate (1905) 74 N. E. 809, 216 Ill. 23, affirmed.—*Board of Education of the Kentucky Annual Conference of Methodist Episcopal Church v. People of State of Illinois*, 27 S. Ct. 171, 203 U. S. 553, 51 L. Ed. 314, 8 Ann. Cas. 157.

Successions which have been finally closed and administered upon may be exempted from the inheritance tax imposed by Act La. June 28, 1904, without rendering such statute void as making an arbitrary classification which amounts to a denial of the equal protection of the laws, where the highest state court makes the validity of the tax depend upon this classification, by deciding that the state can tax the property until it has passed out of the succession of the testator. Judgment, *Succession of Levy* (1905) 39 So. 37, 115 La. 377, affirmed.—*Cahen v. Brewster*, 27 S. Ct. 174, 203 U. S. 543, 51 L. Ed. 310, 8 Ann. Cas. 215.

Assessing the franchises and other property of certain corporations at a different rate and by different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, denies the equal protection of the law protected by Const. U. S. Amend. 14, against impairment by a state. Judgment, *Chicago Union Traction Co. v. State Board of Equalization* (C. C. 1902) 114 F. 557, affirmed.—*Raymond v. Chicago Union Traction Co.*, 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; *Same v. Chicago Edison Co.*, 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

The equal protection of the laws is not denied by the taxation of distilled spirits in bonded warehouses in the state, provided for by Act Ky. March 29, 1902 (Acts 1902, p. 226, c. 102), under which the warehouseman is made liable to pay the tax, and is given a lien on the property for the amount paid. Judgment (1906) 94 S. W. 654, 29 Ky. Law Rep. 705, affirmed.—*Thompson v. Commonwealth of Kentucky*, 28 S. Ct. 533, 209 U. S. 340, 52 L. Ed. 822.

The grantee in a tax deed cannot claim to have been denied the equal protection of the laws by Pub. Laws Mich. 1897, p. 294, No. 229, requiring the giving of notice to the original owners to cut off the right of redemption, on the theory that, by the proceedings under the

tax laws, the state acquired an absolute title, which it conveyed by the tax deed, and that the statute operated to divest such title and transfer it to another.—*Rusch v. John Duncan Land & Mining Co.*, 29 S. Ct. 172, 211 U. S. 526, 53 L. Ed. 312.

The equal protection of the laws is not denied by the imposition of the inheritance tax provided for by Laws N. Y. 1887, p. 921, c. 713, upon certain bequests of personality by a nonresident decedent owning both real and personal property within the state because, under that statute, the tax could not be collected if the only property belonging to the decedent situated within the state was personality. Judgment (1906) in re Lord's Estate, 79 N. E. 1110, 186 N. Y. 549, affirmed.—*Lord v. Glynn*, 29 S. Ct. 186, 211 U. S. 477, 53 L. Ed. 290.

The provisions for the forfeiture of land titles to the state for failure to list and pay taxes thereon for certain specified years, made by Act Ky. March 15, 1906, c. 22, art. 3, do not deny the equal protection of the laws because, in the application of such statute, it can only meet conditions such as are embraced within the law in a part of the counties of the state.—(1911) *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 106 S. W. 290, 127 Ky. 667, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law Rep. 857.

Landowners who did not acquire their title until after the delinquencies had occurred cannot claim to have been denied the equal protection of the laws by the application to them of the provisions of Act Ky. March 15, 1906, c. 22, art. 3, for the forfeiture of such lands to the state, because of the failure of the owners to list lands for taxation and pay the taxes thereon for certain specified years.—Id.

The tax measured by the value of the property, authorized by Laws N. Y. 1896, c. 908, when property is transferred by deed intended to take effect upon the death of the grantor, is one in the nature of an excise tax on the transfer, and is not void as denying the equal protection of the laws guaranteed by Const. U. S. Amend. 14, because lacking in the elements of uniformity, and equality required in the assessment of property taxes.—(1912) *Keeney v. Comptroller of State of New York*, 32 S. Ct. 105, 222 U. S. 525, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139, affirming judgment (1909) in re Keeney's Estate, 87 N. E. 428, 194 N. Y. 281.

Subjecting to the tax authorized by Laws N. Y. 1896, c. 908, a transfer of property by deed intended to take effect at the death of the grantor, without taxing transfers intended to take effect upon the death of some person other than the grantor, or upon the happening of a certain or contingent event, does not involve such a discrimination as to deny the equal protection of the laws guaranteed by the fourteenth amendment to the federal Constitution.—Id.

Taxing shares of foreign corporations owned by citizens under Burns' Ann. St. Ind. 1908, §§ 10,143, 10,233, 10,234, does not deny equal protection of laws because with domestic corporations the property, and not the shares, are taxed.—*Darnell v. State of Indiana*, 33 S. Ct. 120, 226 U. S. 390, 57 L. Ed. 267, affirming judgment 90 N. E. 769, 174 Ind. 143.

Exempting property of telephone companies whose gross annual receipts do not exceed \$500 from ad valorem tax imposed by Pub. Acts Mich. 1909, No. 49, does not render the statute invalid under Const. U. S. Amend. 14, as denying the equal protection of the laws, where the companies taxed are those organized for profit and the untaxed enterprises are mutual or co-operative.—*Citizens' Telephone Co. v. Fuller*, 33 S. Ct. 833, 229 U. S. 322, 57 L. Ed. 1206, affirming decree (C. C.) *The Michigan Telephone Tax Cases*, 185 F. 634.

A foreign corporation which has paid all the local taxes assessed against it and has a leasehold for storerooms in the state is not denied the equal protection of the laws by the exaction under St. Mass. 1909, c. 490, of an excise tax for doing business within the state, though domestic corporations may be favored under such statute.—*Baltic Min. Co. v. Commonwealth of Massachusetts*, 34 S. Ct. 15, 231 U. S. 68, 58 L. Ed. 127, affirming judgments 93 N. E. 831, 207 Mass. 381; *S. S. White Dental Mfg. Co. v. Same*, 98 N. E. 1056, 212 Mass. 35.

Depositors in national banks are not denied the equal protection of the laws by the tax imposed under P. S. Vt. §§ 804-820, on interest-bearing deposits because depositors in state banks are exempted from taxation on their deposits up to \$2,000 on which the depositors are locally taxable.—*Clement Nat. Bank v. State of Vermont*, 34 S. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment *State v. Clement Nat. Bank*, 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

Requiring savings banks to include in their assets mortgages on Minnesota real estate on which the registration tax has been paid under Laws Minn. 1907, c. 328 (Gen. St. 1913, §§ 2301-2309), does not contravene the equal protection of the laws clause of Const. Amend. 14, in view of the privileges as to taxation enjoyed by savings banks under Rev. Laws Minn. 1905, § 839.—*Farmers' & Mechanics' Sav. Bank of Minneapolis v. State of Minnesota*, 34 S. Ct. 354, 232 U. S. 516, 58 L. Ed. 706, reversing judgment *State v. Farmers' & Mechanics' Sav. Bank of Minneapolis*, 130 N. W. 445, 114 Minn. 95.

Railway companies are not arbitrarily discriminated against, contrary to the equal protection of the laws clause of the fourteenth amendment of the United States Constitution, by the excise tax imposed on gross earnings by Act May 31, 1911 (102 Ohio Laws, p. 224), because other public utilities within the state are not included.—*In re Ohio Tax Cases*, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 737, affirming decree (*D. C.*) *Ohio River & W. Ry. Co. v. Dittie*, 203 F. 537.

There is no denial of the equal protection of the laws in the imposition on a foreign railway company under Laws Ark. 1911, p. 67, in addition to the general property tax, of an annual franchise tax for the privilege of transacting intrastate business.—*St. Louis Southwestern Ry. Co. v. State of Arkansas ex rel. Norwood*, 35 S. Ct. 99, 235 U. S. 350, 59 L. Ed. 265, affirming decree 152 S. W. 110, 106 Ark. 321.

Nothing in Const. U. S. Amend. 14, imposes iron-clad rules on states as to internal taxation or prevents double taxation so long as inequality is not based on arbitrary discriminations.—*Id.*

Taxation of memberships in chamber of commerce does not deny equal protection of the laws under Const. Amend. 14, because of exemption from taxation of churches, fraternal orders, etc.—*Rogers v. Hennepin County*, 36 S. Ct. 265, 240 U. S. 184, 60 L. Ed. 594, affirming judgment 145 N. W. 112, 124 Minn. 539.

Mining company and their stockholders are not denied equal protection of the laws nor deprived of property without due process of law contrary to Const. Amend. 5, by income tax, because of discrimination in allowance for depreciation from depletion of ore deposits.—*Stanton v. Baltic Mining Co.*, 36 S. Ct. 278, 240 U. S. 103, 60 L. Ed. 546.

A fund placed in trust in a foreign state, the creator reserving to himself an absolute power of control and receiving the income, may be subjected to an inheritance tax in the domicile state without violating Const. Amend. 14.—*Bullen v. State of Wisconsin*, 36 S. Ct. 473,

240 U. S. 625, 60 L. Ed. 830, affirming judgment *In re Bullen's Estate*, 128 N. W. 109, 143 Wis. 512, 139 Am. St. Rep. 1114.

230. Licenses and license taxes.

See 10 Cent. Dig. Const. Law, § 687.

On April 4, 1873, an act was passed in Pennsylvania requiring foreign insurance companies doing business in that state to pay a tax of 3 per cent. upon the premiums received by them in the state. By Laws N. Y. 1865, c. 694, as amended by Laws N. Y. 1875, c. 60, it is provided that whenever the law of the state in which a foreign company doing business in New York is incorporated requires license fees from companies incorporated in New York, and doing business in that state, greater in amount than the laws of New York require from foreign companies, such foreign company doing business in New York shall be required to pay to the New York superintendent of insurance an amount equal to that imposed by the law of such state upon companies incorporated in New York. A fire insurance company organized under the laws of Pennsylvania, applied, in 1872, for admission to the state of New York, and received annual licenses from year to year. An action was brought to recover license fees for the year 1881, under the New York acts of 1865 and 1875. *Held* that, a corporation being a mere creation of local law, and obtaining recognition in another state only upon the conditions imposed by it, and the license tax in question being a prerequisite to the admission of the defendant into New York, the defendant is not a "person within the jurisdiction" of New York with reference to the subject in controversy, and within the meaning of the fourteenth amendment to the United States constitution.—*Fire Ass'n of Philadelphia v. People*, 119 U. S. 110, 7 S. Ct. 108, 30 L. Ed. 342.

Act Pa. June 7, 1879, providing that foreign corporations shall pay a license for the privilege of keeping an office within the state, is not in conflict with Const. U. S. Amend. 14, providing that no state shall deny to any person within its jurisdiction the equal protection of its laws, since the statute acts uniformly on all foreign corporations within the state.—*Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650.

The ordinance of the city and county of San Francisco prohibiting the issuance of a retail liquor dealer's license to any person who has not first obtained the written consent of a majority of the police commissioners, and providing that, in case of refusal in the first instance such consent shall be given upon the written recommendation of not less than 12 citizens owning real estate in the block or square in which the business is to be carried on, is a valid exercise of the police power of the state and municipality, and not in contravention of the fourteenth amendment to the constitution of the United States, providing that no citizen shall be deprived of the equal protection of the laws.—*Crowley v. Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620, reversing order (*C. C.*) *In re Christensen*, 43 F. 243.

The New York statute imposing a franchise tax upon corporations doing business in the state (Laws 1880, c. 542, § 3, as amended by Laws 1885, c. 359) is not unconstitutional as denying to corporations organized under the laws of other states equal protection because it exempts from the tax corporations wholly engaged in manufacturing or mining within the state, since it makes no discrimination between domestic corporations and those of other states in that regard.—*People of State of New York ex rel. Parke, Davis & Co. v. Roberts*, 19 S. Ct. 58, 70, 171 U. S. 658, 43 L. Ed. 323, affirming judgment 44 N. E. 1127, 149 N. Y. 608, which affirms 36 N. Y. S. 368, 91 Hun, 158.

An ordinance giving the mayor power to determine whether a person applying for a license to sell cigarettes has good character and reputation, and is a suitable person to be intrusted with their sale, but requiring him to grant a license to every person fulfilling these conditions, does not vest in him any arbitrary power to grant or refuse a license, in violation of the provisions of Const. Amend. art. 14, in regard to the clause requiring equal protection of the laws. Judgment 52 N. E. 44, 176 Ill. 340, affirmed.—*Gundling v. City of Chicago*, 20 S. Ct. 633, 177 U. S. 183, 44 L. Ed. 725.

A manufacturer engaged in the business of refining sugar is not denied the equal protection of the laws because of the discrimination made by Const. La. 1879, art. 206, imposing a license tax upon manufacturers engaged in such business, but exempting from the tax those who refine the products of their own plantations. Judgment, *State v. American Sugar-Refining Co.*, 25 So. 447, 51 La. Ann. 562, affirmed.—*American Sugar-Refining Co. v. State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102.

A discrimination against persons engaged in the business of emigrant agents hiring persons to labor outside the state, by a statute which imposes a license tax upon them, but not upon persons engaged in hiring laborers to work within the state, is not unconstitutional as a denial of the equal protection of the laws. Judgment, 35 S. E. 699, 110 Ga. 584, 50 L. R. A. 685, affirmed.—*Williams v. Fears*, 21 S. Ct. 128, 179 U. S. 270, 45 L. Ed. 186.

The classification of elevators and warehouses on a railroad right of way or depot grounds, and other lands used in connection with the railway at stations and sidings other than at terminal points, as made by Gen. Laws Minn. 1895, p. 313, c. 148, requiring a license for such elevators and warehouses, does not deny to the proprietors the equal protection of the laws because a license is not required for elevators and warehouses differently situated. Judgment, *State v. W. W. Cargill Co.*, 79 N. W. 962, 77 Minn. 223, affirmed.—*W. W. Cargill Co. v. State of Minnesota*, 21 S. Ct. 423, 180 U. S. 452, 45 L. Ed. 619.

An ordinance imposing a license tax upon the merchants of a city, by which they are divided into classes according to the amount of their sales, each class including all whose sales range between a certain minimum and maximum amount, does not violate the equality clause of Const. U. S. Amend. art. 14, although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amounts of their sales differ.—*Clark v. City of Titusville*, 22 S. Ct. 382, 184 U. S. 329, 46 L. Ed. 569.

No unconstitutional discrimination is made by imposing the Tennessee merchants' tax on a corporation dealing only in goods manufactured from the produce of other states, because of the provision of Const. Tenn. art. 2, § 30, that "no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees," where the highest court of the state has held that this provision refers only to a direct levy of taxation upon articles manufactured from the produce of the state, and that the merchants' tax applies equally to all merchants. Judgment, 75 S. W. 1037, 110 Tenn. 524, 100 Am. St. Rep. 814, affirmed.—*American Steel & Wire Co. v. Speed*, 24 S. Ct. 365, 192 U. S. 500, 48 L. Ed. 538.

The equal protection of the laws is not denied a retail tobacco dealer by the tax imposed on cigarette selling by Code Iowa, § 5007, because sales by jobbers and wholesalers, in doing an interstate business with customers outside of the state, are excepted from its provi-

sion. Judgment, 93 N. W. 372, 119 Iowa, 584, 104 Am. St. Rep. 283, affirmed.—*Cook v. Marshall County*, 25 S. Ct. 233, 196 U. S. 261, 49 L. Ed. 471.

The equal protection of the laws is not denied a managing agent of a nonresident meat-packing house by the imposition, under Act Ga. Dec. 21, 1900, of a license tax on the domestic business conducted by him, since such act applies to managing agents of both domestic and foreign houses. Judgment, 44 S. E. 854, 117 Ga. 969, affirmed.—*Kehrer v. Stewart*, 25 S. Ct. 403, 197 U. S. 60, 49 L. Ed. 663.

Meat-packing houses are not denied the equal protection of the laws by the tax imposed on their business by Pub. Laws N. C. 1903, c. 247, because houses packing vegetables and the like are not included in the same classification and subjected to the same tax. Judgment, *Lacy v. Armour Packing Co.*, 47 S. E. 53, 134 N. C. 567, affirmed.—*Armour Packing Co. v. Lacy*, 26 S. Ct. 232, 200 U. S. 228, 50 L. Ed. 451.

The equal protection of the laws is not denied a foreign meat-packing house by the tax imposed on its local business, under Pub. Laws N. C. 1903, c. 247, taxing "every meat-packing house doing business in this state," although, at the points where such local business is carried on, persons selling meat-packing house products, but not doing a meat-packing house business either in North Carolina or elsewhere, are not subjected to the tax.—Id.

Liquor sellers are not denied the equal protection of the laws because producers or manufacturers of domestic wines are exempted, by Rev. Civ. St. Tex. 1895, art. 5060i, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors. Judgment (Tex. Civ. App.) 85 S. W. 34, affirmed.—*Cox v. State of Texas*, 26 S. Ct. 671, 202 U. S. 446, 50 L. Ed. 1099.

Wholesale dealers in oils are not denied the equal protection of the laws by the occupation tax imposed upon such dealers by Gen. Laws Tex. 1906, c. 148, § 9, although no similar tax is exacted from wholesale dealers in other articles of merchandise, such as sugar, bacon, coal and iron. Judgment (1907) 103 S. W. 489, 100 Tex. 647, affirmed.—*Southwestern Oil Co. v. State of Texas*, 30 S. Ct. 496, 217 U. S. 114, 54 L. Ed. 688.

The license or occupation tax imposed upon the business of compounding, rectifying, adulterating, or blending distilled spirits by Act Ky. March 28, 1906 (Acts 1906, p. 549), is not invalid as denying the equal protection of the laws because no such tax is exacted from either resident or nonresident distillers who neither rectify, compound, adulterate, nor blend their products, nor from rectifiers and blenders of other states and countries who vend in the state untaxed rectified or blended spirits, in direct competition with the spirits of local rectifiers or blenders.—(1910) *Brown-Forman Co. v. Commonwealth of Kentucky*, 30 S. Ct. 578, 217 U. S. 563, 54 L. Ed. 883, affirming judgment *Brown-Forman Co. v. Same* (1907) 101 S. W. 321, 125 Ky. 402.

The exemption from the provisions of Code Pub. Gen. Laws Md. 1904, art. 43, § 83, for the registration of physicians, in favor of those physicians who were then practicing in the state, and had so practiced prior to January 1, 1898, and could prove by affidavit that within one year of said date they had treated at least 12 persons in their professional capacity, is not such an unreasonable and arbitrary classification as renders the statute invalid, as denying the equal protection of the laws, but is within the discretion vested in the Legislature in exercising the police power.—(1910) *Watson v. State of Maryland*, 30 S. Ct. 644, 218 U. S.

173, 54 L. Ed. 987, affirming judgment (1907) 66 A. 635, 105 Md. 650.

Resident physicians or assistant physicians at hospitals, and students on hospital or dispensary duty or in the office of physicians, physicians and surgeons from other states, or residing on the borders of a neighboring state, army and navy surgeons, chiropodists, midwives, and masseurs, could be exempted by Code Pub. Gen. Laws Md. 1904, art. 43, § 101, from the provisions of that article for the registration of physicians, without rendering the statute invalid as denying the equal protection of the laws.—Id.

No unconstitutional discrimination is made by exempting those private bankers in whose business the average amount of each sum received is not less than \$500, and those who give a bond in a specified amount, from the requirement of Laws N. Y. 1910, c. 348, that a license from the Comptroller be obtained by individuals or partnerships desiring to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose.—(1911) *Engel v. O'Malley*, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128, affirming decree (C. C. 1910) 182 F. 365.

Singling out the keeping of a place where corporate stocks and bonds, and grains, provisions, and other commodities are bought and sold, but not paid for or delivered at the time, as a proper business for the imposition of a stamp tax upon such sales, as is done by Act March 8, 1907 (Acts Mo. 1907, p. 392), does not make the statute invalid, as denying the equal protection of the laws.—(1911) *Broadnax v. State of Missouri*, 31 S. Ct. 238, 219 U. S. 285, 55 L. Ed. 219, affirming judgment *State v. Broadnax* (1910) 128 S. W. 177, 228 Mo. 25.

Exempting steam laundries and women in the laundry business where not more than two women are employed from license tax imposed by Rev. Codes Mont. § 2776, on the laundry business, does not deny equal protection of the laws to a man operating a laundry.—(1912) *Quong Wing v. Kirkendall*, 32 S. Ct. 192, 223 U. S. 59, 56 L. Ed. 350, affirming judgment (1909) 101 P. 250, 39 Mont. 64.

Distinction between gratuitous medical services and those paid for, provided by Laws Tex. 1907, c. 123, relating to registration and licensing medical practitioners charging compensation, does not render statute repugnant to the federal Constitution.—(1912) *Collins v. State of Texas*, 32 S. Ct. 286, 223 U. S. 288, 56 L. Ed. 439, affirming judgment (1909) *Ex parte Collins*, 121 S. W. 501, 57 Tex. Cr. R. 2.

The discrimination between the district of Honolulu and other districts in the amount of fee imposed by Rev. Laws Hawaii, § 1343, for license to sell at auction, is not so unreasonable as to deny the equal protection of the laws.—*Toyota v. Territory of Hawaii*, 33 S. Ct. 47, 226 U. S. 184, 57 L. Ed. 180.

A scheme of an ordinance for licensing occupations, defining the occupations to be taxed and prescribing a maximum and minimum tax, dependent on the classification into thirteen classes, made by the finance committee of a common council after hearing does not show a denial of equal protection of the laws.—*Bradley v. City of Richmond*, 33 S. Ct. 318, 227 U. S. 477, 57 L. Ed. 603, affirming judgment 66 S. E. 872, 110 Va. 521.

Grading of a municipal license fee for theaters according to the price asked for the highest price seats, rather than according to revenue, does not offend against the guaranty of Const. U. S. Amend. 14, of the equal protection of the laws.—*Metropolis Theater Co. v. City of Chicago*, 33 S. Ct. 441, 228 U. S. 61, 57 L. Ed. 730, affirming judgment 92 N. E. 597, 246 Ill. 20.

The exemption of merchants selling sewing machines at their regular places of business from the license tax imposed by Act Ala. March 31, 1911 (Laws 1911, p. 180) §§ 32, 33f, on the business of selling sewing machines, does not deny equal protection of the laws guaranteed by Const. U. S. Amend. 14, as making an arbitrary discrimination.—*Singer Sewing Mach. Co. v. Brickell*, 34 S. Ct. 493, 233 U. S. 304, 58 L. Ed. 974.

A license tax of one cent per pound sold for carrying on the business of selling oleomargarine does not deny the equal protection of the law guaranteed by Const. U. S. Amend. 14, because discriminating between oleomargarine and butter, though the tax is assumed by the state courts to be a revenue measure.—*Hammond Packing Co. v. State of Montana*, 34 S. Ct. 596, 233 U. S. 331, 58 L. Ed. 985, affirming judgment *State v. Hammond Packing Co.*, 123 P. 407, 45 Mont. 345.

Laws Fla. 1913, c. 6421, § 35, imposing an additional license tax on business of selling goods accompanied by coupons, etc., redeemable in premiums, held not to deny the equal protection of the laws in violation of the federal Constitution.—*Rast v. Van Deman & Lewis Co.*, 36 S. Ct. 370, 240 U. S. 342, 60 L. Ed. 679, reversing order *Van Deman & Lewis Co. v. Rast*, 214 F. 827; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

Laws Wash. 1913, c. 134, imposing license tax upon merchants using stamps, etc., redeemable in cash or merchandise, held not repugnant to equal protection clause of Const. Amend. 14, whether stamps are prepared or redeemed by the merchant or by a third party.—*Tanner v. Little*, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree *Little v. Tanner*, 208 F. 605; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Mich. 690.

231. Local improvements.

See 10 Cent. Dig. Const. Law, § 636.

232. — In general.

See 10 Cent. Dig. Const. Law, § 636.

The equal protection of the laws is not denied nonresident owners of property liable to taxation for a proposed public improvement by Rev. St. Mo. 1899, § 5989, providing that the improvement is not to be made if a majority of the resident owners of the property liable to taxation thereof shall file with the city clerk a protest against such improvement, though no such privilege of protest is afforded nonresident owners, where there is no discrimination among property owners in taxing for the improvement. Decree (C. C.) 117 F. 925, modified.—*Field v. Barber Asphalt Pav. Co.*, 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

A charter amendment dealing with the municipal construction and operation of a water plant with reference to the acquisition of the existing privately owned plant held not to deny the equal protection of the laws to the waterworks company whose franchise had expired, because it cuts off all opportunity to obtain future franchises to occupy the streets and supply water to the city, while leaving full opportunity to obtain such franchises for other purposes.—*City and County of Denver v. New York Trust Co.*, 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

233. — Assessments and special taxes.

See 10 Cent. Dig. Const. Law, § 636.

Act Ky. March 24, 1882, giving the city of Louisville control of its streets, with power

to construct and reconstruct them, and to make assessments therefor on the adjoining lots, and creating a lien therefor, payment to be enforced by proceedings in court, is not in conflict with Const. U. S. Amend. 14, securing to all persons the equal protection of the laws.—*Walston v. Nevin*, 128 U. S. 578, 9 S. Ct. 192, 32 L. Ed. 544, affirming *Nevin v. Rouch*, 86 Ky. 492, 5 S. W. 546.

Where a special assessment to pay for a particular work has been held to be illegal, a subsequent authority given to make a new special assessment to pay for the completed work is not violative of Const. U. S. Amend. art. 14, prohibiting any state denying to any person within its jurisdiction the equal protection of the laws. Judgment, *Cummings v. West Chicago Park Com'rs*, 54 N. E. 941, 181 Ill. 136, affirmed.—*Lombard v. West Chicago Park Com'rs*, 21 S. Ct. 507, 181 U. S. 33, 45 L. Ed. 731.

A state statute under which three-fourths of the cost of paving a city street may be assessed upon abutting property in proportion to foot frontage, such assessment to be a lien thereon, is not obnoxious to the fourteenth amendment to the federal constitution. Judgment, *Kelly v. Chadwick*, 29 So. 295, 104 La. 719, affirmed.—*Chadwick v. Kelly*, 23 S. Ct. 175, 187 U. S. 540, 47 L. Ed. 293.

The equal protection of the laws guaranteed by the federal Constitution is not denied to a railway company by requiring it to stand the entire expense of removing and rebuilding its bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of Farm Drainage Act, Ill. July 1, 1885, to effect the drainage of low lands. Decree, 72 N. E. 219, 212 Ill. 103, affirmed.—*Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 26 S. Ct. 341, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175.

Nonresident owners of lands within the levee district created by Act Ark. Feb. 15, 1893, p. 31, are not denied the equal protection of the laws because section 11 of that act, as amended in Act Ark. April 2, 1895, p. 88, § 1, while requiring personal service of summons upon resident owners or occupants for at least 20 days before rendering a decree of sale for unpaid levee taxes, provides for constructive service by publication upon nonresident owners of only 4 weeks. Decree (1905) 85 S. W. 252, 74 Ark. 174, affirmed.—*Ballard v. Hunter*, 27 S. Ct. 261, 204 U. S. 241, 51 L. Ed. 461.

An owner of property lying directly back of property abutting on a street improvement cannot claim to be denied the equal protection of the laws guaranteed by Const. U. S. Amend. 14, on the theory that the hearing afforded him does not, as in the case of abutting owners, give him an opportunity to be heard as to the amount of the assessment against his property, where the amount of such assessment is the same as the assessment against the abutting property, and measures the contingent liability to which the back-lying property may be subjected if the abutting property, which is made primarily liable, fails to satisfy the assessment. Judgment (1905) 74 N. E. 260, 38 Ind. App. 226, affirmed.—*Cleveland, C. & St. L. Ry. Co. v. Porter*, 28 S. Ct. 647, 210 U. S. 177, 52 L. Ed. 1012.

The equal protection of the law is not denied to the owner of property lying directly back of property abutting on a street improvement by a law creating a taxing district of the property along the line of the improvement and extending back therefrom 150 feet and providing that property 50 or more feet distant from the street and within 150 feet therefrom shall be liable if the abutting 50 feet which are primarily liable prove insufficient to pay the cost of the improvements.—*Id.*

The distinction between resident and non-resident owners of abutting property in Act

May 19, 1896, 29 Stat. 125, c. 206, creating a drainage system for the District of Columbia, in that the coercion of the law as to making connections with a sewer is by criminal punishment in the case of residents, whereas, against nonresident owners, the district does the work in case of their neglect, and assesses the cost against the property as a tax, does not invalidate the statute for discrimination, even if Congress cannot enact discriminating legislation. Judgment (1907) 29 App. D. C. 563, reversed.—*District of Columbia v. Brooke*, 29 S. Ct. 560, 214 U. S. 138, 53 L. Ed. 941.

Lessees of state tidelands are not denied the equal protection of the laws contrary to the fourteenth amendment, by state statutes authorizing the assessment of such leaseholds for local improvements.—*Trimble v. City of Seattle*, 34 S. Ct. 218, 231 U. S. 683, 58 L. Ed. 435, affirming judgment 116 P. 647, 64 Wash. 102.

Municipal ordinance establishing a tax district where boundary line after running on a line not 100 feet back from the street jumped 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet or 240 feet away, violates Const. Amend. 14.—*Gast Realty & Investment Co. v. Schneider Granite Co.*, 36 S. Ct. 254, 240 U. S. 55, 60 L. Ed. 523, reversing judgment *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 168 S. W. 687, 259 Mo. 153, and rehearing denied *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 36 S. Ct. 400, 240 U. S. 55, 60 L. Ed. 526.

Equal protection of the laws is not denied owners of property assessed in curative proceedings without opportunity to be heard as to amount of awards to the owners of property condemned.—*St. Louis & Kansas City Land Co. v. Kansas City*, 36 S. Ct. 647, 241 U. S. 419, 60 L. Ed. 1072, affirming judgment *Kansas City v. St. Louis & Kansas City Land Co.*, 169 S. W. 62, 260 Mo. 395.

235. Regulation of use of streets and other highways.

See 10 Cent. Dig. Const. Law, § 683.

Comp. Laws Utah, § 2087, making any one who drives a herd of horses, mules, asses, cattle, sheep, goats, or swine over a public highway constructed on a hillside liable for damages by such animals in destroying the banks, or rolling rocks into the highway, does not deny to such person the equal protection of the laws.—*Jones v. Brim*, 17 S. Ct. 282, 165 U. S. 180, 41 L. Ed. 677.

An ordinance prohibiting the moving of any building upon or across the streets without the written permission of the mayor or president of the city council, or, in their absence, of a councilor, is not a denial of the equal protection of the law.—*Wilson v. Eureka City*, 19 S. Ct. 317, 173 U. S. 32, 43 L. Ed. 603.

The equal protection of the laws is not denied to a stage coach company by a municipal ordinance prohibiting the use of advertising trucks, vans, or wagons in the city streets, because "ordinary business wagons" when "engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising," are expressly permitted to exhibit "business notices," nor because advertising is allowed on the stairs of the elevated railways and on elevated structures.—(1911) *Fifth Ave. Coach Co. v. City of New York*, 31 S. Ct. 709, 221 U. S. 467, 55 L. Ed. 815, affirming decree (1909) 86 N. E. 824, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 16 A. & E. Ann. Cas. 695, which affirms (1908) 110 N. Y. S. 1037, which affirms (1908) 111 N. Y. S. 759.

237. Regulation of keeping and use of animals.

A municipal ordinance, adopted under legislative authority, forbidding the establishment or maintenance of a dairy or cow stable within

the city limits without having received permission so to do from the municipal assembly by a proper ordinance, is not a denial of the equal protection of the laws.—*Fischer v. City of St. Louis*, 24 S. Ct. 673, 194 U. S. 361, 48 L. Ed. 1018, affirming judgment *City of St. Louis v. Fisher*, 87 S. W. 872, 187 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614; *Scheff v. Same*, 24 S. Ct. 676, 194 U. S. 373, 48 L. Ed. 1024, affirming judgment *City of St. Louis v. Scheff*, 67 S. W. 1100, 187 Mo. 666.

An arbitrary and unreasonable discrimination against the sheep industry, prohibited by the guaranty in Const. U. S. Amend. 14, of the equal protection of the laws, is not made by Rev. St. Idaho, §§ 1210, 1211, under which damages may be recovered from one who permits his sheep to graze on the public domain within two miles of a dwelling house.—*Bacon v. Walker*, 27 S. Ct. 289, 204 U. S. 311, 51 L. Ed. 490, affirming judgment *Walker v. Bacon* (Idaho, 1905) 81 P. 155; *Bown v. Walling*, 27 S. Ct. 292, 204 U. S. 320, 51 L. Ed. 503, affirming judgment *Walling v. Bown* (1904) 76 P. 318, 9 Idaho, 740.

238. Occupation and employment in general.

See 10 Cent. Dig. Const. Law, §§ 688-690, 695, 706-708.

The ordinances of the city of San Francisco give the board of supervisors authority, at their discretion, to refuse permission to carry on laundries, except where located in buildings of brick or stone. The appellants applied for and were refused permission, and thereafter they were convicted of a violation of the above ordinances, and sentenced to imprisonment. *Held*, that the ordinances were unconstitutional and invalid; it being a breach of the fourteenth amendment to the constitution to empower any man, or body of men, at his or their absolute and unrestrained discretion, to give or withhold permission to carry on a lawful business in any place.—*Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

The Utah statute forbidding the employment of workmen for more than eight hours a day in mines, and in the smelting, reduction, or refining of ores or metals, is not a denial of due process of law or the equal protection of the laws.—*Holden v. Hardy*, 18 S. Ct. 383, 169 U. S. 366, 42 L. Ed. 780.

The proviso that keeping a barber shop open on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity, which follows the exception as to works of necessity or charity, in Gen. St. Minn. 1894, § 6513, prohibiting Sunday labor, does not make a purely arbitrary classification in conflict with the federal constitution, but is within the limits of the legislative police power. Judgment, *State of Minnesota v. Petit*, 77 N. W. 225, 74 Minn. 376, affirmed.—*Petit v. State of Minnesota*, 20 S. Ct. 666, 177 U. S. 164, 44 L. Ed. 716.

The equal protection of the laws is not denied to a contractor for a public work or his employes by the provisions of Gen. St. Kan. 1901, §§ 3827-3829, making it a criminal offense for such contractor to permit or require an employe to perform labor upon the work in excess of eight hours each day. Judgment, *State v. Atkin*, 67 P. 519, 64 Kan. 174, 97 Am. St. Rep. 348, affirmed.—*Atkin v. State of Kansas*, 24 S. Ct. 124, 191 U. S. 207, 48 L. Ed. 148.

The exemption of coal mines not employing 10 or more men from the operation of Acts Ark. 1906, p. 558, c. 219, § 1, under which miners employed at quantity rates are prevented from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine, does not render such statute invalid under Const. U. S.

Amend. 14, as denying the equal protection of the laws. Judgment (1906) 98 S. W. 729, 81 Ark. 304, affirmed.—*McLean v. State of Arkansas*, 29 S. Ct. 206, 211 U. S. 539, 53 L. Ed. 315.

The prohibition of employment of children under age of 16 in hazardous occupations by Laws Ill. 1903, p. 187, is not a violation of the guaranty in Const. U. S. Amend. 14, for the equal protection of the laws.—*Sturges & Burn Mfg. Co. v. Beauchamp*, 34 S. Ct. 60, 231 U. S. 320, 58 L. Ed. 245, L. R. A. 1915A, 1196, affirming judgment *Beauchamp v. Sturges & Burn Mfg. Co.*, 95 N. E. 204, 250 Ill. 303.

Including hotels among the specified establishments in which, under St. Cal. 1911, p. 437, women may not be employed for more than 8 hours a day or 48 hours a week, does not render the statute discriminatory.—*Miller v. Wilson*, 35 S. Ct. 342, 236 U. S. 373, 59 L. Ed. 628, L. R. A. 1915F, 829, affirming judgment *Ex parte Miller*, 124 P. 427, 162 Cal. 687.

Exempting women harvesting or canning perishable fruit or vegetables from operation of St. Cal. 1911, p. 437, does not render the statute unreasonably discriminatory.—*Id.*

The state may forbid women employed in hotels from working more than certain hours, as is done by St. Cal. 1911, p. 437, without imposing similar restrictions on boarding houses, etc., of employes as stenographers, or assistants in professional classes, and domestic servants.—*Id.*

Exempting graduate nurses in hospitals from operation of St. Cal. 1911, p. 437, as amended by St. Cal. 1913, p. 713, does not render the statute invalid as unreasonably discriminatory.—*Bosley v. McLaughlin*, 35 S. Ct. 345, 236 U. S. 385, 59 L. Ed. 632.

The state may forbid women employed in hospitals from working longer than certain hours, as is done by St. Cal. 1911, p. 437, as amended by St. Cal. 1913, p. 713, without imposing similar restrictions on women in similar employments elsewhere.—*Id.*

Equal protection of the laws is not denied by Act Ind. March 8, 1907 (Laws 1907, c. 121), requiring owners of coal mines and other similar places to provide suitable washhouses for employes on request.—*Booth v. State of Indiana*, 35 S. Ct. 617, 237 U. S. 391, 59 L. Ed. 1011, affirming judgment 100 N. E. 563, 179 Ind. 405.

Equal protection of the laws is not denied contrary to Const. U. S. Amend. 14, by Consol. Laws N. Y. c. 31, § 14, providing that only citizens can be employed in public works and that citizens of New York must be given preference.—*Heim v. McCall*, 36 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 206, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

239. Prohibition of trade or business.

See 10 Cent. Dig. Const. Law, §§ 694, 696.

A city ordinance prohibiting, within defined limits, washing and ironing in public laundries between 10 p. m. and 6 a. m., is not unconstitutional, as denying to any person the equal protection of the laws.—*Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

An ordinance, prohibiting the carrying on of a laundry business within certain designated limits in a city, between the hours of 10 o'clock at night and 6 in the morning, cannot be objected to because persons engaged in other lines of business are not required to cease from their labors during the same hours at night.—*Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145.

The equal protection of the laws is not denied an Ohio corporation, engaged in the manu-

facture and sale of oleomargarine within the state of Ohio, by the statutes of that state forbidding the manufacture or sale of any oleomargarine which contains any coloring matter, although by the Ohio statutes harmless coloring matter may be used in butter. Judgment *State v. Capital City Dairy Co.*, 57 N. E. 62, 62 Ohio St. 350, 57 L. R. A. 181, affirmed.—*Capital City Dairy Co. v. State of Ohio*, 22 S. Ct. 120, 183 U. S. 238, 46 L. Ed. 171.

The equal protection of the laws is not denied by Const. Cal. art. 4, § 26, avoiding all contracts for the sale of shares of corporate stock on margin, because this provision strikes only at some, and not all, objects of possible speculation. Judgment, *Parker v. Otis*, 62 P. 571, 927, 130 Cal. 322, 92 Am. St. Rep. 56, affirmed.—*Otis v. Parker*, 23 S. Ct. 168, 187 U. S. 606, 47 L. Ed. 323.

A municipal ordinance prohibiting keeping of billiard or pool tables for hire does not deny equal protection of laws because hotel keepers may maintain them for their registered guests.—*Murphy v. People of State of California*, 32 S. Ct. 697, 225 U. S. 623, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153.

Prohibiting the sale by itinerant vendors of any drugs intended for the treatment of disease or injury under Act No. 49, of 1894, La., § 12, does not violate the equal protection of the law clause of the fourteenth amendment, although the sale by other persons is permitted.—*Baccus v. State of Louisiana*, 34 S. Ct. 439, 232 U. S. 334, 58 L. Ed. 627.

Sale of food preservatives containing boric acid may be forbidden, as is done by Hurd's Rev. St. Ill. 1913, c. 127b, §§ 8, 22, as construed by the state court, without denying the equal protection of the law.—*Price v. People of State of Illinois*, 35 S. Ct. 892, 238 U. S. 446, 59 L. Ed. 1400, affirming judgment *People v. Price*, 101 N. E. 196, 257 Ill. 587, Ann. Cas. 1914A, 1154.

240. Regulation of trade or business in general.

See 10 Cent. Dig. Const. Law, §§ 638, 692, 693, 697-699.

Act Pa. May 21, 1885, providing that no person shall manufacture out of any compound, other than that produced from unadulterated milk, any articles designed to take the place of butter or cheese, nor shall sell, or offer for sale, the same as an article of food, does not deny to any person the equal protection of the laws.—*Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253, affirming judgment 114 Pa. St. 265, 7 A. 913, 60 Am. Rep. 350.

The Texas law (2 Sayles' Civ. St. p. 124, art. 3226a, § 4), requiring an applicant for a liquor license to execute in advance a bond payable to the state, conditioned that he will not sell liquor to any person after having been notified by an officer or by certain relatives of such person not to do so, any of whom are authorized to sue on the bond in case of a breach, and further imposing a state and county occupation tax, and requiring payment of all taxes a year in advance, is not in conflict with the fourteenth amendment of the constitution of the United States, providing that no state shall deny any person the equal protection of the law.—*Giozza v. Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599.

A valued policy law of a state is not unconstitutional, as denying to persons within its jurisdiction the equal protection of its laws, because it applies only to the business of fire insurance. Judgment, *Daggs v. Orient Ins. Co.*, 38 S. W. 85, 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638, affirmed.—*Orient Ins. Co. of Hartford, Conn., v. Daggs*, 19 S. Ct. 281, 172 U. S. 557, 43 L. Ed. 552.

A discrimination in favor of agricultural products or live stock in the hands of the producer or raiser, made by the Illinois trust act of June 20, 1893, exempting them from the provisions which prohibit a recovery of the price of articles sold by any trust or combination formed in restraint of trade or competition in violation of that act, renders the act repugnant to the provisions of Const. U. S. Amend. art. 14, in respect to equal protection of the laws. Judgment, *Union Sewer Pipe Co. v. Connelly (C. C.)* 99 F. 354, affirmed.—*Connolly v. Union Sewer Pipe Co.*, 22 S. Ct. 431, 184 U. S. 540, 46 L. Ed. 679.

The fourteenth amendment to the federal Constitution is not violated by the provisions of Rev. St. Tex. art. 3395, which make a majority vote in favor of the prohibition of the liquor traffic in a county or precinct a bar to the resubmission of the question to the voters of any political subdivision thereof until after prohibition has been defeated at a subsequent election in the entire county or precinct, while the failure to carry prohibition in a county is no bar to the immediate resubmission of the question to the voters of its political subdivisions, and the corresponding failure in town or city is no bar to the immediate resubmission of the question to the voters of the larger territory. Judgment (Cr. App.) 73 S. W. 15, affirmed.—*Ripley v. State of Texas*, 24 S. Ct. 516, 193 U. S. 504, 48 L. Ed. 767.

A state local option law does not deny a retail liquor dealer the equal protection of the laws because it excepts from its operation druggists, manufacturers, persons who give away liquors in their private dwellings, and railway corporations dispensing liquors in dining and buffet cars under state license. Judgment 70 N. E. 1131, 68 Ohio St. 638, affirmed.—*State of Ohio ex rel. Lloyd v. Dollison*, 24 S. Ct. 703, 194 U. S. 445, 48 L. Ed. 1062.

A foreign corporation whose license to do business in Texas is sought to be forfeited by a suit brought under the anti-trust laws of that state cannot claim to be denied the equal protection of the laws, where the discriminatory features of the prior anti-trust laws have been removed by Act Tex. May 25, 1899, although they may still remain in the Revised Statutes of the state and in the Penal Code, under which certain excepted classes are exempted from indictment and punishment, while the corporation may be subject to both.—*National Cotton Oil Co. v. State of Texas*, 25 S. Ct. 379, 197 U. S. 115, 49 L. Ed. 689, affirming judgment (Civ. App.) 72 S. W. 615; *Southern Cotton Oil Co. v. Same*, 25 S. Ct. 383, 197 U. S. 134, 49 L. Ed. 696.

Insurance companies doing business in Iowa cannot claim to be deprived of their rights under Const. U. S. Amend. 14, by Code Iowa 1897, § 1754, making it unlawful for them or their officers, agents, or employes to make or enter into any combination or agreement relating to the rates to be charged, the amount of commissions to be allowed agents, or the manner of transacting their business within the state, in the absence of any judicial construction of such statute as having any other than the single object to insure competition. Decree (C. C.) *Greenwich Ins. Co. v. Carroll*, 125 F. 121, reversed.—*Carroll v. Greenwich Ins. Co. of New York*, 26 S. Ct. 66, 199 U. S. 401, 50 L. Ed. 246.

Singling out the milk business in the city of New York as a proper subject for regulation does not deny the equal protection of the laws, where all milk dealers in the city are equally affected by such regulation. Judgments 67 N. E. 913, 175 N. Y. 440, 108 Am. St. Rep. 781, and 80 N. Y. S. 1108, 81 App. Div. 128, affirmed.—*People of State of New York v. Van*

De Carr, 26 S. Ct. 144, 199 U. S. 552, 50 L. Ed. 305.

Nonproducing venders of milk are not denied the equal protection of the laws guaranteed by Const. U. S. Amend. 14, because they are not given the privilege accorded to producing venders of exempting themselves from actions or penalties for violation of the provisions of the New York agricultural law to prevent the sale of adulterated milk by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer. Judgment, *People v. St. John*, 70 N. E. 1104, 178 N. Y. 617, affirmed.—*St. John v. People of State of New York*, 26 S. Ct. 554, 201 U. S. 633, 50 L. Ed. 896, 5 Ann. Cas. 909.

A foreign life insurance company doing business in Missouri is not denied the equal protection of the laws by Rev. St. Mo. § 7890, which cuts off any defense by a life insurance company domestic or foreign, based upon the false and fraudulent statements in the application, unless the matter misrepresented, in the judgment of the jury, actually contributed to the death of the insured.—*Northwestern Nat. Life Ins. Co. v. Riggs*, 27 S. Ct. 126, 203 U. S. 243, 51 L. Ed. 168, 7 Ann. Cas. 1104.

The equal protection of the laws is not denied to a domestic corporation whose principal office and works are outside the state, by Acts W. Va. 1905, c. 39, requiring every foreign and nonresident domestic corporation to appoint the State Auditor to accept service of process, and exacting an annual fee of \$10 for his services.—*St. Mary's Franco-American Petroleum Co. v. State of West Virginia*, 27 S. Ct. 132, 203 U. S. 183, 51 L. Ed. 144.

The exception in favor of those engaged in the business of manufacturing or wholesale merchandising, made by Laws N. C. 1905, c. 533, § 7, enacted to prevent dealing in futures, does not make that act void, as repugnant to the equal protection of the law clause of Const. U. S. Amend. 14, where such section is interpreted by the highest state court simply as a declaration that the courts shall not so construe the act as to prevent persons thus engaged from buying and selling, for future delivery, the necessary commodities required in their ordinary business, and not as relieving them from the operation of the provisions of the first section of that act, prohibiting the carrying on of a "bucket shop" business, or from the prohibitions of Laws N. C. 1889, c. 221, concerning the making of gambling contracts for future delivery. Judgment, *State v. Gatewood* (1905) 51 S. E. 53, 138 N. C. 749, affirmed.—*Gatewood v. State of North Carolina*, 27 S. Ct. 167, 203 U. S. 531, 51 L. Ed. 305.

The lessee in possession of a race course is not denied the equal protection of the laws by a state statute under which it is compelled to recognize its own tickets of admission in the hands of persons who are not at the time under the influence of liquor, or boisterous in conduct, or of lewd or immoral character, where the statute is applicable alike to all persons, corporations, or associations conducting places of public amusement or entertainment. Judgment, *Greenberg v. Western Turf Ass'n* (1905) 82 P. 684, 148 Cal. 126, affirmed.—*Western Turf Ass'n v. Greenberg*, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520.

The exemption of merchants and dealers who sell patented things in the usual course of business from the operation of Kirby's Ark. Dig. §§ 513-516, requiring a negotiable instrument taken in payment for a patented article to show on its face for what it was given or be void, does not render such statute repugnant to Const. U. S. Amend. 14, as denying the equal protection of the laws. Judgment (1906) 145 F. 344, 76 C. C. A. 218, 7 Ann. Cas. 390, re-

versed.—*Ozan Lumber Co. v. Union County Nat. Bank*, 28 S. Ct. 89, 207 U. S. 251, 52 L. Ed. 195.

Retail dealers are not denied the equal protection of the laws by Gen. St. Conn. 1902, §§ 4868, 4869, avoiding as against creditors sales by such dealers in bulk without notice of intention recorded seven days before its consummation, but such statute is a valid exercise of the police power. Judgment (1907) *Young v. Lemieux*, 65 A. 436, 79 Conn. 434, affirmed.—*Lemieux v. Young*, 29 S. Ct. 174, 211 U. S. 489, 53 L. Ed. 295.

Hotels, lodging houses, eating houses, bath-houses, physicians, masseurs, surgeons, or other medical practitioners, could be singled out by Act Ark. April 30, 1907 (Acts 1907, p. 553), as the business and professions to which should be made applicable the provisions of that statute forbidding the drumming or solicitation of business or patronage on railway trains and premises of common carriers, without making such statute invalid, as denying the equal protection of the laws to the business and professions mentioned. Judgment (1908) 108 S. W. 838, affirmed.—*Williams v. State of Arkansas*, 30 S. Ct. 483, 217 U. S. 79, 54 L. Ed. 673, 18 Ann. Cas. 865.

The Michigan sales in bulk act (Pub. Acts 1905, No. 223), avoiding, as against creditors, sales in bulk otherwise than in the regular course of business, unless an inventory is made at least five days before the sale, and the purchaser receives a list of the seller's creditors, and notifies them of the proposed sale personally, or by registered mail, at least five days before its consummation, and making a purchaser not conforming to the statute a receiver for the benefit of the seller's creditors, is a valid exercise of the police power, and does not deny the equal protection of the laws.—*Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 30 S. Ct. 606, 217 U. S. 461, 54 L. Ed. 839, affirming judgment, *Musselman Grocery Co. v. Kidd, Dater & Price Co.* (1908) 115 N. W. 409, 151 Mich. 478.

The equal protection of the laws is not denied telegraph companies and the persons with whom it does business by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state, although express companies and other common carriers may by contract limit their liability in this respect.—(1910) *Western Union Telegraph Co. v. Commercial Milling Co.*, 31 S. Ct. 59, 218 U. S. 406, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, affirming judgment (1908) *Commercial Milling Co. v. Western Union Telegraph Co.*, 115 N. W. 698, 151 Mich. 425.

An unconstitutional discrimination does not result from the preference of ordinary depositors over other creditors, given by a state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund.—(1910) *Assaria State Bank of Assaria v. Dolley*, 31 S. Ct. 189, 219 U. S. 121, 55 L. Ed. 123, affirming decree (C. C. 1909) *Larabee v. Dolley*, 175 F. 365, which is reversed (1910) *Dolley v. Abilene Nat. Bank of Abilene, Kan.*, 179 F. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065.

Unincorporated banks, and banks not having a surplus of 10 per cent., are not unconstitutionally discriminated against by excluding them from availing themselves of the privileges of a state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund.—*Id.*

Savings banks are not unconstitutionally discriminated against by making applicable to them alone the provisions of Laws Mass. 1907, c. 340, that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.—(1911) Provident Institution for Savings in Town of Boston v. Malone, 31 S. Ct. 661, 221 U. S. 660, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129, affirming judgment (1909) Malone v. Provident Institution for Savings in Boston, 86 N. E. 912, 201 Mass. 23.

Exempting national banks, and banks under the supervision of the bank commissioner, and certain loan companies, from the provisions of Laws Mass. 1908, c. 605, §§ 7, 8, making invalid against the employer assignments of, or orders for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by the written consent of the wife of the employé, does not deny the equal protection of the laws to an assignee not falling within one of the excepted classes.—(1911) Mutual Loan Co. v. Martell, 32 S. Ct. 74, 222 U. S. 225, 56 L. Ed. 175, Ann. Cas. 1913B, 529, affirming judgment (1909) 86 N. E. 916, 200 Mass. 482.

The exception in favor of existing contracts, contained in Laws Kan. 1907, c. 250, making it criminal to sell or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, does not make such statute repugnant to Const. U. S. Amend. 14, as denying the equal protection of the laws.—(1912) Williams v. Walsh, 32 S. Ct. 137, 222 U. S. 415, 56 L. Ed. 253, affirming order (1908) Ex parte Williams, 98 P. 777, 79 Kan. 212.

Junk dealers are not denied the equal protection of the laws by Laws N. Y. 1903, c. 326, amending Pen. Code, § 550, making it a criminal offense for a junk dealer to buy stolen materials belonging to railroad, telephone or electric light companies without diligent inquiry.—Rosenthal v. People of State of New York, 33 S. Ct. 27, 226 U. S. 260, 57 L. Ed. 212, Ann. Cas. 1914B, 71, affirming judgment People v. Rosenthal, 90 N. E. 991, 197 N. Y. 394.

A junk dealer cannot invoke the equal protection of the laws clause of the federal Constitution (Const. Amend. 14) to invalidate Laws N. Y. 1903, c. 326, amending Pen. Code, § 550, making it a criminal offense for a secondhand dealer to purchase materials belonging to a railroad, telephone or electric light company without diligent inquiry, because of failure of the Legislature to extend the provision of the act to same property owned by manufacturers of such equipment.—Id.

Equal protection of the laws held not denied to a vendor in an executory contract to be performed within the state for the sale of land in another state by applying, in an action for damages for refusal to perform; the provision of Laws Minn. 1897, c. 223, requiring 30 days' written notice to the vendee of an intent to cancel the contract.—Selover, Bates & Co. v. Walsh, 33 S. Ct. 69, 226 U. S. 112, 57 L. Ed. 146, affirming judgment Walsh v. Selover, Bates & Co., 123 N. W. 291, 109 Minn. 136.

National banks are not discriminated against by the Kansas bank depositors' guaranty law of March 6, 1909 (Laws 1909, c. 61), because national banks cannot avail themselves of the scheme while they remain national banks.—Abilene Nat. Bank v. Dolley, 33 S. Ct. 409, 228 U. S. 1, 57 L. Ed. 707.

Milk from cows outside the city held not unconstitutionally discriminated against by ordinance prohibiting shipment into the city, unless the cows have been subjected to the tubercu-

lin test and an official statement to that effect is filed with the health officer, while regulations forbidding sale of milk from sick or diseased cows within the city contemplate inspection by the health officer and application by him of test to determine whether the animal inspected is afflicted with tuberculosis.—Adams v. City of Milwaukee, 33 S. Ct. 610, 228 U. S. 572, 57 L. Ed. 971, affirming judgment 129 N. W. 518, 144 Wis. 371.

Requiring the inclosure of shafts in the floors of a building in the course of construction through which a hoist is operated to lift materials, as is done by Laws Ill. 1907, p. 312, § 7, held not to deny the equal protection of the laws because not requiring other uninclosed openings in the building to be guarded, or because in section 6 it distinguishes between buildings in cities and buildings in villages, and by sections 2 and 3 between houses used for private residences and other structures, as to the strength of the supports for joists.—Chicago Dock & Canal Co. v. Fraley, 33 S. Ct. 715, 228 U. S. 680, 57 L. Ed. 1022, affirming judgment Claffy v. Chicago Dock & Canal Co., 94 N. E. 551, 249 Ill. 210.

Permitting the sale of intoxicating liquors by druggists for medicinal and other specified purposes while forbidding its sale by merchants under Pub. Acts Mich. 1889, No. 207, § 15, does not deny the equal protection of the laws.—Eberle v. People of State of Michigan, 34 S. Ct. 464, 232 U. S. 700, 58 L. Ed. 903, affirming judgment People v. Eberle, 133 N. W. 519, 187 Mich. 477.

Exempting farmers' mutual insurance companies organized in the state and insuring only farm property, from regulation of fire insurance rates under Laws Kan. 1909, c. 152, does not deny to other insurance companies equal protection of the laws.—German Alliance Ins. Co. v. Lewis, 34 S. Ct. 612, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, affirming decree (C. C.) 189 F. 769.

Confining to manufacturers and vendors of articles the prohibitions of Rev. St. Mo. 1909, § 10301, and Rev. St. 1899, § 8966, against combinations to lessen competition and regulate prices, while permitting such combinations among purchasers, does not deny the equal protection of the laws, within Const. U. S. Amend. 14.—International Harvester Co. v. State of Missouri ex inf. Attorney General, 34 S. Ct. 859, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, affirming judgment State ex inf. Mayor v. International Harvester Co. of America, 141 S. W. 672, 237 Mo. 369.

Excluding combinations of wage-earners from statutory prohibitions against combinations to lessen competition and regulate prices, as is done by Rev. St. Mo. 1909, § 10301, and Rev. St. 1899, § 8966, does not render such legislation repugnant to Const. U. S. Amend. 14, as denying the equal protection of the laws.—Id.

A foreign insurance company having less than one-fourth of its reserve on South Carolina policies invested in South Carolina securities is not denied equal protection of laws, contrary to Const. U. S. Amend. 14, because state insurance commissioner, under Act S. C. March 8, 1910 (26 St. at Large, p. 774) § 13, has refused to accept bond of surety company unless it invests one-fourth of its reserve on South Carolina policies in South Carolina securities.—State of South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster, 35 S. Ct. 504, 237 U. S. 63, 59 L. Ed. 839, affirming judgment State ex rel. Phoenix Mut. Life Ins. Co. v. Same, 77 S. E. 401, 94 S. C. 379.

An ordinance passed under authority of the Legislature, making it unlawful to conduct a livery stable within a designated area, does not infringe on rights granted by the fourteenth amendment to the federal Constitution.—Rein-

man v. City of Little Rock, 35 S. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment City of Little Rock v. Reinman, 155 S. W. 105, 107 Ark. 174.

Requiring from officers of corporation an affidavit setting forth nonparticipation in trust combinations, under Rev. St. Mo. § 10322, does not deny equal protection of the laws because individuals, partnerships, and associations are not required to make such affidavits.—Mallinckrodt Chemical Works v. State of Missouri ex rel. Jones, 35 S. Ct. 671, 238 U. S. 41, 59 L. Ed. 1192, affirming judgment State ex rel. Jones v. Mallinckrodt Chemical Works, 156 S. W. 967, 249 Mo. 702.

Prohibiting by ordinance manufacture of brick within a designated area does not deny equal protection of the laws to owner of a brickyard within the prohibited district, where brickyards in other localities in the city are not shown to be regulated or prohibited.—Hada-check v. Sebastian, 36 S. Ct. 143, 230 U. S. 394, 60 L. Ed. 348, affirming judgment Ex parte Hadacheck, 132 P. 584, 165 Cal. 416.

Singling out hotels having more than 50 rooms as proper subjects for regulation of duty of hotel keepers towards guests in case of fire, as is done by Rev. St. Neb. 1913, § 3104, does not deny the innkeeper equal protection of the laws.—Miller v. Strahl, 36 S. Ct. 147, 239 U. S. 426, 60 L. Ed. 364, affirming judgment Strahl v. Miller, 151 N. W. 952, 97 Neb. 820.

Laws N. D. 1911, p. 355, singling out lard from other food products, and requiring sales thereof not in bulk to be put up in packages of specified weights, is not repugnant to Const. Amend. 14, as denying equal protection.—Armour & Co. v. State of North Dakota, 36 S. Ct. 440, 240 U. S. 510, 60 L. Ed. 771, affirming judgment State v. Armour & Co., 145 N. W. 1033, 27 N. D. 177.

Definition of business of "sugar refiner" by Act La. No. 10, of 1915, § 15, which subjects to drastic regulation such business, renders statute violative of equal protection of the laws clause of Const. U. S. Amend. 14.—McFarland v. American Sugar Refining Co., 36 S. Ct. 498, 241 U. S. 79, 60 L. Ed. 899, affirming decree (D. C.) American Sugar Refining Co. v. McFarland, 229 F. 284.

←241. Regulation of operation of railroads and other carriers.

See 10 Cent. Dig. Const. Law, §§ 700, 701.

Gen. St. S. C. 1882, c. 40, providing that the entire expenses of the railroad commission shall be borne by the several corporations owning or operating railroads within the state, is not in conflict with Const. U. S. Amend. 14, securing to every person the equal protection of the law.—Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 386, 12 S. Ct. 255, 35 L. Ed. 1051, affirming judgment 27 S. C. 385, 4 S. E. 49.

Pub. Acts Conn. 1889, c. 220, authorizing the railroad commissioners to order any railroad company, if in their opinion its financial condition will warrant, to remove a dangerous grade crossing, and allowing the entire expense to be imposed, in particular instances, on the railroad company, does not deny to it the equal protection of the laws, since the statute is applicable to all railroad corporations alike.—New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269, affirming judgment 62 Conn. 527, 26 Atl. 122.

A state statute forbidding the heating of passenger cars by stoves, on railroads of over 50 miles in length (Laws N. Y. 1887, c. 616), is not such a discrimination against roads of greater length as to amount to a denial of the equal protection of the laws.—New York, N. H.

& H. R. Co. v. People of the State of New York, 17 S. Ct. 418, 165 U. S. 628, 41 L. Ed. 853.

Where several railroad companies were using tracks passing under a viaduct in a city, some of them being lessees of the others under agreements the terms of which are not disclosed, it cannot be said that a statute and ordinances pursuant thereto imposing on the lessor companies the entire burden of keeping the viaduct in repair are a denial of the equal protection of the laws.—Chicago, B. & Q. R. Co. v. State of Nebraska, 18 S. Ct. 513, 170 U. S. 57, 42 L. Ed. 948.

An exception of a dummy railroad operated by steam, or of an electric railroad, from an ordinance limiting the speed of railroad trains within a city, does not make an arbitrary and unreasonable classification in denial of the equal protection of the laws. Judgment, 56 P. 133, 60 Kan. 251, affirmed.—Erb v. Morasch, 20 S. Ct. 819, 177 U. S. 584, 44 L. Ed. 897.

Equal protection of the law is not denied a street railway company by an order of the commissioner of railroads, made and issued under Pub. Acts Mich. 1893, No. 171, § 5, requiring such street railway company to pay one-half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad, which was not built until after the street railway has been constructed. Judgment, Detroit, Ft. W. & B. I. Ry. v. Commissioner of Railroads, 86 N. W. 842, 127 Mich. 219, 8 Detroit Leg. N. 343, 62 L. R. A. 149, affirmed.—Detroit, Ft. W. & B. I. Ry. v. Osborn, 23 S. Ct. 540, 189 U. S. 383, 47 L. Ed. 860.

An order of the North Carolina Corporation Commission, requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railroad Company, which afforded the principal means of travel between the eastern and western parts of the state, is not so arbitrary and unreasonable as to amount to a deprivation of the equal protection of the laws, if other connections are inadequate for the public conveyance, although compliance with the order may necessitate operating an extra train at a loss or extending with like result the run of the local train, so long as the income of the railroad company from its business in the state affords adequate remuneration. Judgment, North Carolina Corp. Commission v. Atlantic Coast Line R. Co. (1904) 49 S. E. 191, 137 N. C. 1, affirmed.—Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 27 S. Ct. 585, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398.

The exclusion of railroads less than 50 miles in length from the operation of Laws Ark. 1907, No. 116, prescribing a minimum of 3 brakemen for freight trains of more than 25 cars, does not deny to other railroads the equal protection of the laws.—(1911) Chicago, R. I. & P. Ry. Co. v. State of Arkansas, 31 S. Ct. 275, 219 U. S. 453, 55 L. Ed. 290, affirming judgment (1908) 111 S. W. 456, 86 Ark. 412.

The equal protection of the laws under Const. U. S. Amend. 14, is not denied to a carrier by an order of a state railroad commission requiring it to accept, without unloading, reshipments of coal in car load lots tendered in cars of other railway carriers.—Chicago, M. & St. P. Ry. Co. v. State of Iowa, 34 S. Ct. 592, 233 U. S. 334, 58 L. Ed. 988, affirming judgment State v. Chicago, M. & St. P. Ry. Co., 130 N. W. 802, 152 Iowa, 317.

The equal protection of the laws clause of Const. U. S. Amend. 14, is not infringed by Pub. Laws Ga. 1908, pp. 50, 51, requiring locomotives on the main line to be equipped with electric headlights, because the act may not

apply to receivers operating railways.—Atlantic Coast Line R. Co. v. State of Georgia, 34 S. Ct. 829, 234 U. S. 280, 58 L. Ed. 1312, affirming judgment 69 S. E. 725, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

Exceptions in favor of tram roads, mill roads, and roads engaged in transporting lumber or logging, in connection with mills, made by Pub. Laws Ga. 1908, pp. 50, 51, requiring railway locomotives on the main line to be equipped with electric headlights, do not render the statute repugnant to Const U. S. Amend. 14.—Id.

Equal protection of the laws is not denied by Laws Mo. 1907, p. 169, amending Rev. St. 1899, § 1110, requiring openings in rights of way to take care of surface water.—Chicago & A. R. Co. v. Tranbarger, 35 S. Ct. 678, 238 U. S. 67, 59 L. Ed. 1204, affirming judgment Tranbarger v. Chicago & A. R. Co., 156 S. W. 694, 250 Mo. 46.

A state statute forbidding the switching of cars over public crossings in cities of the first and second class with less than a specified number of employes is not violative of the equal protection clause of Const. Amend. 14, in that it exempts railways less than 100 miles in length.—St. Louis, I. M. & S. Ry. Co. v. State of Arkansas, 36 S. Ct. 443, 240 U. S. 518, 60 L. Ed. 776, affirming judgment 170 S. W. 580, 114 Ark. 486.

242. Regulation of charges or prices.
See 10 Cent. Dig. Const. Law, § 691.

Act Miss. March 11, 1884, establishing a commission charged with the duty of supervising railroads and authorized it to fix maximum rates for transportation, is not unconstitutional, as depriving a railroad company of the equal protection of the laws.—Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636.

Under Const. Ark. art. 17, § 10, giving the legislature the power to regulate fares and freights, a classification, by the legislature, of railroad rates in proportion to the length of the line of the road, if applied equally to all roads of the same class, does not violate the constitutional provision securing to all the equal protection of the laws.—Dow v. Beidelman, 125 U. S. 880, 8 S. Ct. 1028, 31 L. Ed. 841, affirming judgment 49 Ark. 325, 5 S. W. 297.

Laws N. Y. 1888, c. 581, fixes a maximum charge of five-eighths of a cent per bushel for elevating, receiving, weighing, and discharging grain, by means of floating or stationary elevators, in any city of the state containing a population of 130,000 or over. Held, that the fact that the operation of the act is limited to cities having a population of 130,000 or over does not render it unconstitutional, as denying the equal protection of the laws.—Budd v. People of State of New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247.

Laws N. D. 1891, c. 126, regulating public warehouses, prescribing maximum rates of charges for storing and handling grain therein, and requiring the grain stored to be insured at the expense of the warehouseman, is not a denial of the equal protection of the laws, even though applied to an elevator owner whose principal business is storing his own grain, the storage of grain for others being a mere incident in his business.—Brass v. State of North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, affirming judgment State v. Brass, 2 N. D. 482, 52 N. W. 408.

A statute reducing the tolls charged by a turnpike company below those prescribed by general statute for other turnpike companies in the state does not necessarily deny to it the equal protection of the laws.—Covington & L. Turnpike Road Co. v. Sandford, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 680.

The Nebraska law of April 12, 1893, to regulate railroads and fix maximum freight rates, is void as to the particular rates prescribed, as denying to the companies the equal protection of the laws.—Smyth v. Ames, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, affirming decree Ames v. Union Pac. Ry. Co. (C. C.) 64 F. 165.

A stock-yards company is denied the equal protection of the laws by Act Kan. March 3, 1897, which limits the amount of the charges to be made by that corporation, without limiting the charges to be made by other similar corporations doing a smaller amount of business, and without any reference to the character or value of the services rendered, although the statute is general in its terms, and is made applicable to any corporation doing business of a certain amount, and notwithstanding the fact that by virtue of the great amount of business done by the corporation affected by the statute it may make a reasonable income, since the statute makes a positive and direct discrimination between persons engaged in the same class of business, and bases it simply upon the quantity of business which each may do. Decree (C. C.) Cotting v. Kansas City Stockyards Co., 82 F. 850, reversed.—Cotting v. Godard, 22 S. Ct. 30, 183 U. S. 79, 46 L. Ed. 92.

The equal protection of the laws is not denied to a railroad company by Const. Ky. § 218, and Gen. St. Ky. 1894, § 820, which prohibit the companies from charging more for a shorter than for a longer haul, except by permission of the railroad commission in special cases after investigation. Judgment 51 S. W. 164, 1012, 106 Ky. 633, 21 Ky. Law Rep. 232, 90 Am. St. Rep. 236, affirmed.—Louisville & N. R. Co. v. Commonwealth of Kentucky, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

The reduction of water rates by a board of supervisors, acting under the authority of St. Cal. 1885, p. 95, § 5, so as to give an annual income of 6 per cent. on the then value of the property of the water company, used in supplying water to the public, does not necessarily amount to a denial of equal protection of the laws. Judgment (C. C.) San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County, 113 F. 930, reversed.—Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co., 24 S. Ct. 241, 192 U. S. 201, 48 L. Ed. 406.

Municipal regulation of the rates which a telephone company may charge, on a lower scale than those prescribed for a competitor, does not necessarily deny the equal protection of the laws, since such competitor may bring its patrons into communication with a larger number of persons, dwelling in a more widely-extended territory, and may render much more valuable service. Decree (C. C. 1907) 155 F. 554, affirmed.—Home Telephone & Telegraph Co. v. City of Los Angeles, 29 S. Ct. 50, 211 U. S. 265, 53 L. Ed. 176.

The exemption of banks or trust companies and bona fide mortgages from the operation of Conn. Pub. Acts 1907, c. 238, prohibiting the exacting of more than 15 per cent. interest on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, does not render such statute repugnant to the equal protection of the laws clause of the federal Constitution, but such classification has a reasonable basis.—Griffith v. State of Connecticut, 31 S. Ct. 132, 218 U. S. 563, 54 L. Ed. 1151; Id., 31 S. Ct. 134, 218 U. S. 572, 54 L. Ed. 1155. Affirming judgment State v. Griffith, 74 A. 1063, 83 Conn. 1.

Punishing the selling of goods at a lower rate at one place than in another, to destroy competition, as provided by Laws S. D. 1907, c. 131, does not deny the equal protection of the

laws.—*Central Lumber Co. v. State of South Dakota*, 33 S. Ct. 66, 226 U. S. 157, 57 L. Ed. 164, affirming judgment *State v. Central Lumber Co.*, 123 N. W. 504, 24 S. D. 136.

The exemption of any railroad in the state under 50 miles in length, not under the control of any other railroad over 50 miles in length, operated wholly or in part in the state, from the operation of Laws W. Va. 1907, c. 41 (Code Supp. 1909, c. 54, §§ 2496a1, 2496a2), fixing maximum rate for passengers at two cents per mile does not deny equal protection of the laws, where, as construed by the state courts, a railway under 50 miles in length controlled by a railway of greater length will be taken out of the exception when operated with a longer line.—*Chesapeake & O. R. Co. v. Conley*, 33 S. Ct. 985, 230 U. S. 513, 57 L. Ed. 1597.

The exception in favor of electric lines and street railways made by Laws W. Va. 1907, c. 41 (Code Supp. 1909, c. 54, §§ 2496a1, 2496a2), fixing maximum rates at two cents per mile, does not deny equal protection of the laws.—*Id.*

243. Creation or discharge of liability in general.

See 10 Cent. Dig. Const. Law, § 702.

Act Kan. 1874, providing that every railroad company shall be liable to its employés for injuries caused by mismanagement of its engineers or other employés, does not deny to a railroad company the equal protection of the laws.—*Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 S. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210, 8 S. Ct. 1176, 32 L. Ed. 109.

Code Iowa, § 1289, provides that any railway company that fails to fence its road, where the right to fence exists, shall be liable for the value of stock killed or injured by reason of the want of such fence, unless it was caused by the willful act of the owner; and that, if the company neglects to pay within 30 days after notice, the owner may recover double the value. *Held*, that the statute is not a denial of the equal protection of the law within the meaning of Const. U. S. Amend. 14, as that clause only requires that legislation shall treat alike all persons brought under subjection to it.—*Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 S. Ct. 207, 32 L. Ed. 585.

A state statute, which, as construed by the courts of the state, gives damages to a landowner for the expense and inconveniences of watching cattle to keep them from going upon a railroad track running through his land, which the company has failed to fence (Gen. Laws Minn. 1877, c. 73), is within the police power of the state, and is not subject to the inhibition of the fourteenth amendment to the federal Constitution, against depriving any person of the equal protection of the laws, even though, by the general law of the state, penalties and damages are given only for direct injuries sought to be prevented, and do not extend to consequential and possible resulting injuries.—*Minneapolis & St. L. Ry. Co. v. Emmons*, 149 U. S. 364, 13 S. Ct. 870, 37 L. Ed. 769; *Same v. Nelson*, 149 U. S. 368, 13 S. Ct. 871, 37 L. Ed. 772.

Restricting railway mail clerks and others whose employment in and about a railroad subjects them to greater peril than passengers in the strict sense to such right of action against the railway company for injuries received in the course of their employment as a railway employé would have under like circumstances is a reasonable classification, which sustains the provision of Act Pa. April 4, 1893, making it, as against the objection that such statute denies the equal protection of the laws. Judgment (1905) 76 N. E. 1129, 72 Ohio St. 659, affirmed.—*Martin v. Pittsburg & L. E. R. Co.*, 27 S. Ct.

100, 203 U. S. 284, 51 L. Ed. 184, 8 Ann. Cas. 87.

245. Imposition of liability for personal injuries.

See 10 Cent. Dig. Const. Law, § 702.

A statute making a railroad company liable to an employé injured by the negligent act of a fellow servant is not unconstitutional as a denial to such corporation of the equal protection of the laws, since there are peculiar hazards in the operation of a railroad.—*Tullis v. Lake Erie & W. R. Co.*, 20 S. Ct. 136, 175 U. S. 348, 44 L. Ed. 192.

Rev. St. 1899, § 2873, providing that every railroad corporation shall be liable for all damages sustained by any servant while engaged in the work of operating such road by reason of the negligence of any other agent or servant thereof, construed as including all servants whose work is directly necessary for the running of trains over the track, is not unconstitutional, as subjecting railroad companies to a liability to their employés not imposed on other persons or companies under similar conditions. Judgment, *Callahan v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 71 S. W. 208, 170 Mo. 473, 60 L. R. A. 249, 94 Am. St. Rep. 746, affirmed.—*St. Louis Merchants' Bridge Terminal Ry. Co. v. Callahan*, 24 S. Ct. 857, 194 U. S. 628, 48 L. Ed. 1157.

The equal protection of the laws is not denied by construing the proviso excepting cases of injuries sustained by railway employés "while engaged in the construction of a new road or any part thereof not open to public travel or use," from the provisions of Gen. St. Minn. 1894, § 2701, abrogating the fellow-servant rule, as only exempting incomplete railroads, and therefore as not excepting from the operation of the statute an accident on a narrow-gauge track on which dump cars were run by a mining company for the purpose of stripping the earth from the surface of its mine. Judgment, *Kline v. Minnesota Iron Co.*, 100 N. W. 681, 93 Minn. 63, affirmed.—*Minnesota Iron Co. v. Kline*, 26 S. Ct. 159, 199 U. S. 593, 50 L. Ed. 322.

The selection of mineowners as a class upon which to impose responsibility for the defaults of certain employes who are required by Mining Act Ill. April 18, 1899 (Laws 1899, p. 300), to be selected from those holding licenses issued by the state mining board created by that act, does not render such legislation repugnant to Const. U. S. Amend. 14, as denying the equal protection of the laws.—*Wilmington Star Min. Co. v. Fulton*, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

The modification of the fellow-servant rule as to railway employes, made by Act Ind. March 4, 1893 (Acts 1893, c. 130) § 1, does not offend against the equal protection of the laws clause of the federal Constitution because construed as applying to all employes doing work essential to enable the carrying on of railway operations, and not as limited to those engaged in or about the movement of trains, but such general classification of railway employes is a proper exercise of the police power.—*Louisville & N. R. Co. v. Melton*, 30 S. Ct. 676, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, affirming judgment 105 S. W. 366, 127 Ky. 276.

The abrogation of the fellow-servant rule as to railway employes, made by Code Miss. 1892, § 3559, does not offend against the equal protection of the laws clause of the federal Constitution because construed as applying to the foreman of a section crew charged with keeping the track in repair.—(1910) *Mobile, J. & K. C. R. Co. v. Turnipseed*, 31 S. Ct. 136, 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (N. S.)

S.) 226, Ann. Cas. 1912A, 463, affirming judgment *Same v. Hicks* (1908) 46 So. 360, 91 Miss. 273, 124 Am. St. Rep. 679.

An unconstitutional discrimination is not made by amending Code Iowa, § 2071, which defined the liability of railway corporations for injuries resulting from negligence or mismanagement in the use and operation of their railways, so that a railway company, when sued on such liability, may not raise the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief department, although this provision of the amendatory act applies only to those employees who were embraced within the provisions of the original statute, and to the enforcement of the particular liabilities which that statute defined, and the benefits of such statute were confined to those engaged in the hazardous business of operating railroads.—(1911) *Chicago, B. & Q. R. Co. v. McGuire*, 31 S. Ct. 259, 219 U. S. 549, 55 L. Ed. 328, affirming judgment *McGuire v. Chicago, B. & Q. R. Co.* (1908) 116 N. W. 801, 138 Iowa, 664.

Abolishing the fellow-servant rule as to corporations operating railroads within the state, as is done by Act Ark. March 8, 1907, p. 162, does not deny such a corporation the equal protection of the laws because the statute does not apply to individual employers.—(1911) *Aluminum Co. of America v. Ramsey*, 32 S. Ct. 76, 222 U. S. 251, 56 L. Ed. 185, affirming judgment (1909) 117 S. W. 568, 89 Ark. 522.

Railway companies are not denied the equal protection of the laws, by Comp. St. Neb. 1911, c. 21, § 4, under which contributory negligence of an injured train employé will not bar recovery, where it was slight and that of the company gross.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

The modification of the fellow-servant rule as to railway employees made by Laws Ind. 1893, c. 130, held not in contravention of the equal protection of the laws clause of Const. U. S. Amend. 14, because applying to any railway employé, where the highest courts of the state exclude employees not engaged in some service subject to the hazards incident to the movement of trains.—*Chicago, I. & L. R. Co. v. Hackett*, 33 S. Ct. 581, 228 U. S. 559, 57 L. Ed. 966, affirming judgment *Hackett v. Chicago, I. & L. R. Co.*, 170 Ill. App. 140.

Employers having five or more employees are not denied equal protection of the laws, because their failure to comply with Ohio Workmen's Compensation Act (Page & A. Gen. Code, § 1465—37 et seq.), by payments into a state insurance fund, deprives them in negligence suits of defenses of contributory negligence, assumed risk, and negligence of fellow servants, while those employing four or less employees can make either of these defenses.—*Jeffrey Mfg. Co. v. Blagg*, 35 S. Ct. 167, 235 U. S. 571, 59 L. Ed. 364.

Equal protection of the laws is not denied by construing Laws Wash. 1911, c. 74, as taking away under Rem. & Bal. Code, §§ 183, 194, the right to maintain action for wrongful death of an employé.—*Northern Pac. Ry. Co. v. Meese*, 36 S. Ct. 223, 239 U. S. 614, 60 L. Ed. 467, reversing judgment *Meese v. Northern Pac. Ry. Co.*, 211 F. 254, 127 C. C. A. 622.

246. Imposition of liability for injuries to property rights.

See 10 Cent. Dig. Const. Law, §§ 702, 709.

A statute making each company owning or operating a railroad within the state liable for property destroyed by fire from its locomotives does not deny to such companies the equal protection of the laws.—*St. Louis & S. F. R. Co. v. Mathews*, 17 S. Ct. 243, 165 U. S. 1, 41 L. Ed. 611.

A city is not denied the equal protection of the laws by Laws Ill. 1887, p. 237, imposing upon it a liability for damage to property within its limits, caused by a mob or riot, because, when property damaged under like circumstances is situated in a village or other incorporated town, the liability is imposed upon the county instead of upon such village or town.—*City of Chicago v. Sturges*, 32 S. Ct. 92, 222 U. S. 313, 56 L. Ed. 215, Ann. Cas. 1913B, 1349, affirming judgment *Sturges v. City of Chicago*, 86 N. E. 683, 237 Ill. 46.

247. Imposition of penalty or forfeiture.

See 10 Cent. Dig. Const. Law, § 703.

A statute providing that a railroad company failing to keep its track fenced as specified shall be liable in double the amount of all damages occasioned by injuries to stock going on the track, because of defects in the fences, cattle guards, etc., is not unconstitutional, as depriving the company of the equal protection of the laws.—*Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 S. Ct. 110, 29 L. Ed. 463; *Same v. Terry*, 115 U. S. 523, 6 S. Ct. 114, 29 L. Ed. 467.

Code Iowa, § 1289, authorizing a recovery against a railroad company of double the value of stock killed through the company's failure to fence as required by statute, where it fails to pay 30 days after notice of loss, is not a denial of equal protection of the law, within Const. U. S. Amend. 14.—*Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 S. Ct. 207, 32 L. Ed. 585.

The Texas statute, authorizing the recovery of damages and attorney's fees for failure by life and health insurance companies to pay losses, is not repugnant to the guaranty of the equal protection of the laws, made by the federal constitution.—*Fidelity Mut. Life Ass'n v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922; *Iowa Life Ins. Co. v. Lewis*, 23 S. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

The imposition upon railway companies alone, by St. Tex. 1901, c. 117, of the penalty therein given to contiguous landowners for allowing Johnson grass or Russian thistle to mature and go to seed, does not deny such railway companies the equal protection of the laws.—*Missouri, K. & T. Ry. Co. of Texas v. May*, 24 S. Ct. 638, 194 U. S. 267, 48 L. Ed. 971.

Common carriers are not denied the equal protection guaranteed by Const. U. S. Amend. 14, by the provisions of Act S. C. Feb. 23, 1903, p. 81, § 2, requiring them to adjust and pay every claim for loss or damage to an intrastate shipment within 40 days after the filing of a claim, under penalty of \$50 for each failure or refusal, where there can be no award of a penalty under the statute unless there is a recovery of the full amount claimed. Judgment, *Seegers Bros. v. Seaboard Air Line Ry.* (1905) 52 S. E. 797, 73 S. C. 71, affirmed.—*Seaboard Air Line Ry. v. Seegers*, 28 S. Ct. 28, 207 U. S. 73, 52 L. Ed. 108.

A statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

The possible invalidity as to individuals of the provisions of Act Ark. Jan. 23, 1905 (Acts 1905, p. 2) § 1, penalizing the doing of business within the state by members of a trust or combination to control prices, does not ren-

der such provisions invalid as to corporations, as denying the equal protection of the laws. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

An insurance company connected with a tariff association which fixes rates is not denied the equal protection of the laws by Code Ala. 1896, §§ 2619, 2620, under which the insured or beneficiary in a policy issued by such company may recover, in addition to the actual loss or damage, 25 per cent. of the amount of such actual loss or damage, since such statute places upon an equality in every respect all insurers which, at the time of issuing the insurance, or subsequently, and before trial, were in any way connected with any other persons, associations, or corporations which acted together in fixing insurance rates.—*German Alliance Ins. Co. v. Hale*, 31 S. Ct. 246, 219 U. S. 307, 55 L. Ed. 229.

A foreign corporation ousted and fined in quo warranto proceedings in the highest court of the state for misuser of its license was not denied equal protection of the laws because corporations prosecuted in inferior courts are entitled to trial by jury and can be subjected only to fine of \$100 per day while the combination continued.—(1912) *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 32 S. Ct. 406, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913D, 936, affirming judgment *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1.

Equal protection of the laws is not denied to a carrier by imposition, under Laws Miss. 1908, c. 196, of a penalty for failure to settle a claim for damages to an intrastate shipment within 60 days from the notice of the claim.—*Yazoo & Mississippi Val. R. Co. v. Jackson Vinegar Co.*, 33 S. Ct. 40, 226 U. S. 217, 57 L. Ed. 193.

An ordinance of a town by which owners of property abutting on any street along which sewer mains have been laid were required to connect with the main sewer under penalty does not deny equal protection of the laws.—*Hutchinson v. City of Valdosta*, 33 S. Ct. 290, 227 U. S. 308, 57 L. Ed. 520.

Singling out railway companies and subjecting them to double damages and attorneys' fees on refusal to pay for killing live stock within 30 days after demand, as is done by Laws Ark. 1907, p. 144, when litigants in general are not subject to the same burdens, does not deprive railway companies of the equal protection of the laws.—*Kansas City Southern Ry. Co. v. Anderson*, 34 S. Ct. 599, 233 U. S. 325, 58 L. Ed. 983, affirming judgment 149 S. W. 58, 104 Ark. 500.

A state statute imposing enormous penalties for violating orders of state railroad commission held violative of Const. U. S. Amend. 14, as denying equal protection of the laws though full hearing is accorded where resort to the courts may be had only at great risk.—*Wadley Southern Ry. Co. v. State of Georgia*, 35 S. Ct. 214, 235 U. S. 651, 59 L. Ed. 405, affirming judgment 73 S. E. 741, 137 Ga. 497.

Penalty of \$5,000 per day for violating orders of state railroad commission imposed by Civ. Code Ga. 1910, § 2667, does not deny equal protection of the laws contrary to Const. U. S. Amend. 14, where judicial review is accorded by Civ. Code Ga. 1910, § 2625.—*Id.*

Carrier failing to resort to remedy accorded by Civ. Code Ga. 1910, § 2625, for relief against order of railroad commission, but attacking validity of order when sued under section 2607, held not denied equal protection of the laws by

being compelled to pay the penalties imposed.—*Id.*

A penalty of from \$300 to \$600, imposed by the so-called Ohio "run-of-mine" or "anti-screen" law, for each separate violation of the act, is not so great as to render the statute a violation of the equal protection of the laws under Const. U. S. Amend. 14, by preventing resort to the courts to test constitutionality of the law.—*Rail & River Coal Co. v. Yapple*, 35 S. Ct. 359, 236 U. S. 338, 59 L. Ed. 607, affirming decree (D. C.) 214 F. 273.

Penalties prescribed by Laws Fla. 1913, c. 6421, § 35, for selling merchandise accompanied by coupons, etc., redeemable in premiums, without payment of license fee, held not so severe as to deny the equal protection of the laws by intimidating against a contest of the validity of the statute.—*Rast v. Van Deman & Lewis Co.*, 36 S. Ct. 370, 240 U. S. 342, 60 L. Ed. 679, reversing order *Van Deman & Lewis Co. v. Rast*, 214 F. 827; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

◀248. Imposition of liability for costs or fees.

See 10 Cent. Dig. Const. Law, § 703.

Gen. St. Kan. 1889, c. 82, § 326, providing that, when a prosecution was malicious, the prosecutor shall be adjudged to pay the costs, and committed to jail until they are paid, is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, and hence does not deny him the equal protection of the laws.—*Lowe v. State of Kansas*, 163 U. S. 81, 16 S. Ct. 1031, 41 L. Ed. 78.

Act Tex. April 5, 1889, providing that railroad companies failing to pay claims less than \$50 for labor, damages, overcharges on freight, or for stock killed, within 30 days after presentation thereof, shall be liable for an attorney's fee not exceeding \$10, is void as depriving such companies of the equal protection of the law.—*Gulf, C. & S. F. Ry. Co. v. Ellis*, 17 S. Ct. 255, 165 U. S. 150, 41 L. Ed. 666.

The provision of the Kansas statute (Sess. Laws 1885, p. 258, c. 155, §§ 1, 2), requiring a reasonable attorney's fee for the plaintiff to be allowed and made a part of the judgment on a recovery against a railroad company for damages from fire caused by the operating of its trains, is in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the escape of fire from their moving trains, which subjects the property of adjacent owners to peculiar hazard, and has a reasonable relation to the object sought to be accomplished, although the statute imposes no specific duty by way of precaution; and the provision is not in violation of the fourteenth constitutional amendment, as an arbitrary classification of suitors, which deprives those affected of the equal protection of the laws.—*Atchison, T. & S. F. R. Co. v. Matthews*, 19 S. Ct. 609, 174 U. S. 96, 43 L. Ed. 909.

The equal protection of the laws is not denied insurance companies by the provisions of Comp. St. Neb. c. 43, §§ 43-45, allowing a reasonable attorney's fee to plaintiff in case of the unsuccessful defense by an insurance company of a suit on a policy of insurance covering real property which has been totally destroyed by the causes insured against. Judgment, *Farmers' & Merchants' Ins. Co. v. Dabney*, 86 N. W. 1070, 62 Neb. 213, 97 Am. St. Rep. 624, affirmed.—*Farmers' & Merchants' Ins. Co. v. Dobney*, 23 S. Ct. 565, 189 U. S. 301, 47 L. Ed. 821.

There is no denial of the equal protection of the laws, contrary to Const. U. S. Amend. 14, in the provisions of Acts Tex. 31st Leg. c. 47, for allowance of reasonable attorney's fee to successful plaintiff, where attorney is actually employed on a claim not exceeding \$200 for labor done, or overcharges on freight, or claim for lost or damaged freight, as there is no classification of debtors, and the claims included are not so grouped as to bear on any class of citizens or corporations.—*Missouri, K. & T. Ry. Co. of Texas v. Cade*, 34 S. Ct. 678, 233 U. S. 642, 58 L. Ed. 1135.

That attorney's fees are allowed by Acts Tex. 31st Leg. c. 47, to successful plaintiffs only, and not to successful defendants, is not a denial of equal protection of the laws, contrary to Const. U. S. Amend. 14, if the classification is otherwise reasonable.—*Id.*

There is no denial of equal protection of the laws contrary to Const. U. S. Amend. 14, by Acts Tex. 31st Leg. c. 47, for the allowance of an attorney's fee of not over \$20 to the successful plaintiff in an action on a claim of a certain class not exceeding \$200 against persons or corporations doing business in the state, where the claim is not paid within 30 days after demand and the recovery is for the full amount claimed, as it makes no classification of debtors and the kind of claims cover a wide range.—*Missouri, K. & T. Ry. Co. of Texas v. Harris*, 34 S. Ct. 790, 234 U. S. 412, 58 L. Ed. 1377, L. R. A. 1915E, 942.

Attorneys' fees for services in mandamus proceedings may be awarded plaintiff under Gen. Stat. Kan. 1909, § 6319 (Code Civ. Proc. § 723), without denying defendant equal protection of the laws contrary to Const. Amend. 14, though no reciprocal right in case of success is given defendant.—*Missouri Pac. Ry. Co. v. Larabee*, 34 S. Ct. 979, 234 U. S. 459, 58 L. Ed. 1398, reversing judgment *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 116 P. 901, 85 Kan. 214.

Equal protection of the laws is denied railway companies by Laws Kan. 1905, c. 345, under which, as amended by Laws Kan. 1907, c. 275, an attorney's fee is allowed shipper who successfully sues a railroad for failure to furnish cars, while no such allowance is made in successful action by railroad in suit under such statute against a shipper failing to use the cars.—*Atchison, T. & S. F. Ry. Co. v. Vosburg*, 35 S. Ct. 675, 238 U. S. 56, 59 L. Ed. 1199, L. R. A. 1915E, 953, reversing judgment *Vosburg v. Atchison, T. & S. F. Ry. Co.*, 130 P. 667, 89 Kan. 114.

249. Civil remedies and proceedings.

See 10 Cent. Dig. Const. Law, § 710.

The supreme court of the United States is bound by the decisions of the supreme court of Illinois that no amendments of its record in derogation of its final judgment can be made after the expiration of the term; and, as this rule is applicable to all persons in the state, its enforcement against a particular person is not a denial by the state of the equal protection of its laws.—*Fielden v. People of State of Illinois*, 143 U. S. 452, 12 S. Ct. 528, 36 L. Ed. 224, affirming judgment 128 Ill. 595, 21 N. E. 584.

The action of a state court in allowing compensation to a property owner who is shut off from free access to a street by the building of a railroad along the street, and denying damages to one whose property is depreciated by the operation of a railroad running along the opposite side of the street on the railroad's own property, does not amount to a denial of the equal protection of the laws.—*Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751.

The requirement, in the fourteenth amendment, of equal protection of the laws, does not secure a right of jury trial in quo warranto proceedings in a state court to suspend or

remove a state officer.—*Wilson v. State of North Carolina*, 18 S. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

Error of the trial court, if such it be, in omitting to charge in respect to one of the elements of damage, in the absence of any request therefor, is merely an error in the administration of the law, and is not one which deprives the respondents of the equal protection of the laws.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

The right to the equal protection of the laws is not denied by a state court where the same course of procedure applied to the person in question would have been applied to any other person in the same state under similar circumstances.—*Tinsley v. Anderson*, 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91.

The provision of the Maryland constitution (article 4, § 39, as amended), authorizing the supreme bench of Baltimore city to provide, by its rules, for requiring causes in the courts of Baltimore city to be tried before the court without a jury unless the litigants, or some one of them, within a reasonable time to be prescribed, shall demand a jury trial, does not deny to litigants the equal protection of the laws, within the meaning of the fourteenth amendment to the federal constitution, though no such provision is made in respect to the courts of the other counties in the state.—*Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 19 S. Ct. 268, 172 U. S. 474, 43 L. Ed. 520.

A statute which requires plaintiff to give a bond as a prerequisite to the issuance of an attachment against a resident, but requires no bond where the attachment is against property of a nonresident, is not a denial of the equal protection of the law. Judgment 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

A nonresident mortgagee is not within the jurisdiction of the state merely because he has a mortgage on property therein, so as to be deprived of the equal protection of the laws in violation of Const. U. S. Amend. 14, by denying him the right to participate on terms of equality in the distribution of the assets of an insolvent foreign corporation.—*Sully v. American Nat. Bank*, 20 S. Ct. 935, 178 U. S. 289, 44 L. Ed. 1072.

A decree adjudging the charter of an alleged corporation to be void, in a suit brought against a corporation alone, without making its members parties, and enjoining the officers and stockholders from acting as a corporation, on the ground that the purpose for which it was formed is illegal, does not deny to the individual incorporators the equal protection of the laws, as a de facto corporation may be treated as such by the state and brought into court as a party defendant.—*New Orleans Debenture Redemption Co. of Louisiana v. State of Louisiana*, 21 S. Ct. 378, 180 U. S. 320, 45 L. Ed. 550.

The provision for a change of venue for local prejudice, which is made by Rev. St. Ohio, § 5030, where the opposite party is a corporation with more than 50 stockholders, having its principal office or transacting its principal business in the county in which the action is pending, without conferring an equivalent right on the corporation, does not violate the constitutional guaranty of the equal protection of the laws, where in both forums equality of law governs and equality of administration prevails. Judgment Street Ry. Co. v. Snell, 65 N. E. 1134, 66 Ohio St. 670, affirmed.—*Cincinnati St. Ry. Co. v. Snell*, 24 S. Ct. 319, 193 U. S. 30, 48 L. Ed. 604.

The remedy given by the Arkansas anti-trust act (Act Ark. Jan. 23, 1905 [Acts 1905,

p. 8] § 8), to secure the attendance of witnesses before a commission, and the production of books and papers in a proceeding under that act, does not deny the equal protection of the laws because it applies only to books and papers outside the state, or because, properly construed, it may be confined to corporations and joint-stock associations, and not extended to individuals. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—Hammond Packing Co. v. State of Arkansas, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

The equal protection of the laws is not denied by Code Miss. 1906, § 1985, under which, in actions against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars is made prima facie evidence of negligence.—(1910) Mobile, J. & K. C. R. Co. v. Turnipseed, 31 S. Ct. 136, 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, affirming judgment Same v. Hicks (1908) 46 So. 360, 91 Miss. 273, 124 Am. St. Rep. 679.

Making the engaging in pumping mineral waters from wells bored or drilled into the rock for the purpose of collecting and vending as a separate commodity the carbonic acid gas contained therein prima facie evidence of the common underground source of supply and of injury to other proprietors, as is done by Laws N. Y. 1908, c. 429, forbidding the pumping of the waters under such conditions, does not render the statute invalid, as infringing upon the guaranty in the federal Constitution of the equal protection of the laws.—(1911) Lindsley v. Natural Carbonic Gas Co., 31 S. Ct. 337, 220 U. S. 61, 55 L. Ed. 369, Ann. Cas. 1912C, 160, affirming decree (C. C. 1909) 170 F. 1023.

Constitutional rights are not invaded by the declaration in Act June 29, 1906, § 15, that taking up a permanent residence in a foreign country within five years after issuance of certificate of citizenship shall be prima facie evidence of lack of intent to become a permanent citizen, which shall be sufficient to warrant the cancellation of the certificate as fraudulent.—Luria v. United States, 34 S. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming decree (D. C.) United States v. Luria, 184 F. 643.

The equal protection of the laws is not denied by confining to Spanish and Mexican grants the provision of Comp. Laws N. M. 1865, c. 73, § 1 (Comp. Laws 1897, § 2937), under which ten years' possession under a deed purporting to convey a fee simple gives title in fee to the land specified, if, during the ten years, no claim by a suit effectually prosecuted has been set up.—Montoya v. Gonzales, 34 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment Same v. Unknown Heirs of Vigil, 120 P. 676, 16 N. M. 349.

An attachment by a foreign creditor of bonds of a foreign corporation for a debt of their nonresident owner does not deny the equal protection of the laws, guaranteed by Const. U. S. Amend. 14, where the bonds were deposited with a custodian under an order of the state court and could not be removed without the authority of the state court, though the bonds were registered in the names of the attachment creditor's minor children.—De Gallard de Brassac de Bearn v. Safe Deposit & Trust Co. of Baltimore, 34 S. Ct. 584, 233 U. S. 24, 58 L. Ed. 833.

The equal protection of the laws clause of Const. Amend. 14, invoked by tender of amended answers after remand to the trial court by the highest state court for a new trial, is not denied on a second appeal from the ruling of the trial court refusing to permit the filing of such amended answers, where the highest state court held that the facts on which the federal

rights were based had been concluded by the former decision in which no infraction of federal right was set up.—Louisville & N. R. Co. v. Higdon, 34 S. Ct. 948, 234 U. S. 592, 58 L. Ed. 1484, affirming judgment 148 S. W. 26, 149 Ky. 321.

A foreign corporation engaged in booking theatrical and vaudeville companies for a weekly fee and on a commission may be required to file its charter as a condition to its right to sue on a contract, and such a requirement is not a denial of the equal protection of the laws.—Interstate Amusement Co. v. Albert, 36 S. Ct. 168, 239 U. S. 560, 60 L. Ed. 439, affirming judgment 161 S. W. 488, 128 Tenn. 417.

A state cannot, consistently with equal protection of the laws (Const. Amend. 14) create, as is attempted by Act La. No. 10 of 1915, presumption of participation in forbidden monopoly by payment in the state by a refiner of a less price for sugar than he pays in any other state, or closing his refinery for more than one year.—McFarland v. American Sugar Refining Co., 36 S. Ct. 498, 241 U. S. 79, 60 L. Ed. 899, affirming decree American Sugar Refining Co. v. McFarland, 229 F. 284.

250. Criminal prosecutions.

See 10 Cent. Dig. Const. Law, §§ 711-713.

Rev. St. Mo. §§ 1900, 1902, providing that in capital cases, except in cities having a population of over 100,000 inhabitants, the state shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, does not deprive one indicted for murder in a city of over 100,000 inhabitants of the equal protection of the laws enjoined by the fourteenth amendment to the United States constitution.—Hayes v. State of Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578.

A statute allowing an accused person only five peremptory challenges in a case where a struck jury has been ordered, while twenty peremptory challenges are allowed in a trial before an ordinary jury, does not constitute a denial of the equal protection of the laws, where the same number of challenges is permitted, in all cases in which a struck jury is ordered.—Brown v. State of New Jersey, 20 S. Ct. 77, 175 U. S. 172, 44 L. Ed. 119.

The equal protection of the laws is not denied by a statute imposing a heavier penalty upon a person convicted of a felony if he has twice before been sentenced for crime to three years' imprisonment or more.—McDonald v. Commonwealth of Massachusetts, 21 S. Ct. 389, 180 U. S. 311, 45 L. Ed. 542.

The allowance of an appeal to the state from the court of one district, but not from another district, of the state, in case of the grant of a new trial to an accused person, is not a denial of the equal protection of the laws guaranteed by Const. U. S. Amend. 14. Judgment, State v. Mallett, 34 S. E. 651, 125 N. C. 718, affirmed.—Mallett v. State of North Carolina, 21 S. Ct. 730, 181 U. S. 589, 45 L. Ed. 1015.

The refusal of a state court to continue a criminal case on account of the absence of accused's witnesses, residing in another state, is not a denial of the equal protection of the laws secured by Const. U. S. Amend. art. 14, because it is not within the power of the state courts to compel the attendance of witnesses beyond the limits of the state, or because the taking and using of depositions of witnesses so situated in criminal cases on behalf of defendant is not provided for and may not be recognized in that state. Judgment 39 S. E. 284, 113 Ga. 772, affirmed.—Minder v. State of Geor-

gia. 22 S. Ct. 224, 183 U. S. 559, 46 L. Ed. 328.

The equal protection of the laws is not denied to two or three persons convicted of conspiracy to defraud, because their sentence was for 10 years' imprisonment, while that of their codefendant was for but 7 years. Writ of error, *State v. Howard*, 40 S. E. 71, 129 N. C. 584, dismissed.—*Howard v. Fleming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. Ed. 121.

Laws 28th Leg. p. 68, c. 50, § 3, which prohibits owners or lessees of property from permitting the same to be used as places for the sale of pools, book making, or wagering on horse races, even if construed so as to allow the owner of such premises to use them for the purpose for which he is forbidden to let others use them, is not in violation of Const. U. S. Amend. 14, guarantying equal protection of the laws, as the discrimination would be between classes, and not between members of a class. Judgment, *Ex parte Hernan* (Tex. Cr. App.) 77 S. W. 225, 45 Tex. Cr. R. 343, affirmed.—*Hernan v. State of Texas*, 25 S. Ct. 800, 198 U. S. 579, 49 L. Ed. 1171.

Litigants and persons accused of crime in Wayne county, Mich., are not denied the equal protection of the laws by Pub. Acts Mich. 1893, p. 337, as amended by Pub. Acts Mich. 1895, p. 69, under which the jury lists are made up and returned by a board or jury commissioners appointed by the Governor with the consent of the Senate, and may include persons whose names do not appear on the assessment roll, while, by the general laws of the state, the officers authorized to make and return the jury lists are elected by the people in their several townships and in city wards, and the jurors must be of those who are assessed on the assessment roll. Judgment, *People v. Gardner* 100 N. W. 126, 136 Mich. 693, 11 Detroit Leg. N. 166, affirmed.—*Gardner v. People of State of Michigan*, 26 S. Ct. 106, 199 U. S. 325, 50 L. Ed. 212.

The decision of the Kentucky court of appeals that a reversal of a conviction for the error, if any, committed by the trial court in discharging a juror, was precluded by Cr. Code Ky. § 281, does not deny the accused the equal protection of the laws secured by Const. U. S. Amend. 14, if such was the construction given that section by prior cases, and no discriminating application against him was made. Judgment 80 S. W. 211, 118 Ky. 1, 25 Ky. Law Rep. 2213, affirmed.—*Howard v. Commonwealth of Kentucky*, 26 S. Ct. 189, 200 U. S. 164, 50 L. Ed. 421.

The equal protection of the laws is not denied to manufacturers and sellers of mixed paints containing other ingredients than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, by a state statute which makes the manufacture and sale of such paints a misdemeanor unless the label shows the constituent ingredients and the quantity or amount of each, because the manufacture and sale of mixed paints containing only the ingredients specified in the statute, and, possibly, of all paste paints, are free from such consequence or condition.—*Heath & Milligan Mfg. Co. v. Worst*, 28 S. Ct. 114, 207 U. S. 338, 52 L. Ed. 236.

Corporations are not denied the equal protection of the laws secured by Const. U. S. Amend. 14, by the provisions of Act Vt. Oct. 9, 1906, p. 79, No. 75, under which corporations alone may be compelled to produce before a court or grand jury material books and papers in their custody or control. Judgment, *In re Consolidated Rendering Co.* (Vt. 1907) 66 A. 790, affirmed.—*Consolidated Rendering Co. v. State of Vermont*, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

Constitutional rights of the accused are not violated by Act March 2, 1907, c. 2564, 34 Stat.

1246 (U. S. Comp. St. Supp. 1907, p. 209), authorizing the United States to bring up a criminal case from a circuit court to the Supreme Court by a direct writ of error where an indictment has been quashed or set aside, or a demurrer to the indictment or any count thereof has been sustained on the ground of the invalidity or construction of the statute upon which the indictment was founded, although such statute does not allow the accused to bring up the case in the same way when a demurrer to the indictment or some count thereof has been overruled. Judgment (C. C. 1907) 155 F. 938, reversed.—*United States v. Bitty*, 28 S. Ct. 396, 208 U. S. 393, 52 L. Ed. 543.

A person indicted for a crime committed after the grand jury was impaneled is not denied the equal protection of the laws because he is precluded from raising the objection that two of the grand jurors were over the age fixed by Laws N. J. 1876, p. 360, c. 196, under which objections on that ground must be made before the jury is sworn, where the object sought to be attained by the statute, according to the view adopted by the state court, was to make the grand jury a more efficient instrument of justice, and not to benefit any particular defendant or class of defendants. Judgment, *State v. Lang* (N. J. 1907) 68 A. 210, affirmed.—*Lang v. State of New Jersey*, 28 S. Ct. 594, 209 U. S. 467, 52 L. Ed. 894.

Corporations are not denied the equal protection of the laws because corporate violators of the Tennessee anti-trust act of March 16, 1903 (Laws 1903, c. 140), may be proceeded against by bill in equity on relation of the attorney general, while natural persons offending against its provisions cannot be tried without a preliminary investigation by a grand jury, and indictment or presentment, and a trial by jury, with the right to an acquittal unless their guilt is established beyond a reasonable doubt, and to the benefit of a statute of limitations of one year.—*Standard Oil Co. of Kentucky v. State of Tennessee ex rel. Cates*, 30 S. Ct. 543, 217 U. S. 413, 54 L. Ed. 817, affirming decree, *State v. Standard Oil Co. of Kentucky* (1903) 110 S. W. 565, 120 Tenn. 86.

Congress could, by Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), authorize the government to bring up a criminal case from a federal Circuit Court to the Supreme Court when a demurrer to an indictment has been sustained, although the same privilege is denied the accused when the indictment is sustained, even assuming that the United States is bound to afford the equal protection of the laws to persons within its jurisdiction.—*United States v. Heinze*, 31 S. Ct. 98, 218 U. S. 532, 54 L. Ed. 1139, 21 Ann. Cas. 884.

Singling out convicts serving life sentences in a state prison as proper subjects for the imposition of the death penalty, as is done by Pen. Code Cal. § 246, in case they shall, with malice aforethought, commit an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury does not deny such life prisoners the equal protection of the laws.—(1911) *Finley v. People of State of California*, 32 S. Ct. 13, 222 U. S. 28, 56 L. Ed. 75, affirming judgment (1908) *People v. Finley*, 94 P. 248, 153 Cal. 59.

Bringing a convict after judgment before court of another county in a separate proceeding under Code W. Va. 1906, c. 165, §§ 1-5, by information charging him with prior convictions not alleged in the former indictment, and on a verdict sentencing him to additional punishment under chapter 152, §§ 23, 24, does not deny the equal protection of the laws.—(1912) *Graham v. State of West Virginia*, 32 S. Ct. 583, 224 U. S. 616, 56 L. Ed. 917, affirming judgment (1911) *State v. Graham*, 69 S. E. 1010, 68 W. Va. 248.

Denying to an inhabitant of Manila a preliminary examination accorded to other persons on the islands as done by Philippine Commission, Act No. 612, § 2, does not contravene the prohibition of the Philippine Bill of Rights, Act July 1, 1902, § 5, against the denial of equal protection of the laws.—*Ocampo v. United States*, 34 S. Ct. 712, 234 U. S. 91, 58 L. Ed. 1231.

Equal protection of the laws is not denied to a person sentenced to 14 years' imprisonment on conviction of perjury, under Pen. Code Cal. § 126, though for other crimes of greater gravity 5 years' imprisonment may be the average maximum penalty.—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

XI. DUE PROCESS OF LAW.

Denial as ground of jurisdiction of federal court, see Courts, ◀282, 385(7), 388, 394(3, 10). Orders of military government, see War, ◀31.

◀251. Constitutional guaranties in general.

See 10 Cent. Dig. Const. Law, §§ 726, 727, 732.

The constitutional provision that no person shall be deprived of life, liberty, or property without due process of law is intended as a limitation upon the power of the government in its dealings with the citizen, and relates to that class of rights whose protection is peculiarly within the province of the judicial branch of the government.—*United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171.

The prohibition against depriving any person of life, liberty, or property without due process of law extends to the action of any one who, by virtue of public position under the state government, deprives another of any rights secured by that amendment.—*Chicago, B. & Q. R. Co. v. City of Chicago*, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

"Due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.—*Holden v. Hardy*, 18 S. Ct. 883, 169 U. S. 366, 42 L. Ed. 780.

The acts of a municipal corporation cannot be said to be wanting in the due process of law guarantied by Const. U. S. Amend. 14, if such acts, when done or ratified by the state, would not be inconsistent with that amendment.—*Owensboro Waterworks Co. v. City of Owensboro*, 26 S. Ct. 249, 200 U. S. 38, 50 L. Ed. 361.

The Illinois state board of equalization in making an assessment pursuant to the supposed command of a writ of mandamus represents the state, there being no method of reviewing its decision except by judicial proceedings for relief from the assessment, and its action is therefore repugnant to Const. U. S. Amend. 14, if it denies any one the due process of law protected by that amendment against impairment by the state. Judgment, *Chicago Union Traction Co. v. State Board of Equalization* (C. C. 1902) 114 F. 557, affirmed.—*Raymond v. Chicago Union Traction Co.*, 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; *Same v. Chicago Edison Co.*, 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

Const. U. S. Amend. 5, is not restrictive of state, but only of national, action. Judgment, *In re City of Pittsburgh*, 66 A. 348, 217 Pa. 227; Appeal of *Hunter, Id.*, affirmed.—*Hunter v. City of Pittsburgh*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151.

The guaranty of due process of law inhibits the taking of one man's property and giving it to another, contrary to settled modes of procedure, without opportunity for hearing.—*Ochoa v. Hernandez y Morales*, 33 S. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

◀252. Persons protected.

See 10 Cent. Dig. Const. Law, §§ 728-731.

A contract made by a city with a water company, so far as the city's rights are concerned, is subject to the will of the legislature, and a statute authorizing a change therein modifying the city's right to tax the water company does not operate as a taking of its property without due process of law.—*City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943.

Private corporations are "persons" within Const. Amend. 14, § 1, prohibiting the states from depriving any "person" of property without due process of law, etc.—*Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 12 S. Ct. 255, 35 L. Ed. 1051, affirming judgment 27 S. Ct. 385, 4 S. E. 49.

A railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law.—*Smyth v. Ames*, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, affirming decree (C. C.) *Ames v. Union Pac. Ry. Co.*, 64 F. 165.

The liberty guarantied by Const. U. S. Amend. 14, against deprivation without due process of law is the liberty of natural, not artificial persons. Judgment, *Greenberg v. Western Turf Ass'n* (1905) 82 P. 684, 148 Cal. 126, affirmed.—*Western Turf Ass'n v. Greenberg*, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520.

◀253. Nature of acts prohibited in general.

See 10 Cent. Dig. Const. Law, §§ 732-735.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the meaning of Const. U. S. Amend. 14.—*Central Land Co. of West Virginia v. Laidley*, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91.

◀254. Control over governmental agencies in general.

See 10 Cent. Dig. Const. Law, § 736.

Citizens and taxpayers of a lesser municipality annexed under the authority of Act Pa. Feb. 7, 1906, §§ 1-9 (P. L. 7-11), to an adjoining and larger municipality, are not deprived of their property without due process of law by reason of the burden of additional taxation resulting from the consolidation, although the method of voting prescribed by the statute has permitted the voters of the larger city to overpower the voters of the smaller one, and compel the union without their consent and against their protest. Judgment, *In re City of Pittsburgh*, 66 A. 348, 217 Pa. 227; Appeal of *Hunter, Id.*, affirmed.—*Hunter v. City of Pittsburgh*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151.

The power of a state to determine what duties may be performed by local officers, and whether they shall be appointed or elected by the people, was not taken away by the due process of law clause of the fourteenth amendment to the federal Constitution.—(1912) *Soliah v. Heskin*, 32 S. Ct. 103, 222 U. S. 522, 56 L. Ed. 294, affirming judgment (1908) *Same v. Cormack*, 117 N. W. 125, 17 N. D. 393.

The power of a state to compel a township, as one of its political subdivisions, to

levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of a drain, was not taken away by the due process of law clause of the fourteenth amendment to the federal Constitution.—*Id.*

The prohibitions and guaranties of Const. U. S. Amend. 14, are addressed to and control not only the state but also every person, whether natural or judicial, who is repository of state power.—*Home Telephone & Telegraph Co. v. City of Los Angeles*, 33 S. Ct. 312, 227 U. S. 278, 57 L. Ed. 510.

A case where a state officer uses his power to the doing of acts forbidden by Const. U. S. Amend. 14, is within such amendment, if the commission of the wrong is rendered possible, or is aided by state authority lodged in the wrongdoer.—*Id.*

Acts done under an ordinance passed under a power conferred by a state are within the fourteenth amendment to the federal Constitution.—*Id.*

The additional conditions on the right to enjoy second-class mail privileges imposed by Post Office Appropriation Act August 24, 1912, § 2, are incidental to the purpose to be secured by the second-class classification, and do not take property without due process of law.—*Lewis Pub. Co. v. Morgan*, 33 S. Ct. 867, 229 U. S. 288, 57 L. Ed. 1180.

255. Deprivation of life or liberty in general.

See 10 Cent. Dig. Const. Law, §§ 736-738, 740-745.

Gen. St. Kan. 1889, c. 82, § 326, providing that, when a prosecution has been instituted without probable cause and maliciously, the name of the prosecutor shall be stated in the finding, and he shall be adjudged to pay the costs, and committed to the county jail until they are paid, is not invalid as depriving the prosecutor of his property without due process of law.—*Lowe v. State of Kansas*, 163 U. S. 81, 16 S. Ct. 1031, 41 L. Ed. 78.

"Liberty," as used in the provision of the fourteenth amendment to the federal constitution, forbidding the states to deprive any person of life, liberty, or property without due process of law, includes, it seems, not merely the right of a person to be free from physical restraint, but to be free in the enjoyment of all his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to carrying out the purposes above mentioned.—*Allgeyer v. State of Louisiana*, 17 S. Ct. 427, 165 U. S. 578, 41 L. Ed. 832.

A person is not deprived of liberty without due process of law by being adjudged a lunatic in his absence, under Civ. Code Ala. 1886, § 2393, providing that the sheriff may take possession of the person, "and, if consistent with his health or safety, have him present at the place of trial," where such person is duly served with process, but is not produced by the sheriff at the trial because, on examination by a physician, it is deemed to be inconsistent with his health or safety, and he is not in fact prevented from attending the hearing or refused opportunity to be represented there by counsel.—*Simon v. Craft*, 21 S. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165.

Exemption from self-incrimination is not safeguarded as against state action by the provision of Const. U. S. Amend. 14, that no state shall deprive any person of life, liberty, or property without due process of law. Judgment, *State of New Jersey v. Twining* (1906)

64 A. 1073, 73 N. J. Law, 683, affirmed.—*Twining v. State of New Jersey*, 29 S. Ct. 14, 211 U. S. 78, 53 L. Ed. 97.

Imprisonment for 2½ months under the order of the Governor of a state, in the exercise of his power under the state Constitution and laws to call upon the military arm of the state government to suppress an insurrection, does not deprive the person imprisoned of his liberty without due process of law. Judgment (C. C. 1906) 148 F. 870, affirmed.—*Moyer v. Peabody*, 29 S. Ct. 235, 212 U. S. 78, 53 L. Ed. 410.

Rem. & Bal. Code Wash. § 2564, making criminal editing of printed matter advocating disrespect for law, held not a violation of Const. U. S. Amend. 14, as an unjustifiable restriction of liberty.—*Fox v. State of Washington*, 35 S. Ct. 383, 236 U. S. 273, 59 L. Ed. 573, affirming judgment *State v. Fox*, 127 P. 1111, 71 Wash. 185.

Liberty is not taken without due process of law, contrary to Const. Amend. 14, by Laws Fla. 1913, c. 6537, §§ 10, 12, making it a misdemeanor punishable by fine and imprisonment to fail to perform labor on the highways.—*Butler v. Perry*, 36 S. Ct. 253, 240 U. S. 328, 60 L. Ed. 672, affirming judgment 66 So. 150, 67 Fla. 405.

256. Criminal prosecutions.

See 10 Cent. Dig. Const. Law, §§ 746-761.

257. — In general.

See 10 Cent. Dig. Const. Law, §§ 746, 747, 749.

How. St. Mich. § 9151, denounces the crime of embezzlement by "any officer, agent, clerk, or servant," and section 9152 provides for the punishment of "any attorney at law," or other person connected with the administration of justice, who collects money belonging to another, and fails to pay it over. Petitioner was arraigned for embezzlement under the former section, and pleaded that, "as an attorney at law, I am guilty of embezzlement of \$3,500, that being the amount collected and received by me." He was sentenced as upon a plea of guilty of the crime charged, and on error the supreme court of Michigan affirmed the judgment on the ground that an attorney at law was an "agent" in the collection of money. Held, that petitioner had the benefit of due process of law, and therefore could not be released on habeas corpus under the fourteenth amendment to the Constitution of the United States.—*Ex parte Converse*, 137 U. S. 624, 11 S. Ct. 191, 34 L. Ed. 796, affirming judgment (C. C.) 42 F. 217.

Where an indictment for a major offense is found in a state court, it is for the state court to determine whether it is sufficient to support a conviction of a minor offense; and the determination of that question does not involve a consideration of Const. U. S. Amend. 14, § 1, declaring that no state shall deprive any person of life, liberty, or property without due process of law, particularly where no such question was seasonably and specifically presented.—*Moore v. State of Missouri*, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301, affirming judgment *State of Missouri v. Moore*, 121 Mo. 514, 28 S. W. 345.

An opportunity for hearing, sufficient to satisfy any requirement of Const. U. S. Amend. 14, respecting due process of law, is afforded by the provisions of Act Vt. Oct. 9, 1906, p. 79, No. 75, for the compulsory production of the books and papers of a corporation before a court or grand jury, where the corporation has full opportunity to show cause before the court why it does not produce such books and papers, and, by objection to the production before the grand jury, can raise the question before that body, and is entitled to be heard upon that question before the court to which it is the grand jury's duty to report the question for its action. Judgment, *In re Consolidated Rendering Co.*

(Vt. 1907) 66 A. 790, affirmed.—Consolidated Rendering Co. v. State of Vermont, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

Due process of law is not denied a foreign corporation doing business in the state by Act Vt. Oct. 9, 1906, p. 79, No. 75, under which it may be compelled, under penalty of fine in case of refusal, to produce before a court or grand jury material evidence in the shape of books or papers, kept by it in the state, and which are in its custody and control, although at the time outside the borders of the state.—Id.

A conviction for practising medicine without registration, contrary to Code Pub. Gen. Laws, Md. 1904, art. 43, § 99, is not wanting in due process of law because the accused was not given the notice required by section 80 of that article to be sent to unregistered physicians, where he had a trial before a court and jury under the Maryland statutes, was proceeded against under the forms provided for by the laws of that state, and the section under which the conviction was had has been construed by the highest court of the state completely to define the offense without resorting to the necessity of notifying unregistered physicians before they become liable to the penalties for practising without registration.—(1910) Watson v. State of Maryland, 30 S. Ct. 644, 218 U. S. 173, 54 L. Ed. 987, affirming judgment (1907) 66 A. 635, 105 Md. 650.

The due process of law secured to the people of the Philippine Islands by Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, was not denied by the affirmance in the Supreme Court of the Philippine Islands of a conviction of the offense described in Philippine Pen. Code, art. 343, which was repealed after the conviction and sentence in the court of first instance by the act of the Philippine Commission of October 9, 1907, Act No. 1757, the repealing act also providing for the punishment of the same offense, and within limitations not exceeded by the sentence imposed under the former act.—Ong Chang Wing v. United States, 31 S. Ct. 15, 218 U. S. 272, 54 L. Ed. 1040.

Conviction on an amended information after prior conviction under original information had been set aside and a new trial granted was not a violation of the due process clause of Const. U. S. Amend. 14, because no arraignment or plea was had on the second information, where accused without objecting to failure to arraign objected to information and was put on trial before a jury.—Garland v. State of Washington, 34 S. Ct. 456, 232 U. S. 642, 58 L. Ed. 772, affirming judgment State v. Garland, 118 P. 907, 65 Wash. 668.

Criminal prosecution in a state court under law not repugnant to federal Constitution according to the course of judicial proceedings in such state is due process of law within Const. U. S. Amend. 14, where it includes notice and a hearing before a court of competent jurisdiction.—Frank v. Mangum, 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

Person indicted for perjury in testifying in a suit by his alleged wife for alimony, that they were not married, held not able to contend that his conviction under a new indictment for perjury on the trial of the first indictment was lacking in due process of law, on the ground that the court refused to consider his defense that the evidence was not material to the issue.—Collins v. Johnston, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

258. — Statutory creation or definition of offense.

See 10 Cent. Dig. Const. Law, § 748.

Act Kan. March 7, 1885, amendatory of Act Feb. 19, 1881, prohibiting the manufacture

or sale of intoxicating liquors within the state, except for medical, scientific, and mechanical purposes, section 13 of which provides that all places where liquors are manufactured, sold, or given away, or kept for such purposes, are thereby declared to be common nuisances, and, upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall abate the same by taking possession, and destroying the liquors and property used in maintaining said nuisance; that the keeper thereof shall, upon conviction, be punished by a fine and imprisonment; that the attorney general, county attorney, or any citizen of the county where such nuisance is maintained may maintain an action in the name of the state to abate the same; that an injunction shall be granted at the commencement of the action, and no bond shall be required; that violation of the injunction shall be punished as for contempt by fine or imprisonment, or both; and section 14, providing that, in prosecutions under this act, the state need not, in the first instance, prove that the sale was without a permit,—is not an attempt to deprive persons of their liberty without due process of law, within the meaning of Const. U. S. Amend. 14.—Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205, affirming decree 29 Kan. 252, 44 Am. Rep. 634.

Act Pa. May 21, 1885, providing that no person shall manufacture, out of any compound other than that produced from unadulterated milk, any articles designed to take the place of butter or cheese, nor shall sell or offer for sale the same as an article of food, does not deprive any one of liberty without due process of law.—Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253, affirming judgment 114 Pa. St. 265, 7 A. 913, 60 Am. Rep. 350.

A state local option law does not violate the due process of law clause of the federal Constitution by vesting legislative powers in the judiciary, because it fails to define the words "wholesale" and "retail," as used in that act, and commits to the courts the power to fix the punishment for this and subsequent offenses by imposing a fine of not less than \$200 and imprisonment of not more than 60 and not less than 10 days. Judgment 70 N. E. 1131, 68 Ohio St. 688, affirmed.—State of Ohio ex rel. Lloyd v. Dollison, 24 S. Ct. 703, 194 U. S. 445, 48 L. Ed. 1082.

A municipal ordinance, which makes it unlawful to visit or resort to a barred or barricaded house or room where gambling implements are exhibited or exposed to view, does not deprive any one of his liberty without due process of law, even if it authorizes a conviction for an innocent visit to such a place.—Ah Sin v. Wittman, 25 S. Ct. 756, 198 U. S. 500, 49 L. Ed. 1142.

Property rights are not invaded without due process of law in violation of Const. U. S. Amend. 14, by the provision of Act Neb. April 8, 1903, p. 644, c. 139, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes. Judgment (Neb. 1905) 105 N. W. 298, affirmed.—Halter v. State of Nebraska, 27 S. Ct. 419, 205 U. S. 34, 51 L. Ed. 696, 10 Ann. Cas. 525.

The right of personal liberty guaranteed by Const. U. S. Amend. 14, is not infringed by the provision of Act Neb. April 8, 1903, p. 644, c. 139, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes.—Id.

Rights under Const. U. S. Amend. 14, are not infringed by the provision of Act N. J. March 24, 1899, p. 514, § 20, as amended by Act March 22, 1901, p. 317, under which a conviction may be had for using a dredge in tidal waters of the state for the purpose of catching

oysters upon leased lands without the consent of the lessees. Judgment, *State v. Lee* (1905) 59 A. 1118, affirmed.—*Lee v. State of New Jersey*, 28 S. Ct. 22, 207 U. S. 67, 52 L. Ed. 108.

Manufacturers and sellers of mixed paints containing other ingredients than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, are not deprived of their liberty without due process of law by a state statute which makes such manufacture and sale a misdemeanor unless the label shows the constituent ingredients and quantity or amount of each.—*Heath & Milligan Mfg. Co. v. Worst*, 28 S. Ct. 114, 207 U. S. 338, 52 L. Ed. 236.

Due process of law is not denied a corporation convicted of violating the Texas anti-trust laws of May 25, 1899 (Laws 1899, p. 246, c. 146), and of March 31, 1903 (Laws 1903, p. 119, c. 94), because the legislation permits and the trial court charged that there may be a conviction, not only for acts which accomplish the prohibited result, but also for those which "tend" or are "reasonably calculated" to bring about such result. Judgment (Tex. Civ. App. 1908) 106 S. W. 918 affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

Due process of law is not denied by the provisions of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), under which the commission by corporate officers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates, is imputed to the corporation, and the corporation is subjected to criminal prosecution therefor. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. R. Co.*, 146 F. 298; Same v. Guilford, Id., affirmed.—*New York Cent. & H. R. Co. v. United States*, 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613.

Liberty and property are not taken without due process of law, contrary to Const. U. S. Amend. 5, by the provisions of Rev. St. D. C. § 1177, making it a crime to engage in any manner in any gift enterprise business in the District.—*In re Gregory*, 31 S. Ct. 143, 219 U. S. 210, 55 L. Ed. 184.

A conviction of selling pooled tobacco without the consent of the agent of the pool, contrary to Ky. St. § 3941a, is wanting in due process of law because of the uncertainty of the test of the legality of the pool prescribed by Ky. St. § 3915, and Const. Ky. § 198.—*Collins v. Commonwealth of Kentucky*, 34 S. Ct. 924, 234 U. S. 634, 58 L. Ed. 1510, reversing judgment 133 S. W. 233, 141 Ky. 564; *Malone v. Same*, 34 S. Ct. 926, 234 U. S. 639, 58 L. Ed. 1512, reversing judgment 133 S. W. 235, 141 Ky. 570.

261. — Preliminary complaint and warrant.

See 10 Cent. Dig. Const. Law, § 752.

The mere fact that a criminal is illegally carried, against his will, into the United States from a foreign country, with no reference to extradition treaties, does not render his subsequent trial and conviction, based upon jurisdiction regularly acquired by his presence in the country, invalid, as tending to deprive him of liberty "without due process of law."—*Ker v. People of State of Illinois*, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421.

262. — Arrest and bail.

See 10 Cent. Dig. Const. Law, § 752.

The provisions of Code Cr. Proc. N. Y. §§ 527, 555, for admitting to bail a defendant appealing from conviction for a crime not punishable with death, only when there is a stay of proceedings, by filing a certificate of a judge that there is reasonable doubt whether the

judgment should stand, do not deprive the defendant of liberty without due process of law.—*McKane v. Durston*, 153 U. S. 684, 14 S. Ct. 913, 38 L. Ed. 867.

A state police officer is not forbidden to make an arrest on the requisition of a consul of a foreign nation, charging a seaman on a vessel of that nation with insubordination, conformably to a treaty provision, because of the guaranty of the state Constitution against the deprivation of personal liberty without due process of law.—*Dallemagne v. Moisan*, 25 S. Ct. 422, 197 U. S. 169, 49 L. Ed. 709.

263. — Preliminary examination and commitment.

See 10 Cent. Dig. Const. Law, § 753.

Preliminary examination is properly dispensed with by Philippine Commission Act, No. 612, § 2, in cases triable in the court of the first instance in Manila, where the prosecuting attorney presented an information, without infringing Philippine Bill of Rights, Act July 1, 1902, § 5, against denial of due process of law.—*Ocampo v. United States*, 34 S. Ct. 712, 234 U. S. 91, 58 L. Ed. 1231.

265. — Indictment or information.

See 10 Cent. Dig. Const. Law, § 755.

Const. Cal. 1879, art. 1, § 8, authorizes prosecutions for felonies by information, after examination and commitment by a magistrate, without indictment by a grand jury, in the discretion of the legislature. The Penal Code of California provides for an examination by a magistrate in the presence of the accused, who is entitled to the aid of counsel and the right of cross-examination of witnesses, whose testimony is to be reduced to writing, and directs that if it appears from the examination that a described offense has been committed, and that there is sufficient cause to believe the accused guilty thereof, he shall be held to answer thereto, and an information shall be filed against the accused in the superior court of the county in which the offense is triable, in the form of an indictment for the same offense. Held, that a conviction on such an information for murder in the first degree, and a sentence of death thereon, do not violate Const. U. S. Amend. 14, which prohibits the states from depriving any person of life, liberty, or property without due process of law.—*Hurtado v. People of State of California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232.

A general statute (Act March 26, 1881; Laws Tex. 1881, p. 60 et seq.) authorizing a simplified form of indictment for murder is not contrary to the fourteenth amendment, as depriving a person convicted under an indictment, in the form prescribed, of life, etc., "without due process of law," for the technical sufficiency of the indictment is a question within the jurisdiction of the state courts.—*Caldwell v. State*, 137 U. S. 692, 11 S. Ct. 224, 34 L. Ed. 816, affirming judgment 28 Tex. App. 566, 14 S. W. 122.

Where the prosecution of a capital offense by information, instead of indictment, is authorized by a state constitution, a prosecution and conviction in accordance therewith in the state courts are not without due process of law.—*McNulty v. People of the State of California*, 149 U. S. 645, 13 S. Ct. 959, 37 L. Ed. 882; *Vincent v. Same*, 149 U. S. 648, 13 S. Ct. 960, 37 L. Ed. 884.

The requirement of due process of law does not necessarily require an indictment by a grand jury.—*Hodgson v. State of Vermont*, 18 S. Ct. 80, 168 U. S. 262, 42 L. Ed. 461; *Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

An information for illegally selling liquor "at divers times" on a certain day, when aided by specifications as to whom the sales were

made, is sufficient, as constituting due process of law, though it does not name the kind, quantity, or price.—*Hodgson v. State of Vermont*, 18 S. Ct. 80, 168 U. S. 262, 42 L. Ed. 461.

A prosecution by information cannot be deemed insufficient to constitute due process of law, if it is authorized by the Constitution of the state.—*Bolin v. State of Nebraska*, 20 S. Ct. 287, 176 U. S. 83, 44 L. Ed. 382, affirming judgment *Same v. State*, 71 N. W. 444, 51 Neb. 581; *Maxwell v. Dow*, 20 S. Ct. 448, 494, 176 U. S. 581, 44 L. Ed. 597.

A prosecution by information cannot be deemed insufficient to constitute due process of law, if it is authorized by the Constitution of the state.—*Davis v. Burke*, 21 S. Ct. 210, 179 U. S. 399, 45 L. Ed. 249.

Authorizing criminal prosecutions to be instituted by information without preliminary examination, as was done by Act Or. Feb. 17, 1899 (Laws 1899, p. 99), did not contravene the due process of law clause, Const. U. S. Amend. 14.—*Lem Woon v. State of Oregon*, 33 S. Ct. 783, 229 U. S. 586, 57 L. Ed. 1340, affirming judgments *State v. Lem Woon*, 107 P. 974, 57 Or. 482, and 112 P. 427, 57 Or. 482.

☞ 266. — Rules of evidence.

See 10 Cent. Dig. Const. Law, § 756.

Due process of law is not denied by the provision of Pen. Code N. Y. § 344b, which makes possession of the record of chances or slips in the game of policy, or the possession of any paper, print or writing commonly used in playing or promoting that game prima facie evidence of "possession thereof knowingly," in violation of section 344a, making the knowing possession of such papers a crime. Judgment, *People v. Adams*, 68 N. E. 636, 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, affirmed.—*Adams v. People of State of New York*, 24 S. Ct. 372, 192 U. S. 585, 48 L. Ed. 575.

Due process of law is not denied by the introduction in evidence in a criminal trial, upon proof of nonresidence, permanent absence, and inability to procure the attendance of a witness, of the deposition of such witness, taken upon the preliminary examination before a committing magistrate when defendants were present and their counsel was afforded opportunity to cross-examine. Judgment, *State v. Kline*, 33 So. 618, 109 La. 622, affirmed.—*West v. State of Louisiana*, 24 S. Ct. 650, 194 U. S. 258, 48 L. Ed. 965.

One convicted of crime in a state court is not denied due process of law because on motion for new trial on ground of insanity of a juror the state was only required to establish his sanity by fair preponderance of the evidence.—(1912) *Jordan v. Commonwealth of Massachusetts*, 32 S. Ct. 651, 225 U. S. 167, 56 L. Ed. 1038, affirming judgment (1911) *Commonwealth v. Jordan*, 93 N. E. 809, 207 Mass. 259.

☞ 267. — Right to trial by jury.

See 10 Cent. Dig. Const. Law, § 754.

At common law a suggestion of insanity, made after verdict and sentence, did not give rise to an absolute right in the convict to have the issue tried before the court and a jury, but addressed itself to the judge's discretion. Hence the manner in which such issues shall be determined is purely a matter of legislative regulation; and a state statute providing that it shall be determined by a jury summoned by the sheriff, with the assistance and concurrence of the ordinary, and not in the presence of a court or judge, does not deny to the prisoner the due process of law which is secured by the fourteenth amendment to the federal Constitution. *Baughn v. State*, 28 S. E. 68, 100 Ga. 554, 38 L. R. A. 577, affirmed.—*Nobles v. State of*

Georgia, 18 S. Ct. 87, 168 U. S. 398, 42 L. Ed. 515.

Trial by a struck jury in a murder case, in conformity to a state statute which is valid under the state Constitution, providing that the court may select from the persons qualified to serve as jurors ninety-six names, from which the prosecutor and defendant may each strike twenty-four and the remainder of which shall be put in the jury box, out of which the trial jury shall be drawn in the usual way,—does not violate the provision of the federal constitution as to due process of law.—*Brown v. State of New Jersey*, 20 S. Ct. 77, 175 U. S. 172, 44 L. Ed. 119.

A state statute providing for a jury of 8, instead of 12, persons in any criminal case not capital, does not deny the right of the defendant to due process of law, if all persons within the state are made liable to be proceeded against in the same way.—*Maxwell v. Dow*, 20 S. Ct. 448, 494, 176 U. S. 581, 44 L. Ed. 597.

Excluding lawyers, ministers, doctors, dentists, and railway engineers and firemen from serving on either the grand or petit juries does not deny a person convicted of crime in a state court the due process of law guaranteed by Const. U. S. Amend. 14. Judgment, *Turner v. State of Georgia*, 52 S. E. 1, 124 Ga. 31, affirmed.—*Rawlins v. State of Georgia*, 26 S. Ct. 560, 201 U. S. 638, 50 L. Ed. 899, 5 Ann. Cas. 783.

☞ 268. — Course and conduct of trial.

See 10 Cent. Dig. Const. Law, §§ 756, 757.

Though it is erroneous to poll a jury before they agree on all the counts, if a nolle prosequi is entered as to the others, such error does not amount to a deprivation of liberty without due process of law.—*Cross v. North Carolina*, 132 U. S. 131, 10 S. Ct. 47, 33 L. Ed. 287, affirming *State v. White*, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

On a trial for homicide the failure to charge as to any other than murder in the first degree, and the act of the state appellate court in sustaining a conviction on the ground of failure to except to a refusal to charge on the other degrees, is not a deprivation of liberty without due process.—*Davis v. Texas*, 139 U. S. 651, 11 S. Ct. 675, 35 L. Ed. 300, affirming judgment 28 Tex. App. 542, 13 S. W. 994.

Crim. Proc. Act N. J. § 68, distinguishes two degrees of murder, and provides that upon a plea of guilty the court shall proceed by examination of witnesses to determine the degree of the prisoner's crime and to pass sentence accordingly. Held that, when such a proceeding is conducted in strict accordance with the forms prescribed by the constitution and laws of the state, it is due process of law.—*Hallinger v. Davis*, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986.

The refusal of a state court to continue a criminal case on account of the absence of material witnesses residing in another state is not a denial of due process of law secured by Const. U. S. Amend. art. 14, because it is not within the power of the state courts to compel the attendance of witnesses beyond the limits of the state, or because the taking and using of depositions of witnesses so situated in criminal cases on behalf of defendant is not provided for and may not be recognized in that state. Judgment, 39 S. E. 284, 113 Ga. 772, affirmed.—*Minder v. State of Georgia*, 22 S. Ct. 224, 183 U. S. 559, 46 L. Ed. 328.

The refusal of a state court to review the question whether the officers in charge of the jury on a trial for a felony were sworn, as prescribed by statute, when the jury retired, because such question was first raised on a motion for a new trial, infringes no right secured

to the accused by the fourteenth amendment to the federal constitution, even if the swearing of such officers when the jury retire is essential to the due process of law prescribed by that amendment; but such a ruling is simply an adjudication of a question of criminal practice and local law. Judgment 58 N. E. 620, 59 N. E. 424, 188 Ill. 40, 58 L. R. A. 869, affirmed.—*Dreyer v. People of State of Illinois*, 23 S. Ct. 28, 187 U. S. 71, 47 L. Ed. 79.

The omission on a criminal trial in the state court of any reference to the presumption of innocence cannot be regarded as a denial of due process of law, where the highest court of the state has held that such omission does not invalidate the proceedings. Writ of error, *State v. Howard*, 40 S. E. 71, 129 N. C. 584, dismissed.—*Howard v. Fleming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. Ed. 121.

Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of the due process of law guaranteed by Const. U. S. Amend. 14. Judgment, 80 S. W. 211, 118 Ky. 1, 25 Ky. Law Rep. 2213, affirmed.—*Howard v. Commonwealth of Kentucky*, 26 S. Ct. 189, 200 U. S. 164, 50 L. Ed. 421.

The accused cannot claim to have been denied the due process of law secured by Const. U. S. Amend. 14, by the action of the state court in holding that he could waive his right to be present to the trial to the extent of consenting, through his counsel, in advance of the swearing of the jury, to a private examination of a juror against whom complaint had been made, which resulted in the discharge of such juror, and the selection of another, not shown to be incompetent, in his place.—*Id.*

The failure of the trial court, in a criminal case, to see that the testimony is read or repeated to the accused, who, by reason of his almost total deafness, is unable to hear the evidence, does not infringe the prohibition of Const. U. S. Amend. 14, against the deprivation of liberty without due process of law.—*Felts v. Murphy*, 26 S. Ct. 366, 201 U. S. 123, 50 L. Ed. 689.

The refusal to grant a continuance of a criminal case, sought on the ground that the counsel for the accused had not had sufficient time or opportunity to examine the notes of the testimony taken before the coroner who investigated the case, is not a denial of due process of law, where the difficulty seems to have been that the notes of the testimony were somewhat illegible, and that the person making them was not at hand.—(1910) *Franklin v. State of South Carolina*, 30 S. Ct. 640, 218 U. S. 161, 54 L. Ed. 980, affirming judgment *State v. Franklin* (1908) 60 S. E. 953, 80 S. C. 332.

There is no denial of due process of law guaranteed by Const. U. S. Amend. 14, in practice in Georgia, that accused may waive his right to be present when the jury renders its verdict, and waiver is inferred by a motion for new trial on other grounds alone.—*Frank v. Mangum*, 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

269. — New trial.

See 10 Cent. Dig. Const. Law, § 759.

Rev. St. Mo. § 1967, providing that a motion for a new trial "must be filed before judgment, and within four days after the return of the verdict or finding by the court," is not in violation of Const. U. S. Amend. 14.—*Brooks v. Missouri*, 124 U. S. 394, 8 S. Ct. 443, 31 L. Ed. 454.

Allowance of a new trial by a state under better auspices, where the first trial is rendered abortive by mob domination, satisfies due process of law clause of Const. U. S. Amend. 14.—*Frank v. Mangum*, 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

270. — Judgment and sentence.

See 10 Cent. Dig. Const. Law, § 758.

Laws N. Y. 1888, c. 489, providing that "punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death," does not violate Const. Amend. 14, which provides that no state shall deprive any person of life, liberty, or property without due process of law, by imposing a cruel punishment.—*In re Kemmler*, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519.

The court of appeals of New York having decided that an appeal from a conviction of murder in the first degree operates as a stay of the execution only, and not of the solitary confinement, this is controlling upon the supreme court of the United States; and hence a continuance of solitary confinement pending an appeal by the prisoner is the result of his own act, and is not in violation of any right secured by the constitution of the United States.—*McElvaine v. Brush*, 142 U. S. 155, 12 S. Ct. 156, 35 L. Ed. 971; *Trezza v. Same*, 142 U. S. 160, 12 S. Ct. 158; 35 L. Ed. 974.

The right to the due process of law guaranteed by the fourteenth amendment to the federal constitution is not infringed by the decision of a state court sustaining the validity of the Illinois indeterminate sentence act of 1899, although such statute may confer judicial powers upon nonjudicial officers, and, in effect, invest them with the pardoning power of the executive. Judgment, 58 N. E. 620, 59 N. E. 424, 188 Ill. 40, 58 L. R. A. 869, affirmed.—*Dreyer v. People of State of Illinois*, 23 S. Ct. 28, 187 U. S. 71, 47 L. Ed. 79.

A public officer convicted of embezzling public moneys, who has been afforded full opportunity to present every defense permitted by the laws of the state, is not denied due process of law by the imposition, as a part of the sentence, pursuant to Cr. Code Neb. § 124, entirely irrespective of the question whether restitution has been made, of a fine in double the amount of the embezzlement found by the jury, which, by the terms of that section, is to operate as a judgment against the estate of the convict.—*Coffey v. Harlan County*, 27 S. Ct. 305, 204 U. S. 659, 51 L. Ed. 666.

A person sentenced under the Michigan indeterminate sentence act (Pub. Acts 1903, No. 136) after having been twice before convicted of felony is not imprisoned without due process of law because he is deprived by that act of the privilege therein accorded to other convicts at the end of the minimum term of the sentence to make application for parole, though it gives no hearing on the question of prior conviction.—*Ughbanks v. Armstrong*, 28 S. Ct. 372, 208 U. S. 481, 52 L. Ed. 582.

A former convict is not denied due process of law by bringing him, after conviction, before court of another county in a separate proceeding under Code W. Va. 1906, c. 165, §§ 1-5, by information charging him with former convictions, on which he was tried, and on verdict that he was a former convict, sentenced to additional punishment which chapter 152, §§ 23, 24, prescribe.—(1912) *Graham v. State of West Virginia*, 32 S. Ct. 583, 224 U. S. 616, 56 L. Ed. 917, affirming judgment (1911) *State v. Graham*, 69 S. E. 1010, 68 W. Va. 248.

A sentence of 14 years' imprisonment for perjury, under Pen. Code Cal. § 126, does not deprive the convict of liberty without due process of law.—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

271. — Appeal or error.

See 10 Cent. Dig. Const. Law, § 760.

When a prisoner sentenced to death carries his case to an appellate court, due process of law does not require that he shall be personally

present therein when it pronounces its judgment, since, in case of affirmance, it pronounces no new sentence, but merely directs that the sentence already imposed shall be carried into execution.—*Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

Due process of law does not require the presence in the appellate court of a person under sentence of death when judgment of affirmance thereof is entered and the day of execution is fixed by the supreme court, as required by the state statute.—*Fielden v. People of State of Illinois*, 143 U. S. 452, 12 S. Ct. 528, 36 L. Ed. 224, affirming judgment 128 Ill. 595, 21 N. E. 584, and followed in *Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

A right of review in capital cases by an appellate court is not a necessary element of due process of law, but it is wholly within the discretion of each state to refuse it or grant it on any terms.—*Andrews v. Swartz*, 156 U. S. 272, 15 S. Ct. 389, 39 L. Ed. 422.

The dismissal by a state supreme court of an appeal in a criminal case, after the accused has escaped, pursuant to an order that the appeal should be dismissed unless he should surrender or be recaptured in a specified time, is not a denial of due process of law.—*Allen v. State of Georgia*, 17 S. Ct. 525, 166 U. S. 138, 41 L. Ed. 949.

The due process of law guaranteed by Const. U. S. Amend. 14, does not require that the highest state court for the review of a conviction of capital crimes be held in any particular county of that state, whatever may be the requirement of the state Constitution in that respect. Order (D. C.) *Ex parte Rogers*, 138 F. 961, affirmed.—*Rogers v. Peck*, 26 S. Ct. 87, 199 U. S. 425, 50 L. Ed. 256.

The refusal of the Supreme Court of the Philippine Islands, on an appeal in a criminal case, to entertain an objection to the sufficiency of the complaint, because such objection was not raised before final judgment in the trial court, does not amount to a conviction of the accused without informing them of the nature and character of the offense charged, or to a conviction without due process of law, in violation of the Bill of Rights enacted by Congress for the Philippine Islands in Act July 1, 1902, c. 1369, 32 Stat. 691, 692 [U. S. Comp. St. Supp. 1905, p. 391], although that court, on appeal, has power to re-examine both the law and the facts, where, as a necessary consequence of the facts found, the testimony offered at the trial, without objection or exception in any form, established every ingredient of the crime.—*Serra v. Mortiga*, 27 S. Ct. 343, 204 U. S. 470, 51 L. Ed. 571.

Due process of law was not denied by the action of the Supreme Court of the Philippine Islands in making an order upon its own motion when the accused were absent from the court, requiring the judge and clerk of the court below to supply deficiencies in the record.—*Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

◀ 272. — Execution of sentence.

See 10 Cent. Dig. Const. Law, § 761.

It is competent, and entirely consistent with due process of law, for a state to confer on the governor the power of fixing the day on which a convict sentenced to death by a court of competent jurisdiction shall be executed.—*Holden v. State of Minnesota*, 137 U. S. 483, 11 S. Ct. 143, 34 L. Ed. 734.

Code Cr. Proc. N. Y. §§ 491, 492, provide that a criminal under sentence of death shall be kept in solitary confinement in the penitentiary until executed, and that the court shall designate a week during which the execution

must take place, but that the warden shall fix the day and hour, keeping the same secret from the prisoner and the public. *Held*, that a warrant from the court commanding the warden to cause the judgment and sentence to be executed, and the condemned to be put to death, "in the mode, manner, and way, and at the place, by law prescribed and provided," constitutes sufficient authority both for the solitary confinement and for the execution in the manner prescribed by law; and, to constitute due process of law, it is not necessary that the mode of confinement or of execution should be more particularly described.—*McElvaine v. Brush*, 142 U. S. 155, 12 S. Ct. 156, 35 L. Ed. 971; *Trezza v. Same*, 142 U. S. 160, 12 S. Ct. 158, 35 L. Ed. 974.

The fact that a contention by one under sentence of death that the warrant issued by the governor for his execution was unauthorized because issued without authority, after a reprieve for a greater time than was authorized by the state law, was decided adversely to the prisoner, does not involve any denial of due process of law, or the infraction of any provision of the United States constitution.—*Lambert v. Barrett*, 159 U. S. 660, 16 S. Ct. 135, 40 L. Ed. 296.

A sentence of conviction imposed under authority of Acts Mass. 1851, c. 87 (Pub. St. c. 187, § 13), after the reversal of a former judgment, on the application of the convict, because it was imposed under a statute that was passed after the offense was committed, and was therefore unconstitutional so far as it related to that offense, does not deprive accused of his liberty without due process of law. Judgment, *Commonwealth of Massachusetts v. Murphy*, 54 N. E. 860, 174 Mass. 369, 48 L. R. A. 393, 75 Am. St. Rep. 853, affirmed.—*Murphy v. Commonwealth of Massachusetts*, 20 S. Ct. 639, 177 U. S. 155, 44 L. Ed. 711.

No denial of the due process of law guaranteed by Const. U. S. Amend. 14, will result from the execution of a death sentence because of the failure of the highest state court, on denying a motion for a new trial, to fix a day for execution, where the Governor of the state had, by a reprieve, already definitely fixed the time for execution at a day which had not arrived when the court made its decision. Order, *Ex parte Rogers* (D. C.) 138 F. 961, affirmed.—*Rogers v. Peck*, 26 S. Ct. 87, 199 U. S. 425, 50 L. Ed. 256.

Solitary confinement by the state authorities, pending the execution of a death sentence after the original day fixed for the execution of that sentence has passed, even if unwarranted, is not a denial of the due process of law guaranteed by Const. U. S. Amend. 14.—*Id.*

◀ 273. Contempt proceedings.

See 10 Cent. Dig. Const. Law, § 739.

Where a contempt has been committed in the presence of the court, an order of commitment therefor may be made without notice to the offender, and without giving him an opportunity to be heard.—*In re Terry*, 128 U. S. 289, 9 S. Ct. 77, 52 L. Ed. 405.

Under Acts 20th Gen. Assem. Iowa, c. 143, § 12, authorizing an injunction to restrain the illegal sale of intoxicating liquors, and providing that a person violating such injunction shall be punished for the contempt by fine or imprisonment, or both, in the discretion of the court, summary proceedings by a state court, imposing fine and imprisonment for contempt in violating such an injunction issued by it, without presentment or indictment, or trial by jury, are due process of law, within the meaning of Const. U. S. Amend. art. 14.—*Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801.

While a party in contempt is not entitled to be heard as to matters of mere favor, yet it is a denial of due process of law to strike out an answer, and render a decree pro confesso as a punishment for contempt.—*Hovey v. Elliott*, 17 S. Ct. 841, 167 U. S. 409, 42 L. Ed. 215.

The danger that the testimony given in an examination under Laws Kan. 1897, c. 265, § 10, might incriminate the witness as a violator of the federal anti-trust law, and of the possible use, in a federal prosecution for a violation of such statute, of the testimony given in the state proceeding, is so unsubstantial and remote as not to make an imprisonment for refusal to testify a deprivation of liberty without due process of law, where the statute is construed by the state courts to render material only such questions as relate to transactions within the state, and grants full immunity from prosecution in the state courts. Judgment, *State v. Jack* (1904) 76 P. 911, 69 Kan. 387, 1 L. R. A. (N. S.) 167, affirmed.—*Jack v. State of Kansas*, 26 S. Ct. 73, 199 U. S. 372, 50 L. Ed. 234, 4 Ann. Cas. 689.

Former officers of corporation which has gone out of existence after transferring to them its books and papers are not deprived of liberty without due process of law by commitment for contempt in refusing to obey a subpoena duces tecum directed to the corporation, requiring production of books and papers before a grand jury.—*Wheeler v. United States*, 33 S. Ct. 158, 226 U. S. 478, 57 L. Ed. 309.

274. Deprivation of personal rights in general.

See 10 Cent. Dig. Const. Law, § 726.

A city ordinance providing that no person shall make any public address in any of the public grounds of the city, "except in accordance with a permit from the mayor," does not violate the fourteenth amendment, as that amendment does not destroy the right of the states to enact police regulations as to the subjects within their control.—*Davis v. Commonwealth of Massachusetts*, 17 S. Ct. 731, 167 U. S. 43, 42 L. Ed. 71.

Those whose names were duly entered as Creek freedmen by blood on the rolls made and approved by the Secretary of the Interior acquired rights of which they could not be deprived without the notice and opportunity to be heard essential to due process of law.—(1911) *United States ex rel. Turner v. Fisher*, 32 S. Ct. 37, 222 U. S. 204, 56 L. Ed. 165, affirming judgment (1909) *Same v. Garfield*, 33 App. D. C. 195.

The state may require a member of a Greek letter fraternity at another college to renounce his allegiance with such fraternity before admitting him as a student to the state university, without denying him due process of law.—*Waugh v. Board of Trustees of University of Mississippi*, 35 S. Ct. 720, 237 U. S. 539, 59 L. Ed. 1131, affirming judgment *Board of Trustees of University of Mississippi v. Waugh*, 62 So. 827, 105 Miss. 623.

275. Deprivation of liberty as to occupation or employment.

See 10 Cent. Dig. Const. Law, §§ 830, 835, 839, 843-846.

The Utah statute forbidding the employment of workmen for more than eight hours a day in mines, and in the smelting, reduction, or refining of ores or metals, is not a denial of due process of law.—*Holden v. Hardy*, 18 S. Ct. 383, 169 U. S. 366, 42 L. Ed. 780.

A state statute providing that whenever any railroad company shall discharge a servant or employé, with or without cause, it shall, on the day of discharge, under certain penalties, pay him the unpaid wages earned at the contract rate at the time of discharge, without discount on account of payment before such

wages were payable under the contract of employment (Acts Ark. 1889, p. 76), does not operate as a deprivation of property without due process of law, where the railroad company is incorporated under the state laws, and the state constitution reserves to the legislature the power to amend or repeal all charters of incorporation. Judgment 40 S. W. 705, 64 Ark. 83, 37 L. R. A. 504, 62 Am. St. Rep. 154, affirmed.—*St. Louis, I. M. & S. Ry. Co. v. Paul*, 19 S. Ct. 419, 173 U. S. 404, 43 L. Ed. 746.

The provision for the redemption of store orders, scrip, etc., in money, which is made by Act Tenn. March 17, 1899, requiring all persons who issue such orders to employes in payment of wages to redeem them in money on any regular pay day or at any time within 30 days after they are issued, if presented and payment in money demanded by such employes or by bona fide holders, is not unconstitutional as an arbitrary interference with the right of contract, but is a legitimate exercise of the general legislative power, as well as of the police power. Judgment, *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 103 Tenn. 421, 76 Am. St. Rep. 682, affirmed.—*Knoxville Iron Co. v. Harbison*, 22 S. Ct. 1, 183 U. S. 13, 46 L. Ed. 55.

Due process of law requires no special provision for granting a hearing to applicants for registration by the board of registration in medicine created by Pub. Acts Mich. 1899, No. 237, where such act provides for semiannual meetings of the board at specified times at the state capitol. Judgment, *People v. Reetz*, 86 N. W. 396, 127 Mich. 87, affirmed.—*Reetz v. People of State of Michigan*, 23 S. Ct. 390, 188 U. S. 505, 47 L. Ed. 563.

The liberty of contract guarantied by Const. U. S. Amend. 14, is not invaded by the provisions of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 755, 763 [U. S. Comp. St. 1901, pp. 3071, 3080], making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned.—*Patterson v. The Eudora*, 23 S. Ct. 821, 190 U. S. 169, 47 L. Ed. 1002.

The freedom to contract guarantied by Const. U. S. Amend. 14, is not infringed by the provisions of Gen. St. Kan. 1901, §§ 3827-3829, making it a criminal offense for a contractor for a public work to permit or require an employé to perform labor upon that work in excess of eight hours each day. Judgment, *State v. Atkin*, 67 P. 519, 64 Kan. 174, 97 Am. St. Rep. 343, affirmed.—*Atkin v. State of Kansas*, 24 S. Ct. 124, 191 U. S. 207, 48 L. Ed. 148.

The limitation of employment in bakeries to 60 hours a week and 10 hours a day, attempted by Laws N. Y. 1897, c. 415, art. 8, § 110, is an arbitrary interference with the freedom to contract guarantied by Const. U. S. Amend. 14, which cannot be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. Judgments, *People v. Lochner*, 76 N. Y. S. 396, 73 App. Div. 120, 16 N. Y. Cr. R. 520, and 69 N. E. 373, 177 N. Y. 145, 101 Am. St. Rep. 773, reversed.—*Lochner v. People of State of New York*, 25 S. Ct. 539, 198 U. S. 45, 49 L. Ed. 937, 3 Ann. Cas. 1133.

Const. U. S. art. 14, § 1, providing that no state shall deprive any person of life, liberty, or property without due process of law, is not a limitation on the police power of the state, so as to render an act providing for the cancellation of a physician's certificate for gross immorality unconstitutional. Judgment, *Meffert v. State Board of Medical Registration & Examination*, 72 P. 247, 66 Kan. 710, 1 L. R. A. (N. S.) 811, affirmed.—*Meffert v. Packer*, 25 S. Ct. 790, 195 U. S. 625, 49 L. Ed. 350.

Personal liberty as well as the right of property are invaded without due process of

law in violation of Const. U. S. Amend. 5, by the provisions of Act June 1, 1898, c. 370, § 10, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employé from service to such carrier because of his membership in a labor organization. Judgment, *United States v. Adair* (D. C. 1907) 152 F. 737, reversed.—*Adair v. United States*, 28 S. Ct. 277, 208 U. S. 161, 52 L. Ed. 436, 13 Ann. Cas. 764.

Rights under Const. U. S. Amend. 14 are not infringed by the limitation of the hours of labor of women employed in laundries to 10 hours daily, which is made by Laws Or. 1903, p. 148, although like legislation affecting male employés may be invalid. Judgment, *State v. Muller* (1906) 85 P. 855, 48 Or. 252, affirmed.—*Muller v. State of Oregon*, 23 S. Ct. 324, 208 U. S. 412, 52 L. Ed. 551, 13 Ann. Cas. 957.

The liberty of contract secured by Const. U. S. Amend. 14, against state invasion, is not infringed by the provision of Acts Ark. 1905, p. 558, c. 219, § 1, under which miners employed at quantity rates are prevented from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine, but such statute is a valid exercise of the police power. Judgment (1904) 98 S. W. 729, 81 Ark. 304, affirmed.—*McLean v. State of Arkansas*, 29 S. Ct. 206, 211 U. S. 539, 53 L. Ed. 315.

Prohibiting employment of children under 16 years of age in various hazardous employments by Laws Ill. 1903, p. 187, does not take liberty or property without due process of law.—*Sturges & Burn Mfg. Co. v. Beauchamp*, 34 S. Ct. 60, 231 U. S. 320, 58 L. Ed. 245, L. R. A. 1915A, 1196, affirming judgment *Beauchamp v. Sturges & Burn Mfg. Co.*, 95 N. E. 204, 250 Ill. 303.

Employment of women for more than ten hours in any one day or more than 56 hours a week in any manufacturing or mechanical establishment may be forbidden, as is done by St. Mass. 1909, c. 514, § 43, without infringing the liberty of contract assured by the fourteenth amendment of the federal Constitution.—*Riley v. Commonwealth of Massachusetts*, 34 S. Ct. 469, 232 U. S. 671, 58 L. Ed. 788, affirming judgment *Commonwealth v. Riley*, 97 N. E. 367, 210 Mass. 387.

Forbidding the employment of women at a time other than is stated in the notice which the employer must post, as is done by St. Mass. 1909, c. 514, § 48, is not such an unreasonable provision as to be wanting in due process of law secured by Const. U. S. Amend. 14.—*Id.*

An infringement of the liberty of contract without due process of law, contrary to Const. U. S. Amend. 14, results from Acts Tex. 31st. Leg. c. 46, making it a misdemeanor for any person to act as a conductor on a railway train without having served for two years as a freight conductor or brakeman.—*Smith v. State of Texas*, 34 S. Ct. 681, 233 U. S. 630, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420, reversing judgment (Tex. Cr. App.) *Same v. State*, 146 S. W. 900.

Liberty and property of an interstate railway company are not taken without due process of law by Laws N. Y. 1897, c. 415, § 10, as amended by Laws 1908, c. 442, passed in the exercise of the reserved power of the state over corporations, that railway employés shall be paid semimonthly, prohibiting carrier and employés from contracting otherwise.—*Erie R. Co. v. Williams*, 34 S. Ct. 761, 233 U. S. 685, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, affirming judgment 92 N. E. 1084, 199 N. Y. 525.

Freedom to contract is not infringed contrary to Const. U. S. Amend. 14, by Act Va. Feb. 13, 1888 (Laws 1887–88, c. 118 [Code 1904, § 3657d]), amending and re-enacting Laws 1887, c. 391, § 3, forbidding any person, firm, or corporation engaged in mining or manufacturing from issuing for the payment of labor any order unless redeemable in lawful money of the United States.—*Keokee Consol. Coke Co. v. Taylor*, 34 S. Ct. 856, 234 U. S. 224, 58 L. Ed. 1288.

Whatever right an employer or employé has, under the due process clause of Const. Amend. 14, to treat as ground for terminating the employment, he can provide against by a stipulation which may be a sine qua non of the employment.—*Coppage v. State of Kansas*, 35 S. Ct. 240, 236 U. S. 1, 59 L. Ed. 441, L. R. A. 1915C, 960, affirming judgment *State v. Coppage*, 125 P. 8, 87 Kan. 752.

The rights of personal liberty and property are infringed without due process of law contrary to Const. Amend. 14, by Laws Kan. 1903, c. 222, punishing an employer for having prescribed as a condition of employment that the employé shall not become or remain a member of a labor organization pending employment.—*Id.*

St. Cal. 1911, p. 437, forbidding employment of women for more than 8 hours a day or 48 hours a week, does not, as applied to women employed in hotels, violate Const. U. S. Amend. 14, as infringing freedom to contract.—*Miller v. Wilson*, 35 S. Ct. 342, 236 U. S. 373, 59 L. Ed. 628, L. R. A. 1915F, 829, affirming judgment *Ex parte Miller*, 124 P. 427, 162 Cal. 687.

A graduate woman pharmacist employed in a hospital is not denied freedom to contract given by Const. U. S. Amend. 14, because under St. Cal. 1911, p. 437, as amended by St. Cal. 1913, p. 713, she is forbidden to work more than 8 hours a day or 48 hours a week.—*Bosley v. McLaughlin*, 35 S. Ct. 345, 236 U. S. 385, 59 L. Ed. 632.

Forbidding women student nurses in a hospital school to work for longer than certain hours under St. Cal. 1911, p. 437, as amended by St. Cal. 1913, p. 713, does not infringe freedom to contract given by Const. U. S. Amend. 14.—*Id.*

Extension by St. Cal. 1913, p. 713, to women employed in hospitals, office assistants, and those engaged in household work, of the provisions of St. Cal. 1911, p. 437, does not render the statute invalid as denying freedom to contract.—*Id.*

Freedom to contract secured by Const. U. S. Amend. 14, against state invasion, is not infringed by the so-called Ohio "run-of-mine" or "anti-screen" law.—*Rail & River Coal Co. v. Yapple*, 35 S. Ct. 359, 236 U. S. 338, 59 L. Ed. 607, affirming decree (D. C.) 214 F. 273.

Due process of law is not denied by Act Ind. March 8, 1907 (Laws 1907, c. 121), requiring owners of coal mines and other similar places to provide suitable washhouses for employés on request.—*Booth v. State of Indiana*, 35 S. Ct. 617, 237 U. S. 391, 59 L. Ed. 1011, affirming judgment 100 N. E. 563, 179 Ind. 405.

Property is not taken without due process of law contrary to Const. U. S. Amend. 14, by Consol. Laws N. Y. c. 31, § 14, providing that only citizens can be employed in public works and that citizens of New York must be given preference.—*Heim v. McCall*, 36 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 206, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

← 276. Deprivation of liberty to contract.

See 10 Cent. Dig. Const. Law. §§ 845, 846.

The prohibition against options to buy or sell grain or other commodities at a future time,

which is made by Cr. Code Ill. § 130, does not invade the liberty granted to every citizen by Const. U. S. Amend. art. 14. Judgment, 57 N. E. 798, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229, affirmed.—*Booth v. People of State of Illinois*, 22 S. Ct. 425, 184 U. S. 425, 46 L. Ed. 623.

No unconstitutional interference with the right of contract is made by Const. Cal. art. 4, § 26, avoiding all contracts for sales of shares of corporate stock on margin, and providing for the recovery of any money paid on such contracts, although this provision may be construed to apply to bona fide, as well as gambling, contracts. Judgment, *Parker v. Otis*, 62 P. 571, 927, 130 Cal. 322, 92 Am. St. Rep. 56, affirmed.—*Otis v. Parker*, 23 S. Ct. 168, 187 U. S. 606, 47 L. Ed. 323.

The constitutional guaranty of liberty of contract is not infringed by the enforcement of the provisions of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by a federal court decree enjoining a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the powers acquired by such corporation by virtue of its acquisition of such stock. Decree, *United States v. Northern Securities Co. (C. C.)* 120 F. 721, affirmed.—*Northern Securities Co. v. United States*, 24 S. Ct. 436, 193 U. S. 197, 48 L. Ed. 679.

The freedom to contract protected by Const. U. S. Amend. 14, is not unduly abridged by so much of the Kansas anti-trust law of March 8, 1897, as is construed by the state courts to forbid inducing four competitive wheat buyers in a single town to enter into an agreement under which, if either should purchase more than one-fourth of the wheat coming into the market, he should pay the others three cents a bushel for the excess. Judgment, *State v. Smiley*, 69 P. 199, 65 Kan. 240, 67 L. R. A. 903, affirmed.—*Smiley v. State of Kansas*, 25 S. Ct. 289, 196 U. S. 447, 49 L. Ed. 546.

Requiring a railway company in making its daily distribution of coal cars in times of car shortage to the bituminous coal mines on its line to desist from its practice not to count the company's fuel cars against the share of the mine receiving them cannot be said to destroy the freedom of contract, on the theory that any discriminations or preferences resulting from such practice arose from the fact that the railway company chose to purchase coal for its fuel supply from a particular mine or mines. Decree, *Chicago & A. R. Co. v. Interstate Commerce Commission (C. C. 1908)* 173 F. 930, reversed.—*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 30 S. Ct. 155, 215 U. S. 452, 54 L. Ed. 280; *Same v. Chicago & A. R. Co.*, 30 S. Ct. 163, 215 U. S. 479, 54 L. Ed. 291.

The freedom of contract is not unreasonably abridged, in violation of Const. U. S. Amend. 14, by Code Miss. § 5002, which, as construed by the state court, condemns as a combination in restraint of trade an agreement between retail lumber dealers not to deal with any manufacturer or wholesale dealer who sells direct to consumers in localities in which such retail dealers conduct their business and keep a sufficient stock to meet demands, and to inform each other of any such sales.—(1910) *Grenada Lumber Co. v. State of Mississippi*, 30 S. Ct. 535, 217 U. S. 433, 54 L. Ed. 826, affirming decree *Retail Lumber Dealers' Ass'n v. State* (1909) 48 S. 1021.

The liberty of contract secured by Const. U. S. Amend. 5, was not unconstitutionally denied by the enactment by Congress, in the exercise of its power under the commerce clause, of the Carmack amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1163]) to Act Feb. 4, 1887, c.

104, § 20, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3169), by which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere en route, in spite of any agreement or stipulation to the contrary, with a right of recovery over against the carrier actually causing the loss.—(Sup., Ga., 1911) *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 S. Ct. 164, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, affirming judgment *Riverside Mills v. Atlantic Coast Line R. Co. (C. C. 1909)* 168 F. 990; (Sup., Ky., 1911) *Louisville & N. R. Co. v. Scott*, 31 S. Ct. 171, 219 U. S. 209, 55 L. Ed. 183, affirming judgment (1909) 118 S. W. 990, 133 Ky. 724.

Making criminal any deduction by the purchaser from the actual weight of grain, seed, hay, or coal under a claim of right by reason of any custom or rule of a board of trade, as is done by Act June 8, 1909 (Acts Mo., 1909, p. 519), does not unconstitutionally interfere with the liberty to contract.—(1911) *House v. Mayes*, 31 S. Ct. 234, 219 U. S. 270, 55 L. Ed. 213, affirming judgment (1910) 127 S. W. 305, 227 Mo. 617.

The conduct of its business by a board of trade formed to enforce, as between its members, a high standard of business dealings, may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the state necessary or needful to protect the people against unfair practices that are likely to occur, without unconstitutionally interfering with the liberty of contract to which its individual members are entitled.—Id.

The keeping of a place where corporate stocks and bonds and grains, provisions, and other commodities are bought and sold, but not paid for and delivered at the time, and where no complete record of the transactions, including a minute of the time of delivery, is made in a book kept for the purpose, and no memorandum of sale properly stamped is given the purchaser, may be made a criminal offense as is done by Act March 8, 1907 (Acts Mo., 1907, p. 392), in the exercise of the police power of the state without unconstitutionally interfering with the freedom to contract.—(1911) *Broadnax v. State of Missouri*, 31 S. Ct. 238, 219 U. S. 285, 55 L. Ed. 219, affirming judgment *State v. Broadnax* (1910) 128 S. W. 177, 228 Mo. 25.

The freedom of contract is not unconstitutionally infringed by amending the provisions of Code Iowa, § 2071, which define the liability of railway corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways, so that a railway company, when sued on such liability, is precluded from making the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief department.—(1911) *Chicago, B. & Q. R. Co. v. McGuire*, 31 S. Ct. 259, 219 U. S. 549, 55 L. Ed. 328, affirming judgment *McGuire v. Chicago, B. & Q. R. Co. (1908)* 116 N. W. 801, 138 Iowa, 664.

The constitutional liberty of the citizen to make contracts was not infringed by the enactment by Congress, in the exercise of its power over commerce, of the provisions of Act June 29, 1906, c. 3591, § 6, 34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1163), which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.—(1911) *Louisville & N. R. Co. v. Mottley*, 31 S. Ct. 265, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, reversing decree (1909) 118 S. W. 982, 133 Ky. 652.

Liberty to contract is not abridged in violation of Const. U. S. Amend. 14, by provision of Laws S. D. 1907, c. 131, punishing the selling of goods at a lower rate in one place than

in another, to destroy competition.—*Central Lumber Co. v. State of South Dakota*, 33 S. Ct. 66, 226 U. S. 157, 57 L. Ed. 164, affirming judgment *State v. Central Lumber Co.*, 123 N. W. 504, 24 S. D. 136.

Vendor in an executory contract to be performed within the state for the sale of land in another state is not deprived of his property without due process of law in an action for refusal to perform by the provision of Laws Minn. 1897, c. 223, that the vendor may not cancel the contract except on 30 days' written notice.—*Selover, Bates & Co. v. Walsh*, 33 S. Ct. 69, 226 U. S. 112, 57 L. Ed. 146, affirming judgment *Walsh v. Selover, Bates & Co.*, 123 N. W. 291, 109 Minn. 136.

Existence of demand in a city for bread of sizes other than those fixed by ordinance does not render the ordinance invalid as interfering with the freedom of contract protected by Const. U. S. Amend. 14.—*Schmidinger v. City of Chicago*, 33 S. Ct. 182, 228 U. S. 578, 57 L. Ed. 364, Ann. Cas. 1914B, 284, affirming judgments *City of Chicago v. Schmidinger*, 90 N. E. 369, 243 Ill. 167, and 92 N. E. 244, 245 Ill. 317.

Freedom to contract secured by Const. U. S. Amend. 14, is not infringed by Consol. Laws N. Y. c. 31, § 14, providing that only citizens of the United States shall be employed in the public works in the state.—*Heim v. McCall*, 36 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 206, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

—277. Property and rights therein protected.

See 10 Cent. Dig. Const. Law, §§ 762, 766, 949.

A contestant of a pre-emption entry, who has neither made an entry on the land nor perfected a right to do so, has no vested right or interest therein of which he is deprived without due process of law by the act of congress of December 29, 1894, enacted during the pendency of the contest, confirming the title of the original entryman. Decree, 102 F. 559, 42 C. C. A. 499, affirmed.—*Emblen v. Lincoln Land Co.*, 22 S. Ct. 523, 184 U. S. 660, 46 L. Ed. 736.

No existing property rights are taken without due process of law by a state statute, passed in the exercise of its power over foreign corporations, incorporating a local benevolent society with the same name as that of a voluntary state association whose charter had been withdrawn by the foreign corporation that issued it, and conferring upon such society the exclusive right of granting subcharters in the state. Decree (1905) 51 S. E. 166, 104 Va. 197, affirmed.—*National Council, Junior Order United American Mechanics of United States v. State Council of Virginia, Junior Order United American Mechanics of Virginia*, 27 S. Ct. 46, 203 U. S. 151, 51 L. Ed. 132.

The police board of Boston, by issuing a liquor license, on a vacancy created by bankruptcy, to the nominee of the trustee in bankruptcy of the original licensees, does not deprive a co-licensee, to whom the original license had been assigned as security, of property without due process of law, where his so-called property right depends wholly upon the practice of the board to reissue licenses to the old holders until refused for cause, since such right, being of the board's creation, is subject to any limitations which the board may impose. Judgment (1905) 75 N. E. 637, 189 Mass. 260, affirmed.—*Tracy v. Ginzberg*, 27 S. Ct. 461, 205 U. S. 170, 51 L. Ed. 755.

—278. Deprivation of property in general.

See 10 Cent. Dig. Const. Law, §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942.

A mortgage of real estate in Illinois to a corporation was executed at a time when such

mortgages were prohibited. A conveyance of the same property was made by the mortgagor subject to the mortgage, a part of the consideration being the assumption of the mortgage debt. Subsequently Act Ill. 1875 was passed, validating such mortgages theretofore made. *Held*, in a contest between the mortgagee and one claiming under the conveyance, that the validating act was not unconstitutional, as depriving any person of property without due process of law.—*Gross v. United States Mortg. Co.*, 108 U. S. 477, 2 S. Ct. 940, 27 L. Ed. 795.

Where one had had the peaceable, undisturbed possession of real or personal property, with an assertion of his ownership for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title,—a title superior to that of the latter, whose neglect to avail himself of his legal right has lost him his title; and a legislative act that would remove the bar of the statute of limitations in such a case would deprive the former of his property without due process of law, and would be void.—*Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483.

The failure of the probate court to require the guardian to give bond, as provided by the Ohio statute, when he makes sale of the ward's land, being a question of procedure merely, is not a breach of the constitutional provision against deprivation of property by a state "without due process of law."—*Arrowsmith v. Harmoning*, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243.

Under a statute of Michigan for the improvement of the Manistee river, a stream wholly within that state, an improvement company was organized that improved the channel of the river. The company was authorized by the statute to exact tolls for the use of the river thus improved. *Held*, that such a statute is not in violation of the provisions of the United States constitution embodied in the fourteenth amendment, which declares that no state shall deprive any person of life, liberty, or property without due process of law.—*Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 8 S. Ct. 113, 31 L. Ed. 149; *Ruggles v. Same*, 123 U. S. 297, 8 S. Ct. 117, 31 L. Ed. 152.

Rev. St. § 4899, permitting one who has purchased or constructed, with the knowledge and consent of the inventor, a newly-invented machine before application for letters patent has been made, to continue to use it after the patent is granted, is not unconstitutional, as depriving one of his property without compensation.—*Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 11 S. Ct. 8, 34 L. Ed. 618, affirming judgment (C. C.) 42 F. 686.

It is within the police power of a state to enforce its legislation for the protection and regulation of its fisheries by enacting laws declaring any nets, pounds, or other devices (being articles of personal property of trifling value) used in violation of law to be public nuisances, which its game protectors and other persons are authorized to abate and summarily destroy (Laws N. Y. 1880, c. 591, as amended by Laws 1883, c. 317); and such legislation is not within the prohibition against deprivation of property without due process of law.—*Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385, affirming judgment 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134.

A statute authorizing the court, upon the petition of a party having an interest in a mine, after due notice and hearing, to order an inspection thereof when necessary for ascertaining, enforcing, or protecting the petitioner's rights (Code Civ. Proc. Mont. § 376), is not invalid as a taking of property without due process of law, although it does not define the right or interest of the petitioner, or require

him to give bond, or provide for a jury trial or an appeal.—*Montana Co. v. St. Louis Min. & Mill. Co.*, 152 U. S. 160, 14 S. Ct. 508, 38 L. Ed. 398, affirming judgment 9 Mont. 288, 23 P. 510.

A state statute which, as construed by the highest state court, prohibits a citizen of the state, under an open policy of marine insurance, effected outside the state, in a foreign insurance company which has not complied with the state laws, from sending by mail or telegraph, while in the state, a notice describing particular goods then within the state, upon which he desires the insurance under the open policy to attach (*Acts La. 1894, No. 66*), operates to deprive such citizen of his liberty without due process of law.—*Allgeyer v. State of Louisiana*, 17 S. Ct. 427, 165 U. S. 578, 41 L. Ed. 832, reversing judgment 18 So. 904.

An ordinance prescribing limits in a city outside of which no woman of lewd character shall dwell, with a proviso that nothing therein shall be so construed as to authorize such women to occupy a house in any portion of the city, and with nothing in the ordinance to deny the ordinary rights of individuals to restrain a private nuisance, is an exercise of the police power which does not invade the rights of property owners in or adjacent to the prescribed limits, in violation of the federal constitution, although the pecuniary value of their property may be depreciated in consequence thereof. Judgment, 24 So. 608, 51 La. Ann. 93, 44 L. R. A. 90, affirmed.—*L'Hote v. City of New Orleans*, 20 S. Ct. 788, 177 U. S. 587, 44 L. Ed. 899.

A foreign steamship company is not deprived of its property without due process of law by the action of the Louisiana state board of health, authorized by *Acts La. 1898, No. 192, § 8*, in prohibiting it from landing the passengers on one of its steamers at New Orleans, or any place contiguous thereto, because of the existence of an infectious disease in that city. Judgment, 25 So. 591, 51 La. Ann. 645, 56 L. R. A. 795, 72 Am. St. Rep. 795, affirmed.—*Compagnie Française de Navigation à Vapeur v. Board of Health of State of Louisiana*, 22 S. Ct. 811, 186 U. S. 380, 46 L. Ed. 1209.

Due process of law is not denied the owners of property damaged by the enforcement of a restriction on the height of buildings on certain Boston streets, imposed by *Act Mass. May 23, 1898*, on the theory that the right of action thereby given to recover the damages from the city of Boston "in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway" does not afford adequate provision for compensation, because the city, not being a party to the taking, is not technically estopped to deny its liability, since such statutory liability is of a character which, under the decisions of the state courts, the Legislature may impose on a municipality. Judgment, *Attorney General v. Williams*, 59 N. E. 812, 178 Mass. 330, affirmed.—*Williams v. Parker*, 23 S. Ct. 440, 188 U. S. 491, 47 L. Ed. 559.

The safeguards for the protection of the property of an absentee in case of his return, afforded by *Laws Pa. 1885, p. 155*, providing a special proceeding for the administration of the estates of absentees, satisfy the requirement of the due process of law clause of *Const. U. S. Amend. art. 14*, where that statute authorizes the revocation of the administration at any time on proof that the absentee is in fact alive, and in such event permits him to recover the shares of his estate received by the distributees, and provides that until the latter shall give security for refunding their shares, with interest, in case the supposed decedent shall be alive, no distribution shall be made, and that in case of inability to give such security the money shall be invested under the control of the court, and

the interest only paid to the distributees. Judgment, 58 A. 16, 208 Pa. 469, 98 Am. St. Rep. 790, affirmed.—*Cunnius v. Reading School Dist.*, 25 S. Ct. 721, 198 U. S. 458, 49 L. Ed. 1125, 3 Ann. Cas. 1121.

Fixing the period of a person's absence from his last domicile within the state, which will be sufficient, under *Laws Pa. 1885, p. 155*, to authorize the administration of his property by the special proceeding provided by that statute at seven or more years, is not so unreasonable as to render the statute repugnant to the due process of law clause of *Const. U. S. Amend. art. 14*.—*Id.*

The due process of law clause of *Const. U. S. Amend. art. 14*, does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by a special and appropriate proceeding distinct from the general law for the settlement of the estates of decedents.—*Id.*

The property of a school district is not taken without due process of law by the creation, by *Laws Mich. 1901, Loc. Acts No. 315*, of a new district, to which was given the property within its limits which had belonged to the districts from which it was created. Judgment, *Attorney General v. Lowrey*, 92 N. W. 289, 131 Mich. 639, 9 Detroit Leg. N. 470, affirmed.—*Attorney General of State of Michigan v. Lowrey*, 26 S. Ct. 27, 199 U. S. 233, 50 L. Ed. 167.

Municipal ordinances requiring all garbage and other refuse matter to be delivered at a specified crematory or reduction plant, there to be cremated or destroyed at the expense of the person, company, or corporation conveying the same, are not wanting in the due process of law required by *Const. U. S. Amend. 14*, as taking private property for public use without compensation, even if some of the substances so destroyed may have had some elements of value. Decree, 126 F. 29, 61 C. C. A. 91, affirmed.—*California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 26 S. Ct. 100, 199 U. S. 306, 50 L. Ed. 204.

An ordinance conferring on a city contractor the exclusive right to collect and dispose of garbage is not, so far as it relates to the refuse from the tables of hotels, wanting in the due process of law required by *Const. U. S. Amend. 14*, as depriving the owner of his property without compensation, although such refuse may be valuable as food for swine, or for the manufacture of merchantable grease and other products. Judgment, *People v. Gardner*, 100 N. W. 126, 136 Mich. 693, 11 Detroit Leg. N. 166, affirmed.—*Gardner v. People of State of Michigan*, 26 S. Ct. 106, 199 U. S. 325, 50 L. Ed. 212.

A provision of the sanitary code of the city of New York which is construed by the state courts to confer discretionary power on the board of health, within reasonable limits, to grant or withhold permits to sell milk in that city, cannot be deemed to be lacking in the due process of law guaranteed by *Const. U. S. Amend. 14*, in the absence of any showing of arbitrary or oppressive exercise of such power. Judgments 67 N. E. 913, 175 N. Y. 440, 108 Am. St. Rep. 781, and 80 N. Y. S. 1108, 81 App. Div. 123, affirmed.—*People of State of New York v. Van De Carr*, 26 S. Ct. 144, 199 U. S. 552, 50 L. Ed. 305.

The right to take possession of the property of a street railway company remaining in the streets at the expiration of its franchise cannot, consistently with due process of law, be conferred by municipal ordinance upon another street railway company. Decree (*C. C. 1905*) 137 F. 111, affirmed.—*Cleveland Electric Ry. Co. v. City of Cleveland*, 27 S. Ct. 202, 204 U. S. 116, 51 L. Ed. 399.

Vested rights, privileges, or property rights of the members of an association insuring lives upon the co-operative plan are not taken without due process of law by the reorganization of such association as a mutual level premium company, pursuant to Laws N. Y. 1901, p. 1779, c. 722, under a new name and without the consent of the members.—*Polk v. Mutual Reserve Fund Life Ass'n of New York*, 28 S. Ct. 65, 207 U. S. 310, 52 L. Ed. 222.

Want of due process of law cannot be urged against proceedings taken pursuant to Act Vt. Oct. 9, 1906, p. 79, No. 75, to compel a foreign corporation doing business in the state to produce books and papers before the grand jury, on the theory that no compensation is provided for the time, trouble, and expense incurred in collecting documents outside the state and sending them into the state, and that private property is thus taken for public use without compensation, where the highest state court has held that the general law of the state in reference to the compensation of witnesses applies. Judgment, *In re Consolidated Rendering Co.* (Vt. 1907) 66 A. 790, affirmed.—*Consolidated Rendering Co. v. State of Vermont*, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas., 658.

A German corporation is not deprived of its property without due process of law, contrary to Const. U. S. Amend. 14, by the refusal of a state court, on grounds of public policy, to apply the doctrine of comity so as to subject by attachment, to the payment of an indebtedness due the corporation from a German subject, a fund within the state to which one of its own citizens asserts a claim, where the effect of judgment in favor of the corporation would be to remove the fund to a foreign country, there to be administered in favor of the foreign creditors. Judgment, *The Disconto Gesellschaft v. Terlinden* (1906) 106 N. W. 821, 127 Wis. 651, 115 Am. St. Rep. 1063, affirmed.—*The Disconto Gesellschaft v. Umbreit*, 28 S. Ct. 337, 208 U. S. 570, 52 L. Ed. 625.

Neither due process of law nor the equal protection of the laws is denied by Laws N. J. 1905, p. 461, c. 238, under which a riparian owner may be prevented from diverting the waters of a stream of the state into any other state, for use therein. Decree, *McCarter v. Hudson County Water Co.* (1906) 65 A. 489, 70 N. J. Eq. 695, affirmed.—*Hudson County Water Co. v. McCarter*, 28 S. Ct. 529, 209 U. S. 349, 52 L. Ed. 828, 14 Ann. Cas. 560.

The prohibition against the possession of game out of season, which is made by Laws N. Y. 1900, p. 22, c. 20, is a proper exercise of the police power, and does not deny the due process of law guaranteed by Const. U. S. Amend. 14, although such game may have been taken in foreign countries during the open season there. Judgment (1906) 76 N. E. 1032, 184 N. Y. 126, 3 L. R. A. (N. S.) 163, affirmed.—*People of State of New York ex rel. Silz v. Hesterberg*, 29 S. Ct. 10, 211 U. S. 31, 53 L. Ed. 75.

The prohibition against teaching white and negro pupils in the same institution, which is made by Acts Ky. 1904, p. 181, c. 85, does not, when applied to a corporation as to which the state has reserved the power to alter, amend, or repeal its charter, deny due process of law, or otherwise violate the federal Constitution. Judgment (1906) 94 S. W. 623, 123 Ky. 209, affirmed.—*Berea College v. Commonwealth of Kentucky*, 29 S. Ct. 33, 211 U. S. 45, 53 L. Ed. 81.

The discrimination or classification made between the commercial and residential sections of Boston by Pub. Acts Mass. 1904, p. 283, c. 333, and Acts 1905, p. 309, c. 333, limiting the maximum height of buildings in the com-

mercial district to 125 feet, and the residential districts to from 80 to 100 feet, will not, in view of a decision of the highest state court, upholding such legislation, as in the exercise of the police power, be held so unreasonable as to deprive the owner of property in the residential section of its profitable use without justification, and hence to take his property without due process of law unless compensation be given him for such invasion of his rights, even though esthetic considerations may have entered into the reasons for its passage. Judgment (1907) 79 N. E. 745, 193 Mass. 364, 118 Am. St. Rep. 523.—*Welch v. Swasey*, 29 S. Ct. 567, 214 U. S. 91, 53 L. Ed. 923.

A cemetery association owning a burial ground within the limits of the city and county of San Francisco is not deprived of its property without due process of law, contrary to the Const. U. S. Amend. 14, by an ordinance forbidding the burial of the dead within those limits. Decree (1907) 93 P. 70, 152 Cal. 464, 14 A. & E. Ann. Cas. 1080, affirmed.—*Laurel Hill Cemetery v. City and County of San Francisco*, 30 S. Ct. 301, 216 U. S. 358, 54 L. Ed. 515.

The owner of Philippine silver coin is not deprived of his property therein without due process of law, contrary to Act July 1, 1902, c. 1369, 32 Stat. 692, by the prohibition against the exportation of such coin from the Philippine Islands, under penalty of forfeiture and fine or imprisonment, which is made by Philippine law No. 1411, enacted by the Philippine Commission in the exercise of the power under Act Cong. March 2, 1903, c. 980, § 6, 32 Stat. 953 (U. S. Comp. St. Supp. 1909, p. 895), to adopt such measures as are deemed proper, not inconsistent with the organic act, to maintain the parity between gold and silver pesos, but such statute is within the limits of the police power.—*Ling Su Fan v. United States*, 31 S. Ct. 21, 218 U. S. 302, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176.

The levy and collection under a state statute from every bank existing under the state laws of an assessment based upon average daily deposits for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent is a valid exercise of the police power, and cannot be regarded as depriving a solvent bank of its liberty or property without due process of law.—(1911) *Noble State Bank v. Haskell*, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, affirming decree (1908) 97 P. 590, 22 Okl. 48. Opinion amended (1911) 31 S. Ct. 290, 219 U. S. 575, 55 L. Ed. 341; (1911) *Shallenberger v. First State Bank of Holstein, Neb.*, 31 S. Ct. 189, 219 U. S. 114, 55 L. Ed. 117, reversing decree (C. C. 1909) *First State Bank of Holstein, Neb., v. Shallenberger*, 172 F. 999.

Property in a photograph taken after Laws N. Y. 1903, c. 132, went into effect, is not taken without due process of law, by the provisions of that statute making it a misdemeanor to use the name, portrait, or picture of any living person for advertising purposes without the written consent of such person, first obtained, and giving a right of action for damages to the injured person.—(1911) *Sperry & Hutchinson Co. v. Rhodes*, 31 S. Ct. 490, 220 U. S. 502, 55 L. Ed. 561, affirming judgment (1908) *Rhodes v. Sperry & Hutchinson Co.*, 85 N. E. 1097, which affirmed (1907) 104 N. Y. S. 1102, 120 App. Div. 467.

The time for distributing the estate of an absentee, and for barring actions relative to the property, prescribed by Rev. Laws Mass. c. 144, is not so arbitrary and unreasonable as to be wanting in due process of law, because

the rights of the absentee are absolutely barred after one year from the appointment of a receiver, in the event that such appointment was not made within 13 years from the date of the disappearance of the absentee, otherwise, after 14 years from such disappearance.—(1911) *Blinn v. Nelson*, 32 S. Ct. 1, 222 U. S. 1, 56 L. Ed. 65, Ann. Cas. 1913B, 555, affirming decree (1908) *Nelson v. Blinn*, 83 N. E. 889, 197 Mass. 279, 15 L. R. A. (N. S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147.

Requiring a water company to bear the cost of making service connections which it was its duty to make under its charter is not a taking of the company's property without due process of law.—(1912) *Consumers' Co. v. Hatch*, 32 S. Ct. 465, 224 U. S. 148, 56 L. Ed. 703, affirming judgment (1909) *Hatch v. Consumers' Co.*, 104 P. 670, 17 Idaho, 204.

Suspending collection of tolls by turnpike company, under a state statute, until the roads are repaired, does not take property without due process of law contrary to Const. U. S. Amend. 14.—*Norfolk & S. Turnpike Co. v. Commonwealth of Virginia*, 32 S. Ct. 828, 225 U. S. 264, 56 L. Ed. 1082.

An infringement of Const. U. S. Amend. 14, as depriving a lot owner of his property without due process of law, results from an ordinance passed under Laws Va. 1908, c. 349, requiring the committee on streets on petition to establish a building line not less than five nor more than 30 feet from the street line; it not being an exercise of the police power.—*Eubank v. City of Richmond*, 33 S. Ct. 76, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 742, reversing judgment 67 S. E. 376, 110 Va. 199, 19 Ann. Cas. 186.

National banks cannot claim that, as to dealings after the Kansas bank depositors' guaranty law of March 6, 1909 (Laws 1909, c. 61), went into effect, their property was taken without due process of law, in that they are not permitted to share equally with depositors under that statute in the assets of an insolvent state bank.—*Abilene Nat. Bank v. Dolley*, 33 S. Ct. 409, 228 U. S. 1, 57 L. Ed. 707.

The property of a private waterworks company is not taken without due process of law in violation of Const. U. S. Amend. 14, by the municipality constructing a competing plant, where there is no contract immunity from such competition.—*Madera Waterworks v. City of Madera*, 33 S. Ct. 571, 228 U. S. 454, 57 L. Ed. 915, affirming decree (C. C.) 185 F. 281.

Subjecting a water company whose franchise has expired to the alternative of accepting an inadequate price or having the value of the plant ruinously impaired by the construction of a municipal plant does not take the property without due process of law, contrary to Const. U. S. Amend. 14, where the city is under no legal obligation to renew the franchise or to purchase the plant.—*City and County of Denver v. New York Trust Co.*, 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

Requiring entries in coal mines to have an unobstructed space of at least 2 feet in width outside the rails, as is done by Burns' Ann. St. Ind. 1908, § 8582, is a valid exercise of the police power and does not violate Const. U. S. Amend. 14.—*Barrett v. State of Indiana*, 33 S. Ct. 692, 229 U. S. 26, 57 L. Ed. 1050, affirming judgment 93 N. E. 543, 175 Ind. 112.

The property of a street railway company whose franchise to operate has expired is not taken without due process of law by requiring it to remove its tracks from the streets within a reasonable time.—*Detroit United Ry. v. City of Detroit*, 33 S. Ct. 697, 229 U. S. 39, 57 L. Ed. 1056, affirming judgment (Mich.) *City of Detroit v. Detroit United Ry.*, 137 N. W. 645, 172 Mich. 136.

Unnaturalized foreign-born residents are not deprived of property without due process of law, contrary to Const. U. S. Amend. 14 by P. L. Pa. 1909, p. 466, prohibiting the killing of any wild bird or animal by such a person except in defense of person or property, and making it unlawful for such person to own or be possessed of a shotgun or rifle.—*Patson v. Commonwealth of Pennsylvania*, 34 S. Ct. 281, 232 U. S. 138, 58 L. Ed. 539, affirming judgment *Commonwealth v. Patson*, 79 A. 928, 231 Pa. 46.

Any right to have beneficiaries on behalf of deceased Creek citizen ascertained by Creek tribal laws under provision of original Creek Agreement March 1, 1901, § 28, could without denying due process of law be recalled by Act May 27, 1902, and Supplemental Creek Agreement June 30, 1902, § 6.—*Sizemore v. Brady*, 35 S. Ct. 135, 235 U. S. 441, 59 L. Ed. 308, affirming judgment *Brady v. Sizemore*, 124 P. 615, 33 Okl. 169.

The reserved right of state to amend corporate charter cannot be so exercised as to take property of corporation without due process of law.—*Chicago, M. & St. P. R. Co. v. State of Wisconsin*, 35 S. Ct. 869, 238 U. S. 491, 59 L. Ed. 1423, L. R. A. 1916A, 1133, reversing judgment *State v. Chicago, M. & St. P. R. Co.*, 140 N. W. 70, 152 Wis. 341, Ann. Cas. 1914C, 478.

Prohibition of sale of food preservatives containing boric acid, made to protect the public health, by Hurd's Rev. St. Ill. 1913, c. 127b, §§ 8, 22, as construed by the state court, held not a deprivation of property without due process of law.—*Price v. People of State of Illinois*, 35 S. Ct. 892, 238 U. S. 446, 59 L. Ed. 1400, affirming judgment *People v. Price*, 101 N. E. 196, 257 Ill. 587, Ann. Cas. 1914A, 1154.

Property is not taken without due process of law within Const. Amend. 14, by decree under statutory authority escheating to the county real property of an intestate leaving no heirs.—*Christianson v. King County*, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

Congress could, notwithstanding due process of law clause of the federal Constitution, provide by Act April 21, 1904, that restrictions on alienation by allottees of Indian blood under Act July 1, 1902, which that act imposes, could be removed by the Secretary of the Interior on application to the Indian agent if he were satisfied.—*Williams v. Johnson*, 36 S. Ct. 150, 239 U. S. 414, 60 L. Ed. 358, affirming judgment 122 P. 485, 32 Okl. 247.

Property is not taken without due process of law, contrary to Const. Amend. 14, by Laws Fla. 1913, c. 6537, §§ 10, 12, making it a misdemeanor punishable by fine and imprisonment to fail to perform labor on the highways.—*Butler v. Perry*, 36 S. Ct. 258, 240 U. S. 328, 60 L. Ed. 672, affirming judgment 66 So. 150, 67 Fla. 405.

279. Exercise of power of eminent domain.

See 10 Cent. Dig. Const. Law, §§ 877-890.

280. — In general.

See 10 Cent. Dig. Const. Law, §§ 877-890.

The New Hampshire mill act, authorizing any person to erect and maintain on his own land a water mill and milldam upon and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding, is a reasonable exercise of the power of the legislature to regulate the manner in which the rights of riparian owners may be asserted and enjoyed, and does not deprive them of their property without due process of law, in violation of the fourteenth amendment of the constitution of the United States.—*Head v.*

Amoskeag Mfg. Co., 113 U. S. 9, 5 S. Ct. 441, 28 L. Ed. 889.

Const. Wash. art. 17, asserts the title of the state to the beds and shores of all navigable waters up to the line of ordinary high water, with a reservation of vested rights. Article 15 requires the legislature to provide for the appointment of a commission to locate harbor lines, and declares that the state shall never give, sell, or lease to any private person or corporation the lands between any harbor line and the line of ordinary high tide, and within not less than 50 feet nor more than 600 feet of such harbor line, as the commission shall determine, and that such area shall be forever reserved for landings, wharves, etc. *Held*, that the mere location of harbor lines by the state commission so as to include a long-established wharf would not deprive the owner thereof of his property without due process of law, for he would still retain whatever rights he ever had in such wharf and the land upon which it stands.—*Yesler v. Board of Harbor-Line Com'rs*, 146 U. S. 646, 13 S. Ct. 190, 36 L. Ed. 1119.

A citizen of another state, whose land is subject to the law of Louisiana allowing the public to impose servitudes on such land without compensation for the making and repairing of levees, cannot complain that he was deprived of his property without due process of law, within the meaning of Const. Amend. 14, if the state law was impartially administered.—*Eldridge v. Trezevant*, 160 U. S. 452, 16 S. Ct. 345, 40 L. Ed. 490.

An order made by a state court, under authority of statute, requiring a railroad company to surrender a portion of its right of way to private individuals, as a site for an elevator to be erected and maintained by such individuals for their own benefit, amounts to a taking of private property by the state without due process of law.—*Missouri Pac. Ry. Co. v. State of Nebraska*, 17 S. Ct. 130, 164 U. S. 403, 41 L. Ed. 489.

A judgment of a state court, though authorized by statute, whereby private property is taken for public use without compensation, is wanting in due process of law, and the affirmation of such a judgment by the highest state court is a denial of a right secured by the federal constitution.—*Chicago, B. & Q. R. Co. v. City of Chicago*, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

The requirement of due process of law is not necessarily fulfilled, in condemnation proceedings, merely by giving due notice, so that defendant appears and makes defense, since what is due process is to be determined by substance, and not by form.—*Id.*

A statute authorizing a city to condemn a water-supply system is not in conflict with the federal constitution because it fails to expressly prescribe the uses to which the property shall be put after condemnation, the property being already used for a public purpose, and there being a mere change of title.—*Long Island Water-Supply Co. v. City of Brooklyn*, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

The requirement of due process of law is not violated by permitting the actual taking possession of private property pending condemnation proceeding, if adequate provision is made for payment of just compensation when the amount is determined.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

Where, under the constitution and laws of a state as construed by its supreme court, consequential damage to property abutting on a street, resulting from the occupation of a portion of the street not adjacent to such property by a railroad, is *dammum absque injuria*, such occupation of the street is not a taking of the

property; and a statute or ordinance authorizing it, without providing for compensation to the property owner, is not unconstitutional, as depriving him of his property without due process of law.—*Meyer v. City of Richmond*, 19 S. Ct. 106, 172 U. S. 82, 43 L. Ed. 374.

The restriction on the waste of gas and oil by owners of land, made by Acts Ind. 1893, p. 300, which provides that it shall be unlawful to permit the flow of gas or oil from a well to escape into the open air, without being confined within the well or proper pipes or other safe receptacle, for more than two days after gas or oil shall have been struck in the well, does not take the private property of the owners of the land without adequate compensation, and therefore without due process of law, since the owner of the surface has no property right in the gas or oil until he has actually reduced it to possession, or, if he has any property right therein, it is a right in common with the co-equal right of other landowners to take from the common source of supply, and therefore subject to the legislative power to prevent a destruction of the common property by one of the common owners. Judgment, 50 N. E. 1125, 150 Ind. 698, affirmed.—*Ohio Oil Co. v. State of Indiana*, 20 S. Ct. 576, 177 U. S. 190, 44 L. Ed. 729; *Id.*, 20 S. Ct. 585, 177 U. S. 212, 44 L. Ed. 740; *Id.*, 20 S. Ct. 585, 177 U. S. 213, 44 L. Ed. 740.

The condemnation of property under a special statute for the abolition of grade crossings is not a taking of the property of the owners, whether as property owners or as taxpayers, without due process of law, by reason of the fact that the statute authorizes an increase in the number of tracks, and provides for payment of part of the expense by the city in which the property is situated, whether the provision for payment by the city is valid under the state constitution or not, since the condemnation of the property and the apportionment of the cost are distinct and separable portions of the statute. Decree, 39 A. 443, 70 Conn. 326, affirmed.—*Wheeler v. New York, N. H. & H. R. Co.*, 20 S. Ct. 949, 178 U. S. 321, 44 L. Ed. 1085.

The interruption of access to lands, and the impairment of the rights of navigation, consequent upon the private construction of a dam across a navigable stream, under the authority of legislation enacted in the exercise of the police power to subserve the drainage of lowlands, is not a "taking" which requires compensation to be made to the owner of the lands in order to afford the due process of law guaranteed by Const. U. S. Amend. 14. Decree (C. C.) *Manigault v. S. M. Ward & Co.*, 123 F. 707, affirmed.—*Manigault v. Springs*, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

The flooding of lands consequent upon the private erection of a dam under the authority of legislation enacted in the exercise of the police power to subserve the drainage of lowlands does not amount to a taking which requires compensation to be made to the owner in order to afford the due process of law guaranteed by Const. U. S. Amend. 14, when such flooding can be prevented by raising the height of the dikes around the lands.—*Id.*

A reservation of "wharves and wharfing privileges" in a dedication of land for an addition to a city does not include the right to appropriate for wharfage purposes a street or an extension thereof which cannot be taken away or destroyed without compensation without denying the due process of law secured by Const. U. S. Amend. 14. Decree, 76 P. 347, 45 Or. 1, affirmed.—*Mead v. City of Portland*, 26 S. Ct. 171, 200 U. S. 148, 50 L. Ed. 413.

Compensation to an upper riparian proprietor for the damages sustained by reason of the erection of a dam by a lower mill owner,

under the authority of Pub. St. Mass. c. 190, must be deemed sufficiently secured to satisfy the due process of law clause of Const. U. S. Amend. 14, by the provisions of that statute for the recovery of the damages sustained within three years by the person whose land is "overflowed or otherwise injured" by such dam, together with an annual compensation for future damages, or, in lieu thereof, a gross sum, both to be computed by the jury, and for the bringing of a new complaint if dissatisfaction exists over the amount of such annual compensation, especially since the state court has held that no easement or title is gained in or over the upper lands, and has recognized the right to injunctive relief if other remedies prove ineffectual. Judgment, 70 N. E. 1009, 186 Mass. 89, 104 Am. St. Rep. 563, modified. —Otis Co. v. Ludlow Mfg. Co., 26 S. Ct. 353, 201 U. S. 140, 50 L. Ed. 896.

The due process of law guaranteed by Const. U. S. Amend. 14, is not denied an upper riparian owner by the provisions of Pub. St. Mass. c. 190, giving mill owners the right to flowage to develop water power, where adequate compensation is secured to the upper owner for the resulting injury to his land.—Id.

Requiring a street railway company to stand the expense of lowering, or, at its option, removing, a tunnel constructed by it under the Chicago river, which, though not an obstruction to navigation when constructed, has since become such by reason of the increased size of the vessels plying upon that river, does not deny it the due process of law guaranteed by the federal Constitution, which requires that compensation be made when private property is taken for public use, where the ordinance under which the tunnel was constructed was adopted while a statute was in force which, as construed by the state courts, made it a condition of the construction of such tunnel that navigation should not be unnecessarily interrupted. Judgment, 73 N. E. 393, 214 Ill. 9, affirmed.—West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago, 26 S. Ct. 518, 201 U. S. 506, 50 L. Ed. 845.

The improvement of the New Haven & Derby Railroad is a public use for which the New York, New Haven & Hartford Railroad Company, which is the lessee of the former road, and the owner of three-fourths of its stock, may proceed under Gen. St. Conn. §§ 3694, 3695, without violating the due process of law clause of Const. U. S. Amend. 14, to condemn the outstanding shares owned by a person who refuses to agree on the terms of purchase. Judgment, New York, N. H. & H. R. Co. v. Offield (1905) 60 A. 740, 78 Conn. 1, affirmed.—Offield v. New York, N. H. & H. R. Co., 27 S. Ct. 72, 203 U. S. 372, 51 L. Ed. 231.

The condemnation of land by a railroad company for a spur track will not be held to be for a private use, and therefore forbidden by Const. U. S. Amend. 14, where the state courts, in effect, have held that the use was public, on evidence tending to show that the spur track was designed, in part for the storage of cars while loading and unloading, and to relieve the congestion of business, although the motive which dictated its location over the land in question was to reach a private industry, which contributed to the cost.—Hairston v. Danville & W. R. Co., 28 S. Ct. 331, 208 U. S. 598, 52 L. Ed. 637, 13 Ann. Cas. 1008.

The expense of constructing a railway bridge over a highway, made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the federal Constitution, which requires that compensation be made when private property is taken for public use.—(19.0) Cincinnati, I. & W. Ry. Co. v. City of Connersville, 31 S. Ct. 93, 218 U. S. 336, 54 L. Ed.

1060, 20 Ann. Cas. 1206, affirming judgment (1905) 83 N. E. 503, 170 Ind. 316.

The property rights of an abutting owner are not taken without due process of law because, in suit to recover for loss by erection of an elevated road, the court refused to submit questions of damage under instruction to exclude from market value after construction of railroad any enhancement from facilities furnished by the improvement.—Brand v. Union Elevated R. Co., 35 S. Ct. 846, 238 U. S. 586, 59 L. Ed. 1471, affirming judgment 101 N. E. 247, 258 Ill. 133, Ann. Cas. 1914B, 473.

281. — Procedure.

See 10 Cent. Dig. Const. Law, § 890.

One who sues for an injury to her property by the building and operation of a railroad in its vicinity, and is denied any relief after a full and fair trial in the courts of her own state, under general provisions of law applicable to all persons in her situation, is not deprived of her property without due process of law.—Marchant v. Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751.

The requirement of due process of law is not necessarily fulfilled, in condemnation proceedings, merely by giving due notice, so that defendant appears and makes defense, since what is due process is to be determined by substance and not by form.—Chicago, B. & Q. R. Co. v. City of Chicago, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

To constitute "due process of law" in condemnation proceedings it is not essential that damages be assessed by a jury, it being sufficient that the assessment is by commissioners, at least where there is provision for a review by the courts.—Long Island Water-Supply Co. v. City of Brooklyn, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

There is no denial of due process of law in making the findings of fact, whether by commissioners or a jury, final, and leaving to the courts only the question whether any erroneous basis was adopted for the appraisal, or any errors occurred in the proceedings.—Id.

The fourteenth amendment does not require that state condemnation proceedings shall be had by a jury of inquest, rather than before a common-law jury, presided over and controlled by a judge. Judgment (Mich.) 61 N. W. 787, affirmed.—Backus v. Fort St. Union Depot Co., 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

The fourteenth amendment does not require that, in proceedings under state authority for the appropriation of private property for public use, the questions of the necessity for taking the property and the amount of compensation shall both be submitted to the same jury.—Id.

Under the state statute regulating condemnation proceedings, which provides for appeals, with notice in writing of the objections, and declaring that objections not specified shall be deemed waived (Michigan Union Depot Act 1881), the refusal of the state supreme court to hear counsel on the necessity for taking the property, when no objection on this ground was specified in the notice of appeal, does not deprive the appellant of due process of law or the equal protection of the laws, contrary to the fourteenth amendment.—Id.

The owners, respectively, of the fee of land taken for a public street and of an easement of way, light, and air over such land, and the holder of a mortgage on the same, subject to the easement, cannot successfully claim to have been denied rights under Const. U. S. Amend. 14, because they were not permitted to pool their interests and have the damages assessed in a lump sum, and estimated as if the land was the sole property of one owner. Judgment (1907) 81 N. E. 244, 195 Mass. 338, affirmed.—Boston

Chamber of Commerce v. City of Boston, 30 S. Ct. 459, 217 U. S. 189, 54 L. Ed. 725.

An award to the owner of one of many parcels of land taken by eminent domain for a reservoir for a city water supply does not deny due process of law, where made after full hearing, because the commissioners and courts refused to consider the value of the land as a natural reservoir site.—*McGovern v. City of New York*, 33 S. Ct. 876, 229 U. S. 363, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391, affirming judgment *In re Simmons*, 114 N. Y. S. 571, 130 App. Div. 350, and 88 N. E. 1132, 195 N. Y. 573.

Power of eminent domain held not exercised for private purposes, contrary to Const. U. S. Amend. 14, in condemnation proceedings by a drainage district organized under Laws Neb. 1905, c. 161, and Laws 1909, c. 147.—*O'Neill v. Leamer*, 36 S. Ct. 54, 239 U. S. 244, 60 L. Ed. 249, affirming judgment 142 N. W. 112, 93 Neb. 786.

282. Taxation of property.

See 10 Cent. Dig. Const. Law, §§ 891-906.

283. — In general.

See 10 Cent. Dig. Const. Law, §§ 891, 892, 904-906.

Act Ky. April 3, 1878 (Bull. & F. Gen. St. Ky. 1881, p. 1019), requiring the chief officer of a railroad company to make a return to the auditor of public accounts in July of each year of the length of his road within the state, and providing for the appointment of a board of equalization, which shall meet annually in a designated month at a designated place, and receive the returns from the auditor, and ascertain the value of the property, and equalize and adjust the assessment thereon, and further providing for the collection of the taxes so assessed by suit against the officers for the penalties incurred by a failure to pay the taxes levied or for the recovery of the taxes themselves by action in the courts, is not unconstitutional, as taking the property of the company without due process of law.—*Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414.

The laws of Pennsylvania taxing bonds and other securities issued by corporations on their nominal instead of their actual value are not unconstitutional, in requiring the treasurer of the corporation to deduct the tax from the interest payable to their bondholders, on the ground that it is a taking of property without due process of law, since the law itself gives them notice of the tax and the mode of its collection.—*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; *City of Chester v. Same*, 134 U. S. 240, 10 S. Ct. 536, 33 L. Ed. 896.

The Pennsylvania statute (Act June 30, 1885, § 4) requiring the treasurer of each private corporation doing business in the state, upon the payment of interest on any bond, etc., issued by such corporation, to assess the state tax of three mills upon the "nominal value" of such evidence of debt, deduct the same from the interest paid, and turn it into the state treasury, is not in contravention of the fourteenth amendment to the constitution of the United States, as taking property without due process of law, or as providing for an unjust discrimination in favor of persons owning bonds of foreign corporations, which by the general laws of the state are taxed at their actual value.—*Jennings v. Coal Ridge Improvement & Coal Co.*, 147 U. S. 147, 13 S. Ct. 282, 37 L. Ed. 116, affirming judgment *Coal Ridge Improvement & Coal Co.*, 127 Pa. St. 397, 17 A. 986, following *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892.

A state tax on the property of an express company within the state, the taxable value of

which is determined with reference to the whole capital of the company ("Nichols Law," Rev. St. Ohio, §§ 2777-2780), is not a tax on property beyond the jurisdiction of the state, and for that reason a taking of property without due process of law.—*Sanford v. Poe*, 17 S. Ct. 305, 165 U. S. 194, 41 L. Ed. 683, affirming decree 69 F. 546, 16 C. C. A. 305.

In order to bring taxation imposed by a state, or under its authority, within the scope of the provision of the fourteenth amendment relating to due process of law, the case should be so clearly an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation, under the guise of exerting the power to tax.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

Where a state reserved the power to alter, amend, or repeal a statute constituting a contract with a corporation exempting it from ordinary taxes, a statute thereafter passed which attempted to preserve all the obligations of the corporation in favor of the state and to take away from the corporation the consideration on the part of the state upon which the duty of the corporation to pay a gross-receipt tax rested, was invalid, as depriving such corporation of property without due process of law. *St. Louis County v. Duluth & I. R. R. Co.*, 80 N. W. 626, 77 Minn. 433, reversed.—*Duluth & I. R. R. Co. v. St. Louis County*, 21 S. Ct. 124, 179 U. S. 302, 45 L. Ed. 201.

A transfer tax law, which is construed as subjecting to taxation remainders created by a will before the precedent estates terminate and the remainders vest in possession, is not in violation of Const. U. S. Amend. art. 14, as depriving the owners of their property without due process of law.—*Orr v. Gilman*, 22 S. Ct. 213, 183 U. S. 278, 46 L. Ed. 196.

The New York transfer tax law (Laws 1897, c. 284), providing for the taxation of the exercise of the power of appointment derived from disposition of property made either before or after the passage of that act, as though the property belonged absolutely to the donee of the power and had been bequeathed or devised by him by law, is not repugnant to Const. U. S. Amend. art. 14, as depriving the owners of property without due process of law, though construed by the highest court of the state to apply to the exercise by a son among his children of a power of appointment given him in the will of his father, who, under the law as it stood at the time of his death, had a legal right to transfer by will his property to such appointees without any limitation then imposed on the exercise of that right.—*Id.*

A Kentucky corporation, operating a ferry across the Ohio river, is deprived of its property without due process of law by the action of that state in including, for purposes of taxation, in the valuation of the franchise derived by the corporation from Kentucky, the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired. Judgment, 57 S. W. 624, 108 Ky. 717, 22 Ky. Law Rep. 446, reversed.—*Louisville & J. Ferry Co. v. Commonwealth of Kentucky*, 23 S. Ct. 463, 188 U. S. 385, 47 L. Ed. 513; *Id.*, 23 S. Ct. 468, 188 U. S. 399, 47 L. Ed. 519.

Including in the appraisal of the capital stock of a domestic corporation for purposes of taxation, under Laws Pa. 1891, p. 229, the value of coal mined by it within the state, but situated in other states, there awaiting sale when the appraisal was made, deprives the corporation of its property without due process of law. Judgment, *Commonwealth v. Delaware, L. & W. R. Co.*, 56 A. 69, 206 Pa. 645, reversed.—*Delaware, L. & W. R. Co. v. Com-*

monwealth of Pennsylvania, 25 S. Ct. 669, 198 U. S. 341, 49 L. Ed. 1077.

The reduction, on account of annual payments "in the nature of a tax" covered by existing agreements, which is made by Laws N. Y. 1899, c. 712, from the amount of the special franchise tax provided for by that statute, does not render the statute invalid, as depriving street railway companies, who agreed to pay a lump sum for their franchises, of their property without due process of law. Judgments, 87 N. E. 69, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674, affirmed, and 80 N. Y. S. 85, 79 App. Div. 183, reversed.—*People of State of New York ex rel. Metropolitan Street Ry. Co. v. State Board of Tax Com'rs*, 25 S. Ct. 705, 199 U. S. 1, 50 L. Ed. 65, 4 Ann. Cas. 381; *People of State of New York ex rel. Brooklyn City R. Co. v. Same*, 25 S. Ct. 713, 199 U. S. 48, 50 L. Ed. 79; *People of State of New York ex rel. Twenty-Third St. R. Co. v. Same*, 25 S. Ct. 715, 199 U. S. 53, 50 L. Ed. 85.

The exemption of the subsurface street railroad in New York City from the operation of the special franchise tax, as authorized by Laws 1899, c. 712, does not make that statute invalid, as depriving them of their property without due process of law.—*Id.*

Due process of law is denied a Kentucky corporation by a tax assessed under the authority of Ky. St. § 4020, upon its rolling stock permanently located in other states and employed there in the prosecution of its business. Judgment, *Commonwealth v. Union Refrigerator Transit Co.*, 80 S. W. 490, 118 Ky. 131, 26 Ky. Law Rep. 23, reversed.—*Union Refrigerator Transit Co. v. Commonwealth of Kentucky*, 26 S. Ct. 36, 199 U. S. 194, 50 L. Ed. 150, 4 Ann. Cas. 493.

A domestic railway corporation is not deprived of its property without due process of law because no reduction is allowed from the capital stock, taken as the basis of the franchise tax imposed by Laws N. Y. 1896, c. 908, § 182, on account of the considerable proportion of its rolling stock which, by the familiar course of railway business, is always absent from the state. Judgment 69 N. E. 1129, 177 N. Y. 584, and 76 N. E. 1104, 183 N. Y. 574, affirmed.—*People of State of New York ex rel. New York Cent. & H. R. R. Co. v. Miller*, 26 S. Ct. 714, 202 U. S. 584, 50 L. Ed. 1155.

Universal legatees under the will of a person who died before the enactment of the Louisiana inheritance tax law of June 28, 1904, are not deprived of their property without due process of law by subjecting their shares to the tax imposed by that statute, although under the Louisiana Civil Code the ownership of the property, passed to such legatees upon the death of the testator. Judgment, *Succession of Levy* (1905) 39 So. 37, 115 La. 377, affirmed.—*Cahen v. Brewster*, 27 S. Ct. 174, 203 U. S. 543, 51 L. Ed. 310, 8 Ann. Cas. 215.

The adoption of the face value of the shares as the basis of the tax on transfers of corporate stock, imposed by Laws N. Y. 1905, c. 241, does not deprive the owners of their property without due process of law. Order (1906) 77 N. E. 970, 184 N. Y. 431, affirmed.—*People of State of New York ex rel. Hatch v. Reardon*, 27 S. Ct. 183, 204 U. S. 152, 51 L. Ed. 415, 9 Ann. Cas. 736.

Even as applied to shares of a foreign corporation owned by nonresidents, the tax on transfers of corporate stock imposed by Laws N. Y. 1905, c. 241, is not invalid under Const. U. S. Amend. 14, as taking property without due process of law.—*Id.*

Property is not taken without due process of law, in violation of Const. U. S. Amend. 14, by imposing a transfer tax, under the au-

thority of the amendment of the general transfer tax law by Laws N. Y. 1897, p. 150, c. 234, upon the exercise by will of the power of appointment conferred by a deed executed prior to the passage of such statute. Order of the surrogate court entered on a remittitur from *In re Delano's Estate* (1903) 68 N. E. 871, 176 N. Y. 486, 64 L. R. A. 279; *State Comptroller v. Carey, Id.*, affirmed.—*Chanler v. Kelsey*, 27 S. Ct. 550, 205 U. S. 466, 51 L. Ed. 882.

The state of Indiana cannot, consistently with due process of law, tax debts evidenced by notes given and payable in Ohio, by residents of that state, to a resident of New York, for loans made in Ohio on lands there situated, merely because, in the attempt to escape proper taxation in Ohio, such notes, together with mortgages securing their payment, were sent to an Indiana agent of the payee, there to be held by him until they were needed in Ohio to have payments of interest indorsed, or to be delivered up if the principal were paid. Judgment (1904) 71 N. E. 963, 164 Ind. 37, 108 Am. St. Rep. 272, reversed.—*Buck v. Beach*, 27 S. Ct. 712, 206 U. S. 392, 51 L. Ed. 1106, 11 Ann. Cas. 732.

Due process of law does not assure to a taxpayer the interpretation of state legislation by the executive officers of a state as against its interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either. Judgment (1906) 94 S. W. 654, 29 Ky. Law Rep. 705, affirmed.—*Thompson v. Commonwealth of Kentucky*, 28 S. Ct. 533, 209 U. S. 340, 52 L. Ed. 822.

The retroactive features of Act Ky. March 21, 1900 (Acts 1900, c. 23), making it the duty of certain officers of each national bank to list its shares of stock for taxation and requiring the bank to pay the tax and a penalty for delinquency, subject to deduction on account of taxes paid by the bank under other legislation, do not, so far as the shares of resident shareholders are concerned, operate to deny due process of law, although the shareholders and the number of shares may not be the same as when the liability to taxation arose, where such statute is construed by the state courts as not imposing any new liability either upon domestic shareholders or the bank, but as simply providing another method for the assessment of shares which have escaped assessment because not listed for taxation.—*Citizens' Nat. Bank v. Commonwealth of Kentucky, to Use of Boyle County*, 30 S. Ct. 532, 217 U. S. 443, 54 L. Ed. 832.

State taxation of the amounts due a foreign insurance company by its policy holders in the state for premiums on which credit of 30 and 60 days had been extended does not take the property of the company without due process of law, contrary to Const. Amend. 14, even though such indebtedness is not evidenced by written instruments.—(1911) *Liverpool & London & Globe Ins. Co. of New York v. Board of Assessors for Parish of Orleans*, 31 S. Ct. 550, 221 U. S. 346, 55 L. Ed. 762, L. R. A. 1915C, 903, affirming judgment (1906) 47 So. 415, 122 La. 98.

Assessing in excess of actual indebtedness the amounts due a foreign insurance company by its policy holders in the state, on which credits have been extended does not take the property of the company without due process of law, where proper opportunity was afforded for correction.—*Id.*

Premiums due a foreign insurance company on open account, though charged to the company's local agents instead of to the policy holders, may be subjected to state taxation without constituting a taking of the company's property without due process of law.—(1911) *Orient Ins. Co. v. Board of Assessors for Parish of Orleans*, 31 S. Ct. 554, 221 U. S. 358, 55 L. Ed.

769, affirming judgment (1909) 50 So. 778, 124 La. 872.

A foreign insurance company cannot claim to have been denied due process of law because the assessments for taxation of the credits due from residents of the state were grossly excessive or the result of mere guesswork, where opportunity was afforded to institute, within a reasonable time fixed by law, a suit to reduce the assessments.—*Id.*

Making the domicile of the corporate owner of ocean-going steamships the situs for taxation, where such vessels have acquired no actual situs elsewhere, is not inconsistent with the due process of law guaranteed by the fourteenth amendment to the federal Constitution.—(1911) *Southern Pac. Co. v. Commonwealth of Kentucky*, 32 S. Ct. 13, 222 U. S. 63, 56 L. Ed. 96, affirming judgment (1909) *Commonwealth v. Southern Pac. Co.*, 120 S. W. 311, 134 Ky. 417, 20 Ann. Cas. 965.

Property is not taken without due process of law, contrary to Const. U. S. Amend. 14, by the imposition of the tax authorized by Laws N. Y. 1896, c. 908, when property is transferred by deed intended to take effect upon the death of the grantor.—(1912) *Keeney v. Comptroller of State of New York*, 32 S. Ct. 105, 222 U. S. 525, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139, affirming judgment (1909) *In re Keeney's Estate*, 87 N. E. 428, 194 N. Y. 281.

The earnings of nonresident express company carrying goods between two points within the state over route incidentally traversing portion of another state, derived from carriage within the state, held within the gross receipts, upon which tax under Rev. Laws Minn. 1905, §§ 794-1038, is based, without burdening interstate commerce or denying due process of law.—(1912) *United States Express Co. v. State of Minnesota*, 32 S. Ct. 211, 223 U. S. 335, 56 L. Ed. 459, affirming judgment (1911) *State v. United States Express Co.*, 131 N. W. 489, 114 Minn. 348.

Tax imposed under Laws Colo. 1907, p. 548, on capital stock of foreign railway company, held invalid, under the commerce and due process of law clauses of the federal Constitution.—*Atchison, T. & S. F. Ry. Co. v. O'Connor*, 32 S. Ct. 216, 223 U. S. 280, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

Excise taxes enacted from foreign corporations under St. Mass. 1909, c. 490, for the privilege of doing business in the state, as applied to corporations carrying on a business not of itself interstate commerce, though their products are sold and shipped in such commerce and which are carrying on a local business, is not invalid under the due process of law clause of the federal Constitution.—*Baltic Min. Co. v. Commonwealth of Massachusetts*, 34 S. Ct. 15, 231 U. S. 68, 58 L. Ed. 127, affirming judgments 93 N. E. 831, 207 Mass. 381; *S. S. White Dental Mfg. Co. v. Same*, 98 N. E. 1056, 212 Mass. 35.

Assessment for taxing purposes of mineral rights owned by others than the owners of the surface, without corresponding deduction from the assessments against the surface, does not violate Const. U. S. Amend. 14, where the mineral rights were not consciously relieved from taxation if they belonged to the owner of the surface.—*Downman v. State of Texas*, 34 S. Ct. 62, 231 U. S. 853, 58 L. Ed. 264, affirming judgment (Tex. Civ. App.) *State v. Downman*, 134 S. W. 787.

The taxation of a resident of the state under Rev. Laws Mass. c. 12, §§ 2, 4, 23, upon shares of stock in foreign corporations not doing business or owning property within the state, does not take his property without due process of

law.—*Hawley v. City of Malden*, 34 S. Ct. 201, 232 U. S. 1, 58 L. Ed. 477, affirming judgment 90 N. E. 415, 204 Mass. 138.

Railway franchises are not valueless so as to make the tax imposed by Act May 3, 1911 (102 Ohio Laws, p. 224), on gross earnings a taking of property without due process of law, because the earnings of the railroad are not sufficient to pay more than other legitimate high-grade securities or may not be sufficient to pay operating expenses.—*Ohio Tax Cases*, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 737, affirming decree (D. C.) 203 F. 537.

The imposition of an excise tax based on gross tonnage on the use of foreign-built pleasure yachts owned by citizens without imposing a like tax on the use of a domestic yacht, as is done by Tariff Act, § 37, does not render that statute repugnant to the due process of law clause of the fifth amendment to the federal Constitution, as being so abhorrent to the sense of justice as to be void even in the absence of express constitutional limitation.—*Billings v. United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, affirming judgment (C. C.) *United States v. Billings*, 190 F. 359; *United States v. Billings*, 34 S. Ct. 428, 232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *Same v. Blair*, 190 F. 372.

The imposition of an excise tax on the use of foreign-built pleasure yachts owned by citizens without imposing a like tax on the use of a domestic yacht, as is done by Tariff Act, § 37, does not render that statute repugnant to the due process of law clause of the fifth amendment to the federal Constitution.—*Rainey v. United States*, 34 S. Ct. 429, 232 U. S. 310, 58 L. Ed. 617, affirming order (C. C.) *United States v. Billings*, 190 F. 359, and modifying judgment (C. C.) *Same v. Blair*, *Id.* 372.

The enforcement of the annual excise tax imposed by Tariff Act, § 37, on the use of foreign-built pleasure yachts owned by citizens, even if destructive of rights vested in the owner by treaty July 3, 1815, with Great Britain, does not for that reason deprive the owner of his property without due process of law.—*Id.*

Construing as applicable to the use of a yacht beyond the territorial limits of the United States the provisions of Tariff Act, § 37, imposing annual excise tax on the use of foreign-built pleasure yachts by citizens, does not render the statute repugnant to the due process of law clause of the fifth amendment to the Constitution as being in conflict with the obvious principles of justice.—*United States v. Bennett*, 34 S. Ct. 433, 232 U. S. 209, 58 L. Ed. 612.

The imposition of an excise tax on the use of foreign-built pleasure yachts owned by citizens without imposing a like tax on the use of a domestic yacht, as is done by Tariff Act, § 37, does not render that statute repugnant to the due process of law clause of the fifth amendment to the federal Constitution.—*Id.*

Transfer tax under Laws N. Y. 1905, c. 368, § 1, amending Laws 1896, c. 908, § 220, on notes left by a nonresident in a state deposit box in New York and made by a resident of Chicago or by a Virginia corporation, held not wanting in due process of law.—*Wheeler v. Sommer*, 34 S. Ct. 607, 233 U. S. 434, 58 L. Ed. 1030, affirming judgments *In re Tiffany's Estate*, 95 N. E. 1140, 202 N. Y. 550, and 128 N. Y. S. 106, 143 App. Div. 327.

Property of a foreign railway company beyond the jurisdiction of the state held not taxed contrary to due process of law by the annual franchise tax imposed by Laws Ark. 1911, p. 67.—*St. Louis Southwestern Ry. Co. v. State of Arkansas ex rel. Norwood*, 35 S. Ct. 99, 235

U. S. 350, 59 L. Ed. 265, affirming decree 152 S. W. 110, 108 Ark. 321.

There is no denial of due process of law in the imposition on a foreign railway company under Laws Ark. 1911, p. 67, in addition to the general property tax of an annual franchise tax for the privilege of transacting intrastate business.—*Id.*

The annual 2 per cent. privilege tax imposed by Act Pa. June 28, 1895 (P. L. 408), on gross premiums of foreign life insurance company from business within the state, may be levied on premiums paid to the company outside the state by citizens of the state, without rendering tax a taking of property without due process of law.—*Equitable Life Assurance Soc. of the United States v. Commonwealth of Pennsylvania*, 35 S. Ct. 829, 238 U. S. 143, 59 L. Ed. 1239, affirming judgment *Commonwealth v. Equitable Life Assurance Soc. of United States*, 86 A. 787, 239 Pa. 288.

Due process of law clause of Const. Amend. 5, is not a limitation on taxing power conferred on Congress by federal Constitution unless taxing statute is so arbitrary as to result in confiscation, or such as produces gross inequality.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

A fund placed in trust in a foreign state, the creator reserving to himself an absolute power of control and receiving the income, may be subjected to an inheritance tax in the domicile state without violating Const. Amend. 14.—*Bullen v. State of Wisconsin*, 36 S. Ct. 473, 240 U. S. 625, 60 L. Ed. 830, affirming judgment in *re Bullen's Estate*, 128 N. W. 109, 143 Wis. 512, 139 Am. St. Rep. 1114.

284. — Assessment and collection.

See 10 Cent. Dig. Const. Law, §§ 293-295.

Where a tax is levied on property according to its value, to be determined by assessors acting judicially, a law prescribing the time when complaints respecting the justice of the assessments will be heard gives all the notice of the assessment required; and the proceedings by which the valuation is determined, though followed by a sale of the delinquent's property, is "due process of law," within the meaning of the fourteenth amendment to the United States constitution. This is especially true as to assessments under the laws of California, for the purpose of reclaiming overflowed and swamp lands, which can be enforced only by suit, in which any defense going either to validity or amount may be pleaded.—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, affirming *Reclamation Dist. No. 108 v. Hagar*, 4 F. 366.

The laws of New Jersey having made the water rents in Jersey City a charge on the land, with a lien prior to all other incumbrances, in the same manner as taxes and assessments, a mortgagee, after the passage of such laws, took his mortgage subject to this condition, whether the water was introduced on the lot mortgaged before or after the giving of the mortgage; and hence such mortgagee has no ground of complaint that his mortgage has been taken without due process of law.—*Provident Inst. for Sav. v. City of Jersey City*, 113 U. S. 506, 5 S. Ct. 612, 28 L. Ed. 1102.

As Laws N. Y. 1859, c. 302, § 10, p. 681, gives a taxpayer an opportunity to object before the tax commissioners to the taxes assessed against him, and as section 20 provides for an opportunity to review the decision of the commissioners by the writ of certiorari, Laws 1843, c. 230, art. 2, §§ 12, 13, which provide that, on the application of the tax receiver to the court of common pleas or the supreme court, a delinquent taxpayer may be fined in an amount equal to the taxes assessed against him,

do not deprive the taxpayer of liberty and property without due process of law, though he has no opportunity to be heard on such application.—*Palmer v. McMahon*, 133 U. S. 660, 10 S. Ct. 324, 33 L. Ed. 772, affirming 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796.

Act Ind. March 6, 1891, providing for assessment of railroad property for taxation by a state board, does not fail of due process of law, in that it does not require personal notice before the assessments are made final, as the statute names the time and place of meeting of the board; nor in that it does not require the board to grant a hearing for correction of errors, as, by the construction of the act by the supreme court of the state, a right to such hearing is given; nor for want of notice and opportunity to be heard after the determination by the board, as a rehearing is not essential.—*Pittsburgh, C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031, and 154 U. S. 438, 14 S. Ct. 1114, 38 L. Ed. 1040, affirming judgment 133 Ind. 625, 33 N. E. 432.

Since St. Minn. 1878, § 113, as amended by Laws 1881, p. 24, providing for the assessment and collection of taxes for previous years in which there was an omission to assess the property, requires them to be collected in the same manner as current taxes, and this involves suit in court, and notice to parties interested, it is not unconstitutional, as depriving persons of property without due process of law.—*Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247.

Act Ind. March 6, 1893, imposing on express, telegraph, telephone, and sleeping-car companies a penalty of 50 per cent. for nonpayment of taxes, does not deprive such companies of property without due process of law.—*Western Union Tel. Co. v. State of Indiana*, 17 S. Ct. 345, 165 U. S. 304, 41 L. Ed. 725.

A state statute (Laws Pa. 1891, p. 240) authorizing banks to collect the tax from their stockholders on their shares, and which fixes the time when the bank shall make its report to the auditor general of the value of its shares, and directs him to hear the stockholders, satisfies the requirement as to "due process of law" in tax proceedings, which is that the law shall fix the time and place at which the assessment is to be made; the rule being that official proceedings are always, in the absence of express provision to the contrary, to be had at the office of the officer charged with the duties.—*Merchants' & Manufacturers' Nat. Bank v. Commonwealth of Pennsylvania*, 17 S. Ct. 829, 167 U. S. 461, 42 L. Ed. 236.

The Louisiana statutes require the name of the owner, when known, to be placed on the assessment roll, with a description of the property assessed, and also provides a period when the assessment roll shall be open to examination and correction after notice by a general publication calling on all persons having property subject to taxation to come forward, and ask for such corrections as they desire. Acts La. 1877 (Ex. Sess.) pp. 154, 155; Acts 1871, p. 13. Under this statute, land owned by Rafael Maria Del Castillo was assessed to R. Castillo, and subsequently sold for nonpayment of taxes, and the sale was held valid by the state supreme court. *Held*, that this construction and application of the statute did not deprive the owner of his property without due process of law.—*Del Castillo v. McConico*, 18 S. Ct. 229, 168 U. S. 674, 42 L. Ed. 622.

Laws Or. 1882, p. 64, providing for the taxation of the mortgagee's interest in land, as real estate, regardless of the residence of the mortgagee, does not deprive him of his property without due process of law.—*Savings & Loan Soc. v. Multnomah County*, 18 S. Ct. 392, 109 U. S.

421, 42 L. Ed. 803, affirming decree (C. C.) 60 F. 31.

The system established by the constitution and laws of West Virginia (Const. art. 13; Code, c. 105), under which taxable lands are forfeited to the state for neglect by the owner for five consecutive years to enter them upon the proper land books for taxation, and under which such lands, upon petition required to be filed in the proper court by the state's representative, are sold, after actual or constructive service upon the owner, and with liberty to him to intervene and redeem, is not inconsistent with the due process of law guaranteed by the federal constitution.—*King v. Mullins*, 18 S. Ct. 925, 171 U. S. 404, 43 L. Ed. 214.

The failure to provide a hearing before the governor in proceedings for the revaluation of undervalued property, pursuant to Gen. Laws Minn. 1893, c. 151, does not make the proceeding void for want of due process of law, as the governor only starts the inquiry upon which reassessment may be based, and opportunity to be heard is offered in the course of the subsequent proceedings. Judgment, *State v. Weyerhauser*, 75 N. W. 718, 72 Minn. 519, affirmed.—*Weyerhaeuser v. State of Minnesota*, 20 S. Ct. 485, 176 U. S. 550, 44 L. Ed. 538.

A reassessment of grossly undervalued property, so as to make the property bear the same burden it would have borne if the true assessment had been made in the first instance, does not violate the constitutional provision for due process of law, on the ground that the former assessments constituted judicial judgments which could be set aside only after notice and opportunity to be heard.—*Id.*

An allowance of a claim for personal property taxes against the estate of a decedent under Gen. St. Minn. 1894, § 4529, preferring claims for taxes to ordinary debts, and section 1623, making them a lien on personal property, and other provisions for enforcing delinquent taxes by distraint of goods and chattels, by proceedings by attachment and publication giving appropriate notice and opportunity to contest, is not without due process of law, although the decedent was a nonresident of the state.—*Bristol v. Washington County*, 20 S. Ct. 585, 177 U. S. 133, 44 L. Ed. 701.

Rev. St. Ind. § 8560, providing for the assessment of omitted property by the county auditor, without provision for notice to any person not a resident of the county in which such omitted property is proposed to be assessed, is not violative of Const. U. S. Amend. art. 14, in depriving a nonresident executor of his property without due process of law, where he not only had an opportunity to appear and set up any defense that he had, but actually did appear, and, after his demurrers and motion to dismiss had been overruled, answered and was fully heard in the trial court, and his objections to the findings and rulings of that court have been heard and considered by the supreme court of the state. Judgment 56 N. E. 443, 154 Ind. 196, affirmed.—*Gallup v. Schmidt*, 22 S. Ct. 162, 183 U. S. 300, 46 L. Ed. 207.

A claimant of land sold to the state by administrative sale for the nonpayment of taxes is not deprived of his property without due process of law by judicial proceedings to collect such delinquent taxes, under a statute enacted subsequent to such sale, although the ordinary expenses attending such proceedings are chargeable as costs, which were not provided for by the prior statute in reference to sales for unpaid taxes, since the state may waive the rights obtained by such sale, and may prescribe the terms on which such waiver will be made. Judgment 57 S. W. 34, 93 Tex. 553, affirmed.—*League v. State of Texas*, 22 S. Ct. 475, 184 U. S. 156, 46 L. Ed. 478.

Due process of law is not violated by proceedings taken in conformity with a state statute providing that personal property held in trust shall be assessed to the trustee, which requires the assessors to give public notice to the inhabitants to return a list of their personal estates, and, in case of failure to make such return, to ascertain as nearly as possible the particulars of the estate, and estimate its just value, which shall be conclusive upon the owner unless he can show a reasonable excuse for omitting to make his return, and which makes provision for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax. Judgment, *Harrington v. Glidden*, 61 N. E. 54, 179 Mass. 488, 94 Am. St. Rep. 613, affirmed.—*Glidden v. Harrington*, 23 S. Ct. 574, 189 U. S. 255, 47 L. Ed. 798.

Lack of any provision for notice to a non-resident stockholder in a domestic corporation of the assessment of taxes on his stock, or for opportunity for contest by him as to the correctness of the valuation, does not render invalid, as denying due process of law, so much of Code Pub. Gen. Laws Md. art. 81, as imposes upon him, as a condition of such ownership, a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay on his behalf, since that statute is construed by the state courts as constituting the corporation in legal effect the agent of the stockholders, to receive notice and to represent them in proceedings for the correction of the assessment. Judgment 53 A. 942, 96 Md. 310, 103 Am. St. Rep. 364, affirmed.—*Corry v. City of Baltimore*, 25 S. Ct. 297, 196 U. S. 466, 49 L. Ed. 556.

Due process of law is not denied a nonresident stockholder in a domestic corporation by the imposition, under Code Pub. Gen. Laws Md. art. 81, as a condition of such ownership, of a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay on his behalf.—*Id.*

Due process of law is not denied a foreign insurance company by distraining its personal property under the authority of Rev. St. Ohio, § 1095, to satisfy personal taxes lawfully levied.—*Scottish Union & National Ins. Co. v. Bowland*, 25 S. Ct. 345, 196 U. S. 611, 49 L. Ed. 619.

A street railway company cannot claim to have been denied due process of law in the valuation of its franchise for the purpose of the special franchise tax imposed by Laws N. Y. 1899, c. 712, on the theory that it was ascertained by speculation and guesswork, where such valuation is required to be made by the state board of tax commissioners, to which the owner of the franchise is required to furnish a written report, and notice and hearing are accorded such owner, and a review of the assessment by certiorari is afforded. Judgments 67 N. E. 69, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674, affirmed, and 80 N. Y. S. 85, 79 App. Div. 183, reversed.—*People of State of New York ex rel. Metropolitan Street Ry. Co. v. State Board of Tax Com'rs*, 25 S. Ct. 705, 199 U. S. 1, 50 L. Ed. 65, 4 Ann. Cas. 381; *People of State of New York ex rel. Brooklyn City R. Co. v. Same*, 25 S. Ct. 713, 199 U. S. 48, 50 L. Ed. 79; *People of State of New York ex rel. Twenty-Third St. R. Co. v. Same*, 25 S. Ct. 715, 199 U. S. 53, 50 L. Ed. 85.

The failure of the Kentucky statutes to require notice to be given of a special assessment for back taxes on omitted property, made

by the regular assessor under Ky. St. § 3179, after the time provided by law for the making of the general assessment, does not deprive the taxpayer of his property without due process of law, where the state court has afforded him full opportunity to be heard on the question of the validity and the amount of the tax, and, on such hearing, has reduced the tax. Judgment, *Bell's Trustee v. City of Lexington* (1903) 85 S. W. 1081, 27 Ky. Law Rep. 591, affirmed. —*Security Trust & Safety Vault Co. v. City of Lexington*, 27 S. Ct. 87, 203 U. S. 323, 51 L. Ed. 204.

Assessing the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, denies the due process of law protected by Const. U. S. Amend. 14, against impairment by a state. Judgment, *Chicago Union Traction Co. v. State Board of Equalization* (C. C. 1902) 114 F. 557 affirmed. —*Raymond v. Chicago Union Traction Co.*, 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; *Same v. Chicago Edison Co.*, 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

Due process of law is not afforded by the system of taxation prescribed by the Georgia Political Code, under which, as construed by the highest state court, the valuation of property not returned for taxation, made by the assessing officer without notice or opportunity for hearing, concludes the taxpayer, both in the tax proceedings and in the courts, unless he can show bad faith, even where he may have withheld the property from return upon reasonable grounds, and in the honest belief that it is not taxable. Judgments (1906) 54 S. E. 52, 125 Ga. 589, and 54 S. E. 64, 125 Ga. 617, reversed. —*Central of Georgia Ry. Co. v. Wright*, 28 S. Ct. 47, 207 U. S. 127, 52 L. Ed. 134, 12 Ann. Cas. 463.

Land subject to a mortgage may be assessed at its full value for taxation without violating Const. U. S. Amend. 14, although the mortgage debt is not deducted from the owner's personal estate. Judgment (1907) 80 N. E. 1114, 187 N. Y. 552, affirmed. —*Paddell v. City of New York*, 29 S. Ct. 139, 211 U. S. 446, 53 L. Ed. 275, 15 Ann. Cas. 187.

Tax proceedings resulting in a tax sale and deed under which property marked "Reserved" on an official plat was described as certain numbered blocks, not designated on the plat, but which would have borne such numbers if the tract reserved had been divided into blocks and lots and numbered in harmony with the numbering of the rest of the tract, do not deprive the owner of his property without due process of law, where he not only has notice from the record, but notice in fact, that such property was listed and assessed for taxes under such description. Judgment (1906) 87 P. 257, 44 Wash. 239, affirmed. —*Ontario Land Co. v. Yordy*, 29 S. Ct. 278, 212 U. S. 152, 53 L. Ed. 449.

The judicial enforcement of a railway franchise tax does not deny the railway company the due process of law guaranteed by Const. U. S. Amend. 14, because the court treated the entry of the assessment in the form provided for the purpose upon the jacket or envelope inclosing the report of the railway company as a sufficient record of the assessment. —(1910) *Illinois Cent. R. Co. v. Commonwealth of Kentucky*, 31 S. Ct. 95, 218 U. S. 551, 54 L. Ed. 1147, affirming judgment (1908) 108 S. W. 245, 128 Ky. 268.

The entry of an assessment of a railway franchise tax under the name of the railway company which formerly owned the franchise furnishes no ground for the contention that the due process of law guaranteed by Const. U. S. Amend. 14, was denied by the judicial enforce-

ment of the tax against the company operating the railroad under a power of attorney from the purchaser at a judicial sale, which in making its report for assessment purposes, named the former railway company as the owner of the road.—Id.

Construing state statutes relating to franchise tax assessments as rendering an assessment once made final, irrespective of any secret intentions of the board levying it, does not deny the due process of law guaranteed by Const. U. S. Amend. 14, to the railway company affected by such assessment.—Id.

The enforcement of a railway franchise tax by a judgment in personam against a railway company which, while not the owner of the franchise, is operating the road under an arrangement with the purchaser at a judicial sale, and is in possession and full control of the railroad property and its earnings, does not deny the due process of law guaranteed by the fourteenth amendment to the federal Constitution.—Id.

A judicial sale under Act Ky. March 15, 1906, c. 22, art. 3, of lands forfeited to the state for failure to list and pay taxes for certain specified years, is not lacking in due process of law because, under such statute, it is not necessary that the petition for forfeiture shall point out and describe the parts of the tract held by adverse claimants to whose benefit the forfeiture will accrue, where it is open to the defendant to show what parts of the tract are subject to sale, if less than the whole is to be sold.—(1911) *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 106 S. W. 260, 127 Ky. 667, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law Rep. 857.

Due process of law in forfeiting lands to the state for failure to list and pay taxes for certain specified years is afforded by Act Ky. March 15, 1906, c. 22, art. 3, under which a judicial proceeding is provided by which the owner of the title may have the taxes assessed, and, upon payment thereof, the forfeiture avoided, and such forfeiture is declared only after a judicial proceeding in which the owner of the title is summoned and heard.—Id.

There is no denial of due process of law in the provisions of Act Ky. March 15, 1906, c. 22, art. 3, under which the forfeiture of land titles to the state, as the result of proper proceedings and after due notice to the owner of the title, who is in default for payment of taxes, is to inure to the benefit of adverse claimants occupying and paying taxes upon the land, and not in default.—Id.

Lack of any assessment other than that made by the statute, or of any notice to the depositor, does not invalidate the semi-annual tax laid by P. S. Vt. §§ 804-820, upon interest-bearing deposits in national banks, as denying due process of law.—*Clement Nat. Bank v. State of Vermont*, 34 S. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment *State v. Clement Nat. Bank*, 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

Sleeping and parlor car companies failing to make return of their gross receipts between points in the state as required by Laws Fla. 1907, c. 5596, § 47, have no right, under the due process clause of Const. Amend. 14, to a hearing when the state comptroller estimates their gross receipts and adds 10 per cent. to the taxes for failing to obey the law.—*Pullman Co. v. Knott*, 35 S. Ct. 2, 235 U. S. 23, 59 L. Ed. 105.

Order of Colorado Tax Commission and State Board of Equalization requiring local taxing officer to increase assessed valuation in city and county of Denver held not wanting in due process of law.—*Bi-Metallic Inv. Co. v. State Board of Equalization*, 36 S. Ct. 141, 239 U. S. 441, 60 L. Ed. 372, affirming decree *State*

Board of Equalization v. Bi-Metallic Inv. Co., 133 P. 1010, 56 Colo. 512.

Assessment for taxation of memberships in a chamber of commerce under the head of "monies and credits" is a matter not touching fundamentals contemplated by Const. U. S. Amend. 14.—*Rogers v. Hennepin County*, 36 S. Ct. 265, 240 U. S. 184, 60 L. Ed. 594, affirming judgment 145 N. W. 112, 124 Minn. 539.

285. — Tax sales and proceedings thereon.

See 10 Cent. Dig. Const. Law, §§ 897-903.

Laws N. Y. 1854, pp. 871, 878, 881, c. 384, §§ 24, 26, 29, 30, 36, tit. 5, provided that the collector of the city of Brooklyn should sell property for unpaid taxes and assessments for the lowest term of years for which any person would purchase it, and that the purchaser should receive a certificate of sale, which, when recorded in the collector's office, should constitute a lien on the premises sold. The owner might redeem within two years by paying the purchase money, any other tax paid by the purchaser, and an additional 15 per cent. In case the land was not redeemed within a specified time, the collector should execute to the purchaser a proper conveyance of the lands sold, and thereupon the purchaser might obtain possession by summary proceedings. Laws 1885, p. 702, c. 405, § 15, provided that no special proceeding should be maintained to compel the execution of any lease on any sale for taxes made more than eight years prior to its passage unless brought within six months thereafter, and that after the lapse of the six months all sales made more than eight years prior to the passage of the act should be canceled, and that the liens of the certificate of the sale should cease. Prior to the enactment of this statute there was a longer limitation for suits to enforce the execution of conveyances from the collector. *Held*, that the cancellation of the record of sales as commanded by the act does not deprive a purchaser of his property without due process of law, in violation of Const. U. S. Amend. 14, § 1; his property being a right to a conveyance or lease after the expiration of the period of redemption, and the cancellation of the certificate being simply a reasonable limitation imposed upon the enforcement of that right.—*Wheeler v. Jackson*, 137 U. S. 245, 11 S. Ct. 76, 34 L. Ed. 659; *MacFarland v. Same*, 137 U. S. 258, 11 S. Ct. 79, 34 L. Ed. 664, affirming judgment 105 N. Y. 681, 13 N. E. 931.

Due process of law in making sales of land for unpaid taxes, even if it requires the observance of all the steps prescribed by a state statute, does not demand that they shall be made matter of record, much less that they shall be made matter of a particular record, such as the return of the sheriff of the sale of the lands.—*Turpin v. Lemon*, 23 S. Ct. 20, 187 U. S. 51, 47 L. Ed. 70.

A decree for the sale of lands for unpaid levy taxes based on constructive service cannot be deemed to deny due process of law because there was no sufficient proof of publication of a warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional. Decree (1905) 85 S. W. 252, 74 Ark. 174, affirmed.—*Ballard v. Hunter*, 27 S. Ct. 261, 204 U. S. 241, 51 L. Ed. 461.

An erroneous judgment as to what costs the law allows in a suit to enforce the payment of levee taxes does not deprive the defendants in that suit of their property without due process of law.—*Id.*

The notice by publication of the pendency of proceedings to sell land to satisfy a lien for unpaid taxes, prescribed by Laws Mich. 1893, p. 354, No. 206, satisfies the requirement of due

process of law made by Const. U. S. Amend. 14, where the delinquent taxpayer, who has had an opportunity to be heard upon the assessment, cannot fail, if he exercises due vigilance, to learn of the pendency of the proceedings, and that full opportunity to defend is afforded to him. Judgment. *Toolan v. Longyear* (1906) 107 N. W. 690, 144 Mich. 55, affirmed.—*Longyear v. Toolan*, 28 S. Ct. 506, 209 U. S. 414, 52 L. Ed. 859.

The grantee in a tax deed cannot claim to have been denied due process of law by Pub. Laws Mich. 1897, p. 294, No. 229, requiring the giving of notice to the original owners in order to cut off the right of redemption, on the theory that, by the proceedings under the tax laws, the state acquired an absolute title, which it conveyed by the tax deed, and that the statute operated to divest such title and transfer it to another, where the highest state court holds that, whatever title the state held, it sold only an interest which was subject to redemption.—*Rusch v. John Duncan Land & Mining Co.*, 29 S. Ct. 172, 211 U. S. 526, 53 L. Ed. 312.

Foreclosure of lien of county for delinquent taxes *held* not to deprive the owner of his property without due process of law, where he had notice from the record that the land was listed for taxation and that the authorities were attempting to tax a reserved tract under the description given.—(1912) *Ontario Land Co. v. Wilfong*, 32 S. Ct. 328, 223 U. S. 543, 56 L. Ed. 544, affirming judgment (1909) *Wilfong v. Ontario Land Co.*, 171 F. 51, 96 C. C. A. 293.

Restricting grounds for attacking tax sales under Laws N. M. 1899, c. 22, as is done by section 25 *held* not to take property without due process of law.—*Straus v. Foxworth*, 34 S. Ct. 42, 231 U. S. 162, 58 L. Ed. 168.

There was no want of due process of law in proceedings under Pol. Code Cal. § 3397, forfeiting land for nonpayment of taxes because the state, having become vested with title with no offer to redeem, sold the land for \$100 to satisfy a tax amounting, with penalties, to but \$16.19.—*Chapman v. Zobelein*, 35 S. Ct. 518, 237 U. S. 135, 59 L. Ed. 874, affirming judgment 124 P. 1021, 19 Cal. App. 132.

286. Internal revenue and customs duties.

The excise on artificially colored oleomargarine, imposed by Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, does not infringe the constitutional guaranty of due process of law because the effect of the tax may be to suppress the manufacture of that article.—*McCray v. United States*, 24 S. Ct. 769, 195 U. S. 27, 49 L. Ed. 78, 1 Ann. Cas. 561.

Due process of law is not denied by the enactment by Congress of Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, imposing an excise on artificially colored oleomargarine, because that body has not chosen to tax natural butter artificially colored.—*Id.*

The ratification by Congress by Act June 30, 1906, c. 3912, 34 Stat. 636, of the illegal collection of duties on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of Act July 1, 1902, c. 1369, 32 Stat. 691, enacting a tariff of duties for those islands, does not deprive importers of their property without due process of law, in violation of Const. U. S. Amend. 5, even though they had commenced an action to recover the amount

of the duties so collected before the ratifying statute was enacted.—*United States v. Heinzen*, 27 S. Ct. 742, 206 U. S. 370, 51 L. Ed. 1098, 11 Ann. Cas. 688, reversing judgment *Heinzen v. United States*, 42 Ct. Cl. 58.

Property is not taken without due process of law by the imposition, under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), of an excise, measured by the net corporate income, upon the doing or the carrying on of business in a corporate or quasi corporate capacity.—*Flint v. Stone Tracy Co.*, 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

The retroactive effect of the income tax provisions of the Tariff Act, fixing preceding March 1st as the time from which the income for ten months is to be computed, does not render it repugnant to due process of law clause of Const. Amend. 5, nor inconsistent with Amendment 16.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

The progressive rate feature of income tax under Act Oct. 3, 1913, is not an arbitrary abuse of power wanting in due process of law.—*Id.*

Methods of collection at the source prescribed by income tax provisions of Tariff Act held not wanting in due process of law.—*Id.*

Limiting amount of interest which may be deducted from gross corporate income in fixing taxable income to interest on indebtedness by Tariff Act is not wanting in due process of law because discriminating between different classes of corporations and individuals.—*Id.*

Allowing individuals to deduct from their gross income dividends paid by corporations whose incomes are taxed, and not giving such right of deduction to corporations, does not render the tax wanting in due process of law.—*Id.*

Allowance of deduction of \$3,000 or \$4,000 given by income tax act is not wanting in due process of law because those whose incomes are greater than \$20,000 are not allowed a second right to deduct such exemption, nor because no second right is given to deduct dividends from corporations is permitted.—*Id.*

Allowance of deduction of stated amounts to ascertain taxable income by Tariff Act does not render tax wanting in due process of law because of discrimination between married and single persons, and husbands and wives living together, and those who are not.—*Id.*

No want of due process of law results because the Tariff Act does not compel owners of houses to estimate their rental value thereof, but those who live in rented houses are not allowed to deduct the rent paid, nor because farmers are permitted to omit from their income products of farms used by their families during the year.—*Id.*

There is no want of due process of law in Rev. St. §§ 3220, 3226, 3227 (Comp. St. 1913, §§ 5944, 5949, 5950), making appeal to commissioner of internal revenue after payment and his refusal prerequisite to suit to recover taxes illegally assessed.—*Dodge v. Osborn*, 36 S. Ct. 275, 240 U. S. 118, 60 L. Ed. 557, affirming decree 43 App. D. C. 144.

Mining company and their stockholders are not denied equal protection of the laws nor deprived of property without due process of law contrary to Const. Amend. 5, by income tax, because of discrimination in allowance for depreciation from depletion of ore deposits.—*Stanton v. Baltic Mining Co.*, 36 S. Ct. 278, 240 U. S. 103, 60 L. Ed. 546.

Allowing individuals to deduct from their gross income dividends paid by corporations whose incomes are taxed, and not giving such right to corporations under income tax law,

does not render tax wanting in due process of law.—*Id.*

No unconstitutional discrimination results from a progressive rate feature of income tax imposed by Act Oct. 3, 1913.—*Id.*

Corporations are not unconstitutionally discriminated against by exemption which the income tax statute makes of individual incomes below \$4,000.—*Id.*

Retroactive effect of the income tax act fixing preceding March 1st as the time from which the income tax is to be computed held not to render tax repugnant to due process of law clause, nor inconsistent with Const. Amend. 16, itself.—*Tyee Realty Co. v. Anderson*, 36 S. Ct. 281, 240 U. S. 115, 60 L. Ed. 554.

Progressive rate feature of income tax act does not cause the tax to be a mere arbitrary abuse of power wanting in due process of law.—*Id.*

Limiting the amount of interest to be deducted from gross income of corporations to fix taxable income to interest on debt not exceeding one-half the bonded debt and paid-up capital stock is not wanting in due process of law because discriminating between different classes of corporations and individuals.—*Id.*

§287. License taxes.

See 10 Cent. Dig. Const. Law, §§ 831, 906.

Gen. St. Conn. § 3087, making it unlawful for any person to sell or keep for sale intoxicating liquors without a license, and section 3067, providing that a license to a druggist shall not be granted except on application and in the manner prescribed, and that the granting of such license shall be discretionary with the county commissioners, are not in conflict with Const. U. S. Amend. 14, as depriving citizens of their property without due course of law.—*Gray v. State of Connecticut*, 159 U. S. 74, 15 S. Ct. 985, 40 L. Ed. 80.

An ordinance giving the mayor power to determine whether a person applying for a license to sell cigarettes has good character and reputation, and is a suitable person to be entrusted with their sale, but requiring him to grant a license to every person fulfilling these conditions, does not vest in him any arbitrary power to grant or refuse a license, in violation of the provisions of Const. U. S. Amend. 14, in regard to the clause requiring due process of law. Judgment 52 N. E. 44, 176 Ill. 340, affirmed.—*Gundling v. City of Chicago*, 20 S. Ct. 633, 177 U. S. 183, 44 L. Ed. 725.

Sufficient provision for notice and hearing to constitute due process of law is afforded the owner of real property who is made personally liable, and his property impressed with a lien, under Code Iowa, § 5007, for the tax imposed thereby on cigarette selling on the premises, by sections 2441, 2442, which permit him to make application to the board of supervisors to remit the tax, and, in case of a denial of the petition, to appeal to the District Court for a judicial determination of his liability. Judgment 98 N. W. 968, 121 Iowa, 482, 67 L. R. A. 624, 104 Am. St. Rep. 304, affirmed.—*Hodge v. Muscatine County*, 25 S. Ct. 237, 196 U. S. 276, 49 L. Ed. 477.

An owner of real property is not denied due process of law by Code Iowa, § 5007, making the tax imposed thereby on the business of cigarette selling a lien upon the property where the business is carried on.—*Id.*

Due process of law does not require that, as to a person actually carrying on the business of selling cigarettes, notice be given of the assessment or levy of the tax imposed by Code Iowa, § 5007, upon the traffic, there being no discretion as to the amount of the tax.—*Id.*

The exaction from a foreign telegraph company for the benefit of the permanent school

fund, under the authority of Gen. St. Kan. 1901, p. 280, of a "charter fee" of a given per cent. of its entire authorized capital stock, as a condition of continuing to do local business in the state, is invalid under the due process of law clause of the federal Constitution, as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside the state. *Decree, State v. Western Union Telegraph Co. (1907) 90 P. 299, 75 Kan. 609, reversed.*—*Western Union Telegraph Co. v. State of Kansas ex rel. Coleman, 30 S. Ct. 190, 216 U. S. 1, 54 L. Ed. 355.*

The imposition of an occupation tax on wholesale dealers in oils, under Gen. Laws Tex. 1905, c. 148, § 9, without exacting a similar tax from wholesale dealers in other articles, does not offend against the due process of law clause of the federal Constitution. Judgment (1907) 103 S. W. 489, 100 Tex. 647, affirmed.—*Southwestern Oil Co. v. State of Texas, 30 S. Ct. 496, 217 U. S. 114, 54 L. Ed. 688.*

The possibility that the Comptroller may refuse a license to a private banker upon his arbitrary whim does not invalidate, under Const. U. S. Amend. 14, the requirement of Laws N. Y. 1910, c. 348, that a license from that official be obtained by individuals or partnerships desiring to engage in that business.—(1911) *Engel v. O'Malley, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128, affirming decree (C. C. 1910) 182 F. 365.*

The keeping of a place where corporate stocks and bonds and grains, provisions, and other commodities are bought and sold, but not paid for and delivered at the time, and where no complete record of the transactions, including a minute of the time of delivery, is made in a book kept for the purpose, and no memorandum of the sale, properly stamped, is given the purchaser, may be made a criminal offense, as is done by Act March 8, 1907 (Acts Mo. 1907, p. 392), in the exercise of the police power of the state, without taking property without due process of law.—(1911) *Broadnax v. State of Missouri, 31 S. Ct. 238, 219 U. S. 285, 55 L. Ed. 219, affirming judgment State v. Broadnax (1910) 128 S. W. 177, 228 Mo. 25.*

An annual municipal charge for each pole and each mile of underground wire which has been paid for many years without complaint is not a denial of due process of law to a telegraph company occupying city streets under authority of Act July 24, 1886.—(1912) *Western Union Tel. Co. v. City of Richmond, 32 S. Ct. 449, 224 U. S. 160, 56 L. Ed. 710, affirming decree (C. C. 1909) 178 F. 810.*

A scheme of an ordinance for licensing occupations, defining the occupations to be taxed and prescribing a maximum and minimum tax, dependent on the classification into thirteen classes, made by the finance committee of a common council after hearing, does not show a want of due process of law.—*Bradley v. City of Richmond, 33 S. Ct. 318, 227 U. S. 477, 57 L. Ed. 603, affirming judgment 66 S. E. 872, 110 Va. 521.*

A domestic railroad whose lines extend into other states is not taxed upon its property outside the state contrary to the federal Constitution by exaction under Laws Kan. 1913, c. 135, of annual tax on paid-up capital stock.—*Kansas City, F. S. & M. Ry. Co. v. Botkin, 36 S. Ct. 261, 240 U. S. 227, 60 L. Ed. 617, affirming judgment Same v. Sessions, 147 P. 791, 95 Kan. 261.*

Laws Fla. 1913, c. 6421, § 35, imposing license fee on merchants offering coupons, etc., redeemable in premiums, which may be prohibitive, does not infringe liberty to contract contrary to Const. U. S. Amend. 14.—*Rast v. Van Deman & Lewis Co., 36 S. Ct. 370, 240 U.*

S. 342, 60 L. Ed. 679, reversing order Van Deman & Lewis Co. v. Rast, 214 F. 827; Pitney v. State of Washington, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment State v. Pitney, 141 P. 883, 80 Wash. 699.

Laws Wash. 1913, c. 134, imposing prohibitive license tax upon use of stamps, etc., redeemable in cash or merchandise, does not deny due process of law.—*Tanner v. Little, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree Little v. Tanner, 208 F. 605; Pitney v. State of Washington, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment State v. Pitney, 141 P. 883, 80 Wash. 699.*

②288. Local improvements.

See 10 Cent. Dig. Const. Law, §§ 870-875.

②289. — In general.

See 10 Cent. Dig. Const. Law, § 870.

As the statute of New Jersey of March 8, 1871, providing for the drainage of any tract of low or marshy land within the state, upon proceedings instituted by at least five owners of separate lots of land included in the tract, and not objected to by the owners of the greater part of the tract, and for the assessment by commissioners, after notice and hearing, of the expenses upon all the owners, is applicable to all lands of the same kind, and no person can be assessed under it without such notice and opportunity to be heard, the statute does not deprive the owners of their property without due process of law, nor deny to them the equal protection of the laws, within the meaning of the fourteenth amendment of the constitution of the United States.—*Wurts v. Hoagland, 114 U. S. 606, 5 S. Ct. 1086, 29 L. Ed. 229.*

After an assessment for improving a street was partly paid, it was declared void for want of any provision for notice and hearing, and the unpaid portion was canceled. Subsequently the legislature directed an assessment of the amount so canceled, with interest, on the lands on which the former assessment was not paid, and provided for an apportionment, with notice and hearing thereof. Held not an attempt to deprive any person of property without due process of law, it being in the power of the legislature to determine not only the amount of a tax to be levied for public improvements, but also the class of lands which shall bear the burden.—*Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. 921, 31 L. Ed. 763, affirming judgment 100 N. Y. 585, 3 N. E. 682.*

Act Cal. March 23, 1876 (St. 1875-76, c. 326), providing for the widening of Dupont street in San Francisco; defining the district on which the assessment to meet the cost of the work was to be imposed; making it a condition precedent that the improvement be declared expedient by a resolution or order of the board of supervisors; directing that after the passage of such order or resolution the board of commissioners to have charge of such improvement should, by notice published in two city papers for 10 days, inform the property owners of its organization; allowing them within 30 days, by written protest, representing the majority in value of property, to defeat the improvement; directing that the board make a report of the assessments and benefits, to be left at their office 30 days for inspection, notice thereof to be published for 20 days; providing that any one aggrieved might by petition within the 30 days have the proceeding reviewed by the county court; and providing that the board could not proceed with the work until such alterations were made in its report as the court might direct.—is not in conflict with the constitutional provision against taking property without due process of law.—*Lent v. Tillson, 140 U. S. 316, 11 S. Ct. 825, 35 L. Ed. 419, affirming decree 72 Cal. 404, 14 P. 71.*

An abutting owner is not deprived of his property without due process of law by the erection by a municipality, in a city street, under the authority of a statute which makes no provision for compensation to abutting owners, of an elevated iron viaduct for general public use, by which travelers are enabled to use such street in connection with other streets from which it has previously been disconnected, where, under the law of the state as laid down by its highest court, abutting owners have no easement of light, air, or access as against any improvement of the street for the purpose of adapting it to public travel. Judgment (1904) 72 N. E. 579, 180 N. Y. 27, 70 L. R. A. 717, affirmed, which affirms 85 N. Y. S. 636, 90 App. Div. 36.—*Sauer v. City of New York*, 27 S. Ct. 686, 206 U. S. 536, 51 L. Ed. 1176.

A charter provision making conclusive the finding of a city council that a proper petition for a public improvement has been filed does not deny the due process of law guaranteed by Const. U. S. Amend. 14, although such finding is made without notice. Judgment, *City of Denver v. Londoner* (1905) 80 P. 117, 33 Colo. 104, reversed.—*Londoner v. City and County of Denver*, 28 S. Ct. 708, 210 U. S. 373, 52 L. Ed. 1103.

An island which cannot be benefited by a drainage improvement may not, consistent with due process of law, be included within a drainage district for the sole purpose of deriving a revenue for the benefit of other lands improved by drainage.—*Myles Salt Co. v. Board of Com'rs of the Iberia & St. Mary Drainage Dist.*, 36 S. Ct. 204, 239 U. S. 478, 60 L. Ed. 392, reversing judgment 64 So. 825, 134 La. 903.

290. Assessments and special taxes.

See 10 Cent. Dig. Const. Law, §§ 871-875.

Act Ky. March 24, 1882, § 1, gives the city of Louisville exclusive control of streets, with power to construct and reconstruct them. Section 2 provides for the assessment of the cost on the adjoining lots, and creates a lien therefor, payment to be enforced by proceedings in court, and such corrections, rules, and orders to be made as will do justice to all parties concerned. Section 4 provides for notice of the inspection and reception of the work by the city engineer. Held, that the act does not infringe Const. U. S. Amend. 14, § 1, prohibiting the taking of property without due process of law, opportunity being given to all concerned to be heard in the courts, and the question of the oppressiveness of state laws not being one arising under the federal constitution.—*Walston v. Nevin*, 128 U. S. 578, 9 S. Ct. 192, 32 L. Ed. 544, affirming *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

So long as the board of commissioners and the county court acquired jurisdiction to proceed with the execution of the provisions of an act, errors in the mere administration of the statute could not justify the supreme court of the United States, on reviewing the decision of the state court, to hold that the state was depriving the owners of their property without due process of law.—*Lent v. Tillson*, 140 U. S. 316, 11 S. Ct. 825, 35 L. Ed. 419, affirming decree (1887) 72 Cal. 404, 14 P. 71.

The charter of the city of Portland, Or. (chapter 10, § 121), which in general terms grants to the council power to construct sewers, and to assess the cost thereof upon the property benefited thereby, is not open to the objection that it deprives the citizen of his property without due process of law because it contains no express provision for notice of such assessment; for the power generally conferred is subject to all constitutional restrictions, of which the requirement of notice is one.—*Paulsen v. City of Portland*, 149 U. S. 30, 13 S. Ct. 750, 37

L. Ed. 637, affirming judgment 16 Or. 450, 19 P. 450.

The fact that a statute governing the incorporation of irrigation districts provides for an ad valorem assessment of the lands benefited, instead of an assessment in proportion to the actual benefits conferred by the improvement, to pay the cost of constructing the works, does not deprive the persons assessed of property without due process of law.—*Fallbrook Irrigation Dist. v. Bradley*, 17 S. Ct. 56, 164 U. S. 112, 41 L. Ed. 369, reversing judgment *Bradley v. Fallbrook Irrigation Dist.* (C. C.) 68 F. 948.

To render the use of water for the irrigation of arid lands a public use, every resident of the irrigation district need not have the right to use the water. If each landowner has the right to use a proportionate share upon the same terms as all the others, the use is a public, and not a private one.—Id.

Water used for the irrigation of lands which are actually arid is used for a public purpose. Therefore a statute providing for the organization of districts for the irrigation of arid lands, and authorizing an assessment on such lands to pay the cost of the irrigation, does not deprive a landowner of property without due process of law, by means of an assessment not made for a public purpose.—Id.

St. Cal. 1887, as amended in 1889 and 1891, provides that landowners desiring the formation of an irrigation district shall present to the board of supervisors of the county in which the lands to be included, or the greater part thereof, are situated, a petition signed by 50, or a majority, of the landowners in the proposed district, which petition, together with a notice of the time of the meeting at which it will be presented, shall have been published in some newspaper of the county at least two weeks before its presentation; that the board of supervisors shall then "hear the same, and may adjourn such hearing from time to time, * * * and on the final hearing may make such changes in the proposed boundaries as they may find to be proper"; and that they shall not include in the district any lands which, in the judgment of the board, will not be benefited by irrigation by the system to be used in the district. Held, that these provisions give the persons interested in the proposed improvement the right to appear before the board and contest the facts upon which the petition is based, and the fact of benefit to any particular land included in the description of the proposed district.—Id.

If the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

A state legislature may create a new taxing district, and determine what territory shall belong to it, and what property shall be considered as benefited by a proposed improvement; and due process of law does not require that it shall first permit a hearing, either before itself, one of its committees, or any other tribunal.—*Williams v. Eggleston*, 18 S. Ct. 617, 170 U. S. 304, 42 L. Ed. 1047.

Notice of a reassessment on abutting property for a street improvement, under Laws Wash. 1893, p. 226, § 4, providing that it shall be given by three successive publications in the official newspaper of the city, and that objections thereto may be filed within 10 days of the last publication, is not so short as to amount to want of due process, in allowing but 10 days for presenting objections.—*Bellingham Bay & B. C. R. Co. v. City of New Whatcom*, 19 S.

Ct. 205, 172 U. S. 314, 43 L. Ed. 460, affirming judgment City of New Whatcom v. Bellingham Bay Imp. Co., 47 P. 237, 16 Wash. 137.

A state statute authorizing assessments for local improvements, and attempting to make the lot owner, who is a nonresident of the state, personally liable for such assessment, is, as to such personal liability, a taking of property without due process of law. Judgment, 70 N. W. 605, 101 Iowa, 416, reversed.—Dewey v. City of Des Moines, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

Where a special assessment to pay for a particular work has been held to be illegal, a special authority given to make a new special assessment to pay for the completed work is not violative of Const. U. S. Amend. art. 14, prohibiting any state from depriving any person of property without due process of law. Judgment, Cummings v. West Chicago Park Com'rs, 54 N. E. 941, 181 Ill. 136, affirmed.—Lombard v. West Chicago Park Com'rs, 21 S. Ct. 507, 181 U. S. 33, 45 L. Ed. 731.

The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any judicial inquiry as to their value or the benefits they receive, may be authorized by the legislature; and this will not constitute a taking of property without due process of law.—Town of Tonawanda v. Lyon, 21 S. Ct. 609, 181 U. S. 389, 45 L. Ed. 908.

It is within the power of the legislature of a state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said districts, either according to valuation or to superficial area or frontage. Judgment, 82 N. W. 732, 9 N. D. 208, 56 L. R. A. 156, affirmed.—Webster v. City of Fargo, 21 S. Ct. 623, 181 U. S. 394, 45 L. Ed. 912; Id., 21 S. Ct. 645, 181 U. S. 398, 45 L. Ed. 916.

An assessment of the cost of a street improvement, made arbitrarily according to the front foot, is not in violation of the constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment. Decree (C. C.) Parker v. City of Detroit, 103 F. 357, reversed.—City of Detroit v. Parker, 21 S. Ct. 624, 181 U. S. 398, 399, 45 L. Ed. 916, 917.

The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking of property without due process of law. Judgment, Barber Asphalt Pav. Co. v. French, 58 S. W. 934, 158 Mo. 534, 54 L. R. A. 402, affirmed.—French v. Barber Asphalt Pav. Co., 21 S. Ct. 625, 181 U. S. 324, 45 L. Ed. 879.

An assessment of the cost of paving upon abutting property in proportion to the frontage of such property, when authorized by the city charter and ordinances, is not in violation of the constitution of the United States. Judgment 83 N. W. 108, 124 Mich. 433, 7 Detroit Leg. N. 283, affirmed.—Cass Farm Co. v. City of Detroit, 21 S. Ct. 644, 181 U. S. 396, 45 L. Ed. 914; Id., 21 S. Ct. 645, 181 U. S. 398, 45 L. Ed. 916.

St. Louis City Charter, art. 6, § 22, enacting that when a district sewer is completed the whole cost shall be assessed as a special tax against the lots of ground in the district, respectively, without regard to improvements, in proportion which their respective areas bear to the areas of the whole district, is not unconstitutional, as a deprivation of property without due process of law. Judgment, Heman v. Allen

57 S. W. 559, 156 Mo. 534, affirmed.—Shumate v. Heman, 21 S. Ct. 645, 181 U. S. 402, 45 L. Ed. 916, 922.

The imposition of the cost of maintaining public sewers by special assessment upon property owners who have already been assessed for the cost of their construction, in case they make use of them, does not deprive them of property without due process of law, but is matter of public policy for the legislature, since they receive a special benefit from the construction of the sewer in the privilege of discharging their private sewers into it, even if they are not entitled to the free use of it. Judgment, Carson v. Sewerage Com'rs of City of Brockton, 56 N. E. 1, 176 Mass. 242, 48 L. R. A. 277, affirmed.—Carson v. Sewer Com'rs of Brockton, 21 S. Ct. 860, 182 U. S. 398, 45 L. Ed. 1151.

An ordinance imposing an annual rental for the use of a public sewer, the use of which is optional with the taxpayer, who is not required to pay unless he uses it, does not deprive him of property without due process of law, though it was passed without giving him notice or opportunity for hearing.—Id.

Property is not taken without due process of law by an assessment for the cost of a street improvement, under a city charter providing for the assessment upon each abutting lot of the full cost of the improvement of half of the street in front of and abutting on such lot, and of a proportionate share of the cost of improving street intersections, where the cost of such improvement is apportioned according to the benefits, which are equal to such cost, and the charter not only gives a hearing upon the question of benefits to the property owner before the formation of the district to be improved, but, as construed by the state courts, gives notice and an opportunity to contest the assessment. Judgment, 63 P. 2, 38 Or. 402, 55 L. R. A. 812, affirmed.—King v. City of Portland, 22 S. Ct. 290, 184 U. S. 61, 46 L. Ed. 431.

A rule or standard of assessment sufficient to satisfy the constitutional guaranty of due process of law is furnished by Comp. Laws Mich. 1897, § 3406, which, as interpreted by the supreme court of the state, provides that a municipal council may assess the whole, or such part, as it may deem just, of the cost of a local improvement, upon such lands in the vicinity thereof as are benefited thereby, and limits the amount of the assessment upon each lot to the amount of benefits. Judgment 82 N. W. 253, 123 Mich. 547, 7 Detroit Leg. N. 21, affirmed.—Voigt v. City of Detroit, 22 S. Ct. 337, 184 U. S. 115, 46 L. Ed. 459.

Failure to provide for any notice or opportunity to be heard on the question, what lands shall be included in an assessment district, or what shall be the maximum aggregate amount to be assessed upon district? does not make Comp. Laws Mich. 1897, § 3406, unconstitutional on the ground that a person compelled to pay an assessment on his property is denied due process of law, since his constitutional rights in this respect are fully protected by the opportunity which the statute gives him to be heard on the question of the amount of the assessment apportioned to his property, and this the statute limits to the amount of benefits which the property receives from the improvement.—Id.

Notice to the owners of land which may be assessed for a local improvement need not be given of the proceedings to make the improvement, in order to constitute due process of law, if none of their property is taken for that purpose, and they have notice and opportunity to be heard on the question of the assessment of their property. Judgment, 82 N.

W. 255, 123 Mich. 559, affirmed.—Goodrich v. City of Detroit, 22 S. Ct. 397, 184 U. S. 432, 46 L. Ed. 627.

A state statute under which the cost of a public improvement may be assessed upon the abutting property in proportion to frontage does not violate the federal Constitution, where, as construed by the state courts, it requires such assessment to conform to the actual special benefits accruing to each of the abutting property owners. Judgment, 16 N. E. 149, 156 Ind. 704, affirmed.—Schaefer v. Werling, 23 S. Ct. 449, 188 U. S. 516, 47 L. Ed. 570.

Due process of law is not denied an owner of property assessed for a local improvement because all the members of the board levying the assessment were residents of the town and taxpayers thereof, and two of such members were owners of lots abutting on the improvement, and assessable therefor. Judgment, 62 N. E. 447, 158 Ind. 206, affirmed.—Hibben v. Smith, 24 S. Ct. 83, 191 U. S. 310, 48 L. Ed. 195.

Due process of law is afforded the owner of property assessed for a local improvement, where there is an opportunity to be heard before the body which is to make the assessment, although the decision of that body after hearing is conclusive.—Id.

Due process of law is not denied nonresident owners of property liable to taxation for a proposed public improvement by the provision of Rev. St. Mo. 1899, § 5989, that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, although no such privilege of protest is afforded nonresident owners, where there is no discrimination among property owners in taxing for the improvement. Decree (C. C.) 117 F. 925, modified.—Field v. Barber Asphalt Pav. Co., 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

Assessing by the frontage rule the entire cost of a street extension, including a charge for planking, is not so manifestly unfair to an abutting owner whose property lies some distance beyond the point where the planking stopped as to render the assessment void as a denial of due process of law.—City of Seattle v. Kelleher, 25 S. Ct. 44, 195 U. S. 351, 49 L. Ed. 232.

Due process of law is not denied by a reassessment for the cost of a street extension because it includes a charge for work which, when done, could not be included in a local assessment.—Id.

Including in a reassessment for the cost of a street extension a charge for certain work which was not authorized by the ordinance ordering the improvement is not a denial of due process of law to a property owner affected thereby, where the municipality has done or adopted the work, and presumably has paid for it.—Id.

Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on tide lands for the compensation, is not unconstitutional as depriving any one of property without due process of law. Judgment, Seattle & L. W. Waterway Co. v. Seattle Dock Co., 77 P. 845, 35 Wash. 503, affirmed.—Seattle Dock Co. v. Seattle & L. W. Waterway Co., 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 350.

The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of Farm Drainage Act Ill. July 1, 1885, does not amount to a taking of private property for public use, which

requires compensation in order to afford the due process of law guaranteed by the federal Constitution. Decree, 72 N. E. 219, 212 Ill. 103, affirmed.—Chicago, B. & Q. Ry. Co. v. People of State of Illinois, 28 S. Ct. 341, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175.

The expense of removing the soil attendant upon the widening and deepening of the channel of a creek across a railroad right of way by drainage commissioners acting under the authority of Farm Drainage Act Ill. July 1, 1885, cannot be imposed upon the railway company without denying it the due process of law guaranteed by the federal Constitution, which requires that compensation be made when private property is taken for public use.—Id.

Due process of law does not require that the nonresident owners of lands within a levee district should have personal notice of the pendency of a suit to collect the levee taxes assessed upon their lands. Decree (1905) 85 S. W. 252, 74 Ark. 174, affirmed.—Ballard v. Hunter, 27 S. Ct. 261, 204 U. S. 241, 51 L. Ed. 461.

Four weeks' notice given by publication to nonresident owners of lands within the levee district created by Act Ark. Feb. 15, 1893, p. 31, of the pendency of the suit authorized by section 11 of that act, as amended in Act Ark. April 2, 1895, p. 88, § 1, to enforce the collection of levee taxes, is adequate to afford due process of law.—Id.

The decree of sale rendered in a suit to enforce the payment of levee taxes does not deprive the owners of their property without due process of law because of mistakes in ascribing the ownership of the lands, which do not increase the taxation, or cast that which should have been paid by one tract of land upon another tract.—Id.

Due process of law is not denied to the owner of property lying directly back of property abutting on a street improvement by legislation creating a taxing district of the property along the line of the improvement and extending back therefrom 150 feet, and providing that property 50 or more feet distant from the street and within 150 feet therefrom shall be liable if the abutting 50 feet which are primarily liable prove insufficient to pay the cost of the improvements. Judgment (1905) 74 N. E. 260, 38 Ind. App. 226, affirmed.—Cleveland, C. & St. L. Ry. Co. v. Porter, 28 S. Ct. 647, 210 U. S. 177, 52 L. Ed. 1012.

The hearing accorded to an owner of property lying directly back of property abutting on a street improvement is not insufficient to afford the due process of law guaranteed by Const. U. S. Amend. 14, as giving no opportunity to such owner to be heard as to the amount to be assessed against his property, where the amount of such assessment is the same as the assessment on the abutting property, and measures the contingent liability to which the backlying property may be subjected if the abutting property, which is made primarily liable, fails to satisfy the assessment.—Id.

Something more than an opportunity to submit in writing to the city council, sitting as a board of equalization, all objections to, and complaints of, an assessment for a public improvement, is essential to satisfy the due process of law guaranteed by Const. U. S. Amend. 14, where the law denies the landowners the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization. Judgment, City of Denver v. Londoner (1905) 80 P. 117, 33 Colo. 104, reversed.—Londoner v. City and County of Denver, 28 S. Ct. 708, 210 U. S. 373, 52 L. Ed. 1103.

Due process of law is not denied an abutting owner of property on which dwellings have been erected by the attempt, in Act May 19, 1890, 29 Stat. 125, c. 206, creating a drainage

system in the District of Columbia, under which she is assessed for the expense of connecting her property with a sewer, to give a controlling evidential effect to the existence of such improvements as dwellings, as indicating the necessity for making such connection. Judgment (1907) 29 App. D. C. 563, reversed.—*District of Columbia v. Brooke*, 29 S. Ct. 560, 214 U. S. 138, 53 L. Ed. 941.

A state statute authorizing an appointed drainage board to determine whether a proposed drain will be a public benefit and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, is not invalidated by the due process of law clause of the fourteenth amendment to the federal Constitution, if notice is given, and an opportunity to be heard is afforded the landowner before the assessment becomes a lien against his property.—(1912) *Soliah v. Heskin*, 32 S. Ct. 103, 222 U. S. 522, 56 L. Ed. 294, affirming judgment (1908) *Same v. Cormack*, 117 N. W. 125, 17 N. D. 393.

The levy of maximum tax of 25 cents per acre for preliminary expenses under Rev. St. Mo. 1909, § 5538, on lands within a drainage district, held not to take property of landowners without due process of law contrary to Const. U. S. Amend. 14.—*Houck v. Little River Drainage Dist.*, 36 S. Ct. 58, 239 U. S. 254, 60 L. Ed. 266, affirming judgment 154 S. W. 739, 248 Mo. 373.

Taxing for preliminary expenses property within drainage district under Rev. St. Mo. 1909, § 5538, does not take property without due process of law because enacted after district was organized where statute then in force, Laws Mo. 1906, p. 190, § 8252, contemplated such a liability.—Id.

A special paving assessment under Laws Md. 1912, c. 688, does not take property without due process of law because special benefits had long since accrued.—*Phillip Wagner, Inc., v. Leser*, 36 S. Ct. 68, 239 U. S. 207, 60 L. Ed. 230, affirming judgment *Leser v. Wagner*, 87 A. 1040, 120 Md. 671.

Intent to use in paving other streets a fund created by special paving assessment under Laws Md. 1912, c. 688, does not render assessment contrary to due process of law, where the assessment was for a benefit formerly conferred and still existing.—Id.

Notice and hearing as to benefits is not essential to validity under due process of law clause of Laws Md. 1912, c. 688, directing the assessment by the front-foot rule.—Id.

Municipal ordinance establishing a tax district where boundary line after running on a line not 100 feet back from the street jumped 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet or 240 feet away, violates Const. Amend. 14.—*Gast Realty & Investment Co. v. Schneider Granite Co.*, 36 S. Ct. 254, 240 U. S. 55, 60 L. Ed. 523, reversing judgment *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 168 S. W. 687, 259 Mo. 153 and rehearing denied *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 36 S. Ct. 400, 240 U. S. 55, 60 L. Ed. 526.

Rev. St. Mo. 1909, c. 102, art. 7, and Laws Mo. 1911, p. 373, held to accord landowners an opportunity to be heard on the question of benefits from the establishment of a road district, so that they were not denied due process of law under Const. Amend. 14.—*Embree v. Kansas City & Liberty Boulevard Road Dist.*, 36 S. Ct. 317, 240 U. S. 242, 60 L. Ed. 624, affirming judgment *Same v. Kansas City & Liberty*

Boulevard Road Dist., 166 S. W. 282, 257 Mo. 593.

The opportunity of landowners within a proposed district to be heard as to benefits afforded by such acts is no less sufficient to satisfy the requirements of due process of law, because the particular road to be improved is yet to be selected.—Id.

Due process of law does not require that landowners within a road district as established under Rev. St. Mo. 1909, c. 102, art. 7, and Laws 1911, p. 373, be afforded a hearing upon the question whether the benefits from the improvement of the road selected will be in accord with the created ratings fixed by the statute.—Id.

Due process of law, in accordance with Const. Amend. 14, is accorded to landowners within a road district established conformably to the general law, though they are not accorded a hearing when their lands are appraised, where a full consideration is accorded to persons aggrieved by a suit in court.—Id.

Owners of property sought to be assessed in curative proceedings are not entitled under Const. Amend. 14, to a redetermination of assessments made on property of other owners which they accepted and paid.—*St. Louis & Kansas City Land Co. v. Kansas City*, 36 S. Ct. 647, 241 U. S. 419, 60 L. Ed. 1072, affirming judgment *Kansas City v. St. Louis & Kansas City Land Co.*, 169 S. W. 62, 260 Mo. 395.

There is nothing in federal Constitution to prevent assessment in curative proceedings of property omitted from the original proceeding.—Id.

Owners of property assessed for widening of street are not entitled under the due process clause of Const. Amend. 14, to be heard in curative proceedings on the amount of awards to the owners of property condemned.—Id.

◀ 291. Construction and maintenance of highways and bridges.

See 10 Cent. Dig. Const. Law, §§ 370-376.

The expense of constructing and maintaining a bridge over the gap in a railway right of way made by the municipal construction across it of a waterway with footpaths on each side used for public recreation may be cast on the railway company without denying it the due process of law guaranteed by the federal Constitution.—*Chicago, M. & St. P. R. Co. v. City of Minneapolis*, 34 S. Ct. 400, 232 U. S. 430, 58 L. Ed. 671, affirming judgment 133 N. W. 169, 115 Minn. 460.

◀ 292. Regulation of use of streets and other highways.

See 10 Cent. Dig. Const. Law, § 807.

Comp. Laws Utah, § 2087, making any one who drives a herd of horses, mules, etc., over a public highway constructed on a hillside liable for damages by such animals in destroying the banks or rolling rocks into the highway, does not deprive the persons to which it applies of property without due process of law.—*Jones v. Brim*, 17 S. Ct. 282, 165 U. S. 180, 41 L. Ed. 677.

An ordinance prohibiting the moving of any building upon or across the streets without the written permission of the mayor or president of the city council, or, in their absence, of a councilor, does not operate as a denial of due process of law.—*Wilson v. Eureka City*, 19 S. Ct. 317, 173 U. S. 32, 43 L. Ed. 603.

A municipal ordinance prohibiting the use of advertising trucks, vans, or wagons in the city streets does not deprive a stage coach company of its property without due process of

law.—(1911) Fifth Ave. Coach Co. v. City of New York, 31 S. Ct. 709, 221 U. S. 467, 55 L. Ed. 815, affirming decree (1909) 86 N. E. 824, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 16 A. & E. Ann. Cas. 695, which affirms (1908) 110 N. Y. S. 1037, which affirms 111 N. Y. S. 759.

Property of telegraph company accepting provisions of Act July 24, 1866, giving right to construct line over post roads, is not taken without due process of law, by municipal ordinance requiring reservation upon the poles for positions for the city's wires under certain conditions.—(1912) Western Union Tel. Co. v. City of Richmond, 32 S. Ct. 449, 224 U. S. 160, 56 L. Ed. 710, affirming decree (C. C. 1909) 178 F. 310.

Neither the contract nor due process of law clause of the federal Constitution prevents a municipality from forbidding a railroad, through whose acquiescence a part of its right of way through a city has become the city's principal business street, to shift cars on the tracks lying in the heart of the city except during specified hours, or permit cars to stand there for more than five minutes and by requiring the tracks to conform to the street grade and the spaces between the rails to be filled in except at street intersections.—Atlantic Coast Line R. Co. v. City of Goldsboro, 34 S. Ct. 364, 232 U. S. 548, 58 L. Ed. 721, affirming decree 71 S. E. 514, 155 N. C. 356.

293. Regulation of keeping and use of animals.

See 10 Cent. Dig. Const. Law, §§ 812-814.

A municipal ordinance, adopted under legislative authority, forbidding the establishment or maintenance of a dairy or cow stable within the city limits without having received permission so to do from the municipal assembly by a proper ordinance, is not a denial of due process of law.—Fischer v. City of St. Louis, 24 S. Ct. 673, 194 U. S. 361, 48 L. Ed. 1018; Schefe v. Same, 24 S. Ct. 676, 194 U. S. 373, 48 L. Ed. 1024.

295. Prohibition of trade or business.

See 10 Cent. Dig. Const. Law, § 841.

Act Kan. Feb. 19, 1881, prohibiting the manufacture and sale of intoxicating liquors, except for certain purposes, does not deprive persons of life, liberty, or property without due process of law, although such persons have been engaged in the business of brewing beer prior to the passage of the act, and own property peculiarly adapted to such business.—Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205, affirming decree 29 Kan. 252, 44 Am. Rep. 634.

Act Kan. March 7, 1885, amendatory of Act Feb. 19, 1881, prohibiting the manufacture or sale of intoxicating liquors, except for certain purposes, and providing for certain proceedings for the abatement of places where liquors are sold contrary to law, and for the destruction of the liquors and property, does not deprive persons of property without due process of law.—Id.

Code Iowa, tit. 11, § 6, as amended by Acts 1884, c. 143, §§ 1523-1530, 1543, which prohibit the manufacture or sale of intoxicating liquors within that state, except for mechanical medicinal, culinary, or sacramental purposes, and provide for the abatement of the unlawful sale or manufacture as a nuisance, does not deprive the owners of property used for the unlawful manufacture or sale of intoxicating liquors of their property without "due process of law," within the meaning of Const. U. S. Amend. 14.—Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346.

An Ohio corporation, engaged in the manufacture and sale of oleomargarine within the state of Ohio, is not deprived of its property without due process of law by the statutes of that state which forbid the manufacture or sale of any oleomargarine which contains any coloring matter, although by the Ohio statutes harmless coloring matter may be used in butter. Judgment, State v. Capital City Dairy Co., 57 N. E. 62, 62 Ohio St. 350, 57 L. R. A. 181, affirmed.—Capital City Dairy Co. v. State of Ohio, 22 S. Ct. 120, 183 U. S. 238, 46 L. Ed. 171.

No individual has such a vested right to trade with foreign nations as precludes Congress, in the exercise of its plenary power to regulate foreign commerce, from prohibiting, by the Tea Inspection Act March 2, 1897, c. 358, 29 Stat. 604 [U. S. Comp. St. 1901, p. 3194], on considerations of public policy, the importation of teas inferior to the government standards, on the theory that the importer is thereby deprived of his property without due process of law.—Buttfield v. Stranahan, 24 S. Ct. 349, 192 U. S. 470, 48 L. Ed. 525; Same v. Bidwell, 24 S. Ct. 356, 192 U. S. 498, 48 L. Ed. 536; Same v. United States, 24 S. Ct. 356, 192 U. S. 499, 48 L. Ed. 537.

Assuming that no opportunity was afforded by Tea Inspection Act March 2, 1897, c. 358, 29 Stat. 604 [U. S. Comp. St. 1901, p. 3194], to an importer of teas for a hearing with reference to the establishing of government standards of purity quality, and fitness for consumption, or on the question whether his tea should be rejected as not entitled to admission into the United States because inferior to the standards, the statute is not thereby rendered objectionable as a denial of due process of law.—Id.

The proprietor of an existing billiard room is not deprived of his property without due process of law, by ordinance prohibiting the keeping of billiard tables for hire.—Murphy v. People of State of California, 32 S. Ct. 697, 225 U. S. 623, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153.

Local sales of malt liquors may be forbidden by the state under its police power, as is done by Laws Miss. 1908, c. 115, without infringing prohibition of Const. U. S. Amend. 14, against taking liberty or property without due process of law.—Purity Extract & Tonic Co. v. Lynch, 33 S. Ct. 44, 226 U. S. 192, 57 L. Ed. 184, affirming judgment 56 So. 316, 100 Miss. 650.

Prohibiting the sale by itinerant vendors of any drugs intended for the treatment of disease or injury under Act No. 49, of 1894, La., § 12, does not violate the due process of law clause of the fourteenth amendment, although the sale by other persons is permitted.—Baccus v. State of Louisiana, 34 S. Ct. 439, 232 U. S. 334, 58 L. Ed. 627.

Manufacture of beer in a dry county for use in starting fermentation of other beer on hand when Pub. Acts Mich. 1889, No. 207, became operative in that county, may be made a criminal offense by that statute without depriving brewers of their property without due process of law.—Eberle v. People of State of Michigan, 34 S. Ct. 464, 232 U. S. 700, 58 L. Ed. 803, affirming judgment People v. Eberle, 133 N. W. 519, 167 Mich. 477.

296. Regulation of trade or business in general.

See 10 Cent. Dig. Const. Law, §§ 825-833, 840-846.

A municipal ordinance, prohibiting, within defined territorial limits, washing and ironing in public laundries from 10 o'clock at night to 6 in the morning, is a purely police regulation, and is therefore not in violation of the fourteenth amendment of the United States constitution, declaring that no state shall deprive any person of liberty, without due process of

law.—*Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

Act Pa. May 21, 1885, provides that no person shall manufacture out of any compound other than that produced from unadulterated milk or cream any article designed to take the place of butter or cheese, nor shall sell, or offer for sale, or have in his, her, or their possession with intent to sell, the same as an article of food; and declares void all contracts made in violation of it, and subjects the offender to a penalty recoverable in an action of debt, and also to a criminal prosecution. *Held*, that the act is a valid exercise of the police power for the protection of health.—*Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253, affirming judgment 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350; *Walker v. Same*, 127 U. S. 699, 8 S. Ct. 997, 32 L. Ed. 261.

The Texas law (2 Sayles' Civ. St. p. 124, art. 3226a, § 4) requiring an applicant for a liquor license to execute in advance a bond payable to the state, conditioned that he will not sell liquor to any person after having been notified by an officer or by certain relatives of such person not to do so, any of whom are authorized to sue on the bond in case of a breach, and further imposing a state and county occupation tax, and requiring payment of all taxes a year in advance, is not in conflict with the fourteenth amendment of the constitution of the United States, providing that no state shall deprive any citizens of property without due process of law.—*Giozza v. Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599.

Const. U. S. Amend. art. 14, is not violated by the prohibition of St. Mass. 1894, c. 522, § 98, against negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in Massachusetts, under which a licensed insurance broker who, as local agent of New York insurance brokers, secured authority from a Boston shipbuilder to place insurance upon a vessel in process of construction in a Boston shipyard, may be convicted of a violation of this section, where he delivered to such builder a policy of insurance on such vessel, issued by an insurance company not admitted to do business in Massachusetts which he had received by mail from the New York brokers. Judgment, *Commonwealth v. Nutting*, 55 N. E. 895, 175 Mass. 154, 78 Am. St. Rep. 483, affirmed.—*Nutting v. Commonwealth of Massachusetts*, 22 S. Ct. 238, 183 U. S. 553, 46 L. Ed. 324.

An arbitrary interference with property rights protected by Const. U. S. Amend. 14, which cannot be justified as an exercise of the police power, results from the narrowing, by municipal ordinance, of the limits within which gasworks may be erected and maintained, so as to include within the prohibited territory property purchased for that purpose within the district wherein the erection of such works was then permitted, and on which such erection was then proceeding in compliance with an existing ordinance and a permit of the board of fire commissioners, where such change was not demanded by the public welfare, and seems rather to have been actuated by a purpose to perpetuate a monopoly enjoyed by a gas company whose works were still within the privileged district.—*Dobbins v. City of Los Angeles*, 25 S. Ct. 18, 195 U. S. 223, 49 L. Ed. 169, reversing judgment 72 P. 970, 139 Cal. 179, 96 Am. St. Rep. 95; *Daly v. Elton*, 25 S. Ct. 22, 195 U. S. 242, 49 L. Ed. 177, reversing judgment in re *Daly*, 72 P. 1097, 139 Cal. 216.

A foreign life insurance company doing business in Missouri is not deprived of its liberty or property without due process of law by Rev. St. Mo. § 7890, which cuts off any defense

by a life insurance company, domestic or foreign, based upon the faults and fraudulent statements in the application, unless the matter misrepresented in the judgment of the jury actually contributed to the death of the insured.—*Northwestern Nat. Life Ins. Co. v. Riggs*, 27 S. Ct. 126, 203 U. S. 243, 51 L. Ed. 168, 7 Ann. Cas. 1104.

A domestic corporation whose principal office and works are outside the state is not deprived of its liberty and property without due process of law by Acts W. Va. 1905, c. 39, requiring every foreign and nonresident domestic corporation to appoint the State Auditor to accept service of process, and exacting an annual fee of \$10 for his services, although the prior laws left it to the corporation to appoint an attorney for that purpose.—*St. Mary's Franco-American Petroleum Co. v. State of West Virginia*, 27 S. Ct. 132, 203 U. S. 183, 51 L. Ed. 144.

An owner of sheep is not deprived of his property without due process of law by Rev. St. Idaho, §§ 1210, 1211, under which damages may be recovered from him for permitting his sheep to graze on the public domain within two miles of a dwelling house.—*Bacon v. Walker*, 27 S. Ct. 289, 204 U. S. 311, 51 L. Ed. 499, affirming judgment *Walker v. Bacon* (Idaho, 1905) 81 P. 155; *Bown v. Walling*, 27 S. Ct. 292, 204 U. S. 320, 51 L. Ed. 503, affirming judgment *Walling v. Bown* (1904) 76 P. 318, 9 Idaho, 740.

Property rights of the lessee in possession of a race course are not taken without due process of law by a state statute compelling it to recognize its own tickets of admission in the hands of persons who are not at the time under the influence of liquor, or boisterous in conduct, or of lewd or immoral character. Judgment, *Greenberg v. Western Turf Ass'n* (1905) 82 P. 684, 148 Cal. 126, affirmed.—*Western Turf Ass'n v. Greenberg*, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520.

Due process of law is not denied retail dealers by the provisions of Gen. St. Conn. 1902, §§ 4868, 4869, avoiding, as against creditors, sales in bulk, unless notice of intention to make such sale be recorded seven days before its consummation, but such statute is a valid exercise of the police power of the state. Judgment (1907) *Young v. Lemieux*, 65 A. 436, 79 Conn. 434, affirmed.—*Lemieux v. Young*, 29 S. Ct. 174, 211 U. S. 489, 53 L. Ed. 295.

The prohibition against drumming and soliciting business or patronage upon railway trains and premises of common carriers, which is made by Act Ark. April 30, 1907 (Acts 1907, p. 553), does not offend against the due process of law clause of the federal Constitution. Judgment (1908) 108 S. W. 838, affirmed.—*Williams v. State of Arkansas*, 30 S. Ct. 493, 217 U. S. 79, 54 L. Ed. 673, 18 Ann. Cas. 865.

The Michigan sales in bulk act (Pub. Acts 1905, No. 223), avoiding as against creditors sales in bulk otherwise than in the regular course of business, unless an inventory is made at least five days before the sale, and the purchaser receives a list of the seller's creditors and notifies them of the proposed sale personally, or by registered mail, at least five days before its consummation and making a purchaser in conforming to the statute a receiver for the benefit of the seller's creditors, is a valid exercise of the police power, and does not deny due process of law.—*Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 30 S. Ct. 606, 217 U. S. 461, 54 L. Ed. 839, affirming judgment *Musselman Grocery Co. v. Kidd, Dater & Price Co.* (1908) 115 N. W. 409, 151 Mich. 478.

Making criminal any deduction by the purchaser from the actual weight of grain, seed, hay, or coal under a claim of right by reason of

any custom or rule of a board of trade, as is done by Act June 8, 1909 (Acts Mo. 1909, p. 519), does not take property without due process of law.—(1911) *Houss v. Mayes*, 31 S. Ct. 234, 219 U. S. 270, 55 L. Ed. 213, affirming judgment (1910) 127 S. W. 305, 227 Mo. 617.

A landowner engaged in collecting and vending as a separate commodity the carbonic acid gas contained in natural mineral waters existing in a common underground reservoir is not deprived of his property without due process of law, contrary to Const. U. S. Amend. 14, by the provisions of Laws N. Y. 1908, c. 429, which, as construed by the state courts, forbid him from pumping or otherwise artificially drawing, by means of wells on his property, unnatural quantities of such waters from the common source of supply, and wasting them to the injury or impairment of the rights of other proprietors.—(1911) *Lindsley v. Natural Carbonic Gas Co.*, 31 S. Ct. 337, 220 U. S. 61, 55 L. Ed. 369, Ann. Cas. 1912C, 160, affirming decree (C. C. 1909) 170 F. 1023.

The property of a savings bank is not taken without due process of law by Laws Mass. 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.—(1911) *Provident Institution for Savings in Town of Boston v. Malone*, 31 S. Ct. 681, 221 U. S. 660, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129, affirming judgment (1909) *Malone v. Provident Institution for Savings in Boston*, 86 N. E. 912, 201 Mass. 23.

Making invalid against the employer assignments of, or orders for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by the written consent of the wife of the employé, as is done by Laws Mass. 1908, c. 605, §§ 7, 8, is a valid exercise of the police power, and does not deny the assignee due process of law.—(1911) *Mutual Loan Co. v. Martell*, 32 S. Ct. 74, 222 U. S. 225, 56 L. Ed. 175, Ann. Cas. 1913B, 529, affirming judgment 86 N. E. 916, 200 Mass. 482.

Fixing by ordinance the weight of the standard loaf of bread to be sold in a city at one pound, and prohibiting selling of loaves not up to weight, or of a specified fractional part or multiple of such loaf, is not such an unreasonable exercise of the police power as to render the ordinance void under Const. U. S. Amend. 14, prohibiting the taking of property without due process of law.—*Schmidinger v. City of Chicago*, 33 S. Ct. 182, 226 U. S. 578, 57 L. Ed. 364, Ann. Cas. 1914B, 284, affirming judgments 90 N. E. 369, 243 Ill. 167, and 92 N. E. 244, 245 Ill. 317.

A safe deposit company is not charged with a duty, without due process of law, by Inheritance Tax Law Ill. July 1, 1909 (Laws 1909, p. 316) § 9, providing that the contents of a safe deposit box shall not be removed until after a specified notice to the Attorney General and State Treasurer, and not then except on the rendition of sufficient of the assets to pay the inheritance tax.—*National Safe Deposit Co. v. Stead*, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

Prohibiting a safe deposit company from permitting the removal of the contents of a safe deposit box after the death of the renter without retaining assets sufficient to pay the inheritance tax, as is done by Act Ill. July 1, 1909 (Laws 1909, p. 316) § 9, does not deprive the company of its property without due process of law.—*Id.*

Application to a combination, which has benefited instead of injured the public, of the prohibitions of Rev. St. Mo. 1909, § 10301, and Rev. St. 1899, § 8966, against combinations lessening competition, does not render such legislation repugnant to Const. U. S. Amend. 14, as arbitrarily limiting the right of contract.—*International Harvester Co. v. State of Missouri ex inf. Attorney General*, 34 S. Ct. 859, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, affirming judgment, *State ex inf. Major v. International Harvester Co. of America*, 141 S. W. 672, 237 Mo. 369.

The nonforfeiture provisions of Rev. St. Mo. 1899, §§ 5856-5859, 7897-7900, cannot, without denying the right of freedom to contract, given by Const. U. S. Amend. 14, be applied to invalidate a loan agreement made in New York between a life insurance corporation of that state and the beneficiary, a resident of New Mexico, and the settlement effected in New York under such agreement in conformity to the New York laws, though the original contract was made in Missouri, and though its laws provided that such company should be subject to the laws of Missouri as if it were a domestic corporation.—*New York Life Ins. Co. v. Head*, 34 S. Ct. 879, 234 U. S. 149, 58 L. Ed. 1259, reversing judgment *Head v. New York Life Ins. Co.*, 147 S. W. 827, 241 Mo. 403; *New York Life Ins. Co. v. Head*, 34 S. Ct. 883, 234 U. S. 166, 58 L. Ed. 1266.

A foreign life insurance company is not denied due process of law, within Const. U. S. Amend. 14, because the state insurance commissioner, in his discretion, under Act S. C. March 8, 1910 (26 St. at Large, p. 774) § 13, has refused to accept bond of surety company on insurance company's application for a license.—*State of South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster*, 35 S. Ct. 504, 237 U. S. 63, 59 L. Ed. 839, affirming judgment *State ex rel. Phoenix Mut. Life Ins. Co. v. Same*, 77 S. E. 401, 94 S. C. 379.

An ordinance making it unlawful to conduct a livery stable within a designated area held not violative of the fourteenth amendment to the federal Constitution.—*Reinman v. City of Little Rock*, 35 S. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment *City of Little Rock v. Reinman*, 155 S. W. 105, 107 Ark. 174.

Requiring managers of corporation organized prior to 1900 to make affidavit prescribed by Rev. St. Mo. 1909, § 10322, as to nonparticipation in any combination, etc., is not inconsistent with due process of law, though statute prescribes a form of affidavit stating the year as "19—," as the year of incorporation, with instructions that no changes shall be made.—*Mallinckrodt Chemical Works v. State of Missouri ex rel. Jones*, 35 S. Ct. 671, 238 U. S. 41, 59 L. Ed. 1192, affirming judgment *State ex rel. Jones v. Mallinckrodt Chemical Works*, 156 S. W. 967, 249 Mo. 702.

Corporations doing business in St. Louis, which, under laws of Missouri, is not a part of any county, required to make affidavit by Rev. St. Mo. 1909, § 10322, of nonparticipation in trust combinations, is not denied due process of law, though the affidavit has a jurat in a county, since section 8037 provides that the word "county" shall be construed to include St. Louis.—*Id.*

A city ordinance prohibiting, as a police measure, brickmaking within a designated area, does not take, without due process of law, land of an owner within the prohibited district containing deposits suitable for brickmaking, which cannot be profitably manufactured elsewhere.—*Hadacheck v. Sebastian*, 36 S. Ct. 143, 239 U. S. 394, 60 L. Ed. 348, affirming judgment *Ex parte Hadacheck*, 132 P. 584, 165 Cal. 416.

There is no such uncertainty in requirement of Rev. St. Neb. 1913, § 3104, that innkeepers in case of fire shall do all in their power to save guests as to render the statute invalid under Const. Amend. 14, as wanting in due process of law.—*Miller v. Strahl*, 36 S. Ct. 147, 239 U. S. 426, 60 L. Ed. 364, affirming judgment *Strahl v. Miller*, 151 N. W. 952, 97 Neb. 820.

Act Aug. 23, 1912, amendatory of Food and Drugs Act, § 8, denouncing as misbranding false statements as to curative properties of drugs, is not so uncertain as to deny due process of law in violation of Const. Amend. 5.—*Seven Cases v. United States*, 36 S. Ct. 180, 239 U. S. 510, 60 L. Ed. 411.

Laws N. D. 1911, p. 355, prohibiting the sale of lard not in bulk unless put up in packages of specified weights, is not repugnant to Const. Amend. 14, as denying due process of law.—*Armour & Co. v. State of North Dakota*, 36 S. Ct. 440, 240 U. S. 510, 60 L. Ed. 771 affirming judgment *State v. Armour & Co.*, 145 N. W. 1033, 27 N. D. 177.

297. Regulation of railroads and other carriers.

See 10 Cent. Dig. Const. Law, §§ 832-834.

Code 1873, § 1289, providing that, where a railway company fails to fence its road, it shall be liable to the owner of any stock killed or injured by reason of the want of such fence, for the amount of the damage, unless the same was caused by the willful act of the owner, and that, if the company neglects to pay the damage within a certain time, the owner shall be entitled to recover double the amount of damage, is not in conflict with the constitution, which prohibits the deprivation of property without due process of law.—*Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 S. Ct. 207, 32 L. Ed. 585.

Pub. Acts Conn. 1889, c. 220, authorizing the railroad commissioners to order any railroad company, if in their opinion its financial condition will warrant, to remove a dangerous grade crossing, and imposing the expense on the company in certain cases, does not amount to a taking of property without due process, when the mode provided for ascertaining such result is suited to the nature of the case, and not merely arbitrary and capricious.—*New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269, affirming judgment 62 Conn. 527, 26 Atl. 122.

A state statute forbidding the heating of passenger cars by stoves (Laws N. Y. 1887, c. 616) does not deprive the companies of property without due process of law.—*New York, N. H. & H. R. Co. v. People of the State of New York*, 17 S. Ct. 418, 165 U. S. 628, 41 L. Ed. 853.

Railroad companies are not deprived of property without due process of law by a decision compelling them to furnish track connections where the roads intersect, when this is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the railroad companies, notwithstanding the fact that they may be required to exercise the power of eminent domain and incur a comparatively small expense. Judgment, *Jacobson v. Wisconsin, M. & P. R. Co.*, 74 N. W. 893, 71 Minn. 519, 40 L. R. A. 389, 70 Am. St. Rep. 358, affirmed.—*Wisconsin, M. & P. R. Co. v. Jacobson*, 21 S. Ct. 115, 179 U. S. 287, 45 L. Ed. 184.

Due process of law is not denied a street railway company by an order of the commissioner of railroads, made and issued under Pub.

Acts Mich. 1893, No. 171, § 5, requiring such street railway company to pay one-half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad, which was not built until after the street railway had been constructed. Judgment, *Detroit, Ft. W. & B. I. Ry. v. Commissioner of Railroads*, 86 N. W. 842, 127 Mich. 219, 62 L. R. A. 149, affirmed.—*Detroit, Ft. W. & B. I. Ry. v. Osborn*, 23 S. Ct. 540, 189 U. S. 383, 47 L. Ed. 860.

An order of the North Carolina Corporation Commission, requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railway Company, which afforded the principal means of travel between the eastern and western parts of the state, is not so arbitrary and unreasonable as to amount to a denial of due process of law, if other connections are inadequate for the public convenience, although compliance with the order may necessitate operating an extra train at a loss, or extending, with like result, the run of a local train, so long as the income of the railroad company, from its business in the state, affords adequate remuneration after allowing for any possible loss resulting from operating either of such trains. Judgment, *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* (1904) 49 S. E. 191, 137 N. C. 1, affirmed.—*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 27 S. Ct. 585, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398.

Requiring a railway company to deliver its own cars to another railway company when performing its duty under Const. Ky. § 213, to receive, deliver, and transport freight from and to any point where there is a physical connection between its tracks and those of any other railway company deprives the former company of its property without due process of law. Judgment (1906) 97 S. W. 778, 30 Ky. Law Rep. 18, reversed.—*Louisville & N. R. Co. v. Central Stock Yards Co.*, 29 S. Ct. 246, 212 U. S. 132, 53 L. Ed. 441.

The property of a railway company is taken without due process of law by Const. Ky. § 213, under which, as construed by the state courts, such company may be compelled, upon payment simply for the service of carriage, to accept cars offered to it at an arbitrary connecting point near its terminus, by a competing road, for the purpose of reaching and using the former's terminal facilities.—Id.

Railway companies enjoying the right, under existing state legislation, of ownership of or association with the articles or commodities carried, are not denied the due process of law guaranteed by Const. U. S. Amend. 5, by so much of the provisions of Hepburn Act June 29, 1906, c. 3591, § 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), as forbids a carrier from transporting articles or commodities in interstate commerce when they have been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not in good faith, before transporting them, disassociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense. Judgment and decree (C. C. 1908) 164 F. 215, reversed.—*United States v. Delaware & H. Co.*, 29 S. Ct. 527, 213 U. S. 366, 53 L. Ed. 836.

The duty of a railway company under its charter to furnish passenger service is not so discharged by carrying them on a mixed train, as to cause an order of the Kansas railroad commission, compelling passenger train service at a pecuniary loss, to be so arbitrary and unreasonable as to take property without due pro-

cess of law, though Laws Kan. 1907, c. 274, as amended by Laws 1909, c. 190, gives the public the right to travel in the caboose of freight trains, since it recognizes that persons availing themselves of such right are not entitled to ordinary passenger facilities, or to the legal protection surrounding passenger traffic. Judgment, *State v. Missouri Pac. Ry. Co.* (1907) 92 P. 606, 76 Kan. 467, affirmed.—*Missouri Pac. Ry. Co. v. State of Kansas ex rel. Taylor*, 30 S. Ct. 330, 216 U. S. 262, 54 L. Ed. 472.

An order of a state railroad commission directing a railroad company to discharge its corporate duty by operating a passenger train over a branch line between its terminus within the state and the state line is not so arbitrary or unreasonable as to deprive the company of its property without due process of law, because there are no facilities at the state line, and no occasion for the termination of the transit at that point.—*Id.*

The compulsory construction and maintenance by a railway company, under Sess. Laws Neb. 1905, c. 105, §§ 1, 6, at its own expense, and without a preliminary hearing, under penalty of a heavy fine for refusal, of the side tracks or switches necessary to reach grain elevators which may be erected adjacent to the right of way, cannot be justified as an exercise of the police power, but such statute takes the property of the railway company without due process of law, even if construed as operating only when the demand for such facilities is reasonable.—*Missouri Pac. Ry. Co. v. State of Nebraska*, 30 S. Ct. 461, 217 U. S. 196, 54 L. Ed. 727, 18 Ann. Cas. 989, reversing judgments *State v. Missouri Pac. Ry. Co.* (1908) 115 N. W. 614, 81 Neb. 15, and 115 N. W. 757, 81 Neb. 174.

Due process of law is not denied, contrary to Const. U. S. Amend. 14, by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state.—(1910) *Western Union Telegraph Co. v. Commercial Milling Co.*, 31 S. Ct. 59, 218 U. S. 406, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, affirming judgment *Commercial Milling Co. v. Western Union Telegraph Co.* (1908) 115 N. W. 698, 151 Mich. 425.

The property of the initial carrier is not taken in violation of Const. U. S. Amend. 5, to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of a loss, by the Carmack amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1163]), to Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), under which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere en route, in spite of any agreement or stipulation to the contrary, with a right of recovery over against the carrier actually causing the loss, since the liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.—(Sup., Ga., 1911) *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 S. Ct. 164, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, affirming judgment *Riverside Mills v. Atlantic Coast Line R. Co.* (C. C. 1909) 168 F. 990; (Sup., Ky., 1911) *Louisville & N. R. Co. v. Scott*, 31 S. Ct. 171, 219 U. S. 209, 55 L. Ed. 183, affirming judgment (1909) 118 S. W. 990, 133 Ky. 724.

A railway company is not deprived of its property without due process of law by Laws Ark. 1907, No. 116, penalizing the operation of freight trains of more than 25 cars with less than 3 brakemen, regardless of any equipment with automatic couplers and air brakes.—(1911) *Chicago, R. I. & P. Ry. Co. v. State of Arkansas*, 31 S. Ct. 275, 219 U. S. 453, 55 L. Ed.

290, affirming judgment (1908) 111 S. W. 456, 86 Ark. 412.

An order of a state railroad commission requiring trackage connections between competing railroads for interchange of business is not due process of law if the order is arbitrary or unreasonable and not justified by public necessity.—(1912) *State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 32 S. Ct. 535, 224 U. S. 510, 56 L. Ed. 863, reversing judgment (1900) *State v. Railroad Commission of Washington*, 100 P. 179, 52 Wash. 17.

Confining scope of judicial review of reasonableness of order requiring trackage connections between railroad companies to the testimony submitted to the railroad commission under Laws Wash. 1907, c. 226, does not take property without due process of law, where the statute provides for a full hearing before the commission.—*Id.*

The places and persons interested, the volume of business, and the saving in time and expense to the shipper, as against the cost to the carrier, must be considered in determining the reasonableness of, and the public necessity for, an order of the state railroad commission requiring trackage connections between competing railroads, when attacked as taking property without due process of law.—*Id.*

An order of the state railroad commission requiring trackage connections between competing railroads, where the commission acted without any evidence of inadequate service or public complaint, or testimony as to freight or as to the volume of business or as to the public revenue, is insufficient to show public necessity under the due process of law clause of the federal Constitution (Const. Amend. 14).—*Id.*

Insufficiency of the evidence before a state railroad commission to sustain on the ground of public necessity under the due process of law clause of the federal Constitution (Const. Amend. 14) its order requiring trackage connection between competing railroads cannot be supplied on judicial review by presumption arising from the failure of the carrier to disprove what had not been established, where the statute confines judicial review of the reasonableness of the order to the testimony submitted to the commission.—*Id.*

Forbidding a railroad to transport in interstate commerce an article purchased by it for its private business, as is done by Hepburn Act June 29, 1906, does not deny due process of law guaranteed by Const. U. S. Amend. 5.—*Delaware, L. & W. R. Co. v. United States*, 34 S. Ct. 65, 231 U. S. 363, 58 L. Ed. 269.

That preferred stockholders may be deprived of part of the noncumulative dividends by enforcement of the regulation of the Interstate Commerce Commission prescribing the system of accounting which rejects the theory that the cost of property abandoned because of permanent improvements should remain in the property account, does not deprive such stockholders of their property without due process of law.—*Kansas City Southern R. Co. v. United States*, 34 S. Ct. 125, 231 U. S. 423, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1, affirming decree (Com. C.) 204 F. 641.

The tracks and terminals of a railway company in Detroit are not appropriated for the benefit of other railroads contrary to Const. U. S. Amend. 14, forbidding taking of property without due process of law by the order of the state railway commission in aid of Pub. Acts Mich. 1909, No. 300, as amended by Pub. Acts 1911, No. 139, under which the company may be compelled to receive and transport loaded cars between junction points with other carriers in the corporate limits and its own team tracks, and between such team tracks and industrial sidings on its own line.—*Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 34 S. Ct. 152, 231 U. S. 457, 58 L. Ed. 310, affirming decree (D. C.) 198 F. 1009.

A railway carrier is not deprived of its liberty without due process of law contrary to Const. U. S. Amend. 14, by an order of a state railroad commission to accept without reloading into its own cars reshipments of coal in car load lots tendered in the cars of other carriers.—*Chicago, M. & St. P. Ry. Co. v. State of Iowa*, 34 S. Ct. 592, 233 U. S. 334, 58 L. Ed. 988, affirming judgment *State v. Chicago, M. & St. P. Ry. Co.*, 130 N. W. 802, 152 Iowa, 317.

Requiring locomotives on the main line to be equipped with electric headlights of a certain capacity, as is done by Pub. Laws Ga. 1908, pp. 50, 51, does not deprive carriers of liberty of contract and property without due process of law, contrary to Const. U. S. Amend. 14, but is a valid exercise of the police power.—*Atlantic Coast Line R. Co. v. State of Georgia*, 34 S. Ct. 829, 234 U. S. 280, 58 L. Ed. 1312, affirming judgment 69 S. E. 725, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

Construing Act June 29, 1906, extending the operation of the interstate commerce act to pipe lines, as embracing existing pipe lines controlled by oil companies in which is carried all oil offered between oil fields east of California and the Atlantic seaboard on condition that the offerer shall first sell to them the oil on their own terms, does not render the statute invalid under Const. Amend. 5, but is a valid exercise of control over interstate commerce.—*United States v. Ohio Oil Co.*, 34 S. Ct. 956, 234 U. S. 548, 58 L. Ed. 1459, modifying decree (Com. Ct.) *Prairie Oil & Gas Co. v. United States*, 204 F. 798.

A railroad may, consistently with due process of law, be required to construct overhead crossings or viaducts at its own expense.—*Missouri Pac. R. Co. v. City of Omaha*, 35 S. Ct. 82, 235 U. S. 121, 59 L. Ed. 157, affirming decree 197 F. 516, 117 C. C. A. 12.

An ordinance requiring a railroad to construct at its own expense a viaduct at a street crossing is not wanting in due process of law because it is to be built along one side of the street only, leaving the other open to public travel.—*Id.*

An order of a state railroad commission directing a railroad company to discontinue demanding prepayment of freight from a connecting carrier held not violative of Const. U. S. Amend. 14, as denying due process of law.—*Wadley Southern Ry. Co. v. State of Georgia*, 35 S. Ct. 214, 235 U. S. 651, 59 L. Ed. 405, affirming judgment 73 S. E. 741, 137 Ga. 497.

A state, not acting in violation of any federal regulation of interstate commerce, may, without denying due process of law, regulate the hauling of empty or loaded cars from its line to connecting line for delivery or loading of intrastate freight.—*Michigan Cent. R. Co. v. Michigan R. R. Commission*, 35 S. Ct. 422, 236 U. S. 615, 59 L. Ed. 750, affirming judgment *Michigan R. Commission v. Michigan Cent. R. Co.*, 132 N. W. 1068, 168 Mich. 230.

Property of steam railroad held not taken without due process of law by order of Michigan Railroad Commission under Pub. Acts Mich. 1907, No. 312, § 7, relating to interchange of railroad with interurban electric railway.—*Id.*

Compelling railroads to construct openings in roadbeds to take care of surface water under amendment, Laws Mo. 1907, p. 169, to Rev. St. 1899, § 1110, does not take their property without due compensation.—*Chicago & A. R. Co. v. Tranbarger*, 35 S. Ct. 678, 238 U. S. 67, 59 L. Ed. 1204, affirming judgment *Tranbarger v. Chicago & A. R. Co.*, 156 S. W. 694, 250 Mo. 46.

Property of two carriers furnishing switching service to each other in a certain city and to a third carrier, except on certain business,

is not taken without due process of law by order of Interstate Commerce Commission under Act Feb. 4, 1887, § 3, commanding them to discontinue such discrimination against the third carrier.—*Louisville & N. R. Co. v. United States*, 35 S. Ct. 696, 238 U. S. 1, 59 L. Ed. 1177, affirming judgment (D. C.) 216 F. 872.

Enforcement of order of a state railroad commission, directing railroad to erect in its stockyards in a specified village a scale without affording opportunity to abate any discrimination against such village because of scales in other villages, takes the railway company's property without due process of law.—*Great Northern Ry. Co. v. State of Minnesota ex rel. Railroad & Warehouse Commission*, 35 S. Ct. 753, 238 U. S. 340, 59 L. Ed. 1337, reversing judgment *State v. Great Northern Ry. Co.*, 141 N. W. 1102, 122 Minn. 55.

Laws Wis. 1911, c. 272, prohibiting the letting down of an unoccupied upper berth in a sleeping car when lower berth is occupied, takes property without compensation, contrary to due process of law clause of Const. U. S. Amend. 14.—*Chicago, M. & St. P. R. Co. v. State of Wisconsin*, 35 S. Ct. 869, 238 U. S. 491, 59 L. Ed. 1423, L. R. A. 1916A, 1133, reversing judgment *State v. Chicago, M. & St. P. R. Co.*, 140 N. W. 70, 152 Wis. 341, Ann. Cas. 1914C, 478.

Issuance of mandamus to compel the relaying of rails removed from a logging spur and to resume service as directed by the state railway commission pending determination of a suit in equity held not to deprive the railway company of due process of law guaranteed by Const. Amend. 14, where an indemnity bond was given to cover the eventuality of the vacation of the order.—*Detroit & M. Ry. Co. v. Michigan R. R. Commission*, 36 S. Ct. 424, 240 U. S. 564, 60 L. Ed. 802, affirming judgment *Michigan R. Commission v. Detroit & M. Ry. Co.*, 144 N. W. 696, 178 Mich. 230.

A state statute prohibiting switching of cars over public crossings in cities of the first and second class with less than a specified number of employes is not violative of due process of law.—*St. Louis, I. M. & S. Ry. Co. v. State of Arkansas*, 36 S. Ct. 443, 240 U. S. 518, 60 L. Ed. 776, affirming judgment 170 S. W. 580, 114 Ark. 486.

A state statute forbidding the switching of cars over public crossings in cities of the first and second class with a crew of less than a specified number of employes under penalty of a \$50 fine for each offense is not invalid on the ground that the excess of its penalties prevents a contest of its validity.—*Id.*

⇐298. Regulation of charges or prices.

See 10 Cent. Dig. Const. Law, § 847.

A general statute (Act Miss. March 11, 1884) establishing a commission charged with the duty of supervising railroads, and authorized to fix maximum rates for transportation, is not invalid, as depriving a company operating a railroad within the state of its property without due process of law.—*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636.

Act Minn. March 7, 1887 (Gen. Laws Minn. 1887, c. 10), creating a railroad and warehouse commission, provided that all charges for transportation by common carriers "shall be equal and reasonable," and empowering the commission, in section 8, on its finding that any part of the schedule of charges of a common carrier is unequal or unreasonable, to compel such carrier to change the same, and adopt such charges as the commission "shall declare to be equal and reasonable," without providing for any hearing before the commission, is unconstitutional as depriving carriers of their property without due process of law, in so far as it

makes the decision of the commission, as to what are equal and reasonable charges, final and conclusive.—*Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. Ed. 970, reversing *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 37 N. W. 782; *Minneapolis E. Ry. Co. v. Same*, 134 U. S. 467, 10 S. Ct. 473, 33 L. Ed. 985.

Laws N. Y. 1888, c. 581, fixing a maximum charge of five-eighths of a cent per bushel for elevating, receiving, weighing, and discharging grain by means of floating or stationary elevators, in any city of the state containing a population of 130,000 or over, is not a taking of private property without due process of law, but is a valid exercise of the police power, as well in its application to elevators owned by private individuals as to those owned by companies having chartered privileges from the state, since the business, as carried on, is affected with a public interest, and is a practical monopoly.—*Budd v. People of State of New York*, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247.

Laws N. D. 1891, c. 126, declaring all buildings, elevators, or warehouses in the state erected and operated "for the purpose of buying, selling, storing, shipping, or handling grain for profit," public warehouses (section 4), and prescribing maximum rates of charges for storing and handling grain therein (section 11), does not amount to a deprivation of property without due process of law, even in its application to an elevator owner whose principal business is storing his own grain, the storage of grain for others being a mere incident, and even though it provides that the grain is to be kept insured at the expense of the warehouseman.—*Brass v. State of North Dakota*, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, affirming judgment *State v. Brass*, 2 N. D. 482, 52 N. W. 408.

A statute making such reduction in the rates of toll of a turnpike company as will prevent it, out of its receipts, from maintaining its road in proper condition, or from earning any dividend on its stock, deprives it of property without due process of law.—*Covington & L. Turnpike Road Co. v. Sandford*, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

If a railroad company has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of increased rates, necessary to realize profits on this fictitious capitalization; but the basis of all calculations as to the reasonableness of rates must be the fair value of the property used by the company for the convenience of the public. In ascertaining this value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.—*Smyth v. Ames*, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, affirming decree (C. C.) *Ames v. Union Pac. Ry. Co.*, 64 F. 165.

While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.—*Id.*

The Nebraska law of April 12, 1893, to regulate railroads, classify freights, and fix max-

imum rates for transportation of freights, is void as to the particular rates prescribed, as depriving the companies of their property without due process of law.—*Id.*

While railroads may not discriminate in their charges against the people of any one state, they are not necessarily bound to give absolutely the same rates to the people of all the states; for the kind and amount of business, the cost thereof, the cost of construction and maintenance, are factors which determine largely the question of rates, and these vary materially in different states.—*Id.*

When a state undertakes to prescribe maximum rates on local business done by an interstate carrier, it must do so with reference exclusively to what is just and reasonable in respect of domestic business alone; and interstate business cannot be made to bear losses resulting from the rates prescribed for local business.—*Id.*

The decision herein reported in 18 Sup. Ct. 418, 169 U. S. 466, was only that the rates prescribed by the Nebraska statute were unreasonably low as an entirety, and is not to be construed as forbidding the railroad companies or the state board of transportation to reduce rates on specific articles below the rates which the companies were charging when the decrees below were rendered.—*Smyth v. Ames*, 18 S. Ct. 888, 171 U. S. 361, 43 L. Ed. 197, modifying 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, which affirms decree (C. C.) *Ames v. Union Pac. Ry. Co.*, 64 F. 165.

Pub. Acts Mich. 1891, No. 90, requiring railroad companies in the state to keep for sale 1,000-mile tickets at specified rates, less than the regular rates, to be used in the name of the purchaser, his wife and children, and valid for two years, where the maximum rates for transportation of passengers have been previously established by the legislature, is void as not within the legislative power to fix maximum rates, nor a proper regulation of the affairs of the company, but, on the contrary, a taking of the property of the company without due process of law. Judgment *Smith v. Lake Shore & M. S. R. Co.*, 72 N. W. 328, 114 Mich. 460, 4 Detroit Leg. N. 662, reversed.—*Lake Shore & M. S. Ry. Co. v. Smith*, 19 S. Ct. 565, 173 U. S. 684, 43 L. Ed. 858.

The guaranty of due process of law by the federal constitution is not violated by Const. Ky. § 218, and Gen. St. Ky. 1894, § 820, giving a railroad commission power to make exceptions in particular cases, after investigation, from the general prohibition of greater rates for shorter than for longer hauls. Such commission is not to be deemed a mere administrative body, but it is a constitutional tribunal, the decisions of which are made conclusive, and not reviewable by the courts. Judgment, 51 S. W. 164, 1012, 106 Ky. 633, 21 Ky. Law Rep. 232, 90 Am. St. Rep. 236, affirmed.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

Through rates for hard coal in car load lots from Duluth, Minn., to interior points in that state, as fixed by the Minnesota railroad and warehouse commission, are not so unreasonable as to amount to a taking of the property of the railroad without due process of law because, if such rates were applied to all freight, the road would not pay its operating expenses, in which are included interest upon bonds and dividends on stock, where hard coal in car load lots is a comparatively insignificant item of the total freight carried. Judgment, *State v. Minneapolis & St. L. R. Co.*, 83 N. W. 60, 80 Minn. 191, 89 Am. St. Rep. 514, affirmed.—*Minneapolis & St. L. R. Co. v. State of Minnesota*, 22 S. Ct. 900, 186 U. S. 257, 46 L. Ed. 1151.

The reduction of water rates by a board of supervisors acting under the authority of St.

Cal. 1885, p. 95, § 5, so as to give an annual income of 6 per cent. upon the then value of the property of the water company actually used in supplying water to the public, does not necessarily amount to a taking of property without due process of law. Judgment, *San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County* (C. C.) 113 F. 930, reversed.—*Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.*, 24 S. Ct. 241, 192 U. S. 201, 48 L. Ed. 406.

Carriers may be forbidden by the state railroad commission to make their local freight rate for phosphates more than 1 cent per ton per mile without denying due process of law to a railway company whose transportation of phosphates constitutes about one-sixth of its local freight business, where the rate so authorized is nearly 2 mills per ton larger than that company's average local freight rate. Judgments, *State v. Seaboard Air Line Ry. Co.* (1904) 37 So. 314, 658, 48 Fla. 129, 150, 152, affirmed.—*Seaboard Air Line Ry. v. State of Florida*, 27 S. Ct. 109, 203 U. S. 261, 51 L. Ed. 175.

State regulation of local freight rates for shipments to and from the Florida West Shore Railway and over the Seaboard Air Line Railway does not deprive the latter road of its property without due process of law, even if its total receipts from local freight rates are insufficient to meet what can properly be cast as a burden upon that business, where, so far as appears, such regulation may have no other effect than to make the rates on the Florida West Shore Railway the same as those obtaining generally in the state.—*Id.*

Municipal ordinances fixing telephone rates do not deny the due process of law guaranteed by Const. U. S. Amend. 14, because the section of the municipal charter under the authority of which they were enacted does not expressly provide for notice and hearing, where both notice and an opportunity to be heard were in fact accorded by ordinances providing that the rates be fixed at a meeting of the city council held in February in each year, and requiring the telephone company to furnish the city council annually in that month a statement of its receipts, expenditures, and property employed in the business. Decree (C. C. 1907) 155 F. 554, affirmed.—*Rome Telephone & Telegraph Co. v. City of Los Angeles*, 29 S. Ct. 50, 211 U. S. 285, 53 L. Ed. 176.

Laws Or. 1907, p. 67, empowering the state railroad commission to remedy discrimination in railway fares, may prohibit fares consistently with due process of law that are unjustly discriminatory as against a given locality, where the commission has authority to determine what rates are discriminatory and to make orders for other fares not open to such objection.—*Portland Ry., Light & Power Co. v. Railroad Commission of Oregon*, 33 S. Ct. 820, 229 U. S. 397, 57 L. Ed. 1248, affirming judgment 105 P. 709, 56 Or. 468; *Id.*, 33 S. Ct. 827, 229 U. S. 414, 57 L. Ed. 1259.

The determination of a state railway commission confirmed by the state courts that a town on one division of a suburban electric railway was discriminated against contrary to Laws Or. 1907, p. 67, *held* not to deny due process of law under the evidence.—*Id.*

Procedure permitted by the Oregon Railroad Commission Act (Laws 1907, c. 53), under which the commission may determine whether freight rates are unreasonable or excessive and order other rates not open to such objection, does not deny due process of law, where it authorizes suit in the state court to set aside unlawful rates.—*Southern Pac. Co. v. Campbell*, 33 S. Ct. 1027, 230 U. S. 537, 57 L. Ed. 1610, affirming decree (C. C.) 189 F. 182.

The absence of any definite rules governing the Interstate Commerce Commission under Act

June 18, 1910, § 8, amending the long and short haul clause of Act Feb. 4, 1887, § 4, in determining, in view of the preference and discrimination clause of sections 2 and 3, whether petitioning carrier shall be relieved from the operation of the short and long haul clause, does not render the statute invalid.—*United States v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; *Same v. Union Pac. R. Co.*, 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. United States*, 191 F. 856.

The maximum intrastate rates fixed by Laws N. D. 1907, c. 51, for transportation of coal in car load lots, *held* confiscatory, and to deny the carrier the due process of law.—*Northern Pac. Ry. Co. v. State of North Dakota ex rel. McCue*, 35 S. Ct. 429, 236 U. S. 585, 59 L. Ed. 735, Ann. Cas. 1916A, 1, reversing judgment *State v. Northern Pac. Ry. Co.*, 145 N. W. 135, 26 N. D. 438.

Rate of 2 cents a mile fixed for passenger traffic by Acts W. Va. 1907, c. 41 (Code 1913, c. 54, §§ 71f I, 71f II [secs. 3020, 3021]), is a violation of the due process of law clause, as confiscatory, where rate yields a very narrow margin over the cost.—*Norfolk & W. Ry. Co. v. Conley*, 35 S. Ct. 437, 236 U. S. 605, 59 L. Ed. 745.

The exercise by a state of its power to fix street railway rates, notwithstanding municipal rate ordinance, does not deprive street railway company of its property without due process of law.—*Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin*, 35 S. Ct. 820, 238 U. S. 174, 59 L. Ed. 1254, affirming judgment 142 N. W. 491, 153 Wis. 592, Ann. Cas. 1915A, 911.

A trunk line railway has no right, under the due process clause of the federal Constitution, to build up its business by paying tap line railroads bonuses or rebates forbidden by statute.—*O'Keefe v. United States*, 36 S. Ct. 313, 240 U. S. 294, 60 L. Ed. 651.

◀299. Creation or discharge of liability in general.

See 10 Cent. Dig. Const. Law, §§ 851, 852, 853-862, 867-869.

Under Civ. Code, art. 354, the property of the tutor is "tacitly" mortgaged in favor of the minor to secure a proper administration of his estate. By Const. La. 1868, art. 123, it is provided that "tacit mortgages and privileges now existing in this state shall cease to have effect against third persons after January 1, 1870, unless duly recorded," and Act La. March 8, 1869, in pursuance thereof provided for the recording of such mortgages. *Held*, that the constitutional provision is not invalid, as depriving the minor of his property without due process of law.—*Vance v. Vance*, 108 U. S. 514, 2 S. Ct. 854, 27 L. Ed. 808.

The limit of a city's power of taxation, at the time a judgment for a tort was rendered against it, was fixed at \$1.75 for every hundred dollars of assessed value. This was subsequently reduced to \$1, by Const. 1879, making it impossible for plaintiffs to collect their judgment, as the funds receivable thereunder were exhausted by current municipal expenses. *Held*, the municipal liability for damages being purely statutory and for a tort, that, although it was reduced to judgment, the constitutional provision is not invalid, as depriving plaintiffs of their property without due process of law.—*State of Louisiana v. City of New Orleans*, 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936.

The provision of Act Ala. June 1, 1887, requiring a railway company to pay the fees for the examination of its employés by a medical board to ascertain whether or not they are

color blind, does not deprive the company of property without due process of law, in violation of Const. U. S. Amend. 14.—*Nashville C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 19 S. Ct. 28, 32 L. Ed. 352.

Const. W. Va. 1872, art. 8, § 35, provides that "no citizen of this state who aided or participated in the late war * * * on either side shall be liable in any proceeding, civil or criminal, nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto." In 1863 defendant sued plaintiff in a circuit court of West Virginia in trespass de bonis, for taking cattle, which action plaintiff defended on the ground that he was a Confederate soldier, and as such took the cattle under military orders, in accordance with the usages of civilized warfare; but judgment was rendered against him, and affirmed by the supreme court of appeals in 1867. *Held*, on bill in chancery to enjoin the execution thereof, that as to such judgment the above constitutional provision is not repugnant to the provisions of Const. U. S. Amend. 14, that no state shall "deprive any person of life, liberty, or property without due process of law." The constitutional provision in question simply removes the obstructions which otherwise might hinder the enforcement of such remedies, and authorizes relief against judgments rendered contrary to a principal of law existing independently of constitutional or statutory provisions, viz. that for acts done in accordance with the usages of civilized warfare there is no personal liability.—*Freeland v. Williams*, 131 U. S. 405, 9 S. Ct. 763, 33 L. Ed. 193.

The provision of Gen. St. S. C. 1882, c. 40, that the entire expenses of the railroad commission, which is thereby created and invested with general supervision of all railroads in the state, "shall be borne by the several corporations owning or operating railroads" within the state, is not in conflict with Const. U. S. Amend. 14, § 1, forbidding deprivation of property without due process of law, as the business of such corporations is affected with a public use, and subject to legislative regulation, and the regulations imposed are within the power of the state to prescribe, and the exercise of the duties of the commissioners is beneficial to the public, and also to the railroad corporations.—*Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 12 S. Ct. 255, 35 L. Ed. 1051, affirming judgment 27 S. C. 385, 4 S. E. 49.

The requirement of the act of 1885, creating a board of commissioners of electrical subways, as amended by Laws 1886, c. 503, § 7, that the salaries of the commissioners shall be assessed upon the companies constructing or operating electrical subways under the act, is not a taking of their property without due process of law.—*People of State of New York v. Squire*, 145 U. S. 175, 12 S. Ct. 880, 36 L. Ed. 666, affirming judgment 107 N. Y. 593, 14 N. E. 820.

Due process of law is not denied a person injured in the course of his employment in or about a railroad by Act Pa. April 4, 1868, restricting his rights as against the railway company to those which an employé of such company would have under like circumstances. Judgment (1905) 76 N. E. 1129, 72 Ohio St. 659, affirmed.—*Martin v. Pittsburg & L. E. R. Co.*, 27 S. Ct. 100, 203 U. S. 284, 51 L. Ed. 184, 8 Ann. Cas. 87.

300. Creation or displacement of liens.

See 10 Cent. Dig. Const. Law, § 940.

Laws Tenn. 1877, c. 31, § 5, providing that, on the insolvency of a foreign corporation carrying on business in the state, "creditors who may be residents of this state shall have a priority in the distribution of assets over all sim-

ple contract creditors being residents of any other country or countries," cannot be said to deprive a nonresident creditor of his property without due process of law.—*Blake v. McClung*, 19 S. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

Subjecting the logs of one owner in a log boom to a statutory lien for fees due the surveyor general for surveying and scaling all the logs in the boom, including those of other owners, does not deprive the owner of property without due process of law, when he has chosen to avail himself of the boom.—*Lindsay & Phelps Co. v. Mullen*, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

A nonresident mortgagee is not deprived of property without due process of law by Act Tenn. 1877, § 5, simply because his claim is subordinated to the claims of Tennessee creditors of an insolvent foreign corporation.—*Sully v. American Nat. Bank*, 20 S. Ct. 935, 178 U. S. 289, 44 L. Ed. 1072.

Attaching creditors, who had actual knowledge of the existence of a mortgage covering the property attached before suing out the attachment, acquired no property rights therein by virtue of a default judgment in the attachment suit in their favor and against their judgment debtor, of which they were deprived without due process of law by Act Feb. 3, 1897, validating mortgages recorded like the one in question, which enactment went into effect while the issue in such attachment suit between the attaching creditors and the mortgagees, who had intervened, claiming the property, was still pending and undetermined. Judgment, *Evans-Snider-Buel Co. v. McFadden*, 105 F. 293, 44 C. C. A. 494, 58 L. R. A. 900, affirmed.—*McFadden v. Evans-Snider-Buel Co.*, 22 S. Ct. 758, 185 U. S. 505, 46 L. Ed. 1012.

Property is not taken without due process of law, by the provisions of Rev. St. Ohio, §§ 3184, 3185, 3185a, giving a lien on the property of the owner to subcontractors, laborers, and those who furnish materials to be used by the contractor in the execution of his contract with the owner. Decree, *Great Southern Fire Proof Hotel Co. v. Jones*, 118 F. 793, 54 C. C. A. 165, affirmed.—*Great Southern Fire Proof Hotel Co. v. Jones*, 24 S. Ct. 576, 193 U. S. 532, 48 L. Ed. 778.

301. Imposition of liability for personal injuries.

See 10 Cent. Dig. Const. Law, §§ 848-850, 857.

Act Kan. 1874, providing that every railroad company shall be liable to its employes for all damages occasioned by the negligence of its agents, or by any mismanagement of its engineers or other employes, does not deprive a company of its property without due process of law, and is not in conflict with Const. U. S. Amend. 14.—*Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 S. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210, 8 S. Ct. 1176, 32 L. Ed. 109.

A corporation incorporated under the Nebraska railroad incorporation act of 1867 accepts as a part and condition of its charter the rule of liability for injuries to passengers expressed in section 3 of that act as absolute, unless the injury was one caused by the passenger's own criminal negligence or by his violation of some rule of the railroad company brought to his actual notice, and such company cannot complain that by such section it is deprived of its property without due process of law.—*Chicago, R. I. & P. Ry. Co. v. Eaton*, 22 S. Ct. 228, 183 U. S. 589, 46 L. Ed. 341, affirming judgment 82 N. W. 1119, 59 Neb. 698; *Same v. Zernecke*, 22 S. Ct. 229, 183 U. S. 582, 46 L. Ed. 339, affirming judgment 82 N. W. 26, 59 Neb. 689, 55 L. R. A. 610.

The imposition upon mineowners by Mining Act Ill. April 18, 1899 (Laws 1899, p. 300),

of responsibility for the defaults of mine managers and mine examiners, who are required by that act to be selected by the mineowners from those holding licenses issued by the state mining board created by such act, does not deprive them of their property without due process of law, in violation of Const. U. S. Amend. 14, where it is not obligatory upon a mineowner to select a particular individual, or to retain one when selected if found incompetent.—*Wilmington Star Min. Co. v. Fulton*, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

The imposition of the liability created by Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), upon interstate carriers by railroad only, and for the benefit of all their employes engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employes in such commerce not within the act are exposed, does not invalidate the statute under the due process of law clause of the fifth amendment to the federal Constitution, on the ground that it makes an arbitrary and unreasonable classification, even assuming that that clause is equivalent to the provision of the fourteenth amendment securing the equal protection of the laws.—(1912) *Mondon v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, reversing judgment (1909) 73 A. 762, 82 Conn. 373.

Congress, possessing the power exercised in Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), to regulate the relations of interstate railway carriers and their employes engaged in interstate commerce, made no unwarranted interference with the liberty of contract, contrary to Const. U. S. amend. 5, by declaring in the fifth section of that act that any contract, rule, regulation, or device the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created shall be void.—*Id.*

◀ 302. Imposition of liability for injuries to property rights.

See 10 Cent. Dig. Const. Law, §§ 851-856.

A statute providing that a railroad company, failing to keep its track fenced as specified, shall be liable in double the amount of all damages occasioned by injuries to stock getting on the track because of defects in the fences, cattle guards, etc., is not unconstitutional, as depriving the company of its property without due process of law.—*Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 S. Ct. 110, 29 L. Ed. 463; *Same v. Terry*, 115 U. S. 523, 6 S. Ct. 114, 29 L. Ed. 467.

The allowance of damages by Gen. Laws Minn. 1877, c. 73, for the diminution of value in the farm, resulting from the failure of the company to fence its roads and construct proper cattle guards, is not a taking of the railroad company's property without due process of law.—*Minneapolis & St. L. Ry. Co. v. Emmons*, 149 U. S. 364, 13 S. Ct. 870, 37 L. Ed. 769; *Same v. Nelson*, 149 U. S. 368, 13 S. Ct. 871, 37 L. Ed. 772.

A statute making railroad companies liable for property destroyed by fire communicated by their locomotives, and giving them an insurable interest in the property along their road, does not deprive them of property without due process of law.—*St. Louis & S. F. R. Co. v. Matthews*, 17 S. Ct. 243, 165 U. S. 1, 41 L. Ed. 611.

The subjection to double damages and fine or imprisonment under a state statute of one making a casual and involuntary trespass upon state lands by cutting timber thereon without a valid and existing permit does not deny due process of law, but may be justified as a valid

exercise of the police power, although the trespasser may have had reasonable grounds for believing that authority had been granted and honestly acted on such belief.—(1910) *Shevlin-Carpenter Co. v. State of Minnesota*, 30 S. Ct. 663, 218 U. S. 57, 54 L. Ed. 930, affirming judgment *State v. Shevlin-Carpenter Co.* (1907) 113 N. W. 634, 102 Minn. 470.

Making a municipality liable for three-fourths of the damage to property within its limits caused by a mob or riot, as is done by Laws Ill. 1887, p. 237, which saves to the owner his action against the rioters, and gives the municipality a lien upon any judgment against such participants for reimbursement, or a remedy to the municipality directly against the individuals causing the damage, to the amount of any judgment it may have paid the sufferer, is a valid exercise of the police power, and does not deny to the municipality due process of law because it imposes liability irrespective of any question of the power of the municipality to have prevented the violence, or of negligence in the use of its power.—(1911) *City of Chicago v. Sturges*, 32 S. Ct. 92, 222 U. S. 313, 56 L. Ed. 215, Ann. Cas. 1913B, 1349, affirming judgment *Sturges v. City of Chicago*, 86 N. E. 683, 237 Ill. 48.

Acceptance by carrier of interstate shipment over route selected by shipper as to which the carrier had no established rate held not so involuntary, within Carmack Amendment June 29, 1906, § 7, to Interstate Commerce Act Feb. 4, 1887, § 20, making such carrier answerable for damages by connecting carriers notwithstanding contrary stipulation, as to constitute taking of property without due process of law.—*Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 33 S. Ct. 609, 228 U. S. 593, 57 L. Ed. 980, affirming judgment 69 S. E. 1106, 111 Va. 813.

No rights under Const. Amend. 14, are infringed by provisions of Civ. Code S. C. 1912, §§ 2754, 2755, under which any carrier participating in a through intrastate shipment may be sued for damages occurring on any part of the through route.—*Atlantic Coast Line R. Co. v. Glenn*, 36 S. Ct. 154, 239 U. S. 388, 60 L. Ed. 344, affirming judgment *Glenn v. Atlantic Coast Line R. Co.*, 80 S. E. 898, 96 S. C. 357.

◀ 303. Imposition of penalty or forfeiture.

See 10 Cent. Dig. Const. Law, §§ 863-866.

Code Iowa 1873, § 1289, authorizing a recovery against a railroad company of double the value of stock killed through the company's failure to fence as required by statute, where it fails to pay 30 days after notice of loss, does not deprive the company of its property without due process of law.—*Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 S. Ct. 207, 32 L. Ed. 585.

The additional duty which Act June 10, 1890, § 70, requires the collector to levy where the valuation of imports by the general appraisers exceeds by more than 10 per cent. the value declared in the entry, is a legal incident to the decision of the board of general appraisers; and where the importer has full notice of the proceedings before the board, and ample opportunity to be heard on the question of the market value of the goods, the levy and collection of the additional duty is not a deprivation of property without due process of law, nor is the importer subjected to a penalty without notice or opportunity to be heard.—*Passavant v. United States*, 148 U. S. 214, 13 S. Ct. 572, 37 L. Ed. 426.

The property of a foreign corporation engaged in manufacturing products of cotton seed is not taken without due process of law by the Texas anti-trust laws, under which its license to do business in that state is forfeited for vio-

lating those laws by entering into an agreement to regulate or fix the price of cotton seed.—*National Cotton Oil Co. v. State of Texas*, 25 S. Ct. 379, 197 U. S. 115, 49 L. Ed. 689, affirming judgment (Civ. App.) 72 S. W. 615; *Southern Cotton Oil Co. v. Same*, 25 S. Ct. 383, 197 U. S. 134, 49 L. Ed. 696.

The owner of a building which he knowingly permits to be used for gaming purposes is not deprived of his property without due process of law by Rev. St. Ohio, § 4275, which authorizes an action to subject such building to the payment of a judgment obtained by an informer for the recovery of money lost there at play. Judgments 72 N. E. 1161, 1162, 70 Ohio St. 437, affirmed.—*Marvin v. Trout*, 26 S. Ct. 31, 199 U. S. 212, 50 L. Ed. 157.

Due process of law is not denied a social club by the revocation of its charter, which, under Act Va. March 12, 1904, p. 214, c. 116, automatically followed a judgment of a court of competent jurisdiction, rendered with all the parties before it, after giving full opportunity to be heard, that such club was being conducted for the purpose of violating and evading the laws of the state regulating the licensing and sale of liquors.—*Cosmopolitan Club v. Commonwealth of Virginia*, 28 S. Ct. 394, 208 U. S. 378, 52 L. Ed. 536.

Penalties imposed by the jury and confirmed by the state courts at the rate of \$1,500 and \$50 per day for violating, respectively, through a series of years, the Texas anti-trust laws of May 25, 1899 (Laws 1899, p. 246, c. 146), and of March 31, 1903 (Laws 1903, p. 119, c. 94), are not so excessive as to deprive the defendant corporation of its property without due process of law, where such property amounts to more than \$40,000,000, and its dividends have been as high as 700 per cent. per annum. Judgment (Tex. Civ. App. 1908) 106 S. W. 918, affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

Fixing the amount of fines for the violation of state legislation is within the police power of the state, subject only to the limitation that such fines must not be so grossly excessive as to amount to a deprivation of property without due process of law.—Id.

Property is not taken without due process of law, contrary to Const. U. S. Amend. 14, by Act Ark. Jan. 23, 1905 (Acts 1905, p. 2) § 1, imposing a penalty upon a foreign corporation doing business within the state while a member of a trust or combination to control prices, although such combination may not have been created in the state, and may not affect prices in such state, since the statute, as construed by the state courts, does not forbid or affix penalties to acts done beyond the state, but simply prohibits a corporation from continuing to do business within the state after it has done, either within or outside of the state, the enumerated acts. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

Making the official medical examination at the port of arrival conclusive for the purpose of imposing the penalty, enforceable by refusing clearance papers until paid, which is authorized by Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, for violating its provisions by bringing into the United States an alien afflicted with a loathsome or contagious disease, does not render such statute repugnant to Const. U. S. Amend. 5, as taking property without due process of law. Judgment, *International Mercantile Marine Co. v. Stranahan* (C. C. 1907) 155 F. 423, affirmed.—*Oceanic Steam Nav. Co. v. Stranahan*, 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013; *International Mercantile Marine Co. v. Same*, 29 S. Ct. 678, 214 U. S. 344, 53 L. Ed. 1024.

Due process of law is not denied to an insurance company connected with a tariff association which fixes rates, by Code Ala. 1896, §§ 2619, 2620, under which the insured or beneficiary in a policy issued by such company may recover, in addition to the actual loss, 25 per cent. of the amount of such actual loss or damage, any stipulation in the contract of insurance to the contrary notwithstanding; but such statute is a valid exercise of the police power of the state, to discourage monopolies and to encourage competition in the matter of insurance rates.—*German Alliance Ins. Co. v. Hale*, 31 S. Ct. 246, 219 U. S. 307, 55 L. Ed. 229.

Entry of judgment of ouster and imposition of fine in quo warranto under local state practice is sufficient notice to satisfy the due process clause of Const. U. S. Amend. 14, though the information contains only general allegations of misuser and general prayer for ouster.—(1912) *Standard Oil Co. of Indiana v. State of Missouri* ex inf. *Hadley*, 32 S. Ct. 406, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913D, 936, affirming judgment, *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1.

There is no want of due process of law in a judgment of the highest court of a state imposing a fine in quo warranto on a foreign corporation, although there was no statute fixing the maximum penalty, and no hearing as to damages.—Id.

Exacting double liability and an attorney's fee under Laws Ark. 1907, p. 144, from a railway company refusing to pay within 30 days an excessive demand for killing live stock, takes the company's property without due process of law.—(1912) *St. Louis, I. M. & S. R. Co. v. Wynne*, 32 S. Ct. 493, 224 U. S. 354, 56 L. Ed. 796, 42 L. R. A. (N. S.) 102, reversing judgment 119 S. W. 1127, 90 Ark. 538.

Due process of law is not denied to a carrier by imposition under Laws Miss. 1908, c. 196, of a penalty for failure to settle a claim for damages to an intrastate shipment within 60 days from the notice of the claim.—*Yazoo & Mississippi Val. R. Co. v. Jackson Vinegar Co.*, 33 S. Ct. 40, 226 U. S. 217, 57 L. Ed. 193.

An ordinance of a town by which owners of property abutting on any street along which sewer mains have been laid were required to connect with the main sewer under penalty is not an invalid exercise of the police power, because giving no opportunity to be heard, and does not deny due process of law.—*Hutchinson v. City of Valdosta*, 33 S. Ct. 290, 227 U. S. 303, 57 L. Ed. 520.

Fixing the damages for violation of Laws Neb. 1905, c. 107, imposing a limitation of time for transportation of live stock at \$10 for each car for every hour of time exceeding the statutory limit, is not a usurpation of judicial functions rendering the statute repugnant to the due process of law clause of Const. U. S. Amend. 14, where the highest court of the state holds that the statute imposes only compensatory damages.—*Chicago, B. & Q. R. Co. v. Cram*, 33 S. Ct. 437, 228 U. S. 70, 57 L. Ed. 734, affirming judgments *Cram v. Chicago, B. & Q. R. Co.*, 122 N. W. 31, 84 Neb. 607, 26 L. R. A. (N. S.) 1022, and 123 N. W. 1045, 85 Neb. 598, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170; *Chicago, B. & Q. R. Co. v. Kyle*, 33 S. Ct. 440, 228 U. S. 85, 57 L. Ed. 741, affirming judgment *Kyle v. Chicago, B. & Q. R. Co.*, 122 N. W. 37, 84 Neb. 621.

The imposition by Laws Kan. 1905, c. 353, of a liability of \$500 and attorney's fees for every excessive charge by a carrier for the shipments of oil between points in the state, takes property without due process of law, contrary to the fourteenth amendment of the Constitution of the United States.—*Missouri Pac. R. Co. v. Tucker*, 33 S. Ct. 961, 230 U. S. 340, 57 L. Ed.

1507, reversing judgment *Tucker v. Missouri Pac. Ry. Co.*, 108 P. 89, 82 Kan. 222.

The exaction of a double liability from a railway company failing to pay within 60 days damages caused by fire, under Laws S. D. 1907, c. 215, unless the owner recovers a less sum as damages, than the tender by the railway company, is a taking of property without due process of law.—*Chicago, M. & St. P. R. Co. v. Polt*, 34 S. Ct. 301, 232 U. S. 165, 58 L. Ed. 554, reversing judgment *Polt v. Chicago, M. & St. P. Ry. Co.*, 128 N. W. 472, 26 S. D. 378.

The exaction of double liability from a railroad company failing to pay within 60 days a claim, because of fire set by locomotive under Laws S. D. 1907, c. 215, unless the owner recovers a less sum than any tender by the railroad company, is a taking of the company's property without due process of law.—*Chicago, M. & St. P. R. Co. v. Kennedy*, 34 S. Ct. 463, 232 U. S. 626, 58 L. Ed. 762, reversing judgment *Kennedy v. Chicago, M. & St. P. Ry. Co.*, 132 N. W. 802, 28 S. D. 94.

Double liability and an attorney's fee may be exacted under Laws Ark. 1907, p. 144, from a railroad refusing to pay for killing stock, within 30 days after demand, without denying due process of law guaranteed by Const. U. S. Amend. 14, where the justice of the demand is established in a suit following such refusal.—*Kansas City Southern Ry. Co. v. Anderson*, 34 S. Ct. 599, 233 U. S. 325, 58 L. Ed. 983, affirming judgment 149 S. W. 58, 104 Ark. 500.

A state statute imposing enormous penalties for violating orders of the state railroad commission is void under Const. U. S. Amend. 14, as denying due process of law, though the orders are made after full hearing, where resort to the courts is hazardous.—*Wadley Southern Ry. Co. v. State of Georgia*, 35 S. Ct. 214, 235 U. S. 651, 59 L. Ed. 405, affirming judgment 73 S. E. 741, 137 Ga. 497.

Penalty of \$5,000 per day for violating order of state railroad commission, imposed by Civ. Code Ga. 1910, § 2667, does not deny due process of law contrary to Const. U. S. Amend. 14; a judicial review being accorded by Civ. Code Ga. 1910, § 2625.—*Id.*

A carrier failing to resort to remedy accorded by Civ. Code Ga. 1910, § 2625, for relief against order of state railroad commission, but attacking validity of order when sued under section 2667, held not denied due process of law on being compelled to pay the penalty imposed.—*Id.*

Imposition on telephone company, under Kirby's Dig. Ark. § 7948, of penalties aggregating \$6,300 for its enforcement against a patron in arrears of a regulation not to furnish telephone service, takes the property of the company without due process of law.—*Southwestern Telegraph & Telephone Co. v. Danaher*, 35 S. Ct. 886, 238 U. S. 482, 59 L. Ed. 1419, L. R. A. 1916A, 1208, reversing judgments *Danaher v. Southwestern Telegraph & Telephone Co.*, 127 S. W. 963, 94 Ark. 533, 30 L. R. A. (N. S.) 1027, and *Southwestern Telegraph & Telephone Co. v. Danaher*, 144 S. W. 925, 102 Ark. 547.

☞304. Civil remedies and proceedings.
See 10 Cent. Dig. Const. Law, §§ 925-939, 941-949.

☞305. — Actions in general.
See 10 Cent. Dig. Const. Law, §§ 925-927.

The denial of the right to bring an action for the recovery of duties paid under an excessive valuation does not deprive the importer of his property without due process of law.—*Hilton v. Merritt*, 110 U. S. 97, 3 S. Ct. 548, 28 L. Ed. 83.

The question whether a proceeding is "due process of law," within the meaning of the constitution, is independent of the question whether

it was by a motion or ordinary action, provided the form sanctioned by the state law gives notice, and affords an opportunity to be heard.—*Iowa Cent. Ry. Co. v. State of Iowa*, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467.

One who actually appeared and made a defense in an action to which he was not technically a party cannot contend that, when he was brought in by rule to show cause after the judgment was rendered, and was condemned to pay it, he was denied due process of law because all right to defend had been cut off by the previous judgment, if he offered no defense which the court did not entertain. Judgment, *Schmidt v. Louisville, C. & L. Ry. Co.*, 35 S. W. 135, 36 S. W. 168, 99 Ky. 143, affirmed.—*Louisville & N. R. Co. v. Schmidt*, 20 S. Ct. 620, 177 U. S. 230, 44 L. Ed. 747.

The proceedings in a state court, in order to constitute due process of law under Const. U. S. Amend. art. 14, need not be by any particular mode, if they constitute a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.—*Simon v. Craft*, 21 S. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165.

Due process of law is not denied the owners of property damaged by the enforcement of a restriction on the height of buildings on certain Boston streets, imposed by Act Mass. May 23, 1898, on the theory that the right of action thereby given to recover the damages from the city of Boston "in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway" does not afford adequate provision for compensation, because the city not being a party to the taking, is not technically estopped to deny its liability, since such statutory liability is of a character which, under the decisions of the state courts, the Legislature may impose on a municipality. Judgment, *Attorney General v. Williams*, 59 N. E. 812, 178 Mass. 330, affirmed.—*Williams v. Parker*, 23 S. Ct. 440, 188 U. S. 491, 47 L. Ed. 559.

An employer is not deprived of its property without due process of law by a recovery against it alone in a suit in which it and its servants are charged with joint and concurring negligence, on the theory that it was thereby deprived of the right of reimbursement from the servants. Judgment, *Carson v. Southern Ry. Co.*, 46 S. E. 525, 68 S. C. 55, affirmed.—*Southern Ry. Co. v. Carson*, 24 S. Ct. 609, 194 U. S. 136, 48 L. Ed. 907.

Defendant in possessory action for land with a demand for damages for timber taken is not deprived of property without due process of law contrary to Const. Amend. 14, because under Code Prac. La. art. 55, he may not sue to establish title until after judgment in the possessory action and until he shall have satisfied the judgment if against him.—*Grant Timber & Mfg. Co. v. Gray*, 35 S. Ct. 279, 236 U. S. 133, 59 L. Ed. 501, affirming judgment *Gray v. Grant Timber & Mfg. Co.*, 60 So. 617, 131 La. 922.

A foreign corporation doing local business in the state may, consistently with due process of law, be required to file a copy of its charter, conformably to Laws Tenn. 1895, c. 81, as a condition to its right to sue in the state courts.—*Interstate Amusement Co. v. Albert*, 36 S. Ct. 168, 239 U. S. 560, 60 L. Ed. 439, affirming judgment 161 S. W. 488, 128 Tenn. 417.

☞306. — Special or summary proceedings.

See 10 Cent. Dig. Const. Law, §§ 928, 936, 939, 942-946, 948, 949.

A summary proceeding to strike an attorney's name from the roll for having committed

an indictable offense does not deprive him of life, liberty or property without due process of law.—*Ex parte Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

In Canada, where no constitutional prohibition exists against the passage of laws impairing the obligation of contracts parliament may, by statute, compel individual bondholders of a domestic corporation to accept an arrangement or compromise made when the corporation is in financial embarrassment for the benefit of all the bondholders, and accepted by a majority of them. Such statutes are on a footing with bankrupt acts, and cannot be said to deprive any person of his property without due process of law.—*Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 3 S. Ct. 363, 27 L. Ed. 1020.

A state statute regulating proceedings for the removal of a person from a state office is not repugnant to the constitution of the United States, if it provides for bringing the party against whom proceedings are had into court, and notifying him of the case he has to meet; for giving him an opportunity to be heard in his defense; and for the deliberation and judgment of the court.—*Foster v. Kansas*, 112 U. S. 201, 5 S. Ct. 897, 28 L. Ed. 629, 696.

The discharge by a state court of a writ of habeas corpus is not a denial of due process of law, where the commitment sought to be reviewed is not void; for the writ cannot be availed of as an appeal or writ of error.—*Tinsley v. Anderson*, 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91.

The mere fact that a proceeding to hold a party liable to a judgment is by rule to show cause does not conflict with due process under Const. U. S. Amend. 14, for forms of procedure in the state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied. Judgment, *Schmidt v. Louisville, C. & L. Ry. Co.*, 35 S. W. 135, 38 S. W. 168, 99 Ky. 143, affirmed.—*Louisville & N. R. Co. v. Schmidt*, 20 S. Ct. 620, 177 U. S. 230, 44 L. Ed. 747.

The safeguards afforded unknown claimants or claims by the provisions of St. Cal. 1906, c. 59, for the establishment and quieting of title to real property in case of the loss or destruction of public records, by an action in rem, to be brought by a person in the actual and peaceable possession of the property against "all persons claiming any interest in or lien upon the real property herein described, or any part thereof," satisfy the due process of law clause of the federal constitution, where such statute, as construed by the state courts, requires the plaintiff to designate and serve all known claimants, and those whom, with reasonable diligence, he can ascertain to be such, and calls for constructive service by publication against nonresidents and unknown owners, for the conspicuous posting upon the property of a copy of the summons, and the recording of a lis pendens, especially since under Code Civ. Proc. Cal. § 473, any person interested and having no actual notice of the decree may come in at any time within a year after its rendition, and, upon showing cause, may have the decree vacated as to him, and be allowed to answer to the merits.—*American Land Co. v. Zeiss*, 31 S. Ct. 200, 219 U. S. 47, 55 L. Ed. 82.

There is no infirmity under Const. U. S. Amend. 14, in a personal judgment for a devastavit rendered by the probate court according to local practice in favor of an administrator de bonis non, against the executor who has removed to another jurisdiction and has been adjudged incompetent, where the steps taken were concurred in by the court that controlled the cause and the court had control of his person.—*Michigan Trust Co. v. Ferry*, 33 S. Ct. 550, 228 U. S. 346, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221, and 175 F. 681, 99 C. C. A. 235.

Procedure under Ky. St. § 829, for a recovery before the State Railroad Commission of reparation for payments made to a carrier in excess of the rates found reasonable, does not deny the due process of law guaranteed by Const. U. S. Amend. 14.—*Louisville & N. R. Co. v. Finn*, 35 S. Ct. 146, 235 U. S. 601, 59 L. Ed. 379, affirming order (D. C.) Same v. Kentucky Railroad Commission, 214 F. 465.

Failure to afford opportunity to be heard, necessary under due process clause of Const. U. S. Amend. 14, rendered invalid provisions of Gen. St. Fla. 1906, § 2677, as amended by Laws Fla. 1909, c. 5892, providing for execution against stockholder for unpaid subscription without notice, he having the right to contest fact of ownership or of unpaid subscription, and to relief under provisions of sections 1624 and 1625, for testing legality of execution after issuance.—*Coe v. Armour Fertilizer Works*, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027, reversing judgment *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 58 So. 231, 63 Fla. 64.

307. — Withdrawal or change of remedy.

See 10 Cent. Dig. Const. Law, § 925.

A person is not deprived of his reputation (even if that constitutes property) without due process of law by denying his right to an action for defamatory words in a pleading. Judgment, 56 F. 376, 20 Wash. 552, affirmed.—*Abbott v. National Bank of Commerce*, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217.

Due process of law is denied by the requirement of Act Ill. March 22, 1872, § 30, that the master's deed be taken out by the purchaser on a foreclosure sale within a specified time after the expiration of the time for redemption, where failure to comply with such requirement is held by the highest state court to destroy the rights of a mortgagee in possession after condition broken, to avoid the certificate of sale issued to her on her purchase for less than the amount of the mortgage debt at a sale in foreclosure proceedings initiated by her before such statute went into effect, and to entitle the mortgagor, without payment of his debt, to recover possession in ejectment, on the strength of a perfect title.—*Bradley v. Lightcap*, 24 S. Ct. 748, 195 U. S. 1, 49 L. Ed. 65, reversing judgment 68 N. E. 546, 201 Ill. 511; *Id.*, 24 S. Ct. 753, 195 U. S. 24, 25, 49 L. Ed. 75, reversing decree (Ill.) 67 N. E. 45, 202 Ill. 154.

308. — Limitation or suspension of remedy.

See 10 Cent. Dig. Const. Law, § 925.

The bar of the statute of limitation, as a defense to an action on a contract, cannot become a vested right, and a law (Const. Tex. art. 12, § 43) taking it away after it has become perfected is not unconstitutional, as depriving defendant of his property without due process of law, within the meaning of the fourteenth amendment.—*Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483.

The new limitation prescribed by Code Civ. Proc. Mont. § 554, for the enforcement of a liability for corporate debts against the directors of a corporation which has failed to make its annual report, is not unconstitutional as applied to actions outside of the state on a liability incurred prior to the enactment, on the theory that, since remedies outside the state cannot be affected by statutes of limitation, this statute can only be applicable because it qualifies the right to enforce such liability, and therefore would destroy an existing right without due process of law.—*Davis v. Mills*, 24 S. Ct. 692, 194 U. S. 451, 48 L. Ed. 1067.

Property is not taken without due process of law, in violation of Const. U. S. Amend. 14,

by construing the provisions of Pub. Laws Me. 1895, c. 162, barring actions by the former owner to recover wild land adversely held unless commenced within 20 years or before January 1, 1900, as defeating an action begun after that date, when defendant had held the statutory possession for the 5 years following the act, and for 15 years before. Judgment 56 A. 908, 98 Me. 268, 99 Am. St. Rep. 397, affirmed.—*Soper v. Lawrence Bros. Co.*, 26 S. Ct. 473, 201 U. S. 359, 50 L. Ed. 788.

There is no denial of the due process of law guarantied by Const. U. S. Amend. 14, in so much of Pub. Laws Me. 1895, c. 162, as in effect enacts that a doing of such overt acts of ownership as are possible on wild land, under a recorded deed showing a claim of title, coupled with the payment of the taxes, the owner meantime not paying such taxes, and doing no act indicative of ownership, shall constitute a disseisin, and that such disseisin, if continued for 20 years, shall bar an action for the land.—Id.

The forfeiture to the state for the benefit of actual occupants in adverse possession, which is provided for by Act Ky. March 15, 1903, c. 22, art. 3, in case of the failure of the owner or claimant to list the lands and pay taxes thereon for certain specified years, is not lacking in due process of law because the effect is to cut down the period of limitation in which actions may be brought by the holders of the title to recover against adverse claimants.—(1911) *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 106 S. W. 260, 127 Ky. 667, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law. Rep. 857.

The heirs of the original grantee in the Alameda land grant are not deprived of that property without due process of law within the federal Constitution by Comp. Laws N. M. 1865, c. 73, § 1 (Comp. Laws 1897, § 2937), under which ten years' possession by a disseisor of a strip of such grant lying between the Rio Grande and the foothills to the west, under a deed conveying the land from the river westward to the ridge of Rio Puerco, gives title to the whole.—*Montoya v. Gonzales*, 34 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment *Same v. Unknown Heirs of Vigil*, 120 P. 676, 16 N. M. 349.

309. — Parties and process or notice.

See 10 Cent. Dig. Const. Law, §§ 929, 930.

Rev. St. Mo. c. 1, art. 1, § 14, authorizing a special administrator, having charge of an estate during the pendency of a suit to have a final settlement of his accounts with the regular administrator, without giving notice to distributees, which settlement, in the absence of fraud, is deemed conclusive against such distributees, does not deprive any person of his property without due process of law, as the regular administrator represents all the distributees claiming under the will.—*Ro Bards v. Lamb*, 127 U. S. 58, 8 S. Ct. 1031, 32 L. Ed. 60.

A nonresident owner of land is bound to take measures to be represented when his property is called into requisition; and if he fails to do this, and fails to get notice of the proceedings by the ordinary publication, he must abide the consequences. Such publication is "due process of law."—*Huling v. Kaw Val. Ry. & Imp. Co.*, 9 S. Ct. 603, 130 U. S. 559, 32 L. Ed. 1045.

Rev. St. Tex. art. 1230, provides that, where the defendant is a nonresident, the clerk shall address a notice to him requiring him to appear and answer at a specified time and place, and

shall send him a certified copy of the petition. *Held*, that as a judgment against a firm and against a resident partner individually bound the firm assets only, so far as it concerned a nonresident partner served with notice according to the statute, the statute was not unconstitutional, as authorizing a judgment without "due process of law."—*Sugg v. Thornton*, 132 U. S. 524, 10 S. Ct. 163, 33 L. Ed. 447.

Rev. St. Tex. arts. 1240–1245, providing, as construed by the supreme court of Texas, that a defendant who appears specially to object to the insufficiency of the service of process upon him is thereafter subject to the jurisdiction of the court, though the service is insufficient, are valid, and not in conflict with Const. U. S. Amend. 14, forbidding the deprivation by any state of a person's life, liberty, or property without due process of law. 73 Tex. 395, 11 S. W. 390, affirmed.—*York v. State of Texas*, 137 U. S. 15, 11 S. Ct. 9, 34 L. Ed. 604; *Kaufman v. Wooters*, 138 U. S. 285, 11 S. Ct. 293, 34 L. Ed. 962.

Rev. St. Tex. arts. 1240–1245, providing, as construed by the supreme court of Texas, that a defendant who appears specially to object to the insufficiency of the service of process upon him is thereafter subject to the jurisdiction of the court, though the service is insufficient, are valid, and not in conflict with Const. U. S. Amend. 14, forbidding the deprivation by any state of a person's life, liberty, or property, without due process of law.—*Kaufman v. Wooters*, 138 U. S. 285, 11 S. Ct. 293, 34 L. Ed. 962.

The final determination in appropriate judicial proceedings, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, that land has escheated to the public, is due process of law.—*Hamilton v. Brown*, 161 U. S. 256, 16 S. Ct. 585, 40 L. Ed. 691.

The insufficiency of a notice on a nonresident in another state to constitute due process of law is not affected by the fact that by the local practice there would be several days' additional time before the case could be called for trial or default taken, or that the court, in its discretion, would probably set aside a default judgment and permit a defense. Judgment 35 S. W. 1074, 13 Tex. Civ. App. 636, reversed.—*Roller v. Holly*, 20 S. Ct. 410, 176 U. S. 398, 44 L. Ed. 520.

Five days' notice to a nonresident in another state of a suit to foreclose a lien on land, where it would require four days of constant traveling to reach the court, giving but one day, and that a Sunday, to make preparations for the trip, without any allowance for accidental delays, is insufficient to constitute reasonable notice or due process of law.—Id.

Personal service on nonresidents outside the jurisdiction of the court may be sufficient to constitute due process of law in a suit for the foreclosure of a lien upon land within the state.—Id.

The rendition of a judgment against one who was not served with process in the action or named as a party until after the original judgment was rendered, but was brought in subsequent thereto by an order to show cause, and condemned to pay the judgment, was not in violation of the provision as to due process of law in Const. U. S. Amend. 14, where such party had voluntarily appeared in the cause and actively conducted the defense. Judgment, *Schmidt v. Louisville, C. & L. Ry. Co.*, 35 S. W. 135, 36 S. W. 168, 99 Ky. 143, affirmed.—*Louisville & N. R. Co. v. Schmidt*, 20 S. Ct. 620, 177 U. S. 230, 44 L. Ed. 747.

A decree adjudging the charter of an alleged corporation to be void, in a suit brought against the corporation, without making its members parties, and enjoining the officers and stockholders from acting as a corporation, on the ground that the purpose for which it was formed is illegal, does not take away the property of the individual corporators without due process of law, as a de facto corporation may be treated as such, and brought into court as a party defendant, without making its members parties.—*New Orleans Debenture Redemption Co. of Louisiana v. State of Louisiana*, 21 S. Ct. 378, 180 U. S. 620, 45 L. Ed. 550.

Creditors of a bankrupt are not deprived of their property without due process of law because the bankruptcy act of July 1, 1898 (chapter 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), does not require personal service of notice of the application for the discharge in voluntary proceedings.—*Hanover Nat. Bank v. Moyses*, 22 S. Ct. 857, 186 U. S. 181, 46 L. Ed. 1113.

The failure of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], to provide for notice to creditors of the filing of a petition in voluntary proceedings, does not deprive such creditors of their property without due process of law, in view of the provisions of the act for ten days' notice of the first meeting of creditors, and of each of the subsequent steps in administration, and of the various provisions relative to the granting of a discharge, and for revocation of the same when procured by fraud or not warranted by the facts.—*Id.*

Due process of law is not denied the holder of a lien on real property by the lack of any provision for personal service on him of notice of the pendency of proceedings in rem to enforce the lien acquired by a purchaser of the property at a tax sale, which are authorized by the Nebraska statutes, where notice is given by publication to all persons interested in the property to appear and set up their claims. Judgment (1902) 90 N. W. 255, 64 Neb. 533, 101 Am. St. Rep. 592, affirmed.—*Leigh v. Green*, 24 S. Ct. 390, 193 U. S. 79, 48 L. Ed. 623.

Notice by publication of the special proceeding provided by Laws Pa. 1885, p. 155, for the administration of the estates of absentees satisfies the requirement of the due process of law clause of Const. U. S. Amend. art. 14. Judgment (1903) 56 A. 16, 206 Pa. 469, 98 Am. St. Rep. 790, affirmed.—*Cunnius v. Reading School Dist.*, 25 S. Ct. 721, 198 U. S. 458, 49 L. Ed. 1125, 3 Ann. Cas. 1121.

Due process of law is not denied a stockholder in a domestic corporation by Gen. Laws Minn. 1899, p. 315, c. 272, enacted to make more effectual the constitutional liability of stockholders for the debts of the corporation, because stockholders need not necessarily be served with process in the action in which the assessment is made.—*Bernheimer v. Converse*, 27 S. Ct. 756, 206 U. S. 516, 51 L. Ed. 1163; *Drey v. Same*, *Id.*

Sufficient notice and other safeguards to satisfy the constitutional guaranty of due process of law are afforded by the provisions of Rev. Laws Mass. c. 144, for the distribution of the estate of an absentee, where there is reasonably careful provision for notice by publication before the appointment of a receiver, and the whole proceeding begins with a seizure by the sheriff of the property mentioned in the original petition.—(1911) *Blinn v. Nelson*, 32 S. Ct. 1, 222 U. S. 1, 56 L. Ed. 65, Ann. Cas. 1913B, 555, affirming decree, *Nelson v. Blinn*, 83 N. E. 889, 197 Mass. 279, 15 L. R. A. (N. S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147.

An order for substituted service in suit to quiet title made conformably to Code Civ. Proc. Cal. § 412, held supported by a sufficient showing of diligent inquiry to satisfy due process of law because of Const. U. S. Amend. 14.—(1912) *Jacob v. Roberts*, 32 S. Ct. 303, 223 U. S. 261, 56 L. Ed. 429, affirming judgment (1908) *Roberts v. Jacob*, 97 P. 671, 154 Cal. 307.

Construing Code Civ. Proc. Cal. § 1582, to mean that heirs are not necessary parties to a suit against the administratrix to foreclose a mortgage executed by decedent, does not deprive the heirs, without due process of law, of title which Civ. Code, § 1384, casts upon them on the death of their ancestor.—(1912) *McCaughy v. Lyall*, 32 S. Ct. 602, 224 U. S. 558, 56 L. Ed. 883, affirming judgment (1908) 93 P. 681, 152 Cal. 615.

Upholding a foreclosure sale against an attack on the ground that the owner was not served with process does not deprive her of her property without due process of law, contrary to Const. U. S. Amend. 14, where the state had made provision for service of process, and the plaintiff in foreclosure did all that was required, but the sheriff made a return contrary to the fact, that the service had been made, though recovery on the sheriff's bond authorized by the state law was an insufficient remedy.—*Miedreich v. Lauenstein*, 34 S. Ct. 309, 232 U. S. 236, 58 L. Ed. 584, affirming judgments 86 N. E. 963, 172 Ind. 140 and 87 N. E. 1029, 172 Ind. 140.

The principal defendant in garnishment in a territorial court having jurisdiction over small debts only is not deprived of its property without due process of law by judgment by default, appropriating property to payment of defendant's debt, with no other service of process than that provided for in Rev. Laws Hawaii, § 2114, by leaving a copy of summons at his place of abode where he had knowledge of the suit before time for suing out a writ of error expired, and it might have been possible to set aside the judgment and retry the case.—*Herbert v. Bicknell*, 34 S. Ct. 562, 233 U. S. 70, 58 L. Ed. 854.

Service by publication and mailing of summons in partition, conformably to the local law, naming as party defendant Albert Guilfuss, assignee, and Albert B. Guilfuss, satisfied the due process of law clause of Const. U. S. Amend. 14, conferring jurisdiction, so as to render a judgment binding on Albert B. Guilfuss, assignee as to his lien; he not having appeared.—*Grannis v. Ordean*, 34 S. Ct. 779, 234 U. S. 385, 58 L. Ed. 1363, affirming judgment *Ordean v. Grannis*, 136 N. W. 576, 1026, 118 Minn. 117.

No infringement of the due process of law clause of Const. U. S. Amend. 14, results from ruling of state court that defendant, by permitting judgment in his favor to be reviewed on the merits at expense of plaintiff, without interposing a cross-appeal to question the overruling of a motion to quash the return on the summons, waived objection to the jurisdiction of the court over defendant, and that it could not be raised on a second appeal by defendant from a judgment for plaintiff.—*Western Life Indemnity Co. of Illinois v. Rupp*, 35 S. Ct. 37, 235 U. S. 261, 59 L. Ed. 220, affirming judgment 144 S. W. 743, 147 Ky. 489.

Courts of one state may not, without violating due process of law clause of Const. U. S. Amend. 14, render money judgment against a corporation of sister state on service of a resident director, where the corporation does no business in the state.—*Riverside & Dan River Cotton Mills v. Menefee*, 35 S. Ct. 579, 237 U. S. 189, 59 L. Ed. 910, reversing judgment *Menefee v. Riverside & Dan River Cotton Mills*, 76 S. E. 741, 161 N. C. 164.

Casual notice or hearing granted as a matter of favor in proceedings for the taking of property to satisfy an alleged debt is not a substitute for the due process of law required by Const. U. S. Amend. 14.—*Coe v. Armour Fertilizer Works*, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027, reversing judgment *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 58 So. 231, 63 Fla. 64.

Attorney for mortgagee and for transferee of certificate of purchase on foreclosure held not deprived of property without due process of law by summary order to restore to the court proceeds of fire insurance policy on mortgaged property which he had applied on a personal judgment against the mortgagor, instead of redeeming the property from the sale under agreement between him and counsel for mortgagor.—*Holmes v. Conway*, 36 S. Ct. 681, 241 U. S. 624, 60 L. Ed. 1211, affirming judgment *Hess v. Same*, 142 P. 253, 92 Kan. 787.

—310. — Rules of pleading.

See 10 Cent. Dig. Const. Law, § 931.

The allowance of amendments to a declaration by consent of counsel cannot be deemed to deprive a party of property without due process of law, on the ground that counsel had no authority to give consent thereto. Judgment 57 N. E. 337, 176 Mass. 48, affirmed.—*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573.

—311. — Rules of evidence.

See 10 Cent. Dig. Const. Law, § 932.

A valued policy statute, which applies only to future contracts, cannot be said to deprive an insurance company of its property without due process of law, by raising a conclusive presumption of fact as to the value of the property in actions on such policies, as the parties are free to fix such value for themselves by their contract, and the statute operates merely by way of estoppel after the contract is made. Judgment, *Daggs v. Orient Ins. Co.*, 38 S. W. 85, 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638, affirmed.—*Orient Ins. Co. of Hartford, Conn., v. Daggs*, 19 S. Ct. 281, 172 U. S. 557, 43 L. Ed. 552.

A railway company is not deprived of its property without due process of law by Gen. Laws Minn. 1901, c. 270, under which is imposed on it the burden of showing, in proceedings to compel it to provide a station at an incorporated village on its line, that the establishment of a station there is unreasonable and unnecessary. Judgment, *State v. Minneapolis & St. L. R. Co.*, 91 N. W. 465, 87 Minn. 195, affirmed.—*Minneapolis & St. L. R. Co. v. State of Minnesota ex rel. Railroad & Warehouse Commission*, 24 S. Ct. 396, 193 U. S. 53, 48 L. Ed. 614.

Due process of law is not denied by Code Miss. 1906, § 1985, under which, in actions against railway companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars is made prima facie evidence of negligence.—(1910) *Mobile, J. & K. C. R. Co. v. Turnipseed*, 31 S. Ct. 136, 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, affirming judgment *Same v. Hicks* (1908) 46 So. 360, 91 Miss. 273, 124 Am. St. Rep. 679.

Making the engaging in pumping mineral waters from wells bored or drilled into the rock for the purpose of collecting and vending as a separate commodity the carbonic acid gas contained therein prima facie evidence of the common underground source of supply and of injury to other proprietors, as is done by Laws N. Y. 1906, c. 429, forbidding the pumping of the waters under such conditions, does not ren-

der the statute invalid, as infringing upon the guaranty in the federal Constitution of due process of law.—(1911) *Lindsley v. Natural Carbonic Gas Co.*, 31 S. Ct. 337, 220 U. S. 61, 55 L. Ed. 369, Ann. Cas. 1912C, 160, affirming decree (C. C. 1909) 170 F. 1023.

Making the entry on the official record of forfeiture of school land for default in payment prima facie evidence that preliminary steps to a forfeiture were properly taken under Laws Kan. 1907, c. 373, does not offend against the due process of law clause of the federal Constitution.—(1912) *Reitler v. Harris*, 32 S. Ct. 248, 223 U. S. 437, 56 L. Ed. 497, affirming judgment (1909) 102 P. 249, 80 Kan. 148.

Constitutional rights are not invaded by the declaration in Act June 29, 1906, § 15, that taking up a permanent residence in a foreign country within five years after issuance of certificate of citizenship shall be prima facie evidence of lack of intent to become a permanent citizen, which shall be sufficient to warrant the cancellation of the certificate as fraudulent.—*Luria v. United States*, 34 S. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming decree (D. C.) *United States v. Luria*, 184 F. 643.

Rebuttable presumption established by Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, that findings and order of the Interstate Commerce Commission shall be prima facie evidence of the facts therein stated, does not deny due process of law.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

—312. — Provisional remedies.

See 10 Cent. Dig. Const. Law, § 928.

A statute which requires the plaintiff to give a bond as a prerequisite to the issuance of an attachment against a resident, but requires no bond where the attachment is against property of a nonresident, does not operate as a denial of due process of law. Judgment 49 P. 43, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

A garnishment of a resident debtor to reach a debt due to a nonresident defendant who has no property subject to the jurisdiction of the court does not deprive him of property without due process of law. Judgment, *Cross v. Brown*, 33 A. 147, 19 R. I. 220, affirmed.—*King v. Cross*, 20 S. Ct. 131, 175 U. S. 396, 44 L. Ed. 211.

Attachment of debts due to nonresident creditors at the place where the debtor resides, in accordance with the law of that state, does not deprive the creditor of property without due process of law. Judgment 57 N. E. 337, 176 Mass. 48, affirmed.—*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573.

Due process of law is not denied by an order directing the production of books and papers by a foreign corporation sued for violating the Arkansas anti-trust act (Act Ark. Jan. 23, 1905 [Acts 1905, p. 1]), because such order seeks to elicit proof not only as to the liability of the corporation, but also evidence in its possession relevant to its defense. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

Striking from the files the answer of a foreign corporation sued for violating the Arkansas anti-trust act (Act Ark. Jan. 23, 1905 [Acts 1905, p. 9]), and rendering judgment by default against it, conformably to section 9 of that act, authorizing such action when defendant disobeys an order made in pursuance of sec-

tion 8, to secure the attendance as witnesses before a commission of certain designated officers, agents, directors, and employes, and the production of books, papers and documents in their possession or control, does not deny due process of law.—Id.

An attachment by a foreign creditor of bonds of a foreign corporation for a debt of their nonresident owner does not deny due process of law, guaranteed by Const. U. S. Amend. 14, where the bonds were deposited with a custodian under an order of the state court and could not be removed without the authority of the state court, though the bonds were registered in the names of the attachment creditors' minor children.—*De Gallard de Brassac de Bearn v. Safe Deposit & Trust Co. of Baltimore*, 34 S. Ct. 584, 233 U. S. 24, 58 L. Ed. 833.

313. — Right to trial by jury.

See 10 Cent. Dig. Const. Law, § 933.

The provision in the constitution of the United States, that a state shall not "deprive any person of life, liberty, or property without due process of law," does not prevent a state from giving jurisdiction to a court of equity of a suit brought by the owner of an equitable interest in land to establish his rights against the holder of the legal title, although it deprives the holder of the legal title of the right to a trial by jury which he would have in a suit at law.—*Church v. Kelsey*, 121 U. S. 282, 7 S. Ct. 897, 30 L. Ed. 960.

The requirement in the fourteenth amendment of due process of law does not secure a right of jury trial in quo warranto proceedings in a state court to suspend or remove a state officer.—*Wilson v. State of North Carolina*, 18 S. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

A jury trial is not essential to due process of law in a proceeding for contempt.—*Tinsley v. Anderson*, 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91.

A judgment founded upon a state statute is not wanting in due process of law because the statute does not provide for or permit a trial by jury. Judgments 72 N. E. 1161, 1162, 70 Ohio St. 437, affirmed.—*Marvin v. Trout*, 26 S. Ct. 31, 199 U. S. 212, 50 L. Ed. 157.

314. — Course and conduct of trial.

See 10 Cent. Dig. Const. Law, § 934.

Where the judgment of the state supreme court adverse to a claim made under the federal constitution was correct, plaintiff in error cannot complain that the refusal of that court to grant him a hearing by seven judges, as provided by state statute in cases where a federal question was involved, constituted a denial of due process of law.—*Moore v. State of Missouri*, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301, affirming judgment State of Missouri v. Moore, 121 Mo. 514, 26 S. W. 345.

Error of the trial court, if such it be, in omitting to charge in respect to one of the elements of damage, in the absence of any request therefor, is merely an error in the administration of the law, and is not one which deprives the respondents of due process of law.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

Sustaining of a demurrer to evidence and entry of decree in suit tried by the court does not take her property without due process of law because of Rev. Laws Okl. 1910, § 5039, providing for trials by jury where Oklahoma Supreme Court in affirming the decree decided that it was required to disregard errors not affecting the substantial rights of the parties where the trial court made findings of fact.—*Porter v. Wilson*, 36 S. Ct. 91, 239 U. S. 170, 60 L. Ed. 204, affirming judgment 135 F. 732, 39 Okl. 500.

Chinaman refused entry to Philippine Islands has no ground to complain that he was not afforded due process of law secured in those islands by Act July 1, 1902, where his case was heard twice with the same result, and the decision affirmed by Philippine Supreme Court.—*Chiang Ah Sui v. McCoy*, 36 S. Ct. 95, 239 U. S. 139, 60 L. Ed. 183.

Requiring trial of action for death of an interstate railway employé to proceed after amendment to complaint so as to specifically bring the case within Employers' Liability Act held not an abuse of discretion amounting to a denial of due process of law guaranteed by Const. Amend. 14.—*Seaboard Air Line Ry. v. Koennecke*, 36 S. Ct. 126, 239 U. S. 352, 60 L. Ed. 324, affirming judgment *Koennecke v. Seaboard Air Line Ry.*, 85 S. E. 374, 101 S. C. 86.

Due process of law does not forbid hearing of a cause on a transcript of evidence formerly heard in court.—*De La Rama v. De La Rama*, 36 S. Ct. 518, 241 U. S. 154, 60 L. Ed. 932.

315. — Judgment and execution.

See 10 Cent. Dig. Const. Law, §§ 935, 937, 941, 947.

Where a state statute changes the rate of interest thereafter to accrue on judgments previously rendered, a citizen whose claims under the statute have been adjudicated by the highest court of the state is not deprived of property without due process of law, within the meaning of the constitution.—*Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 13 S. Ct. 54, 36 L. Ed. 925.

There is no color for a contention that a man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard. Judgment 56 N. E. 979, 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, affirmed.—*Lynde v. Lynde*, 21 S. Ct. 555, 181 U. S. 183, 45 L. Ed. 810.

Due process of law is wanting in proceedings by which judgment is taken in a state court under a warrant of attorney annexed to a promissory note, authorizing confession of judgment "in favor of the holder," if the party in whose favor the judgment was rendered has ceased, before the commencement of the suit, to own the note, or to be entitled to receive the proceeds to its own use, since such judgment is, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. Judgment 92 N. W. 582, 3 Neb. (Unof.) 716, affirmed.—*National Exch. Bank v. Wiley*, 25 S. Ct. 70, 195 U. S. 257, 49 L. Ed. 184.

Due process of law is denied by the action of a state court in according full faith and credit to a judgment in personam rendered by a court of a sister state against a non-resident who was not personally served with process within the state, and who made no appearance in the action. Judgment (1905) 73 N. E. 703, 164 Ind. 821, reversed.—*Old Wayne Mut. Life Ass'n v. McDonough*, 27 S. Ct. 236, 204 U. S. 8, 51 L. Ed. 345.

The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim of ownership in such property. Judgment (1905) 75 N. E. 637, 189 Mass. 260, affirmed.—*Tracy v. Ginzberg*, 27 S. Ct. 461, 205 U. S. 170, 51 L. Ed. 755.

An erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, contrary to Const. U. S. Amend. 14, where the

parties have been fully heard in the regular course of judicial proceedings.—*Bonner v. Gorman*, 29 S. Ct. 483, 213 U. S. 86, 53 L. Ed. 709.

The refusal of a state court to treat a decree of dismissal in the federal court as conclusive of a point left open did not deprive defendant of its property without due process of law.—*Swift v. McPherson*, 34 S. Ct. 239, 232 U. S. 51, 58 L. Ed. 499, affirming judgment *McPherson v. Swift*, 130 N. W. 768, 27 S. D. 298.

—316. — Appeal or other proceeding for review.

See 10 Cent. Dig. Const. Law, § 938.

The protection of the due process of law clause of Const. Amend. 14, invoked by tender of amended answers after remand to the trial court by the highest state court for a new trial, is not denied on a second appeal from the ruling of the trial court refusing to permit the filing of such amended answers, where the highest state court held that the facts on which the federal rights were based had been concluded by the former decision in which no infraction of federal right was set up.—*Louisville & N. R. Co. v. Higdon*, 34 S. Ct. 948, 234 U. S. 592, 58 L. Ed. 1484, affirming judgment 148 S. W. 26, 149 Ky. 321.

—317. — Costs and fees.

Due process of law is not denied, contrary to Const. U. S. Amend. 14, by Acts Tex. 31st Leg. c. 47, allowing attorney's fee to successful plaintiff, where attorney is employed on a claim not exceeding \$200 against any person or corporation for certain designated demands.—*Missouri, K. & T. Ry. Co. of Texas v. Cade*, 34 S. Ct. 678, 233 U. S. 642, 58 L. Ed. 1135.

Due process of law is not denied contrary to Const. U. S. Amend. 14, by Acts Tex. 31st Leg. c. 47, providing for attorney's fees of not over \$20 to the successful plaintiff, where the attorney is employed on a claim of a certain class not exceeding \$200, where such claim is not paid within 30 days after demand, and the recovery is for the full amount claimed.—*Missouri, K. & T. Ry. Co. of Texas v. Harris*, 34 S. Ct. 790, 234 U. S. 412, 58 L. Ed. 1377, L. R. A. 1915E, 942.

—318. Administrative proceedings.

See 10 Cent. Dig. Const. Law, § 949.

The grant to a board of registration in medicine, by Pub. Acts Mich. 1899, No. 237, of the power to decide whether an applicant for registration had been "legally registered" under a prior statute, with no provision in terms for a review of the proceedings of such board, does not render the act obnoxious to the federal Constitution. Judgment, *People v. Reetz*, 86 N. W. 396, 127 Mich. 87, 8 Detroit Leg. N. 203, affirmed.—*Reetz v. People of State of Michigan*, 23 S. Ct. 390, 188 U. S. 505, 47 L. Ed. 563.

The lack of any provision for a judicial hearing on the question of illegality does not render repugnant to the due process of law clause of the federal Constitution the provisions of Rev. St. U. S. § 3929 [U. S. Comp. St. 1901, p. 2686], as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2686], and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], empowering the Postmaster General to direct the seizure and return to the sender of all letters addressed to persons conducting certain prohibited enterprises, since his action is subject to revision by the courts in case he has exceeded his authority under such legislation. Judgment (C. C.) 121 F. 927, affirmed.—*Public Clearing House v. Coyne*, 24 S. Ct. 789, 194 U. S. 497, 48 L. Ed. 1092.

The constitutional guaranty of due process of law is not infringed by the provision of Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 372, 390 [U. S. Comp. St. 1901, p. 1303], making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the federal courts in habeas corpus proceedings in the absence of any abuse of authority, even where citizenship is the ground on which the right of entry is claimed.—*United States v. Ju Toy*, 25 S. Ct. 644, 198 U. S. 253, 49 L. Ed. 1040.

The proceedings before the examining board, convened under Act Oct. 1, 1890, c. 1241, 26 Stat. 562 (U. S. Comp. St. 1901, p. 849), enacted to provide for the promotion or retirement of army officers, which resulted in the discharge of an officer with one year's pay, by order of the President, were not had without jurisdiction, and hence without due process of law, because the board had previously made an order that such officer was then physically incapacitated for service from disability contracted in line of duty, but had a reasonable hope of recovery, and that he could not with safety proceed with his examination, since such order was merely provisional, and not a final decision, which, under the law, would have entitled him to be retired with three quarters pay for life.—(1911) *Reaves v. Ainsworth*, 31 S. Ct. 230, 219 U. S. 296, 55 L. Ed. 225, affirming judgment (1906) 28 App. D. C. 157.

Military law is due process of law to those in the military or naval service of the United States.—Id.

Notice to the attorney for those whose names were duly entered as Creek freedmen by blood on the rolls made and approved by the Secretary of the Interior, given a few hours before the hearing of a motion to strike their names from the roll on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process of law.—(1911) *United States v. Fisher*, 32 S. Ct. 37, 222 U. S. 204, 56 L. Ed. 165, affirming judgment (1909) *Same v. Garfield*, 33 App. D. C. 195.

Proceedings resulting in deportation of an alien are not wanting in due process of law because she had no counsel, where the examination was within authority of Act Feb. 20, 1907, as amended by Act March 26, 1910, and before the proceedings were closed she had assistance of counsel.—*Low Wah Suey v. Backus*, 32 S. Ct. 734, 225 U. S. 460, 56 L. Ed. 1165.

The immigration officer's lack of power to issue process to compel attendance of witnesses is not a denial of due process of law, in proceedings had under Act Feb. 20, 1907, as amended by Act March 26, 1910, resulting in deportation of an alien.—Id.

Proceedings under Act Feb. 20, 1907, § 3, resulting in deportation of an alien for practicing prostitution within three years after entry, are not contrary to Const. U. S. Amend. 5, as being without due process of law.—*Zakonaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

The government of the Philippine Islands having under Acts Cong. March 2, 1901, and July 1, 1902, all civil and judicial powers necessary for the government of the islands, may authorize deportation of aliens without contravening the provision of the Bill of Rights; section 5 of the latter act forbidding deprivation of liberty without due process of law.—*Chuoco Tiaco v. Forbes*, 33 S. Ct. 585, 228 U. S. 549, 57 L. Ed. 960.

Failure of Act Ky. March 10, 1900 (Ky. St. § 820a), to provide for an appeal from final

order of railroad commission fixing freight rates or for review of their reasonableness, does not deprive carrier of its property without due process of law.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

The method of fixing the width of the barrier pillar to be left between adjoining coal properties which, under Act Pa. June 2, 1891 (P. L. 176), must be sufficient to safeguard employes of either mine in case of abandonment, does not constitute a taking of property without due process of law because the width of the pillar is determined by the engineers of the adjoining property owners, together with the inspector of the district, nor because the statute does not require notice to the lessor, there being notice to the lessee, nor because neither a procedure is prescribed nor a right to appeal given.—*Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 34 S. Ct. 359, 232 U. S. 531, 58 L. Ed. 713, affirming decree *Commonwealth v. Plymouth Coal Co.*, 81 A. 148, 232 Pa. 141.

The imperative enforcement of Act Feb. 4, 1887, § 4, as amended by Act June 18, 1910, § 8, forbidding carriers to charge a lesser rate for a longer than for a shorter haul, when the Interstate Commerce Commission has refused an application for relief from such long and short haul clause, does not render the statute repugnant to Const. Amend. 5, as denying due process of law.—*United States v. Atchison, T. & S. F. R. Co.*, 34 S. Ct. 986, 234 U. S. 478, 58 L. Ed. 1408; *Same v. Union Pac. R. Co.*, 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426. Reversing decree (Com. Ct.) *Atchison, T. & S. F. Ry. Co. v. United States*, 181 F. 856.

The action of the State Dispensary Commission of South Carolina in rejecting a claim on the ground that the claimant was indebted to the state for money fraudulently collected was not a confiscation of his claim, where the state Supreme Court in upholding the action of the Commission expressly held that the validity of any demand by the state against claimant was not foreclosed by the Commission's finding.—*Carolina Glass Co. v. State of South Carolina*, 36 S. Ct. 293, 240 U. S. 305, 60 L. Ed. 658, affirming judgments 69 S. E. 391, 87 S. C. 270, and *Same v. Murray* (D. C.) 197 F. 392, reversing judgment 206 F. 635, 124 C. C. A. 423.

The removal by the South Carolina Dispensary Commission under Act S. C. Feb. 23, 1910, of funds in the hands of county dispensaries due to a corporation indebted to the state, does not deny the corporation due process of law, though the state has not consented to be sued.—*Id.*

The state may, consistently with due process of law required by Const. Amend. 14, clothe a bank commissioner with power to close a state bank found to be insolvent without awaiting judicial proceedings.—*Title Guaranty & Surety Co. of Scranton, Pa. v. State of Idaho*, 36 S. Ct. 345, 240 U. S. 136, 60 L. Ed. 566, dismissing appeal *State v. Title Guaranty & Surety Co. of Scranton, Pa.*, 152 P. 189, 27 Idaho, 752.

Claimant of irrigation rights is not deprived of property without due process of law because in proceedings before State Water Board under 3 Lord's Or. Laws, tit. 43, c. 6 (Laws 1913, cc. 82, 86, 97), he is required at his own expense to assert his claim before the board and pay a fee for having it considered.—*Pacific Live Stock Co. v. Lewis*, 36 S. Ct. 637, 241 U. S. 440, 60 L. Ed. 1084, affirming decree (D. C.) 217 F. 95.

Proceedings before State Water Board controlled by 3 Lord's Or. Laws, tit. 43, c. 6 (Laws 1913, cc. 82, 86, 97), held not wanting in due process of law because sworn statements of claimants are taken ex parte in first instance

and state engineer's report is accepted, though not sworn to as prima facie evidence.—*Id.*

Requirements of 3 Lord's Or. Laws, tit. 43, c. 6 (Laws 1913, cc. 82, 86, 97), that pending final adjudication by court waters of stream shall be distributed according to order of State Water Board unless bond is given, held not wanting in due process of law.—*Id.*

320. Destruction of property.

See 10 Cent. Dig. Const. Law, § 771, 773.

Due process of law is not denied an importer of teas by the provision of the Tea Inspection Act March 2, 1897, c. 358, 29 Stat. 604 [U. S. Comp. St. 1901, p. 3194], commanding the destruction of teas not exported within six months after their final rejection as not entitled to admission into the United States because inferior to the government standards.—*Buttfield v. Stranahan*, 24 S. Ct. 349, 192 U. S. 470, 48 L. Ed. 525; *Same v. Bidwell*, 24 S. Ct. 356, 192 U. S. 498, 48 L. Ed. 536; *Same v. United States*, 24 S. Ct. 356, 192 U. S. 499, 48 L. Ed. 537.

Due process of law is not denied the owner or custodian of food in cold storage by a municipal ordinance under which such food, when unfit for human consumption, may summarily be seized, condemned, and destroyed by municipal officers without a preliminary hearing. Decree (C. C. 1907) 151 F. 120, modified.—*North American Cold Storage Co. v. City of Chicago*, 29 S. Ct. 101, 211 U. S. 306, 53 L. Ed. 195, 15 Ann. Cas. 276.

Confiscation and destruction provided by municipal ordinance where milk does not conform to the requirements of an ordinance forbidding shipment into the city of milk from cows outside, unless they have been first subject to a tuberculin test and certificate shall have been filed with the health officer, held not to take property without due process of law in violation of Const. U. S. Amend. 14.—*Adams v. City of Milwaukee*, 33 S. Ct. 610, 228 U. S. 572, 57 L. Ed. 971, affirming judgment 129 N. W. 518, 144 Wis. 871.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

322. Nature of remedies guaranteed.

See 10 Cent. Dig. Const. Law, § 951.

Whatever merit there may be in a claim that submerged lands in the Potomac river, reclaimed by the United States, should in equity be restored to the heirs or assigns of former English holders of the title from whom they were confiscated during the Revolution, such claim is not a legal one which can be considered by the courts.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

329. Remedies by appeal or error or other proceeding for review.

See 10 Cent. Dig. Const. Law, § 963; 36 Cent. Dig. Mun. Corp. § 1183.

Plaintiffs in error in a federal Circuit Court of Appeals are substantially denied their day in court by an affirmation of the judgment below on the ground that the defenses relied upon were of an equitable nature, not cognizable in a court of law, where the trial court, with the acquiescence of all parties, treated the defenses interposed by the answer as legal in their nature, and no such question was raised by either party or considered when the cause was submitted to the Circuit Court of Appeals. Judgment (1907) 156 F. 1022, 84 C. C. A. 679, reversed.—*Lutcher & Moore Lumber Co. v. Knight*, 30 S. Ct. 505, 217 U. S. 257, 54 L. Ed. 757.

CONSTRUCTION.

Language used in alleged libel or slander, see Libel and Slander, ¶20, 21.
Parol or extrinsic evidence to aid construction of written instruments, see Evidence, ¶448-463.

Statute relating to quashing indictment as affecting jurisdiction, see Courts, ¶385(1½).

Of contracts, instruments, or judicial acts or proceedings.

See—

Acknowledgment, ¶49.
Appeal and Error, ¶1194.
Arbitration and Award, ¶20.
Assignments, ¶71-85.
Assignments for Benefit of Creditors, ¶178-190.
Attorney and Client, ¶144, 148.
Bills and Notes, ¶118-132.
Boundaries, ¶3-14.
Carriers, ¶50, 51.
Charities, ¶37.
Chattel Mortgages, ¶117-125.
Compromise and Settlement, ¶10-12.
Constitutional Law, ¶11-49.
Contracts, ¶151-234.
Corporations, ¶372.
Covenants, ¶32-39.
Criminal Law, ¶822, 823.
Customs Duties, ¶12.
Deeds, ¶96-162.
Dedication, ¶49-59.
Guaranty, ¶32-37.
Indictment and Information, ¶117.
Insurance, ¶146-174.
Judgment, ¶526-533.
Master and Servant, ¶8.
Mines and Minerals, ¶43, 61-70, 72-79.
Mortgages, ¶114, 126-139.
Municipal Corporations, ¶352.
Patents, ¶165-177.
Powers, ¶17-39.
Public Lands, ¶114.
Principal and Surety, ¶59-86.
Railroads, ¶133.
Release, ¶25-34.
Sales, ¶61-87, 276-279.
Shipping, ¶39-49.

See—

Statutes, ¶180-278.
Stipulations, ¶14.
Taxation, ¶777-781.
Territories, ¶6, 15.
Trial, ¶285-296, 343, 395, 404.
Treaties, ¶7.
Trusts, ¶121-140.
Vendor and Purchaser, ¶50-80.
Wills, ¶445-707.

Of buildings or other works.

See—

Bridges, ¶20.
Contracts, ¶197, 198.
Levees, ¶16.
Railroads, ¶17-60, 103.
Telegraphs and Telephones, ¶4-22.
Turnpikes and Toll Roads, ¶28-30.

CONSTRUCTIVE ASSIGNMENTS.

See Assignment for Benefit of Creditors, ¶14, 17.

CONSTRUCTIVE NOTICE.

See—

Bills and Notes, ¶336-340.
Principal and Agent, ¶177-181.
Vendor and Purchaser, ¶229-232.

CONSTRUCTIVE RESIDENCES.

See Public Lands, ¶35.

CONSULS.

See Ambassadors and Consuls.

CONTAGIOUS DISEASES.

Animals, see Animals, ¶28-33.
Penalties for bringing into United States aliens afflicted with contagious diseases, see Aliens, ¶40, 58, 80; Constitutional Law, ¶303.
Health regulations, see Health, ¶22-25.

CONTEMPT.*Scope-Note.*

[INCLUDES disobedience to the process, orders, or rules of courts, and other acts or conduct in disregard of their authority or dignity, tending to impede or frustrate the administration of law; what constitutes such contempt, civil or criminal, in general; what persons are liable therefor; power to punish contempt, and proceedings therefor; and punishment of contempt.]

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Acts or Conduct Constituting Contempt of Court.**

- ¶6. Misconduct in presence of court.
- 8. Publications relating to court, jury, or officers.
- 10. Misconduct as officer of court.
- 19. Disobedience to mandate, order, or judgment.
- 20. — In general.
- 21. — Validity of mandate, order, or judgment.
- 22. — Stay or review of proceedings.
- 23. — Service on or knowledge of party or other person.

II. Power to Punish, and Proceedings Therefor.

- ⌘ 32. Scope and extent of authority.
- 34. — Superior courts.
- 37. Existence of other remedy.
- 46. Limitations and laches.
- 51. Summary proceedings.
- 52. — Contempts in presence of court.
- 58. Plea, answer, or counter affidavit.
- 59. Interrogatories and answers thereto.
- 61. Hearing and determination.
- 64. Commitment.
- 66. Appeal or error.

III. Punishment.

- ⌘ 73. Indemnity to party injured.
- 79. — Imprisonment to compel performance of act required.
- 82. Remission of fine, or discharge from imprisonment.

Cross-References.

Release on habeas corpus, see Habeas Corpus, ⌘ 106.
 Review on habeas corpus, see Habeas Corpus, ⌘ 92.
 Right to trial by jury, see Jury, ⌘ 21.

Disobedience to particular writs, mandates, orders, or judgments.
 See—
 Bankruptcy, ⌘ 229.
 Discovery, ⌘ 107.
 Injunction, ⌘ 224-232.
 Supersedeas, ⌘ 8.
 Trade-Marks and Trade-Names, ⌘ 97.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

⌘ 6. Misconduct in presence of court.

See 10 Cent. Dig. Contempt, §§ 6, 9, 10, 13.

Attempts by persuasion and offer of money to deter a witness duly subpoenaed from testifying in behalf of the government, such attempts being made in the witness room, immediately adjacent to, and in the hallway of, the court room, and while the court was in session, constitute misbehavior in the presence of the court, under Rev. St. § 725, giving the federal courts power to punish contempts committed "in their presence, or so near thereto as to obstruct the administration of justice."—*Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150.

⌘ 8. Publications relating to court, jury, or officers.

See 10 Cent. Dig. Contempt, § 14.

⌘ 10. Misconduct as officer of court.

See 10 Cent. Dig. Contempt, §§ 19-22.

Advice of attorneys to a state court, pursuant to which that court compelled the surrender by a receiver in bankruptcy of property which had, without the consent of the state court, been voluntarily turned over to him by a receiver appointed by such court, cannot be deemed to constitute contempt of the bankruptcy court, where there is no evidence that their advice was given otherwise than in good faith and in the discharge of their duty as counsel.—*In re Watts*, 23 S. Ct. 718, 190 U. S. 1, 47 L. Ed. 933.

⌘ 19. Disobedience to mandate, order, or judgment.

See 10 Cent. Dig. Contempt, §§ 58-80; 24 Cent. Dig. Garn. § 285.

⌘ 20. — In general.

See 10 Cent. Dig. Contempt, §§ 58-62; 24 Cent. Dig. Garn. § 285.

Participation in the murder of a prisoner under sentence of death in a state court, with intent to prevent the delay attendant upon an appeal to the federal Supreme Court from an

order of the Circuit Court denying relief by habeas corpus, and to prevent the hearing of such appeal, is a contempt of the Supreme Court, where such murder was committed after the appeal had been allowed, and that court had ordered that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal."—*United States v. Shipp*, 27 S. Ct. 185, 203 U. S. 563, 51 L. Ed. 319, 8 Ann. Cas. 265.

⌘ 21. — Validity of mandate, order, or judgment.

See 10 Cent. Dig. Contempt, §§ 34, 63-66.

Lack of jurisdiction in the federal Circuit Court of a petition for habeas corpus, or in the Supreme Court of the appeal from the order denying the writ, does not enable persons to disregard, without liability to process for contempt, the order of the Supreme Court that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal," since that court necessarily has jurisdiction to decide whether the case is properly before it.—*United States v. Shipp*, 27 S. Ct. 185, 203 U. S. 563, 51 L. Ed. 319, 8 Ann. Cas. 265.

⌘ 22. — Stay or review of proceedings.

See 10 Cent. Dig. Contempt, § 67.

The sheriff and night jailer in charge of a prisoner under sentence of death in a state court are chargeable with contempt of the mandate of the Supreme Court of the United States, staying all proceedings pending an appeal, where such officials made no preparation to prevent the murder of the prisoner by a mob, actuated by the intent to prevent the delay attendant upon such appeal, although such action was reasonably to be anticipated, and made no effort to resist the mob, to save the prisoner, or to identify the participants in the crime.—*United States v. Shipp*, 29 S. Ct. 637, 214 U. S. 386, 53 L. Ed. 1041.

Participants in the murder of a prisoner under sentence of death in a state court, after an appeal to the Supreme Court of the United States has been allowed, are guilty of contempt

of the Supreme Court, where their crime was actuated by the intent to prevent the delay attendant upon such appeal.—*Id.*

Ⓒ23. — Service on or knowledge of party or other person.

See 10 Cent. Dig. Contempt, §§ 68-70.

In quo warranto proceedings in a state court to suspend a state officer, a judgment of ouster was entered, which of itself operated to remove the incumbent, and also adjudged the title to the relator. An appeal and supersedeas was allowed, but the relator, without knowledge thereof, broke into the office, and assumed its duties. *Held*, that this was not a contempt.—*Wilson v. State of North Carolina*, 18 S. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

Circuit court of appeals, see Courts, Ⓒ405.

Decisions reviewable, see Appeal and Error, Ⓒ77.

Delegation of legislative power, see Constitutional Law, Ⓒ61.

Due process of law, see Constitutional Law, Ⓒ273, 313.

Jurisdiction to review proceedings, see Courts, Ⓒ385(1), 388, 396.

Practice peculiar to federal courts, see Courts, Ⓒ356.

Violation of injunction, see Injunction, Ⓒ230.

Ⓒ32. Scope and extent of authority.

See 10 Cent. Dig. Contempt, §§ 95-110.

Ⓒ34. — Superior courts.

See 10 Cent. Dig. Contempt, §§ 99, 101-104.

A federal court has jurisdiction to entertain proceedings for contempt against a constable who without a warrant searches railroad premises in possession of the court's receiver, and seizes liquors deposited therein, and to determine if the receiver was violating state statutes, and whether the seizure was authorized thereby.—*In re Swan*, 150 U. S. 637, 14 S. Ct. 225, 37 L. Ed. 1207.

Ⓒ37. Existence of other remedy.

See 10 Cent. Dig. Contempt, §§ 111-116.

Rev. St. § 725, gives the federal courts power to punish contempts of their authority, *inter alia*, in cases of "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." *Held*, that while the same offense is embraced in Rev. St. § 5399, and punishable by indictment, that method of procedure is not exclusive, and the court may proceed summarily, under section 725.—*Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150.

Comp. Laws, § 2002, providing for the imposition of a fine for disobedience of a mandamus, does not affect the power of the court to punish for a contempt.—*Delgado v. Chavez*, 140 U. S. 586, 11 S. Ct. 874, 35 L. Ed. 578, affirming judgment 5 P. 948, 5 N. M. 646.

Ⓒ46. Limitations and laches.

See 10 Cent. Dig. Contempt, § 133.

Criminal contempts are crimes, within Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725), prescribing a three-year limitation, though the right of trial by jury in criminal cases does not extend to such contempts.—*Gompers v. United States*, 34 S. Ct. 693, 233 U. S. 604, 58 L. Ed. 1115, Ann. Cas. 1915D, 1044, reversing judgment in *re Gompers*, 40 App. D. C. 293.

Ⓒ51. Summary proceedings.

See 10 Cent. Dig. Contempt, §§ 140-142.

Ⓒ52. — Contempts in presence of court.

See 10 Cent. Dig. Contempt, §§ 140-142.

Where the offender, immediately after committing a contempt, leaves the court room, going into another room in the same building, the court still has jurisdiction, at least on the day of the offense, to order his arrest and imprisonment, without first ordering an attachment to bring him before the court.—*In re Terry*, 128 U. S. 289, 9 S. Ct. 77, 52 L. Ed. 405.

Ⓒ58. Plea, answer, or counter affidavit.

See 10 Cent. Dig. Contempt, §§ 169-175.

Sworn answers denying any participation in the alleged murder of a prisoner under sentence of death in a state court, pending his appeal to the federal Supreme Court from an order of a Circuit Court denying relief by habeas corpus, are not sufficient to purge the affiants of a charge of contempt of the Supreme Court by taking part in such murder after the appeal had been allowed and a stay of proceedings ordered.—*United States v. Shipp*, 27 S. Ct. 165, 203 U. S. 563, 51 L. Ed. 319, 8 Ann. Cas. 265.

Ⓒ59. Interrogatories and answers thereto.

See 10 Cent. Dig. Contempt, §§ 176-181.

Where an opportunity for explanation and defense is given, it is not necessary to direct service of interrogatories upon defendants.—*Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150.

Ⓒ61. Hearing and determination.

See 10 Cent. Dig. Contempt, §§ 188-194, 196.

The court may adopt such mode of trying the question of contempt as it deems proper, only so that the person charged be given an opportunity for explanation and defense.—*Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150.

Ⓒ64. Commitment.

See 10 Cent. Dig. Contempt, §§ 202-209.

An order committing a person for contempt until he shall comply with an order of court, or until discharged by the court, is not uncertain nor indefinite; it being in his power at any time to obtain his discharge by obeying the order.—*Tinsley v. Anderson*, 18 S. Ct. 806, 171 U. S. 101, 43 L. Ed. 91.

Ⓒ66. Appeal or error.

See 10 Cent. Dig. Contempt, §§ 213-215, 223-237; 2 Cent. Dig. App. & E. §§ 365, 463.

An order fining a party for contempt in violating an injunction, and directing the fine to be paid to the adverse party, as compensation for the damage done him, and for his expense in the contempt proceedings, is reviewable, as being an interlocutory order in a civil suit, and not a criminal proceeding.—*Worden v. Searls*, 121 U. S. 14, 7 S. Ct. 814, 30 L. Ed. 853.

On habeas corpus the record of petitioner's conviction of contempt showed that on due hearing he was found guilty of attempting to corruptly influence a juror sworn in a case pending, but both the petition and the record were silent as to the particular locality where such attempt was committed. *Held*, that it would be presumed in support of the judgment that the necessary jurisdictional facts existed.—*Ex parte Cuddy*, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154.

The decision of the highest court of a state construing its own prior judgment, and holding that a party thereto has not been guilty of contempt, is not a final, appealable judgment.—

Newport Light Co. v. City of Newport, 151 U. S. 527, 14 S. Ct. 429, 38 L. Ed. 259.

Judgments in contempt proceedings are not reviewable by the supreme court on error or appeal, but may be reached, in cases of excess of jurisdiction, by certiorari, in the absence of other adequate remedy.—*Ex parte Chetwood*, 17 S. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

Objections to the materiality of the testimony are not open to consideration on a writ of error sued out by witnesses to review a judgment for contempt, entered against them for disobeying an order to testify.—*Nelson v. United States*, 26 S. Ct. 358, 201 U. S. 92, 50 L. Ed. 673.

A judgment fining a person for contempt in disobeying a subpoena duces tecum is reviewable only by writ of error.—*Grant v. United States*, 33 S. Ct. 190, 227 U. S. 74, 57 L. Ed. 423, affirming judgment (D. C.) *In re Grant*, 198 F. 708.

Neither appearance before the grand jury of the alleged owner of certain books called for in a subpoena duces tecum directed to his attorney, nor an order appointing a referee to take testimony as to the ownership of such books, makes the owner a party to proceedings to punish the attorney for contempt, so that he has no standing to sue out a writ of error to review the judgment in such proceedings.—*Id.*

III. PUNISHMENT.

73. Indemnity to party injured.

See 10 Cent. Dig. Contempt, §§ 267-269, 267-270, 274.

79. — Imprisonment to compel performance of act required.

See 10 Cent. Dig. Contempt, §§ 270, 274.

Though Comp. Laws, § 2002, provides for the imposition of a fine for the refusal or neglect of an officer to perform a duty enjoined by a writ of mandamus, payment of which fine shall be a bar to an action for any penalty incurred by him for such neglect or refusal, this does not affect the power of the court to punish as a contempt the disobedience of the writ, or to enforce obedience by imprisonment.—*Delgado v. Chavez*, 140 U. S. 586, 11 S. Ct. 874, 35 L. Ed. 578, affirming judgment 5 N. M. 646, 25 P. 948.

82. Remission of fine, or discharge from imprisonment.

See 10 Cent. Dig. Contempt, §§ 275-284.

One sentenced to imprisonment for contempt until he restores certain goods, then to three months in addition, and until he pays the costs of the proceeding, cannot be released until the first and second provisions are performed, although the costs may be beyond the court's power to impose.—*In re Swan*, 150 U. S. 637, 14 S. Ct. 225, 37 L. Ed. 1207.

CONTEST.

Will, see Wills, 204-434.

CONTINGENT FEES.

See Attorney and Client, 146-150.

CONTINUANCE.

Scope-Note.

[INCLUDES adjournment or postponement of proceedings in civil actions in general to a subsequent day or term of court; nature and grounds of such adjournments or postponements, proceedings therefor, and operation and effect thereof in general; and entry of continuances.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 21. Absence of witness or evidence.
- 22. — In general.
- 26. — Diligence.
- 28. Surprise at trial.
- 29. — In general.

Cross-References.

Appeal, see Appeal and Error, 818!
Criminal prosecutions, see Criminal Law, 573-603.

Review of decisions, see Appeal and Error, 968.
Stipulations as to pleading judgment, see Stipulations, 3.

21. Absence of witness or evidence.

See 10 Cent. Dig. Contin. §§ 58-93.

22. — In general.

See 10 Cent. Dig. Contin. §§ 58-67; 5 Cent. Dig. Ball, § 130.

Refusal to postpone case to produce witness in support of good character of witness attacked on cross-examination is in discretion of trial court.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918.

26. — Diligence.

See 10 Cent. Dig. Contin. §§ 74-93.

Refusal to grant continuance of consolidated cause arising from difficulties of a corporation in the hands of a receiver, for absence of material witnesses, is not an abuse of discretion, where the matter had been pending for a year, and all the parties had acquiesced in bringing the cause to a speedy trial.—*Valdes v. Central Altagracia*, 32 S. Ct. 664, 225 U. S. 58, 56 L. Ed. 980.

⚡28. Surprise at trial.

See 10 Cent. Dig. Contin. §§ 95-112.

⚡29. — In general.

See 10 Cent. Dig. Contin. § 95.

The refusal to discharge a jury and postpone the trial because of the misleading effect of rulings admitting testimony on the question of damages, afterwards excluded from the consideration of the jury, is not an abuse of discretion, where no witnesses had been discharged, nor any books or documents in possession of counsel sent away, during the trial, and there was no offer at the time to present further testimony. Judgment, *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland*, 109 F. 393, 48 C. C. A. 436, affirmed.—*Fidelity & Deposit Co. of Maryland v. L. Bucki & Son*

Lumber Co., 27 S. Ct. 582, 189 U. S. 135, 47 L. Ed. 744.

CONTRABAND.

See War, ⚡18.

CONTRACTORS.

Bonds, see United States, ⚡87.

Independent contractors, see Master and Servant, ⚡316-319.

Naval contractor, see Army and Navy, ⚡27.

Rights and remedies of contractor with United States, see United States, ⚡74.

Right to mechanic's lien, see *Mechanics' Liens*, ⚡85-93.

CONTRACTS.*Scope-Note.*

[INCLUDES promises and agreements in general, express or implied, oral or written, and more particularly executory agreements; their nature, requisites, validity, incidents, construction, operation, and effect; evidence relating thereto; modification or rescission thereof, by new agreements or by acts of the parties, and discharge of the obligations thereof by operation of law or by performance or breach; and actions for breach.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Requisites and Validity.****(A) NATURE AND ESSENTIALS IN GENERAL.**

⚡9. Certainty as to subject-matter.

(B) PARTIES, PROPOSALS, AND ACCEPTANCE.

⚡19. Revocation or withdrawal of offer.

26. Contracts by correspondence.

27. Implied agreements.

29. Questions for jury.

(C) FORMAL REQUISITES.

⚡35. Signature.

41. Confirmation or ratification of defective instrument.

(D) CONSIDERATION.

⚡48. Contracts under seal.

53. Adequacy.

63. Money, investments, and securities.

87. Evidence as to consideration or failure thereof.

88. — Presumptions and burden of proof.

(E) VALIDITY OF ASSENT.

⚡94. Fraud and misrepresentation.

95. Duress.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

⚡101. What law governs.

103. Contravention of law in general.

108. Public policy in general.

112. Immorality.

113. Inducing fraud or breach of trust.

115. Restraint of trade or competition in trade.

116. — In general.

I. Requisites and Validity—Continued.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION—Continued.

- ⌘ 117. — General or partial restraint.
- 118. — Preventing disclosure of trade secrets.
- 120. Procuring or making fictitious bids or proposals.
- 123. Injury to public service in general.
- 126. Influencing legislation.
- 129. Obstructing or perverting administration of justice.
- 131. Influencing action of administrative officer.
- 132. Prevention of competition for public work, franchises, or property.
- 133. Aid to public enemy.
- 135. Effect of illegality.
- 137. — Partial illegality.
- 138. — Relief of parties.

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(A) GENERAL RULES OF CONSTRUCTION.

- ⌘ 151. Language of instrument.
- 156. — General and specific words.
- 163. Writing and printing.
- 164. Construing instruments together.
- 166. Matters annexed or referred to as part of contract.
- 167. Existing law as part of contract.
- 169. Extrinsic circumstances.
- 170. Construction by parties.
- 173. Dependent or independent stipulations.
- 175. Evidence to aid construction.

(B) PARTIES.

- ⌘ 181. Joint and several contracts.
- 182. — Joint contracts and survivorship.
- 185. Rights acquired by third persons.
- 186. — Privity of contract in general.

(C) SUBJECT-MATTER.

- ⌘ 189. Scope and extent of obligation.
- 192. Property and rights therein in general.
- 193. Money, investments, and securities.
- 194. Loans and advances.
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- 198. — In general.

(D) PLACE AND TIME.

- ⌘ 209. Place of payment of compensation.
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- 213. Time of performance.
- 215. Duration of contract in general.

(E) CONDITIONS.

- ⌘ 221. Conditions precedent in general.
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(F) COMPENSATION.

- ⌘ 228. Right to compensation in general.
- 229. Rate or amount in general.
- 232. Alterations and extra work.
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- 235. Mode of making compensation.

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- ⌘ 237. Consideration for modification.
- 242. Extension of time.
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IV. Rescission and Abandonment.

- ↪ 257. Grounds for rescission by party.
- 261. ——— Failure of performance or breach.

V. Performance or Breach.

- ↪ 278. Performance of conditions.
- 279. Tender of performance.
- 283. Approval or decision of architects, arbitrators, or others.
- 284. ——— In general.
- 286. ——— Acceptance or approval of work.
- 287. ——— Certificates in general.
- 298. Delay in performance.
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- 303. Excuses for nonperformance or defects.
- 306. Completion by other party.
- 312. Acts or omissions constituting breach in general.
- 313. Renunciation.
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- 319. Rights and liabilities on partial performance.
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- ↪ 324. Nature and form of remedy.
- 325. What law governs.
- 327. Conditions precedent.
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- 332. ——— Declaration, complaint, or petition in general.
- 346. ——— Issues, proof, and variance.
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- 349. ——— Admissibility.

Cross-References.

See—

Alteration of Instruments.
Assignments.
Cancellation of Instruments.
Champerly and Maintenance.
Customs and Usages.
Frauds, Statute of.
Gaming.
Lost Instruments.
Reformation of Instruments.
Specific Performance.
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Claims against United States founded on contract, see United States, ↪95.
Claims provable against bankrupt's estate, see Bankruptcy, ↪318.
Competency of written contract as evidence, see Evidence, ↪353.
Constitutional guaranty of liberty to contract, see Constitutional Law, ↪89.
Contract as property subject to condemnation, see Eminent Domain, ↪45.
Due process of law, see Constitutional Law, ↪276.
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Contracts of particular classes of persons.

See—

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Banks and Banking, ↪104-116, 260.
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Contracts relating to particular subjects.

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 Animals, ❧21-23.
 Arbitration and Award, ❧5-9.
 Attorney and Client, ❧142-144, 157.
 Bills and Notes, ❧137.
 Bridges, ❧20.
 Brokers, ❧41-69.
 Carriers, ❧47-68, 180, 218, 251-254, 307, 406.
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 Husband and Wife, ❧181-196.
 Insurance.
 Intoxicating Liquors, ❧329.
 Levees, ❧16.
 Logs and Logging, ❧8.
 Marriage.
 Master and Servant, ❧2-4.
 Mines and Minerals, ❧109.
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See—
 Animals, ❧21-23.
 Arbitration and Award, ❧1-24.
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 United States, ❧69.
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Particular modes of discharging contracts.

See—

Compromise and Settlement
 Payment.
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I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

Necessity of mutuality in order to enforce specific performance, see Specific Performance, ❧32.

❧9. Certainty as to subject-matter.

See 11 Cent. Dig. Contracts, §§ 10-20.

The power to change details, reserved by the government in a contract for a public work, does not make the contract unenforceable for want of certainty and mutuality, there being full provisions for ascertaining a change in the compensation where any such change is proper.—(1912) *United States v. McMullen*, 32 S. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment (1909) *McMullen v. United States*, 167 F. 460, 93 C. C. A. 96.

(B) PARTIES, PROPOSALS, AND ACCEPTANCE.

Implied contract to pay for use of patent by United States, see United States, ❧97.
 Offer and acceptance of guaranty, see Guaranty, ❧6.

❧19. Revocation or withdrawal of offer.

See 11 Cent. Dig. Contracts, §§ 57-60.

Letters containing an offer to purchase an interest in a mining venture were sent by one partner in that enterprise addressed to the other at St. Louis, although the writer knew that the other's address would be Bayfield, Wis., where the letters were in fact received, and an acceptance immediately telegraphed by the recipient. The first partner wrote, withdrawing his offer,

before it had been received, but the second partner testified that he had never received the letter of withdrawal. In a subsequent correspondence both parties treated the contract as complete, except as to detail. *Held*, that the attempted withdrawal was invalid, and the contract complete, and could be treated as such by the purchaser.—*Patrick v. Bowman*, 149 U. S. 411, 13 S. Ct. 811, 366, 37 L. Ed. 790, reversing decree (C. C.) *Bowman v. Patrick*, 36 F. 133, and following *Taylor v. Merchants' Fire Ins. Co.*, 50 U. S. 390, 13 L. Ed. 187.

❧26. Contracts by correspondence.

See 11 Cent. Dig. Contracts, §§ 119, 120.

A contract is to be deemed concluded when the offer is accepted within a reasonable time, either by telegram, duly sent in the ordinary way, or by letter, duly posted to the proposer, provided either be done before the offer is withdrawn to the knowledge of, or upon notice to, the other party.—*Burton v. United States*, 26 S. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

❧27. Implied agreements.

See 11 Cent. Dig. Contracts, §§ 121-122.

The mere fact that the United States avails itself of the benefits of labor and expense incurred by counsel acting under contract with private parties, and having no reason to expect compensation from the government, in filing suits in the name of the United States to vacate land patents, is insufficient to raise an implied promise on the part of the latter to compensate them, although their clients refuse to do so or to proceed with the litigation, and the government itself then prosecutes the suits with other counsel.—*Coleman v. United States*, 152 U. S. 96, 14 S. Ct. 473, 38 L. Ed. 368.

§29. Questions for jury.

See 11 Cent. Dig. Contracts, §§ 141-148, 1834.

Plaintiffs did certain work under the directions of defendant's agent, who said the company would do what was right about it. *Held*, that it was for the jury to say whether the conversation was with a contractual intent or not.—*Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934.

Plaintiff wrote to defendant, its co-tenant of a water ditch, suggesting that necessary repairs be made, and the ditch thereafter kept in good condition, each party paying one-half the expense. Defendant answered, approving the suggestion, and stating that it would direct its engineer to co-operate with plaintiff or his agent, and determine and report what repairs were needed. The ditch was examined on different occasions by the agents of the parties acting in concert, and repairs were made by plaintiff during several years, one-half the expense for the first year, being paid by the defendant. Statements of the subsequent repairs were regularly sent to defendant, who acknowledged their receipt, and at no time dissented to plaintiff's action, nor disclaimed liability for its share of the expenses. *Held*, that the questions whether the first two letters were treated by both parties as embodying a contract relative to such repairs, and whether plaintiff was justified in believing that defendant would pay its share of the expenses, were properly submitted to the jury. *Société Anonyme des Mines de Lexington v. Old Jordan Mining & Milling Co.*, 35 P. 492, affirmed.—*Old Jordan Mining & Milling Co. v. Société Anonyme des Mines de Lexington*, 17 S. Ct. 113, 164 U. S. 261, 41 L. Ed. 427.

(C) FORMAL REQUISITES.

Contract of United States, see United States, §65.

Deed, see Deeds; §30-40, 63, 64.

§35. Signature.

See 11 Cent. Dig. Contracts, §§ 171-185.

Whether a contract made by receivers for the completion of a building, in course of construction at the time of their appointment, was actually signed by them, is immaterial, so long as its terms were agreed upon and understood between the parties.—*Girard Life Insurance, Annuity & Trust Co. v. Cooper*, 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062, affirming decree 51 F. 332, 2 C. C. A. 245, 4 U. S. App. 631.

§41. Confirmation or ratification of defective instrument.

See 11 Cent. Dig. Contracts, §§ 215-219.

The invalidity of a public contract because of noncompliance with the requirement of Rev. St. U. S. 3744 [U. S. Comp. St. 1901, p. 2510], that such contracts be reduced to writing and be subscribed by the contracting parties, is immaterial after the contract has been performed. Judgment, *R. P. Andrews & Co. v. United States* (1905) 41 Ct. Cl. 48, affirmed.—*United States v. R. P. Andrews & Co.*, 28 S. Ct. 100, 207 U. S. 229, 52 L. Ed. 185.

(D) CONSIDERATION.

Affecting liability for money received for the benefit of another, see Money Received, §8. Parol or extrinsic evidence to show nature of consideration, see Evidence, §419.

Restoration of consideration on cancellation of written contracts, see Cancellation of Instruments, §24.

Statement of consideration in memorandum of contract within statute of frauds, see Frauds, Statute of, §108.

Sufficiency as to creditors and subsequent purchasers, see Fraudulent Conveyances, §85-95.

Sufficiency to entitle party to specific performance, see Specific Performance, §48-50.

Particular classes of contracts.

See—

- Accord and Satisfaction, §5, 7.
- Bills and Notes, §91, 92, 356, 503.
- Bonds, §93.
- Carriers, §154.
- Compromise and Settlement, §8.
- Deeds, §17, 96.
- Indemnity, §2-4.
- Release, §11-13.
- United States, §67.
- Vendor and Purchaser, §12, 13.

§48. Contracts under seal.

See 11 Cent. Dig. Contracts, § 406.

An indemnity bond by which defendant undertook to hold plaintiff harmless against loss or damage on an appeal bond, which he had already executed in Louisiana, was entered into in New York, by the law of which state a written contract, though under seal, may be impeached for want of consideration, and a pre-existing liability entered into without request is an insufficient consideration. The rule in Louisiana in both respects is otherwise. *Held*, in an action brought thereon in Louisiana, that, in view of the situation and purpose of the parties, the contract must be taken as entered into in contemplation of the law of Louisiana as the place of its performance, and that the rule in that state must govern.—*Pritchard v. Norton*, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104.

§53. Adequacy.

See 11 Cent. Dig. Contracts, §§ 231, 232.

A contract by plaintiff to furnish the government with many articles at stipulated prices, among which are shucks at 60 cents per pound, is unenforceable as to that article, where the evidence for the government shows that shucks were worth from \$12 to \$35 per ton; that it was the custom to buy them by the hundred weight; and that the error occurred by failing to strike out the word "pounds" on the printed form on which plaintiff's proposal was made, and to insert "hundred weight" instead, though plaintiff insists that there was no mistake on his part in making the bid.—*Hume v. United States*, 132 U. S. 406, 10 S. Ct. 134, 33 L. Ed. 393, affirming 21 Ct. Cl. 328.

§63. Money, investments, and securities.

See 11 Cent. Dig. Contracts, § 263.

The receipt of money under a contract which requires the persons receiving the same to adjust, on principles of equity and justice, the claims of certain other persons who had rendered services to the other contracting party, is, of itself, a sufficient consideration for the promise to make such adjustment.—*McKee v. Lamon*, 159 U. S. 317, 16 S. Ct. 11, 40 L. Ed. 165.

§87. Evidence as to consideration or failure thereof.

See 11 Cent. Dig. Contracts, §§ 403-405, 407-410.

§88. — Presumptions and burden of proof.

See 11 Cent. Dig. Contracts, §§ 403-406, 407.

A nominal and immaterial consideration of a contract sued on need not be proven; and testimony offered by the defendant, tending to show that no such consideration passed, is properly rejected.—*Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216.

(E) VALIDITY OF ASSENT.

Particular contracts, see—

- Bills and Notes, ¶100-103.
- Chattel Mortgages, ¶75.
- Composition with Creditors, ¶11.
- Compromise and Settlement, ¶7, 8.
- Deeds, ¶70-72.
- Sales, ¶37-43.

Parol or extrinsic evidence to show invalidity, see Evidence, ¶429-434.

¶94. Fraud and misrepresentation.

See 11 Cent. Dig. Contracts, §§ 420-430, 1160, 1164, 1165.

Fraudulent expressions of opinion are insufficient to justify rescission of a contract executed and acted upon by the parties.—*Johansson v. Stephanson*, 154 U. S. 625, 14 S. Ct. 1180, 23 L. Ed. 1009.

¶95. Duress.

See 11 Cent. Dig. Contracts, §§ 431-440.

Refusal by a purchaser in possession of personal property to pay for it to satisfy a mortgage lien on it, or release it, unless the seller will execute a contract which, if persisted in, both parties understand will lead to an immediate foreclosure and the ruin of the seller, amounts to duress which will avoid the contract. Judgment, *Snyder v. Stribling* (1907) 89 P. 222, 18 Okl. 168, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

Affecting broker's right to compensation, see Brokers, ¶58.

Particular contracts, see—

- Carriers, ¶35.
- Champerly and Maintenance.
- Gaming, ¶2-49.
- Intoxicating Liquors, ¶329.
- Shipping, ¶139-142.
- Sunday, ¶10-13.

¶101. What law governs.

See 11 Cent. Dig. Contracts, §§ 455-460.

Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union, when not controlled by the constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application, are governed by the law of the state as expressed in its own constitution and statutes, or declared by its highest court. Judgment 70 F. 201, 17 C. C. A. 62, 30 L. R. A. 193, affirmed.—*Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 20 S. Ct. 33, 175 U. S. 91, 44 L. Ed. 84.

¶103. Contravention of law in general.

See 11 Cent. Dig. Contracts, §§ 468-476.

An agreement between a person who has performed work under a contract with the United States and the accounting officers that penalties incurred by defaults in the performance of the work will be waived if the contractor will pay certain claims which have been presented against him at the treasury department for materials and labor in the performance of the contract, is valid.—*United States v. Windom*, 137 U. S. 636, 11 S. Ct. 197, 34 L. Ed. 811.

¶108. Public policy in general.

See 11 Cent. Dig. Contracts, §§ 498-503, 505, 507-511.

Public policy does not forbid an agreement under which the surety on a bail bond became such on condition that certain securities held by a third person should remain in his hands as indemnity for signing the bond.—(1912)

Leary v. United States, 32 S. Ct. 599, 224 U. S. 567, 56 L. Ed. 889, Ann. Cas. 1913D, 1029, reversing decree (1910) 184 F. 433, 107 C. C. A. 27.

¶112. Immorality.

See 11 Cent. Dig. Contracts, §§ 512-514.

The assignment of a mortgage by a man to a woman, whom he had induced to marry him by falsely representing that he had procured a divorce from his wife, and by whom he had had two children, made after she had discovered the deception, is not impeachable for immorality of consideration.—*Gay v. Pappart*, 106 U. S. 679, 1 S. Ct. 456, 27 L. Ed. 256.

¶113. Inducing fraud or breach of trust.

See 11 Cent. Dig. Contracts, §§ 521-541.

An extension company which had a contract with a railroad company to locate and construct the road "by the nearest, cheapest, and most suitable route," between two points, for \$20,000 per mile, agreed to locate the road through the town of A. in consideration of being paid a bonus by defendant. In locating the road through A. it was necessary to deflect from the nearest, cheapest, and most natural route a distance of five miles, at an additional cost of \$100,000. Held, that the contract between the extension company and defendant, being an agreement by an employé to violate his obligation to his employer, was against public policy, and void.—*Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 9 S. Ct. 402, 32 L. Ed. 819.

A contract made by a person, in contemplation of becoming an officer in a private corporation and controlling a majority of its stock, that he will use his influence to retain another in office at a fixed salary, is void, as against public policy, being inconsistent with the duty that the promisor as an officer owes to the stockholders, though no direct private gain is to result therefrom to him.—*West v. Camden*, 135 U. S. 507, 10 S. Ct. 838, 34 L. Ed. 254.

¶115. Restraint of trade or competition in trade.

See 11 Cent. Dig. Contracts, §§ 542-563.

¶116. — In general.

See 11 Cent. Dig. Contracts, §§ 542-552.

A stipulation in a contract that a sleeping-car company shall have the exclusive right, for 15 years, to furnish drawing-room and sleeping cars for a railroad company's use, does not render the contract void as being in restraint of trade or against public policy, as such stipulation does not disable the sleeping-car company from furnishing cars to a rival railroad, and the law will imply, from the terms of the contract, that it must furnish the railroad company in question, not only adequate and safe cars, but sufficient in number for the use of the public traveling on the latter's road.—*Chicago, St. L. & N. O. R. Co. v. Pullman South. Car Co.*, 139 U. S. 79, 11 S. Ct. 490, 35 L. Ed. 97.

¶117. — General or partial restraint.

See 11 Cent. Dig. Contracts, §§ 554-563.

Contracts with telegraph companies, by which the Chicago Board of Trade limits the communication of quotations of prices on sales of grain and provisions for future delivery, collected by it, which it might have refrained from communicating to any one, are not contracts in restraint of trade, either under Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], or at common law. Decrees, Board of Trade of City of Chicago v. L. A. Kinsey Co., 130 F. 507, 64 C. C. A. 669, 69 L. R. A. 59, affirmed, and *Christie Grain & Stock Co. v. Board of Trade of City of Chicago*, 125 F. 161, 61 C. C. A. 11, reversed.—Board

of Trade of City of Chicago v. Christie Grain & Stock Co., 25 S. Ct. 637, 198 U. S. 236, 49 L. Ed. 1031.

— **Preventing disclosure of trade secrets.**

See 11 Cent. Dig. Contracts, § 553.

An assignment for a valuable consideration, by the proprietor of a secret medicinal compound, of the exclusive right to manufacture and sell it in certain states and territories, with a covenant by the assignor not to manufacture or sell the article in such territory, and a covenant by the assignees not to manufacture or sell it in other territory, is not contrary to public policy, as being in restraint of trade.—*Fowle v. Park*, 131 U. S. 88, 9 S. Ct. 658, 33 L. Ed. 67.

— **Procuring or making fictitious bids or proposals.**

An agreement between two persons to secretly combine their interests and to put in bids known to each other, the highest being fictitious, and made only for the purpose of making an appearance of competition, is illegal and void as against public policy, without regard to its actual effect; its vice being inherent, and arising from its natural tendency to induce the authorities having the letting of the contract to act in the belief that the competition is real, and the lower bid a reasonable one. Judgment, *McMullan v. Hoffman* (C. C.) 69 F. 509, and *Hoffman v. McMullen*, 83 F. 372, 28 C. C. A. 178, 45 L. R. A. 410, affirmed.—*McMullen v. Hoffman*, 19 S. Ct. 839, 174 U. S. 639, 43 L. Ed. 1117.

— **Injury to public service in general.**

See 11 Cent. Dig. Contracts, §§ 570-575.

As railroad companies are for many purposes public highways, the business of the extension company was one in which the public was interested; and the contract of the company to disregard its duty, and locate and construct the road by a longer road than was required, was also a wrong upon the public.—*Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 9 S. Ct. 402, 32 L. Ed. 819.

Public policy precludes a decree for the specific performance of a covenant in a deed of a railroad's right of way not to build or establish a depot within three miles of the one therein stipulated for, especially where the erection of the structure in dispute has been ordered by the state railroad commission. Decree 115 F. 952, 53 C. C. A. 434, affirmed.—*Beasley v. Texas & P. Ry. Co.*, 24 S. Ct. 164, 191 U. S. 492, 48 L. Ed. 274.

— **Influencing legislation.**

See 11 Cent. Dig. Contracts, §§ 536-538.

It would seem that two parties, who have made separate applications to a city council for the grant of a street-railway franchise, may make a contract to unite their interests, and mutually co-operate to secure the franchise in the name of one of them, without contravening any rule of public policy, where the fact of such union of interests is disclosed to the city council and to all parties interested. Decree, 80 F. 839, 26 C. C. A. 175, modified.—*Hyer v. Richmond Traction Co.*, 18 S. Ct. 114, 168 U. S. 471, 42 L. Ed. 547.

An agreement to sell a tract of land at a specified price if the offer should be accepted within the time mentioned is unenforceable, as contrary to public policy, where made in part consideration of services rendered before and after the making of the agreement, in bringing the property to the attention of committees of Congress as a suitable and appropriate

site for a hall of records, although the actual services rendered may have been legitimate.—*Hazelton v. Sheckels*, 26 S. Ct. 567, 202 U. S. 71, 50 L. Ed. 939, 6 Ann. Cas. 217.

— **Obstructing or perverting administration of justice.**

See 11 Cent. Dig. Contracts, §§ 616-632; 31 Cent. Dig. Jud. S. § 85.

The owner of some 65 patents for improvements on bicycles and tricycles granted a license to another to manufacture and sell under 15 of them, in consideration whereof the licensee expressly admitted the validity of all the licensor's patents, covenanted not to manufacture or sell machines covered by any of them after the license expired or was in any way terminated, even after the patents themselves expired, and agreed that on violation of such covenants the licensor might treat him as liable for the breach, or as a mere infringer, and that, in either case, upon suit brought, an injunction might issue against him without notice. Held that, whether or not an action could be maintained at law for a breach of the covenants not to manufacture and sell the specific devices, the stipulation not to set up any defense to an action under any of the patents was void as against public policy.—*Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 12 S. Ct. 632, 36 L. Ed. 414; Same v. *Gormully & Jeffery Mfg. Co.*, 144 U. S. 238, 12 S. Ct. 637, 36 L. Ed. 419, affirming decree (C. C.) 34 F. 877.

— **Influencing action of administrative officer.**

See 11 Cent. Dig. Contracts, §§ 594-607.

There was nothing against public policy in a contract whereby a person was to receive a 10 per cent. interest in a concession to a riparian owner of the right to utilize water power for helping in the necessary steps under which he joined in the application to the military governor of Porto Rico for a franchise, and helped to present the matter to the Secretary of War and to the executive council of Porto Rico, where the first franchise granted by the Secretary of War had been lost by failure to comply with its terms.—*Valdes v. Larrinaga*, 34 S. Ct. 750, 233 U. S. 705, 58 L. Ed. 1163.

Employment of a person by a corporation on compensation contingent on success in securing a contract from Postmaster General for furnishing letter carriers' satchels is against public policy.—*Crocker v. United States*, 36 S. Ct. 245, 240 U. S. 74, 60 L. Ed. 533, affirming judgment 49 Ct. Cl. 85.

Public policy forbids any secret arrangement between the agents of a corporation and superintendent of the free delivery service who is connected with the purchase of letter carriers' satchels, whereby, if the corporation secures the contract for the satchels, the superintendent is to receive a part of profits.—*Id.*

Postmaster General properly rescinded for fraud a contract with a corporation to furnish letter carriers' satchels, on discovery of an arrangement whereby the superintendent of such service was to receive profits from such contract, though corporation itself may have been without knowledge of the corrupt acts of its agents.—*Id.*

— **Prevention of competition for public work, franchises, or property.**

See 11 Cent. Dig. Contracts, §§ 659-661.

Bidders for public work are bound to the exercise of the utmost good faith in relation to their bids, and an agreement between two persons to secretly combine their interests and to put in bids known to each other, the highest being fictitious and made only for the purpose

of making an appearance of competition, is illegal and void as against public policy, without regard to its actual effect; its vice being inherent, and arising from its natural tendency to induce the authorities having the letting of the contract to act in the belief that the competition is real, and the lower bid a reasonable one. Judgment *Hoffman v. McMullen*, 83 F. 372, 28 C. C. A. 178, 45 L. R. A. 410, affirmed. —*McMullen v. Hoffman*, 19 S. Ct. 839, 174 U. S. 639, 43 L. Ed. 1117.

133. Aid to public enemy.

See 11 Cent. Dig. Contracts, §§ 662-680.

A sale of cotton situated in the Confederate States, in 1862, between two persons within the Union lines, and unattended by any communications with the enemy's country, or any agreement for the transfer of money or property across the lines, was not in contravention of any rule of international law, or of any proclamation issued by the president of the United States.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

135. Effect of illegality.

See 11 Cent. Dig. Contracts, §§ 681-721.

137. — Partial illegality.

See 11 Cent. Dig. Contracts, §§ 701-712.

Where it is shown that a written instrument providing for a partnership in the performance of a contract for public work embodies but a portion of the contract between the parties, which included a fraudulent agreement for procuring the contract for the work, void as against public policy, as well as to share the profits in case of success, the written part of the contract cannot be enforced on the theory that the illegal portion is not necessary to plaintiff's case, but is pleaded and shown by way of defense. A part of the contract being shown, the remainder may be; and, its illegality appearing, the court will neither recognize nor enforce any part of it, but will leave the parties as it finds them. Judgment *Hoffman v. McMullen*, 83 F. 372, 28 C. C. A. 178, 45 L. R. A. 410, affirmed. *McMullen v. Hoffman*, 19 S. Ct. 839, 174 U. S. 639, 43 L. Ed. 1117.

A written agreement for a partnership between two persons in the performance of a contract for public work awarded to one of them, which is in fact but a portion of an illegal agreement entered into previous to the making of bids for the work, the remainder of which rests in parol, by which they made a secret combination to create a false appearance of competition between them by means of fictitious bids, cannot be separated from the illegal part and enforced, but the contract is indivisible and illegal as an entirety.—*Id.*

138. — Relief of parties.

See 11 Cent. Dig. Contracts, §§ 681-700.

Plaintiff in a suit against a gas company to recover for services in negotiating and consummating a settlement of differences between defendant and another company, put the contract between said companies in evidence, and testified that he conducted the negotiations resulting in it; that he was the general manager of a company manipulating gas property throughout the country; that his and other companies were inconvenienced by the fact that they were expected to furnish gas at the insufficient price at which it was sold in the city where the contracting companies were located; that he suggested that the conflict there should be amicably terminated, and in consequence was employed to negotiate a settlement with defendant by the other company. Held, that plaintiff having himself suggested the settlement, and the contract being unlawful, as ultra vires of the other company, he could not recover for services in procuring its execution.—*Gibbs v. Con-*

solidated Gas Co. of Baltimore, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

An Illinois railroad corporation is bound to take notice that its lease to an Indiana corporation is ultra vires of the latter, so that, where the lease becomes an executed contract by the delivery of the leased property, the lessor is in pari delicto with the lessee, and cannot maintain a suit to recover possession.—*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, affirming decree (C. C.) 83 F. 440.

The right to recover money paid to a national bank on a contract sought to be rescinded for fraud is not defeated because the parties were attempting a transaction forbidden by law, since to deny the right to rescind is to rely on the contract, which must be accepted, if at all, with the burden of the fraud.—*National Bank & Loan Co. v. Petrie*, 23 S. Ct. 512, 189 U. S. 423, 47 L. Ed. 879; *Same v. Carr*, 23 S. Ct. 513, 189 U. S. 426, 47 L. Ed. 881.

That no recovery can be had on a contract with a Postmaster General for furnishing letter carriers' satchels because contract was tainted with fraud will not defeat recovery on a quantum valebat.—*Crocker v. United States*, 38 S. Ct. 245, 240 U. S. 74, 60 L. Ed. 533, affirming judgment 49 Ct. Cl. 85.

II. CONSTRUCTION AND OPERATION.

Particular classes of contracts.

See—

- Arbitration and Award, 20.
- Assignments, 71-85.
- Assignments for Benefit of Creditors, 173-199.
- Attorney and Client, 144, 148.
- Bills and Notes, 118-132.
- Boundaries, 3-14.
- Carriers, 50, 51.
- Chattel Mortgages, 117-153.
- Compromise and Settlement, 10-12.
- Covenants, 32-39.
- Deeds, 96-162.
- Guaranty, 32-37.
- Insurance, 146-174.
- Master and Servant, 8.
- Mines and Minerals, 61-70, 72-79, 109.
- Mortgages, 114-176.
- Municipal Corporations, 352.
- Principal and Surety, 59-66.
- Railroads, 133.
- Release, 25-34.
- Sales, 61-87, 276-278.
- Shipping, 39-49.
- Stipulations, 14.
- United States, 70.
- Vendor and Purchaser, 50-80.

(A) GENERAL RULES OF CONSTRUCTION.

Parol or extrinsic evidence, see Evidence, 386-424, 448-463.
Separate or subsequent oral agreement affecting written contract, see Evidence, 440-445.

151. Language of instrument.

See 11 Cent. Dig. Contracts, §§ 732-740.

156. — General and specific words.

See 11 Cent. Dig. Contracts, § 737.

The damage incurred by persons contracting to repair a dam for the United States, because the existing dam had not been built as positively stated in the specifications, may be recovered from the government, notwithstanding general language in other paragraphs of the specifications that no claim shall be made for any excess or deficiency, and that bidders are expected to visit the site and ascertain the nature of the

work.—*Hollerbach v. United States*, 34 S. Ct. 553, 233 U. S. 165, 58 L. Ed. 898, reversing judgment 47 Ct. Cl. 236.

◀163. Writing and printing.

See 11 Cent. Dig. Contracts, § 745.

A printed billhead cannot be allowed to control, modify, or alter the terms of a contract which is clearly expressed in writing below it.—*Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093.

The written provisions of a contract will, in case of any repugnancy, prevail over its printed provisions.—(1908) *Thomas v. Taggart*, 28 S. Ct. 519, 209 U. S. 385, 52 L. Ed. 845, affirming judgment in *re Jacob Berry & Co.* (1906) 149 F. 176, 79 C. C. A. 124.

◀164. Construing instruments together.

See 11 Cent. Dig. Contracts, §§ 746-748.

When a contract for the sale of goods provides that the goods are to be of the same quality as those made by the sellers for certain third persons, and no reference is made to the contract between them, that contract became no part of the contract with these purchasers.—*De Witt v. Berry*, 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896.

The I. C. R. Co. and three other railroad companies executed a contract with a bridge company by which such railroad companies were granted the right to use in perpetuity a certain bridge, and agreed to pay certain monthly tolls; and, if such tolls fell below a certain sum, each agreed to pay one-fourth of the deficiency. The I. C. R. Co. executed the contract at the request of the P. R. Co. and the Pa. R. Co., which agreed to assume all the liabilities of such contract, "the same as if it had been specifically named and made a part of the ninth article of a" lease by the I. C. R. Co. of its road to the P. R. Co. for 99 years, dated 3 days after the bridge contract. By such ninth article the lessee agreed to assume and carry out certain existing contracts for transportation over roads of other companies, and the Pa. R. Co. guaranteed performance by the P. R. Co. *Held*, that the contracts between the bridge company and the P. and Pa. R. Cos. were so independent of such lease that the contracts were not affected, nor such companies released from liability under them, by a termination of the lease by eviction or otherwise.—*Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 155 U. S. 156, 15 S. Ct. 42, 39 L. Ed. 106.

◀166. Matters annexed or referred to as part of contract.

See 11 Cent. Dig. Contracts, § 749.

A reference in a subcontract to the general contract for a particular purpose makes the general contract a part of the subcontract only for the purpose specified.—*Guerini Stone Co. v. P. J. Carlin Const. Co.*, 36 S. Ct. 300, 240 U. S. 264, 60 L. Ed. 636.

◀167. Existing law as part of contract.

See 11 Cent. Dig. Contracts, § 750.

A corporation, created in Canada to build and work a railway in that country, became financially embarrassed, and the Dominion parliament, as it had the power to do, passed a statute legalizing a plan of adjustment or compromise, which was accepted by a large majority of the creditors, and, while enabling the company to go on with its business, protected the creditors to the full extent of the available value of the corporate property. *Held*, that citizens of the United States, who had purchased bonds of the corporation, were bound by such state

statute, though the bonds were payable in this country.—*Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527, 3 S. Ct. 363, 27 L. Ed. 1020.

◀169. Extrinsic circumstances.

See 11 Cent. Dig. Contracts, § 752.

If the language of a written agreement is on its face ambiguous, the courts will look at the surrounding circumstances, at the situation of the parties, and the subject-matter of the contract, for aid in giving a construction to its language.—*Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527.

◀170. Construction by parties.

See 11 Cent. Dig. Contracts, § 753.

Plaintiffs contracted with the board of public works of defendant to build the final or outlet section of a sewer, other sections of which had already been completed. Before work was commenced certain deviations in the direction of the sewer were agreed to by both parties, and defendant's engineer furnished plaintiffs with a working drawing of the sewer, representing a structure similar to that of the completed section at the point of connection. Plaintiff proceeded with the work according to this plan, constructing it under the direction of defendant's engineers, until the board of public works was legislated out of office. Until that time nothing had been said as to any variance between the contract and the plan, nor that the work was not progressing satisfactorily, and in accordance with the former sample work. The engineer detailed under the new form of government reported several departures from the contract in the work as done, and recommended a deduction from the contract price, which defendant claimed in its settlement with plaintiffs. *Held*, that the parties practically construed the contract as one for work in accordance with the plan and sample, and that such construction must prevail over the literal meaning of the contract.—*District of Columbia v. Gallaher*, 124 U. S. 506, 8 S. Ct. 585, 31 L. Ed. 526.

A contractor for a public improvement, who, pending a dispute with the government as to his right to compensation for certain work, enters into a supplemental contract with the same terms and specifications as the original, with full knowledge of the meaning affixed by the government to the terms of such original contract, which had been insisted upon by it in carrying on previous operations, is precluded from claiming compensation under the new contract for any work of that character. Judgment (1906) 41 Ct. Cl. 214, affirmed.—*Bowers Hydraulic Dredging Co. v. United States*, 29 S. Ct. 77, 211 U. S. 176, 53 L. Ed. 136.

◀173. Dependent or independent stipulations.

See 11 Cent. Dig. Contracts, §§ 762-764.

Plaintiff, an electric light company, agreed with defendant, upon payment by him of a certain sum in full of all demands due plaintiff by defendant and another electric light company, to transfer to defendant all shares held by plaintiff in the latter company; also to furnish defendant certain electric lamps and machinery, for which he agreed to pay 12 per cent. of the cost price as rental for one year, to enable him to comply with his contract with the city for lighting its streets. If the city adopted the light after the expiration of defendant's contract, he was to pay plaintiff the full cost of the lamps and machinery, and not the rental; but, if the city did not continue the light, they were to be returned to plaintiff. *Held*, that the covenants were independent.—*Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 9 S. Ct. 119, 32 L. Ed. 474.

A bridge company agreed with the I. Railroad Company and three others, forming a continuous line, to construct and maintain a bridge for the use of the four companies, for which they agreed to pay monthly tolls, the deficiency, if any, of the gross tolls below a certain amount to be paid by each company in proportion to its tonnage carried over the bridge. Before the contract had been executed, the I. Company leased its road to the P. Company the performance of whose covenants were guaranteed by the Pa. Company. In an action by the bridge company against the P. and Pa. Companies for arrears of deficiencies assessed against the I. Company, *held* that the validity of the bridge contract did not depend upon the validity of the lease, since the contract and lease were separate and distinct agreements.—*Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 S. Ct. 770, 33 L. Ed. 157.

175. Evidence to aid construction.

See 11 Cent. Dig. Contracts, §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810.

It is conclusively presumed that both parties to a contract know the law in respect to which they make it, when they agree that it shall be determined by the laws of a certain state. Judgment 76 F. 617, 22 C. C. A. 425, reversed.—*Mutual Life Ins. Co. of New York v. Phinnev*, 20 S. Ct. 906, 178 U. S. 327, 44 L. Ed. 1088.

The presumption is that the law of the place at which a contract is made shall govern the rights of the parties, in the absence of anything to show the contrary. Judgment 97 F. 985, 38 C. C. A. 696, reversed.—*Mutual Life Ins. Co. of New York v. Cohen*, 21 S. Ct. 106, 179 U. S. 262, 45 L. Ed. 181.

(B) PARTIES.

181. Joint and several contracts.

See 11 Cent. Dig. Contracts, §§ 780-789.

182. — Joint contracts and survivorship.

See 11 Cent. Dig. Contracts, §§ 780-787.

A contract between four persons provided that one was to represent the interests of the others in the coal trade at a certain place, selling their coal only, taking from them in equal quantities, agreeing to labor to improve the market, and give the others the advantage of any improvement, except his fair proportion, and to keep his books open to them, they agreeing to aid his trade. *Held*, that the contract was several, not joint.—*Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 15 S. Ct. 886, 39 L. Ed. 1015.

185. Rights acquired by third persons.

See 11 Cent. Dig. Contracts, §§ 790-807.

186. — Privity of contract in general.

See 11 Cent. Dig. Contracts, §§ 790-797.

P. entered into a contract with a railroad company to construct its road, and furnish all the material for the same, and to receive in payment state bonds issued in aid of the railroad. P. then made a contract with plaintiffs for the purchase of the iron rails for the road, which provided that P. was to deposit in the C. Bank an amount of the state bonds more than equal to the purchase price of the rails; that such bonds should be held by the bank subject to the joint order of the parties to the contract and H., who was president of the railroad company; that, on the presentation of a warehouse receipt for any lot of said rails, P. and H. were to join with plaintiffs in drawing an order on the bank, in favor of plaintiffs, for so many of the bonds as would pay for such lot of iron. Afterwards H. signed an agreement which re-

cited the fact of the above contract having been entered into with plaintiffs, and stipulated that the state bonds on deposit in the C. Bank, and subject to his order as president of the railroad, should remain on deposit subject to the joint order of the parties to the contract, as therein provided, for the purpose of providing for the payment of the rails. The agreement further stipulated that H. would join in drawing the orders provided for in the said contract. *Held*, that said contract did not disclose any agreement on the part of the railroad company to purchase iron rails of plaintiff.—*Baltzer v. Raleigh & A. A. L. R. Co.*, 115 U. S. 634, 6 S. Ct. 216, 29 L. Ed. 505.

(C) SUBJECT-MATTER.

Liquidated damages and penalties, see Damages, 75-79.

Parol or extrinsic evidence, see Evidence, 460, 461.

189. Scope and extent of obligation.

See 11 Cent. Dig. Contracts, §§ 811-845, 900-902, 905.

Where claimant's bid to furnish oats to a military station at a certain rate was accepted for less than half the amount for which bids were invited, and the circular of information to bidders advised him that the bidder whose proposal was accepted would be required to enter into contract to perform it, he will be presumed to have known that he had a successful competitor in the bidding as to the rest of the oats needed, and the fact that his contract provided that he should supply the quantity stated in his bid, more or less, "or such other quantity, more or less, as may be required, from time to time, for the wants of such station," between certain dates, "in such quantities and at such times as the receiving officer may require," will not justify the contention that he was bound to deliver, and the United States to receive, in addition to his bid, all the oats needed at the station between the dates mentioned, and a refusal to receive oats in excess of the amount of his bid is not a breach of the contract.—*Merriam v. United States*, 107 U. S. 437, 2 S. Ct. 536, 27 L. Ed. 531.

A contract to furnish the quartermaster's department all the transportation needed between certain points, at certain rates, for military, Indian, and government stores, will not justify a claim for compensation for Indian supplies, never in the charge of the quartermaster's department for transportation, but transported under a contract by another person with the commissioner of Indian affairs, although during the time some Indian supplies are delivered by the commissioner to the quartermaster's department, and by it turned over to claimant for transportation under his contract.—*Hazlett v. United States*, 115 U. S. 291, 6 S. Ct. 48, 29 L. Ed. 382.

Plaintiff, an electric light company, agreed with defendant, upon payment by him of a certain sum in full of all demands due plaintiff by defendant and another electric light company, to transfer to defendant all shares held by plaintiff in the latter company; also to furnish defendant certain electric lamps and machinery, for which he agreed to pay 12 per cent. of the cost price as rental for one year, to enable him to comply with his contract with a city council for lighting the streets of the city. If the city adopted the light for lighting the streets after the expiration of defendant's contract, he was to pay plaintiff the full cost of the lamps and machinery, and not the rental; but, if the city did not continue the light, they were to be returned to plaintiff. *Held*, that a renewal by the city of the contract with defendant rendered him liable for the full cost to plaintiff, though the territory to be lighted was but a limited portion of the city, and the renewal was not in writing, or for a fixed period.—*Pollak v. Brush*

Electric Ass'n, 128 U. S. 446, 9 S. Ct. 119, 32 L. Ed. 474.

A railroad company leased to certain persons lots belonging to it, and the lessees covenanted to erect thereon an elevator of a specified capacity, and, to the extent of its capacity, to receive and store all grain delivered to it by the lessor. The lessor covenanted to build side tracks to such elevator, and to deliver to it all grain hauled by the lessor, so far as it could control the same. It was further covenanted that "the amount of grain received at said elevator shall be at least five millions of bushels, on an average, for each year during the term of this lease," failing which the lessor should pay the lessees one cent a bushel for the amount of the deficiency. *Held*, that this was not an undertaking to pay in case the elevator failed to store and handle at least 5,000,000 bushels per annum, and the lessor is only liable if the grain brought to the elevator fell short of that amount. —Chicago, M. & St. P. Ry. Co. v. Hoyt, 149 U. S. 1, 13 S. Ct. 779, 37 L. Ed. 625.

A contract whereby one not a party to a suit purchases the subject of it from the plaintiff therein, and agrees to pay the money into court, on a "recognized order thereof," at the end of a year, if the case is not then determined, binds him to co-operate with the plaintiff to procure the necessary order.—Crescent Min. Co. v. Wasatch Min. Co., 151 U. S. 317, 14 S. Ct. 348, 38 L. Ed. 177, affirming decree Wasatch Min. Co. v. Crescent Min. Co., 7 Utah, 8, 24 P. 586.

An Illinois corporation having a contract right to be furnished by a Pennsylvania corporation with patented lamps to be sold by it, exclusively, within a prescribed territory, made a similar contract as to part of its own territory with a local company, and stipulated that it would "not knowingly sell, or permit other parties to sell," lamps for use therein. *Held*, that the scienter was an essential term of the covenant, and that an assignee of the Illinois company could not be held responsible, in the absence of proof of knowledge on the part of itself or its assignor, for sales made within such territory by the Pennsylvania company.—Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. Ed. 411.

A contract recited that B., one of the parties thereto, had discounted a draft drawn on M., which was afterwards protested for non-payment, and that he had been paid a part of said draft, that he recognized R., the other party to the contract, as M.'s assignee in the transaction out of which the draft arose, and B. bound himself to transfer to R. certain stock deposited by M. as collateral security for the draft, as soon as the balance due him on the draft had been satisfied by R., either directly or by a sale of the collateral to be ordered by him. *Held*, that this contract bound R. to pay such balance.—Runkle v. Burnham, 153 U. S. 216, 14 S. Ct. 837, 38 L. Ed. 694, affirming judgment (C. C.) Burnham v. Runkle, 40 F. 408.

Under a contract by several coal companies, by which defendant was made their exclusive representative for sale of their coal in a certain city, and by which they agreed to encourage his trade in all lawful ways, they are bound to fill contracts made by him for future delivery at the market price at the time of the execution of such contracts, and not at the price at the time of delivery.—Shipman v. Straitsville Cent. Min. Co., 158 U. S. 356, 15 S. Ct. 886, 39 L. Ed. 1015.

192. Property and rights therein in general.

See 11 Cent. Dig. Contracts, §§ 846-851.

H. advanced money to O., to be used in the purchase of cattle, and, as security, took a bill of

sale. O., who was indebted to a bank, gave the bank a mortgage on the cattle, and, by agreement of all parties, the cattle were sold to B., who gave his note in payment of the amount of the debt due the bank and H., B. agreeing that, as sales of the cattle were made by him, to pay the proceeds of the note for division pro rata between H. and the bank. Under the agreement, the representative of the bank was to accompany B. and have legal possession of the cattle, and receive the proceeds of the sale, to the amount of B.'s assumed indebtedness. *Held*, that the cattle belonged to B., subject to the right of H. to retake them, if the note was not paid at the time agreed.—City Nat. Bank v. Hunter, 129 U. S. 557, 9 S. Ct. 346, 32 L. Ed. 752.

193. Money, investments, and securities.

See 11 Cent. Dig. Contracts, §§ 894, 895.

B., the owner of the stock and bonds of an uncompleted railroad financially embarrassed, made a contract with A., a finance company, providing for a new railroad corporation, to which should be transferred the property and franchises of the old corporation; the new company to issue stock and \$800,000 of mortgage bonds. A. was to negotiate a loan on the note of B., secured by bonds, and to receive $2\frac{1}{2}$ per cent. commission therefor. It was also agreed that A. should have as commission 10 per cent. of the bonds and stock issued and negotiated, to be payable as the bonds should be negotiated, sold, or exchanged for debts or material required by the road, or otherwise used or disposed of. And, as a further consideration of the premises and the undertaking to market the bonds, A. was to receive 45 per cent. of the stock. After A. had negotiated with M. to make the loan, and pending an agreement between the three parties, A. wrote that it could not afford, for the $2\frac{1}{2}$ per cent. commission on the loan, to use its position to set the road on its feet, and therefore it and M. were treating the negotiation as a sale of the bonds, but that in doing so it extinguished all claims for commissions. Thereafter the three executed and carried into effect a contract providing for the execution by B. of his note to his own order for \$325,000, and the delivery thereof, with \$650,000 of the bonds as collateral security, to M., and appropriating the remaining \$150,000 on bonds as follows: \$65,000 to the purchasers of the notes, as a bonus; \$80,000 to A., "in full payment of all its claims for commissions for negotiating said \$800,000 of said bonds"; \$5,000 to B.,—such appropriations and the delivery of the bonds to be made pro rata as the notes were disposed of. *Held*, that A. was entitled to the \$80,000 of bonds, on the notes being disposed of, its title not depending on the bonds being sold.—Burke v. American Loan & Trust Co., 155 U. S. 534, 15 S. Ct. 214, 39 L. Ed. 251.

194. Loans and advances.

See 11 Cent. Dig. Contracts, §§ 823, 903.

An agreement was entered into between a steamship company, of the first part, certain trustees, of the second part, and certain railroad companies, of the third and fourth parts, for the purpose of securing control of the steamship company. The agreement required the party of the third part to pay to the trustees semiannually certain sums out of its gross receipts. It also required the party of the fourth part, when called on by the trustees, to pay to the trustees "sums not exceeding in all \$600,000, to be used by said parties of the second part for the same purposes as said semiannual payments, and to be pro tanto in lieu thereof, and to be repaid out of said semiannual reservation as herein-after provided; it being understood and agreed that each of said parties of the third part shall

only be liable to reserve and advance or pay to the parties of the second part, or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said parties bear to the entire amount of said gross receipts * * * upon roads owned, leased, or operated by any of said third parties." *Held*, the parties of the third part were not bound to repay to the party of the fourth part any advances made by it, except to the amount of the semiannual payments, for which the parties of the third part were liable.—*Ogdensburgh & L. C. R. Co. v. Nashua & L. R. Co.*, 112 U. S. 311, 5 S. Ct. 161, 28 L. Ed. 740.

197. Buildings and other works.

See 11 Cent. Dig. Contracts, §§ 861-877, 879-889.

198. — In general.

See 11 Cent. Dig. Contracts, §§ 861-877, 879-889.

A contract to furnish "all of the dimension stone that may be required in the construction" of a building does not include dimension stone used in "the approaches or steps leading up into the building."—*United States v. Mueller*, 113 U. S. 153, 5 S. Ct. 380, 28 L. Ed. 946.

Under contracts to furnish stone to the United States for a building, and to saw it and cut and dress it all as "required," the contractor may recover damages for enforced suspensions of, and delays in, the work by the United States, arising from doubts as to the desirability of completing the building with the stone and on the site, which involved the examination of the foundation and the stone by several commissions.—*Id.*

A United States naval engineer prepared a profile plan, showing soil underlying a proposed dry dock to be stable, which was shown to plaintiffs, and considered by them in making their bid for building the dock. They offered to build it "on an available site to be provided by the government"; and the contract was made containing this provision, and that it should be located at such place as should be designated by the defendant, but no other provision as to its location, or the character of the underlying ground. *Held*, that a warranty that the ground was free from quicksand, or was of the character shown by the profile, could not be implied from the terms of the contract, and, hence, that plaintiffs were not entitled to recover damages sustained by the presence of quicksand in the formation of the location selected. Judgment 31 Ct. Cl. 217, affirmed.—*Sirapson v. United States*, 19 S. Ct. 222, 172 U. S. 372, 43 L. Ed. 482.

(D) PLACE AND TIME.

209. Place of payment of compensation.

See 11 Cent. Dig. Contracts, §§ 929-935.

A debt having no special provision in regard to payment is payable at any place. Judgment 51 P. 1100, 58 Kan. 818, reversed.—*Chicago, R. I. & P. Ry. Co. v. Sturm*, 19 S. Ct. 797, 174 U. S. 710, 43 L. Ed. 1144.

212. Reasonable time.

See 11 Cent. Dig. Contracts, §§ 944-953.

A contract providing that, if the party of the second part shall, "by freshets, ice, or other force or violence of the elements, and by no fault of his," be prevented from completing the work at the time agreed upon, such additional time may be allowed for the completion as in the judgment of the party of the first part shall be just and reasonable; while a previous provision of the contract provides that it may be annulled, with the sanction of the chief of engineers, for failure to prosecute the work faithfully and diligently in accordance with the require-

ments,—must be interpreted to mean that the engineer shall determine whether a failure to complete the work within the time limited has been occasioned by freshets or other force of the elements and by no fault of the contractor, and, if so, what additional time shall be just and reasonable. Judgment *Gleason v. United States* 33 Ct. Cl. 65, reversed.—*United States v. Gleason*, 20 S. Ct. 228, 175 U. S. 588, 44 L. Ed. 284.

213. Time of performance.

See 11 Cent. Dig. Contracts, §§ 957-977.

The contract sued on was for the construction and erection of certain machinery on a steamboat to be furnished by plaintiff. The work was to be done in 60 days, but the boat was not completed in time to enable defendants to complete the work in that time. *Held* that, if the boat was thereafter made ready, and defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement, and such additional time as may have been lost by delay in the construction of the boat.—*McGowan v. American Pressed Tan-Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.

215. Duration of contract in general.

See 11 Cent. Dig. Contracts, §§ 996-1009.

A contract between a telegraph company and a business firm recited that, in consideration of the surrender by the firm of a valuable existing telegraphic contract, it should have the privilege of putting up, at its own expense, on the poles of the company, a wire between New York and Philadelphia for its own use and that of its licensees, not exceeding four in number, such licensees not to be telegraph or railroad companies, bankers, or stock or exchange brokers; that, in consideration of being allowed to use the wire when not in use by the firm or its licensees, the company would keep it in working order free of charge; that on the expiration of 10 years the wire should become the property of the company; that thereafter the company would lease it to the firm "for \$600 per annum, payable quarterly," "upon the same terms in all other respects as if the wire had not been given up"; and that no assignment by the firm of their rights under the contract should give their assignees the right to demand a lease of the wire after the expiration of the 10 years. *Held*, that the contract, after the expiration of that time, was not terminable by the company at the end of any year, but gave the firm an absolute right, on paying the yearly rental, to use the wire so long as the company should maintain a telegraph line between the two cities.—*Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 S. Ct. 900, 36 L. Ed. 776.

A contract by which plaintiffs agreed to mine iron ore from defendant's mine by the caving system gave defendant the right of terminating the contract whenever it should decide that such system of mining was "prejudicial to the future welfare and development of said mine." *Held*, that this gave defendant no right to arbitrarily terminate the contract, and, having stopped plaintiffs from continuing the work, without even pretending to have determined that the system would be prejudicial, it was liable in damage for breach of the contract.—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814.

A contract made to run during the corporate life of one of the contracting parties is not extended by the extension of the charter of that party, in the absence of a provision to that effect in the contract.—*Pullman's Palace-Car Co. v. Central Transp. Co.*, 18 S. Ct. 808, 171 U. S. 138, 43 L. Ed. 108, reversing judgment 76 F. 401, 22 C. C. A. 246.

(E) CONDITIONS.

Contract for sale of land, see Vendor and Purchaser, ¶79.

In insurance policies, see Insurance, ¶250-300, 306-366.

In railroad tickets, see Carriers, ¶254.

¶221. Conditions precedent in general.

See 11 Cent. Dig. Contracts, §§ 1015-1032.

The Choctaw Indians, who had a claim against the United States for a large sum of money, contracted with one C. for services to be rendered by him in procuring payment thereof, agreeing to pay him 30 per cent. of the sums actually received. After rendering services during several years, C. died, and his executor, under a power in his will, assigned the contract to another. Neither the efforts of C. nor of his assignee resulted in the payment of any money to the tribe, and thereafter the tribe entered into a new contract with B. and M., to whom was to be paid 30 per cent. of any moneys obtained, with a stipulation, however, that they should pay to the widow of C. 5 per cent. of any amount realized by them. *Held* that, as C.'s contract was contingent upon success, no legal right to any money accrued under it, either to himself or to the assignee.—*Gillilan v. McKee*, 159 U. S. 303, 16 S. Ct. 6, 40 L. Ed. 161.

¶222. Suspensory conditions.

See 11 Cent. Dig. Contracts, §§ 1015-1032.

The "suspensive condition," under the Louisiana Civil Code (article 2021), is the equivalent of the condition precedent at common law.—*City of New Orleans v. Texas & P. Ry. Co.*, 18 S. Ct. 875, 171 U. S. 312, 43 L. Ed. 178.

(F) COMPENSATION.

Claims against United States for extra work, see United States, ¶112.

¶223. Right to compensation in general.

See 11 Cent. Dig. Contracts, §§ 1042-1044.

An architect devoted several years to the preparation of plans for the construction of the congressional library building, but there was no contract entered into with him by any commission or officer empowered to adopt plans, employ architects, or enter upon the construction of the building, until Act April 15, 1886, c. 50 (24 Stat. 12), which adopted the architect's plan. *Held*, that the act did not constitute a contract, but only declared the legislature's intention, and might have been rescinded by either party without liability at any time before the architect entered upon the performance of the work.—*Smithmeyer v. United States*, 147 U. S. 342, 13 S. Ct. 321, 37 L. Ed. 196, affirming judgment 25 Ct. Cl. 481.

¶229. Rate or amount in general.

See 11 Cent. Dig. Contracts, §§ 1045-1057, 1059-1066, 1070, 1077.

Act April 15, 1886, c. 50 (24 Stat. 12), adopted an architect's plans for the congressional library building, and created a commission, which appointed the architect and his draughtsman at fixed salaries. The appointees did not notify congress or the commission before the work began that they intended to charge according to the schedule of the American Institute of Architects, though they had previously notified the chairman of a committee on the library building that they intended to charge for the plans. *Held*, that the value of the services of the appointees in preparing plans prior to their appointment should be measured by their subsequent salaries, and not by the schedule of the American Institute of Architects.—*Smithmeyer v. United States*, 147 U. S. 342,

13 S. Ct. 321, 37 L. Ed. 196, affirming judgment 25 Ct. Cl. 481.

Under a contract with D. for 1,000,000 pounds of corn, K., who had just brought it from the States, delivered 63,000 pounds. It was rejected by the general commanding (and D. was so notified), but was used in the service, and was reported to the commissary general of subsistence as bought from D. at the lowest market rates, certified accounts being given at D.'s contract price. K. received and receipted for the price of the corn "as purchased in open market, by order," etc. The same day D. wrote, asking an extension of time, if he were expected to deliver the 1,000,000 pounds exclusive of this 63,000, and this was granted. D. was paid in full for all else he delivered under the terms of the contract. *Held*, that on the 63,000 pounds he had no claim for the difference between the contract and the market price.—*Dold v. United States*, 154 U. S. 645, 14 S. Ct. 1187, 24 L. Ed. 1103.

¶232. Alterations and extra work.

See 11 Cent. Dig. Contracts, §§ 1071-1084.

The specifications of a contract for rebuilding a government building that had been destroyed by fire provided that certain walls left standing were to remain and be carried up to the required height. Before the plaintiff made his bid for the contract, his agent examined the premises at which those portions of the walls which were considered unfit for a superstructure had been removed by the agents of the government. During the progress of the work the walls were discovered to be further insufficient, and additional portions had to be removed, occasioning increased expense to plaintiff. The contract provided that there should be no extra charge for modifications, unless mutually agreed upon. *Held*, that the contract must be construed with reference to the condition of the walls as left by the government, and when examined by the plaintiff preparatory to making his bid, and that he was entitled to recover for the expense occasioned by the further reduction of them.—*United States v. Gibbons*, 109 U. S. 200, 3 S. Ct. 117, 27 L. Ed. 906.

A clause in a contract for the construction of waterworks in a city providing that no claim for extra work should be made or entertained unless done in obedience to a written order cannot be pleaded as a defense to a claim by plaintiffs for extra work done in pursuance of a change of plan made by the defendant and marked by its engineer in the plans; nor can a clause providing that all loss or damage arising from any unforeseen obstructions or any difficulties that might be encountered in the prosecution of the work should be incurred by plaintiffs without extra charge be held to apply to the obstructions and difficulties at a changed place of crossing a river, resulting from the increased depth of water and quicksand.—*Wood v. City of Ft. Wayne*, 119 U. S. 312, 7 S. Ct. 219, 30 L. Ed. 416.

Where a contract with a city for the construction of a system of waterworks provides that extra work involved by any change of plan shall be paid for at contract rate for work of its class, which rate is calculated at so much per lineal foot, and the city makes a change of plan involving extra work of a much more difficult character than that involved in the original plan upon which the general contract price for the work was based, the actual increase of cost must be paid for.—*Id.*

The erection pursuant to the direction of the government officer in charge of a temporary liftspan, which was the most feasible and least expensive substitute which could be employed after an accident during the performance of a contract to reconstruct and remodel a govern-

ment bridge over the Mississippi river had carried away a substantial part of the unfinished drawspan, together with the false work supporting the old structure, was contemplated by the contract, so as to preclude extra compensation therefor, where the immediate opening of navigation, which would have been seriously interrupted by the restoration of the false work, was imminent, and the contract, although containing many minute stipulations looking to uninterrupted railway service across the bridge, with no express requirement as to the navigability of the river, had fixed a date for the completion of the drawspan sufficiently early ordinarily to insure noninterruption of navigation. Judgment (1903) 38 Ct. Cl. 492, affirmed.—*Phoenix Bridge Company v. United States*, 29 S. Ct. 81, 211 U. S. 188, 53 L. Ed. 141.

233. Reimbursement of expenditures.

See 11 Cent. Dig. Contracts, § 1098.

A contractor for the construction of a public work realizes a profit "under said contract with the United States," within the meaning of an agreement to repay, in the contingency of such profit, certain moneys advanced, where the contractor, without himself doing the work, made a profit out of his arrangement with a subcontractor, although the work was actually constructed at a heavy loss. Judgment (1907) 29 App. D. O. 571, affirmed.—*Sand Filtration Corp. of America v. Cowardin*, 29 S. Ct. 509, 213 U. S. 360, 53 L. Ed. 833.

234. Deductions and offsets.

See 11 Cent. Dig. Contracts, §§ 1099, 1100.

A contract for the sale of a ranch and cattle for a certain price provided for delivery of possession July 15, 1885, and that, if the number of cattle delivered exceeded or fell short of a certain number, the purchaser should pay a certain price per head for the excess, or be credited on the purchase price with that price per head for the deficiency. It was provided that the consideration should be paid partly in cash and partly by notes and the remainder by a conveyance by the purchaser to the sellers on July 15, 1885, of certain realty. It appeared that he could not convey a clear title to the realty on that day. Held, that the stipulated price of the realty then became a cash payment, and that any credit for deficiency in cattle delivered was applicable on it to its extent, and the remainder on the amount of the notes to be executed on that day, there being no provision for repayment of any part of the sums paid before then.—*McGillin v. Bennett*, 132 U. S. 445, 10 S. Ct. 122, 33 L. Ed. 422, affirming judgment (C. C.) *Bennett v. McGillan*, 28 F. 411.

235. Mode of making compensation.

See 11 Cent. Dig. Contracts, §§ 1101-1116.

Contract construed as to whether payment was to be made in currency or current foreign money.—*City of San Juan v. St. John's Gas Co.*, 25 S. Ct. 108, 195 U. S. 510, 49 L. Ed. 299, 1 Ann. Cas. 796.

III. MODIFICATION AND MERGER.

See Bills and Notes, 137; United States, 72.

237. Consideration for modification.

See 11 Cent. Dig. Contracts, §§ 1119-1122.

Under a contract of agistment, cattle were to be wintered on hay, straw, and stalk fields, and in summer to be fed on corn, and the defendant agreed to so feed them that they would increase in weight an average of 450 pounds each before the time for delivery. During the winter several of the cattle died, and it was apparent that others would unless better fed, whereupon it was agreed that they should be let into the corn, and that defendant should be released from his obligation to increase the weight of the cattle to the extent originally agreed. Held, that the giving of more nutritious

food by the defendant, and his discharge by the plaintiffs from obligation to increase the weight as originally stipulated, constituted a good consideration for the substituted contract.—*Teal v. Bilby*, 123 U. S. 572, 8 S. Ct. 239, 31 L. Ed. 263.

242. Extension of time.

See 11 Cent. Dig. Contracts, § 1127.

Previous delinquencies of contractors, and the futility of previous extensions, may be taken into consideration by an engineer in determining whether a further extension of time for performance should be allowed. Judgment *Gleason v. United States*, 33 Ct. Cl. 65, reversed.—*United States v. Gleason*, 20 S. Ct. 228, 175 U. S. 588, 44 L. Ed. 284.

The conclusion of an engineer as to the right of a contractor to an extension of time is not prevented from constituting a judgment, within the meaning of a contract provision referring the matter to his judgment, merely because the court reaches a different conclusion.—Id.

The basis of the decision of an engineer in the exercise of his power to determine the right of a contractor to an extension of time because of interruption by the elements without his fault need not be expressly stated in order to give efficacy to his decision.—Id.

246. Operation and effect.

See 11 Cent. Dig. Contracts, §§ 1131-1138.

Plaintiffs contracted to grade a railroad for defendant, the agreement consisting of specifications and profile of the work, proposals by plaintiffs, and acceptance thereof by defendant. During the progress of the work, owing to modifications of the plan by defendant, omitting all trestlework, and making a continuous embankment, with underlying drainpipes, defendant further modified the plan by changing the excavations along one side of the road, from which the earth was taken to form the embankment, so as to form a continuous drain of over four miles in length, which should have a uniform bottom and sides of a given pitch, and which should increase in width and depth at a given rate. In order to form the drain from the excavations, it was necessary to haul the earth from the high ground, where the embankment was low, to the low grounds, where the embankment was high, in many places necessitating long hauls; whereas, but for the drain, the earth for the embankments would have been taken directly from the sides. Moreover, where the drain had to be dug deep, it was more expensive on account of the increased hardness of the earth. Held, that the change in the ditch created a feature in the work to be done so different from that originally contracted for as to put plaintiffs in a position to make, as to that feature, a new contract.—*Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934.

IV. RESCISSION AND ABANDONMENT.

See Cancellation of Instruments.

Rescission of compromise and settlement, see Compromise and Settlement, 18.

Rescission of contract for municipal water supply, see Waters and Water Courses, 200.

Rescission of contract of infant, see Infants, 31, 58.

Rescission of contract of sale, see—Sales, 108, 112-121.

Vendor and Purchaser, 106-126.

Rescission of insurance policy, see Insurance, 229-246.

257. Grounds for rescission by party.

See 11 Cent. Dig. Contracts, §§ 1153-1159.

⌚261. — Failure of performance or breach.

See 11 Cent. Dig. Contracts, §§ 1174-1180.

An instruction that if defendants interfered with, hindered, and prevented plaintiffs in the performance of the contract between them to such an extent as to render performance difficult, and greatly decrease plaintiffs' profits, then such interference would justify plaintiffs in abandoning the contract and suing for damages, is not open to the objection that it permits a party to rescind a contract, and at the same time recover damages for its nonperformance; for it merely asserts the right of one party to treat the contract as broken when the other party is guilty of a breach.—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814.

V. PERFORMANCE OR BREACH.

Affecting right of contractor to mechanic's lien, see *Mechanics' Liens*, ⌚93.

Covenants or conditions in leases, see *Landlord and Tenant*, ⌚102-108.

Damages, see *Damages*, ⌚120-123, 175, 189. Enforcement of specific performance, see *Specific Performance*.

Excuse for failure to perform contract for water supply, see *Waters and Water Courses*, ⌚200.

Excuses from liability of contractor for loss on destruction of incomplete public work, see *United States*, ⌚74.

Liquidated damages and penalties, see *Damages*, ⌚75-79.

Restraining breach, see *Injunction*, ⌚57-59.

Time of performance as affecting application of statute of frauds, see *Frauds, Statute of*, ⌚48-50.

Water company's liability to taxpayer for breach of contract of city, see *Waters and Water Courses*, ⌚206.

Particular classes of contracts.

See—

Bills and Notes, ⌚426-429.

Bonds, ⌚109, 110.

Brokers, ⌚47-58.

Carriers, ⌚268-278.

Chattel Mortgages, ⌚240.

Compromise and Settlement, ⌚20.

Covenants, ⌚87-100.

Deeds, ⌚159-162.

Injunction, ⌚234, 235.

Insurance, ⌚306-366.

Master and Servant, ⌚35.

Mortgages, ⌚298-316.

Sales, ⌚155-181.

United States, ⌚73.

Vendor and Purchaser, ⌚135-186.

Waters and Water Courses, ⌚200.

⌚278. Performance of conditions.

See 11 Cent. Dig. Contracts, §§ 1207-1213.

Where plaintiff agrees to transfer certain corporate stock to defendant, with certain electric lamps and machinery, for which defendant is to pay a rental for one year and the cost price thereof on a certain contingency, plaintiff may recover the cost price on the happening of the contingency, without having transferred the stock to defendant; the covenants being independent.—*Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 9 S. Ct. 119, 32 L. Ed. 474.

⌚279. Tender of performance.

See 11 Cent. Dig. Contracts, §§ 1233-1248.

A railroad company leased to certain persons lots belonging to it, and the lessees covenanted to erect thereon an elevator of a specified capacity, and, to the extent of its capacity,

to receive and store all grain delivered to it by the lessor. The lessor covenanted to build side tracks to such elevator, and to deliver to it all grain hauled by the lessor, so far as it could control the same. It was further covenanted that "the amount of grain received at said elevator shall be at least five millions of bushels, on an average, for each year during the term of this lease," failing which the lessor should pay the lessees one cent a bushel for the amount of the deficiency. *Held*, that there was no breach of the covenant where the railroad company tendered more than 5,000,000 bushels during the year, but the elevator was unable to receive it because the amount already delivered had been allowed by the shippers to remain in store, the railroad company having no control in this matter.—*Chicago, M. & St. P. Ry. Co. v. Hoyt*, 149 U. S. 1, 13 S. Ct. 779, 37 L. Ed. 625.

⌚283. Approval or decision of architects, arbitrators, or others.

See 11 Cent. Dig. Contracts, §§ 1290-1306, 1308-1351.

⌚284. — In general.

See 11 Cent. Dig. Contracts, §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351.

A contract for the construction of a railroad provided that the company's engineer should, in all cases, determine questions relating to its execution, including the quantity of the several kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that "whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within 30 days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which, according to his contract, shall be due." *Held*, that the contractor could not maintain an action for compensation without alleging the making of such certificate, or facts entitling him to sue without it; and that, in the absence of fraud, or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, such estimate by the engineer was conclusive upon the parties.—*Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 5 S. Ct. 1035, 29 L. Ed. 255.

Where a contract to grade a railroad provides that the work is to be done under the supervision of the chief engineer and his assistant, whose estimate of quantities is to be "final and conclusive upon the parties," and that the contractor shall receive monthly payments on the certificate of the engineer "for work done," the railroad company cannot, after accepting the work and the last monthly estimate of the engineer, have the work re-estimated by another subordinate engineer. The previous monthly estimates, and the acceptance of the entire work with the last monthly one, are conclusive in the absence of proof of fraud or bad faith on the part of the engineers making them; mere mistakes, incompetency, or negligence not being grounds for going behind them.—*Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 11 S. Ct. 290, 34 L. Ed. 917, affirming judgment (C. C.) 38 F. 304.

The acceptance of contract work biweekly as it progresses, by the superintendent of a corporation, as done to his "satisfaction," in compliance with the terms of the contract, and a final acceptance of the whole in writing, is conclusive on the company, in the absence of fraud or mistake on the part of the superintendent.—*Sheffield & Birmingham Coal, Iron & Railway Co. v. Gordon*, 151 U. S. 235, 14 S. Ct. 343, 38 L. Ed. 164.

286. — Acceptance or approval of work.

See 11 Cent. Dig. Contracts, § 1305.

A contract for the erection of furnaces provided that the work should be examined by the company's engineer biweekly, and finally accepted if to his satisfaction. *Held*, that the acceptance of the work by the superintendent was conclusive on the owner, in the absence of fraud or mistake on the part of the superintendent.—*Sheffield & B. Coal, Iron & Railway Co. v. Gordon*, 151 U. S. 285, 14 S. Ct. 343, 38 L. Ed. 164.

287. — Certificates in general.

See 11 Cent. Dig. Contracts, §§ 1308, 1309, 1312-1316, 1318-1338, 1340-1342, 1344-1346, 1348, 1350, 1351.

The architect's certificate of completion according to the contract and its plans and specifications is not conclusive, so as to bind the owner or relieve the contractor from performance, where the contract, although providing that the contractor must obtain such certificate before he is entitled to payment, contains no provision that such certificate shall be final and conclusive between the parties, but instead provides that such certificate shall not lessen the responsibility of the contractor, nor exempt him from liability to replace defective work, contains the positive agreement of the contractor to perform the work called for in the specifications in the best and most workmanlike manner, and provides that final payment is to be made only when the buildings are completed in accordance with the agreement and the plans and specifications. Judgment (1906) 27 App. D. C. 210, affirmed.—*Mercantile Trust Co. v. Hensley*, 27 S. Ct. 535, 205 U. S. 298, 51 L. Ed. 811, 10 Ann. Cas. 572.

288. Delay in performance.

See 11 Cent. Dig. Contracts, §§ 1372-1397.

289. — In general.

See 11 Cent. Dig. Contracts, §§ 1372-1381, 1384, 1395.

A clause in a contract, for constructing a system of waterworks in a city, providing that the contractors shall have no claim upon the city for any delay in the delivery of pipes or other materials from the manufacturers, will not apply to the delay and expenses resulting to contractors from the necessity of altering defective pipe castings furnished by the city, the defects of which could not be detected till they were being put in place.—*Wood v. City of Ft. Wayne*, 119 U. S. 312, 7 S. Ct. 219, 30 L. Ed. 416.

303. Excuses for nonperformance or defects.

See 11 Cent. Dig. Contracts, §§ 1409-1442.

Defendant accepted in writing an offer of the vice president of a railroad company to buy 1,000 tons of old rails. The vice president the same day accepted the order. Some days later the vice president forwarded to defendant a ratification of the sale, which stated the ton to be "of 2,000 pounds." Defendant answered that the sale needed no ratification, that "per ton" meant a ton of 2,240 pounds, and asked for a reply. None was received until the time for delivery of the rails, when a tender was made of 1,000 tons, at gross weight of "2,240 pounds per ton." *Held*, that the contract had not been repudiated, and defendant was bound to receive the rails.—*Wheeler v. New Brunswick & O. R. Co.*, 115 U. S. 29, 5 S. Ct. 1061, 1160, 29 L. Ed. 841.

A party may, by absolute contract, bind himself to perform things which subsequently become impossibilities, or to pay damage for their nonperformance, and such construction is to be put upon an unqualified undertaking when the event which causes the impossibility might have been foreseen and guarded against, or when the impossibility arises from the act

or default of the promisor. But when the event is of such a character that it cannot reasonably be supposed to have been in contemplation of the contracting parties, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens.—*Chicago, M. & St. P. Ry. Co. v. Hoyt*, 149 U. S. 1, 13 S. Ct. 779, 37 L. Ed. 625.

Failure to perform an absolute undertaking to grind sugar cane during the grinding season is not excused by the repeated breaking down of the machinery.—*Porto Rico Sugar Co. v. Lorenzo*, 32 S. Ct. 133, 222 U. S. 481, 56 L. Ed. 277.

306. Completion by other party.

See 11 Cent. Dig. Contracts, §§ 1523-1533.

The amount necessarily expended by an owner to complete a building under an adjustment by the architect, after a strike, should be credited against the contract price, where the contract provides that the owner shall have full authority to adjust the matter.—*David Lupton's Sons Co. v. Automobile Club of America*, 32 S. Ct. 711, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, 699.

312. Acts or omissions constituting breach in general.

See 11 Cent. Dig. Contracts, § 1279½.

H. advanced money to O., to be used in the purchase of cattle, and, as security, took a bill of sale. O., who was indebted to a bank, gave the bank a mortgage on the cattle, and by agreement of all parties the cattle were sold to B., who gave his note in payment to the amount of the debt due the bank and H.; B. agreeing, as sales of the cattle were made by him, to pay the proceeds of the note for division pro rata between H. and the bank. Under the agreement, a representative of the bank was to accompany B., have legal possession of the cattle, and receive the proceeds of the sale, to the amount of B.'s assumed indebtedness. *Held*, that the taking possession of the cattle by H. under the writ of sequestration, before the expiration of the time agreed upon for the payment of the note, was a breach of contract on the part of H.—*City Nat. Bank v. Hunter*, 129 U. S. 557, 9 S. Ct. 346, 32 L. Ed. 752.

313. Renunciation.

See 11 Cent. Dig. Contracts, § 1279.

An unqualified and positive refusal to perform a contract, though the performance thereof is not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach, which will entitle the injured party to bring his action at once. Judgment, 91 F. 345, 33 O. C. A. 550, and 84 F. 565, affirmed.—*Roehm v. Horst*, 20 S. Ct. 780, 178 U. S. 1, 44 L. Ed. 953.

316. Waiver of breach.

See 11 Cent. Dig. Contracts, §§ 1282-1287, 1295, 1298-1400, 1490-1491.

A contractor for the construction of a mill having completed the work, except as to certain corn rolls, which did not work satisfactorily to the owner, the latter wrote to the contractor a letter stating that, whenever the rolls should do satisfactory work, he would be ready to pay for the entire work. *Held*, that this was a waiver of the time fixed by the contract for the completion of the entire work, and that a completion within a reasonable time thereafter was sufficient.—*Van Stone v. Stillwell & Pierce Mfg. Co.*, 142 U. S. 123, 12 S. Ct. 181, 35 L. Ed. 961.

Fines or penalties for delay or failure to deliver articles under a contract cannot be recovered, if strict performance by plaintiff has

been prevented, or waived by defendant. Judgment, 15 App. D. C. 198, affirmed.—District of Columbia v. Camden Iron Works, 21 S. Ct. 680, 181 U. S. 453, 45 L. Ed. 948.

An action of covenant on a contract to recover the price of articles delivered under it may be brought, although there has not been full performance, where that which has been delivered has been accepted in part performance, and further performance has been waived.—Id.

◀319. Rights and liabilities on partial performance.

See 11 Cent. Dig. Contracts, §§ 1458, 1476, 1477, 1479, 1493-1507.

One who, after partially performing a contract, is wrongfully prevented by the other contracting party from completing it, may recover actual expenditures made by him on account of such contract, and also damages for loss of profits.—United States v. Behan, 110 U. S. 338, 4 S. Ct. 81, 28 L. Ed. 168.

A party to a contract, who, after partial performance by the other party, wrongfully prevents such other party from completing it, is estopped to deny that the other party has been damaged to the extent of his actual expenditures on account of the contract.—Id.

◀320. Rights and liabilities on defective performance.

See 11 Cent. Dig. Contracts, §§ 1459, 1469, 1493-1527.

Defendant, being solicited late in the season to buy ice from plaintiff, who was overstocked and in danger of a total loss, received a cargo under a contract to return it "next year from our houses." Next year the price of ice was very high, and defendant replied to plaintiff's demand for the ice in July that it was inequitable to expect the return of it at that time, saying, "We must therefore decline to ship the ice for you this season," and claiming the right to pay for it in cash at the market price when it was received. After further correspondence, he concluded, July 15th: "We beg you to consider anew all the circumstances of the transaction. * * * We will be glad to hear from you in reply, but would be more pleased to have a personal interview." Held not such a refusal to perform the contract as would amount to a breach thereof; that, in any event, defendant was entitled to return the ice at any time during the whole shipping season, and an action brought immediately after the refusal of July 15th was premature.—Dingley v. Oler, 117 U. S. 490, 6 S. Ct. 850, 29 L. Ed. 984.

VI. ACTIONS FOR BREACH.

See Assumpsit, Action of.

Damages, see Damages, ▶10, 11, 120-123, 175, 189.

Damages, liquidated damages and penalties, see Damages, ▶75-79.

Distinguished from action on tort, see Action, ▶26, 27.

Due process of law, see Constitutional Law, ▶308.

Effect of adequacy of remedy on jurisdiction in equity, see Equity, ▶48.

Jurisdiction of admiralty of suits on maritime contracts, see Admiralty, ▶9, 10.

Parol or extrinsic evidence, see Evidence, ▶386-424, 429-434, 448-463.

Restraining breach, see Injunction, ▶57-59.

Separate or subsequent oral agreement affecting written contract, see Evidence, ▶440-445.

Splitting cause of action, judgment as bar to another action, see Judgment, ▶596.

Statutory limitations, see Limitation of Actions, ▶21-25, 48-54.

◀324. Nature and form of remedy.

See 11 Cent. Dig. Contracts, §§ 1549-1557.

H. advanced money to O. to be used in the purchase of cattle, and as security took a bill of sale. O., who was indebted to a bank, gave the bank a mortgage on the cattle, and by agreement of all parties the cattle were sold to D., who gave his note in payment of the amount of the debt due the bank and H., D. agreeing, as sales of the cattle were made by him, to pay the proceeds of the note for division pro rata between H. and the bank. Under the agreement, a representative of the bank was to accompany D., have legal possession of the cattle, and receive the proceeds of the sale to the amount of D.'s assumed indebtedness. Held, that the taking of possession of the cattle by H. under a writ of sequestration before the expiration of the time agreed upon for the payment of the note was a breach of contract for which D. could recover damages by way of reconvention in the action of sequestration.—City Nat. Bank v. Hunter, 129 U. S. 557, 9 S. Ct. 346, 32 L. Ed. 752.

◀325. What law governs.

See 11 Cent. Dig. Contracts, §§ 1558-1562; 37 Cent. Dig. Parties, § 2.

An action in Illinois by an Illinois railroad corporation, to set aside a lease to a railroad corporation of Indiana, is governed not by the law of the forum, but by the law of the contract.—St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, affirming decree (C. C.) 33 F. 440.

◀327. Conditions precedent.

See 11 Cent. Dig. Contracts, §§ 1563-1570; 1 Cent. Dig. Action, §§ 62, 72.

A person who agrees to save another harmless as to one-half the amount of a trust-deed note upon which the latter is liable in full may be sued by the latter for a breach of his contract in failing to pay at maturity, although the latter has only discharged the trust-deed note by giving to the holder his individual note, the holder retaining the trust-deed note as collateral security therefor.—Clark v. Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. Ed. 1157.

◀328. Defenses.

See 11 Cent. Dig. Contracts, §§ 1571-1584.

An agreement between plaintiff and defendant recited that the latter had on hand claims for money believed to be due from the government to postmasters upon a readjustment of salaries under Act June 12, 1866, and was in need of funds to prosecute said claims, and to urge the passage of bills then pending in congress looking to their settlement; and by the agreement, defendant, for the consideration of \$2,500, agreed to "prosecute to collection" said claims or others which defendant might acquire, and to allow plaintiff one-fourth of the fees so obtained by him. The bill then pending failed of passage, but a practically similar one was passed in 1883, two years later. Held, that the fact that the postmaster general, in readjusting salaries in conformity with the act of 1866 and under the authority conferred by the act of 1883, placed on the former act a construction different from that placed on it by defendant at the time of the agreement, so as to give a different status to many of the claimants under that act, did not affect plaintiff's right to the one-fourth interest in the fees collected by defendant.—Spalding v. Mason, 161 U. S. 375, 16 S. Ct. 592, 40 L. Ed. 738.

◀331. Pleading.

See 11 Cent. Dig. Contracts, §§ 1615-1753.

⚡332. — Declaration, complaint, or petition in general.

See 11 Cent. Dig. Contracts, §§ 1615-1639.

A written agreement between a company making sewing machines, and a consignee to receive and sell them on commission, provided that the commission should be calculated on the retail prices for which the machines should be sold, as reported by the consignee, and that attachments should be sold to the consignee at the lowest wholesale rates. The proceeds of sales of machines, beyond the commission, belonged to the company. In a suit by it against the consignee, and a person liable with him on a bond for his indebtedness, to recover such proceeds and the price of attachments, the complaint set forth schedules showing the retail price, as reported, of each machine sold, and the excess of money, beyond commission, retained by the consignee, and the price of each attachment sold to the consignee. *Held*, that the complaint was sufficient.—*Streep v. Victor Sewing-Mach. Co.*, 112 U. S. 676, 5 S. Ct. 327, 28 L. Ed. 852.

⚡346. — Issues, proof, and variance.

See 11 Cent. Dig. Contracts, §§ 1714, 1718-1751.

Code Iowa 1873, § 2715, provides that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he performed all the conditions on his part." Section 2717 provides that "if either of the allegations contemplated in the three preceding sections is controverted it shall not be sufficient to do so in terms contradictory of the allegation but the facts relied on shall be specifically stated." *Held*, that where a plaintiff alleges general performance by him of his obligations under a contract, a denial in the answer of "each and every allegation in the petition," will not put in issue a condition precedent without performing

which plaintiff would have had no right of action.—*Halferty v. Wilmering*, 112 U. S. 713, 5 S. Ct. 364, 28 L. Ed. 858.

⚡347. Evidence.

See 11 Cent. Dig. Contracts, §§ 1754-1784, 1788-1798, 1809, 1811-1814, 1817-1823.

⚡348. — Presumptions and burden of proof.

See 11 Cent. Dig. Contracts, §§ 1095, 1754-1759, 1762-1780.

In an action on a bond to secure the performance of a contract to furnish to a military station such quantity of grain as may be required, not exceeding a quantity named, to be delivered as may be required for the wants of the station, in such quantities and at such times as the receiving officer may require, the breach assigned being failure to carry out any of the stipulations of the agreement, plaintiffs have the burden of showing demand and failure to perform.—*United States v. Corwin*, 129 U. S. 381, 9 S. Ct. 318, 32 L. Ed. 710.

⚡349. — Admissibility.

See 11 Cent. Dig. Contracts, §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818.

A rule of court that the execution of an instrument cannot be impeached, unless denied by affidavit, will not prevent defendant from showing that a contract dated "January 2" was really executed on Sunday, January 1st, and is therefore invalid; nor that the copy of another contract, executed in duplicate, which was offered in evidence, differed materially from the duplicate which he had.—*Ames v. Quimby*, 106 U. S. 342, 1 S. Ct. 116, 27 L. Ed. 100.

CONTRADICTION.

See cross-references under Impeachment.

CONTRIBUTION.

Scope-Note.

[INCLUDES reimbursement of one who has discharged an obligation or suffered a loss for which another or others are liable with him, to the extent of the proportionate share of such other or others; and rights, liabilities, and remedies of the parties in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

⚡2. Common interest or liability.

5. — Joint wrongdoers.

Cross-References.

Admiralty jurisdiction, see Admiralty, ⚡7.
To general average, see Shipping, ⚡186-195.

⚡2. Common interest or liability.

See 11 Cent. Dig. Contrib. §§ 2-9.

⚡5. — Joint wrongdoers.

See 11 Cent. Dig. Contrib. §§ 6-9.

A terminal company whose negligence toward one of its employes in failing, by a prop-

er inspection to discover a defective brake on a car delivered to it by a railroad company has been established by a competent tribunal, cannot enforce contribution from the railroad company because of the latter's like neglect of duty.—*Union Stock Yards Co. of Omaha v. Chicago, B. & Q. R. Co.*, 25 S. Ct. 226, 198 U. S. 217, 49 L. Ed. 453, 2 Ann. Cas. 525.

CONTRIBUTORY INFRINGEMENT.

See Patents, ¶259.

CONTRIBUTORY NEGLIGENCE.

See Negligence, ¶82-101, 113, 122, 132, 141.

CONTROVERSY.

Amount in controversy as affecting jurisdiction of courts, see—
 Appeal and Error, ¶45-65.

Amount in controversy as affecting jurisdiction of courts, see—
 Courts, ¶326-330.
 Removal of Causes, ¶71-76.
 Existence of actual controversy as requisite to appellate jurisdiction, see Appeal and Error, ¶19.
 Submission to arbitrators, see Arbitration and Award.
 Want of actual controversy ground for dismissal of appeal or other proceeding for review, see Appeal and Error, ¶781.

CONVERSION.*Scope-Note.*

[INCLUDES changes in the nature of property as real or personal, whether actual, as by exercise of power of eminent domain, sale for partition, foreclosure, etc., investment of funds in land, etc., or constructive, as necessary to carry into effect directions or agreements contained in deeds, wills, settlements, contracts, or other instruments in writing; nature, requisites, incidents, operation, and effect of such changes; and reconversion by act of the parties or by operation of law.

[For related matters under other topics, see cross-references following.]

Cross-References.

Chattels into realty, see Fixtures.

Wrongful conversion of personal property, see Trover and Conversion.

¶2. What law governs.

The equitable conversion of real property into personalty by will is a matter within the exclusive province of the courts of the state in which the land lies to determine, although the will was made and has been probated at the domicile of the testator in another state, where it is construed to work such conversion of the real property wherever situated, and it

is immaterial that the executor has not assumed to make any conveyance of the property. Judgment, Appeal of Clarke, 40 A. 111, 70 Conn. 483, affirmed.—Clarke v. Clarke, 20 S. Ct. 873, 178 U. S. 186, 44 L. Ed. 1028.

CONVEYANCES.

See Assignments; Covenants; Deeds, etc.

CONVICTS.*Scope-Note.*

[INCLUDES persons adjudged guilty of crime; disabilities resulting from such conviction; and regulation of convicts under sentence, and of their labor.

[For related matters under other topics, see cross-references following.]

Cross-References.

See Pardon.

Competency as witnesses, see Witnesses, ¶47-49.

Due process of law, see Constitutional Law, ¶270.

Equal protection of laws, see Constitutional Law, ¶250.

Former jeopardy, see Criminal Law, ¶163.

Nature and extent of punishment, see Criminal Law, ¶1208-1221.

Privileges and immunities of citizens of United States, see Constitutional Law, ¶206.

¶11. Convict bonds.

See 11 Cent. Dig. Convicts, §§ 30, 31.

Laws Ariz. 1895, pp. 20, 22, authorizing the board of control of penal and reformatory

institutions of the territory to contract for the services of convicts, require that a sufficient bond be given by the person leasing the labor of the inmates of such institutions for the faith-

ful performance of his contract. Held that, where it did not appear that such bond had been executed by a contractor, he could not compel the superintendent of prisons to deliver convicts under the contract.—*Nugent v. State of Arizona Imp. Co.*, 19 S. Ct. 461, 173 U. S. 838, 43 L. Ed. 721.

COOLING TIME.

Heat of passion as element of manslaughter, see Homicide, ¶40.

COPY.

Certified copies as evidence, see Evidence, ¶341-349.

COPYRIGHTS.

Scope-Note.

[INCLUDES nature and incidents of the exclusive right of an author or other proprietor of a literary work or similar production to multiply copies thereof, secured by grant of copyright; proceedings to obtain such copyright; exercise, protection, and enforcement of the exclusive rights granted; and infringements of such rights, and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Acquisition.

- ¶2. Constitutional and statutory provisions.
- 3. Subjects of copyright.
- 4. — In general.
- 9. — Engravings, cuts, prints, or photographs.
- 10. — Paintings, drawings, or chromos.
- 16. Literary or artistic qualities of work.
- 19. Persons entitled to copyright.
- 20. — In general.
- 21. — Citizens or residents.
- 23. — Assigns.
- 25. Proceedings to obtain copyright.
- 27. — Deposit of title or description of work.
- 28. — Deposit of copies of work.
- 29. — Inserting or inscribing notice.
- 30. — Penalties for inserting or impressing false notice.
- 31. — Publication.
- 32. Publication before deposit of title or copies of work.
- 35. Extent of rights acquired.
- 36. — In general.
- 39. — Protection as to subject-matter.

II. Title, Conveyances, Contracts, and Regulations.

- ¶43. Assignments.
- 45. — Requisites and validity.

III. Infringement.

(A) WHAT CONSTITUTES INFRINGEMENT.

- ¶53. Copying constituting infringement in general.
- 54. Books or other literary works.
- 55. — In general.
- 66. Musical compositions.

(B) ACTIONS.

- ¶69. Actions at law for damages.
- 70. Penalties and actions therefor.
- 71. Forfeitures of copies, sheets, or plates.
- 72. Suits in equity.
- 77. — Persons liable.
- 83. — Evidence.
- 86. — Permanent injunction.
- 87. — Damages and profits.

*Cross-References.*See *Literary Property*.

Name of copyrighted work as subject of trade-

name, see *Trade-Marks and Trade-Names*,
◀13.**I. NATURE AND ACQUISITION.****◀2. Constitutional and statutory provisions.**

See 11 Cent. Dig. Copyr. § 1.

Construing the exclusive right given to authors by Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1106 (U. S. Comp. St. 1901, p. 3406), to dramatize their works, as extending to the public exhibition of moving pictures of the incidents of a copyrighted work, does not render the statute invalid, as exceeding the power given to Congress by Const. art. 1, § 8, to secure to authors for a limited time the exclusive right to their writings.—(1911) *Kalem Co. v. Harper Bros.*, 32 S. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, affirming decree (1909) *Harper & Bros. v. Kalem Co.*, 169 F. 61, 94 C. C. A. 429.

◀3. Subjects of copyright.

See 11 Cent. Dig. Copyr. §§ 2-10, 13.

◀4. — In general.

See 11 Cent. Dig. Copyr. §§ 2, 9, 10.

That clause of the constitution which authorizes congress to secure to authors and inventors, for a limited time, the exclusive right to their respective writings and discoveries, does not include mere labels, whose object is only to indicate the contents of the package to which they all are affixed.—*Higgins v. Keuffel*, 140 U. S. 428, 11 S. Ct. 731, 35 L. Ed. 470, affirming decree (C. C.) 30 Fed. 627.

◀9. — Engravings, cuts, prints, or photographs.

See 11 Cent. Dig. Copyr. § 7.

Under Const. art. 1, § 8, empowering congress to secure "to authors and inventors the exclusive right to their respective writings and discoveries," congress can authorize copyright of photographs, so far as they embody original intellectual conceptions of the author.—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 4 S. Ct. 279, 28 L. Ed. 349.

Where a photographer so contrives the pose, costume, and expression of his subject as to produce an original and graceful effect, the picture is entitled to the benefit of the act providing for copyright of photographs.—*Id.*

Printing and engraving, though not for a mechanical end, are not excluded from the useful arts, which congress is empowered by the constitution to promote by copyright laws. Judgment, *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 44 C. C. A. 296, reversed.—*Bleistein v. Donaldson Lithographing Co.*, 23 S. Ct. 298, 188 U. S. 239, 47 L. Ed. 460.

Pictorial illustrations are none the less within the protection of the copyright law (Rev. St. U. S. § 4952 [U. S. Comp. St. 1901, p. 3406]), because they are drawn from real life.—*Id.*

◀10. — Paintings, drawings, or chromos.

See 11 Cent. Dig. Copyr. §§ 2, 12.

The attempted duplication of an existing copyright in a painting by depositing the same photograph of the same painting under a new title, and with but a slight change in description, is void, and cannot be made the basis of

a suit for infringement. Judgment (1907) 157 F. 186, 84 C. C. A. 634, affirmed.—*Caliga v. Inter Ocean Newspaper Co.*, 30 S. Ct. 38, 215 U. S. 182, 54 L. Ed. 150.

◀16. Literary or artistic qualities of work.

See 11 Cent. Dig. Copyr. § 17.

Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, are proper subjects of copyright, under Rev. St. U. S. § 4952 [U. S. Comp. St. 1901, p. 3406], as amended by Act 1874, § 8, 18 Stat. 78, 79, c. 301 [U. S. Comp. St. 1901, p. 3412], as "pictorial illustrations," even assuming that only such illustrations as are "connected with the fine arts" are within the protection of such laws. Judgment, *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 44 C. C. A. 296, reversed.—*Bleistein v. Donaldson Lithographing Co.*, 23 S. Ct. 298, 188 U. S. 239, 47 L. Ed. 460.

◀19. Persons entitled to copyright.

See 11 Cent. Dig. Copyr. §§ 12-21.

◀20. — In general.

See 11 Cent. Dig. Copyr. § 19.

A state cannot properly be called a citizen, within the meaning of Rev. St. §§ 4952, 4954, conferring the copyright upon any citizen "who shall be the author, inventor, designer, or proprietor of any book," and upon his representatives or assigns.—*Banks v. Manchester*, 128 U. S. 244, 9 S. Ct. 36, 32 L. Ed. 425, affirming (C. C.) 23 F. 143.

A court reporter, though a sworn public officer, receiving a fixed salary for his labors, is not, in the absence of statute, deprived of any privilege of taking out a copyright, which he would otherwise have.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

◀21. — Citizens or residents.

See 11 Cent. Dig. Copyr. § 20.

The action of the President is a condition of the right of a foreign citizen to the benefits of Act March 3, 1891, c. 565, § 13, 26 Stat. 1110 (U. S. Comp. St. 1901, p. 3417), giving the right of copyright to citizens of a foreign state when such state permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party, the existence of such condition to be determined by the President. Judgment (1907) 155 F. 116, 83 C. C. A. 576, affirmed.—*Bong v. Alfred S. Campbell Art Co.*, 29 S. Ct. 623, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

◀23. — Assigns.

See 11 Cent. Dig. Copyr. § 22.

The judge who, in his judicial capacity, prepares the headnotes, statement of the case, and opinion, cannot be regarded as their author or proprietor, within the provisions of Rev. St. §§ 4952, 4954, so as to confer any title by assignment on the state, or any other person, sufficient to authorize a copyright to it or him as

the assignee of the author or proprietor.—*Banks v. Manchester*, 128 U. S. 244, 9 S. Ct. 36, 32 L. Ed. 425, affirming (C. C.) 23 F. 143.

An artist may, before publication of his painting assign, independently of the ownership of the painting itself, the right or privilege of taking out the copyright secured by Rev. St. U. S. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3406], to the "author, inventor, designer, or proprietor, * * * and the executors, administrators, or assigns of any such person." Judgment (1906) 146 F. 375, 76 C. C. A. 647, affirmed.—*American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

—25. Proceedings to obtain copyright.

See 11 Cent. Dig. Copyr. §§ 24-33.

—27. — Deposit of title or description of work.

See 11 Cent. Dig. Copyr. §§ 25, 26.

Though the title and the work were deposited the same day, it will be presumed, in the absence of evidence to the contrary, that the former was deposited before, and the latter after, publication.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

In the absence of evidence to the contrary, it will be presumed that the deposit of the title was made before publication, and that, where the work purports to have been deposited within three months after the title, it was deposited within three months after publication.—*Id.*

—28. — Deposit of copies of work.

See 11 Cent. Dig. Copyr. §§ 27, 28.

Act Cong. Feb. 3, 1831, c. 16, § 4, provides that one seeking a copyright shall, before publication, deposit a printed copy of the title of the book in the office of the clerk of the district court of his district, who shall record the title forthwith, and give a copy, under seal of the court, to the author or proprietor, whenever he may require it; that the author or proprietor shall, within three months from publication, deliver a copy of the book to the clerk. *Held*, that a memorandum, signed, but not sealed, by the clerk, at the foot of his certified copy of the title, that the work was deposited on a certain date, was a sufficient prima facie certificate of that fact, without further proof of the clerk's signature.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

A work deposited five months and five days after its title cannot be presumed to have been deposited within three months from publication.—*Id.*

The deposit of two copies of a book in the mail, addressed to the librarian of congress one day before the publication of the work, is a sufficient compliance with Rev. St. § 4956, requiring such deposit "within 10 days from the publication."—*Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

—29. — Inserting or inscribing notice.

See 11 Cent. Dig. Copyr. §§ 29, 30.

The words, "Copyright, 1882, by N. Sarony," appearing upon each copy of a photograph, are sufficient notice to the public of the existence of the copyright.—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 4 S. Ct. 279, 28 L. Ed. 349.

The title having been deposited in 1867, it is immaterial, as to third persons, that the notice printed in the work states that the copyright was entered in 1866; the proprietor being concluded by such notice as to the time when his copyright expires.—*Callaghan v. Myers*, 128 U.

S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

Under Act Cong. June 18, 1874, c. 301, providing that "no person shall maintain an action for the infringement of his copyright, unless he shall give" the notice thereof therein provided for, which notice contains the year of copyright, and the name of the person taking it out, plaintiff could not maintain an action for the infringement of the copyright where his notice omitted the year of the copyright and the name of the person taking it out, or stated only the former, though defendant himself took out the copyright, and the edition published by him before the sale contained a proper notice thereof.—*Thompson v. Hubbard*, 131 U. S. 123, 9 S. Ct. 710, 33 L. Ed. 76.

It is not a compliance with the notice of copyright required by Act Cong. June 18, 1874, to state upon a label merely that it has been registered in the patent office.—*Higgins v. Keuffel*, 140 U. S. 428, 11 S. Ct. 731, 35 L. Ed. 470, affirming decree (C. C.) 30 F. 627.

A copyright of a book, obtained by an author in her own name, is vitiated for failure to comply with the requirement of Act Feb. 3, 1831, c. 16, § 5 (4 Stat. 436), that notice of copyright be inserted in each copy of the work, by its subsequent publication, with her consent, in a magazine with no other notice of copyright than that of the entry of the magazine in the name of its publishers.—*Miffin v. R. H. White Co.*, 23 S. Ct. 769, 190 U. S. 260, 47 L. Ed. 1040, affirming decree 112 F. 1004, 50 C. C. A. 661, 61 L. R. A. 134: *Same v. Dutton*, 23 S. Ct. 771, 190 U. S. 265, 47 L. Ed. 1043, affirming decree 112 F. 1004, 50 C. C. A. 661, 61 L. R. A. 134.

Any copyright protection for a work, secured under Act Feb. 3, 1831, c. 16 (4 Stat. 436), by entering for copyright in the name of the publishers the issues of a magazine which contain installments thereof, is lost by the subsequent publication of the work in book form with no other notice of copyright than that of an entry in the author's name.—*Id.*

Inscribing the copyright notice upon the published copies without placing such inscription upon the original painting satisfies the requirement of Rev. St. U. S. § 4962, as amended by Act June 18, 1874, c. 301, 18 Stat. 78 [U. S. Comp. St. 1901, p. 3411], that such notice shall be inserted in the several copies of every edition published on the title page or the page immediately following, if it be a book, or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statuary, or model or design intended to be perfected and completed as a work of the fine arts, upon some visible portion thereof, or of the substance on which the same shall be mounted. Judgment (1906) 146 F. 375, 76 C. C. A. 647, affirmed.—*American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

An American copyright is not lost by publishing a work abroad and selling it for use there without inserting the notice of copyright which, under Act June 18, 1874, c. 301, § 1, 18 Stat. 78 [U. S. Comp. St. 1901, p. 3411], must be inserted in the several copies of every edition published. Judgment, G. & C. Merriam Co. v. United Dictionary Co. (1906) 146 F. 354, 76 C. C. A. 470, affirmed.—*United Dictionary Co. v. G. & C. Merriam Co.*, 28 S. Ct. 290, 208 U. S. 260, 52 L. Ed. 478.

A single copyright notice on a paper containing a dozen copies of a copyrighted painting joined so as to form a harmonious whole is not a sufficient notice under Act June 18, 1874.—*Dejonne & Co. v. Breuker & Kessler Co.*, 35 S. Ct. 6, 235 U. S. 33, 59 L. Ed. 113, affirming decree 191 F. 35, 111 C. C. A. 567.

◀30. — Penalties for inserting or impressing false notice.

See 11 Cent. Dig. Copyr. §§ 32, 33.

The act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States is not within the provision of Rev. St. U. S. § 4963, as amended by Act March 3, 1891, c. 565, 26 Stat. 1109 [U. S. Comp. St. 1901, p. 3412], imposing a penalty for untruthfully impressing notice of copyright upon an article which was the subject of copyright in the United States. Judgment, 115 F. 85, 53 C. C. A. 508, affirmed.—*McLoughlin v. Raphael Tuck & Sons Co.*, 24 S. Ct. 105, 191 U. S. 287, 48 L. Ed. 178.

◀31. — Publication.

See 11 Cent. Dig. Copyr. § 31.

Delivering to the secretary of state, for the use of the state, the number of copies of a volume of law reports required by law to be so delivered, is a publication of that volume; and certificates of the auditor of public accounts and of the secretary of state that on such a date the reporter made such delivery are competent evidence of the date of publication.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

◀32. Publication before deposit of title or copies of work.

See 11 Cent. Dig. Copyr. § 34.

Under the copyright act of 1831 (4 Stat. 436), which provided that no person should be entitled to its benefits unless he should before publication deposit a printed copy of the title of his book as therein prescribed, the printing of a literary composition in serial parts in a magazine constituted a publication, and the subsequent copyright of the work by the author when completed and published in book form will not prevent another from reprinting the uncopyrighted parts from the magazine, numbering the pages consecutively, and publishing and vending them in book form. Judgment 80 F. 514, 25 C. C. A. 610, affirmed.—*Holmes v. Hurst*, 19 S. Ct. 606, 174 U. S. 82, 43 L. Ed. 904.

Entering an original painting with the copyright reserved at an exhibition of the Royal Academy, whose by-laws prohibit copying, is not such a publication as defeats the right to take out a copyright in such painting. Judgment (1906) 146 F. 375, 76 C. C. A. 647, affirmed.—*American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

◀35. Extent of rights acquired.

See 11 Cent. Dig. Copyr. §§ 37-39.

◀36. — In general.

See 11 Cent. Dig. Copyr. § 37.

The sole right to vend a copyrighted book, secured by Rev. St. U. S. § 4952 (U. S. Comp. St. 1901, p. 3406) to the owner of the copyright, does not include the right to impose, by a notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. Decree (1906) 147 F. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766, affirmed.—*Bobbs-Merrill Co. v. Straus*, 28 S. Ct. 722, 210 U. S. 339, 52 L. Ed. 1088.

◀39. — Protection as to subject-matter.

See 11 Cent. Dig. Copyr. § 39.

Rev. St. Ohio 1879, §§ 426-435, provide for the appointment of a reporter of the supreme

court, to report and prepare for publication its decisions, and to receive therefor a certain compensation, and to secure a copyright for the use of the state for each volume when published. Section 437, as amended January 17, 1881 (78 Ohio Laws, p. 14), provides for the publication of the reports under a contract with the secretary of the state, and that "such contractor shall have the exclusive right to publish such reports, so far as the state can confer the same." Held, that a copyright obtained by the reporter on a volume of reports published by the contractor does not cover the syllabi, statements of the cases, and opinions, which were the work of the judges.—*Banks v. Manchester*, 128 U. S. 244, 9 S. Ct. 36, 32 L. Ed. 425, affirming (C. C.) 23 F. 143.

A copyright on law reports will cover all matter not included in the written opinions of the court, namely, the title-page table of cases, headnotes, statements of facts, arguments of counsel, and index; also the order of arrangement of the cases, the division into volumes, the numbering and paging of the volumes, the table of cases cited, and the subdivision of the index into titles, involving the distribution of the subjects of the headnotes, and the cross references.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

II. TITLE, CONVEYANCES, CONTRACTS, AND REGULATIONS.

Monopolistic agreements restricting sales of copyrighted works, see Monopolies, ▶17.

◀43. Assignments.

See 11 Cent. Dig. Copyr. §§ 42-45.

◀45. — Requisites and validity.

See 11 Cent. Dig. Copyr. § 43.

Under Act Cong. Feb. 3, 1831, c. 16, § 4, permitting a proprietor as well as an author to copyright a work, the rights of an author before publication may be transferred by parol.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

A complete transfer of the property right of copyright existing in an original painting, and not a mere license or personal privilege, must be deemed intended by an instrument executed by the artist, reciting that, for a named consideration, he transfers the copyright in his painting, where there is no evidence of any intention on his part to retain any further interest in this copyright, and he offers the painting for sale with the copyright reserved. Judgment (1906) 146 F. 375, 76 C. C. A. 647, affirmed.—*American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

An author of a painting, who is excluded by Act March 3, 1891, c. 565, § 13, 26 Stat. 1110 (U. S. Comp. St. 1901, p. 3417), from the benefit of copyright, cannot convey such right to a person whose citizenship is such as to satisfy the provisions of that section. Judgment (1907) 155 F. 116, 83 C. O. A. 576, affirmed.—*Bong v. Alfred S. Campbell Art Co.*, 29 S. Ct. 628, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

III. INFRINGEMENT.

(A) WHAT CONSTITUTES INFRINGEMENT.

◀53. Copying constituting infringement in general.

See 11 Cent. Dig. Copyr. § 51.

Reproduction through the agency of the phonograph of the sounds of musical instru-

ments playing music for which a copyright has been granted is not a violation of the copyright, such reproduction not being "publishing" or "copying" within the meaning of the copyright act.—(1908) *White-Smith Music Pub. Co. v. Apollo Co.* 23 S. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628, affirming decree (1906) 147 F. 226, 77 C. C. A. 368, which affirmed (C. C. 1905) 139 F. 427.

54. Books or other literary works.

See 11 Cent. Dig. Copyr. § 52-59.

55. — In general.

See 11 Cent. Dig. Copyr. § 52.

The paging of defendants' volumes of law reports and complainant's was substantially the same throughout. The list of cases preceding each report was the same. Defendants' editors testified that their work was independent of that of complainant's editor, but complainant's volumes were all used in editing and annotating in some instances words and sentences being followed without change, in others changed only in form, though there was a considerable difference between the headnotes, it was evident that complainant's had been freely used. There were errors common to both sets of reports. *Held* an infringement.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

The public exhibition of moving pictures of the incidents of a copyrighted book constitutes an infringement of the exclusive right given to the author by Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1106 (U. S. Comp. St. 1901, p. 3406), to dramatize his work.—(1911) *Kalem Co. v. Harper Bros.*, 32 S. Ct. 20, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, affirming decree (1909) *Harper & Bros. v. Kalem Co.*, 169 F. 61, 94 C. C. A. 429.

The makers of moving picture films of the incidents of a copyrighted book, who sell the same with a view to their use for dramatic reproduction, infringe the exclusive right given to the author by Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1106 (U. S. Comp. St. 1901, p. 3406), to dramatize his work.—*Id.*

56. Musical compositions.

See 11 Cent. Dig. Copyr. § 53.

Perforated rolls which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions, which, under Rev. St. U. S. § 4952 [U. S. Comp. St. Supp. 1907, p. 1021], secures to the composer the sole liberty of printing and reprinting, publishing, completing, copying, executing, finishing, and vending the same.—(1908) *White-Smith Music Pub. Co. v. Apollo Co.*, 23 S. Ct. 319, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628, affirming judgment (1906) 147 F. 226, 77 C. C. A. 368, which affirmed (C. C. 1905) 139 F. 427.

(B) ACTIONS.

See Election of Remedies, 7.

Abatement of action for penalty, see Abatement and Revival, 49.

Exclusive or concurrent jurisdiction, see Courts, 518.

Jurisdiction of federal courts, see Courts, 291, 382, 385(1).

Procedure in federal court, see Courts, 339.

59. Actions at law for damages.

See 11 Cent. Dig. Copyr. §§ 55-56.

A decree establishing the validity of a copyright, and determining that a railroad scene in a play, apart from the dialogue, is a dramatic composition, and entitled to protection under the copyright laws, is conclusive on the parties

in a subsequent action at law for damages for the infringement. Judgment, 83 F. 1007, 23 C. C. A. 253, affirmed.—*Brady v. Daly*, 20 S. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

The remedies of forfeiture and penalty and of injunction, given by Rev. St. U. S. §§ 4965, 4970 (U. S. Comp. St. 1901, pp. 3414, 3416), to the owner of a copyrighted map in case of infringement, are exclusive, and preclude any resort to an action at law to recover the damages sustained by reason of the infringement.—(1908) *Globe Newspaper Co. v. Walker*, 23 S. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096, reversing judgment (1905) *Walker v. Globe Newspaper Co.*, 140 F. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, which reversed (C. C. 1904) 130 F. 593.

70. Penalties and actions therefor.

See 11 Cent. Dig. Copyr. §§ 55-54.

The penalty for infringement of copyright imposed by Rev. St. U. S. § 4965, of \$1 for every sheet found in defendant's possession, extends only to sheets found in his possession, for the purposes of forfeiture and condemnation, and does not extend to sheets which are merely proved to have been in his possession at some time within two years before the action began. Judgment, 77 F. 966, 23 C. C. A. 594, 46 L. R. A. 712, affirmed.—*Bolles v. Outing Co.*, 20 S. Ct. 94, 175 U. S. 262, 44 L. Ed. 156.

A separate action to recover the penalty prescribed by Rev. St. U. S. § 4965 [U. S. Comp. St. 1901, p. 3414], for every infringing copy of a copyrighted painting found in the infringer's possession or sold by him, cannot be maintained after judgment of forfeiture of the infringing copies provided for by that section has already been recovered, since such section contemplates but a single action in the nature of replevin, in which may be had both a forfeiture and a recovery of penalties. Judgment (1906) 144 F. 1023, 74 C. C. A. 682, affirmed.—*Werckmeister v. American Tobacco Co.*, 23 S. Ct. 124, 207 U. S. 375, 52 L. Ed. 254.

The infringing copies of a copyrighted painting need not be found in the infringer's possession in order to render him liable for the penalty of \$10 imposed by Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414) "for any copy of the same in his possession, or by him sold or exposed for sale."—(1911) *American Lithographic Co. v. Werckmeister*, 31 S. Ct. 676, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 F. 426, 91 C. C. A. 376.

71. Forfeitures of copies, sheets, or plates.

See 11 Cent. Dig. Copyr. § 54.

The institution by the owner of a copyright in certain engravings of an action of replevin not prosecuted to judgment, to enforce the forfeiture of the infringing copies, prescribed by Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), precludes him from subsequently bringing and maintaining an action of assumpsit to recover the penalty provided for by that section, measured by the number of copies found in the infringer's possession, even where the state practice affords no form of action in which the double remedy may be enforced, since, under the broad powers conferred by section 716 (page 580), the federal court may so frame its process and writs as to give full relief in one action.—*Hills & Co. v. Hoover*, 31 S. Ct. 402, 220 U. S. 329, 55 L. Ed. 485, Ann. Cas. 1912C, 562.

72. Suits in equity.

See 11 Cent. Dig. Copyr. §§ 49, 55-53, 55; 12 Cent. Dig. Corp. § 1475.

77. — Persons liable.

See 11 Cent. Dig. Copyr. § 59; 12 Cent. Dig. Corp. § 1475.

Having control, as business manager, of sheets of a photograph, does not give a person

such possession as to render him liable to the penalty imposed by Rev. St. § 4965, which provides that, when any one shall copy a photograph which has been copyrighted, he shall forfeit one dollar for every sheet of the same found in his possession.—*Thornton v. Schreiber*, 124 U. S. 612, 8 S. Ct. 618, 31 L. Ed. 577.

One who prints an infringing book under a contract with the publisher is liable, with the publisher, to account for the profits realized.—*Belford, Clark & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

§83. — Evidence.

See 11 Cent. Dig. Copyr. §§ 74-76.

Parol evidence of the assignment of an interest in a copyright is sufficient unless objected to or rebutted.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

A certificate by the librarian of congress that two copies of a book mailed by the publisher were received at a date which was within the 10 days from publication allowed by the copyright law is admissible in evidence, though not under seal.—*Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

§86. — Permanent injunction.

See 11 Cent. Dig. Copyr. §§ 79, 80.

Injunctive relief will not be granted to the proprietor of a mercantile agency publishing at intervals a copyrighted book giving information as to the business, capital, and credit rating of merchants, manufacturers, and traders, because of the improper use of such work with respect to a few names by a corporation publishing a similar book limited to those engaged in lumber and kindred trades, where the latter book contains about 60,000 names, 25 per cent. more than the former, and the subjects of information given by it concerning the persons named are six times as many as are given by the other work. Judgment (1906) 144 F. 83, 75 C. C. A. 241, affirmed.—*Dun v. Lumbermen's Credit Ass'n*, 28 S. Ct. 335, 209 U. S. 20, 52 L. Ed. 663, 14 Ann. Cas. 501.

§87. — Damages and profits.

See 11 Cent. Dig. Copyr. § 81.

Where the master on an accounting placed the average selling price of infringing volumes at \$4.34, while the complainant insisted that the average price should be \$4.588, the master, in consideration of the impossibility of ascer-

taining the exact price, acted correctly in splitting the difference between the prices, and fixing the selling price at \$4.464.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636.

An infringing firm will not be allowed on an accounting to charge the cost for stereotyping the infringing volumes, nor the amount paid for editing them, nor an amount paid to different members of the firm for their services as salaries during the period of the infringement, nor will they be allowed a credit for the cost of producing volumes which remain unsold, and they will be charged with the profits of resales of the infringing volumes which they had purchased as secondhand books.—*Id.*

The master, to whom the account for one set of volumes was committed, credited defendants with 12½ per cent. of their gross sales for expenses. Another master, dealing with a second set of volumes, allowed 12 per cent. *Held*, that these conclusions, being so near alike, were properly allowed to stand.—*Id.*

In a suit in equity for an infringement, defendants may be compelled to produce their books and papers on the accounting before the master, though complainant has brought replevin against them to forfeit the copies of the infringing works in their possession. Since the forfeiture cannot be enforced in the equity suit, defendants are not thus compelled to produce evidence against themselves in aid thereof.—*Id.*

When infringing law reports contain matter to which the copyright cannot extend, and this is so inextricably mingled with matter proper to be protected that the profits from each class cannot be distinguished, defendants must answer for the entire profits, under the doctrine of confusion of goods.—*Callaghan v. Myers*, 128 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, modifying (C. C.) *Myers v. Callaghan*, 24 F. 636; *Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

The right to an account of profits is incident to the right to an injunction under Rev. St. § 4970, in copyright cases.—*Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

CORONERS.

[No paragraphs or references in this Digest. But see 11 Cent. Dig. Coroners.]

This Digest is compiled on the Key-Number System. For explanation, see page iii.

CORPORATIONS.

Scope-Note.

[INCLUDES bodies corporate in general; their creation, organization, consolidation, and dissolution; rights, powers, duties, and liabilities of such bodies, their members and officers, as among themselves and as to others, incident to corporate existence, and legal proceedings for enforcement thereof.

[For related matters under other topics, see cross-references after analysis.]

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I. Incorporation and Organization.

- ☞ 1. Nature and theory of incorporation.
- 7. Special charters or acts.
- 8. — Grant or enactment.
- 26. Official recognition of corporation.
- 28. De facto corporations.
- 29. Attacking validity of incorporation.
- 30. Acts of corporators and promoters.

II. Corporate Existence and Franchise.

- ☞ 32. Evidence of corporate existence.
- 34. Estoppel to allege or deny corporate existence.
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- ☞ 51. Seal.
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[No paragraphs or references in this Digest. But see 12 Cent. Dig. Corp. §§ 162-183.]

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- ☞ 75. Contract of subscription in general.
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- ☞ 113. Restriction of right to transfer.
- 115. Sales.
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- ⌘161. Nature and grounds in general.

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- 244. — Effect of transfers of stock.
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- See—
- Banks and Banking, —313-315.
 - Building and Loan Associations.
 - Carriers, —408½.
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 - Colleges and Universities.
 - Electricity, —2-4.
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 - Insurance.
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 - Railroads.
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 - Waters and Water Courses, —184-277.

I. INCORPORATION AND ORGANIZATION.

- Banks, see Banks and Banking, —5.
- Judicial notice of incorporation, see Evidence, —34.
- Municipalities, see Municipal Corporations, —17-19.
- Religious societies, see Religious Societies, —4.
- Validity of territorial statute granting charter, see Statutes, —55.

—1. Nature and theory of incorporation.

See 12 Cent. Dig. Corp. §§ 1, 3-6.

On the admission of a territory as a state into the Union, corporations created by the legislature of the territory become corporations of the state.—*Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 S. Ct. 208, 28 L. Ed. 794, reversing (C. C.) 13 F. 106, 2 McCrary, 550.

§7. Special charters or acts.

See 12 Cent. Dig. Corp. §§ 27-47.

§8. — Grant or enactment.

See 12 Cent. Dig. Corp. §§ 28-38.

A provision in a special charter passed by the New York legislature, that the corporation shall have the powers, and be subject to the liabilities, provided by a general act, does not incorporate into the charter a penalty, imposed by the general act on trustees, for failure to file reports.—*National Park Bank of New York v. Remsen*, 158 U. S. 337, 15 S. Ct. 891, 39 L. Ed. 1008.

§26. Official recognition of corporation.

See 12 Cent. Dig. Corp. § 72.

The passage by a state legislature of an act authorizing a municipal corporation to sell its stock in a railroad company is a recognition of the legal existence of such railroad company.—*Town of Andes v. Ely*, 158 U. S. 312, 15 S. Ct. 954, 39 L. Ed. 996.

§28. De facto corporations.

See 12 Cent. Dig. Corp. §§ 26, 70.

A de facto corporation was constituted by a bona fide attempt to organize an irrigation district under the California irrigation act of March 7, 1887 (providing for the creation of such districts as public municipal corporations), accompanied by an actual user of the corporate franchise. Judgment, *Shepard v. Tulare Irr. Dist.* (C. C.) 94 F. 1, affirmed.—*Tulare Irr. Dist. v. Shepard*, 22 S. Ct. 531, 185 U. S. 1, 46 L. Ed. 773.

§29. Attacking validity of incorporation.

See 12 Cent. Dig. Corp. §§ 77-79, 2604.

A railroad corporation having existed as a matter of fact at the time a county subscribed to its stock and issued bonds in payment, the question whether it then had a legal existence cannot be raised in an action on the bonds, this being a question between the railroad and the state.—*Dallas County v. Huidekoper*, 154 U. S. 654, 14 S. Ct. 1180, 25 L. Ed. 974.

Legal existence of a corporate seller of goods cannot be collaterally attacked by objection, in a suit for the price, that the corporation had organized in violation of Act July 2, 1890, forbidding combinations in restraint of interstate commerce.—*D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 35 S. Ct. 398, 236 U. S. 165, 59 L. Ed. 520, Ann. Cas. 1916A, 118, affirming judgment 75 S. E. 918, 11 Ga. App. 588.

§30. Acts of corporators and promoters.

See 12 Cent. Dig. Corp. §§ 97-100.

A corporation cannot avoid in equity a purchase of property sold to it by its promoters, at a large profit, while they owned all the stock, in contemplation of a large issue to the public, since the corporation thus had full knowledge of the facts, and remained unchanged and unaffected in its identity by the changes in its members due to purchases of the stock by the innocent public, and for the further reason that, if the corporation succeeds, all the stockholders, guilty as well as innocent, will profit.—(1908) *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 28 S. Ct. 634, 210 U. S. 208, 52 L. Ed. 1025, affirming judgment (1906) 148 F. 1020, 79 C. C. A. 534, which affirmed (C. C. 1906) *Old Dominion Copper Min. Co. v. Lewisohn*, 136 F. 915.

A corporation may recover secret profits made by some promoters without knowledge of their associates in the purchase of land for pro-

posed corporations, and require them to surrender shares of stock issued to them for their services as promoters.—*Davis v. Las Ovas Co.*, 38 S. Ct. 197, 227 U. S. 80, 57 L. Ed. 428, affirming decree *Las Ovas Co. v. Davis*, 35 App. D. C. 372.

II. CORPORATE EXISTENCE AND FRANCHISE.

Compelling production of corporate books, as unreasonable search and seizure, see *Searches and Seizures*, §7.

Compensation on condemnation of franchise, see *Eminent Domain*, §108.

Due process of law, see *Constitutional Law*, §278.

Electric companies, see *Electricity*, §4.

Estoppel to deny right to exercise reserved power to amend charter, see *Constitutional Law*, §43.

Impairing obligation of contract, see *Constitutional Law*, §126.

Impairing obligation of charter, see *Constitutional Law*, §125.

Imposition of penalty in quo warranto, see *Quo Warranto*, §60.

Objection to evidence relating to existence of corporation, see *Trial*, §81.

Right to question validity of statute repealing charter, see *Constitutional Law*, §42.

Turnpike companies, see *Turnpikes and Toll Roads*, §28, 34.

Vested rights, see *Constitutional Law*, §101.

Water companies, see *Waters and Water Courses*, §188.

§32. Evidence of corporate existence.

See 12 Cent. Dig. Corp. §§ 106-118, 2086, 2087.

The authority granted by Act Mass. March 19, 1880 (L. & R. 1880-81, c. 117, p. 74), to the person named therein, to organize as a corporation under the provisions of L. & R. 1870, c. 224, relating to corporations, gave them the right to select a corporate name; and such persons having selected a name, and brought suit in that name, proof of the special act under which they were incorporated, and a certificate of the secretary of the commonwealth in the form required by L. & R. 1870, c. 224, § 11, is conclusive evidence of the corporate existence.—*Dolbear v. American Bell Tel. Co.*, 126 U. S. 1, 8 S. Ct. 778, 31 L. Ed. 863.

The plea of null tiel corporation is not sustained by evidence that after the cause of action accrued plaintiff bank was changed into a national bank, since that change did not affect its identity or its right to sue.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

§34. Estoppel to allege or deny corporate existence.

See 12 Cent. Dig. Corp. §§ 81-96.

Congress, by Acts 1854, incorporated Glenwood Cemetery, and provided that its capital stock should be divided among the owners of the land appropriated. No stock was ever issued, but the owner of the whole tract appropriated, as one of the associates, and named as president and general manager of the corporation, made no objection to the appropriation for a period of 20 years, and sold a large number of burial lots, giving deeds signed by him as president, and sealed with the corporate seal. Held, that he was estopped to deny the existence of the corporation.—*Close v. Glenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

A de facto corporation, which has received full consideration for bonds issued by it, cannot set up the fact that it was never legally incorporated, as a defense to a suit by a bona fide

holder for value, and without notice, to recover the interest due on such bonds. Judgment, *Shepard v. Tulare Irr. Dist.* (C. C.) 94 F. 1, affirmed.—*Tulare Irr. Dist. v. Shepard*, 22 S. Ct. 531, 185 U. S. 1, 46 L. Ed. 773.

—38. Amendment of charter or act of incorporation.

See 12 Cent. Dig. Corp. §§ 119, 120, 125-127.

By Act Ky. Feb. 14, 1856, it was declared that "all charters and grants of or to corporations, or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be expressed: provided, that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested"; also that the provisions of that statute "shall only apply to charters and acts of incorporation to be granted hereafter." By Act Ky. Jan. 22, 1869, amending the charter granted by Act Jan. 30, 1867, to the Louisville Gas Company, and granting the exclusive privileges before mentioned, it was provided that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company." Held, that the last act "plainly expressed" an intent that the charter of the company should not be subject to amendment or repeal at the mere will of the legislature, but only with the concurrence of the city council and the company's directors.—*Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 S. Ct. 285, 29 L. Ed. 510, reversing 81 Ky. 263.

The right at pleasure to alter, amend, or repeal the charter of a company was therein reserved. Held, that the company's consent to a supplementary act prohibiting it from entering into any consolidation, combination, or contract with any other company in the same business was not necessary, and, if consent were necessary, the subsequent exercise of corporate functions was sufficient evidence of acceptance.—*Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

Laches affecting right to injunction, against use of same name, see Injunction, —113. Records and proceedings as evidence, see Evidence, —352.

Subpoena duces tecum for production of records in action against corporations, see Witnesses, —16, 298, 304.

—51. Seal.

See 12 Cent. Dig. Corp. § 139.

In the absence of evidence to the contrary, a scroll or rectangle containing the word "Seal," when placed opposite the name of a corporation, will be presumed to be its proper and common seal.—*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

—52. Domicile or place of business.

See 12 Cent. Dig. Corp. §§ 140-150.

A meeting in one of several states of the stockholders of a corporation chartered in all those states, whose capital stock is a unit, is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those states.—*Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 S. Ct. 1009, 30 L. Ed. 196.

Gen. St. Ky. p. 769, which requires the election of directors of a domestic corporation to be held within the state, does not prevent a stockholders' meeting to increase the capital stock from being held outside of the state; and where all the stockholders are present at the meeting,

and agree to the increase, and receive proportionate shares of the increased stock, they cannot question the validity of the meeting in an action brought against them by creditors of the corporation to compel them to pay the par value of the stock as a trust fund for the creditors.—*Handley v. Stutz*, 139 U. S. 417, 11 S. Ct. 530, 35 L. Ed. 227, reversing decree (C. C.) *Stutz v. Handley*, 41 F. 531.

—59. Records.

See 12 Cent. Dig. Corp. §§ 160, 161.

The failure to enter in the books of a corporation, at the time it was adopted, a resolution increasing the amount of the capital stock, does not affect the validity of the increase, as such corporate acts may be proved as well by parol as by written evidence.—*Handley v. Stutz*, 139 U. S. 417, 11 S. Ct. 530, 35 L. Ed. 227, reversing decree (C. C.) *Stutz v. Handley*, 41 F. 531.

IV. CAPITAL, STOCK, AND DIVIDENDS.

Charter exemption from taxation, see Taxation, —193, 210.

Evidence of value, see Evidence, —113, 323, 352, 383.

Jurisdiction of action to quiet title to stock, see Courts, —19.

National bank, see Banks and Banking, —241.

Presumptions as to value, see Evidence, —84.

Taxation, liability of shares of stockholders, see Taxation, —11.

Taxation of capital as interfering with commerce, see Commerce, —74.

(A) NATURE AND AMOUNT OF CAPITAL AND SHARES.

[No paragraphs or references in this Digest. But see 12 Cent. Dig. Corp. §§ 162-183.]

(B) SUBSCRIPTION TO STOCK.

—75. Contract of subscription in general.

See 12 Cent. Dig. Corp. §§ 197-243, 420-424, 429-434, 455.

—78. — Rights and liabilities of subscribers.

See 12 Cent. Dig. Corp. §§ 219-231, 420-424, 429-434.

By subscribing to stock in a foreign corporation the subscriber subjects himself to the laws of the foreign country in respect to the powers and obligations of such corporation. Judgment, 108 F. 764, 48 C. C. A. 15, affirmed.—*Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co.*, 23 S. Ct. 517, 189 U. S. 221, 47 L. Ed. 782.

—80. Subscriptions obtained by misrepresentation.

See 12 Cent. Dig. Corp. §§ 244, 246-264, 1407, 1407½; 40 Cent. Dig. Princ. & A. § 583.

Defendant T., president and agent of defendant corporation, in April, 1884, represented by letter to complainant that the capital stock of the company was \$18,000, and that the last dividend declared was a 1 per cent. semiannual and that the fiscal year ended June 1st, and that the company was in a flourishing condition. At such time \$8,000 of the assets of the company consisted of formulas and recipes given by T. for stock, and were unsalable, and the company was insolvent. The last dividend declared was June 1, 1882. Of the \$10,000 paid for an increased issue of stock by complainant on T.'s representations, \$6,000 was taken by T. in payment of loans to the company, and the balance went to pay ordinary expenses and to buy material. Held, that a finding that the sale was procured by fraud, and charging T. with

the purchase price, was sustained.—*Tyler v. Savage*, 143 U. S. 79, 12 S. Ct. 340, 36 L. Ed. 82.

§82. Collateral agreements.

See 12 Cent. Dig. Corp. §§ 285-295.

An agreement by the incorporators of a company to take the shares of one of the subscribers, and refund his money if he should demand it within a fixed time, is valid, though none of the subscriptions were to be paid in until all the stock was all reliably subscribed, and the other subscribers neither made such an agreement as to their stock, nor were aware that the one in question was made, there being no design to deceive or defraud any one.—*Morgan v. Struthers*, 131 U. S. 246, 9 S. Ct. 726, 33 L. Ed. 182.

§89. Calls or assessments on unpaid subscriptions.

See 12 Cent. Dig. Corp. §§ 367-379, 381, 382.

Courts cannot, in the absence of fraud, inquire into the necessity for an assessment by the directors of a foreign corporation upon its capital stock. Judgment, 108 F. 764, 48 C. C. A. 15, affirmed.—*Nashua Sav. Bank v. Anglo-American Land Mortgage & Agency Co.*, 23 S. Ct. 517, 189 U. S. 221, 47 L. Ed. 782.

The posting of a notice of a call upon shareholders in an English corporation, in a conspicuous place in the registered office of the company, for more than a month before the call was payable, and the forwarding of a printed notice of the call to a foreign shareholder, is a sufficient compliance with the provisions of the articles of association that notices for a non-resident shareholder who neglects to give his address, as therein provided, shall be posted in a conspicuous place in such office, which for all purposes of the regulations shall be deemed to be his registered place of abode.—*Id.*

§90. Actions on subscriptions.

See 12 Cent. Dig. Corp. §§ 245, 383-419; 39 Cent. Dig. Plead. § 63.

In an action to recover on unpaid stock, where one of the defendants had turned over some furniture to the corporation, receiving full credit therefor on his stock, his subsequent payment of a balance due on the furniture could not be allowed as a set-off.—*Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363.

A trustee to whom a corporation has assigned the title to money payable on stock subscriptions cannot, in the absence of an express or implied promise to pay him, sue therefor in his own name in the District of Columbia, since by the common-law rule (which prevails therein) such rights are mere choses in action, and not assignable.—*Glenn v. Marbury*, 145 U. S. 499, 12 S. Ct. 914, 36 L. Ed. 790.

No promise to pay the assignee can be implied from the general authority which every stockholder is presumed to give the corporation to deal with its property in a lawful manner.—*Id.*

The disability of the trustee to sue in his own name is not affected by the fact that the call was made by the court at the instance of creditors, and that the trustee was specially authorized by it to collect the same, since in making the call the court simply acted in the place of the company, which had failed to perform its duty.—*Id.*

A sale or forfeiture of a stockholder's shares in an English corporation is not a condition precedent to the maintenance of an action against him to recover an assessment on the capital stock of the corporation, although a remedy by forfeiture is given by its articles of association. Judgment, 108 F. 764, 48 C. C. A. 15, affirmed.—*Nashua Sav. Bank v. Anglo-Ameri-*

can Land Mortgage & Agency Co., 23 S. Ct. 517, 189 U. S. 221, 47 L. Ed. 782.

An express promise by a stockholder in an English corporation need not be proved in an action to recover an assessment on its capital stock, in view of the promise implied from a subscription to the shares by 25 & 26 Vict. c. 89, which declares that all moneys payable by any member in pursuance of the articles of the company shall be deemed a debt due by such member.—*Id.*

(C) ISSUE OF CERTIFICATES.

Limitation of action for assessments, see Limitation of Actions, §66.

§104. Estoppel to allege invalidity.

See 12 Cent. Dig. Corp. § 454.

A purchaser of preferred stock in a corporation, issued without statutory authority, who was active in passing the resolution authorizing its issue, and who voluntarily subscribed and paid for it, cannot hold it for 28 months, voting upon it, and using it to obtain control of the corporation's affairs, and then, upon the insolvency of the corporation, assert its invalidity, and recover the money he paid for it.—*Banigan v. Bard*, 134 U. S. 291, 10 S. Ct. 565, 33 L. Ed. 932.

(D) TRANSFER OF SHARES.

Damages for misrepresentation in sale of stock, see Damages, §19.

Impairing obligation of contract, see Constitutional Law, §129.

Tax on transfer as interference with commerce, see Commerce, §74; denial of due process of law, see Constitutional Law, §283; Taxation, §53.

§113. Restriction of right to transfer.

See 12 Cent. Dig. Corp. § 463.

A holder of railroad stock, issued to him as full paid, in payment of undisputed debts due to a construction company whose claims have been assigned to him, takes it free of all trusts or obligations in favor of the company issuing it, and is under no duty to that company or to its other stockholders to continue in the ownership thereof, for the purpose of facilitating pending negotiations for the transfer of control of the company to another railroad corporation, but may sell the same to a rival company also seeking control, or to whomsoever he sees fit, and at any price he can obtain.—*Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co.*, 163 U. S. 31, 16 S. Ct. 917, 41 L. Ed. 60.

§115. Sales.

See 12 Cent. Dig. Corp. §§ 493-506; 11 Cent. Dig. Contracts, § 894.

§116. — Contract in general.

See 12 Cent. Dig. Corp. §§ 493, 494, 496.

The seller in this contract owned the entire stock of a railway company. The amount sold was one-third of the entire stock, and the purchaser was the seller's brother. They both continued in the management and extension of the road for several years, the seller being the principal manager. Subsequent corporations were formed to extend the road, and the stock of these was taken by the brothers in the same proportion as they owned the original stock, two-thirds by the seller and one-third by the purchaser. Held, that the contract was not merely a stock transaction, but a sale of a joint interest in the road, so that the seller and purchaser became joint owners, jointly interested in subsequent contracts with the railroad company, and in the proceeds thereof.—*Beardsley v. Beardsley*, 138 U. S. 262, 11 S. Ct. 318, 34 L. Ed. 928.

The option given by an agreement for a transfer of corporate stock, together with the owner's proxy as director, in consideration of a specified sum "to be considered an option," running until a given date, when an additional sum is to be paid, or, in lieu thereof, all the property delivered under the agreement is to be returned, is not an option to purchase, but one to return; and, if not exercised at the time named, the sale is complete, and the promise to pay the purchase price becomes absolute. Judgment 78 P. 170, 14 Okl. 296, affirmed.—Guss v. Nelson, 26 S. Ct. 260, 200 U. S. 298, 50 L. Ed. 489.

117. — Rescission.

See 12 Cent. Dig. Corp. § 506.

The purchaser of stock cannot escape liability for his fraud in concealing facts affecting its value which he was in good faith bound to disclose, on the theory that, because of the insistence of the seller that her agent was not authorized to make the sale, there had never been any consent on her part, obtained by fraud or otherwise, where the court finds that the agent's authority was sufficient, since, in legal effect, her consent will be deemed induced by the fraud.—Strong v. Repide, 29 S. Ct. 521, 213 U. S. 419, 53 L. Ed. 853.

119. — Operation and effect.

See 12 Cent. Dig. Corp. §§ 499-503; 11 Cent. Dig. Contracts, § 894.

Personal responsibility of the minority stockholders, if the project for rehabilitating the corporation should not succeed in two years, to see that the majority of stockholders would be reinvested with the same proportionate interest in the corporate stock that they previously had, held imported by an agreement between all the stockholders.—Tevis v. Ryan, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 P. 461, 13 Ariz. 120, and 114 P. 557, 13 Ariz. 282.

121. — Remedies.

See 12 Cent. Dig. Corp. §§ 504, 505; 43 Cent. Dig. Sales, § 1157.

A sale of stock bought on an exchange to the highest bidder is a fair basis upon which to determine the amount of damages sustained by a purchaser's refusal to take the stock, when at the time of the sale the exchange has been closed by order of its governing committee, and the sale is made to the highest bidder after proper notice to the purchaser, with opportunity for full and open competition. Decree 96 F. 648, 38 C. C. A. 473, reversed.—Clews v. Jamieson, 21 S. Ct. 845, 182 U. S. 461, 45 L. Ed. 1183.

Evidence, that stockholders who surrendered their control of the corporate stock to certain minority stockholders to rehabilitate the company was not given timely information of suits against the corporation, held relevant to the question of fraud consisting in fraudulent representations by such stockholders on the strength of which the contract was entered into, followed by alleged fraudulent use of such control.—Tevis v. Ryan, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 P. 461, 13 Ariz. 120, and 114 P. 557, 13 Ariz. 282.

An oral demand for reinvestment by majority stockholders, who had surrendered their control of the stock to the minority stockholders to rehabilitate the company, reserving the right to resume control, is sufficient if it is specific enough to warn such minority stockholders that they are called upon to perform their engagement under the reinvestment clause.—Id.

123. Pledges.

See 12 Cent. Dig. Corp. §§ 481, 491, 507-512, 537, 539-546, 569, 618; 40 Cent. Dig. Pign. §§ 1-194.

No interest, legal or equitable, was acquired as against the true owner, in the absence

of any laches or negligence on his part, under an attempted pledge of a stock certificate by means of a forged power of attorney by a firm of brokers who held the same as evidence of the owner's financial responsibility, and under an express agreement that it was not to pass out of their possession. Judgment, Unity Banking & Saving Co. v. Boyden (1908) 159 F. 916, 87 C. C. A. 96, affirmed.—Unity Banking & Saving Co. v. Bettman, 30 S. Ct. 488, 217 U. S. 127, 54 L. Ed. 695.

128. Registration or transfer on corporate books.

See 12 Cent. Dig. Corp. §§ 479, 480, 482-492, 513-525, 527, 528, 538.

134. — Liabilities and remedies for erroneous or wrongful transfer.

See 12 Cent. Dig. Corp. §§ 521-526, 527, 528.

Where a corporation has negligently canceled a member's stock, and issued certificates therefor to a purchaser from one not authorized to sell it, the true owner need not pursue such purchaser, but may proceed directly against the corporation alone, to compel it to replace his stock, or pay him its value.—St. Rome v. Levee Steam Cotton Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. Ed. 289.

136. — Rights of creditors of transferor.

See 12 Cent. Dig. Corp. §§ 483-485.

A transfer for valuable consideration of shares in a Massachusetts manufacturing corporation, not recorded as required by St. Mass. 1870, c. 224, § 26, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer.—Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 6 S. Ct. 241, 29 L. Ed. 557.

Transfer of corporate stock by delivery of properly indorsed stock certificate held not in fraud of transferor's creditors.—Stowe v. Harvey, 36 S. Ct. 541, 241 U. S. 199, 60 L. Ed. 953, affirming judgment Harvey v. Stowe, 219 F. 17, 134 C. C. A. 635.

142. Effect of transfer.

See 12 Cent. Dig. Corp. §§ 462, 522, 529-534, 536, 539-546.

143. — In general.

See 12 Cent. Dig. Corp. §§ 529, 532, 534, 536.

K. sold to plaintiff stock which was held by defendant bank as collateral. The bank sold it for the amount due on the obligation for which it was collateral, and it passed through several transfers, the bank and the successive transferees having knowledge of plaintiff's rights. Held, that plaintiff was entitled to the stock, subject to the payment of the amount for which it was originally sold by the bank as pledgee.—Minneapolis Agricultural & Mechanical Ass'n v. Canfield, 121 U. S. 295, 7 S. Ct. 887, 30 L. Ed. 962, modifying decree (C. C.) Canfield v. Minneapolis Agricultural & Mechanical Ass'n, 14 F. 801, 4 McCrary, 646.

(E) INTEREST, DIVIDENDS, AND NEW STOCK.

See Monopolies, 24.

152. Declaration of dividends.

See 12 Cent. Dig. Corp. §§ 561-567.

A trust company having commenced an action against a railroad corporation for the foreclosure of certain mortgages, the stock and bond holders entered into an agreement for the reorganization of the road, one of the articles of which was as follows: "Preferred stock to an amount equal to the preferred stock of the * * * company, to wit, 85,369 shares, of the

nominal amount of one hundred dollars each, entitling the holders to noncumulative dividends at the rate of six per cent. per annum, in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors." For the fiscal year ending September 30, 1880, there was a large fund, after paying operating expenses and fixed charges, applicable to the payment of a 6 per cent. dividend on preferred stock, which was expended by the managers upon the road, and in other improvements for the company. *Held*, that the holders of the preferred stock are not entitled of right to dividends payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, such dividend, and whether a dividend should be declared in any year is a matter belonging, in the first instance, to the directors to determine, with reference to the condition of the company's property and affairs as a whole.—*New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 7 S. Ct. 209, 30 L. Ed. 363.

⚡153. **Rights and liabilities as to dividends improperly paid.**

See 12 Cent. Dig. Corp. §§ 579, 580.

Certain stock in a national bank was transferred on the books of the bank from the president thereof to the vice president before the latter's election, and subsequently, during his incumbency, a false and fraudulent dividend was declared without his cognizance; and he first learned that the shares were standing in his name by being informed that the dividend thereon had been credited to him on the bank's books, whereupon he immediately repudiated the transaction, ordered the president to retransfer the shares to his own name, and then gave the latter a check for the amount of the dividend, which check was properly credited on the books. *Held* that, as the dividend was fraudulent, it should have been repaid to the bank, and the vice president was liable therefor notwithstanding his payment to the president.—*Finn v. Brown*, 142 U. S. 56, 12 S. Ct. 136, 35 L. Ed. 936, affirming judgment (C. C.) *Brown v. Finn*, 34 F. 124.

(F) LIEN OF CORPORATION.

National banks, see Banks and Banking, ⚡245.

⚡161. **Nature and grounds in general.**

See 12 Cent. Dig. Corp. §§ 577, 604, 605, 608.

How. Ann. St. Mich. § 4143, providing that a corporation shall have a lien on all the stock or property of its members invested therein, for all debts due from them to the corporation, is a general law, with knowledge of whose provisions all are chargeable; and hence one who purchases stock of a Michigan corporation, organized under that law, belonging to one who is indebted to such corporation, takes it subject to the lien, though he may be a resident of another state, and ignorant of the indebtedness.—*George H. Hammond & Co. v. Hastings*, 134 U. S. 401, 10 S. Ct. 727, 33 L. Ed. 960.

V. MEMBERS AND STOCKHOLDERS.

Estoppel to deny relationship as stockholder, see Estoppel, ⚡92.
Holding stock in corporation as disqualifying judge, see Judges, ⚡43.
Stockholders concluded by judgment against corporation, see Judgment, ⚡701.
Stockholders of banks, see Banks and Banking, ⚡46-48, 246-250.
Stockholders of trust company, see Banks and Banking, ⚡313.

(A) RIGHTS AND LIABILITIES AS TO CORPORATION.

Stockholders of national banks, see Banks and Banking, ⚡246.

⚡175. **Liability to assessment.**

See 12 Cent. Dig. Corp. §§ 654-656.

A declaration that shares of stock, issued as a bonus to purchasers of bonds, are fully paid up and unassessable, is conclusive in favor of the holders, as against the corporation and its stockholders, when the rights of creditors are not involved. Decree 80 F. 450, 25 C. C. A. 549, affirmed.—*Dickerman v. Northern Trust Co.*, 20 S. Ct. 311, 176 U. S. 181, 44 L. Ed. 423.

⚡182. **Corporate property, funds, and securities.**

See 12 Cent. Dig. Corp. §§ 686-690.

A conveyance of all the assets of a corporation is not within the power of the stockholders, even though they all sign it, without formal action at a meeting held for that purpose.—*De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 20 S. Ct. 20, 175 U. S. 40, 44 L. Ed. 65.

A contract with stockholders of a corporation for its assets and good will is without consideration, if there is no corporate action authorizing the transfer; since the assets are the property of the company, and not of its stockholders.—*Id.*

⚡189. **Actions between members and corporation.**

See 12 Cent. Dig. Corp. §§ 706-722.

A suit in equity by a stockholder against the corporation to restrain it from paying an Alaskan license tax was properly dismissed, where the corporation made no serious defense, and there was no showing of irreparable injury or of any effort to secure action by the corporation or its directors, as is required by equity rule 94, other than a demand on the resident managing agent; the distance of such directors from the place where the plaintiff resides and in which the court is held being relied upon as an excuse for not making any further effort. Judgment (D. C.) 99 F. 334, affirmed.—*Corbus v. Alaska Treadwell Gold Min. Co.*, 23 S. Ct. 157, 187 U. S. 455, 47 L. Ed. 256.

A stockholder cannot maintain an equitable suit against the corporation, its president and treasurer to restrain it from paying certain taxes, where no showing of the residence of the directors, or of any application to them or to such president and treasurer to take action to relieve from the burden of the taxes, is made. Judgment, *Corbus v. Alaska Treadwell Gold Min. Co.* (D. C.) 99 F. 334, affirmed.—*Stewart v. Washington & A. S. S. Co.*, 23 S. Ct. 161, 187 U. S. 466, 47 L. Ed. 261.

(B) MEETINGS.

See 12 Cent. Dig. Corp. §§ 732-776.

Restraining right to vote stock acquired contrary to anti-trust law, see Monopolies, ⚡24.

(C) SUING OR DEFENDING ON BEHALF OF CORPORATION.

See Monopolies, ⚡28.

⚡202. **Right to sue or defend in general.**

See 12 Cent. Dig. Corp. §§ 777-780, 822.

A stockholder in a corporation cannot set aside the transactions of its directors unless it

appears that he has exhausted all the means within his reach to obtain redress within the corporation itself.—*Dimpfel v. Ohio & M. Ry. Co.*, 110 U. S. 209, 3 S. Ct. 573, 28 L. Ed. 121.

206. Refusal of corporation or officers to act.

See 12 Cent. Dig. Corp. §§ 791-796.

Effort to secure action by a corporation, its directors or shareholders, need not be made and set forth with the particularity required by equity rule 94, in order to sustain a bill filed by shareholders against the corporation and its corporate lessee to obtain an accounting for unpaid rentals, where a majority of the directorate of the former corporation, to whose interest it was to assert the right to payment and demand it, were, and had been for many years, officers, directors, and employees of the other company, to whose interest it was to deny indebtedness and resist payment, and the latter company and its directors and officers controlled a working majority of the stock vote of the other corporation.—*Delaware & H. Co. v. Albany & Susquehanna R. Co.*, 29 S. Ct. 540, 213 U. S. 435, 53 L. Ed. 862.

207. Persons entitled to sue or defend.

See 12 Cent. Dig. Corp. §§ 797-806.

A corporate stockholder cannot sue to set aside the transactions of the corporate directors unless he was a stockholder at the time of the transaction complained of, or has since acquired the stock by operation of law.—*Dimpfel v. Ohio & M. Ry. Co.*, 110 U. S. 209, 3 S. Ct. 573, 28 L. Ed. 121.

211. Pleading.

See 12 Cent. Dig. Corp. §§ 814-818, 820, 821, 823, 824.

In a bill filed by two stockholders to correct a mistake in a deed to the corporation, an averment that complainants are owners of a majority of the stock, but without any statement as to where or how they became such, or whether they were such at the time the matter complained of occurred, or became stockholders afterwards, is not a sufficient averment of their relation to the corporation, or of their interest in the subject of the suit, to enable them to bring the suit in their own names, where it appears that, though the corporation has expired by limitation, it still exists for the purpose of winding up, and that, though most of the directors are dead, one of them survives, and that no application has been made to him to bring the suit, nor any effort to call together the stockholders, or to obtain any united action in asserting this claim.—*Taylor v. Holmes*, 127 U. S. 489, 8 S. Ct. 1192, 32 L. Ed. 179.

A bill by stockholders of a railroad company to enjoin it from complying with a statute relating to rates sufficiently sets out the reason for their commencing it and making the company a party defendant by alleging that they had demanded of the corporate officers that they refuse obedience to the statute, and should institute suits to prevent its enforcement, but that the company and its officers had positively refused to do so, not because they considered the rates just, or that they would not be confiscatory, but because of the severity of the penalties provided for violation of the statute, to the ruinous consequences of which they would not subject themselves, and which no action by themselves, their stockholders, or directors could avoid.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

A majority stockholder seeking to restrain the corporation from complying with a state statute and to enjoin the state officers from enforcing its provisions, does not comply with equity rule 27 by merely alleging that the corpo-

rate officers will comply with the statute through fear of its penalties.—*Wathen v. Jackson Oil & Refining Co.*, 35 S. Ct. 225, 235 U. S. 635, 59 L. Ed. 395.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

Impairing obligation of contract, see Constitutional Law, 129, 154.

Limitation of action to enforce liability, see Limitation of Actions, 2, 58.

Pendency of bankruptcy proceedings against corporation defense in action to enforce liability, see Bankruptcy, 211.

Self-executing constitutional provisions, see Constitutional Law, 34.

State laws as rules for decisions in federal courts, see Courts, 363.

Stockholders of banks, see Banks and Banking, 46-48, 247-250.

215. Nature and grounds in general.

See 12 Cent. Dig. Corp. §§ 826-828, 845-848, 852, 854.

The liability of a stockholder to an additional amount equal to his stock, though created by statute, is contractual in its nature, where the parties voluntarily form a corporation under such statute. Judgment 85 F. 283, 23 C. C. A. 404, affirmed.—*Whitman v. National Bank of Oxford*, 20 S. Ct. 477, 176 U. S. 559, 44 L. Ed. 587.

Liability of a principal debtor, not that of surety, is imposed on stockholders of a corporation doing business in California, by Civ. Code Cal. § 322.—*Thomas v. Matthiessen*, 34 S. Ct. 312, 232 U. S. 221, 58 L. Ed. 577, reversing judgment 192 F. 495, 113 C. C. A. 101.

216. What law governs.

See 12 Cent. Dig. Corp. §§ 829-834.

As no one of the Pacific Railroad acts contains any clause imposing upon the stockholders of a corporation receiving subsidy bonds personal responsibility for any debt due the United States from such corporation by reason of its failure to pay those bonds at maturity, and as they disclose an intention on the part of congress to grant national aid to the corporations named upon terms and conditions applicable alike to all of such corporations, it cannot be presumed that congress intended that the stockholders of the California corporations which received such bonds should be individually liable under the corporation law of that state.—*United States v. Stanford*, 161 U. S. 412, 16 S. Ct. 576, 40 L. Ed. 751.

California stockholders in a Colorado corporation, whose charter specified that one purpose of the incorporation was the transaction of business by the corporation in California, must be deemed to have contracted with reference to the provisions of Civ. Code Cal. § 322, imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations, and are bound thereby, so far, at least, as such liability arises from the corporate business carried on in California.—*Pinney v. Nelson*, 22 S. Ct. 52, 183 U. S. 144, 46 L. Ed. 125.

A New York stockholder in an Arizona corporation, formed to carry on business in Arizona and California, who before incorporation signed a writing expressing an intent to form the corporation and acquire a site for the building of a hotel in California, will be deemed to have assented to be bound by Civ. Code Cal. § 322, relating to the liability of stockholders for corporate debts.—*Thomas v. Matthiessen*, 34 S. Ct. 312, 232 U. S. 221, 58 L. Ed. 577, reversing judgment 192 F. 495, 113 C. C. A. 101.

217. Constitutional and statutory provisions.

See 12 Cent. Dig. Corp. §§ 835-844.

Obligations which a corporation had no right to incur because ultra vires are not dues from the corporation, within the meaning of Const. Kan. art. 12, § 2, providing that "dues from corporations shall be secured by individual liability of the stockholders," although the corporation may be estopped from denying the validity of such obligation. Judgment 105 F. 224, 44 C. C. A. 456, affirmed.—Ward v. Joslin, 22 S. Ct. 807, 186 U. S. 142, 46 L. Ed. 1093.

Gen. St. Fla. 1906, § 2677, as amended by Laws Fla. 1909, c. 5892, providing for execution against stockholder for unpaid subscription without notice, he having the right to contest fact of ownership or of unpaid subscription, and to relief under provisions of sections 1624 and 1625, for testing legality of execution after issuance, held invalid.—Coe v. Armour Fertilizer Works, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027, reversing judgment Armour Fertilizer Works v. Parrish Vegetable & Fruit Co., 58 So. 231, 63 Fla. 64.

219. Corporation incurring liability.

See 12 Cent. Dig. Corp. §§ 843, 894, 895.

A domestic corporation, formed for the purchase of the capital stock, evidences of indebtedness, and assets of another domestic corporation, and for the further purpose of manufacturing and selling implements and machinery, is one organized for a purpose other than that of carrying on any kind of manufacturing or mechanical business, and is therefore not within the exception as to the liability of stockholders made by Const. Minn. art. 10, § 3, in favor of corporations of that kind.—Bernheimer v. Converse, 27 S. Ct. 755, 206 U. S. 516, 51 L. Ed. 1163.

223. Participation in unauthorized or wrongful acts of corporation.

See 12 Cent. Dig. Corp. §§ 861-863.

Where patentee has conveyed his patents to his partner in trust, and the latter has fraudulently transferred them to another partnership, of which he is a member, and they have come into the hands of a corporation by other conveyances, the patentee cannot maintain a bill in equity against the individual stockholders of the corporation for "fraud" and "conspiracy," simply because at the time of the purchase they knew of plaintiff's claim, and took no steps to protect his interest. If the suit is for an accounting and an injunction against the further use of the invention, the proceeding should be against the corporation.—Ambler v. Choteau, 107 U. S. 586, 1 S. Ct. 556, 27 L. Ed. 322.

226. Extent of liability on subscription to stock.

See 12 Cent. Dig. Corp. §§ 874-886, 889-892, 951.

228. — Unpaid subscriptions.

See 12 Cent. Dig. Corp. §§ 874, 878.

The fact that the court in which a suit by the creditors of an insolvent corporation was originally brought ordered a stock assessment for the benefit of creditors for only part of the unpaid subscriptions, without expressly reserving the right to call for the balance, does not prevent a court of competent jurisdiction, to which the cause is afterwards removed, from making such call.—Glenn v. Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing judgment (C. C.) Same v. Priest, 28 F. 907.

Though the president and directors individually may not have been parties to the suit, yet the corporation, which was a party, sufficiently

represented them in their official capacity to constitute a compliance with the statute of Virginia and the contract of subscription, providing that unpaid subscriptions can be called for only through the president and directors.—Id.

232. — Stock issued for unauthorized or insufficient consideration.

See 12 Cent. Dig. Corp. §§ 879, 880, 883, 884, 967.

Where the charter of a corporation authorizes shareholders to pay their subscriptions in property instead of cash, a creditor of the corporation cannot maintain a bill to compel the shareholders to pay the amount of their subscription, if it appears that the stock has been fully paid up in property, at an honest and fair valuation, though by reason of subsequent events the property has depreciated, and no longer represents the face value of the stock.—Coit v. North Carolina Gold Amalgamating Co., 119 U. S. 343, 7 S. Ct. 231, 30 L. Ed. 420.

Where the lands conveyed to the trustee are subsequently reconveyed by him to the original owners, a creditor of the corporation, who was also a stockholder and consented to such reconveyance, has no right of action against a stockholder on the ground that the lands retained their trust character after such reconveyance.—Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 S. Ct. 382, 32 L. Ed. 725.

A number of persons owning timber lands formed a corporation for the manufacture and sale of lumber, and the lands were conveyed to a trustee for the benefit of the corporation, according to an agreement by which each member was to receive stock in proportion to his individual interest in the lands, the trustee accepting such lands in full payment of the shares issued. Held, that a creditor of the corporation having full knowledge of the facts could not enforce a liability against a stockholder on the ground that the land conveyed by him was worth much less than the stock received therefor, and that therefore he was indebted to the corporation.—Id.

A creditor who in good faith takes from an insolvent corporation its stock, which is wholly worthless, cannot be held liable to other creditors for the difference between the price for which he took the stock and its face value, under Revision Iowa, 1860, tit. 10, c. 52, making stockholders of a corporation liable to creditors for the amount of the unpaid installments on the stock owned by them.—Clark v. Bever, 139 U. S. 96, 11 S. Ct. 468, 35 L. Ed. 88, affirming judgment (C. C.) 31 F. 670.

An active corporation, for the purpose of paying its debts, and obtaining money to prosecute its business, issued bonds; but, finding it impossible to negotiate them, it issued shares of capital stock in an amount equaling the par value of the bonds as an additional inducement to their purchase. Held, that persons who purchased the bonds and stock at a price fairly representing their market value, without any unfair dealing on the part of any one connected with the transaction, could not be called upon to respond for the par value of the stock, at the suit of the creditors of the corporation.—Handley v. Stutz, 139 U. S. 417, 11 S. Ct. 530, 35 L. Ed. 227, reversing decree (C. C.) Stutz v. Handley, 41 F. 531.

Where a partnership was incorporated after having been in operation but one year, and, in estimating its property conveyed to the corporation, the profits were inflated, and an expert accountant afterwards found the actual amount of such profits, such amount was properly allowed in computing the balance due on stock subscriptions of the members of the firm in a subsequent

action thereon by creditors.—*Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 863.

Where a corporation was formed by the members of a firm, and the value of the property turned over was greatly inflated, no allowance should be made for the experience or good will of the partners, or for their trouble or loss of time, in determining the balance due on their subscriptions, in an action by corporate creditors to enforce the same.—*Id.*

Defendant H. agreed with complainants, his creditors, to extend and improve a railroad owned by him; to organize a railway company, and transfer to it such railroad; to cause the company so formed to issue bonds, and to deliver a certain amount thereof to complainants in payment of their respective claims against him. In pursuance of such agreement, H., with others, organized a railway corporation; he subscribing for a large number of shares, and the others, persons in his employ, and acting under his direction and control, subscribing for one share each. At a meeting held by them immediately thereafter, a board of directors, consisting of all of them except H. and another, was elected, and at the same meeting H. proposed to sell his said railroad to the corporation for a sum grossly in excess of its value, payable in the bonds and stock of the company, including the subscriptions previously made. The proposition was unanimously accepted by the directors, and their action was subsequently ratified by the stockholders. After the issue of such bonds and stock to him, H. transferred the stipulated amount of bonds to complainants, who were ignorant of the facts relating to such organization and sale. Complainants thereafter recovered judgments on the bonds against the corporation, executions thereon were returned unsatisfied, and the company became insolvent and abandoned action under its charter. *Held*, that the overvaluation of the property so transferred by H. in pretended payment of the subscriptions to stock, taken in connection with the other facts, clearly established such a case of fraud as entitled complainants to enforce, from the estate assigned by H. for benefit of his creditors, actual payment for the stock issued to him, and also for that issued to another person for his use and benefit.—*Lloyd v. Preston*, 146 U. S. 630, 13 S. Ct. 131, 36 L. Ed. 1111.

Complainants did not agree or understand that the subscriptions to the stock were to be paid by the transfer of the property, but understood that the stockholders were to be liable, as the law of the state provided, for full payment in money or its equivalent, and, in addition, for an equal amount individually; and they had no knowledge of or complicity in the illegal organization. *Held*, that they were not estopped from alleging, as judgment creditors of the company, that its capital stock was not adequately and actually paid up.—*Id.*

233. — Increase of stock.

See 12 Cent. Dig. Corp. §§ 889, 890.

Where, upon the purchase of additional property, the capital of a corporation is increased by the issue to the stockholders, upon the surrender of their old certificates, of new stock to a much greater extent than the cost or value of the additional property, the stockholder cannot be held individually liable upon the stock issued, at the suit of a creditor who was cognizant of the whole transaction, and acquiesced in it.—*Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 7 S. Ct. 231, 30 L. Ed. 420.

Where the charter of a corporation empowers it to increase its capital stock to the precise amount fixed at a stockholders' meeting, subscribers to such increased stock are estopped, as against creditors of the corporation who acted without fault, believing the increase to have been lawfully made, from asserting that the increased issue of stock is invalid because

the amendment of the charter authorizing such increase was never recorded or published, as required by Gen. St. Ky. c. 56, §§ 5, 6; section 18 of the same chapter further providing that "no persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of a legal organization as a defense to an action brought against them as a corporation."—*Handley v. Stutz*, 139 U. S. 417, 11 S. Ct. 530, 35 L. Ed. 227, reversing decree (C. C.) *Stutz v. Handley*, 41 F. 531.

The stockholders of a corporation, who voted to increase the capital stock 800 shares, and then distributed among themselves 300 of those shares, without any consideration, must, at the suit of creditors of the corporation, which has become insolvent, respond for the par value of the shares, though they never expressly agreed to pay for the same, and though the stock is expressly declared to be fully paid, and free from all claims or demands on the part of the corporation.—*Id.*

One of the original stockholders of a corporation, who knew of the contemplated increase of the capital stock, and who authorized an agent to represent him in all matters connected therewith, cannot repudiate his agent's act in receiving a proportionate share of the increased stock distributed to him by virtue of his ownership of the original stock.—*Id.*

Creditors of a corporation are presumed to have trusted it on the faith of an increase in the capital stock from the time it was voted; and the fact that the subscribers did not receive it until after the debts were contracted will not relieve them from liability.—*Id.*

235. Extent of additional statutory liability.

See 12 Cent. Dig. Corp. §§ 882, 893-906.

A partnership was converted into a corporation with a capital stock of \$150,000, the certificate of incorporation reciting that \$50,000 had been paid in. All the partnership assets were turned over, and immediately afterwards a call was made by the directors for a stock payment for \$4,000, the resolution declaring that the payment by the stockholders of their respective proportions thereof would be in full payment of the entire capital stock. *Held*, that this resolution was not conclusive as against creditors, and upon the failure of the corporation, the stockholders were liable for any balance not actually paid in, in cash or its equivalent.—*Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 863.

236. Debts to which liability extends.

See 12 Cent. Dig. Corp. §§ 907-933.

237. — Corporate debts in general.

See 12 Cent. Dig. Corp. §§ 907-910, 914-918, 923-929, 931-933.

It is error to charge stockholders, in enforcing their personal liability, with claims of persons who failed to appear and prove their claims.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

240. Persons entitled to enforce liability.

See 12 Cent. Dig. Corp. §§ 934-942, 1099-1100½.

The receiver of the assets of a corporation is not authorized to maintain an action to enforce the liability of a stockholder, by Gen. St. Kan. 1868, §§ 32, 44, since that act made the liability of the stockholder, not an asset of the corporation, but an asset which a creditor of the corporation alone could recover for his individual benefit to the extent required to pay a judgment obtained by him against the corporation.—*Evans v. Nellis*, 23 S. Ct. 74, 187 U. S. 271, 47 L. Ed. 173.

241. Persons liable.

See 12 Cent. Dig. Corp. §§ 943, 950, 952-979.

241½. — Members in general.

See 12 Cent. Dig. Corp. §§ 943, 944.

After certain negotiable bonds of a private corporation had been pledged by the owner thereof to secure a pre-existing debt, the pledgor was adjudged a bankrupt. The pledgee took the bonds without notice of any equities existing between the pledgor and the obligor. After the adjudication in bankruptcy, the pledgee of the bonds and the assignee in bankruptcy entered into an agreement by which the pledgee was to be paid a sum of money, and be allowed to retain the bonds in discharge of his debt, and he was to indemnify the assignee against any loss on account of stock of the corporation held by the pledgor. *Held*, that the pledgee did not agree to become a stockholder in the corporation or to indemnify the pledgor against his individual liability as a stockholder, and, the assignee in bankruptcy having never accepted the stock, or consented to become a stockholder, neither the assignee nor the assets in his hands became subject to the individual liability of a stockholder, and no liability was imposed on the pledgee by reason of the contract of indemnity.—*American Fidelity Co. v. Garrett*, 110 U. S. 288, 4 S. Ct. 90, 28 L. Ed. 149.

In an action by a trustee under an assignment from an insolvent corporation to recover an assessment on its stock, a finding that defendant never subscribed for the shares, and was not liable to pay the assessment, is conclusive in defendant's favor and the question of the effect of a discharge in bankruptcy is wholly immaterial.—*Glenn v. Sumner*, 132 U. S. 152, 10 S. Ct. 41, 33 L. Ed. 301.

243. — Holders or owners of stock.

See 12 Cent. Dig. Corp. §§ 943, 944, 946-950, 952-959, 974, 975, 979.

1 Wag. St. c. 37, art. 1, § 22, provides that, upon the dissolution of a corporation leaving debts unpaid, the stockholders shall be liable therefor in an action in which the company need not be joined. *Id.* art. 2, § 9, provides that no person holding stock as collateral security shall be personally liable thereon, but the pledgor thereof shall be considered as holding the same. *Held*, that stock pledged to a creditor by the corporation itself is within the exemption; that, though the certificates are absolute in form, parol evidence is admissible to show the real nature of the transaction; and that the creditor is not estopped from claiming the exemption by being represented and voting at stockholders' meetings.—*Burgess v. Seligman*, 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359.

The capital stock of an insolvent corporation is part of its assets, and, when issued, the creditors have a right to assume that it is paid up, or, if unpaid, that a court of equity may require its payment; and, where stock which purports to be fully paid up has been issued to a person in consideration only of his influence, a claim of such person against the corporation, amounting to only half of the face of such stock, is not entitled to priority over that of any bona fide creditor, whether secured or unsecured.—*Washburn v. Green*, 133 U. S. 30, 10 S. Ct. 280, 33 L. Ed. 516.

The mere fact that a railroad company, after adequately compensating contractors for the construction of its road by the delivery of its first mortgage bonds, issued to them, in addition, shares of its stock to a large amount, does not enable a creditor of the company, which has since become insolvent, to subject to his claim, as unpaid subscriptions, the shares of stock held by the contractors, unless he affirmatively shows that such stock, when delivered, had a substantial value; and general allega-

tions in his bill that the issue of the stock to the contractors was "colorable," and a "breach of trust," and a scheme by which they were to get stock without paying for it, are insufficient.—*Fogg v. Blair*, 139 U. S. 118, 11 S. Ct. 476, 35 L. Ed. 104.

Under the Ohio statute providing that the term "stockholder" shall apply to an equitable owner, though the stock appears on the books in the name of another, one for whose benefit stock is sold by another is subject to the same liability for corporate debts as one holding stock in his own name.—*Lloyd v. Preston*, 146 U. S. 630, 13 S. Ct. 131, 36 L. Ed. 1111.

244. — Effect of transfers of stock.

See 12 Cent. Dig. Corp. §§ 960-977.

Code Va. 1860, c. 57, tit. 18, § 24, provides that on any assignment of corporate stock "the assignee and assignor shall each be liable for any installments which may have accrued, or which may thereafter accrue." *Id.* § 25, provides that "a person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof, as regards the company." A company's stock ledger showed that five certificates of 50 shares each were issued in defendant's name. He testified that he transferred three of these certificates to third persons, but they failed to have them transferred to their own names on the books. Of the remaining 100 shares, he transferred 50 to other persons, the transfer being made on the books. *Held* that, as to creditors, he still remained the owner of 200 shares, and was properly assessed on 250.—*Hawkins v. Glenn*, 131 U. S. 319, 9 S. Ct. 739, 33 L. Ed. 184.

The authority of the Minnesota courts under Rev. Laws Minn. 1905, §§ 3184-3190, relating to the liability of stockholders for corporate debts, is not confined to proceedings to assess existing stockholders, in view of the provision making it applicable to liability on shares at any time held or owned by such stockholders.—*Selig v. Hamilton*, 34 S. Ct. 926, 234 U. S. 652, 58 L. Ed. 1518, affirming judgment (*D. C.*) *Hamilton v. Selig*, 195 F. 153.

A nonresident former stockholder in a domestic corporation is not denied rights under the federal Constitution by Rev. Laws Minn. 1905, §§ 3184-3190, relating to liability of stockholders for corporate debts, because he may be assessed for debts antedating the transfer, in proceedings of which he is notified only by publication and mailing of notice and is represented by the corporation.—*Id.*

248. Payment or satisfaction of liability.

See 12 Cent. Dig. Corp. §§ 998-1001.

A subscriber for stock in a corporation offered, while the company was solvent, to pay for his stock, but the company refused to receive the money or to issue the stock to him. The stockholder, however, took no action to absolve himself from his subscription contract, but continued active in the company's business until it became insolvent and embarrassed. *Held*, that the offer and its refusal constituted no defense to an action by the assignee of the corporation to recover on the subscription.—*Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

251. Amendment or repeal of statute imposing liability.

See 12 Cent. Dig. Corp. §§ 1013-1015.

The grant to a consolidated railroad company, by Sp. Laws Minn. 1881, c. 113, of the franchises, exemptions, and immunities of the older company, does not include the exemption which the stockholders of the earlier company were given by mere implication, without any express provision therefor, even if such ex-

emption could be granted by the legislature under the provision of the state constitution of 1858, which imposes liability upon the shareholders of all such corporations. Judgment, *Gardner v. Minneapolis & St. L. Ry. Co.*, 76 N. W. 282, 73 Minn. 517, affirmed.—*Minneapolis & St. L. Ry. Co. v. Gardner*, 20 S. Ct. 656, 177 U. S. 332, 44 L. Ed. 793.

252. Necessity of exhausting remedy against corporation.

See 12 Cent. Dig. Corp. §§ 1016-1023.

Act Feb. 17, 1848, § 24, providing that no suit against stockholders for the debts of the company shall be brought until execution against the company shall be returned unsatisfied, an adjudication in bankruptcy of the company makes an issue and return of execution unnecessary.—*Flash v. Conn.*, 109 U. S. 371, 3 S. Ct. 263, 27 L. Ed. 966; *Adams v. Same*, 109 U. S. 381, 3 S. Ct. 269, 27 L. Ed. 970.

Under the Rhode Island corporation act of 1847 (Laws June Sess. 1847, p. 30), providing for the enforcement of the individual liability of stockholders of manufacturing corporations for debts of the corporation, by bill in equity or by proceedings on attachment or execution against the corporation, or under the act of March 27, 1877, c. 600, limiting the remedy to a bill in equity or an action at law on a judgment against the corporation, such liability cannot be enforced by action at law against a stockholder or his executor, without previously recovering judgment against the corporation, although the corporation is in bankruptcy.—*Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 S. Ct. 757, 30 L. Ed. 825.

A person having a claim for unliquidated damages arising out of fraud in a sale against a corporation which has sold its assets, distributed its corporate funds among its stockholders, and suspended business, but which has not been legally dissolved, cannot maintain a suit in equity in a federal court against a portion of the stockholders to subject to his claim the assets so received by them without first reducing to judgment his claim against the corporation.—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 S. Ct. 691, 37 L. Ed. 577.

253. Effect as against stockholder of judgment against corporation.

See 12 Cent. Dig. Corp. §§ 1024-1030.

A judgment against a corporation, which by the laws of the state in which it is rendered is binding on the stockholders, must be given by a court of another state the same conclusive effect against a stockholder who is sued therein; and the only defenses which he can make against it are those which he could make in the courts of the state in which it was rendered. Judgment 40 A. 341, 20 R. I. 466, reversed.—*Hancock Nat. Bank v. Farnum*, 20 S. Ct. 506, 176 U. S. 640, 44 L. Ed. 619.

A judgment against a corporation is not so conclusive on a stockholder, in an action to enforce his individual liability for a corporate obligation under the Kansas constitution and laws, as to prevent his showing that because such corporate obligation was ultra vires he was not liable under such constitution and laws. Judgment 105 F. 224, 44 C. C. A. 456, affirmed.—*Ward v. Joslin*, 22 S. Ct. 807, 186 U. S. 142, 46 L. Ed. 1093.

Full faith and credit are not denied to a judgment of a Minnesota court against resident stockholders of a domestic corporation, in an action to enforce their statutory liability, by the judgment of a court of another state, denying the right to maintain a further action to enforce such liability outside the state of incorporation, where, under the Minnesota laws as construed by its courts, the only remedy pro-

vided for the enforcement of the liability of stockholders in domestic corporations is a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who can be served with process. Judgment 87 N. W. 255, 111 Wis. 296, affirmed.—*Finney v. Guy*, 23 S. Ct. 558, 189 U. S. 335, 47 L. Ed. 839.

A nonresident notified only by publication and mailing of notice of proceedings under Rev. Laws Minn. 1905, §§ 3184-3190, relating to liability of stockholders for corporate debts, is not concluded in an action in another jurisdiction by the receiver against him as stockholder on any issue as to the transfer of his stock, but may litigate the same.—*Selig v. Hamilton*, 34 S. Ct. 926, 234 U. S. 652, 58 L. Ed. 1518, affirming judgment (D. C.) *Hamilton v. Selig*, 195 F. 153.

The determination of the court on the evidence in proceedings under Rev. Laws Minn. 1905, §§ 3184-3190, relating to the liability of stockholders for corporate debts, as to the amount of assessment to be made on former stockholders for debts while they held the stock, is conclusive in a suit by the receiver in another jurisdiction to recover the amount of assessment from a former stockholder notified of the original proceedings only by publication and mailing of notice.—Id.

All stockholders liable for corporate debts are embraced by an order in proceedings under Rev. Laws Minn. 1905, §§ 3184-3190, to enforce liability of stockholders, where the receiver's petition invoked the jurisdiction of the court to make such assessment as was necessary to enforce the stockholders' liability as to unpaid debts, and the order of assessment included every share of capital stock and the persons liable as stockholders.—Id.

A former stockholder in a Minnesota corporation cannot resist recovery in an action by the receiver in another jurisdiction to enforce his liability under Rev. Laws Minn. 1905, §§ 3184-3190, for corporate debts, because no distinct assessment based on debts antedating his transfer was made when levying the assessment, but he must look to the court levying the assessment for the adjustment of any equities he may have.—Id.

Competent evidence that there are corporate debts unpaid antedating the transfer of stock by a former stockholder was furnished in a suit against him in a foreign jurisdiction to enforce his liability under Rev. Laws Minn. 1905, §§ 3184-3190, by decrees in Minnesota determining the amount of the outstanding claims and when they arose.—Id.

256. Execution against stockholder on judgment against corporation.

See 12 Cent. Dig. Corp. §§ 1036-1043.

Under Rev. St. Mo. 1879, § 736, authorizing execution on a judgment against a corporation to be issued against a stockholder to the amount of the unpaid balance of his stock, upon order of court made "after sufficient notice in writing to the person sought to be charged," and upon fundamental principles of jurisprudence, an alleged stockholder of a Missouri corporation, not served with process within the state upon the original writ in an action against the corporation in the state court, is entitled to legal notice and trial of the issue whether he is a stockholder, before he can be charged with personal liability as such; and personal service of the notice within the jurisdiction of the court is essential to support an order or judgment ascertaining and establishing such liability, unless he has voluntarily appeared or otherwise waived his right to such service.—*Wilson v. Seligman*, 144 U. S. 41, 12 S. Ct. 541, 36 L. Ed. 338, affirming judgment (C. C.) 36 F. 154.

◀258. Actions to enforce liability.

See 12 Cent. Dig. Corp. §§ 831, 887, 888, 980, 1050-1129, 1131, 1133-1140, 1149-1170, 2263, 2272-2274, 2276, 2277.

◀259. — Nature and form.

See 12 Cent. Dig. Corp. §§ 1050, 1052-1067, 2273.

Under Const. Or. art. 11, § 3, providing that the individual liability of stockholders for the indebtedness of the corporation shall be limited to the amount of their stock subscribed and unpaid, the remedy of the creditor to enforce this liability is in equity, to subject the subscriptions as a trust fund to the debts of the company.—*Patterson v. Lynde*, 108 U. S. 519, 1 S. Ct. 432, 27 L. Ed. 265.

Where a patentee has conveyed his patents to his partner in trust, and the latter has fraudulently transferred them to another partnership, of which he is a member, and they have come into the hands of a corporation by other conveyances, the patentee cannot maintain a bill in equity against the individual stockholders of the corporation for "fraud" and "conspiracy," simply because at the time of the purchase they knew of plaintiff's claim, and took no steps to protect his interest. If the suit is for damages for a fraudulent conspiracy to cheat him out of the profits of his invention, the remedy is at law.—*Ambler v. Choteau*, 107 U. S. 586, 1 S. Ct. 556, 27 L. Ed. 322.

Inasmuch as the liability of the defendant is fixed, and is not dependent upon the liability of other stockholders, there is no necessity for a proceeding in equity bringing in other stockholders or creditors, but it may be enforced by an action at law.—*Flash v. Conn.* 109 U. S. 371, 3 S. Ct. 263, 27 L. Ed. 966; *Adams v. Same*, 109 U. S. 381, 3 S. Ct. 269, 27 L. Ed. 970.

Only the remedy given by the statute creating the liability, if the statute gives a remedy, is available, whether the proceedings are taken in the state creating the corporation or elsewhere, and whether in the state or federal courts.—*Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 S. Ct. 757, 30 L. Ed. 825.

Under Rev. St. Mo. 1879, § 736, giving judgment creditors of a corporation having no corporate property to be levied on the right to issue execution against the stockholders for the unpaid balance due on the stock, such creditors, without special legislative authority, cannot sue on notes given by the stockholders to the corporation for such balances.—*Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 10 S. Ct. 589, 33 L. Ed. 994.

In Pennsylvania the assignee of an insolvent corporation may maintain an action at law to recover the amount due on a stock subscription, when it appears that the debts of the concern exceed its entire assets, including the unpaid stock.—*Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

Equity is without jurisdiction, on the ground of the prevention of a multiplicity of suits, of a suit to enforce the statutory liability of the stockholders of a foreign corporation, in which the amount demanded is the full amount of the par value of the shares held by each defendant. Judgment 106 F. 253, 45 C. C. A. 270, affirmed.—*Hale v. Allison*, 23 S. Ct. 244, 188 U. S. 56, 47 L. Ed. 380.

A suit to enforce the statutory liability of stockholders in a foreign corporation cannot be maintained in a court of equity on the theory that it is an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree of a court of the state where the corporation resides in a suit to enforce the liability of its stockholders, where the nonresident stockholders were merely nominal parties in that

suit, and no judgment was rendered against them because of a want of jurisdiction over them.—*Id.*

◀261. — Conditions precedent.

See 12 Cent. Dig. Corp. §§ 1016-1023, 1063-1075, 2268-2271.

Where the charter of a corporation forbids it to commence business until the whole amount of shares subscribed is paid in, or secured to be paid on demand by notes or mortgages, and a stockholder gives his notes on demand for the balance due from him, a provision in the charter that the balance due on each share shall be subject to the call of the directors does not give the stockholder, as between himself and the company's creditors, the right to withhold payment of the balance until the directors require payment.—*Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 10 S. Ct. 589, 33 L. Ed. 994.

In Pennsylvania the assignee of an insolvent corporation may maintain an action at law to recover the amount due on a stock subscription, when it appears that the debts of the concern exceed its entire assets, including the unpaid stock, and in such case no assessment is necessary to support the suit.—*Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

The remedy against a stockholder of an insolvent corporation, given to the receiver of its assets by Laws Kan. 1898, c. 10, cannot be enforced until such receiver has first brought suit against the corporation and all resident stockholders, in order to fix the sum required to pay the corporate debts.—*Evans v. Nellis*, 23 S. Ct. 74, 187 U. S. 271, 47 L. Ed. 173.

◀262. — Defenses.

See 12 Cent. Dig. Corp. §§ 1076-1083, 2273.

An insolvent corporation, by resolution of its directors, authorized its president to make a deed of assignment of all the corporate property without preferences. A few days later a resolution was passed by the directors and stockholders, directing the president to execute a mortgage to one of the directors, and also assign to him a leasehold and other property, as security for money advanced, and then to make the assignment according to the original resolution. The president, however, afterwards made the assignment without executing these securities. Thereafter the directors passed a resolution repudiating the assignment, and declaring it a fraud upon the stockholders; but no effort was made to prevent the assignment from taking effect, and no notice was given to the assignee of this attempt of the directors to have one of their number preferred, and the assignee was allowed to proceed in the execution of his trust. *Held*, that a stockholder who was sued by the assignee for the amount due on his stock could not set up as a defense the abortive attempt to prefer the director.—*Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

An order of a court making a "call or assessment" upon all stockholders of a corporation who have not paid their shares in full, is merely such a call as the directors might have made before the matter was brought within the court's jurisdiction, and is not a judgment against any particular stockholder, so as to be entitled as such to full faith and credit, under the constitution and laws of the United States, in the courts of another state, where an action is brought against a stockholder to recover the amount of the assessment on his shares. And in such action defendant is entitled to rely on any defense which he might have to an action upon the contract of subscription.—*Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 16 S. Ct. 810, 40 L. Ed. 986, affirming judgment 50 N. W. 45, 83 Iowa, 430.

263. — Jurisdiction and venue.

See 12 Cent. Dig. Corp. §§ 831, 1065.

The liability of stockholders under Act N. Y. Feb. 17, 1848, providing that all stockholders of every company incorporated thereunder shall be individually liable for the debts of the company, to the amount of their stock until all the capital stock shall have been paid in and a certificate thereof made and recorded by the president and trustees, is not in the nature of a penalty, but arises out of a contract, and may be enforced in an action in another state in a court having jurisdiction of the subject-matter and the parties.—*Flash v. Conn*, 109 U. S. 371, 3 S. Ct. 263, 27 L. Ed. 966; *Adams v. Same*, 109 U. S. 381, 3 S. Ct. 269, 27 L. Ed. 970.

Laws N. Y. 1875, c. 611, § 37, making stockholders liable for the full amount of stock held by them for all debts contracted by the company before the whole amount of capital stock has been paid in, is not a penal statute in the international sense, so that a judgment recovered thereunder cannot be enforced in another state.—*Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123.

An action to enforce the liability of a stockholder under the state constitution and statutes, which make him liable to an additional amount equal to his stock, can be maintained in any court of competent jurisdiction, because the liability is contractual in its nature, and is not an action to enforce a statutory remedy, so as to deprive the federal court of jurisdiction. Judgment 83 F. 288, 28 C. C. A. 404, affirmed.—*Whitman v. National Bank of Oxford*, 20 S. Ct. 477, 176 U. S. 559, 44 L. Ed. 587.

A receiver appointed by a court of equity in the exercise of its general jurisdiction cannot, by virtue of his appointment and the direction to sue contained therein, maintain a suit in equity in a foreign jurisdiction to enforce the statutory liability of stockholders in an insolvent corporation, especially where the courts of the state where the receiver was appointed have held that such an action cannot be maintained by him in the courts of that state. Judgment 106 F. 258, 45 C. C. A. 270, affirmed.—*Hale v. Allinson*, 23 S. Ct. 244, 188 U. S. 56, 47 L. Ed. 380.

A stockholder's liability in an Ohio corporation cannot be enforced outside of the jurisdiction of that state on the theory that Const. Ohio, art. 13, § 3, is, for that purpose, self-executing, when it provides for the individual liability of the stockholders, where an action in the Ohio courts alone is contemplated by Rev. St. Ohio 1880, § 3260, as amended in 1894, which was enacted in pursuance of this constitutional provision, and itself provides for the procedure and states the remedy.—*Middletown Nat. Bank v. Toledo, A. A. & N. M. Ry. Co.*, 25 S. Ct. 462, 197 U. S. 394, 49 L. Ed. 803.

The personal liability of a nonresident stockholder of a foreign corporation doing business in California under Civ. Code Cal. § 322, may be enforced outside of the California courts.—*Thomas v. Matthiessen*, 34 S. Ct. 312, 232 U. S. 221, 58 L. Ed. 577, reversing judgment 192 F. 495, 113 C. C. A. 101.

264. — Limitations and laches.

See 12 Cent. Dig. Corp. §§ 1084-1098, 2274; 33 Cent. Dig. Lim. of Act. §§ 327, 343, 347, 349.

Where no call has ever been made by the corporation for a stock assessment for the benefit of creditors, the statute of limitations does not begin to run against the stockholder's liability on his subscription until the date of a decree of a court of equity ordering the assessment.—*Hawkins v. Glenn*, 131 U. S. 319, 9 S. Ct. 739, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing judgment (C. C.) *Same v. Priest*, 28 F. 907.

The law of the state creating the corporation governs the rights of its stockholders and creditors; and the statute of another state, prescribing a different period of limitation, can have no application to an action brought in that state to enforce the decree ordering the assessment.—*Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing judgment (C. C.) *Same v. Priest*, 28 F. 907.

A corporation made an assignment, transferring to the trustees thereunder, among other property, all moneys payable "on calls or assessments on the stock of the company." Subsequently a receiver was appointed, with directions to collect "any sums due upon the shares of the capital stock of the company." The trustees under the deed of assignment possessed no authority to make a call upon the stockholders, and none in fact was made until long after the appointment of the receiver. Held, that no money was due from the stockholders until the call was in fact made, and hence limitation did not begin to run in their favor until that time.—*Glenn v. Marbury*, 145 U. S. 499, 12 S. Ct. 914, 36 L. Ed. 790.

A cause of action to enforce the liability of a stockholder under the Minnesota Constitution and laws does not accrue so as to start the running of the six years' limitation prescribed by Code Civ. Proc. N. Y. § 382, until the receiver of the corporation can sue upon the assessment after the stockholder has failed to pay as required by an order of court.—*Bernheimer v. Converse*, 27 S. Ct. 755, 206 U. S. 516, 51 L. Ed. 1163.

The limitation of the right to bring an action against a stockholder for a debt of the corporation to two years after he has ceased to be a stockholder, which is made by Laws N. Y. 1892, p. 1841, c. 688, § 55, is not applicable to a suit to enforce the liability of a stockholder in a foreign corporation.—Id.

The three years' limitation prescribed by Code Civ. Proc. N. Y. § 394, for actions against the stockholders to enforce their liability created by common law or by statute, does not govern a suit to enforce liability of a stockholder in a foreign mercantile corporation.—*Selig v. Hamilton*, 34 S. Ct. 926, 234 U. S. 652, 58 L. Ed. 1518, affirming judgment (D. C.) *Hamilton v. Selig*, 195 F. 153.

265. — Parties.

See 12 Cent. Dig. Corp. §§ 1101-1125, 2275.

When a patentee has conveyed his patents to his partner in trust, and the latter has fraudulently transferred them to another partnership, of which he is a member, and they have come into the hands of a corporation by other conveyances, the patentee cannot maintain a bill in equity against the individual stockholders of the corporation for "fraud" and "conspiracy," simply because, at the time of the purchase, they knew of plaintiff's claim, and took no steps to prevent his interest. If the object be to charge defendants for the profits made by the defaulting trustee, he is a necessary party.—*Ambler v. Choteau*, 107 U. S. 586, 1 S. Ct. 556, 27 L. Ed. 322.

A court of equity, at the suit of creditors of an insolvent corporation which has made an assignment, but which by statute (Code Va. 1860, c. 56, § 30) still exists as a corporation for the purpose of collecting debts and enforcing its liabilities, in which suit the corporation and the trustees are made parties defendant, may by its decree direct a stock assessment for the benefit of creditors, which will bind stockholders who are not individually parties to the suit.—*Hawkins v. Glenn*, 131 U. S. 319, 9 S. Ct. 739, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing judgment (C. C.) *Same v. Priest*, 28 F. 907.

A person having a claim for unliquidated damages arising out of fraud in a sale against

a corporation which has sold its assets, distributed its corporate funds among its stockholders, and suspended business, but which has not been legally dissolved, cannot maintain a suit in equity in a federal court against a portion of the stockholders to subject to his claim the assets so received by them, without making the corporation itself a party; and the fact that it has no officers or agents upon whom personal service can be made is immaterial when, by the statutes of the state of its incorporation (Nebraska), a method is provided whereby it can be brought into court.—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 S. Ct. 691, 37 L. Ed. 577.

—274. — Judgment or decree.

See 12 Cent. Dig. Corp. §§ 1162-1164, 1167, 1168.

In an action by judgment creditors to enforce liability against stockholders, where stock is held in the name of one person for the benefit of another, it is proper to give a decree against both if the recovery is restricted to the aggregate amount of complainant's judgments.—*Lloyd v. Preston*, 146 U. S. 630, 13 S. Ct. 131, 36 L. Ed. 1111.

—277. — Costs.

See 12 Cent. Dig. Corp. § 1166.

If a bill, as originally framed against an insolvent bank, seeks only the collection of assets, but is afterwards amended so as to enforce the personal liability of stockholders, these should not be charged with the expense of a receiver appointed under the original bill, and not necessary for the enforcement of their liability.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

VI. OFFICERS AND AGENTS.

Banks, see Banks and Banking, —252-257.

Compelling delivery of corporate books to trustee in bankruptcy, see Bankruptcy, —136.

Extraditable offense by corporate officer, see Extradition, —5.

Right of directors to question validity of statute affecting bondholders, see Constitutional Law, —42.

(A) ELECTION OR APPOINTMENT, QUALIFICATION, AND TENURE.

Resignation of bank officers, see Banks and Banking, —251.

—283. Election of directors.

See 12 Cent. Dig. Corp. §§ 1195, 1198-1205, 1207-1235.

Where in a suit in equity it appeared that the title to office in a regularly incorporated private domestic corporation was the sole or main question at issue, as shown by the record; that the defendants were in possession under a claim of election; and that the only standing the complainants had was by virtue of a claimed election—the court below was without jurisdiction, the remedy of the complainants, if any, being by quo warranto. Judgment *Hayes v. Burns*, 25 App. D. C. 242, affirmed.—*Burns v. Hayes*, 28 S. Ct. 744, 201 U. S. 650, 50 L. Ed. 905.

—292. Resignation.

See 12 Cent. Dig. Corp. §§ 1255-1257.

A statute providing that directors shall continue in office until their successors are elected, or appointed and qualified, does not prevent a director from resigning at any time.—*Briggs v. Spaulding*, 141 U. S. 132, 11 S. Ct. 924, 35 L. Ed. 662, affirming decree (C. C.) *Movius v. Lee*, 20 F. 298.

(B) AUTHORITY AND FUNCTIONS.

—296. Nature of corporate office in general.

See 12 Cent. Dig. Corp. §§ 1267-1273.

Complainant, as one of a syndicate, purchased a mine under an agreement that complainant should "control the management." Complainant was elected president of the corporation owning the mine, and appointed general manager. The directors voted that all checks should be signed by the president, vice president, and secretary; that, in the absence of the president, the vice president should sign certificates of stock; and that the superintendent at the mine, in the absence of the president, should draw drafts for indebtedness at the mine. *Held* not to be in violation of the agreement that complainant should control the mine "as if he owned it."—*Grant v. Parker*, 115 U. S. 51, 5 S. Ct. 1170, 29 L. Ed. 346.

(C) RIGHTS, DUTIES, AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS.

Jurisdiction of action against officer as dependent on effort to secure remedy through corporation, see Courts, —21.

Limitation of action to recover compensation, see Limitation of Actions, —54.

Nature of action to enforce liability for failure to make reports, see Action, —27.

—308. Compensation.

See 12 Cent. Dig. Corp. §§ 1334-1349.

A director can recover compensation for services rendered, under proper employment, outside his regular duties.—*Fitzgerald & Malloy Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

The vice president of a corporation which was conducting a ranch, stock, and mill business sued to recover compensation for services as general manager. The by-laws of the company cast no special duties on him as vice president, and, while the evidence was conflicting, there was positive testimony that he had rendered extensive services outside the ordinary duties, of that office, and similar to those of general manager. Substantially all the stock of the corporation was owned by himself and the president, and, soon after he began to render the services, there was an attempt between them to adjust his compensation, but no agreement was reached. *Held*, that the evidence warranted the submission of the case to the jury.—*Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U. S. 405, 14 S. Ct. 632, 38 L. Ed. 493, affirming judgment *Toponce v. Corinne Mill, Canal & Stock Co.*, 6 Utah, 439, 24 P. 534.

—309. Rights as creditors of corporation.

See 12 Cent. Dig. Corp. §§ 1366-1373.

Where a director of a railroad company, holding only illegally issued stock, induces directors holding office by virtue of similar stock, transferred to them by him, to authorize a certain number of bonds to be deposited with him as security for advances made and to be made by him, and by unfair means secures the election of himself as treasurer, and thereby the custody of the entire body of the company's bonds, equity will not consider that he ever acquired a lien on the bonds voted as security, though he may have separated them from the other bonds, it having been done without the knowledge of the company, and with an implied denial on his part that he had done so.—*Washburn v. Green*, 133 U. S. 30, 10 S. Ct. 280, 33 L. Ed. 516.

An indemnity mortgage, executed by a corporation to its directors by express authorization of the stockholders, is not void against the corporation and stockholders, as involving a breach of trust.—*Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 S. Ct. 621, 39 L. Ed. 713, reversing decree (O. C.) *Howe, Brown & Co. v. Sanford Fork & Tool Co.*, 44 F. 231.

312. Corporate property, funds, and securities.

See 12 Cent. Dig. Corp. §§ 1376-1386, 1388-1392.

Act Cong. 1877, amending Act 1854, which incorporated Glenwood Cemetery, provided that thereafter the corporation's affairs should be managed by trustees to be elected as provided, and that of the gross receipts from subsequent sale of lots one-fourth should be paid to the former proprietors, and the balance used for the improvement of the cemetery. *Held*, that the president of the corporation, who was the sole former proprietor, was liable to account to the trustees for three-fourths of the proceeds of sales made subsequent to the act of 1877, and that the trustees should pay him one-fourth of the proceeds of future sales.—*Close v. Glenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 403.

A stockholder and director of a corporation purchasing in his own name, and that of the company, shares of another stockholder, to be paid for in the workings of the company's property, and having the stock transferred to him as trustee, must account to it for dividends received by him on the stock.—(1912) *Zeckendorf v. Steinfeld*, 32 S. Ct. 728, 225 U. S. 445, 56 L. Ed. 1156, modifying decree (1909) 100 P. 784, 12 Ariz. 245.

314. Individual profits or benefits from corporate business.

See 12 Cent. Dig. Corp. §§ 1393-1398, 1400.

Where two of the board of directors of a railroad corporation, who took part in making a contract for the construction of the road, were interested with the other parties in the contract, and the other contractors, except these two, entered into an agreement with the other directors at the time the construction contract was made, that, in effect, relieved them from liability on their unpaid stock, such contract is voidable at the election of the parties affected by the fraud; but to the extent of the benefit conferred upon and received by the corporation in the construction of the road, the bonds issued in payment thereof are not void, and in a suit to foreclose the mortgage by which they are secured a decree for that amount should be allowed.—*Thomas v. Brownville. Ft. K. & P. R. Co.*, 109 U. S. 522, 3 S. Ct. 315, 27 L. Ed. 1018.

316. Dealings with corporation or shareholders.

See 12 Cent. Dig. Corp. §§ 1401, 1402, 1404-1406, 1408, 1409, 1412-1414.

The release by a corporation of all claims against a director, arising out of transactions connected with a lease executed to the director by the corporation, in excess of its corporate powers, is valid if made in good faith, without fraud or concealment.—*Illinois Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 5 S. Ct. 525, 28 L. Ed. 1003.

That part of an agreement between a corporation and a director and stockholder by which proceeds of the sale of mining property controlled by him were vested in the corporation on certain conditions is not included in the general terms of a stockholder's rescinding resolution, where it is apparent that they only intended to affect his rights under the agreement to retain for his indemnity the custody of the proceeds of the sale.—(1912) *Zeckendorf*

v. Steinfeld, 32 S. Ct. 728, 225 U. S. 445, 56 L. Ed. 1156, modifying decree (1909) 100 P. 784, 12 Ariz. 245.

317. Fraud as against corporation or shareholders.

See 12 Cent. Dig. Corp. §§ 1401-1414.

A sale of nearly the entire stock in a corporation by its president, with whom it was pooled for that purpose, made, on the advice of the directors, to the person offering the best terms, and subsequently formally ratified by the directors and by a majority vote of the stockholders, is not in fraud of the rights of minority stockholders because the purchaser's object may have been to stop litigation brought against him by the corporation, and to quiet his possession to the property claimed by it, where the issues presented by such litigation, so far as tried, had been decided against the corporation, and where not decided, in the opinion of its attorney, would also be decided against it; nor can fraud be deduced from the provisions in the contract of sale for the payment of compensation to such president and attorney, and for the surrender of a note due the corporation, where it is manifest that these provisions constituted no inducement to the contract. Judgment 74 P. 1052, 8 Ariz. 329, affirmed.—*Hallenborg v. Cobre Grande Copper Co.*, 26 S. Ct. 236, 200 U. S. 239, 50 L. Ed. 458.

A purchase of stock by a director and owner of three-fourths of the entire capital stock, who was also administrator general of the company, and engaged in the negotiations which finally led to the sale of the company's lands to the Philippine Islands government at a price which greatly enhanced the value of the stock, was fraudulent as procured by "insidious machinations" inducing the execution of the contract of sale, within the meaning of Code P. L. art. 1260, defining deceit, where he employed an agent to make the purchase, concealing both his own identity as the purchaser, and his knowledge of the state of the negotiations and their probable successful result.—*Strong v. Repide*, 29 S. Ct. 521, 213 U. S. 419, 53 L. Ed. 833.

319. Actions between corporation and its officers or agents.

See 12 Cent. Dig. Corp. §§ 1415-1426.

Where a bill filed by a railroad corporation to have a decree rendered against it in a foreclosure suit set aside, on the ground of the unfaithful conduct of its solicitor and directors in conducting such suit, showing hostile control of the corporate affairs of plaintiff by its directors during the period covered by such suit, mere knowledge by or notice to plaintiff, or its directors or officers or stockholders, of the facts alleged in the bill, during that period, was unimportant, a case of acquiescence, assent, or ratification, or of the intervention of the rights of innocent purchasers, not being shown by the bill, and the corporation having acted promptly when freed from the control of such directors.—*Pacific Railroad of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

Due process of law, see Constitutional Law, 308.

Liability of bank officers, see Banks and Banking, 255-257.

Limitation of action to enforce liability, see Limitation of Actions, 34.

Officers of national banks, see Banks and Banking, 254.

326. Constitutional and statutory provisions.

See 12 Cent. Dig. Corp. §§ 1443, 1460½, 1469, 1493.

Act N. Y. Feb. 17, 1848, § 12, providing that, if a corporation fails to file reports, the

trustees shall be personally liable for all debts of the corporation then existing, and all debts contracted before the making of the report, is penal in its character, and the liability imposed by it cannot therefore be extended by construction to debts not arising ex contractu.—*Chase v. Curtis*, 113 U. S. 452, 5 S. Ct. 554, 28 L. Ed. 1038.

◀336. **Participation in unauthorized or wrongful acts of corporation.**

See 12 Cent. Dig. Corp. § 1454.

The secretary of a corporation cannot be charged with liability for the publication of a libel merely because, at the request of the general manager of the corporation, he permitted the latter to take a memorandum which was in his custody as such secretary, and which was, without his consent or knowledge, so-used by the general manager as to be made the basis of the libelous article.—*Washington Gas-Light Co. v. Lansden*, 19 S. Ct. 296, 172 U. S. 534, 43 L. Ed. 543.

◀347. **Necessity of judgment and execution against corporation.**

See 12 Cent. Dig. Corp. §§ 1489, 1490.

The fact that money borrowed by a railroad company, on the security of a mortgage of a branch road, is misapplied by the president thereof, will give the bondholders no cause of action against him personally, in the absence of a judgment and execution returned nulla bona against the company.—*Van Weel v. Winston*, 115 U. S. 228, 6 S. Ct. 22, 29 L. Ed. 384.

◀348. **Effect as against officer of judgment against corporation.**

See 12 Cent. Dig. Corp. § 1491.

Under Act N. Y. Feb. 17, 1848, § 12, making officers liable for debts of the company on failure to file reports, a judgment against a corporation is not evidence, as against the trustees, of any debt due from the corporation.—*Chase v. Curtis*, 113 U. S. 452, 5 S. Ct. 554, 28 L. Ed. 1038.

◀350. **Actions to enforce liability.**

See 12 Cent. Dig. Corp. §§ 1492-1494, 1496, 1498-1503.

◀351. — **Nature and form.**

See 12 Cent. Dig. Corp. §§ 1492, 1493.

An action at law cannot be maintained to enforce the personal liability of its officers for the debts of a corporation. The only remedy is by bill in equity.—*Stone v. Chisolm*, 113 U. S. 302, 5 S. Ct. 497, 28 L. Ed. 991.

◀355. — **Jurisdiction and venue.**

See 12 Cent. Dig. Corp. § 1498.

Laws 1875, c. 611, § 21, making the officers of a corporation liable for its debts in case they make a false certificate or report, is not a penal statute in the international sense, so that a judgment recovered thereunder cannot be enforced in another state.—*Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123.

◀356. — **Limitations and laches.**

See 12 Cent. Dig. Corp. § 1499.

The three-year limitation prescribed by Code Civ. Proc. Mont. § 554, for actions against corporate directors to recover a penalty or forfeiture imposed, or to enforce a liability created, by law, must be deemed so far as to qualify the right to enforce a liability for corporate debts already incurred under an earlier act, reenacted as Civ. Code Mont. § 451, by the directors of a corporation which had failed to make its annual report, as to make such limitation available as a defense in any jurisdiction, in view of Code Civ. Proc. § 3456, the language of which imports that the limitations in such

Code are to apply to existing obligations upon which the previous limitation had already begun to run, although by the section immediately preceding no action commenced before the Code took effect, and no accrued right, were to be affected by its provisions.—*Davis v. Mills*, 24 S. Ct. 692, 194 U. S. 451, 48 L. Ed. 1067.

VII. CORPORATE POWERS AND LIABILITIES.

Banks, see Banks and Banking, ▶258.

Delegation of power of eminent domain, to private corporations, see Eminent Domain, ▶10.

Mandamus to control exercise of corporate franchises and powers, see Mandamus, ▶130-133.

Particular corporations, see—

Banks and Banking, ▶89-192, 315.

Building and Loan Associations, ▶25-27.

Street Railroads, ▶17, 18.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

Banking powers, see Banks and Banking, ▶89.

Imposition of penalty in quo warranto, see Quo Warranto, ▶60.

◀372. **Construction of charters and acts of incorporation.**

See 12 Cent. Dig. Corp. §§ 1519-1523.

A corporation chartered "for the transportation of passengers in railroad cars, constructed and to be owned by the said company," under certain patents, and empowered to enter into contracts with other corporations "for the leasing or hiring and transfer to them" of their railway cars and other personal property, leased for a certain rental, for 99 years, to another corporation in the same business, all its property, including its cars and patents and all contracts with railroad companies for the hire of its cars, and agreed that, while the lease was in force, it would not engage in the business of manufacturing and using or hiring cars. *Held*, that the corporation was quasi public, and the lease was void as ultra vires, and because it was an abandonment by the lessor of its duty to the public.—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55.

◀374. **Powers incident to execution of those granted.**

See 12 Cent. Dig. Corp. §§ 1517, 1518.

The chartering of a yacht by a newspaper corporation for the purpose of collecting news concerning events connected with hostilities between the United States and Spain, by a charter party embodying an absolute obligation to return the yacht at the expiration of the term of hiring, and a stipulation as to value in the event of nonreturn, is not ultra vires of the corporation, as beyond the means incidental to the exercise of the power to charter. *Decree Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. O. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

◀377. **Purchasing and holding stock in other corporations.**

See 12 Cent. Dig. Corp. §§ 1531-1534.

A New York telegraph company agreed to build a telegraph line and connect it with the line of a Connecticut company, for a certain amount of that company's bonds secured by mortgage on all its property, including the new line. It then exchanged the Connecticut company's bonds for stock in that company, thus obtaining control of it, and managing the two

companies as one concern. It built the new line, raising money therefor by an issue of its own bonds secured by mortgage covering after-acquired property. *Held*, that these proceedings were within the powers of the New York company, and were not contrary to law or good morals.—*United Lines Tel. Co. v. Boston Safe-Deposit & Trust Co.*, 147 U. S. 431, 13 S. Ct. 396, 37 L. Ed. 231.

The purchase by a manufacturing company of the stock of an insolvent rival concern which has ceased to do business, and whose stock is bought for the evident purpose of preventing a reorganization and of obtaining its patronage, is not authorized by Act N. Y. April 28, 1866, c. 838, making it lawful for a manufacturing company to hold stock in the capital of any corporation engaged in the business of mining, manufacturing, or transporting such matters as are required in the prosecution of the business of the former company, so long as they shall furnish or transport such materials for the use of such company and for two years thereafter, and no longer.—*De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 20 S. Ct. 20, 175 U. S. 40, 44 L. Ed. 65.

It is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management, unless express permission be given them to do so.—*Id.*

⚡385. Effect of acts ultra vires in general.

See 12 Cent. Dig. Corp. §§ 1545-1547.

The fact that a loan procured by a corporation was usurious or ultra vires will not charge the lender with notice of the rights of a third person or corporation in securities pledged for its payment. Decree, 76 F. 905, 22 C. C. A. 606, affirmed.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

⚡387. Persons entitled to question corporate powers.

See 12 Cent. Dig. Corp. §§ 1548-1553.

A devise to a corporation for charitable uses cannot be contested by the heirs at law and next of kin, on the ground that it has the effect to increase the income of the corporation to a sum in excess of the amount which it is authorized by its charter to enjoy. Such a violation of its charter restrictions can only be taken advantage of in a direct proceeding for that purpose by the state which created it.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

The question as to whether defendants shall be left in possession of land fraudulently acquired, and for which they gave no consideration, cannot be raised by a plaintiff who has no right to take the land.—*Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513.

⚡388. Estoppel to deny corporate powers.

See 12 Cent. Dig. Corp. §§ 1556-1567.

A creditor of a railroad company, having proceeded against the successor to its property and franchises, and obtained a judgment against it based on the assumed validity of the transfer of the property and franchises of the old corporation, cannot afterwards object that the transfer was illegal and ultra vires.—*Fogg v. Blair*, 133 U. S. 534, 10 S. Ct. 338, 33 L. Ed. 721.

The performance of a contract by the lessor, a corporation, which contract was ultra vires and void, and use of the demised property by the lessee, cannot estop the lessee from setting up its invalidity in an action on the contract.—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55.

The defense that an absolute promise, contained in a certificate of stock issued by a build-

ing and loan association incorporated under the laws of the state of New York, to mature its shares in a specified time, was ultra vires the corporation, is not available in an action on such promise by a shareholder who has in good faith fully performed his part of the contract. Judgment, *Williamson v. Eastern Building & Loan Ass'n*, 38 S. E. 616, 62 S. C. 390, affirmed.—*Eastern Building & Loan Ass'n v. Williamson*, 23 S. Ct. 527, 189 U. S. 122, 47 L. Ed. 735.

⚡391. Legislative regulation.

See 12 Cent. Dig. Corp. §§ 1573, 1578.

The power to prescribe such regulations and provisions for corporations as the legislature may deem advisable, which is reserved by section 9 of the Illinois general incorporation act (Starr & C. Ann. St. p. 1006), is not limited to the external business of corporations, to the exclusion of interference with their internal management.—*Freeport Water Co. v. City of Freeport*, 21 S. Ct. 493, 180 U. S. 587, 45 L. Ed. 679.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

Bank officers and agents, see Banks and Banking, ⚡104-116, 262.

Declarations by officers and agents as evidence against corporation, see Evidence, ⚡244.

Notice to officer or agent of insurance company as notice to company, see Insurance, ⚡378.

⚡399. Actual or apparent authority.

See 12 Cent. Dig. Corp. §§ 1533, 1602-1610.

A statement by the superintendent of a mine owned by a corporation, made to the owner of an adjoining claim, that the lines of the latter would be respected as long as he was superintendent, does not bind the corporation, not being within the scope of his agency or authority.—*Walrath v. Champion Min. Co.*, 18 S. Ct. 909, 171 U. S. 293, 43 L. Ed. 170, affirming decree 72 F. 978, 19 C. C. A. 323.

The managing editor of a newspaper, charged with the full control of the business of collecting news, and impliedly vested with power to enter into contracts in respect thereto, is, in effect, a general officer of the newspaper corporation as to such matters, and as such has power prima facie to do any act which the directors or trustees of the corporation can authorize or ratify. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

⚡404. Disposition of corporate property and securities in general.

See 12 Cent. Dig. Corp. §§ 1626-1628, 1633-1639.

Where the secretary and treasurer of a trust company, who was intrusted with the entire management of its business, delivered to one of its debtors securities deposited by him, having no indorsement which would prevent their negotiation, and with knowledge of his purpose to hypothecate them to others, the company cannot set up a claim to such securities as pledgee as against a subsequent pledgee in good faith and without notice. Decree, 76 F. 905, 22 C. C. A. 606, affirmed.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

⚡408. Transactions concerning corporate stock.

See 12 Cent. Dig. Corp. §§ 1677, 1678.

Plaintiff loaned money to one B., who gave as security therefor a certificate of stock in a national bank of which he (B.) was cashier. The certificate was written by B. in one of the printed forms which the president had signed

and left with him to be used if needed in the president's absence, and recited that plaintiff was the owner of the stock "transferable only on the books of the bank on the surrender of this certificate," as was in fact provided by its by-laws. B. did not surrender any certificate to the bank, or make any transfer to plaintiff on its books, though he falsely represented to plaintiff that he owned the stock, and had transferred to her. He never repaid the money lent, and was insolvent. The bank never ratified, or received any benefit from, the transaction. *Held*, that the bank was not liable to plaintiff on the certificate, though there was evidence that in one or two other instances stock was issued by B. without any certificate having been surrendered, and that shares once owned by B., and which there was evidence to show had been pledged by him to other persons before the issue of the certificate to A., were afterwards transferred to the president with the approval of the directors, to secure a debt due from B. to the bank, without further evidence that such issue of stock by B. was known or recognized by the other officers of the bank.—*Moore v. Citizens' Nat. Bank of Piqua, Ohio*, 111 U. S. 156, 4 S. Ct. 345, 28 L. Ed. 385.

The cashier of defendant bank fraudulently issued to plaintiff certain shares of defendant's stock, of which he falsely represented himself to be the owner, as security for a loan, by filling up a stock certificate which had been signed by the president of the bank, and delivered to him to be used if required during the president's absence. The bank's stock was transferable only on the books of the bank, on surrender of the old certificate, and the cashier never surrendered any certificate to the bank for the stock represented by the certificate issued to plaintiff, nor made any transfer of such stock to her on its books. The bank never ratified the transaction nor received any benefits therefrom. *Held*, that since plaintiff's certificate was issued to her direct, and not by a transfer of stock held by the cashier, she was thereby put on inquiry to ascertain if the transfer had been properly made before the issuance of the new certificate to her, and, no valid transfer having been made, the bank was not liable to her for the value of the certificate.—*Id.*

411F. Collections and payments.

See 12 Cent. Dig. Corp. §§ 1650-1653.

A general manager of a corporation, though given by its by-laws the entire charge of its business and affairs, subject to the order and approval of its board of directors, has no power, after he knows the corporation to be insolvent and about to be placed in the hands of a receiver, to transfer the bulk of its property to one of its creditors in payment of a pre-existing debt; and such a transfer, not authorized nor ratified by the directors, is void as to its other creditors.—*Dooley v. Hadden*, 21 S. Ct. 259, 179 U. S. 646, 45 L. Ed. 357, reversing *Hadden v. Dooley*, 93 F. 728, 35 C. C. A. 554, which affirmed 92 F. 274, 34 C. C. A. 338, which reversed *Same v. Natchaug Silk Co.* [C. C.] 84 F. 80.

414. Negotiable instruments in general.

See 12 Cent. Dig. Corp. §§ 1640-1646.

A construction company, whose president had general charge and control of its business, and who had been permitted by the directors to execute and indorse notes and drafts for the purpose of raising money to conduct the corporate business, is liable for the amount of notes executed by the president to pay off debts due from the company.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

417. Compromises and releases.

See 12 Cent. Dig. Corp. §§ 1670-1675; 42 Cent. Dig. Release, § 1.

Where a contract, not under seal, was made by the superintendent of a corporation, who was authorized under its by-laws, "with the approval of the president, to buy and sell material, and to make all contracts for the same," without any express resolution or ratification of the directors, the by-laws providing "that the superintendent and all other persons shall in all cases be subject to the control of the board of directors in everything where the board shall elect to exercise such control," *held*, that the superintendent had power to release the contract which he had power to make.—*Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 7 S. Ct. 542, 30 L. Ed. 639.

423. Wrongful acts or omissions.

See 12 Cent. Dig. Corp. §§ 1692-1695, 1903, 1906.

A corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person, when done by its authority, express or implied.—*Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 S. Ct. 1286, 30 L. Ed. 1146.

A "general manager" of a gas company cannot be presumed, from the designation of his position, to have had authority to write letters in behalf of the company to the publisher of a periodical in relation to testimony given by a witness before a congressional committee regarding the cost of producing gas, nor to authorize the publication of anything in such periodical; nor can such authority be inferred from evidence showing that he was a gas engineer, and that it was his duty to have charge of the works, and of all persons employed in the manufacture and distribution of gas, so as to charge the company with liability for a libelous article published in regard to such witness, and based on letters so written without the knowledge of the other officers or directors.—*Washington Gas-Light Co. v. Lansden*, 19 S. Ct. 296, 172 U. S. 534, 43 L. Ed. 543.

To render a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal, though it is not essential that the authority should be under seal or by a vote of the directors, nor that the act should be strictly within the corporate powers, where it is assumed to be performed for the corporation and by the corporate agents, who had authority, either express or implied, to act in regard to the general subject-matter.—*Id.*

425. Estoppel to deny authority or acts in general.

See 12 Cent. Dig. Corp. §§ 1697-1701, 1705.

The trustees of a newspaper corporation, in whom is lodged the power to manage its affairs, are charged with the knowledge of the extent of the power usually exercised by the managing editor in the collection of news, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

426. Ratification and repudiation.

See 12 Cent. Dig. Corp. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; 40 Cent. Dig. Princ. & A. § 663.

After seven years' acquiescence on the part of a corporation lessor in a lease, something more must be shown than that it was executed in excess of the powers of the directors before

the lessee will be made to surrender the profits he has made under it.—*Illinois Pneumatic-Gas Co. v. Berry*, 113 U. S. 322, 5 S. Ct. 525, 28 L. Ed. 1003.

Under the by-laws of a corporation, its board of directors retained the power to control the president and superintendent whenever it thought proper; and where a release was made of a contract by the president, and reported to the board, but no act of disaffirmance of the release was passed till two years after notice of the transaction, and about a year and a half after suit commenced upon the original contract, such disaffirmance was too late.—*Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 7 S. Ct. 542, 30 L. Ed. 639.

A corporation which accepts the benefit of a contract made by its officers without authority is estopped from denying the authority of the officers, if the contract is one which the corporation has authority to make.—*Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 S. Ct. 770, 33 L. Ed. 157.

Where a contract by a company to lease an hotel is within the legitimate scope of the company's powers, and it is executed by that officer of the company who, by the by-laws, is the proper agent to perform such function, and the company goes into possession of, and receives the rents and profits of, the hotel, the company is bound by the lease, though its minutes fail to disclose authority expressly given to the president to execute the contract.—*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

The managing editor of a newspaper must be deemed to have had authority to charter a yacht for the purpose of gathering news concerning events connected with hostilities between the United States and Spain, by a charter party embodying an absolute obligation to return the yacht at the expiration of the term of hiring and a stipulation as to value in the event of nonreturn, where payments for the hire of the boat, the expenses of its management, and premiums for insurance were entered on the corporate books, and the corporation received money from other newspapers for accommodations furnished to their reporters on board the yacht, all of which matters must be presumed to have been brought to the notice of the board of trustees charged with the management of the corporate concerns, who must have known that the editor had hired the yacht, that its possession was pursuant to a contract, and that some obligation had been entered into for its return. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

428. Notice to officer or agent as affecting corporation.

See 12 Cent. Dig. Corp. §§ 1748-1761.

Knowledge or actual notice to all the corporators, including the president, of a company, of matters affecting the title to land claimed by the company through them, is knowledge or notice of the company, and it is bound by constructive notice which would bind them.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

Knowledge of the president of a corporation of the fraud committed by an entryman in procuring and commuting a homestead entry is imputed to the corporation, so as to deprive it of the position of a bona fide purchaser under a conveyance from the president, who had taken a deed of the property from the patentee, where the president was one of the incorporators, and, together with the secretary, owned a large majority of the capital stock, and was intrusted with the entire management of the

corporate business, since his interest and that of the corporation are identical.—*J. J. McCaskill Co. v. United States*, 30 S. Ct. 386, 216 U. S. 504, 54 L. Ed. 590.

429. Notice of authority of officer or agent to person dealing with corporation.

See 12 Cent. Dig. Corp. §§ 1720-1723, 1725.

Every one being charged with knowledge, that, by a statute, directors of a railway company were authorized to guarantee the bonds of a railroad only on the petition of a majority of the stockholders of such railway company, one accepting the guaranty with knowledge that there had been no such petition could not hold the company on the guaranty.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 O. C. A. 378.

432. Evidence as to authority.

See 12 Cent. Dig. Corp. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762.

Where a corporate contract appears on its face to have been duly executed, and the parties have entered on its execution with full knowledge on the part of the board of directors, its ratification by the board will be presumed.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174, 10 U. S. App. 98.

(C) PROPERTY AND CONVEYANCES.

Banks, see Banks and Banking, 259, 260.

Religious societies, see Religious Societies, 15-20.

Restraining disposition of or dealings with corporate property, see Injunction, 72.

440. Power to mortgage or pledge.

See 12 Cent. Dig. Corp. §§ 1775-1777.

Where the charter of a corporation, giving the exclusive right to use certain water power, gives it power to sell all the rights it has under its charter, it may mortgage the same, and the franchises granted are not of so personal and exclusive a character that the mortgage is void as far as it includes them.—*Willamette Woolen-Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 7 S. Ct. 187, 30 L. Ed. 384.

441. Conveyances by corporations.

See 12 Cent. Dig. Corp. §§ 1778-1784.

444. — Execution.

See 12 Cent. Dig. Corp. §§ 1779-1781.

An instrument averring that the parties had set their hands and seals thereto, with an attesting clause alleging that a corporation party thereto had signed, sealed, and delivered it in the presence of two witnesses, who signed their names thereto, sufficiently avers, as against a demurrer, that the seal attached in behalf of the corporation was its common or corporate seal.—*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

(D) CONTRACTS AND INDEBTEDNESS.

See Associations, 15.

Ancillary jurisdiction of foreclosure proceedings, see Courts, 264.

Excise taxes, liability of corporation leasing entire property, see Internal Revenue, 9.

Loans by building and loan associations, see Building and Loan Associations, 25-27.

Right of directors to question validity of statute affecting bondholders, see Constitutional Law, 42.

§447. Capacity to contract in general.

See 12 Cent. Dig. Corp. §§ 1786, 1788, 1807.

A corporation created for the purpose of dealing in lands, and expressly empowered to purchase, subdivide, and sell, and to make any contract essential to the transaction of its business, is authorized to contract for the construction of a bridge to render its lands accessible, and may agree to pay therefor in its bonds and those of another corporation, controlled by the same parties.—*Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 S. Ct. 339, 38 L. Ed. 167.

§448. Contracts before incorporation or organization.

See 12 Cent. Dig. Corp. §§ 1709, 1789-1792.

Plaintiff, in 1879, undertook to acquire the right to operate telephone exchanges in Kansas City and St. Louis. He was to secure the rights of the Kansas City Telephone Exchange and the American District Telegraph Company of St. Louis. Accordingly, plaintiff organized defendant, taking in four friends as stockholders. Before their stock was delivered, an arrangement was effected for the consolidation of the American District Telegraph Company with defendant, the former receiving 250 shares of the stock of the latter. These 250 shares were deducted from shares of stock previously allowed to plaintiff. Plaintiff had charge of and directed all these transactions. Plaintiff sues defendant on an implied contract for the reasonable worth of the 250 shares. *Held* no contract; the allotting of the 250 shares to the American District Telegraph Company being simply a new arrangement in the creation of defendant and distribution of its stock, and not a contract between defendant and plaintiff for 250 shares of stock.—*Eldred v. Bell Tel. Co.*, 119 U. S. 513, 7 S. Ct. 296, 30 L. Ed. 496.

The president of a corporation has no authority to deplete the coffers of the company by instructing the treasurer to refuse to receive payment of stock subscriptions when tendered.—*Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 190, 36 L. Ed. 1135.

§450. Limitation of amount of indebtedness.

See 12 Cent. Dig. Corp. §§ 1793-1795.

Under Code Iowa, § 1611, requiring that articles of incorporation shall fix a maximum of indebtedness to which the corporation "is at any time to be subject," a bona fide indebtedness in excess of such limitation is not void, but only gives rise to a right on the part of the state to proceed against the corporation or its officers for violating the statute. Decrees, *First Nat. Bank v. Sioux City Terminal Railroad & Warehouse Co.* (C. C.) 69 F. 441, and 82 F. 124, 27 C. C. A. 73, affirmed.—*Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 19 S. Ct. 341, 173 U. S. 99, 43 L. Ed. 628.

§452. Formal requisites in general.

See 12 Cent. Dig. Corp. §§ 1796, 1797, 1804, 1805.

A construction company, whose president has general charge of its business, and who has been permitted by the directors to execute and indorse notes and drafts for the purpose of raising money to conduct the corporate business, is liable on notes executed by the president to pay off debts due from the company, notwithstanding that such notes are not executed with all the formalities required by the by-laws and articles of association.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

§453. Use of corporate name.

See 12 Cent. Dig. Corp. §§ 1798, 1799.

Where there are two corporations having the same name and management, and identical

in every respect except in the origin of their powers, one being an Indiana corporation, and the other a Kentucky corporation, a guaranty signed in its name, pursuant to an agreement therefor, reciting that it is made by "a corporation organized and existing under the laws of the states of Indiana and Kentucky," will be presumed to be intended to bind each, in the absence of some specific restriction therein.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

§463. Making and indorsement of negotiable instruments.

See 12 Cent. Dig. Corp. §§ 1820-1831.

The board of directors of a mining company having authorized the conversion of certain outstanding certificates of indebtedness into stock of the company, conditionally upon all the holders of such certificates converting them, a creditor who did not offer to convert cannot legally contend that the conditional offer of the other holders to convert was in effect a conversion, and satisfied their notes, leaving the property of the company unincumbered and liable to seizure, and applicable exclusively, to the satisfaction of his claim.—*Pugh v. Fairmount Gold & Silver Min. Co.*, 5 S. Ct. 131, 112 U. S. 238, 28 L. Ed. 684.

§466. — Indorsement and transfer.

See 12 Cent. Dig. Corp. §§ 1827-1830; 4 Cent. Dig. Assign. § 33.

An indorsement by an officer of a corporation duly authorized to make indorsements, in his own name with his official title, is an indorsement by the corporation.—*Falk v. Moebis*, 127 U. S. 597, 8 S. Ct. 1319, 32 L. Ed. 266.

§468. Making and issue of bonds.

See 12 Cent. Dig. Corp. §§ 1832-1855.

§472. — Negotiation and sale.

See 12 Cent. Dig. Corp. §§ 1837, 1839, 1841.

A bonus in stock given to purchasers of the bonds of a corporation, simply as an inducement to take the bonds, if this is done in good faith, will not entitle dissenting stockholders to have a deduction of the par value of the stock made from the bonds. Decree, 80 F. 450, 25 C. C. A. 549, affirmed.—*Dickerman v. Northern Trust Co.*, 20 S. Ct. 311, 176 U. S. 181, 44 L. Ed. 423.

§475. Mortgages and trust deeds by corporation.

See 12 Cent. Dig. Corp. §§ 1856-1889.

§479. — Rights, duties, and liabilities of mortgagees and trustees.

See 12 Cent. Dig. Corp. §§ 1869, 1872-1874.

An instant declaration by trustees that both principal and interest of a mortgage are due because of the nonpayment of an execution on a judgment against the mortgagor, which is a corporation, cannot be contested by stockholders, where the directors of the company do not make any objection, on the ground that the provision of the mortgage for such declaration if the execution was not paid "forthwith" allowed a reasonable time for such payment. Decree 80 F. 450, 25 C. C. A. 549, affirmed.—*Dickerman v. Northern Trust Co.*, 20 S. Ct. 311, 176 U. S. 181, 44 L. Ed. 423.

§480. — Lien and priority.

See 36 Cent. Dig. Mtg. §§ 290-323, 326-455.

A judgment in tort, recovered against the corporate purchaser of a waterworks system incumbered with a mortgage executed by the original corporate owner is entitled to priority

over the lien of such mortgage, under Code N. C. 1883, § 1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation, since to hold that only the interest in the property acquired by the purchasing corporation was responsible for damages caused by its negligence would defeat the purpose of the statute to make corporate property security against torts committed by the owner. Decree (C. C.) Guardian Trust & Deposit Co. v. Greensboro Water Supply Co., 115 F. 184, affirmed.—Guardian Trust & Deposit Co. v. Fisher, 26 S. Ct. 186, 200 U. S. 57, 50 L. Ed. 367.

Judgments against a water company in actions to recover the value of property alleged to have been destroyed by fire, as a result of the failure of the company to exercise reasonable care to furnish an adequate supply of water, are judgments for torts, within the meaning of Code N. C. 1883, § 1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation.—Id.

482. — Foreclosure by action.

See 12 Cent. Dig. Corp. §§ 1870, 1877-1888.

A judgment against a corporation is not collusive in the legal sense, so as to prevent its nonpayment from constituting a default for which a mortgage debt may be declared due, under a provision of the mortgage, merely because the action was undertaken for the purpose of creating such default, if it was brought for a debt that was due, and was properly conducted. Decree 80 F. 450, 25 C. C. A. 549, affirmed.—Dickerman v. Northern Trust Co., 20 S. Ct. 311, 176 U. S. 181, 44 L. Ed. 423.

The right to set off, as against some individual bondholders, their obligation for unpaid stock, cannot be allowed in a suit by a trustee for all the bondholders to foreclose a mortgage, in which the bonds must be treated as an entirety.—Id.

The illegality of the purpose for which a corporation was originally organized cannot become a material inquiry in a suit to foreclose a mortgage upon the property of the concern, if the mortgage was made while the corporation had power to create it, and the illegality was wholly extrinsic to the mortgage.—Id.

487. Rights and liabilities on contracts and securities ultra vires.

See 12 Cent. Dig. Corp. §§ 1893-1898.

Where all the property of a corporation, including contracts relating thereto, and patents, is held for several years under a lease subsequently declared ultra vires, compensation is to be made, where the property is incapable of being returned, only for the actual value of the tangible property received, and it cannot be measured by the market price of the lessor's stock.—Pullman's Palace-Car Co. v. Central Transp. Co., 18 S. Ct. 808, 171 U. S. 138, 43 L. Ed. 108, reversing judgment 76 F. 401, 22 C. C. A. 246.

A corporation cannot maintain an action on a contract which is prohibited by its charter.—De La Vergne Refrigerating Mach. Co. v. German Sav. Inst., 20 S. Ct. 20, 175 U. S. 40, 44 L. Ed. 65.

(E) TORTS.

Particular classes of corporations or associations.

See—

- Banks and Banking. 112.
- Carriers. 91, 95-100, 108-136, 140-146, 148-163, 173-185, 204-230, 281-321, 354-384, 394-405, 408½.
- Railroads. 262-266, 276-282, 301-401, 433-444, 453-485.
- Street Railroads. 106-117.

490. Exercise of power conferred by charter.

See 12 Cent. Dig. Corp. § 1901.

A corporation authorized to carry on a business is liable for the nuisance created thereby.—Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739.

(F) CIVIL ACTIONS.

Commencement of action, see Action, 64.
Declarations by officers and agents as evidence against corporation, see Evidence, 244.

District in which action in federal court must be brought, see Courts, 274.

Jurisdiction of federal courts, see Courts, 314.

Subpoena duces tecum in action against corporation, see Witnesses, 16, 293, 304.

By or against particular classes of corporations or associations.

See—

- Carriers. 20, 37, 126-136, 181-185, 220-230, 273-278, 309-321, 342-347, 375-384.
- Electricity. 19.
- Insurance. 611-674.
- Railroads. 20-23, 180-202, 282, 341-353, 393-401, 433-444, 471-485.
- Street Railroads. 106-117.

501. Nature and form.

See 12 Cent. Dig. Corp. §§ 1920-1929, 1931, 1932.

The right of a church corporation to recover damages for maintenance of a nuisance causing annoyance and discomfort to its members in the use of its property is not affected by its corporate character.—Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739.

Under Code Wash. T. §§ 605, 606, defining a nuisance to be whatever is injurious to health, or indecent or offensive to the senses, or an obstacle to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property, and under sections 1235, 1242, providing that an action for damages may be brought and an injunction or abatement obtained "by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance," the only ground on which a corporation can obtain either damages or an injunction is injury to its property, since it cannot be said to have life or health or senses.—Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 S. Ct. 822, 37 L. Ed. 686, affirming judgment 17 P. 890, 3 Wash. T. 452.

Independently of statutory provisions, the only ground on which a court of equity will enjoin the maintenance of a nuisance in a private suit by a corporation is special injury to the property of such corporation, and no corporation has such property in its workmen or in their services that it can, under the ordinary jurisdiction of the court of chancery, maintain a suit as for nuisance against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work.—Id.

503. Venue.

See 12 Cent. Dig. Corp. §§ 1935-1939, 1942-1946.

The voluntary action of defendant corporation in waiving its privilege of being sued in the district of its residence cannot be overruled at the instance of stockholders and creditors not parties to the suit as brought, but who were afterwards permitted to intervene.—Central Trust Co. v. McGeorge, 151 U. S. 129, 14 S. Ct. 286, 38 L. Ed. 98, reversing decree (C. C.) Central Trust Co. v. Virginia T. & C. Steel & Iron Co., 55 F. 769.

505. Use of corporate name.

See 12 Cent. Dig. Corp. §§ 1953-1957, 1976.

The change of a state bank to a national bank after the making of the contract in suit does not affect the bank's right to sue.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

506. Parties.

See 12 Cent. Dig. Corp. §§ 1958-1970; 19 Cent. Dig. Equity, § 554.

Stockholders of a resident corporation brought suit in the state of their residence against it, a foreign corporation, and several individuals, citizens of both that and another state, and directors in one or both of the corporations, to set aside a lease executed by the resident to the nonresident corporation. *Held*, that the resident corporation was a necessary party defendant to the suit.—*Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 5 S. Ct. 456, 28 L. Ed. 949, affirming 20 F. 449.

In a suit by a stockholder for the cancellation of a lease of the franchise and assets of his company to another corporation, to restrain the latter from operating under it, for an accounting, and to restrain plaintiff's corporation from issuing bonds to purchase the lease, both corporations are necessary parties.—*East Tennessee V. & G. R. Co. v. Grayson*, 119 U. S. 240, 7 S. Ct. 190, 30 L. Ed. 382.

All promoters who have shared in secret profits made in the purchase of land for a proposed corporation are not necessary parties to a suit by a corporation to recover such profits.—*Davis v. Las Ovas Co.*, 33 S. Ct. 197, 227 U. S. 80, 57 L. Ed. 426, affirming 35 App. D. O. 372.

507. Process and notice.

See 12 Cent. Dig. Corp. §§ 1971-1974, 1976-2000.

Under 2 Thomp. & S. St. Tenn. 1871, p. 1190; Mill. & V. Code Tenn. p. 660, a return that process was served on the superintendent, the highest officer to be found in the county, is sufficient.—*Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 S. Ct. 306, 34 L. Ed. 963, affirming judgment 88 Tenn. (4 Pickle) 721, 13 S. W. 698.

Certain railroad companies, including defendant, a foreign corporation, erected and maintained a joint warehouse for the storage of imported goods, and goods for export, until the customs laws were complied with. One-half the expense of erecting and maintaining the warehouse was paid by defendant, and the balance by the other companies, one of which owned the land on which it was built. The agent in charge of this warehouse was appointed without any action or approval by defendant. He was on the pay roll of one of the other companies, and under bond to it for the faithful discharge of his duties. He had no authority to contract for defendant, received and disbursed no money on its account, and it had no control over, or power to discharge, him. *Held*, that he was not "a local agent" of defendant, on whom service of process could be made, under Sayles' Rev. Civ. St. Tex. art. 1223a.—*Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 850, 37 L. Ed. 699.

509. Attachment and garnishment.

See 12 Cent. Dig. Corp. §§ 2006-2014; 24 Cent. Dig. Garn. §§ 30, 185.

Notes to a bank were from time to time renewed, without expectation of payment, as the maker was hopelessly insolvent. Finally, both the maker and bank went into the hands of receivers. *Held*, that an attachment on behalf of the bank would not be held invalid merely because some of the renewal notes lacked a few days of maturity.—*Dooley v. Hadden*, 21 S. Ct. 259, 179 U. S. 646, 45 L. Ed. 357.

512. Pleading.

See 12 Cent. Dig. Corp. §§ 2017-2023, 2031-2034, 2035-2064, 2068, 2087.

514. — Allegation and denial of corporate existence.

See 12 Cent. Dig. Corp. §§ 2062-2081.

An allegation that a corporation is doing business in a certain state does not necessarily import that it was created by the laws of that state, and was a citizen thereof.—*Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 9 S. Ct. 552, 32 L. Ed. 905.

Code Wis. § 4199, making it unnecessary, when a corporation is a party, to prove its corporate existence unless the same is "specifically denied" by a verified pleading, does not render insufficient a direct denial on information and belief.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

Where plaintiff sued as a bank incorporated under a state law, a denial that at or since the commencement of the action it was, or is now, a corporation, is a good plea in bar.—*Id.*

The citizenship of a corporation is sufficiently disclosed by an allegation that it is a corporation duly organized under the laws of New York.—*Dodge v. Tulleys*, 144 U. S. 451, 12 S. Ct. 728, 36 L. Ed. 501.

523. Execution and enforcement of judgment.

See 12 Cent. Dig. Corp. §§ 2114-2120.

Various owners of lands granted to a railroad corporation "and its assigns" a right of way through the lands to make and run a railroad, the corporation having a franchise to do so, and to take tolls. The corporation obtained a like right as to other lands by statutory proceedings. *Held*, that a judgment creditor of the corporation, who did not own the franchise, could acquire no title to the right of way by purchase at execution sale.—*East Alabama Ry. Co. v. Doe*, 114 U. S. 340, 5 S. Ct. 869, 29 L. Ed. 136.

Under St. Md. 1834, c. 241, Id. 1835, c. 395, Id. 1838, c. 396, and Id. 1844, c. 281, and the instruments executed pursuant to those statutes, by which the tolls and revenues of the Chesapeake & Ohio Canal Company are mortgaged to the state, to secure the repayment of money lent by the state to the company, and the payment of dividends and interest on the stock subscribed for by the state, subject, in the first place, to the appropriation of so much of the tolls and revenues as is necessary to keep the canal in repair, to provide the necessary supply of water, and to pay the salaries of officers and annual expenses, and, in the second place, to a mortgage to trustees to secure the payment of certain bonds of the company,—a suit in equity may be maintained by the state and such trustees, even before the state has taken possession under its mortgages, to restrain a mere general creditor of the company, who, at the time of contracting his debt, had notice of the provisions of the statutes and of the mortgages, from levying on money deposited by the company in a bank, and needed to meet such necessary expenses.—*Brown v. Maryland*, 114 U. S. 598, 5 S. Ct. 1065, 24 L. Ed. 233.

A general creditor of the Chesapeake & Ohio Canal Company, with notice of Laws 1834, c. 241; Laws 1835, c. 395; Laws 1838, c. 396; Laws 1844, c. 281,—and of the several mortgages made thereunder, providing for a first mortgage on the net tolls of the canal to secure certain bondholders, and a second mortgage to secure the state for money lent, could not levy on revenues deposited by the company to meet current expenses.—*Id.*

(G) CRIMES AND CRIMINAL PROSECUTIONS.

See 12 Cent. Dig. Corp. §§ 2138-2143.
Carriers, see Carriers, ◄38.
Due process of law, see Constitutional Law, ◄255.
Equal protection of laws, see Constitutional Law, ◄250.
Violation of internal revenue laws, see Internal Revenue, ◄39.
Witnesses' competency, see Witnesses, ◄298.

VIII. INSOLVENCY AND RECEIVERS.

Bankruptcy proceedings, see Bankruptcy, ◄72.
Banks, see Banks and Banking, ◄86-82, 281-288.
Collecting bank, see Banks and Banking, ◄166, 167.
Insurance companies, see Insurance, ◄61-68.
Limitation of creditor's suit, see Limitation of Actions, ◄65.
Railroad companies, see Railroads, ◄205-212.

◄541. Conveyances when insolvent or in contemplation of insolvency.

See 12 Cent. Dig. Corp. §§ 2154-2161.

◄542. — In general.

See 12 Cent. Dig. Corp. §§ 2154-2160.

A mortgage given by a corporation, while it is a going concern, though not having property sufficient at the market price to pay its debts, but while all concerned expect and intend that it shall continue, and believe that its continuance will bring financial success, though given to its directors, who are sureties on its notes, to secure them on account thereof, and to induce them to procure renewals or extensions of the notes, and to procure further advances of credit, is not invalid as to creditors of the corporation.—*Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 S. Ct. 621, 39 L. Ed. 713, reversing decree (C. C.) *Howe, Brown & Co. v. Sanford Fork & Tool Co.*, 44 F. 231.

◄544. Preferences to creditors generally.

See 12 Cent. Dig. Corp. §§ 2162-2169.

The factor of a manufacturing corporation, who has advanced to his principal more in cash and acceptances than the value of the goods consigned to him, has a valid lien on the goods for the amount of such advances, and a transfer of the goods to him by the company just prior to its failure is valid, notwithstanding 1 Rev. St. p. 603, § 4, tit. 4, c. 18, pt. 1, prohibits any transfer or assignment by a corporation in contemplation of insolvency, for such transfer is merely a recognition of the antecedent lien, and cannot prejudice creditors.—*Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234, 11 S. Ct. 52, 34 L. Ed. 655, affirming decree (C. C.) 29 F. 611.

◄547. Remedies of creditors in general.

See 12 Cent. Dig. Corp. §§ 2178-2181.

The expression that the property of a corporation constitutes a "trust fund" for its creditors only means that when the corporation is insolvent, and a court has possession of its assets, they must be appropriated to the payment of its debts before any distribution to the stockholders; but, as between a corporation itself and its creditors, the former does not hold its property in trust in favor of the creditors, in any other sense than does an individual debtor.—*Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 S. Ct. 127, 37 L. Ed. 1113.

◄551. Appointment of receiver.

See 12 Cent. Dig. Corp. §§ 2201-2228, 2230-2252.

◄559. — Effect.

See 12 Cent. Dig. Corp. §§ 2241-2252, 2259.

Where defendant corporation, in a bill filed by creditors alleging its insolvency and praying the appointment of a receiver, suffers the bill to be taken pro confesso, it is too late, nine months after the receiver has taken possession of the property, and undertaken to carry on the business for the benefit of creditors, to object that plaintiffs had an adequate remedy at law.—*Brown, Bonnell & Co. v. Lake Superior Iron Co.*, 134 U. S. 530, 10 S. Ct. 604, 33 L. Ed. 1021.

◄561. Collection of assets.

See 12 Cent. Dig. Corp. §§ 2261-2264.

The refusal of an officer of a corporation to obey an order to turn over property of the corporation to its receiver is a contempt, though he personally claims a lien thereon.—*Tinsley v. Anderson*, 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91.

◄563. Enforcement of liabilities of promoters, officers and stockholders.

See 12 Cent. Dig. Corp. §§ 2280, 2280½.

Where a corporation becomes insolvent, and a receiver is appointed by a court of competent jurisdiction, the right of action against the officers of the corporation for fraudulent misappropriation of its property vests in him; and if he fails or refuses to sue he should properly be made a defendant to any such suit brought by the stockholders in the right of the corporation.—*Porter v. Sabin*, 149 U. S. 473, 13 S. Ct. 1008, 37 L. Ed. 815, affirming decree (C. C.) 36 F. 475.

The receiver of the assets of a corporation is not authorized to maintain an action to enforce the liability of a stockholder, by Gen. St. Kan. 1868, §§ 32, 44, since that act made the liability of the stockholder, not an asset of the corporation, but an asset which a creditor of the corporation alone could recover for his individual benefit to the extent required to pay a judgment obtained by him against the corporation.—*Evans v. Nellis*, 23 S. Ct. 74, 187 U. S. 271, 47 L. Ed. 173.

◄566. Priorities of claims.

See 12 Cent. Dig. Corp. §§ 2283-2285.

Certificates of preferred stock of a railroad company provided that it should be a "first claim on the property of the company after its indebtedness," and entitled to 7 per cent. interest from the net earnings of the company before the payment of dividends on the common stock, and that, whenever the net earnings were more than sufficient to pay such interest and 7 per cent. dividends on the common stock, the excess should be divided upon the preferred and common shares equally, share by share. *Held*, that the priority of the preferred stock is only to the common stock; that its holders have no claim on the property of the company superior to that of creditors subsequent to its issue.—*Warren v. King*, 108 U. S. 389, 2 S. Ct. 789, 27 L. Ed. 769.

A company borrowed on a note money from a bank, pledging as security \$80,000 of bonds of a second mortgage, which, with an earlier one, was afterwards foreclosed. The money lent was used to pay pressing debts. The earnings were used to make permanent improvements, to pay interest on earlier mortgages, and bolster up the credit of the company, so as to make its bonds marketable. The bank relied for its ultimate security on the indorsers of the note, and the evidence failed to show any fraud on the part of the company. *Held*, that the bank was not entitled to payment out of the proceeds of the sale in preference to the first mortgage bondholders.—*Penn v. Calhoun*, 121 U. S. 251, 7 S. Ct. 906, 30 L. Ed. 915.

The promoter of a corporation had detached overdue coupons from bonds of the corporation before disposing of the bonds, and delivered them to material men in part payment of their demands. *Held* that, as it would be inequitable to permit the promoter to use these coupons as a basis of a preference over purchasers of the bonds from which they had been cut, the material men, who had taken them after maturity, had no greater rights.—*Wood v. Guarantee Trust & Safe-Deposit Co.*, 128 U. S. 416, 9 S. Ct. 131, 32 L. Ed. 472.

Two telegraph companies, A. and B., made a written agreement whereby B. was to build and equip certain lines, and connect them with the lines of A. A. was to issue and deliver to B. its bonds secured by a mortgage on all its property, including the lines contracted for. On the next day B. agreed with the stockholders of A. to exchange these A. bonds for A. stock in equal amounts. The bonds were issued and exchanged as agreed, B. thereby getting control of A., electing its own officers to the offices of A., and managing the two companies as one concern. The new lines were built in part by B., and connected with the A. system, B. raising the money therefor by issuing its own bonds secured by a mortgage covering after-acquired property. This mortgage was not recorded until after the recording of the A. mortgage. B. was a New York corporation. *Held*, that the act of connecting the new lines with the lines of A., and their use as part of the A. system, was a sufficient delivery of them by B. to A., under the contract; and the new lines then became subject to the A. mortgage, and the lien thereof took precedence of the B. mortgage.—*United Lines Tel. Co. v. Boston Safe-Deposit & Trust Co.*, 147 U. S. 431, 13 S. Ct. 396, 37 L. Ed. 231.

Preferences by confessed judgments and assignments, which are constructively, but not actually, fraudulent against other creditors of an insolvent corporation, though set aside in a suit by the other creditors, will not preclude those who have taken the invalid preferences from sharing with the unsecured creditors pro rata. Decree, *American Oak-Leather Co. v. United States Rubber Co.*, 96 F. 891, 37 C. C. A. 599, reversed.—*United States Rubber Co. v. American Oak-Leather Co.*, 21 S. Ct. 670, 181 U. S. 484, 45 L. Ed. 938.

IX. REINCORPORATION AND REORGANIZATION.

Reorganization of bank as national bank, see Banks and Banking, 66, 237.
Turnpike companies, see Turnpikes and Toll Roads, 28.

6573. Agreements for reorganization.

See 12 Cent. Dig. Corp. §§ 223-226.

Under Const. Ark. 1874, art. 12, providing that "no private corporation shall issue stock or bonds except for money or property actually received, and all fictitious increase of stock or indebtedness shall be void," mortgage bondholders, who buy in the property and franchise of a corporation upon foreclosure sale under their mortgage, are not prohibited from fixing the terms upon which they will surrender those interests, and they may reorganize upon substantially the same basis, as to capital stock and bonded indebtedness, as that of the old corporation and its predecessor previous to the adoption of the constitution of 1874, although under that arrangement they receive both stock and bonds in a large amount, of which the amount of the stock alone is sufficient to cover the full value of the property, rights, and privileges of the reorganized company.—*Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 S. Ct. 482, 30 L. Ed. 595.

6577. Identity of original and reorganized corporations.

See 12 Cent. Dig. Corp. §§ 2307, 2308.

The principal creditors and stockholders of an insolvent corporation agreed among themselves to sell all the stock and bonds to a syndicate. The agreement stated the part of the purchase price each of the signers should receive, and provided that certain of them, in consideration of the amounts to be received, should pay certain classes of claims against the corporation, so as to deliver it free of indebtedness. Of these, defendant was to take care of the claims arising out of the foreclosure and bankruptcy proceedings in which the corporation was involved, and plaintiffs, who had a prior lien for services rendered therein, consented to the entry of a foreclosure decree which made no provision for its payment, upon defendant's promise to pay it if the sale were effected. The sale failed, and another agreement was made, by which a new corporation was formed, the property purchased, and the stock distributed in the same proportions as proposed in the previous agreement. *Held*, that defendant was chargeable, in equity, with at least a proportionate part of plaintiffs' claim, which should be declared a lien on the stock received by him.—*Meddaugh v. Wilson*, 151 U. S. 333, 14 S. Ct. 356, 38 L. Ed. 183.

6579. Liabilities for debts and acts of original corporation.

See 12 Cent. Dig. Corp. §§ 2307, 2309, 2312-2315.

Where a steamship company ceased to do business and went into liquidation, and assigned all its vessels and business to defendant, a new company organized for the purpose of undertaking it, plaintiff, having recovered judgment against the old company for damages caused by a collision which occurred after the transfer, has no standing in equity to enforce it against the property of the new company.—*Gray v. National S. S. Co.*, 115 U. S. 116, 5 S. Ct. 1166, 29 L. Ed. 309.

X. CONSOLIDATION.

Prohibiting consolidation as regulation of commerce, see Commerce, 58.
Railroad companies, see Railroads, 140-144.
Telephone company, see Telegraphs and Telephones, 22.

6582. Agreements for consolidation.

See 12 Cent. Dig. Corp. §§ 2330, 2331.

Laches and acquiescence would themselves defeat any right of the original stockholders in two competing interstate railway companies to rescind the contract under which they had delivered their stock to a corporation formed in pursuance of a combination under which such corporation was to acquire a controlling interest in the capital stock of the railway companies in exchange for its own capital stock, where such stockholders stood upon their rights as shareholders in the new corporation until nearly a year after the Supreme Court of the United States had adjudged the combination to be illegal, and until the directors of the new corporation resolved upon a ratable distribution of its corporate assets, during which time stock in the new corporation had passed into many hands.—*Harriman v. Northern Securities Co.*, 25 S. Ct. 493, 197 U. S. 244, 49 L. Ed. 739, affirming decree *Northern Securities Co. v. Harriman*, 134 F. 331, 67 C. C. A. 245, which reversed (C. C.) *Harriman v. Northern Securities Co.*, 132 F. 464.

6586. Status of original and consolidated corporations.

See 12 Cent. Dig. Corp. §§ 2348-2353.

Act Mo. March 2, 1869, authorizing consolidation of certain railway corporations, pro-

vided that the companies should become one, that a new corporate name might be adopted, that new certificates of stock should be issued in exchange for the stock of the constituent companies, and that the consolidation agreement should be recorded as the charter of the new company. *Held*, that such a consolidation extinguished the prior corporations, and formed a new one.—*Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 14 S. Ct. 592, 38 L. Ed. 450.

588. Franchises and powers of consolidated corporation.

See 12 Cent. Dig. Corp. §§ 2350-2353, 2386.

A new corporation, formed by consolidation under Act Ky. April 5, 1893, can claim no right to the exclusive privilege to conduct an electric light, heat, and power business, conferred by Act Ky. April 22, 1882, upon one of the constituent corporations, in view of the provision of the consolidation statute for the merger of the old corporations into a single corporation, which is to be subject to all the provisions of that statute and other laws relating to it, and is to be vested with all the property, business, credits, assets and effects of the constituent corporations, especially since the policy of the law at the time of the passage of the consolidation statute was entirely opposed to the continuance of any such special privileges.—*Shaw v. City of Covington*, 24 S. Ct. 754, 194 U. S. 593, 48 L. Ed. 1131.

589. Succession to rights of original corporations.

See 12 Cent. Dig. Corp. §§ 2354-2360.

By Act La. April 20, 1870, the Crescent City Gaslight Company was incorporated, and authorized to lay pipes in the streets and alleys of New Orleans, to acquire and hold property, construct works, purchase machinery, provide materials, and make such preparations as should be necessary for the enjoyment of its exclusive franchise to furnish gas to the inhabitants of the city, which did not take effect until April 1, 1875, upon the expiration of the exclusive franchise of the New Orleans Gaslight Company. *Held*, that in that interval it was an "existing" corporation, within the language of Act La. Dec. 12, 1874, authorizing the consolidation of business and manufacturing companies; and that, upon its consolidation with the New Orleans Gaslight Company, its exclusive franchise passed to the consolidated company, in common with all the franchises of both constituent companies.—*New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 518.

590. Liabilities for debts and acts of original corporations.

See 12 Cent. Dig. Corp. §§ 2354, 2361-2367.

A company having consolidated with another company under an agreement that the transfer of all its property to the consolidated company was made subject "to all liens, charges, and equities pertaining thereto," the obligations of a contract for exchange of land, which had been made by unauthorized officers, and ratified by the company, devolved upon the consolidated company, and can be enforced against it.—*Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 305, 9 S. Ct. 286, 32 L. Ed. 673, affirming decree (C. C.) *McAlpine v. Union Pac. Ry. Co.*, 23 F. 168.

591. Actions by or against consolidated corporation.

See 12 Cent. Dig. Corp. §§ 2034, 2368-2372.

A clear preponderance of proof is essential to establish that the parties to a transaction by which a corporation, formed for the purpose, acquired, in exchange for its own capital stock,

a controlling interest in the capital stock of two competing interstate railway companies, pursuant to a combination of the stockholders in those companies, agreed that the new corporation should hold such stock as trustee or bailee for the railway stockholders, where the transaction on its face was one of purchase and sale.—*Harriman v. Northern Securities Co.*, 25 S. Ct. 493, 197 U. S. 244, 49 L. Ed. 739, affirming decree *Northern Securities Co. v. Harriman*, 134 F. 331, 67 C. C. A. 245, which reversed (C. C.) *Harriman v. Northern Securities Co.*, 132 F. 464.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

See Associations, 25.

Dissolution for violation of anti-trust law, see Monopolies, 28.

Ground of abatement of action, see Abatement and Revival, 39.

Imposition of penalty in quo warranto, see Quo Warranto, 60.

611. Proceedings to enforce dissolution or forfeiture.

See 12 Cent. Dig. Corp. §§ 2431-2445.

613. — By or in name of state or public officers.

See 12 Cent. Dig. Corp. §§ 2431-2434, 2437-2444.

Members of a de facto corporation, who appear in court and contest the right to maintain a suit against the corporation as such for the annulment of its charter, and who appeal from a decision against it, thereby waive any objection to the failure to make them parties to the proceeding.—*New Orleans Debenture Redemption Co. of Louisiana v. State of Louisiana*, 21 S. Ct. 378, 180 U. S. 320, 45 L. Ed. 550.

A de facto corporation may be treated as such by the state and brought into court as the party defendant, without making its members parties, for the purpose of obtaining a decree against it to annul its charter on the ground that the incorporation was illegal because made for an illegal purpose.—*Id.*

618. Continuance of corporation for purpose of winding up.

See 12 Cent. Dig. Corp. §§ 2457, 2458.

Where a corporation exists by law, after the expiration of its charter, solely for the purpose of winding up its affairs, a majority in interest of its stockholders cannot sell its property to a new corporation, of which they are directors and stockholders, at a valuation estimated by themselves, against the will of the minority, and compel such dissenting stockholders either to receive shares of stock in the new corporation in return for their old shares, or to be paid therefor on a basis of the estimated valuation of the property, and the minority may have the property publicly sold.—*Mason v. Pewabic Min. Co.*, 133 U. S. 50, 10 S. Ct. 224, 33 L. Ed. 524.

619. Officers or other trustees for purpose of winding up.

See 12 Cent. Dig. Corp. §§ 2459, 2460.

Directors who conduct the business of a corporation after expiration of its charter, without attempting to wind it up, may be required to account, in a proceeding by stockholders to wind up the affairs of the corporation.—*Mason v. Pewabic Min. Co.*, 133 U. S. 50, 10 S. Ct. 224, 33 L. Ed. 524.

621. Appointment of receiver.

See 12 Cent. Dig. Corp. §§ 2461-2463, 2471.

A receiver is properly appointed in a stockholder's suit, where the company's properties have all been sold and its assets are to be distributed.—(1912) *Zeckendorf v. Steinfeld*, 32

S. Ct. 728, 225 U. S. 445, 56 L. Ed. 1156, modifying decree (1909) 100 P. 784, 12 Ariz. 245.

623. Collection of assets.

See 12 Cent. Dig. Corp. §§ 2472-2474.

In Virginia, after dissolution of a company incorporated for the purpose of constructing and carrying on works of internal improvement, including railroads, the disposition of its property is not governed by Act March 11, 1837, § 20, which provides that, on a forfeiture of the charter for causes specified, the railroad shall belong to the state, or in certain contingencies the right of way shall revert to the original owner, but by the provision of Code 1849, c. 57, §§ 28, 31, that after dissolution of the corporation its property shall be devoted to the payment of its debts, and that no forfeiture on the ground of an abandonment can be enforced by the state.—*McConihay v. Wright*, 121 U. S. 201, 7 S. Ct. 940, 30 L. Ed. 932.

The charter of a corporation having been forfeited under Act Cong. Feb. 19, 1887, it was within the power of congress to pass section 17 thereof, authorizing the United States attorney general to institute proceedings for the administration and settlement of its affairs.—*Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 10 S. Ct. 792, 34 L. Ed. 478, affirming *United States v. Church of Jesus Christ of Latter Day Saints*, 5 Utah, 361, 15 Pac. 473.

XII. FOREIGN CORPORATIONS.

See—

- Building and Loan Associations, 646.
- Injunction, 85.
- Abatement of action, see Abatement and Revival, 39, 40.
- Contempt in violating injunction, see Injunction, 230.
- District in which actions may be brought, see Courts, 274.
- Due process of law, see Constitutional Law, 258, 278, 296, 303, 305, 308.
- Effect of appointment of receiver on priority of jurisdiction between courts, see Courts, 492.
- Equal protection of laws, see Constitutional Law, 210, 211, 240, 247, 249.
- Excise taxes as interference with interstate commerce, see Commerce, 69.
- Federal court practice, see Courts, 344.
- Federal jurisdiction to review proceedings for appointment of receiver, see Courts, 394(10).
- Ground for removal of cause to federal court, see Removal of Causes, 27.
- Impairing obligation of contracts, see Constitutional Law, 130, 154.
- Insurance companies, see Insurance, 15-22.
- License taxes, see Licenses, 18.
- Necessity of determination of law relating to service of process on agent, see Constitutional Law, 46.
- Objection to service of process after removal to federal court, see Removal of Causes, 112.
- Partial invalidity of statute, see Statutes, 64.
- Privileges and immunities of citizens, see Constitutional Law, 207.
- Railroad companies, see Railroads, 33.
- Regulation as interference with commerce, see Commerce, 31, 40, 46, 57, 69, 70, 73, 74, 80, 81.
- Restrictions on removal of causes, see Removal of Causes, 3.
- Service of writ of attachment on agent, see Attachment, 170.
- Taxation, see Taxation, 162-168.
- Validity of statute as affected by retroactive operation, see Constitutional Law, 200.

632. What are foreign corporations.

See 12 Cent. Dig. Corp. §§ 2487, 2488.

Where a railroad extends through several states, and is incorporated in each, it is, as far as concerns the regulation of its business within the state, a domestic corporation.—*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636.

634. Domestication.

See 12 Cent. Dig. Corp. §§ 2497-2502.

Under the act of Rhode Island of January, 1869, ratifying and confirming the sale of the franchises and property of a Rhode Island railroad corporation to a Massachusetts and Connecticut company, and authorizing the latter to extend and operate its road within Rhode Island, it became for that purpose a Rhode Island corporation, and its acts in that behalf are not ultra vires.—*Clark v. Barnard*, 108 U. S. 436, 2 S. Ct. 878, 27 L. Ed. 780.

The legislature of New York having passed an act "to consolidate the Boston, Hartford & Erie, the Boston, Hartford & Erie Extension, and the Boston, Hartford & Erie Ferry Extension Railroad Companies," which provided that the two last-named companies, which were New York corporations, or either of them, might upon certain conditions, convey their or either of their franchises and properties to the company first named, the Boston, Hartford & Erie Railroad Company, as a purchaser of what the act authorized to be sold to it became a New York corporation by its then existing name.—*Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 S. Ct. 1009, 30 L. Ed. 196.

The act of Tennessee of December 4, 1851, entitled "An act to incorporate the Louisville & Nashville Railroad Company," granted to that company, which had been incorporated by the legislature of Kentucky by the act of that state of March 5, 1850, a right of way within designated limits, for the construction of a railroad, with all the rights, etc., and subject to all the restrictions, etc., prescribed in its charter, and fixed the terms and conditions upon which it was to exercise the franchise given it. *Held*, that the act did not make the company a corporation of Tennessee.—*Goodlett v. Louisville & N. R. Co.*, 122 U. S. 391, 7 S. Ct. 1254, 30 L. Ed. 1230.

It being clear from the body of the act that the intention of the legislature of Tennessee was not to create a corporation, but merely to recognize a corporation of Kentucky, and to authorize it to exert its functions in Tennessee, the use of the word "incorporate" in the title of the act could not operate to enlarge that intention.—*Id.*

A corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction; but, in order to do so, the language of the act must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not have that effect.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 483, 22 C. C. A. 378.

636. Power to exclude, restrict, or regulate.

See 12 Cent. Dig. Corp. §§ 2505-2509, 2571.

The right of a state to prescribe conditions on which foreign corporations may enter its territory for purposes of business is subject to

the limitation that such conditions shall not be repugnant to the constitution or laws of the United States.—*Blake v. McClung*, 19 S. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

The power of a state to impose conditions on foreign corporations doing business therein is as extensive as its power over domestic corporations. Judgment *Daggs v. Orient Ins. Co.*, 38 S. W. 85, 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638, affirmed.—*Orient Ins. Co. of Hartford, Conn., v. Daggs*, 19 S. Ct. 281, 172 U. S. 557, 43 L. Ed. 552.

A state may impose such terms as it may see fit as a condition upon which it will permit foreign corporations to do business within its borders.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 19 S. Ct. 308, 172 U. S. 602, 43 L. Ed. 569.

The right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, except with respect to business of a federal nature. Judgment, 44 S. W. 936, 19 Tex. Civ. App. 1, affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 20 S. Ct. 518, 177 U. S. 28, 44 L. Ed. 657.

A state may require the consent of the stockholders of a foreign mining corporation as a necessary prerequisite to the sale or incumbrance of the mining ground owned by it within the state, as such a requirement is not a regulation of the internal affairs of the corporation, but has reference to the conduct by it of its business. Judgment, 42 C. C. A. 401, 102 F. 372, affirmed.—*Williams v. Gaylord*, 22 S. Ct. 798, 186 U. S. 157, 46 L. Ed. 1102.

637. Application of constitutional provisions.

The fact that a corporation is foreign, and not domestic, does not help it in contesting the constitutionality of Act Tenn. March 17, 1899, requiring the redemption in money of store orders and scrip issued to employes in payment of wages, which act is held valid as to domestic corporations. Judgment, 53 S. W. 970, 103 Tenn. 604, affirmed.—*Dayton Coal & Iron Co. v. Barton*, 22 S. Ct. 5, 183 U. S. 23, 46 L. Ed. 61.

641. Special statutory provisions.

See 12 Cent. Dig. Corp. §§ 2519, 2604, 2607.

A statute which prohibits a foreign corporation, which has not filed a copy of its charter with the secretary of state, from transacting business in the state after the date on which such statute goes into effect, is not retroactive with regard to that business, even though such business be done in pursuance of an earlier contract.—*Diamond Glue Co. v. United States Glue Co.*, 23 S. Ct. 206, 187 U. S. 611, 47 L. Ed. 328.

Contracts of a foreign corporation which have been adjudged invalid because of its failure to register within the state before making such contracts are embraced by the provisions of Act Pa. May 23, 1907 (P. L. 205), legalizing contracts of foreign corporations which, after making such contracts, but prior to the passage of the act, have established a known place of business in the state, and designated authorized agents for the transaction of its business, and, before commencing suit, have paid all taxes that would have accrued if they had complied with the law at the time of beginning business.—(1911) *West Side Belt R. Co. v. Pittsburgh Const. Co.*, 31 S. Ct. 196, 219 U. S. 92, 55 L. Ed. 107, affirming judgment *Pittsburg Const. Co. v. West Side Belt R. Co.* (1910) 75 A. 1029, 227 P. 90.

642. Carrying on business within state.

See 12 Cent. Dig. Corp. §§ 2520-2527.

The Colorado constitution provides that no foreign corporation shall do any business within

the state without having one or more known places of business, and an authorized agent in the same upon whom process can be served. Act 1877 provided that such corporations, before being authorized to do business in the state, should file a certificate designating the principal place of business, and the agent on whom process may be served. Held, that a single act of a foreign corporation, consisting in the making of a contract in Colorado to manufacture machinery in another state and deliver it there, did not come within the prohibition of such constitution and law.—*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 S. Ct. 739, 28 L. Ed. 1137.

The sending of a note by a resident of Alabama to Tennessee for discount, and its discount in that state by a Memphis company, is not a carrying on of business in Alabama by such company within the purview of Const. Ala. art. 14, and Acts 1886-87, pp. 102, 104, imposing certain prerequisites upon the carrying on of business in that state by a foreign corporation.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

Pub. Acts Mich. 1893, c. 79, p. 82, making void all contracts made within the state by foreign corporations who have not filed their articles and paid a franchise tax, does not invalidate a contract signed by a general agent in Michigan, where it is to be performed, but stipulating that it is not valid until approved at Akron, Ohio, where it was approved, as such contract is not one made within the state. Judgment (C. C.) 68 F. 467, affirmed.—*Holder v. Aultman, Miller & Co.*, 18 S. Ct. 269, 169 U. S. 81, 42 L. Ed. 669.

A contract under which a foreign corporation is to have the management of the manufacturing in a factory within the state, and is to assist in the operation of such factory and keep it supplied with a superintendent, calls for the transaction of business within the state, within the meaning of Rev. St. Wis. 1898, §§ 1770b, 4978, forbidding foreign corporations to transact business in the state until they have filed a copy of their charter with the secretary of state.—*Diamond Glue Co. v. United States Glue Co.*, 23 S. Ct. 206, 187 U. S. 611, 47 L. Ed. 328.

The ownership by a foreign railway company of a controlling interest in the stock of a domestic railway company, which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals, does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation.—*Peterson v. Chicago, R. I. & P. R. Co.*, 27 S. Ct. 513, 205 U. S. 364, 51 L. Ed. 841.

A foreign corporation conducting a correspondence school, whose business involves the solicitation of students in Kansas by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse by correspondence between the company and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers, is doing business within the state, within the meaning of Gen. St. Kan. 1901, § 1283, which prohibits the maintaining of an action in the Kansas courts by any corporation doing business in the state which has not filed with the secretary of state the statement of its condition, provided for by that section. Judgment (1907) 91 P. 74, 76 Kan. 328, reversed.—*International Text-Book Co. v. Pigg*, 30 S. Ct. 481, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

A foreign railway company is doing business in the state, so far as the question of service of process is concerned, where its local representative undertakes to negotiate for it and in

its behalf declines to adjust a claim made against it.—*St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 33 S. Ct. 245, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

The continuous solicitation of orders through the local agents of a nonresident manufacturing corporation which are sent to another state to be filled, the articles being delivered within the state and the agents having authority to accept payment in money or check or to take notes payable in the state, is a doing of business in the state authorizing the service of process upon agents thus engaged.—*International Harvester Co. of America v. Commonwealth of Kentucky*, 34 S. Ct. 944, 234 U. S. 579, 58 L. Ed. 1479, affirming judgment *Same v. Commonwealth*, 145 S. W. 393, 147 Ky. 655.

644. Filing charter or articles of association.

See 12 Cent. Dig. Corp. §§ 2512, 2539.

Under the Montana statute requiring a foreign corporation doing business in that territory to file with the secretary of the territory, and with the recorder of the county in which it is carrying on business, a copy of its charter or certificate of incorporation, duly authenticated, a copy certified under the seal of the secretary of state of the state of the incorporation, as being a correct copy of the original on file in his office, is sufficient.—*Hammer v. Garfield Min. & Mill. Co.*, 130 U. S. 291, 9 S. Ct. 548, 32 L. Ed. 964, affirming *Garfield Min. & Mill. Co. v. Hammer*, 6 Mont. 53, 8 P. 153.

646. Designation of agent for service of process.

See 12 Cent. Dig. Corp. §§ 2514, 2515.

Gen. Laws Colo. 1877, c. 19, § 23, requiring foreign corporations, before they do business in the state, to designate an authorized agent, on whom process may be served, is sufficiently complied with by a corporation if it designates its general manager as such agent, without giving the name of any person.—*Goodwin v. Colorado Mortg. & Inv. Co.*, 110 U. S. 1, 3 S. Ct. 473, 28 L. Ed. 47.

Acts Tenn. 1875, c. 66, § 12, provided for service of process on a particular person in behalf of a foreign corporation, and pursuant thereto a nonresident company appointed such person as its agent to receive process. Afterwards it was provided by Acts 1887, c. 226, that service might be made on any other agent. *Held* that, by thereafter continuing to do business in the state, the company assented to the terms of the later act, at least to the extent of consenting to service of process on an agent so far representative in character that the law would imply authority in him to receive such service within the state.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 19 S. Ct. 308, 172 U. S. 602, 43 L. Ed. 569.

651. Expulsion or withdrawal of permission to do business.

See 12 Cent. Dig. Corp. §§ 2574, 2575.

A state may provide by its legislation that, if a foreign insurance company shall remove to a federal court a case which has been commenced in a state court, the license of such company to do business within the state shall thereupon be revoked. Judgment *Prewitt v. Security Mut. Life Ins. Co.*, 83 S. W. 611, 26 Ky. Law Rep. 1239, 119 Ky. 321, 1 L. R. A. (N. S.) 1019, 115 Am. St. Rep. 1239, and 84 S. W. 527, 119 Ky. 321, 27 Ky. Law Rep. 77, 1 L. R. A. (N. S.) 1019, 115 Am. St. Rep. 264, affirmed.—*Security Mut. Life Ins. Co. v. Prewitt*, 26 S. Ct. 314, 200 U. S. 446, 50 L. Ed. 545; *Id.*, 26 S. Ct. 619, 202 U. S. 246, 50 L. Ed. 1013, 6 Ann. Cas. 317.

The license or permit to do local business, given to a foreign company which has come into the state in compliance with its laws, and has acquired, under the sanction of the state, a large amount of property within its borders, cannot be revoked under the authority of Act Mo. March 13, 1907 (Laws 1907, p. 174), and the company subjected to penalties because it brings a suit in a federal court, or removes a suit from a state court to a federal court, especially where a domestic railway company may bring suit in a federal court, or, in a proper case, remove one thereto, without forfeiting its right to do business, or incurring a liability to penalties.—(1910) *Herndon v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; *Swanger v. Atchison, T. & S. F. Ry. Co.*, 30 S. Ct. 639, 218 U. S. 159, 54 L. Ed. 978, affirming decree *Chicago, R. I. & P. Ry. Co. v. Swanger* (C. C. 1908) 157 F. 783.

656. Acquiring, holding, and conveying real property.

See 12 Cent. Dig. Corp. §§ 2573-2587.

Const. Colo. art. 15, § 10, declares that no foreign corporation shall do business in the state without a known place of business, and agent in the state on whom process may be served. Gen. St. Colo. 1883, §§ 260-262, provide that, before any foreign corporation shall do business in the state, it shall file with certain officers a certificate of its place of business, and the name of its agent in the state; that "no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this state, except as provided for in this act," that every foreign corporation shall file with the secretary of state a copy of its charter, and of the law under which it was incorporated; and that failure to comply with the act "shall render each and every officer, agent, and stockholder of any such corporation jointly and severally liable on any and all contracts of such company made within the state during the time that such corporation is so in default." *Held*, that failure of a foreign corporation to comply with the conditions entitling it to do business in the state does not render a conveyance to it void, so that it may be attacked collaterally by a private person.—*Fritts v. Palmer*, 132 U. S. 282, 10 S. Ct. 93, 33 L. Ed. 317.

The right of a foreign corporation to take and hold title to real estate cannot be questioned in ejectment by it against a former managing director.—*Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523, 14 S. Ct. 847, 38 L. Ed. 807.

657. Contracts.

See 12 Cent. Dig. Corp. §§ 2536-2541, 2550, 2552-2554.

A contract under which a foreign corporation was to superintend the operation of a factory within the state, and control, handle, and sell its output, is not relieved from the operations of Rev. St. Wis. 1898, §§ 1770b, 4978, prohibiting foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, because the contemplated traffic in the product might extend beyond the limits of the state.—*Diamond Glue Co. v. United States Glue Co.*, 23 S. Ct. 206, 187 U. S. 611, 47 L. Ed. 328.

Prohibition against suit in New York courts, which is the penalty for failure of foreign corporation to comply with Laws N. Y. 1890, c. 563, § 15, as amended by Laws 1892, c. 687, does not make the contract void.—*David Lup-ton's Sons Co. v. Automobile Club of America*, 32 S. Ct. 711, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, 699.

661. Right to sue or defend.

See 12 Cent. Dig. Corp. §§ 2536, 2539, 2542-2544, 2546, 2563-2567.

Prohibition against suit in New York courts, which is the penalty for failure of foreign corporation to comply with Laws N. Y. 1890, c. 563, § 15, as amended by Laws 1892, c. 687, does not make the contract void, but it is enforceable in a federal court.—*David Lupton's Sons Co. v. Automobile Club of America*, 32 S. Ct. 711, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, 699.

662. Liability to be sued.

See 12 Cent. Dig. Corp. §§ 2544, 2568-2570.

The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied by a grant of authority in those statutes to carry on its business there.—*Barrow S. S. Co. v. Kane*, 18 S. Ct. 526, 170 U. S. 100, 42 L. Ed. 964.

An initial carrier, when a foreign corporation, held not liable to suit on contract of shipment in a state in which it was not carrying on business because of any agency of a connecting carrier within that state, effected by Carmack Amendment June 29, 1906, to Act Feb. 4, 1887, requiring initial carrier in interstate commerce to obligate itself to carry to final destination.—*St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 33 S. Ct. 245, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

663. Actions by or against.

See 12 Cent. Dig. Corp. §§ 2534, 2535, 2557, 2558, 2571, 2582, 2590-2592, 2595, 2596.

668. — Process.

See 12 Cent. Dig. Corp. §§ 2603-2627.

Service of process on the general agent for the state of Texas of a French corporation is a sufficient service on the corporation, under Rev. St. Tex. 1879, art. 1223, providing that in suits against "any incorporated company" the citation may be served on its local agent in the county in which the suit is brought; the language of Laws 1874, c. 34, for which the above section is a substitute, being any corporation "of this state, or any other state or country."—*Société Foncière et Agricole des Etats Unis v. Milliken*, 135 U. S. 304, 10 S. Ct. 823, 34 L. Ed. 208.

Where a foreign corporation is not transacting business in the state, service of process on its president, who is inveigled into the state for that purpose, is invalid.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

In a personal action against a foreign corporation, neither doing business within the state nor having an agent or property therein, service of summons on its president, temporarily within the jurisdiction, is not sufficient service on the corporation.—*Goldey v. Morning News of New Haven*, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517, affirming judgment (C. C.) *Golden v. Same*, 42 F. 112.

Where an agent of a corporation sufficiently represents the company, as a matter of law, to enable the courts of a foreign state wherein it does business to acquire jurisdiction over it by service of process on him therein, it is immaterial that the company in fact withholds such authority from the agent.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 19 S. Ct. 308, 172 U. S. 602, 43 L. Ed. 569.

Rev. St. Ariz. 1887, § 348, requiring foreign corporations proposing to do business in the territory to file with certain territorial and county officers the appointment of an agent upon whom process "may be served," and sections 712 and 713, providing for service on such corporations by publication, are not exclusive, and are only designed to secure a special mode of service,

when the corporation has ceased to do business in the territory, or has not appointed such local agent; and, when a foreign corporation has officers in the territory carrying on its business there, service may be made under section 704, which provides for service of summons on corporations generally, by leaving a copy with specified officers, or with a local agent, etc.—*Henrietta Mining & Milling Co. v. Johnson*, 19 S. Ct. 402, 173 U. S. 221, 43 L. Ed. 675, affirming judgment 81 P. 1126, 5 Ariz. 222.

Service of summons within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where, at the time of such service, it had ceased to do business within the state, and had designated no agent upon whom service could be made.—*Conley v. Mathieson Alkali Works*, 23 S. Ct. 728, 190 U. S. 406, 47 L. Ed. 1113, affirming order (C. C.) 110 F. 730; *Geer v. Mathieson Alkali Works*, 23 S. Ct. 807, 190 U. S. 428, 47 L. Ed. 1122.

The mere ownership of lands in New Mexico by a railroad company organized and existing under Act Cong. March 3, 1897, c. 374, 26 Stat. 622, none of whose offices are located in the territory, or the bringing of suits in that territory to protect its land against trespasses, is not sufficient, under Comp. Laws N. M. 1897, § 450, to authorize the service of summons upon its president while passing through the territory on a railroad train, in a personal action in which an attachment may be levied upon the lands to satisfy any judgment that may be obtained, even assuming that the provisions of this statute could be made applicable to a corporation created by an act of Congress. Judgment 78 P. 624, 12 N. M. 456, affirmed.—*Territory of New Mexico ex rel. Caledonian Coal Co. v. Baker*, 25 S. Ct. 375, 196 U. S. 432, 49 L. Ed. 540.

Service of summons on a director of a foreign corporation, who is casually within the state for a few days, confers no jurisdiction on a federal court, where the corporation is doing no business, and has no property in the state.—*Remington v. Central Pac. R. Co.*, 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

Local "correspondents" of a foreign corporation, which furnishes them with market quotations to enable them to take orders from their customers for trades in shares of stock, may properly be treated as its agents for the purpose of service of process, although their relations to the corporation, as between themselves, are fixed by formal contract in which agency is expressly disclaimed, where the method of doing business shows that the corporation is the party really interested in the transactions, and the correspondents are compensated by a commission charged the customer for their services.—*Board of Trade of City of Chicago v. Hammond Elevator Co.*, 25 S. Ct. 740, 198 U. S. 424, 49 L. Ed. 1111.

Service of a subpoena on the resident treasurer of a foreign corporation is not sufficient to give the court jurisdiction over such corporation, where, at the time of such service, it was doing no business within the state, and never had done any business there since its incorporation.—*Kendall v. American Automatic Loom Co.*, 25 S. Ct. 768, 198 U. S. 477, 49 L. Ed. 1133.

The implied assent of a foreign insurance company transacting business in Pennsylvania without complying with Act Pa. June 20, 1883, that service of process in a suit brought against it there in respect of business transacted in that state may be made upon the state insurance commissioner, as prescribed by that statute, does not extend to a suit brought by citizens of that state on a contract of insurance executed in another state. Judgment (1905) 73 N. E. 703, 164 Ind. 321, reversed.—*Old Wayne Mut. Life Ass'n v. McDonough*, 27 S. Ct. 236, 204 U. S. 8, 51 L. Ed. 345.

Service of process on an agent of a foreign corporation doing business within the state, in order to be valid, must be upon an agent representing the corporation with respect to such business.—*Peterson v. Chicago, R. I. & P. R. Co.*, 27 S. Ct. 513, 205 U. S. 364, 51 L. Ed. 841.

A foreign corporation can be served with process within the state only when it is doing business therein, and such service must be upon an agent who represents the corporation and its business.—*Mechanical Appliance Co. v. Castleman*, 30 S. Ct. 125, 215 U. S. 437, 54 L. Ed. 722.

Service of process on a foreign corporation should not be quashed on the ground that the person served was not the corporation's agent, where the weight of the evidence showed that he remained the corporation's local managing agent in the state after the formation of a partnership between him and certain officers of the corporation.—*Herndon-Carter Co. v. James N. Norris, Son & Co.*, 32 S. Ct. 550, 224 U. S. 496, 56 L. Ed. 857.

Service of process on a resident director of a foreign corporation doing business in New York held valid under the New York statute.—*St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 33 S. Ct. 245, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

Service of process on the state officer designated by Acts La. 1904, No. 54, for that purpose does not give jurisdiction of a suit against a foreign corporation on a cause of action in another state.—*Simon v. Southern R. Co.*, 35 S. Ct. 255, 236 U. S. 115, 59 L. Ed. 492, affirming decree 195 F. 56, 115 C. C. A. 58.

—679. **Effect of insolvency in general.**
See 12 Cent. Dig. Corp. §§ 2656-2658, 2660.

The fact that a foreign corporation is in liquidation, and has been placed by the courts of that country in the hands of a liquidator, will not prevent a person from establishing his claim against the corporation by suit in a federal court, and subjecting its property to the satisfaction thereof.—*Société Foncière et Agricole des États Unis v. Milliken*, 135 U. S. 304, 10 S. Ct. 823, 34 L. Ed. 208.

—684. **Appointment of receiver in general.**

See 12 Cent. Dig. Corp. § 2666.

The appointment by a state court of a receiver for a foreign corporation whose permit to do business has been forfeited for violation of the state anti-trust laws is not invalid because the judgment of forfeiture permits the corporation to continue its interstate business, where the order appointing the receiver is not rested solely upon Act April 11, 1907, of Texas (Laws 1907, p. 175, c. 87), making special provisions for carrying out judgments under the anti-trust laws, but also upon a statute in force before the permit to do business was granted, empowering such appointment. Judgment (C. C. A. 1907) *State of Texas v. Palmer*, 158 F. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316, modified.—*Palmer v. State of Texas*, 29 S. Ct. 230, 212 U. S. 118, 53 L. Ed. 435.

—690. **Consolidation of corporations of different states.**

See 12 Cent. Dig. Corp. § 2672.

After an act of Kentucky incorporated an Indiana corporation as a corporation of Kentucky, the Indiana corporation and an Illinois corporation consolidated their stock and prop-

ty, the consolidated corporation being vested with all their rights and franchises. Held, that the existence of the Kentucky corporation was not thereby affected, especially as the new condition brought about by the consolidation was recognized by an act of Kentucky.—*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

—691. **Dissolution.**

See 12 Cent. Dig. Corp. §§ 2673-2677.

A Delaware corporation organized under the general incorporation laws of that state has no corporate existence, and cannot be recognized by the courts of this district as having the right to maintain a suit as a corporation, after proclamation by the governor of Delaware annulling its certificate of incorporation for nonpayment of franchise taxes assessed against it.—(1912) *Indian Protective Ass'n v. Gordon*, 32 S. Ct. 839, 225 U. S. 698, 56 L. Ed. 1262, affirming decree (1910) 34 App. D. C. 553.

CORPUS DELICTI.

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CORRUPTION.

See—

Bribery.

Fraud.

CORRUPT PRACTICE ACT.

See United States, —52.

COSERVANTS.

See Master and Servant, —160-201.

COSTS.

Scope-Note.

[INCLUDES pecuniary allowances made by law to parties prevailing in actions or other proceedings, civil or criminal, as reimbursement or indemnity for their expenses therein, payable by adverse parties or out of the subject-matter of the litigation; statutory provisions relating to costs; nature, grounds, and extent of the right thereto in general; who are entitled to costs, and who are liable therefor, as between parties, and discretion of courts to award costs; security for payment of costs; proceedings, disbursements, etc., for which costs are allowed, and items, rate, and amount of costs; taxation of costs, and review thereof; and payment and remedies for collection of costs.

[For related matters under other topics, see cross-references after analysis.]

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I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

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Proceedings in forma pauperis in federal court, see Courts, ↔356.

↔4. Constitutional and statutory provisions.

See 13 Cent. Dig. Costs, §§ 2, 3, 109.

Acts Tex. 31st Leg. c. 47, providing for allowance of an attorney fee to a successful plaintiff, *held* constitutional.—Missouri, K. & T. Ry. Co. of Texas v. Cade, 34 S. Ct. 678, 233 U. S. 642, 58 L. Ed. 1135.

Acts Tex. 31st Leg. c. 47, providing for attorney's fees of not over \$20 to the successful plaintiff where the attorney is employed on a claim not exceeding \$200 where such claim is not paid within 30 days after demand and the recovery is for the full amount claimed, *held* constitutional.—Missouri, K. & T. Ry. Co. of Texas v. Harris, 34 S. Ct. 790, 234 U. S. 412, 58 L. Ed. 1877, L. R. A. 1915E, 942.

↔5. Power to award costs.

See 13 Cent. Dig. Costs, §§ 6-16, 26, 30, 31, 33-35.

↔8. — Want of jurisdiction.

See 13 Cent. Dig. Costs, § 16; 42 Cent. Dig. Rem. of C. § 24.

Where the court has dismissed, for want of jurisdiction, a bill to enjoin the collection of taxes, it has no power to decree the payment of costs and counsel fees allowed by statute.—Citizens' Bank of Louisiana v. Cannon, 17 S. Ct. 89, 164 U. S. 319, 41 L. Ed. 451.

↔10. Stipulations and agreements.

See 13 Cent. Dig. Costs, §§ 17-19.

The condition upon which the United States agreed to allowances for counsel fees and other expenses out of funds in court into which the illicit gains of its agent had been traced, viz., the turning over by the defendants to the receiver of all assets which had not been theretofore "bona fide disposed of by them, and therefore beyond their control," was not so violated as to defeat the right to such allowances by the insistence by the defendants upon a credit for all disbursements made by them in defense of the suit and in the care of the property in their

hands, and for sums retained by them as compensation for their services. Decree (1909) 172 F. 1, 96 C. C. A. 537, affirmed.—United States v. Carter, 30 S. Ct. 515, 217 U. S. 286, 54 L. Ed. 769, 19 Ann. Cas. 594.

↔11. Discretion of court.

See 13 Cent. Dig. Costs, §§ 20-25, 231.

↔13. — In equity.

See 13 Cent. Dig. Costs, §§ 21, 25.

In a suit for infringement, an interlocutory decree was entered, granting an injunction and directing an accounting. Complainant's damages, however, were found to be merely nominal, and the final decree, though awarding nominal damages only, gave complainant full costs. *Held* that, as costs in equity suits are in the discretion of the court, the decree for costs would not be disturbed on the theory that defendant should have been allowed all costs subsequent to the interlocutory decree.—Du Bois v. Kirk, 158 U. S. 58, 15 S. Ct. 729, 39 L. Ed. 895, affirming decree (C. C.) Kirk v. Du Bois, 33 F. 252, and 48 F. 486.

↔42. Effect of offer of judgment, tender, or payment into court.

See 13 Cent. Dig. Costs, §§ 137-164; 13 Cent. Dig. Courts, § 409.

An offer to submit to judgment, though printed in the brief and made out of court, will be ineffectual to relieve the party from the costs thereafter accruing unless made in open court, and the court is asked to act thereon after notice to the opposing party to show cause.—Inhabitants of New Providence Tp. v. Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. Ed. 904.

↔48. Dismissal or nonsuit.

See 13 Cent. Dig. Costs, §§ 129, 192-210.

No costs should be imposed upon the dismissal for want of jurisdiction of a bill in equity to enjoin the Secretary of the Interior and commissioners appointed by him from selling or disturbing an Indian cemetery.—Conley v. Ballinger, 30 S. Ct. 224, 216 U. S. 84, 54 L. Ed. 393.

↔55. Judgment after remand by appellate court.

See 13 Cent. Dig. Costs, § 254.

The naming of the amount for which plaintiff is entitled to judgment, in an order by the

supreme court remanding a cause to the circuit court for further proceedings in accordance with the decree of the supreme court, does not prevent the circuit court from including the costs of such suit in its decree, above the amount of the judgment stated in the order remanding the cause.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (*C. C.*) *Whitney v. City of New Orleans*, 43 F. 215.

659. **Apportionment.**

See 13 Cent. Dig. Costs, §§ 261-276; 32 Cent. Dig. Land. & Ten. § 1321.

660. — **In general.**

See 13 Cent. Dig. Costs, §§ 261-271; 32 Cent. Dig. Land. & Ten. § 1321.

On an original suit in the supreme court between two states to settle a boundary dispute arising from changes in the course of a river, the costs will be divided between the parties, since the question is of a governmental nature, in which each has a vital, though not a litigious, interest.—*State of Nebraska v. State of Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186; *Id.*, 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798.

677. **Ownership of costs awarded.**

See 13 Cent. Dig. Costs, §§ 330-334.

Acts Va. 1871, 1879, authorized the issue by the state of bonds with coupons attached, and declared that such coupons should be receivable for all taxes and demands due the state. *Held* that, where judgment has been recovered by the state of Virginia against a taxpayer for taxes and costs, the taxpayer is entitled to pay the whole judgment with such coupons. The costs are not a debt due the officers of the court, but are due the state, which in turn is indebted to the officers for their fees.—*McGahey v. Virginia*, 135 U. S. 662, 685, 10 S. Ct. 972, 34 L. Ed. 304.

II. PERSONS ENTITLED.

See 13 Cent. Dig. Costs, §§ 335-368.

Allowance of docket fees to separate claimants in action on bond of government contractor, see United States, 667.

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Costs, §§ 369-399.]

IV. SECURITY FOR PAYMENT.

Security to perfect appeal or other proceeding for review, see Appeal and Error, 370-395.

109. **Persons or parties from whom security may be required.**

See 13 Cent. Dig. Costs, §§ 439-461.

One who sues as next friend for an infant is not required to execute a bond for costs before bringing the bill, under Rev. St. Ill. c. 47, § 13, providing that "the person so selected [as next friend] shall file bond * * * for all the costs," and that, "after bond shall have been so filed, said suit shall progress to final judgment and execution," though he may be required to give such bond before the suit proceeds to final judgment and execution.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

V. AMOUNT, RATE, AND ITEMS.

Allowance of docket fees in action on bond of government contractor, see United States, 667.

171. **Attorney's fees.**

See 13 Cent. Dig. Costs, §§ 665-690.

173. — **Under special statutory provisions.**

See 13 Cent. Dig. Costs, §§ 683-690.

On the denial of an original petition to the supreme court for a writ of mandamus, the respondent may tax a docket fee.—*Ex parte Hughes*, 114 U. S. 548, 5 S. Ct. 1008, 29 L. Ed. 281.

Testimony given before an examiner may be treated as a "deposition" within the meaning of Rev. St. U. S. § 824 [U. S. Comp. St. 1901, p. 632], providing for solicitor's fees for each deposition taken and admitted in evidence.—*State of Missouri v. State of Illinois*, 26 S. Ct. 713, 202 U. S. 598, 50 L. Ed. 1160.

The attorneys' fee taxable as a part of the costs under Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159], where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery of damages sustained in consequence of any such violation of the act, may not be taxed to the successful plaintiff in an action by a shipper against an initial carrier for a loss on a connecting line, in which the carrier's liability is dependent upon the Carmack amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), since the cause of action is the loss of property which is in no way traceable to the violation of any provision of the statute.—(*Sup.*, Ga., 1911) *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 S. Ct. 164, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, affirming judgment *Riverside Mills v. Atlantic Coast Line R. Co.* (C. C. 1909) 168 F. 990; (*Sup.*, Ky., 1911) *Louisville & N. R. Co. v. Scott*, 31 S. Ct. 171, 219 U. S. 209, 55 L. Ed. 183, affirming judgment (1909) 118 S. W. 990, 133 Ky. 724.

Services for which an attorney's fee is to be taxed under Act Feb. 4, 1887, § 8, and section 16 as amended by Act June 29, 1906, § 5, on plaintiff's success in an action for damages sustained by shipper, defined.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 523, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

The services for which an attorney's fee is to be taxed under Act Feb. 4, 1887, §§ 8, 16, as amended by Act June 29, 1906, in case of plaintiff's success in action against a carrier for damages to shipper awarded by the Interstate Commerce Commission, are those incident to the action in which the recovery is had, and not to those before the Commission.—*Mills v. Lehigh Valley R. Co.*, 35 S. Ct. 888, 238 U. S. 473, 59 L. Ed. 1414, affirming judgment *Lehigh Valley R. Co. v. Clark*, 207 F. 717, 125 C. C. A. 235.

183. **Witnesses' fees.**

See 13 Cent. Dig. Costs, §§ 715-743; 50 Cent. Dig. Witn. § 55.

184. — **In general.**

See 13 Cent. Dig. Costs, §§ 715-736; 50 Cent. Dig. Witn. § 55.

Under Rev. St. § 850, providing that the necessary expenses of any clerk or other officer of the United States who is sent away from his place of business as a witness for the government shall be "audited and paid," and section 983, providing that the costs of witnesses shall be taxed against the losing party, the expenses of a clerk attending court away from his place of business may be taxed against defendant in a suit by the United States, in which the latter is successful.—*Sanborn v. United States*, 135 U. S. 271, 10 S. Ct. 812, 34 L. Ed. 112.

190. Printing or other reproduction of papers, exhibits, or evidence.

See 13 Cent. Dig. Costs, §§ 660-662.

On denial of an original petition to the supreme court for a writ of mandamus, respondent cannot tax disbursements for printing briefs.—*Ex parte Hughes*, 114 U. S. 548, 5 S. Ct. 1008, 29 L. Ed. 281.

On denial of an original petition to the supreme court for a writ of mandamus, respondent may tax disbursements for printing objections in the nature of pleadings.—*Id.*

193. Incidental expenses.

See 13 Cent. Dig. Costs, § 656.

Where property is attached and cared for pending the litigation, the plaintiff on recovery may be allowed as costs a reasonable amount for the expenses incurred in preserving the attached property.—*Burns v. Rosenstein*, 135 U. S. 449, 10 S. Ct. 817, 34 L. Ed. 193.

VI. TAXATION.

211. Remedies for erroneous taxation.

See 13 Cent. Dig. Costs, §§ 326, 790, 792-795, 797-802, 807-813, 816, 818-820, 822-826.

214. — Motion for retaxation.

See 13 Cent. Dig. Costs, §§ 798, 799, 801, 807, 809-813, 816, 818-820, 826.

A circuit court, under the discretion given by 24 Stat. 508, § 15, on a petition by the marshal to recover fees and expenses against the United States, awarded \$59.15 costs, "considering the frivolous and vexatious nature of the objections taken." On appeal the items of costs were not objected to, and did not appear in the record. *Held*, that the costs must be assumed to have been taxed in accordance with the statute, which says that costs shall include only what was actually incurred for witnesses and fees paid to the clerk.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment (C. C.) *Harmon v. United States*, 43 F. 500.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Security to perfect appeal or other proceeding, see Appeal and Error, 370-395.

223. Power of appellate court to award costs.

See 13 Cent. Dig. Costs, §§ 835-837.

On a motion to dismiss an appeal, the right of the supreme court to decide implies the right to adjudge as to all costs which are incident to the motion.—*Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 S. Ct. 880, 29 L. Ed. 176.

225. Appeal or error in general.

See 13 Cent. Dig. Costs, § 844.

A decree for complainant in a patent infringement suit awarding injunction and directing accounting is "final," within Act Feb. 13, 1911, relating to supervision fees of clerks, on appeal from final judgment of a District Court.—*Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co.*, 35 S. Ct. 132, 235 U. S. 383, 59 L. Ed. 282.

235. Reversal.

See 13 Cent. Dig. Costs, §§ 900-907, 929.

236. — In general.

See 13 Cent. Dig. Costs, §§ 900-905, 907.

Where, after a cause has been wrongfully removed to a circuit court, a judgment therein

is reversed on appeal to the supreme court for want of jurisdiction of the circuit court, there is an exercise of jurisdiction by the supreme court, on which costs may be awarded; and costs will be awarded against the party who wrongfully removed the cause, although he is the successful party on the appeal.—*Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462.

Where appeals from a decree dismissing an original bill and a cross bill, in a suit begun in the circuit court, are reversed because the record fails to show the citizenship necessary to give the court jurisdiction, the costs will be imposed on complainant in the original bill, whose duty it was to put on record the facts necessary to show the jurisdiction.—*Everhart v. Huntsville Female College*, 120 U. S. 223, 7 S. Ct. 555, 30 L. Ed. 623.

Costs will be awarded against appellants in the supreme court, though the case is reversed, when the reversal takes place on account of their fault in invoking the jurisdiction of the circuit court when they had no right to resort to it.—*Blacklock v. Small*, 127 U. S. 96, 8 S. Ct. 1096, 32 L. Ed. 70.

Where it appears that defendant in error procured the removal of the case from a state court on a record which fails to support the jurisdiction of the federal court, the judgment will be reversed, with directions to remand, and defendant in error will be condemned to pay the costs both of the court below and the appellate court.—*Neel v. Pennsylvania Co.*, 157 U. S. 153, 15 S. Ct. 589, 39 L. Ed. 654, following *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462.

238. Acts or omissions of parties affecting right.

See 13 Cent. Dig. Costs, §§ 908-919.

Where a decree on the merits dismissing a bill in the circuit court is reversed by the supreme court on the ground of want of jurisdiction to render such a decree, and the cause remanded to the circuit court with direction to dismiss the case for want of jurisdiction, the costs of the appeal will be taxed against appellants, whose duty it was to make the jurisdiction of the circuit court appear.—*Peninsular Iron Co. v. Stone*, 121 U. S. 631, 7 S. Ct. 1010, 30 L. Ed. 1020.

Where a decree, though properly dismissing a bill, is so broad as to shut out any further suit, however great the exigency, it will be modified on appeal, but appellant will not thereby be relieved of costs, he not having made a motion below to amend, and his contention on appeal not having been limited to such amendment.—*Texas & P. Ry. Co. v. Interstate Transp. Co.*, 155 U. S. 585, 15 S. Ct. 228, 39 L. Ed. 271, modifying decree (C. C.) 45 F. 5.

Costs may be imposed on plaintiff in error where a judgment is reversed for lack of jurisdiction of the circuit court, if the cause was removed into that court at his instance. Judgment, *Morrison v. North American Transportation & Trading Co. (C. C.)* 85 F. 802, reversed.—*North American Transportation & Trading Co. v. Morrison*, 20 S. Ct. 869, 178 U. S. 262, 44 L. Ed. 1061.

239. Persons entitled.

See 13 Cent. Dig. Costs, §§ 920, 921.

A decree of reversal as to one of several plaintiffs in error, with costs, is interpreted to allow only the costs of the successful plaintiff in error.—*Sully v. American Nat. Bank*, 21 S. Ct. 29, 179 U. S. 68, 45 L. Ed. 80.

241. Apportionment of costs on appeal or error.

See 13 Cent. Dig. Costs, §§ 927-935.

In a suit in equity for infringement of a patent for a design, the master reported no profits, and nominal damages. On exception by plaintiff, the circuit court allowed a sum for damages, but the supreme court reversed this decree. *Held*, that plaintiff should be allowed costs in the circuit court, to and including the interlocutory decree, and defendant be allowed his costs after such decree.—*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 S. Ct. 945, 29 L. Ed. 177, reversing decree (C. C.) *Bigelow Carpet Co. v. Dobson*, 10 F. 385.

The supreme court, in reversing a cause for want of jurisdiction in the circuit court, has full discretionary power in the matter of awarding costs; and where it appeared that the bill of plaintiff showed on its face a lack of jurisdiction in the circuit court, and it appeared that defendant on his part neglected to urge lack of jurisdiction in the circuit court, the costs of appeal to the supreme court were ordered equally divided between the parties, each party being ordered to pay his own costs in the circuit court.—*Peper v. Fordyce*, 119 U. S. 469, 7 S. Ct. 287, 30 L. Ed. 435, reversing decree (C. C.) *Fordyce v. Peper*, 16 F. 516, 5 McCrary, 221.

253. Expenses of record, abstract, or transcript on appeal or error.

See 13 Cent. Dig. Costs, §§ 962-977.

254. — In general.

See 13 Cent. Dig. Costs, §§ 962-966, 974-977.

Defendant in a bill answered and filed a cross bill. Plaintiff appealed from the dismissal of the original bill, and defendant appealed in the cross suit. The latter was required by the clerk of the supreme court to pay one-half of the cost of printing the record. The decree dismissing the original bill was affirmed, and the cross suit dismissed. *Held*, on motion for retaxation of costs, that defendant could recover of plaintiff the amount advanced for printing the record.—*Nichols, Shepard & Co. v. Marsh*, 131 U. S. 401, 9 S. Ct. 791, 32 L. Ed. 538.

Fees for a transcript of record used by a party in preparing a bill of exceptions for an appeal to the circuit court of appeals are not taxable as costs, either under Rev. St. U. S. § 983 [U. S. Comp. St. 1901, p. 706], authorizing the taxing of "lawful fees for exemplifications and copies of papers necessarily obtained for use," or by rule 31, subd. 3, of the circuit court of appeals, providing that the cost of the transcript of the record from the court below shall be taxable as costs. Judgment 105 F. 1004, 44 C. C. A. 685, affirmed.—*Pine River Logging & Improvement Co. v. United States*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

256. — Unnecessary matter or expenditure.

See 13 Cent. Dig. Costs, §§ 968-971.

An appellee who incumbers the record with some 50 immaterial patents will be charged with half the costs of printing the same, under Sup. Ct. Rule 10, par. 9 (7 Sup. Ct. iii).—*Ball & Socket Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 S. Ct. 48, 37 L. Ed. 1019.

259. Damages and penalties for frivolous appeal and delay.

See 13 Cent. Dig. Costs, §§ 983-1003.

260. — Right and grounds in general.

See 13 Cent. Dig. Costs, §§ 983-996, 1002, 1003.

Where it appears that a case has been carried to the supreme court merely for the purpose of delay, the court in affirming the judg-

ment will grant damages to the defendant in error.—*Sire v. Ellithorpe Air-Brake Co.*, 137 U. S. 579, 11 S. Ct. 195, 34 L. Ed. 801, affirming judgment (C. C.) *Ellithorpe Air-Brake Co. v. Sire*, 41 F. 662; *Wilson v. Everett*, 139 U. S. 616, 11 S. Ct. 664, 35 L. Ed. 286.

Where, on writ of error to the state court, in an action for the balance due on machinery sold defendant, it is undisputed that the mill was built and equipped by plaintiff and accepted by defendant, and that the rulings of the trial court on evidence and instructions assigned as error were proper, it is obvious that the writ was taken for delay, and the judgment for plaintiff will be affirmed, with 10 per cent. damages, under clause 2 of supreme court rule 23.—*Gregory Consol. Min. Co. v. Starr*, 141 U. S. 222, 11 S. Ct. 914, 35 L. Ed. 715, affirming judgment: 6 Mont. 485, 13 Pac. 195, and 6 Mont. 491, 13 Pac. 198.

Ten per cent. damages awarded to defendant in error, under Sup. Ct. Rule 23, cl. 2 (3 S. Ct. xiii), on the ground that the errors assigned were frivolous, and the writ was taken merely for delay.—*Nelson v. Flint*, 17 S. Ct. 576, 166 U. S. 276, 41 L. Ed. 1002.

Power to award damages for delay under Rev. St. § 1010 (U. S. Comp. St. 1901, p. 715), where on writ of error judgment is affirmed, gives the Supreme Court authority to exert the power where the writ of error is dismissed for its frivolous character.—*Deming v. Carlisle Packing Co.*, 33 S. Ct. 80, 226 U. S. 102, 57 L. Ed. 140, dismissing writ of error *Carlisle Packing Co. v. Deming*, 114 F. 172, 62 Wash. 455.

The conclusion that a writ of error from the federal Supreme Court to a state court has been prosecuted for delay is a necessary inference from an order of dismissal for its frivolous character.—*Id.*

Judgment of a Circuit Court of Appeals affirming a judgment of the trial court on the ground that the evidence, though conflicting, sustained a verdict for plaintiff, will be affirmed with 10 per cent. damages, where the Supreme Court concurs in such view.—*Texas & P. R. Co. v. Prater*, 33 S. Ct. 637, 229 U. S. 177, 57 L. Ed. 1139, affirming judgment 183 F. 574, 106 C. C. A. 120.

Five per cent. damages for delay will be awarded under United States Supreme Court rule 23 (32 Sup. Ct. xi), on affirmation of a judgment of a Circuit Court of Appeals under federal Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, where contentions that interpretation of the statute was involved are wholly without merit.—*Southern Ry. Co. v. Gadd*, 34 S. Ct. 696, 233 U. S. 572, 58 L. Ed. 1099, affirming judgment 207 F. 277, 125 C. C. A. 21.

Ten per cent. damages may be added by state court of last resort in affirming judgment for plaintiff in action under Employers' Liability Act, where defendant obtained supersedeas, and local law makes 10 per cent. the costs thereof where judgment is affirmed.—*Louisville & N. R. Co. v. Stewart*, 36 S. Ct. 596, 241 U. S. 261, 60 L. Ed. 989, affirming judgment *Same v. Stewart's Adm'r*, 174 S. W. 744, 163 Ky. 823.

263. — Amount or rate and computation.

See 13 Cent. Dig. Costs, § 1001.

Where, on writ of error brought by a collector of customs, to review a judgment recovered against him for money exacted and paid on entries, the judgment is affirmed, the supreme court will allow the respondent in error interest pending the writ as "just damages for his delay," under Rev. St. § 1010, and under rule 23.—*Cochran v. Schell*, 107 U. S. 625, 2 S. Ct. 827, 27 L. Ed. 543.

**VIII. PAYMENT AND REMEDIES
FOR COLLECTION.**

Payment or security on taking appeal or other proceeding for review, see Appeal and Error, ¶370-395.

¶281. Attachment of the person.

See 13 Cent. Dig. Costs, §§ 1070-1076.

Where, on stipulation for a settlement by the parties to an action, others are allowed to intervene on filing bonds for future costs, the court will, on determining the cause against such interveners, they failing to pay the costs, order an attachment against them and their sureties.—*Craig v. Leitensdorfer*, 127 U. S. 764, 8 S. Ct. 1393, 32 L. Ed. 322.

IX. IN CRIMINAL PROSECUTIONS.

See 13 Cent. Dig. Costs, §§ 1082-1200.

Fees of prosecuting attorneys, see District and Prosecuting Attorneys, ¶4-6.

COTENANCY.

See Tenancy in Common.

COTTON.

Conspiracy to run cotton corners, see Monopolies, ¶12.

Duties on cotton manufactures, see Customs Duties, ¶32.

COUNSEL

See—

Amicus Curiae.

Attorney and Client.

District and Prosecuting Attorneys.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTERFEITING.*Scope-Note.*

[INCLUDES falsely and fraudulently imitating or altering coin or other money or government obligations or securities, and uttering, having or pretending to have in possession, offering, advertising, etc., such counterfeits; nature and extent of criminal responsibility therefor; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references following.]

Cross-References.

See Forgery.

Power of Congress to punish counterfeiting notes of foreign bank, see Commerce, ¶82.

¶19. Trial.

See 13 Cent. Dig. Counterfeit, §§ 46-49.

The first count of an indictment charged defendant with having counterfeit coin in his possession, with intent to defraud, etc. Defendant, by written plea, indorsed on the indictment, admitted having counterfeit coins in his possession, with knowledge that they were counterfeit, but denied any intent to pass the same, or

to defraud any person. The jury returned a verdict of "guilty in the first count for having in possession counterfeit minor coin." *Held*, that this was a general and not a special verdict, and that consequently all except the words "guilty in the first count" were to be rejected as mere surplusage, not affecting the validity of the verdict.—*Statler v. United States*, 157 U. S. 277, 15 S. Ct. 616, 39 L. Ed. 700.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

COUNTIES.

Scope-Note.

[INCLUDES the primary territorial divisions of states or territories for political purposes, whether designated as counties or as parishes; their status as bodies politic and corporate; their creation, organization, boundaries, alteration, and discontinuance; local boards and officers, and their rights, powers, duties, proceedings, and liabilities; county property; contracts, indebtedness, bonds, and other securities; claims against counties and precincts, etc., thereof; and actions by or against counties.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation, Alteration, Existence, and Political Functions.

- ⇒ 1. Nature and status.
- 4. De facto counties.
- 9. Alteration and creation of new counties.
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- 18. Precincts and divisions for special purposes.

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- ⇒ 24. Legislative control of acts, rights, and liabilities.

(B) COUNTY SEAT.

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[No paragraphs or references in this Digest. But see 13 Cent. Dig. Counties, §§ 199-208.]

(D) TORTS.

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Counties, §§ 209-213.]

IV. Fiscal Management, Public Debt, Securities, and Taxation.

- ⇒ 150. Limitation of amount of indebtedness.
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- 163. Warrants and certificates of indebtedness.
- 170. — Remedies.
- 172. Power to issue bonds.
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- 175. — Refunding.
- 176. Proceedings preliminary to issue of bonds.
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IV. Fiscal Management, Public Debt, Securities, and Taxation—Continued.

- ②183. Issuance, requisites, and validity of bonds.
- 184. Construction and operation.
- 186. Transfer of bonds or coupons.
- 188. Actions on bonds or coupons.
- 189. Taxation.
- 190. — In general.
- 191. — Levy for general county purposes.
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- 193. — Assessment.
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V. Claims Against County.

- ②197. Nature of claims required to be presented.

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Cross-References.

See—
Municipal Corporations.
Schools and School Districts, ②22-105.
Towns.

County in, which to sue, see Venue.
Highways, see Highways.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

Effect of division of county on right to mandamus to compel tax levy to pay judgment, see Mandamus, ②116.

Parties to mandamus to compel tax levy to pay judgment, see Mandamus, ②151.

Special or local laws, see Statutes, ②92-94.

②1. Nature and status.

See 13 Cent. Dig. Counties, § 1.

A county is not a municipal corporation.—*Sherman County v. Simonds*, 109 U. S. 735, 3 S. Ct. 502, 27 L. Ed. 1093.

A county is territorially a part of the state, yet politically it is also a corporation created by, and with such powers as are given to it by, the state.—*Lincoln County v. Luning*, 10 S. Ct. 363, 133 U. S. 529, 33 L. Ed. 766.

②4. De facto counties.

See 13 Cent. Dig. Counties, §§ 20-22.

A county, organized under Act Kan. 1872, was in form a valid organization, but was in fact fraudulent. The legislature recognized it as valid, by detaching the county from an organized county, to which it had been attached for judicial purposes, and by establishing courts therein. A representative to the legislature was elected, and his right, being challenged, was examined into by the committee on elections, and on their report he was admitted, and acted as a member during the session (Gen. St. Kan. 1868, c. 24, providing that no county shall be entitled to representation in the legislature until it shall have been organized). A new commissioner and new county clerk were also elected. Afterwards the legislature appointed a committee to examine, in connection with the attorney general, into the state of the organization, and upon their report, its character being disclosed, the county was treated as an unorganized county. *Held*, that there was sufficient recognition by the legislature of the de facto organization to

make it valid.—*Board of Com'rs of Comanche County v. Lewis*, 133 U. S. 198, 10 S. Ct. 286, 33 L. Ed. 604, affirming (C. C.) *Lewis v. Comanche*, 35 F. 343.

The fact that a de facto organization of a county, recognized by the legislature, was, after bonds were issued, abandoned, and the county treated as unorganized, does not release the county from liability on the bonds, when it is afterwards reorganized, no change of political organization, nor change of the form of organization, being sufficient to release a county from debts theretofore contracted.—*Id.*

Though the organization of a county be originally fraudulent, the ratification and confirmation by the legislature of the de facto organization will make it valid.—*Board of Com'rs of Harper County v. Rose*, 140 U. S. 71, 11 S. Ct. 710, 35 L. Ed. 344.

②9. Alteration and creation of new counties.

See 13 Cent. Dig. Counties, §§ 7-15.

②16. — Adjustment of rights and liabilities.

See 13 Cent. Dig. Counties, §§ 12-15.

Where Carter county, Kentucky, had issued bonds, and portions of its territory had been taken to form other counties, by acts which provided that the citizens and property within the old limits should remain liable to taxation for the payment of those bonds as though "this act had never been passed," the parts of the county set off to form other counties, which were interested in the bonds, remained, for the purposes of the debt, a part of Carter county. A suit against it on account of the bonds is a suit against the parts set off, and a judgment against the county is payable out of taxes collected within the boundaries of the original county.—*Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701, affirming judgment (C. C.) *Sinton v. County of Carter*, 23 F. 535.

18. Precincts and divisions for special purposes.

See 13 Cent. Dig. Counties, §§ 17, 18.

Under Act Neb. Feb. 15, 1869, as amended by Act March 3, 1870 (Laws 1869, p. 92, and Laws 1870, p. 15, and Gen. St. 1873, c. 35, p. 448) authorizing counties, etc., to issue bonds to aid works of internal improvement, and giving precincts the privilege of voting to aid such works, the county commissioners to "issue special bonds for such precinct," such bonds were issued, purporting to be issued by the board of county commissioners, on behalf of a precinct, and were signed by the chairman of the board, and attested by its clerk, who was also the clerk of the county, and were sealed with the seal of the county; and the coupons were signed by such clerk, and the bonds referred to the coupons as annexed. *Held*, that the bonds and coupons were issued by the county commissioners, within the statutory requirement.—*Blair v. Cumming County*, 111 U. S. 363, 4 S. Ct. 449, 28 L. Ed. 457.

In an action on bonds issued by a county for a precinct of the county which has voted such bonds, the county is the proper party defendant.—*Blair v. Cumming County*, 111 U. S. 363, 4 S. Ct. 449, 28 L. Ed. 457; *Nemaha County v. Frank*, 120 U. S. 41, 7 S. Ct. 395, 30 L. Ed. 584.

II. GOVERNMENT AND OFFICERS.

(A) ORGANIZATION AND POWERS OF GOVERNMENT IN GENERAL.

24. Legislative control of acts, rights, and liabilities.

See 13 Cent. Dig. Counties, § 24.

Funding bonds issued by Arizona in place of county bonds, under Act Cong. June 6, 1896 (29 Stat. 262, c. 339), are not invalid because the county, after requesting their issue, withdrew the request before the bonds were issued, since the request or consent of the county was not requisite to their issue under the statute. Judgment, 60 P. 895, 7 Ariz. 62, affirmed.—*Schuerman v. Territory of Arizona*, 22 S. Ct. 406, 184 U. S. 842, 46 L. Ed. 580.

(B) COUNTY SEAT.

27. Location and establishment.

See 13 Cent. Dig. Counties, §§ 24-25.

29. — Submission of question to popular vote.

See 13 Cent. Dig. Counties, § 29.

Pol. Code, c. 21, relating to the organization of counties, leaves the designation of a county seat to the voters of the county, and provides that the validity of the election may be contested by any competent elector of the county before a certain court upon leave obtained from it, and prescribes the mode in which and the persons by whom the contest shall be prosecuted and defended, and that the validity of the designation shall then be determined by such court. *Held* that, when proceedings are taken accordingly, the question of the validity of such election as thus presented is a case or controversy to which the judicial power of the territory extends.—*Smith v. Adams*, 130 U. S. 167, 9 S. Ct. 566, 32 L. Ed. 895.

37. Change of site of public buildings.

See 13 Cent. Dig. Counties, § 47.

The limitation upon the powers of the board of county commissioners to remove or designate new sites for county buildings, except in conjunction with the justices of the peace of the county, contained in the act of legislature of North Carolina ratified Feb. 27, 1877 (Laws N. C. 1876-77, c. 141), applies only to those com-

missioners who should be chosen thereafter under the provisions of the act, and does not affect the powers of a board of commissioners in office in the year 1877.—*Board of Com'rs of Washington County v. Sallinger*, 119 U. S. 178, 7 S. Ct. 161, 30 L. Ed. 377.

After the occupation of the rented building as a court house for five years, the change of the county's title from that of lessee to the ownership in fee by purchase is not a change of the site of the court house within the meaning of the statute.—*Id.*

Where a court house has been destroyed by fire, the renting of a building to be used for a court house in another locality cannot be considered as a removal or designation of a new site for a court house, within the meaning of the statute of North Carolina (Act 1868, c. 20) providing that the site of any county building shall not be changed unless by the unanimous vote of the county commissioners previously had, and notice given.—*Id.*

(C) COUNTY BOARD.

47. Powers and functions in general.

See 13 Cent. Dig. Counties, § 55.

Under Act April 1, 1851 (Laws 1851, p. 51), providing for township organization, in the counties which adopt such organization, the board of supervisors becomes the legal successor of the county court as the county board and should perform the duties theretofore devolving upon such court.—*Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 S. Ct. 80, 27 L. Ed. 309.

(D) OFFICERS AND AGENTS.

Clerks of courts, see Clerks of Courts.

Sheriffs, see Sheriffs and Constables.

Tax assessors, see Taxation, 310-320.

Tax collectors, see Taxation, 550-570.

63. Appointment of agents or employees.

See 13 Cent. Dig. Counties, §§ 57-60.

Where, by an act of the legislature, the county court of Carter county, Kentucky, was authorized to compromise a debt for which the county was liable, and to act in such compromise for those parts of two other counties which had formerly belonged to Carter county, the acts establishing the two new counties having declared that the liability of citizens and property within the old territory for taxation on account of this debt should continue the same as if those acts had never been passed, *held*, that it was within the power of the legislature to designate the county court to act as agent of the county, and of those whose property was subject to taxation for the existing debt, and that it was not necessary that taxpayers should vote on the subject, or that they should participate in an election of the body that was to act in the matter, no new debt being created.—*Carter County v. Sinton*, 120 U. S. 517, 7 S. Ct. 650, 30 L. Ed. 701, affirming judgment (C. C.) *Sinton v. County of Carter*, 23 F. 535.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(A) PUBLIC BUILDINGS AND OTHER PROPERTY.

Construction and maintenance of bridges, see Bridges, 6, 7.

108. Power to sell and convey.

See 13 Cent. Dig. Counties, §§ 167, 170-173.

A county which has authority to sell its lands for money may, in the absence of express

restrictions, sell them for money's worth, as for a consideration consisting in the construction of a railroad through the county, and the building of wharves, docks, and depots for the accommodation of the public.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

(B) CONTRACTS.

127. Modification or rescission.

See 13 Cent. Dig. Counties, §§ 192, 193.

Complainant sold a farm to a county for a poorhouse, and received a portion of the consideration in county orders, the balance being secured by notes and mortgage. *Held* that, the contract having failed because of the want of power on part of the county to make the mortgage and notes, the vendor may rescind, and demand a restitution of the premises upon the surrender of the void securities.—*Chapman v. Board of County Com'rs of Douglass County*, 107 U. S. 348, 2 S. Ct. 62, 27 L. Ed. 378.

(C) COUNTY EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Counties, §§ 199-208.]

(D) TORTS.

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Counties, §§ 209-213.]

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Appeal by county treasurer in action relating to disposition of taxes, see Courts, 395.

Bona fide purchaser of bonds, see Municipal Corporations, 943, 955; effect of lis pendens, see Lis Pendens, 25.

Estoppel to question constitutionality of issue of bonds, see Constitutional Law, 43.

Impairing obligation of contract, see Constitutional Law, 143, 144.

Mandamus to compel taxation for payment of judgment, see Mandamus, 14, 111, 116.

Matters concluded by judgment on bonds, see Judgment, 713.

Presumption as to compliance with conditions precedent to issuance of bonds, see Evidence, 83.

Taxes for highway purposes, see Highways, 121-140.

150. Limitation of amount of indebtedness.

See 13 Cent. Dig. Counties, §§ 165, 166, 215-217.

Under Const. Colo. art. 11, § 6, limiting the amount to which a county can become indebted by loan, and providing further that "the aggregate amount of indebtedness of any county, for all purposes, * * * shall not exceed, at any time," a certain limit therein fixed, a county cannot exceed such limit for loans or for any other kind of indebtedness, even on warrants issued for fees of witnesses, jurors, sheriffs, and the like, as required by statute.—*Lake County v. Rollins*, 130 U. S. 662, 9 S. Ct. 651, 32 L. Ed. 1060, overruling judgment (C. C.) 34 F. 845.

154. Aid to corporations and investments in stock.

See 13 Cent. Dig. Counties, §§ 228-240; 18 Cent. Dig. Elections, §§ 23, 37; 36 Cent. Dig. Mun. Corp. §§ 1845, 1846, 1860; 41 Cent. Dig. R. R. § 72.

Where a railroad company is authorized to build and operate a railroad from a point on

another railroad in a southerly or southwesterly direction, through certain named counties, and also "to extend branch railroads into and through any counties that the directors may deem advisable," a road built from the starting point on the other railroad in a northeasterly direction through the defendant county, which is not one of those named, is a branch, within the provision of the charter authorizing the county court of any county, in which any part of the railroad or branches may be, to subscribe to the stock and issue bonds therefor.—*Howard County v. Central Nat. Bank of Boonville*, 108 U. S. 314, 2 S. Ct. 689, 27 L. Ed. 738.

The original charter of a railroad gave to H. county, through which the railroad was constructed, authority to subscribe to the stock of the railroad company without a vote of the people. Afterwards the state adopted a constitution, which required subscriptions by counties to the stock of railroad companies to be submitted to a vote of the people. After the adoption of such constitution, the charter of the railroad company was amended so as to authorize it to extend the road, and also to build a branch. *Held*, that the amendment did not subject the original charter to the restriction of the constitution, so as to require H. county to submit to a vote of the people a proposition to subscribe to the stock of the railroad company.—*Howard County v. Paddock*, 110 U. S. 384, 4 S. Ct. 24, 28 L. Ed. 171.

The meaning of a constitutional or statutory provision that a county, city, or town shall not be charged as subscriber to a corporation, "unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," is that at least two-thirds of the qualified voters who vote at an election, duly notified, shall give their assent. It is not necessary that two-thirds of all the resident voters should cast favorable votes. All voters who absent themselves from an election, duly notified and held, are presumed, unless the law providing the election expressly declares otherwise, to assent to the result.—*Board of Sup'rs of Carroll County v. Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517.

Act Miss. Feb. 10, 1860, authorized certain counties to subscribe to the stock of a railroad company, provided that "a majority of the qualified voters * * * should first assent thereto." Const. Miss. 1869, art. 12, § 14, provides that no county shall become a stockholder in any corporation "unless two-thirds of the qualified voters * * * shall assent thereto." Act Miss. March 25, 1871, declared that the act of 1860 should apply to G. county, and that "all elections when held shall be conducted in all things as required by the act [Feb. 10, 1860] of which this is amendatory, and of the constitution and laws of this state in force at the time so held." *Held*, that Act March 25, 1871, did not authorize a county to subscribe to the stock of a railroad company on the assent of a bare majority of the voters, as was allowed by Act Feb. 10, 1860, but required a two-thirds vote, according to the constitution of 1869.—*Grenada County Sup'rs v. Brown*, 112 U. S. 261, 5 S. Ct. 125, 28 L. Ed. 704.

A subscription by a county to the stock of two or more railroad companies is not avoided by the subsequent consolidation of such companies, and bonds issued in payment of such subscription are valid.—*Bates County v. Winters*, 112 U. S. 325, 5 S. Ct. 157, 28 L. Ed. 744.

Where a person appointed by the county court agent to make a subscription to stock is present at the meeting when the subscription was made and accepted, no other notice to the

county court of the acceptance was necessary.—*Id.*

Where the body or agency having authority to make a subscription on behalf of a county to the stock of a railroad company passes a resolution to the effect that it does thereby, in the name and on behalf of the county, subscribe a specified amount of stock, and presents a copy of that resolution to the company for acceptance as a subscription, and the company does in fact accept, and notifies the county or its proper agent to that effect, the contract of subscription is complete, and binds the parties according to its terms.—*Id.*

After the adoption of Const. Tenn. 1870, declaring that no county should become a stockholder in any corporation except upon election first held, and the assent of three-fourths of the votes cast thereat, no action by the county court can ratify an invalid subscription to the stock of a railroad company made before its adoption, without such election first held.—*Norton v. Shelby County*, 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178.

Rev. St. Ky. 306, c. 28, art. 17, § 2, requiring the justices of the county to act with the county court in certain matters relating to aid to railroads "under the provisions of any law hereafter enacted," do not apply to statutes previously enacted relating to aid to railroads.—*Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 7 S. Ct. 563, 30 L. Ed. 653, affirming judgment (C. C.) *Same v. Judge of Muhlenburg County Court*, 8 F. 737.

Act Ky. March 15, 1851, incorporated the Shelby Railroad Company, and authorized the county of Shelby to subscribe for stock, and to levy taxes to pay therefor, each person paying such tax to become entitled to his pro rata share of the stock. By an amendment of February 3, 1869, a specified portion of Shelby county was authorized to subscribe for stock, issue bonds in payment thereof, and levy taxes, with the provision that stock for which certificates had been issued to taxpayers should be voted by the individuals holding the same. By Act March 11, 1870, the charter was again amended, so as to provide that any county, or part of a county, which had delivered bonds in payment of stock should be entitled to representation and to vote the amount of such stock through the county judge and justices of the peace. *Held*, that taxes paid and used merely to discharge interest on the bonds did not entitle the taxpayer to stock, and the county or district thereof was entitled to vote the stock represented by the amount of bonds still outstanding.—*Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 12 Sup. Ct. 969, 36 L. Ed. 755.

A county court, in an order for an election on the question of the granting of aid to a railroad, directed that notice of the election be given through a certain newspaper for five weeks. The period between the date of the order, February 6th, and the date of the election, March 12th, excluding the former and including the latter day, according to the rule prescribed in Gen. St. Mo. 1866, p. 84, § 6, lacked one day of five full weeks, but the notice was not prescribed by statute. *Held*, that the order should be construed so as to make, if possible, a valid election, i. e. as requiring advertisement in five weekly issues of the paper.—*Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 S. Ct. 267, 37 L. Ed. 83, affirming judgment *Ninth Nat. Bank v. Knox County* (C. C.) 37 F. 75.

The election was held, the votes canvassed by the proper officers, and an order made by the county court for the subscription in accordance with the terms of the order for the election. *Held*, that it might be presumed that proper notices of the election were given, under the rule that where the performance of a prior act is necessary to the legality of a subsequent

act proof of the latter carries with it a presumption of the due performance of the former.—*Id.*

A conveyance of lands by a county to a railroad company for an express consideration of \$1, and upon the further consideration of its constructing its road through the county, and building wharves, docks, etc., to make a connection with the Great Lakes, is a sale of the lands and not a mere gift or donation without consideration, within the meaning of decisions which hold that donations to railroads are invalid.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

Any county near or through which a railroad running via Salem and Winston, N. C., in the direction of some point in the northwestern boundary line of that state, might pass, was authorized to take, and pay for in county bonds, capital stock of the Northwestern North Carolina Railroad Company, by the North Carolina ordinance of March 8, 1868, incorporating such company for the purpose of constructing a line via Salem and Winston "to some point in the northwestern boundary line of the state, to be hereafter determined," and providing that counties subscribing stock to such company should do so in the same manner and subject to the same restrictions as were prescribed by Laws N. C. 1852, c. 136, which empowered any county near or through which the railroad incorporated by that act should pass to subscribe for its stock, payable in county bonds. Judgment Board of Com'rs of Wilkes County v. Coler, 113 F. 725, 51 C. C. A. 390, affirmed.—*Board of Com'rs of Wilkes County v. W. N. Coler & Co.*, 23 S. Ct. 738, 190 U. S. 107, 47 L. Ed. 971.

§163. Warrants and certificates of indebtedness.

See 13 Cent. Dig. Counties, §§ 241-259.

§170. — Remedies.

See 13 Cent. Dig. Counties, §§ 256-259.

In a suit on warrants, brought seven years after they had been presented to the county treasurer, and payment demanded, and he had indorsed thereon "Not paid for want of funds," *held* that, under the law in Nebraska, the cause of action did not accrue when payment was refused, but only when the money for their payment is collected, or time sufficient for the collection of the money has elapsed.—*King Iron Bridge & Manufacturing Co. v. Otoe County*, 124 U. S. 459, 8 S. Ct. 582, 31 L. Ed. 514.

§172. Power to issue bonds.

See 13 Cent. Dig. Counties, §§ 261-267, 275, 276.

§173. — In general.

See 13 Cent. Dig. Counties, §§ 261, 262, 266, 267, 275, 276.

Under Act Ill. April 1, 1851 (Laws 1851, p. 35), providing for township organization of counties, and, in article 15, § 4, that powers of the county as a body politic can only be exercised by the board of supervisors, and, in article 16, § 4, that the board of supervisors shall have power "to perform all other duties * * * which may be required of or enjoined on them by any law of this state to the county courts," the board of supervisors are the legal successors of the county judges, and can properly act in issuing bonds in aid of a railroad under authority conferred by statute on the county court.—*Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 S. Ct. 80, 27 L. Ed. 309.

Act Ill. Nov. 6, 1849 (Laws 1849, 2d Sess. p. 33), authorizes county subscriptions to railroad stock, and empowers the county court to borrow money and issue bonds in payment of such subscriptions. Act April 15, 1869 (charter of Kankakee & Illinois River Railroad Com-

pany), authorizes aid subscriptions by townships, corporate towns, and cities along the railroad under special conditions. Id. § 17, declares that "nothing herein contained shall prevent counties and cities from taking and voting for subscriptions in the stock of said company, under the general laws of this state." *Held*, that section 17 cannot be regarded as a reservation to counties of the power to subscribe for stock only, without the power to issue bonds therefor; but that a proper construction is that the section simply preserves the powers granted to counties by the general laws unimpaired by the charter.—Id.

A wagon bridge across the Platte river is a work of internal improvement, within Act Neb. Feb. 15, 1869, as amended by Act March 3, 1870, which provides that any county may issue bonds in aid of any work of internal improvement to an amount to be determined by the county commissioners, not exceeding 10 per cent. of the assessed valuation of all the taxable property in the county, and the limitation as to amount imposed by Rev. St. Neb. 1866, c. 9, does not apply.—*United States v. County Com'rs of Dodge County*, 110 U. S. 156, 3 S. Ct. 590, 28 L. Ed. 103.

Act Ky. Feb. 27, 1867, c.-1505, authorized a county court to subscribe to the capital stock of a railroad company in a sum to be fixed by commissioners, named in the statute, in a proposition submitted to the approval of the legal voters. The commissioners fixed the amount at \$250,000, and the proposition was approved. *Held*, that the authority of the county court only extended to the issue of bonds to that amount, and that bonds issued in excess thereof were void.—*Daviess County v. Dickinson*, 117 U. S. 657, 6 S. Ct. 897, 29 L. Ed. 1026.

Though the organization of a county was confessedly fraudulent, where it was afterwards recognized as valid by the legislature, it is binding, and bonds of such county which are regular on their face are valid obligations in the hands of bona fide purchasers before maturity.—*Board of County Com'rs of Comanche County v. Lewis*, 133 U. S. 198, 10 S. Ct. 286, 33 L. Ed. 604, affirming judgment (C. C.) *Lewis v. Comanche*, 35 F. 343; *Harper County Com'rs v. Rose*, 140 U. S. 71, 11 S. Ct. 710, 35 L. Ed. 344.

Where a state constitution permits counties to donate their bonds, not exceeding a certain percentage on the assessed valuation, to railroad companies, a donation in excess of the prescribed percentage is void in toto; and the bondholders have no equity to recover any amount whatever on the theory that the county received a consideration in the construction of the railroad, and should therefore pay so much on the bonds as it might lawfully have donated.—*Hedges v. Dixon County*, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044, affirming judgment (C. C.) 37 F. 304.

An interest in an unfinished railroad begun before the adoption of Const. N. C. 1868 cannot be deemed essential to the exercise by a county of the power to issue bonds in aid of railroad construction, conferred by Code N. C. §§ 1996-1999, "when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," on the theory that such sections, being a reproduction of a statute passed shortly after the adoption of such Constitution, must be construed in the light of the constitutional provision which forbade the state to lend its aid to any corporation except in aid of the completion of such railroads as might be unfinished at the time of its adoption, or in which the state had a direct pecuniary interest. Decree Board of Com'rs of Stanly County v. Coler, 113 F. 705, 51 C. C. A. 379, affirmed.—Board of

Com'rs of Stanly County v. W. N. Coler & Co., 23 S. Ct. 811, 190 U. S. 437, 47 L. Ed. 1126.

—174. — Public improvements.

See 13 Cent. Dig. Counties, § 264, 265.

Bonds issued by county commissioners to aid a company in improving the water power of a river, for the purpose of propelling public gristmills, are issued to aid in constructing a "work of internal improvement," within the meaning of Act Neb. Feb. 15, 1869, as amended by Act March 3, 1870 (Laws 1869, p. 92), and Laws 1870, p. 15, and Gen. St. 1873, c. 35, p. 448, authorizing counties, etc., to issue bonds to aid such works.—*Blair v. Cumming County*, 111 U. S. 363, 4 S. Ct. 449, 28 L. Ed. 457.

Under Code Tenn. §§ 408-415, giving counties power to erect a court house and other necessary county buildings, the power to issue, as evidence or security for a debt contracted for the construction of such a building, bonds or other commercial paper having the privileges and exemptions accorded to that class of securities, not being expressly given, cannot be necessarily implied; no extraordinary powers being given, and no mode of raising funds for the purpose being pointed out, except the levy of a special tax.—*Claiborne County v. Brooks*, 111 U. S. 400, 4 S. Ct. 489, 28 L. Ed. 470.

Act Kan. Feb. 29, 1868, giving county commissioners power to "borrow," upon the credit of the county, a sum sufficient for the erection of county buildings, etc., gives them also the power to issue county bonds therefor, as the power to borrow money carries with it the power to issue the ordinary evidences and security of a loan.—*Board of Com'rs of Comanche County v. Lewis*, 133 U. S. 198, 10 S. Ct. 286, 33 L. Ed. 604, affirming judgment (C. C.) *Lewis v. Comanche*, 35 F. 343.

—175. — Refunding.

See 13 Cent. Dig. Counties, § 263.

Drafts drawn by levee inspectors on the levee treasurer under Act Ark. Feb. 16, 1859, providing for the division of overflowed lands in certain counties into levee districts for reclamation, and their taxation for the expenses thereof, and the renewal bonds or scrip issued therefor by the county clerk under the amendatory act of January 15, 1861, are not an indebtedness of the county, within Act April 29, 1873, authorizing "certain counties to fund their outstanding indebtedness."—*Meath v. Phillips County*, 108 U. S. 553, 2 S. Ct. 869, 27 L. Ed. 819.

The authority of the territory of Arizona to issue funding bonds under Act Cong. June 6, 1896 (29 Stat. 262, c. 339), which provides that certain indebtedness "may be funded * * * until January 1, 1897," is not limited to the issuance of the funding bonds before that date, but is limited to the issue of such bonds for indebtedness that had accrued prior to that date. Judgment, 60 P. 895, 7 Ariz. 62, affirmed.—*Schuerman v. Territory of Arizona*, 22 S. Ct. 406, 184 U. S. 342, 46 L. Ed. 580.

—176. Proceedings preliminary to issue of bonds.

See 13 Cent. Dig. Counties, § 268-273.

—178. — Petition or assent of taxpayers or voters.

See 13 Cent. Dig. Counties, § 269-273.

Bonds issued by counties in Missouri during years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are valid if the subscription was made under authority granted before the adoption of the constitution of 1865, which did not require such a vote to be taken.—*Dallas*

County in the State of Missouri v. McKenzie, 110 U. S. 686, 4 S. Ct. 184, 28 L. Ed. 285.

Under Gen. St. Mo. 1886, c. 63, § 17, an issue of bonds in aid of a railroad pursuant to a vote wherein merely the route of the railroad is designated is valid, the county authorities having the right to select the particular corporation to be the recipient of the subscription.—Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. Ed. 93, affirming judgment (C. C.) Ninth Nat. Bank v. Knox County, 37 F. 75.

A notice of hearing before the county judge upon an application to issue railroad aid bonds need not specify the place of hearing; the judge's usual place of transacting business being understood if no other is named.—Town of Andes v. Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. Ed. 996.

179. Conditions precedent to issue of bonds.

See 13 Cent. Dig. Counties, § 274.

180. — In general.

Bonds of Pima county, Ariz., issued in literal compliance with the Arizona act of February 21, 1883, in exchange for bonds of the Arizona Narrow Gauge Railroad Company, are not excluded from the provision of the act of congress of June 6, 1896 (29 Stat. 262, c. 339), authorizing the refunding of all bonds which "had been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized," because subsequent to their issue the original holders of such bonds failed to complete the railroad and the county received no benefit therefrom, as the territorial act did not make the completion of the road a condition precedent to the issuance of the bonds or make their validity dependent upon the subsequent conduct of the railroad company.—Murphy v. Utter, 22 S. Ct. 776, 186 U. S. 95, 46 L. Ed. 1070.

A presumption, though not a conclusive one, that there has been a compliance with the condition precedent to the issuance of county bonds in payment of a subscription to the capital stock of a railway company, that the county should first be exonerated from a prior subscription to the stock of another railroad company, arises from the mere fact of subscription and issuance by the officer charged with the duty of issuing the bonds upon the performance of the condition precedent.—Quinlan v. Green County, 27 S. Ct. 505, 205 U. S. 410, 51 L. Ed. 860.

A condition imposed by a vote authorizing a county bond issue in aid of railroads, that they shall not be issued until the county shall be exonerated from a prior subscription to another railway company, is a condition precedent to the lawful issue of the bonds. Judgment Quinlan v. Green County, Ky., 157 F. 33, 84 C. C. A. 537, 19 L. R. A. (N. S.) 849, modified.—Green County, Ky., v. Quinlan, 29 S. Ct. 162, 211 U. S. 582, 53 L. Ed. 335.

Provisions in a vote authorizing a county bond issue in payment of a subscription for railroad stock, on condition that the railroad construct through the county and within a mile of a named town and expend the amount subscribed within the county, did not impose a condition on the lawful issue of the bonds or on the obligation of county thereon, where the vote makes exoneration from a prior subscription to stock of another railroad company a condition precedent to the issue of the bonds.—Id.

181. — Provision for payment.

See 13 Cent. Dig. Counties, § 274.

It is the law of Texas, as settled by the decisions of its supreme court, that the provision of the state constitution (article 11, § 7)

that "no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and to provide at least two per cent. as a sinking fund" is complied with as to bonds issued by a county in payment for bridges built therein as authorized by the act of the legislature (Laws 1887, c. 141) by the provisions of the act itself, which imposes the duty on the county authorities of levying and collecting an annual tax sufficient to pay the interest on such bonds, and to create a sinking fund of not less than 4 per cent. of the full sum for which bonds have been issued; and that the actual levy by the county of the required tax at the time a contract for a bridge, to be paid for in bonds, is entered into, is not essential to the validity of the bonds. Judgment, 81 F. 742, 28 C. C. A. 589, reversed.—Wade v. Travis County, Tex., 19 S. Ct. 715, 174 U. S. 499, 43 L. Ed. 1060.

182. Sale or other disposition of bonds by county.

See 13 Cent. Dig. Counties, § 285.

Where the law authorizing an issue of county bonds in aid of a railroad requires that the railroad shall not sell the bonds for less than par, the fact that the railroad does so sell them does not affect the right of their holder to recover principal and interest at par.—Richardson v. Lawrence County, 154 U. S. 536, 14 S. Ct. 1157, 17 L. Ed. 558.

183. Issuance, requisites, and validity of bonds.

See 13 Cent. Dig. Counties, §§ 275-281, 223, 224.

Bonds to the amount of \$40,000 were issued by the county of Otoe, in the state (then territory) of Nebraska, to a railroad company, as a donation to the company to aid in the construction of a railroad in Fremont county, Iowa, to secure to said Otoe county an eastern railroad connection. Held that, notwithstanding any defects or irregularities in the voting upon or issuing said bonds, they were validated by Act Neb. Feb. 15, 1869 (Laws 1869, p. 200), and another act of the same date (Laws 1869, p. 92), section 8 of which provided that the bonds theretofore issued in aid of any railroad should be legal and valid, notwithstanding any defect or irregularity in the submission of the question to vote, or in taking the vote, or in the execution of the bonds, and notwithstanding the same may not have been voted on, executed, or issued in conformity with law.—Otoe County v. Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. Ed. 331.

The fact that county bonds have been duly registered, and a certificate indorsed on them stating that they are issued according to law, does not preclude the county from asserting their invalidity, the provision of law requiring registration and a certificate thereof not having declared the effect thereof to be conclusive as to the validity of the bonds.—Dixon County in State of Nebraska v. Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. Ed. 360.

Under Acts Tenn. 1867-68, c. 6, § 1, which authorizes a subscription on behalf of a county to the stock of a railroad by the county court, but requires that a majority of the justices in commission when the subscription is made shall be present, and that a majority of those present shall concur therein, a subscription which was invalid when made is not ratified by the levy of a tax to pay the bonds issued in payment of the subscription, where a majority of the justices in commission were not present when the tax was levied.—Norton v. Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178.

By Const. Colo. art. 11, § 6, the amount of indebtedness which a county can incur depends on the amount of the assessed valuation of

the county. Act Feb. 21, 1881, authorized the issue of bonds, and required only that they "shall not exceed the sum of the county indebtedness" at the date of notice of election held to decide the question of such issue, such sum to be ascertained by the county commissioners. There was a recital in the bonds, each of which showed the total amount of issue, that they were "under, and by virtue of, and in full compliance with," the statute, and that "all the provisions and requirements of said act have been fully complied with by the proper officers," etc., but they contained no reference to the constitutional provision. *Held*, that the county was not estopped to make the defense that the indebtedness for which the bonds were issued was incurred after the constitutional limit had been reached.—*Lake County v. Graham*, 130 U. S. 674, 9 S. Ct. 654, 32 L. Ed. 1065.

It is immaterial that bonds issued in pursuance of Act Kan. Feb. 29, 1888, giving authority to borrow money to erect county buildings, recite that the purpose of their issue is to erect county buildings, instead of reciting that it is to borrow money for their erection, where the bonds refer to the act, and recite that they are issued in pursuance thereof.—*Board of Com'rs of Comanche County v. Lewis*, 133 U. S. 198, 10 S. Ct. 286, 33 L. Ed. 604, affirming judgment (C. C.) *Lewis v. Comanche*, 35 F. 343.

A county voted a subscription to the stock of a railroad, to be paid in county bonds provided the railroad shops were located at D. This condition was never fulfilled, but the bonds were issued and delivered, after being registered, and a certificate of registration indorsed upon them. The bonds recited that they were issued in accordance with the act permitting counties to subscribe to the stock of this railroad (Act Feb. 14, 1857), but did not recite that they were issued in accordance with another act, providing that bonds voted as subscriptions to be issued on a condition precedent are not valid until the condition shall have been performed (Act April 16, 1869). *Held*, that the recitals in the bond did not estop the county from denying the validity of the bonds because the condition precedent to their issue was not performed.—*Citizens' Savings & Loan Ass'n v. Perry County*, 156 U. S. 692, 15 S. Ct. 547, 39 L. Ed. 585.

◀184. Construction and operation.

See 13 Cent. Dig. Counties, §§ 282, 285-288.

A county subscribed to the stock of the G., H. & E. and the V. & G. Railroad Companies, pursuant to Const. Miss. 1869, art. 12, § 14, which authorizes such subscriptions when "two-thirds of the qualified voters * * * shall assent thereto." At the time the vote was taken there was no such corporation as the V. & G. R. Co., but a railroad was then projected from G., a terminus of the G., H. & E. R. Co., to V., and it was afterwards incorporated as the V., T. V. & G. R. Co. The G., H. & E. R. Co. was thereafter authorized to extend its road from G. to V., over the proposed route of the V., T. V. & G. R. Co., the consolidation of the two companies was provided for, and the county was authorized to issue to the consolidated company bonds in payment of the subscription voted to the V. & G. Company, and the benefit of such subscription was confirmed to the consolidated company. *Held*, that the bonds so issued were valid.—*Grenada County Sup'rs v. Brown*, 112 U. S. 261, 5 S. Ct. 125, 28 L. Ed. 704.

The bonds were, by the act, to be registered, but this could not lawfully be done until after completion of the road near to or in the county, and the running of cars thereon; and, after the subscription creating the debt had been

voted for by a majority of the legal voters when the road was so completed, the presiding judge of the county was required to certify that all the preliminary conditions required by the act to authorize registration had been complied with, and also as to the date and amount of the bonds, under what law issued, etc. *Held*, that the certificate required did not relate to the conditions prescribed by the vote of the county, and that the certificate and registry were not conclusive upon the county that such conditions had been complied with.—*German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 S. Ct. 159, 32 L. Ed. 519.

Const. Mo. (adopted July 4, 1865) art. 11, § 14, provided that the legislature should not authorize any county to loan its credit in aid of any corporation unless two-thirds of the qualified voters should assent, and a general law to carry out this provision was enacted. Prior to the adoption of the constitution a special act had authorized county courts to loan the credit of counties in aid of a certain railroad without the assent of the voters, and in 1867 the state supreme court decided in *State v. Macon County Court*, 41 Mo. 453, that this prior act was not repealed by the constitution. Before this decision, the question being a doubtful one, a county court had ordered an election, and issued bonds in aid of a railroad pursuant to a two-thirds vote of the people assenting thereto, but the bonds bore on their face a recital that they were issued under authority of the special act. *Held*, that the bondholder had a right to treat the bonds as if issued under authority of the general act, and was entitled to all the remedies given thereby.—*Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 S. Ct. 267, 37 L. Ed. 93, affirming judgment (C. C.) *Ninth Nat. Bank v. Knox County*, 37 F. 75.

After the vote, but before the issuance of the bonds by the county court, the provision in the state constitution of 1870, forbidding all municipal subscriptions to railroad corporations, except "where the same have been authorized, under existing laws," went into operation. *Held*, that the county officers having violated their duty in issuing bonds when the condition as to location of certain shops had not been complied with, the issuance of the bonds had not been authorized, so as to bring them within the exception to the constitutional prohibition; that the bonds were therefore invalid when issued.—*Citizens' Savings & Loan Ass'n v. Perry County*, Ill., 156 U. S. 692, 15 S. Ct. 547, 39 L. Ed. 585.

◀186. Transfer of bonds, or coupons.

See 13 Cent. Dig. Counties, §§ 289-292.

County bonds issued in excess of the statutory limit are not invalid in the hands of bona fide purchasers if the recitals in them import a valid issue.—*Dallas County in the State of Missouri v. McKenzie*, 110 U. S. 686, 4 S. Ct. 184, 28 L. Ed. 285.

A purchaser of municipal bonds is bound to ascertain whether the municipality has power to issue them, and an utter want of such power is not cured by any recitals in the bonds.—*Dixon County in State of Nebraska v. Field*, 111 U. S. 83, 4 S. Ct. 315, 28 L. Ed. 360.

Bonds issued in excess of the amount allowed by law are void in the hands of bona fide purchasers.—*Davies County v. Dickinson*, 117 U. S. 657, 6 S. Ct. 897, 29 L. Ed. 1026.

When irregular county bonds are made valid by coming into the hands of a bona fide holder without notice, they remain valid when subsequently passing into the hands of a holder with notice.—*Scotland County v. Hill*, 132 U. S. 107, 10 S. Ct. 26, 33 L. Ed. 261.

County commissioners issued bridge bonds under Act Kan. 1872, authorizing counties to

issue bonds for the purpose of building bridges, and prescribing the proceedings, including therein, as essential, a vote of the people. The bonds recited that they were issued in accordance with the act, and in accordance with the vote of a majority of the qualified electors. They were indorsed with the official certificate of the auditor of the state that they had been legally issued, that the signatures were genuine, and that the bonds had been registered according to law. *Held*, that the recitals were sufficient to validate them in the hands of a bona fide holder, it not being necessary that they should specify the particular bridge for the building of which they were issued.—Board of Com'rs of Comanche County v. Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. Ed. 604, affirming (C. C.) Lewis v. Comanche, 35 F. 343.

Certain county bonds issued under Act Colo. Feb. 21, 1881, recited that all the requirements of the act had been fully complied with, that the issue was authorized by the vote of a majority of the qualified electors voting at a general election, and that the whole amount of the issue did not exceed the limit of indebtedness prescribed by the constitution. The bonds themselves afforded no data from which the total amount of the issue was ascertainable. *Held* that, as against a bona fide holder, the county was estopped by the recitals from questioning the validity of the bonds on the ground that the percentage of indebtedness allowed by the constitution was exceeded.—Board of Com'rs of Chaffee County v. Potter, 142 U. S. 355, 12 S. Ct. 216, 35 L. Ed. 1040, affirming judgment (C. C.) Potter v. Chaffee County Com'rs, 33 Fed. 614.

A recital on the face of county bonds that they are "issued under and pursuant to order of the county court * * * for subscription to the stock of the M. & M. R. R. Co., as authorized by an act * * * entitled 'An act to incorporate the M. & M. R. R. Co.,' approved Feb. 20, 1865," although it may estop the county in favor of the bondholder, is not conclusive in favor of the county, and the bondholder may introduce evidence to prove that the bonds were issued under authority of another statute.—Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. Ed. 93, affirming judgment (C. C.) Ninth Nat. Bank v. Knox County, 37 F. 75.

Const. Colo. art. 11, § 6, forbids a county, under any circumstances, to issue bonds beyond a certain amount, and limits the right to issue bonds, without a previous vote of the qualified electors of the county, to half such amount. Gen. Laws 1877, p. 218, § 30, provides that the board of county commissioners of each county shall make out semiannual statements showing the debt owed by the county, payments thereon, and rate of interest, and shall cause such statements to be entered on their records, open to the inspection of the public at all times. Lake county, being already indebted beyond the constitutional limit, issued bonds containing a recital that the issue was by virtue of a vote of the qualified voters of the county, in compliance with the general statute. *Held*, that a purchaser of the bonds for value, and before maturity, was charged with the duty of examining the county record of indebtedness in order to ascertain whether the bonds were lawfully issued.—Sutliff v. Lake County Com'rs, 147 U. S. 230, 13 S. Ct. 318, 37 L. Ed. 145.

When county bonds have passed into the hands of bona fide purchasers, the decision of the county board that the result of the preliminary election authorized their issue cannot be questioned, and the bonds will be valid notwithstanding irregularities as to such election.—Citizens' Savings & Loan Ass'n v. Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. Ed. 585.

188. Actions on bonds or coupons.

See 13 Cent. Dig. Counties, §§ 296-299.

St. Nev. 1877, p. 46, provided that certain overdue coupons of Lincoln county should be registered and paid by the treasurer, as money came into his possession applicable thereto, in the order of their registry; and coupons, having been presented and payment refused as the interest fund was exhausted, were accordingly registered by the treasurer. *Held*, that the statute of limitations does not begin to run against such coupons until money is received by the treasurer which is applicable to their payment.—Lincoln County v. Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

In a suit on county bonds in aid of a railroad, where the question is under which of two statutes they were issued, their validity being admitted, it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of the issue under the statute for which the plaintiff contends. Any statement on the records of the county may be competent evidence, and from all the facts and circumstances it is to be determined under which statute the county proceeded.—Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. Ed. 93, affirming judgment (C. C.) Ninth Nat. Bank v. Knox County, 37 F. 75.

In a suit on county bonds in aid of a railroad, where the question involved is under which of two statutes the bonds were issued, the whole conduct of the county, both before, at the time of, and after the issue of the bonds, may be shown to aid in determining the question, and the bondholder may offer in evidence tax levies for several years after the issue of the bonds, entries on the bond register of the county, and a financial statement of the county, published by the direction of the county court.—Id.

The question whether certain county bonds in aid of a railroad were issued under authority of Acts Mo. 1865, p. 86, § 13, and therefore payable only by levy of the tax thereby authorized to a limited amount each year, or under Gen. St. Mo. 1866, c. 63, § 17, in which case they would be payable without restriction as they fall due, is properly determinable in a suit on the bonds, and one to be finally settled by the judgment therein.—Id.

The omission from county bonds purporting to be issued under the authority of Act Ky. March 18, 1878, p. 554, c. 483, of the stipulation respecting the remedies for collection which was required to appear on their face by the amending act (Act Feb. 27, 1882, p. 558, c. 306), coupled with their failure to contain any reference to the later statute, deprives the holder of the extraordinary remedies for collection not provided for by the original, and only granted in the amendatory act. Judgment, Campbellsville Lumber Co. v. Hubbert, 112 F. 718, 50 C. C. A. 435, affirmed.—Hubbert v. Campbellsville Lumber Co., 24 S. Ct. 28, 191 U. S. 70, 48 L. Ed. 101.

189. Taxation.

See 13 Cent. Dig. Counties, §§ 300-306.

190. — In general.

See 13 Cent. Dig. Counties, §§ 303, 304.

The tax of one half of 1 per cent. authorized by the laws of Missouri, as they existed May 2, 1870, to be levied and collected by Macon county for county revenue, was independent of any amount that might be levied by the boards of townships for township and bridge purposes.—Macon County v. United States, 10 S. Ct. 491, 134 U. S. 332, 33 L. Ed. 914.

Laws Mo. 1851, pp. 483, 486, authorizing counties to subscribe to the stock of a certain

railroad, provide that the county may issue bonds "to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county." *Held*, that this confers authority to levy a tax sufficient to pay the interest on such bonds, though the general laws restrict the tax rate "for county purposes" to one-half of 1 per cent.—*Scotland County Court v. United States*, 140 U. S. 41, 11 Sup. Ct. 697, 35 L. Ed. 351, affirming judgment (C. C.) 32 F. 714.

—191. — Levy for general county purposes.

See 13 Cent. Dig. Counties, §§ 300, 305.

Under Act Ky. Feb. 24, 1868, amending the charter of the Elizabethtown & P. R. R. Co., the "county court" which is authorized to levy a tax to pay bonds in aid of the railway is the county judge and the justices of the peace for the county, and not the county judge alone.—*Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 7 S. Ct. 563, 30 L. Ed. 653, reversing judgment (C. C.) Same v. Muhlenburg County Court, 8 F. 737.

—192. — Levy for special purposes.

See 13 Cent. Dig. Counties, §§ 300-302.

Act La. 1869, requiring the court, when rendering a judgment against a parish, to order a levy of a tax sufficient to pay it, is impliedly repealed by Act La. 1872, limiting the power of taxation of the police jury of the parish.—*State of Louisiana v. Police Jury of Jefferson*, 116 U. S. 135, 6 S. Ct. 332, 29 L. Ed. 588.

The provisions of the Kentucky act of February 24, 1868, amending the charter of the Elizabethtown & Paducah Railroad Company, and, among other things, requiring the county court, in case of a county subscription to the capital stock of the company, to levy taxes to meet such subscription, are mandatory, and leave no discretion to be exercised by the court.—*Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 7 S. Ct. 563, 30 L. Ed. 653, affirming judgment (C. C.) Same v. Judge of Muhlenburg County Court, 8 F. 737.

Though a judgment has been obtained on coupons of county bonds issued under section 13 of the Missouri act of February 20, 1865, incorporating the Missouri & Mississippi Railroad, which provided that the amount of the special tax to be levied in any one year for their payment should not exceed one-twentieth of 1 per cent., mandamus will not lie to compel the levy of a higher special tax to pay such judgment, as the holders of such bonds are chargeable with notice of the provisions of the statute under which they are issued.—*United States v. County Court of Macon County*, 144 U. S. 568, 12 S. Ct. 921, 36 L. Ed. 544, affirming judgment (C. C.) 35 F. 483.

—193. — Assessment.

See 13 Cent. Dig. Counties, § 306.

The levy of a tax for county purposes on personal property on an Indian reservation outside the county, but to which it is attached for that purpose, is not invalid on the ground that the persons taxed receive no benefit from the expenditure of the money.—*Thomas v. Gay*, 18 S. Ct. 340, 169 U. S. 264, 42 L. Ed. 740; *Wagoner v. Evans*, 18 S. Ct. 730, 170 U. S. 588, 42 L. Ed. 1154.

—194. — Collection.

See 13 Cent. Dig. Counties, § 306.

Where a creditor of a county has recovered judgment on which execution has been returned nulla bona, and the county court, in obedience to a mandamus issued by the United States circuit court, has levied a tax to pay the judgment, but such, is the hostility of the people that no

fit and proper person can be found to perform the office of tax collector, the failure of the remedy at law to produce the money is not such inadequacy as will justify a court of equity in exercising the powers of taxation in entertaining a bill against a number of the taxpayers and in appointing a receiver to collect the tax.—*Thompson v. Allen County*, 115 U. S. 550, 6 S. Ct. 140, 29 L. Ed. 472.

V. CLAIMS AGAINST COUNTY.

Jurisdiction of federal courts to enforce, see Courts, —262.

—197. Nature of claims required to be presented.

See 13 Cent. Dig. Counties, §§ 309-311.

Gen. St. Nev. §§ 1950, 1964-1966, providing that no demands against a county shall be paid, and that no suit shall be brought thereon, until the same have been presented to the county commissioners and the auditor for allowance and approval, apply only to unliquidated demands, and not to bonds and coupons.—*Lincoln County v. Luning*, 10 S. Ct. 363, 133 U. S. 529, 33 L. Ed. 766.

VI. ACTIONS.

Jurisdiction of federal courts, see Courts, —303.

Limitation of action on bonds, see Limitation of Actions, —48.

Parties in proceedings to compel tax levy to pay judgment, see Mandamus, —151.

—209. Statutory provisions.

See 13 Cent. Dig. Counties, § 338.

The act of Arkansas of February 27, 1879, repealed all laws allowing suits against counties, and provided that any person having a claim against a county must present the same to the county court for allowance or rejection, with the right of appeal to either party from its action thereon. *Held* that, under this statute, the allowance or rejection of a claim either has the force and effect of a judgment for or against the county from which an appeal will lie, or it is merely a preliminary proceeding, which may be carried to an appellate court, where an actual trial is had; and in either view the result is that counties are in substance and effect suable by the local law, and therefore subject to suit in a federal court by original process.—*Chicot County v. Sherwood*, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546.

—211. Conditions precedent.

See 13 Cent. Dig. Counties, §§ 341-343.

—213. — Presentation of claim.

See 13 Cent. Dig. Counties, §§ 342, 343.

Gen. St. Nev. §§ 1950, 1964-1966, providing that no demands against a county shall be paid, and that no suit shall be brought thereon, until the same have been presented to the county commissioners and the auditor for allowance and approval, apply only to unliquidated demands, and not to bonds and coupons.—*Lincoln County v. Luning*, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

—216. Time to sue and limitations.

See 13 Cent. Dig. Counties, § 346.

St. Nev. 1877, p. 46, provided that certain overdue coupons of Lincoln county should be registered and paid by the treasurer, as money came into his possession applicable thereto, in the order of their registry; and coupons, having been presented and payment refused as the interest fund was exhausted, were accordingly registered by the treasurer. *Held*, that the statute of limitations does not begin to run against

such coupons until money is received by the treasurer which is applicable to their payment.—*Lincoln County v. Luning*, 10 S. Ct. 363, 133 U. S. 529, 33 L. Ed. 766.

219. **Process.**

See 13 Cent. Dig. Counties, § 352.

As Rev. St. Mo. 1879, § 3489, authorizes the service of the summons, in an action against a county, on the clerk of the county court, he is thereby made the agent of the county, and any neglect of his to communicate the fact of such service to the county court will not affect the validity of the service, or the judgment obtained therein by default.—*Knox County v. Harshman*, 133 U. S. 152, 10 S. Ct. 257, 33 L. Ed. 586.

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COURTS.

Scope-Note.

[INCLUDES the judicial department of government; nature and scope of judicial power in general; establishment, organization, and conduct of business of courts; ministerial officers attached to them; jurisdiction and procedure peculiar to particular courts; and concurrent and conflicting jurisdiction and comity between courts.

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(A) GROUNDS OF JURISDICTION IN GENERAL.

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Courts, §§ 487-498.]

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Review of questions of jurisdiction, see Appeal and Error, ¶185, 1166.

Want of jurisdiction ground for habeas corpus, see Habeas Corpus, ¶27; for prohibition, see Prohibition, ¶10.

¶3. Jurisdiction of cause of action.

See 13 Cent. Dig. Courts, §§ 10-19, 21-31.

¶7. — Local or transitory actions.

See 13 Cent. Dig. Courts, §§ 14, 16, 22-31; 47 Cent. Dig. Trovers, § 181.

An action by the United States to recover the value of timber taken from public lands is transitory, and may be brought in any jurisdiction in which the defendant can be served with process.—*Stone v. United States*, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451.

¶8. — Actions under laws of other state.

See 13 Cent. Dig. Courts, §§ 18, 19; 37 Cent. Dig. Office, § 242.

The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to the person injured by the wrongful act.—*Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123.

The full faith and credit demanded by Rev. St. U. S. § 906 (U. S. Comp. St. 1901, p. 677), is given by the Texas courts to New Mexico by act of March 11, 1903 (Laws 1903, p. 51, c. 33), providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affi-

davit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to make the suit maintainable only in the district court of the territory. Judgment (Tex. Civ. App. 1907) 99 S. W. 190, affirmed.—*Atchison, T. & S. F. Ry. Co. v. Sowers*, 29 S. Ct. 397, 213 U. S. 55, 53 L. Ed. 695.

Full faith and credit demanded by Rev. St. U. S. § 906 (U. S. Comp. St. 1901, p. 677), is not given to act N. M. March 11, 1903 (Laws 1903, p. 51, c. 33), governing actions for personal injuries received in that territory, where a recovery is permitted in a state court on such a cause of action, with no showing of a compliance with the preliminaries of notice and demand prescribed by the territorial statute. Judgment, *Gutierrez v. El Paso & N. E. R. Co.* (Tex.) 117 S. W. 426, affirmed.—*El Paso & N. E. Ry. Co. v. Gutierrez*, 30 S. Ct. 21, 215 U. S. 87, 54 L. Ed. 106.

Enforcement by the Georgia courts of a cause of action given by Code Ala. 1907, § 3910, to a servant for injuries caused by defective machinery, does not deny full faith and credit to provision of section 6115 of that Code that all actions under section 3910 must be brought in a court of competent jurisdiction in the state of Alabama.—*Tennessee Coal, Iron & R. Co. v. George*, 34 S. Ct. 587, 233 U. S. 354, 58 L. Ed. 997, affirming judgment 75 S. E. 567, 11 Ga. App. 221.

Ruling of Kentucky court that insurance in that state by an Illinois life insurance corporation was not affected by Act III. June 22, 1893 (Laws 1893, p. 121) § 9, providing that life insurance companies shall not issue policies on any person in whom the beneficiary has no insurable interest, does not deny the full faith and credit to which such statute, under Const. U. S. art. 4, § 1, and Rev. St. § 905 (U. S. Comp. St. 1901, p. 677), is entitled where there was no decision by the Illinois courts placing any construction on that section.—*Western Life Indemnity Co. of Illinois v. Rupp*, 35 S. Ct. 37, 235 U. S. 261, 59 L. Ed. 220, affirming judgment 144 S. W. 743, 147 Ky. 489.

¶16. Jurisdiction of property or other subject-matter involved.

See 13 Cent. Dig. Courts, §§ 46-68.

19. — Situation of personal property.

See 13 Cent. Dig. Courts, §§ 47-52.

Shares of stock in a corporation within the jurisdiction of the court held by a nonresident are personal property within the jurisdiction of the court for the purposes of a suit to quiet title against the nonresident stockholder.—*Jellenik v. Huron Copper Min. Co.*, 20 S. Ct. 559, 177 U. S. 1, 44 L. Ed. 647, reversing (C. C.) 82 F. 778.

21. Mode of acquiring or exercising jurisdiction in general.

See 13 Cent. Dig. Courts, §§ 69-74, 129-133.

The validity of proceedings in a state court by a stockholder of a corporation, in behalf of himself and other stockholders, against the president, to have him account for money and stocks received and improperly appropriated, cannot be assailed on the ground that the bill did not sufficiently show that any effort had been made by the plaintiff, who sued as stockholder, to procure action by the corporation against the president, as that merely involved the judgment of the court, and did not affect its jurisdiction.—*Griswold v. Hazard*, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. Ed. 678, affirming decree (C. C.) 28 F. 578.

30. Loss or divestiture of jurisdiction.

See 13 Cent. Dig. Courts, §§ 119-123.

Where property has been levied on to satisfy a judgment in a federal court, it is thereby brought within the custody of the court, and, by the death of the debtor before its sale, a state court does not acquire probate jurisdiction to administer on it as part of the debtor's estate.—*Rio Grande R. Co. v. Vinet*, 132 U. S. 565, 10 S. Ct. 168, 33 L. Ed. 438.

37. Waiver of objections.

See 13 Cent. Dig. Courts, §§ 147-149, 151, 156; 1 Cent. Dig. Abate. & R. §§ 8-10, 497.

Defendant does not preclude himself from raising the question of jurisdiction by interposing a plea of former adjudication, and waiting until it is decided against him. The court is bound, even of its own motion, to determine questions of jurisdiction, whenever and however they are presented.—*Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690.

The objection of the want of jurisdiction of the supreme court of the District of Columbia, sitting as a court of equity, over a suit to set aside a will of real and personal property, will be regarded as waived, where the parties agreed to submit certain issues to a jury (before whom such issues were in fact tried), and stipulated for returning the testimony there taken to the equity court for consideration by the judge thereof. Decree 17 App. D. C. 238, affirmed.—*Beyer v. Le Fevre*, 22 S. Ct. 765, 186 U. S. 114, 46 L. Ed. 1080.

The objection to the want of jurisdiction of the federal District Court for Porto Rico of a suit in which all the parties plaintiff were foreign subjects, and all the parties defendant citizens of Porto Rico, is available to defendants, although the final decree was entered pro confesso after the jurisdiction of the court was extended by Act March 2, 1901, c. 812, § 3, 31 Stat. 953, to embrace such a case, where the last appearance of the defendants in the case was before such statute was enacted, when a stipulation was made in respect to an extension of the time to plead to the bill.—*Fraenkl v. Cececedo*, 30 S. Ct. 322, 216 U. S. 295, 54 L. Ed. 486.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

Jurisdiction of bankruptcy court, see Bankruptcy, 43.

Review of rulings, see Appeal and Error, 674.

(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.

Clerks of courts, see Clerks of Courts.

Courts-martial, see Army and Navy, 43.

Estoppel to question constitutionality of statute, see Constitutional Law, 43.

Judges, see Judges.

43. Powers of Legislature.

See 13 Cent. Dig. Courts, §§ 164-170, 181-183.

The power of the legislative assembly of Porto Rico to confer, by Act March 10, 1904, original jurisdiction upon the supreme court of Porto Rico for the trial and adjudication of questions between the Roman Catholic Church and the people or any municipality, affecting property rights, was embraced in the express authority conferred by Foraker Act April 12, 1900, c. 191, §§ 8, 15, 33, 31 Stat. 77, to legislate regarding the jurisdiction and procedure of the Porto Rican courts.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 23 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

52. Transfer or change of jurisdiction.

See 13 Cent. Dig. Courts, §§ 184-192.

The creation of Santa Cruz county by Acts Ariz. 1899, No. 44, which in section 10 provides that actions now pending in Pima county, where the property in controversy is situated in the new county of Santa Cruz, shall be transferred to the proper courts of said county, did not divest the jurisdiction of the Pima county court until the conditions of transfer were fulfilled.—*Sanford v. Ainsa*, 33 S. Ct. 704, 228 U. S. 705, 57 L. Ed. 1033, affirming judgment 114 P. 560, 13 Ariz. 287.

Jurisdiction of the federal courts to establish title of heirs of an Indian allottee dying intestate during the trust period was taken away, even as to pending cases, by Act June 25, 1910, notwithstanding Rev. St. § 13 (Comp. St. 1913, § 14).—*Hallowell v. Commons*, 36 S. Ct. 202, 239 U. S. 506, 60 L. Ed. 409, affirming decree 210 F. 793, 127 C. C. A. 343.

Congress, under its power over Indians and to control federal courts, could take away, even as to pending cases as it did by Act June 25, 1910, jurisdiction of the federal district courts to establish equitable title of heirs of an Indian allottee and vest the power of ascertaining heirs in the Secretary of the Interior.—*Id.*

56. Interpreters.

See 13 Cent. Dig. Courts, §§ 194-197; 50 Cent. Dig. Witn. § 812.

The salary of plaintiff as an Indian interpreter was fixed at \$400 per annum. Rev. St. § 2070. The subsequent appropriation act of March 3, 1877 (19 Stat. 271), appropriated a gross sum for the pay of a number of interpreters, at \$300 per annum, and set apart an additional sum, to be distributed by the secretary of the interior at his discretion. *Held*, that the later act operated a repeal of the former, and that plaintiff was not entitled to more than \$300 per annum of salary after the passage thereof.—*United States v. Mitchell*, 109 U. S. 146, 3 S. Ct. 151, 27 L. Ed. 887.

(B) TERMS, VACATIONS, PLACE AND TIME OF HOLDING COURT, COURT-HOUSES, AND ACCOMMODATIONS.

Authority of court to open or vacate judgment after the term, see Judgment, §342.

§66. Extension or adjournment of terms.

See 13 Cent. Dig. Courts, §§ 221-242.

Comp. Laws N. M. § 543, provides that district courts shall be held in the several counties at times fixed by law, and continued until adjourned by order of court. Section 552 authorizes holding special terms, but provides that no special term shall conflict with the regular term in another county of the district. *Held*, that proceedings at a special term were not invalidated by continuance of the term beyond the time fixed for a regular term. *Borrego v. Territory*, 46 P. 349, 8 N. M. 446, affirmed.—*Borrego v. Cunningham*, 17 S. Ct. 182, 164 U. S. 612, 41 L. Ed. 572.

(C) RULES OF COURT AND CONDUCT OF BUSINESS.**§82. Modification, amendment, suspension, or disregard of rules.**

See 13 Cent. Dig. Courts, § 226.

The rule of the supreme court of New Mexico, providing that no motion to set aside a judgment rendered in vacation shall be entertained, unless filed and served within 10 days after the entry of such judgment, has the force of law, and cannot be disregarded by a trial judge, to whom it leaves no discretion. *Judgment* 48 P. 309, 9 N. M. 12, affirmed.—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 19 S. Ct. 761, 174 U. S. 603, 43 L. Ed. 1103.

(D) RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

Decision of appellate court as law of the case in lower court, see Appeal and Error, §1195.

Decision of foreign court as rules of decision in admiralty, see Admiralty, §1.

Former decision of appellate court as law of the case on subsequent appeal, see Appeal and Error, §1097-1099.

Mandamus against single federal judge, see Mandamus, §4.

Operation and enforcement in state courts of judgments of United States courts, see Judgment, §829.

Parol or extrinsic evidence to contradict or vary records, see Evidence, §386.

Record of judgments, see Judgment, §273.

§88. Previous decisions as controlling or as precedents.

See 13 Cent. Dig. Courts, §§ 311-339, 351.

§89. — In general.

See 13 Cent. Dig. Courts, §§ 311, 312.

Decisions affirming the validity of legislation under which territorial bonds are issued in exchange for county bonds, and which provides for the payment of the principal and interest thereof by the county, even if not binding on such county, which was not nominally a party, should be upheld as against it on the doctrine of stare decisis, after such bonds have gone into the channels of trade. *Judgment, Territory v. Vail* (Ariz. 1906) 85 P. 652, affirmed.—*Vail v. Territory of Arizona*, 28 S. Ct. 107, 207 U. S. 201, 52 L. Ed. 169.

Whether or not the rule of stare decisis shall be followed or departed from is a question entirely within the discretion of the court

when called upon to consider a question once decided.—*Hertz v. Woodman*, 30 S. Ct. 621, 218 U. S. 205, 54 L. Ed. 1001.

The established fellow-servant doctrine can only be done away with by the Legislature.—*Beutler v. Grand Trunk Junction R. Co.*, 32 S. Ct. 402, 224 U. S. 85, 56 L. Ed. 679.

Spanish decisions construing Civil Code of Porto Rico, when rendered after Porto Rico had ceased to be subject to Spanish jurisdiction, do not preclude Porto Rico courts from exercising independent judgment.—*Cordova v. Folgueras y Rijos*, 33 S. Ct. 350, 227 U. S. 375, 57 L. Ed. 556.

§90. — Decisions of same court or co-ordinate court.

See 13 Cent. Dig. Courts, §§ 313-321, 351.

The supreme court, being clothed with the power and intrusted with the duty to maintain the fundamental law of the constitution, is not required, under the rule stare decisis, to extend the scope of any decision upon a constitutional question, if it is convinced that error in principle might supervene.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

An adjudication that banks accepting the provisions of the "Hewitt Tax Law" (Act Ky. May 17, 1886) acquired an irrevocable right to exemption from other forms of taxation is not conclusive that trust companies, having no general banking powers, by like acceptance, acquired a similar exemption. *Decrees* (C. C.) *Louisville Trust Co. v. Stone*, 88 F. 407, affirmed.—*Fidelity Trust & Safety-Vault Co. v. City of Louisville*, 19 S. Ct. 875, 174 U. S. 429, 43 L. Ed. 1034.

An affirmance in the federal Supreme Court upon equal division of opinion is not an authority for the determination of other cases, either in that court or in the inferior federal courts.—*Hertz v. Woodman*, 30 S. Ct. 621, 218 U. S. 205, 54 L. Ed. 1001.

Decision upholding validity of annual tax imposed by Laws Kan. 1913, c. 135, on foreign railroad doing business in the state in proportion to its capital stock devoted to such business, will be affirmed, where the Supreme Court has upheld tax imposed by same statute on domestic corporations.—*Lusk v. Botkin*, 36 S. Ct. 263, 240 U. S. 236, 60 L. Ed. 621, affirming judgment *Same v. Sessions*, 147 F. 794, 95 Kan. 271.

§91. — Decisions of higher court or court of last resort.

See 13 Cent. Dig. Courts, §§ 313, 325, 326.

A taxpayer brought suit, in the district court of Minnesota, against plaintiff town and the P. Ry. Co., to restrain the issue of railway-aid bonds by the town to the company, under Gen. Laws Minn. 1877, c. 106, § 7, and judgment was entered therein for defendants. Pending an appeal, the bonds were issued and negotiated to bona fide purchasers. The decree was reversed on appeal, and the bonds declared invalid. Subsequently defendant railroad company purchased the rights, etc., of the P. Ry. Co., under Act Minn. March 3, 1881, authorizing such purchase, with the proviso that it should be subject to the claims and rights of action against the latter growing out of the disposal of such bonds. The bondholders, being nonresident, sued in the federal court on coupons, and recovered; the court holding that, as they purchased in good faith under the decision of the state court holding the bonds valid, they could not be affected by the subsequent decision on appeal declaring them invalid. *Held*, in a subsequent action in the state courts by the town against defendant company to recover the

amount of such bonds, in which the court held that the company was bound by the prior decision declaring them invalid, and gave judgment for plaintiff, that the court did not fail to give full faith and credit to the decision of the federal court, as the right of recovery must have depended upon the fact that the holders of the bonds were bona fide holders, and entitled to enforce them against the town.—*Winona & St. P. R. Co. v. Town of Plainview*, 143 U. S. 371, 12 S. Ct. 530, 36 L. Ed. 191.

92. — Dicta.

See 13 Cent. Dig. Courts, § 335.

Where the question of jurisdiction does not appear to have been contested in a previously adjudicated case, the court is not bound by the view expressed therein.—*Cross v. Burke*, 146 U. S. 82, 13 S. Ct. 22, 36 L. Ed. 896.

The court is not bound, under the rule *stare decisis*, to extend the scope of decisions holding taxes on gains, profits, or income to be excises or duties, and not direct taxes, so far as to sustain a tax on the income of realty on the ground of being an excise or duty, where none of such decisions discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of them held real estate liable to direct taxation only.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

93. — Rules of property.

See 13 Cent. Dig. Courts, §§ 336-339.

If a judgment, given for defendant in an action for taxes for one year, be regarded as establishing a rule of property on which a purchaser relied, it is not available to him as a defense to a subsequent action for taxes, in which such rule is not involved, and the tax is defended on a ground not in issue in the former action.—*Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 14 S. Ct. 502, 38 L. Ed. 450.

Decisions of the Supreme Court of Porto Rico that the Civil Code of March 1, 1902, went into effect July 1, 1902, will be followed by the federal Supreme Court as a rule of property.—*Nadal v. May*, 34 S. Ct. 611, 233 U. S. 447, 58 L. Ed. 1040.

96. — Decisions of United States courts as authority in other United States courts.

See 13 Cent. Dig. Courts, §§ 325, 327, 328, 334.

A decision in one of the federal circuits, declaring valid a protest notifying the collector that it was to apply to all future similar importations, will not be overruled by the supreme court after the lapse of many years, during all of which time the decision has generally been accepted as correct, and under which, notwithstanding a treasury regulation requiring a special protest in each case, a practice has grown up throughout the country of paying excessive duties under such prospective protests.—*Schell v. Fauché*, 138 U. S. 562, 11 S. Ct. 376, 34 L. Ed. 1040, affirming (C. C.) judgment, *Fauché v. Schell*, 33 Fed. 336.

The settled doctrine of the supreme court is that the concurrent decisions of two courts below on a question of fact will be followed unless shown to be clearly erroneous.—*The Carib Prince*, 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181, reversing decree 68 F. 254, 15 C. C. A. 385.

The supreme court, having in numerous decisions wherein the question was involved, beginning in 1881, uniformly and unanimously affirmed the validity of the coupon provision in the law of Virginia of 1871, which made the matured coupons from the refunding bonds of the state thereby authorized receivable in payment of taxes due the state, will not now con-

sider the question as an open one. Judgment 19 S. E. 114, 90 Va. 597, reversed.—*McCullough v. Commonwealth of Virginia*, 19 S. Ct. 134, 172 U. S. 102, 43 L. Ed. 382.

Where the federal question set up in the assignment of errors is the same as in preceding cases, the decision will be the same. Judgment 50 N. E. 442, 58 Ohio St. 123, affirmed.—*Wright v. Columbus, H. V. & A. R. Co.*, 20 S. Ct. 398, 176 U. S. 481, 44 L. Ed. 554.

A decision by the supreme court of the United States affirming a decision of a state court that upheld a state statute of limitations, the constitutional validity of which was dependent upon the existence of some precedent or coincident remedy, must be regarded as expressly deciding that such remedy exists, and cannot be disregarded as a precedent in a later case on writ of error to a lower federal court, on the theory that the existence of such remedy was merely assumed by the supreme court of the United States in the former case because it was bound in that particular to follow the decision of the state court, but is not so bound in a case arising in a federal court. Judgment 83 F. 436, affirmed.—*Saranac Land & Timber Co. v. Roberts*, 20 S. Ct. 642, 177 U. S. 318, 44 L. Ed. 786.

A circuit court of appeals is not bound to affirm an order of a circuit court which, upon the ground of comity, followed the decision of the circuit court of appeals of another circuit with reference to the validity and scope of a patent, but may investigate the matter of the validity and scope of the patent for itself, since comity is not a rule of law, but simply a rule of expediency. Decree, *Stover Mfg. Co. v. Mast, Foos & Co.*, 89 F. 333, 32 C. C. A. 231, affirmed.—*Mast, Foos & Co. v. Stover Mfg. Co.*, 20 S. Ct. 708, 177 U. S. 485, 44 L. Ed. 856.

The concurrent decisions of the two lower courts that a ship was unseaworthy at the commencement of a voyage will be accepted by the supreme court of the United States, if there is no adequate ground to conclude that the finding was erroneous. Decree, *Farr & Bailey Mfg. Co. v. International Nav. Co.*, 98 F. 636, 39 C. C. A. 197, affirmed.—*International Nav. Co. v. Farr & Bailey Mfg. Co.*, 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

The authority of a decision of the supreme court of the United States upholding a rule of a court of the District of Columbia is not lessened by the former court's failure to give the grounds for its decision, as this omission does not give rise to an inference that it had doubts as to the validity of the rule, but rather that it regarded the grounds of challenge to such validity as without foundation.—*Fidelity & Deposit Co. of Maryland v. United States*, 23 S. Ct. 120, 187 U. S. 315, 47 L. Ed. 194, affirming 20 App. D. C. 376.

The federal Supreme Court will not consider itself bound on the question of its jurisdiction by a prior case in which jurisdiction was entertained without any suggestion as to the want of it. Writ of error, *New v. Territory*, 70 P. 198, 12 Okl. 172, dismissed.—*New v. Territory of Oklahoma*, 25 S. Ct. 68, 195 U. S. 252, 49 L. Ed. 182.

The concurrent findings of the two lower courts that water damage to cargo was caused by hurried and imprudent unloading will be accepted by the federal Supreme Court, on certiorari, unless clearly incorrect. Decree, *The Germanic*, 124 F. 1, 59 C. C. A. 521, affirmed.—*Oceanic Steam Nav. Co. v. Aitken*, 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

A decree of a federal Circuit Court in a suit involving rights protected by the Constitution of the United States must be given, in the federal courts, the force and effect to which it is entitled under the principles of *res judi-*

cata as settled by the Supreme Court of the United States, although they may differ from the doctrine announced by the courts of the state in which the Circuit Court was sitting.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 60 L. Ed. 477.

The view of a territorial Supreme Court, that an alias attachment is not authorized by the local statutes is very persuasive upon the federal Supreme Court in construing such statutes. Judgment, *Dye v. Crary* (N. M. 1906) 85 P. 1038, 9 L. R. A. (N. S.) 1136, affirmed.—*Crary v. Dye*, 28 S. Ct. 360, 208 U. S. 515, 52 L. Ed. 595.

The construction of a territorial statute by the local courts is of great, if not controlling, weight. Judgment (Ariz. 1906) 85 P. 245, affirmed.—*Lewis v. Herrera*, 28 S. Ct. 412, 208 U. S. 309, 52 L. Ed. 506.

Supreme Court of the United States, in construing provisions of an ambiguous territorial statute, will lean to the construction given it by the territorial Supreme Court.—(1912) *Clason v. Matko*, 32 S. Ct. 392, 223 U. S. 646, 56 L. Ed. 588, affirming judgment (1909) 100 P. 773, 12 Ariz. 213.

Federal courts should respect ruling of Porto Rico Supreme Court that provisions of Porto Rico Mortgage Law, art. 395, remain in force notwithstanding Porto Rico Code Civ. Proc. § 188, and Law of Evidence, §§ 59, 101, which the Porto Rico Supreme Court having knowledge of Mortgage Law, art. 413, continued in force by Act April 12, 1900, § 8, though it could not have been intended to operate as an implied repeal.—*De Elzaburu v. Chaves*, 36 S. Ct. 47, 239 U. S. 283, 60 L. Ed. 290.

§97. — Decisions of United States courts as authority in state courts.

See 13 Cent. Dig. Courts, §§ 329-333.

The Supreme Court is bound by the construction of the extradition laws adopted by the Supreme Court of the United States. Judgment, *Ex parte Dennison*, 101 N. W. 1045, 72 Neb. 703, 117 Am. St. Rep. 817, affirmed.—*Dennison v. Christian*, 25 S. Ct. 795, 196 U. S. 637, 49 L. Ed. 630.

A decision of the United States Supreme Court in a matter of federal jurisdiction must be regarded as of binding authority on a state court of last resort. Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 69 P. 1064, 139 Cal. 370, affirmed.—*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

Rights of parties to interstate shipment depend upon federal legislation, bill of lading, and common-law rules as applied by the federal courts.—*Cincinnati, N. O. & T. P. Ry. Co. v. Rankin*, 36 S. Ct. 553, 241 U. S. 319, 60 L. Ed. 1022.

Rights under federal Employers' Liability Acts depend on principles of the common law as applied by the federal courts.—*Southern Ry. Co. v. Gray*, 36 S. Ct. 558, 241 U. S. 333, 60 L. Ed. 1030, reversing judgment *Gray v. Southern R. Co.*, 83 S. E. 849, 167 N. C. 433.

§98. — Decisions of courts of other countries.

See 13 Cent. Dig. Courts, § 324.

The federal courts will follow the construction given by the courts of the government of Hawaii to a statute first enacted on May 24, 1866, legitimating children born out of wedlock upon the marriage of their parents, as not applicable to the issue of an adulterous relation.—*Kealoha v. Castle*, 28 S. Ct. 684, 210 U. S. 149, 52 L. Ed. 998.

The holding of the Hawaiian Supreme Court that a person seeking the registration and confirmation in the court of land registration of a title which depends upon an unexecuted decree is, as against the holder of the outstanding legal title, in the same position as a party asking the aid of a court of chancery in executing a former decree, and takes the risk of opening up such decree for re-examination, will be followed by the federal Supreme Court.—*Lewers & Cooke v. Atcherly*, 32 S. Ct. 94, 222 U. S. 285, 56 L. Ed. 202.

The federal Supreme Court will follow a decision of the Hawaiian Supreme Court that a judgment of the land commission of 1845, adjudging a parcel of land to a specified person in fee simple, cannot be attacked except by a direct appeal to the Supreme Court provided by law.—*Id.*

§99. Previous decisions in same case as law of the case.

See 13 Cent. Dig. Courts, § 340.

An order sustaining defendant's demurrer and giving plaintiff leave to amend does not preclude the plaintiff from renewing, or the court from entertaining, the same question of law upon the subsequent trial on an amended complaint.—*Post v. Pearson*, 108 U. S. 418, 2 S. Ct. 799, 27 L. Ed. 774.

§101. Quorum or number of judges necessary to adjudication.

See 13 Cent. Dig. Courts, §§ 344-350, 629.

A temporary restraining order suspending, on constitutional grounds, the enforcement of a state statute by restraining the action of a state officer thereunder, cannot be vacated, nor can an application for an interlocutory injunction be denied, by a single federal judge, since the enactment of Act June 18, 1910, c. 309, § 17, 36 Stat. 557, which prohibits the granting of such an application except after a hearing before three judges, two of whom must concur in granting it, and provides that, when such an application is made, the judge shall call two other judges to his assistance to hear and determine it, but may grant a temporary restraining order, if of the opinion that irreparable injury will otherwise result, to remain in force only until the hearing and determination of the application, and gives an appeal from the order granting or denying an interlocutory injunction after notice and hearing.—*Ex parte Metropolitan Water Co. of West Virginia*, 31 S. Ct. 600, 220 U. S. 539, 55 L. Ed. 575.

§109. Syllabi.

It is to the opinion, and not to the headnotes, that the United States Supreme Court will turn on writ of error to a state court for an authentic statement of the grounds of the decision under review, though the headnotes are written by the court itself.—*Burbank v. Ernst*, 34 S. Ct. 299, 232 U. S. 162, 53 L. Ed. 551, affirming judgment *Succession of Burbank*, 56 So. 430, 129 La. 528.

§110. Records.

See 13 Cent. Dig. Courts, §§ 362, 363, 365-374.

§113. — Making and custody.

See 13 Cent. Dig. Courts, §§ 365, 366; 10 Cent. Dig. Clerks of C. § 97; 15 Cent. Dig. Crim. Law, § 2542.

The rule that a court of record can act only through its orders made of record does not require, where the court has large administrative and executive powers, with authority to appoint agents, that all the acts of the agents should appear of record.—*Bullitt County v. Washer*, 130 U. S. 142, 9 S. Ct. 499, 32 L. Ed. 885.

114. — **Entries nunc pro tunc.**

See 13 Cent. Dig. Courts, § 363.

In a district court which has monthly terms, a final decree was entered Dec. 21st, and an appeal allowed Dec. 31st. Jan. 17th an assignment of error, questioning the jurisdiction of the court, was directed to be filed nunc pro tunc as of Dec. 31st, and it was claimed that such assignment was equivalent to a certificate of the jurisdictional questions involved. *Held* that, in the absence of anything in the record, prior to the expiration of the December term, to indicate any attempt to file a certificate during that term, the case was not within the rule permitting amendments nunc pro tunc, and the assignment could not be considered as a certificate.—*The Bayonne*, 159 U. S. 687, 16 S. Ct. 185, 40 L. Ed. 305.

116. — **Amendment and correction.**

See 13 Cent. Dig. Courts, §§ 369, 371-373.

The federal circuit court, at a subsequent term, may order an amendment of its record by a nunc pro tunc entry showing that a criminal cause certified to it by the district court had been remitted before sentence pronounced by the latter court, though no written memoranda of the proceedings of the previous term are on file in the cause.—*Wight v. Nicholson*, 134 U. S. 136, 10 S. Ct. 487, 33 L. Ed. 865.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

Presumptions as to jurisdiction upon collateral attack on judgment, see Judgment, 495.

(A) **GROUND OF JURISDICTION IN GENERAL.**

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Courts, §§ 375-382.]

(B) **COURTS OF PARTICULAR STATES.**

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Courts, §§ 383-403.]

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

See 13 Cent. Dig. Courts, §§ 404-468.

Review of decisions, see Appeal and Error, 65.

V. COURTS OF PROBATE JURISDICTION.

Accounting by executor or administrator, see Executors and Administrators, 469.

Appointment of executor or administrator, see Executors and Administrators, 8-13.

Collection and administration of estate of decedent, see Executors and Administrators, 83-87.

Sale of property of decedent, see Executors and Administrators, 345-356.

Jurisdiction of attachment proceedings, see Attachment, 69.

198. **Nature and scope of jurisdiction in general.**

See 13 Cent. Dig. Courts, §§ 469, 471-475, 478.

The state may invest its probate courts with jurisdiction to render a personal judgment for a devastavit against an executor, in favor of an administrator *de bonis non*.—*Michigan Trust Co. v. Ferry*, 33 S. Ct. 550, 228 U. S. 346, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221, and 175 F. 681, 99 C. C. A. 235.

A probate court under Laws Wash. 1862-63, p. 193, on determining interest of heirs in real estate, could determine whether there were any heirs and, if there were none, could decree

an escheat to the county.—*Christianson v. King County*, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

VI. COURTS OF APPELLATE JURISDICTION.

(A) **GROUND OF JURISDICTION IN GENERAL.**

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Courts, §§ 487-493.]

(B) **COURTS OF PARTICULAR STATES.**

[No paragraphs or references in this Digest. But see 13 Cent. Dig. Courts, §§ 499-791.]

VII. UNITED STATES COURTS.

See Judges, 48, 54.

Effect in state courts of judgments of United States courts, see Judgment, 829.

Effect in United States courts of judgments of state courts, see Judgment, 828.

Injunction against collection of state taxes, see Taxation, 608.

Jurisdiction of criminal prosecutions, see Criminal Law, 97.

Jurisdiction of habeas corpus proceedings, see Habeas Corpus, 45.

Jury trial, deprivation of right, see Jury, 34.

(A) **JURISDICTION AND POWERS IN GENERAL.**

Exercise of equity jurisdiction beyond territorial limits, see Equity, 36.

Judicial notice in aid of jurisdiction, see Pleading, 6.

Patent cases, see Patents, 288.

256. **Constitutional and statutory provisions.**

See 13 Cent. Dig. Courts, § 792.

The special provision of Act March 2, 1887, c. 315, § 4, 24 Stat. 442 [U. S. Comp. St. 1901, p. 345], giving the federal Circuit Court for either district in Illinois jurisdiction, where the requisite diversity of citizenship exists, of a civil cause in which two or more defendants reside in different districts in the state, was not repealed by the general language of Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], respecting the proper district for instituting suits in the Circuit or District Courts, although the act contains a general clause repealing all laws and parts of laws in conflict with its provisions.—*Petri v. F. E. Creelman Lumber Co.*, 26 S. Ct. 133, 199 U. S. 487, 50 L. Ed. 281.

The limitation as to amount in dispute prescribed by Act March 3, 1887, c. 359, 27 Stat. 505 (U. S. Comp. St. 1901, p. 754), for appeals or writs of error to a District Court sitting as a court of claims, remains in force, notwithstanding provisions of Circuit Court of Appeals Act March 3, 1891, c. 517, § 14, 26 Stat. 826 (U. S. Comp. St. 1901, p. 488).—*Reid v. United States*, 29 S. Ct. 171, 211 U. S. 529, 53 L. Ed. 313.

The provisions as to the proper district for suit on the bond of a public contractor made by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), for the protection of persons furnishing materials and labor for the construction of a public work, do not apply where the contract with, and the bond to, the government, and the contract under which the labor and materials were furnished, all antedate the passage of the amendatory act.—*David-*

son Bros. Marble Co. v. United States ex rel. Gibson, 29 S. Ct. 324, 213 U. S. 10, 53 L. Ed. 675.

Provisions as to proper district for an action on the bond of a public contractor made, by Act Feb. 24, 1905, amendatory of Act August 13, 1894, for protection of persons furnishing material and labor for public works, do not apply where the bond and contracts were executed prior to the amendatory act, though the work was done and materials furnished thereafter, and the suit is properly brought under Act August 13, 1894, § 5, in the district where the principal office of the surety company was situated.—Title Guaranty & Surety Co. v. United States, 33 S. Ct. 614, 228 U. S. 567, 57 L. Ed. 969, affirming judgment (C. C.) United States v. Scofield, 191 F. 944.

257. Scope and extent of judicial power of United States.

See 13 Cent. Dig. Courts, § 794.

The "judicial power," which the constitution (article 3, §§ 1, 2) confines to courts created by congress, extends only to "cases" in courts of record; and congress is at liberty to authorize judicial officers of the several states to exercise such powers as are ordinarily given to officers of courts not of record.—Robertson v. Baldwin, 17 S. Ct. 326, 165 U. S. 275, 41 L. Ed. 715.

The power to arrest deserting seamen in the merchant service, and deliver them on board their vessel, is not a part of the "judicial power," as defined by the constitution (article 3, §§ 1, 2); and congress, therefore, had power to confer it, by Rev. St. §§ 4598, 4599, on justices of the peace.—Id.

The judicial power of the United States, vested by Const. U. S. art. 3, § 1, in the federal courts, embraces all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto, except so far as there are limitations expressed in the Constitution on the general grant of judicial power.—State of Kansas v. State of Colorado, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 936.

The entire judicial power of the nation granted to the federal courts by Const. U. S. art. 3, § 1, is not limited by the declaration in section 2 that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc.—Id.

Congress could not, as was attempted by Act March 1, 1907, c. 2285, 34 Stat. 1015, confer jurisdiction upon the Court of Claims, and, by appeal, upon the federal Supreme Court, of suits against the United States, to be brought by certain named Cherokee Indians, for themselves and all others similarly situated, to determine the validity of acts of Congress passed since act July 1, 1902, c. 1375, 32 Stat. 716, so far as such acts purport to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of the Cherokee lands and funds, since this is nothing more than an attempt to provide for a final judicial determination in the Supreme Court of the constitutional validity of congressional legislation, without a "case" or "controversy" to which, under the federal Constitution, the judicial power alone extends.—(1911) Muskrat v. United States, 31 S. Ct. 250, 219 U. S. 346, 55 L. Ed. 246, reversing judgment (1909) 44 Ct. Cl. 137, and (1909) Brown v. Same, 44 Ct. Cl. 283.

The pendency in the courts of the District of Columbia of suits to enjoin the Secretary of the Interior from carrying into effect certain

congressional legislation when Congress attempted, by Act March 1, 1907, c. 2285, 34 Stat. 1015, to confer jurisdiction upon the Court of Claims, and, by appeal, upon the federal Supreme Court, of suits against the United States, to be brought by the petitioners in the then pending litigation to determine the validity of such legislation, does not remove the objection that action not judicial in its nature within the meaning of the federal Constitution was thereby required of the Supreme Court.—Id.

258. Power of Congress to create courts and confer jurisdiction.

See 13 Cent. Dig. Courts, § 793.

Congress may lawfully give the courts of the United States exclusive or concurrent jurisdiction of all actions brought to enforce any liability incurred through obedience to the orders of governmental officers, where the defendant, if compelled to respond in damages, would be entitled to demand indemnity from the public treasury.—Mitchell v. Clark, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. Ed. 279.

It is within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the constitution with original jurisdiction.—Bors v. Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419; Ames v. State of Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

Const. art. 3, § 1, providing that the judicial power of the United States shall be vested in a supreme court and such inferior courts as congress may establish, the judges of which shall hold office during good behavior, does not prevent the establishment of a court to determine claims against the United States to lands in the territories, with judges of limited terms, or the giving of appeal therefrom to the supreme court.—United States v. Coe, 155 U. S. 76, 15 S. Ct. 16, 39 L. Ed. 76.

Congress having authority to establish a court, unaffected by the definitions of Const. art. 3, § 1, to determine claims against the United States to lands in the territories, the fact that the act establishing the court gives it jurisdiction of such claims to lands in the states as well as the territories cannot affect its jurisdiction as to the lands in the territories, even if congress cannot give such a court jurisdiction as to the lands in the states.—Id.

259. Powers of state Legislatures as to United States courts.

See 13 Cent. Dig. Courts, §§ 795, 796.

The jurisdiction of the circuit court of suits against such counties by citizens of another state, being given by the constitution, cannot be defeated by the statute of a state directing such suits to be brought in a state court.—Lincoln County v. Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

St. Mass. 1886, c. 192, which regulates the use of nets or seines for taking fish in Buzzard's bay,—a bay wholly within the state, and whose mouth is less than two marine leagues in width, and hence within the boundaries and jurisdiction of the commonwealth, as defined by Pub. St. Mass. c. 1, §§ 1, 2,—is not in violation of Const. art. 3, § 2, cl. 1, declaring that the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction."—Manchester v. Commonwealth of Massachusetts, 139 U. S. 240, 11 S. Ct. 559, 35 L. Ed. 159, affirming judgment Commonwealth v. Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236.

St. Ark. Feb. 27, 1879, requiring all persons having claims against a county to present them

for allowance to the county court, does not deprive nonresident creditors of their right to sue the county in a federal court.—*Chicot County v. Sherwood*, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546.

260. Jurisdiction conferred on United States courts in general.

See 13 Cent. Dig. Courts, § 792.

Whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide, and not a question for a United States Court. Judgment 87 N. W. 255, 111 Wis. 296, affirmed.—*Finney v. Guy*, 23 S. Ct. 558, 189 U. S. 335, 47 L. Ed. 839.

262. Equity jurisdiction.

See 13 Cent. Dig. Courts, §§ 797, 798.

The creditors of a certain debtor, by process out of the federal court, attached property in the hands of the complainant, who claimed title to it in his own right. The goods were returned to him upon his giving a delivery bond to the marshal conditioned upon his producing the goods at a day named, or paying their value. Complainant, having disposed of the goods and paid their value to the marshal, brought a bill for an injunction to prevent the money so paid in, which he claimed as his own, from being distributed to the creditors in the original suit. Held that, being unable to maintain replevin against the marshal in the state court by reason of the goods being in the custody of the law in the federal court, the complainant had no adequate legal remedy, and was entitled to his injunction without regard to his citizenship.—*Krippendorf v. Hyde*, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145.

The controversy being between citizens of different states, and the value of the property being of the jurisdictional amount, a case is within the equity jurisdiction of the circuit court, though it involve rights arising under judicial proceedings in another jurisdiction.—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 S. Ct. 237, 32 L. Ed. 630.

The settled rule of the federal courts that simple contract creditors cannot come into equity to obtain the seizure of their debtor's property, and its application to their claims, applies with the same force when the debtor is a corporation; and the rule is not changed either by the insolvency of the corporation, its failure to collect in full all stock subscriptions, its execution of an illegal trust deed, or the pendency in the same court of a suit to foreclose the same.—*Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 S. Ct. 127, 37 L. Ed. 1113.

The scope of the equitable jurisdiction of the federal courts was not extended beyond what was an appropriate subject-matter for equitable relief according to existing standards, by the provision of Rev. St. U. S. § 1979 [U. S. Comp. St. 1901, p. 1262], that every person who, under color of state legislation, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the federal Constitution and laws shall be liable to the party injured "in an action at law, suit in equity, or other appropriate proceeding for redress."—*Giles v. Harris*, 23 S. Ct. 639, 189 U. S. 475, 47 L. Ed. 909.

Lack of an adequate remedy at law in the same jurisdiction cannot successfully be urged to sustain the equitable jurisdiction of a federal court of a suit to cancel an insurance policy for fraud, when the insurance company, because of diversity of citizenship, might have removed the action brought on such policy in a state court to a federal court, where the fraud could have been set up as a defense, although by exercising this right of removal the company might have subjected itself to a revocation of its

license to do business in the state, or, at least, to litigation to prevent the state authorities from revoking it. Judgment 111 F. 19, 49 C. C. A. 216, reversed.—*Cable v. United States Life Ins. Co. of City of New York*, 24 S. Ct. 74, 191 U. S. 288, 48 L. Ed. 188.

The fact that the law is more favorable to insurance companies as administered in the federal than in the state courts furnishes no reason for the assumption by a federal court of equitable jurisdiction over a suit by an insurance company to cancel a policy for fraud, although diversity of citizenship exists.—Id.

The existing relation of debtor and creditor between South Carolina and the vendors of liquor under the state dispensary acts was not so altered by the winding-up act of February 16, 1907 (25 St. at Large [S. C.] p. 835), providing a commission to close out the state dispensary business and turn over to the state treasury the surplus funds remaining after liquidating and paying claims out of the state assets, as to enable a Federal Circuit Court to take jurisdiction of a bill filed by such vendors, which seeks to enjoin the commission from disposing of the fund until their claims are paid, and asks for the appointment of a receiver, on the theory that by such statute the assets of the dispensary were placed in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against such fund, which they are entitled to enforce by judicial action against the commission, without the presence of the state as a necessary party.—(1909) *Murray v. Wilson Distilling Co.*, 29 S. Ct. 458, 213 U. S. 151, 53 L. Ed. 742, reversing decree (1908) 164 F. 1, 92 C. C. A. 1; (1909) *Same v. State of South Carolina ex rel. Ray*, 29 S. Ct. 465, 213 U. S. 174, 53 L. Ed. 752.

The chancery jurisdiction of the federal courts embraces a suit where the requisite diversity of citizenship exists to have the complainants adjudicated to be the heirs at law and next of kin of a decedent.—*McClellan v. Carland*, 30 S. Ct. 501, 217 U. S. 268, 54 L. Ed. 762.

A federal District Court has no equity power to appoint an officer to apportion and collect a tax to satisfy its judgment on county bonds, though mandamus has proved ineffectual.—*Yost v. Dallas County*, 35 S. Ct. 235, 236 U. S. 50, 59 L. Ed. 400.

263. Jurisdiction of entire controversy.

See 13 Cent. Dig. Courts, §§ 799, 800.

The federal Supreme Court, on appeal from the decision of a Circuit Court, may decide local questions only, and omit to decide the federal questions which gave the lower court jurisdiction, or may decide such questions adversely to the party claiming their benefit.—*Siler v. Louisville & N. R. Co.*, 29 S. Ct. 451, 213 U. S. 175, 53 L. Ed. 753; *Same v. Illinois Cent. R. Co.*, 29 S. Ct. 458, 213 U. S. 199, 53 L. Ed. 760; *Same v. Southern Ry. Co. in Kentucky*, Id.; *Same v. Cincinnati, N. O. & T. P. Ry. Co.*, Id.

A Circuit Court, having obtained jurisdiction by reason of the federal questions set up by the bill, may decide all the questions in the case, even though it decides the federal questions adversely to the party raising them, or omits to decide them, but decides the case on local questions only.—Id.

On application to enjoin enforcement of state statute as unconstitutional under Act June 18, 1910, § 17, all questions local as well as federal may be determined.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

Jurisdiction of federal courts cannot be enlarged by uniting in a single suit causes of action for which the court is without jurisdiction

with one of which it has jurisdiction.—*Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 35 S. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

②264. Ancillary and incidental jurisdiction.

See 13 Cent. Dig. Courts, § 801.

If necessary to prevent the abuse of its own process a federal court will entertain a bill by a stranger to the suit in which the process issued, without regard to diversity of citizenship. Such a bill is regarded as merely incidental and ancillary to the suit already pending.—*Krippeendorf v. Hyde*, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145.

A person holding himself aggrieved through a wrongful attachment in execution by a United States marshal acting under authority of a United States court, must seek redress in that court. He has not recourse for that purpose to the courts of the several states.—*Covell v. Heyman*, 111 U. S. 176, 4 S. Ct. 355, 28 L. Ed. 394, reversing *Heyman v. Covell*, 6 N. W. 846, 44 Mich. 332, 38 Am. Rep. 272.

Where the United States circuit court had jurisdiction, on the ground of diverse citizenship, of a suit to foreclose a mortgage on a railroad, it has jurisdiction of a suit by the railroad corporation to have the decree in such suit set aside on the ground of the unfaithful conduct of its officers in conducting such suit, without regard to the citizenship of the parties to the suit, to set aside the decree.—*Pacific Railroad v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498.

Though the jurisdiction of the circuit courts by mandamus is not original, they have ancillary jurisdiction to enforce a judgment rendered by the court, and such jurisdiction may be exercised over persons not parties to the judgment sought to be enforced.—*Labette County Com'rs v. United States*, 112 U. S. 217, 5 S. Ct. 108, 28 L. Ed. 698.

A bill in a federal court to restrain the enforcement of a judgment by such court in ejectment between the same parties, on account of an equitable defense that could not be pleaded in ejectment, need not allege the citizenship of the parties, since no other court than the one which rendered the judgment could stay process in it on the grounds set forth.—*Johnson v. Christian*, 125 U. S. 642, 8 S. Ct. 1135, 31 L. Ed. 820.

Where the property is within the jurisdiction of the circuit court, and has been taken into its custody by the appointment of a receiver, its jurisdiction to protect it from interference by such state officer is independent of the amount involved, the citizenship of the parties, or of the existence of any new ground of equitable jurisdiction.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689; *Ex parte Riser*, 149 U. S. 191, 13 S. Ct. 793, 37 L. Ed. 698.

The circuit court has jurisdiction in a general creditors' suit properly pending therein, for the collection and distribution of the assets of an insolvent corporation, to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claims the right to recover from any one debtor a sum not exceeding \$2,000.—*White v. Ewing*, 159 U. S. 36, 15 S. Ct. 1018, 40 L. Ed. 67.

A bill by the stockholders of a corporation, filed to impeach the decree of foreclosure and sale on the ground of collusion and fraud and want of jurisdiction in the court to make it, is an ancillary suit, and a mere continuation of the main suit, so far as the jurisdiction of the circuit court, as a court of the United States, is concerned.—*Carey v. Houston & T. C. Ry.*

Co., 161 U. S. 115, 16 S. Ct. 537, 40 L. Ed. 638.

Diversity of citizenship between the parties is not necessary to the jurisdiction of the circuit court of the United States in an ancillary action to enforce the payment of a judgment of that court out of a fund which by such judgment was made liable for its payment.—*Decree 91 F. 574*, 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

A bill to enjoin a sale of railway stock by a firm of bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of sale sufficient to satisfy any judgment which may be recovered by the complainant in a pending suit to foreclose a mortgage on the property of such railway company, to which suit the stockholders are not parties, cannot be sustained as ancillary to the bill in the foreclosure suit because such bankers, upon learning of the foreclosure proceedings, required an indemnity fund from the stockholders to protect their firm on its guaranty against any liability of the company in that suit. Judgment (C. C.) 118 F. 777, affirmed.—*Raphael v. Trask*, 24 S. Ct. 647, 194 U. S. 272, 48 L. Ed. 973.

Jurisdiction of a bill which seeks to reach and distribute to the persons found entitled thereto the proceeds of a sale of lands to the United States cannot be entertained by a federal circuit court on the theory that the cause is ancillary to an action at law to recover the lands from the United States, as occupied without right, in which the rival claimants had united in procuring final judgment in favor of two of their number, leaving their respective interests to be settled by arbitration.—*Stillman v. Combe*, 25 S. Ct. 480, 197 U. S. 436, 49 L. Ed. 822.

Ancillary relief in a federal circuit court by way of an injunction in aid of a decree in a suit over the validity of state taxation, in which jurisdiction as to the state and its officers had been acquired as the result of the voluntary action of the state in submitting its rights to judicial determination, is not forbidden by Const. U. S. Amend. 11, as a suit against the state.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

②265. Issuance of prerogative writs.

See 13 Cent. Dig. Courts, §§ 802-805, 1353.

By force of Rev. St. § 716 (section 14 of the judiciary act of 1789), providing that the United States circuit courts shall have "power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," those courts have no jurisdiction to award a mandamus except as ancillary to some other proceeding establishing a demand, and reducing it to judgment; and their jurisdiction in this respect, either original or by removal, is not enlarged by Act March 3, 1875 (18 Stat. 470).—*Rosenbaum v. Bauer*, 120 U. S. 450, 7 S. Ct. 633, 30 L. Ed. 743.

The supreme court of the United States has no power to issue a writ of mandamus to a state supreme court, requiring it to vacate an order disbarring an attorney for using vituperative and denunciatory language concerning a state judge in pleading filed in the United States circuit court; since Rev. St. § 688, only confers power to issue writs of mandamus warranted by the principles and usages of law "to any courts appointed, or persons holding office, under the authority of the United States."—*In re Green*, 141 U. S. 325, 12 S. Ct. 11, 35 L. Ed. 765.

That a state statute, under which railroad commissioners assume to act, is constitutional, does not oust a federal court of jurisdiction to restrain their excessive and illegal acts.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014.

In cases over which the Supreme Court of the United States possesses neither original nor appellate jurisdiction, it cannot grant prohibition, mandamus, or certiorari as ancillary thereto.—*In re Commonwealth of Massachusetts*, 25 S. Ct. 512, 197 U. S. 482, 49 L. Ed. 845.

The Supreme Court of the United States cannot grant a writ of mandamus to compel the judges of a federal Circuit Court to take jurisdiction of an action alleged to be pending in that court, where the cause was not of such a character that a final judgment therein could be directly reviewed, under Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], in the Supreme Court.—*In re Glaser*, 25 S. Ct. 653, 198 U. S. 171, 49 L. Ed. 1000.

The federal circuit courts have no jurisdiction of an original action in mandamus to compel the return of a franchise tax collected under the authority of a state statute, although the basis of the relief sought is the alleged repugnancy of the tax to the commerce clause of the federal Constitution.—*Covington & C. Bridge Co. v. Hager*, 27 S. Ct. 24, 203 U. S. 109, 51 L. Ed. 111.

267. District in which suit must be brought.

See 13 Cent. Dig. Courts, §§ 806-815, 818.

269. — Local actions.

See 13 Cent. Dig. Courts, § 809.

Rev. St. § 738 (17 Stat. 196, § 13), relating to suits in United States courts, provides that when any defendant in a suit in equity to enforce any lien or claim against land within the district where suit is brought is not an inhabitant of or found within such district, and does not appear, it shall be lawful for the court to order the absent defendant to appear, etc., at a designated day. Section 739 provides that, except as provided in the next three sections and "the preceding section," no civil suit shall be brought in any other district than that of which defendant is an inhabitant, or in which he shall be found at the time of serving the writ. Act March 3, 1875 (18 Stat. 470) § 1, provides that no civil suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found when process is served or proceeding commenced, "except as hereinafter provided." Section 8, relating to the class of cases mentioned in Rev. St. § 738, provides for publication in any suit to enforce any legal or equitable lien or claim to, or to remove any incumbrance or lien or cloud on title to, land within the district, and that the adjudication shall, as regards such absent defendant or defendants without appearance, affect only the property under the jurisdiction of the court therein within such district. Act Aug. 13, 1888 (25 Stat. 434, amending Act March 3, 1875), § 1, contains the same provision first quoted from section 1 of the latter act, and the further provision that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Section 5 expressly reserves any jurisdiction or right mentioned in Act March 3, 1875, § 8. *Held*, that in suits of the class mentioned in Act March 3, 1875, § 8, the circuit court of the district wherein the land in dispute lies may assume jurisdiction, though plaintiff and some of defendants are residents of other districts.—*Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69, dis-

tinguishing *Smith v. Lyon*, 133 U. S. 315, 10 S. Ct. 303, 33 L. Ed. 635.

A United States circuit court has jurisdiction of a suit to remove a cloud from a title to land situated in the district where the suit is brought, though defendant is a citizen of another state, under Rev. St. § 738, and Acts 1875, § 8.—*Dick v. Foraker*, 155 U. S. 404, 15 S. Ct. 124, 39 L. Ed. 201.

Where a complaint alleges a continuing trespass by defendant, through its agents, on plaintiff's land, and the cutting and conversion of timber growing thereon, in a single count, the entire cause of action is local, and only a federal court within the state in which the land lies has jurisdiction.—*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 S. Ct. 771, 39 L. Ed. 913.

Shares of stock in a Michigan corporation, being by the laws of that state deemed personal property, must be so considered within the meaning of the act of congress of March 3, 1875, authorizing an order to bring in absent defendants who are not inhabitants of or found within the district in a suit to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought. Decree (C. C.) 82 F. 778, reversed.—*Jellenik v. Huron Copper-Min. Co.*, 20 S. Ct. 559, 177 U. S. 1, 44 L. Ed. 647.

A suit to cancel and annul certain deeds and leases of the property of a railway company lying wholly within the Eastern district of Illinois may be brought and maintained in the federal Circuit Court for that district against defendants who are inhabitants of the Northern district of Illinois, as being a suit to remove an "incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," within the meaning of Act March 3, 1905, c. 1427, § 8, 33 Stat. 992, 995 [U. S. Comp. St. Supp. 1905, p. 93], authorizing the making of an order in such suits to bring in absent defendants who are not inhabitants of, or found within, the district and who do not voluntarily appear.—*Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 27 S. Ct. 425, 205 U. S. 46, 51 L. Ed. 703.

The restriction as to the place of suit when persons holding unpaid demands for labor or materials bring an action in the name of the United States, on the bond of a public contractor, given conformably to Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), to the federal Circuit Court for the district in which said contract is to be performed, "and not elsewhere," governs as well where the action is brought by the United States against the principal and sureties on the bond, for the failure to pay certain designated subcontractors for labor and materials used in the construction of the work.—*United States v. Congress Const. Co.*, 32 S. Ct. 44, 222 U. S. 199, 56 L. Ed. 163.

The limitation to the federal Circuit Court of the district wherein a contract for a public work is to be performed of an action brought by the United States against the principal and sureties on the bond of a public contractor, given conformably to Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), for his failure to pay certain designated subcontractors for labor and materials used in construction, operates pro tanto to displace the provisions upon that subject in General Jurisdictional Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), and amply authorizes the Circuit Court for the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through the service upon them

of its process in whatever district they may be found.—Id.

Suits to remove clouds on title, resting on state statutes, established usages and practices in equity, are embraced within Judicial Code, § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102 [U. S. Comp. St. Supp. 1911, p. 152]), authorizing jurisdiction by federal District Courts over nonresident defendants, in suits to enforce equitable lien, or remove any incumbrance, or cloud upon title, within the district where such suit is brought.—*Louisville & N. R. Co. v. Western Union Tel. Co.*, 34 S. Ct. 810, 234 U. S. 369, 58 L. Ed. 1356.

A suit by a Kentucky railway company to annul judgments of special courts of eminent domain, condemning portions of its right of way in Mississippi for a New York telegraph company, on the ground that they are invalid under the local law, and becloud the railway company's title, is a suit to remove a cloud upon title within Judicial Code, § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102 [U. S. Comp. St. Supp. 1911, p. 152]), and is therefore justifiable in the federal District Court wherein the property is located, though the judgments are void on their face, where under the local law, the owner may maintain such a suit, and the judgments in eminent domain may be attacked because not for a public use.—Id.

◀270. — District of which defendant is inhabitant.

See 13 Cent. Dig. Courts, § 810.

Acts March 3, 1887, c. 373, and Aug. 13, 1888, c. 866, amending the judiciary act of 1875, provide that a civil suit must be brought in the district of which the defendant is an inhabitant, except when founded on the residence of the plaintiff in different states, in which case it shall be brought in a district of which either party is an inhabitant. *Held*, that defendant in a suit for the wrongful use of a trade-mark, brought in the federal court, as arising under a United States law, or as being between citizens of different states, cannot be compelled to answer in a district of which neither he nor the plaintiff is an inhabitant.—*In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402.

A suit brought in the name of the United States under Act Aug. 13, 1894, c. 290, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), on the bond of a public contractor, for the benefit of a person furnishing materials and labor for the construction of a public work, is governed by that part of Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), which provides that no civil suit shall be brought before any federal Circuit Court "against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant."—*Davidson Bros. Marble Co. v. United States ex rel. Gibson*, 29 S. Ct. 324, 213 U. S. 10, 53 L. Ed. 675.

Only in the district of the residence of a party can a federal District Court, under Judicial Code, § 51, take jurisdiction of a bill in a patent infringement suit charging defendants with procuring licensees to violate their contract and in refusing to perform contract to assign plaintiffs certain other patents and asking for an injunction and specific performance; such causes of action not arising under the patent laws.—*Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 35 S. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

◀272. — Actions between citizens of different states.

See 13 Cent. Dig. Courts, § 811.

Two citizens of different states may maintain an action against a citizen of a third state

in the federal Circuit Court for the district of the latter's residence, under Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], conferring original jurisdiction on the Circuit Courts of suits in which there is a controversy between citizens of different states, to be brought in the district of the residence of either the plaintiff or the defendant.—*Sweeney v. Carter Oil Co.*, 26 S. Ct. 55, 199 U. S. 252, 50 L. Ed. 178.

A suit by resident shippers to restrain foreign interstate carriers from putting into effect a proposed advance in freight rates which is averred to be an "arbitrary and unlawful exaction," and to be the outcome of a conspiracy and combination in restraint of interstate trade, unlawful both at common law and under the federal statutes, is one in which the jurisdiction of the federal court is not invoked solely upon the ground of diversity of citizenship, and can therefore not be brought in a federal district in which none of the defendants reside, in view of the provision of Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), that no civil suit shall be brought in any other district than that whereof the defendant is an inhabitant, but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. *Decree, Atlantic Coast Line R. Co. v. Macon Grocery Co.* (C. C. A. 1909) 166 F. 206, 92 C. C. A. 114, affirmed.—*Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 30 S. Ct. 184, 215 U. S. 501, 54 L. Ed. 300.

◀273. — Coplaintiffs or codefendants inhabitants of different districts.

See 13 Cent. Dig. Courts, § 813.

Under Act Cong. March 3, 1887 (24 Stat. 552), as amended by Act Aug. 13, 1888 (25 Stat. 433), providing that, where jurisdiction of the federal courts "is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," the circuit court of a district of which one of two co-plaintiffs who sue as partners and the defendant are nonresidents has no jurisdiction of the suit.—*Smith v. Lyon*, 133 U. S. 315, 10 S. Ct. 303, 33 L. Ed. 635.

Jurisdiction of a civil cause in which two or more defendants reside in different districts in the state of Illinois was conferred upon the federal Circuit Court for either district, where the requisite diversity of citizenship exists, by the provision of Act March 2, 1887, c. 315, § 4, 24 Stat. 442 [U. S. Comp. St. 1901, p. 345], that, "if there are two or more defendants in civil suits residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside."—*Petri v. F. E. Creelman Lumber Co.*, 26 S. Ct. 183, 199 U. S. 487, 50 L. Ed. 281.

The presence of one of the defendants in the Federal district in which suit by the United States under Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), is brought to restrain violations of that act, gives the circuit court jurisdiction.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming decree (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

◀274. — Actions by or against corporations.

See 13 Cent. Dig. Courts, § 814.

Act Cong. March 3, 1887 (24 Stat. 552), corrected by Act Aug. 13, 1888, and amending Act

March 3, 1875, provides that no civil suit shall be brought before either the circuit or district court of the United States, against any person, by any original process, in any other district than that whereof he is an inhabitant; but, when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant. *Held* that, where the jurisdiction is founded only on the fact of diverse citizenship, suit for falsely and maliciously suing out an attachment may be brought in the circuit court of the district, in which plaintiff resides, against a corporation residing in another state.—*McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 10 S. Ct. 485, 33 L. Ed. 833.

Under statutes providing that no civil suit shall be brought in federal courts against any person by any original process in any other district than that whereof he is an inhabitant, a corporation of one state cannot be sued in a federal court of another state for infringement of patent, though it has a place of business there.—*Ex parte Shaw*, 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768.

The fact that a corporation does business in a state other than that of its incorporation does not make it an inhabitant of that state for the purposes of jurisdiction.—*Shaw v. Quincey Min. Co.*, 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942.

The provision in Judiciary Act 1887-88, § 1, prohibiting the bringing of suit against any person "in any other district than that whereof he is an inhabitant," does not apply to aliens or foreign corporations.—*In re Hohorst*, 150 U. S. 653, 14 S. Ct. 221, 37 L. Ed. 1211.

Since the provision in Judiciary Act 1887-88, § 1, prohibiting the bringing of suits against any person "in any other district than that whereof he is an inhabitant," does not apply to foreign corporations, such corporations may be sued by a citizen of a state in any district where service can be obtained.—*Id.*

A railway company incorporated under the laws of a state, and having its principal offices within one district of such state, is an inhabitant of that district, within Act Aug. 13, 1888, c. 866, and cannot be sued by an alien in a circuit court of the United States held in another district of the same state, through which it operates its road, and in which it maintains freight and ticket offices and depots, notwithstanding a statute of the state makes it liable to be sued in any county through or into which its railway extends or is operated, especially where other statutes of the state provide that the public office which every such corporation is required to maintain shall be considered its domicile.—*Galveston, H. & S. A. Ry. Co. v. Gonzales*, 151 U. S. 496, 14 S. Ct. 401, 38 L. Ed. 248.

A corporation is not a citizen, inhabitant, or resident of a state in which it has not been incorporated, within the meaning of statutes requiring a civil suit to be brought in the district of which defendant is an inhabitant, or, where the jurisdiction is founded on diverse citizenship, in the district of the residence of either plaintiff or defendant.—*In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402.

In the absence of any charter provision on the subject, the principal office and domicile of a railroad corporation, for the purposes of a suit in a federal court, are in the district where its stockholders' and directors' meetings are held, and the records thereof kept, together with the stock-certificate book, and where the principal officers have their offices, rather than in a different district, where the general administrative offices of the heads of its departments are located.—*Texas & P. Ry. Co. v. Interstate Com-*

merce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 Fed. 948, 6 C. C. A. 653.

The provisions of the judiciary act as to the district in which suits must be brought have no application to a suit against an alien or a foreign corporation, and they may be sued by a citizen of a state in any district where valid service can be had.—*Barrow S. S. Co. v. Kane*, 18 S. Ct. 526, 170 U. S. 100, 42 L. Ed. 964.

Soliciting through its district freight and passenger agent in Philadelphia freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there. Judgment (C. C. 1906) 147 F. 767, affirmed.—*Green v. Chicago, B. & Q. Ry. Co.*, 27 S. Ct. 595, 205 U. S. 530, 51 L. Ed. 916.

A corporation created by an act of Congress which, having designated Dallas, Texas, where its senior vice president lives, as its general office, maintains an office in Dallas county, and has all the acts of its board of directors taken in New York City affirmed by a meeting of the board at Dallas, is suable in the Northern district of Texas, under act March 11, 1902, c. 183, 32 Stat. 68 (U. S. Comp. St. Supp. 1907, p. 163), and *Tex. Sayles' Ann. Civ. St.* 1897, arts. 1222, 1223, as being a resident of, and doing business in, that district, and having an agent there upon whom service can properly be made.—*In re Dunn*, 29 S. Ct. 299, 212 U. S. 374, 53 L. Ed. 558.

The asserted right of citizens of New York and West Virginia, as owners of timber lands in Georgia, near the Tennessee boundary line, to protection against the destruction of their forests by the discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the territorial jurisdiction of the federal circuit for the Eastern District of Tennessee, is not a claim to real property within the district, within the meaning of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), providing for bringing in absent defendants in local actions, so as to confer jurisdiction upon that court over the New Jersey corporation, which refuses to appear voluntarily in the suit as a defendant.—*Ladew v. Tennessee Copper Co.*, 31 S. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, affirming decree (C. C.) 179 F. 245, which is affirmed *Wetmore v. Same*, 31 S. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073.

A suit by a nonresident owner of lands within the territorial jurisdiction of the federal Circuit Court for the Eastern District of Tennessee for protection against injury from a discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the district does not present a claim to real property within the district, within the meaning of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), providing for bringing in absent defendants in local actions, so as to confer jurisdiction upon that court over the New Jersey corporation which refuses to appear voluntarily in the suit as a defendant.—*Wetmore v. Tennessee Copper Co.*, 31 S. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073, affirming decree *Ladew v. Same* (C. C.) 179 F. 245, which is affirmed 31 S. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069.

A suit to enforce liability in equity of a Kansas corporation on bonds of a railway company created by an act of Congress involves a federal question, which under Judicial Code, § 51, may not be brought in any other federal district than that of the residence of the Kansas corporation without its consent.—*Male v. Atchison, T. & S. F. R. Co.*, 36 S. Ct. 351, 240 U. S. 97, 60 L. Ed. 544.

276. — Waiver of objections.

See 13 Cent. Dig. Courts, § 815; 3 Cent. Dig. Apppear. § 114.

A federal court has jurisdiction of a suit between corporations created by different states, though neither is created by the state in which the suit is brought, when the defendant waives its personal privilege of being sued in the district of its residence.—*Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 S. Ct. 286, 38 L. Ed. 98, reversing decree *Central Trust Co. v. Virginia F. & C. Steel & Iron Co.*, 55 F. 769.

The exemption from suit in the federal court, in any district other than that of defendant's residence, is waived, if not pleaded.—*Interior Const. & Imp. Co. v. Gibney*, 160 U. S. 217, 16 S. Ct. 272, 40 L. Ed. 401.

The objection that a particular Federal circuit court is without jurisdiction of a suit between citizens of different states because neither of the parties is a resident of the district is waived by demurring upon grounds reaching to the merits of the cause of action in addition to jurisdictional grounds, where, under the local practice, defendant could have made a special appearance by motion aimed at the jurisdiction of the court over his person, or by motion to quash the service of process.—*Western Loan & Savings Co. v. Butte & Boston Consol. Min. Co.*, 28 S. Ct. 720, 210 U. S. 368, 52 L. Ed. 1101.

The objection that a suit in a federal Circuit Court between citizens of different states is not brought in the proper district is waived by demurring and answering without raising that question. Decree, *Coram v. Ingersoll* (1906) 148 F. 169, 78 C. C. A. 303, reversed.—*Ingersoll v. Coram*, 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208.

Pleading to the merits, without objecting that suit was brought in the wrong federal district, waives requirement of Act March 3, 1887, § 5, that suits against the United States must be brought in the district where the claimant resides.—*United States v. Hvosslef*, 35 S. Ct. 459, 237 U. S. 1, 59 L. Ed. 813, Ann. Cas. 1916A, 286, affirming judgment (D. C.) *Hooslet v. United States*, 217 F. 680.

The requirement as to the proper district for suits on claims against the United States, under Tucker Act March 3, 1887, § 5, held waived by demurrer; the demurrer being in substance a general appearance by the United States.—*Thames & Mersey Marine Ins. Co. v. United States*, 35 S. Ct. 496, 237 U. S. 19, 59 L. Ed. 821, Ann. Cas. 1915D, 1087, reversing judgment (D. C.) 217 F. 685.

280. Determination of questions of jurisdiction.

See 13 Cent. Dig. Courts, §§ 816-818.

Although the circuit court is authorized to protect itself of its own motion from impositions upon its jurisdiction by collusion or fraud, the evidence on which it acts must be pertinent to some issue, and where the complaint alleged in good faith that plaintiff was an alien, and that defendant was a citizen of Illinois, and no plea to the jurisdiction was made by defendant, but upon the trial it appeared, from evidence that was irrelevant and pertinent to no issue, that defendant was also an alien, and that consequently, under Act Cong. March 3, 1875, § 5, the court had no jurisdiction, the granting of a motion to dismiss in that condition of the record was error.—*Hartog v. Memory*, 116 U. S. 588, 6 S. Ct. 521, 29 L. Ed. 725.

Where the jurisdiction of the United States circuit court depends alone on the citizenship of the parties, the record must show it positively, and not inferentially, and when not so shown the judgment of the court will be reversed.—*Con-*

tinental Life Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380.

Where the record does not show that the circuit court had jurisdiction of the suit, which depends alone on the citizenship of the party, its judgment, will be reversed by the supreme court of the United States; and where the fault rests alone on the plaintiff, whose duty it was in bringing the suit to make the jurisdiction appear, the reversal will be at his cost in that court. If the citizenship of a defendant was in fact such, at the commencement of the suit, as to give the circuit court jurisdiction, it will be in the power of that court, when the case gets back, to allow the necessary amendments to be made, and then proceed to trial.—*Halsted v. Buster*, 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462.

The supreme court of the United States will of its own motion deny its jurisdiction, and that of the court from which the record comes, unless the jurisdiction affirmatively appears, although neither party make the point in the argument.—*King Iron Bridge & Manufacturing Co. v. Otoe County*, 120 U. S. 225, 7 S. Ct. 552, 30 L. Ed. 623.

Where the averments in a complaint or declaration in an action in a United States circuit court make out a case arising under the Constitution, laws, or treaties of the United States, if, when all the pleadings are in, it appears that the averments are immaterial in the determination of the matter really in dispute between the parties, and especially if they were evidently made for the purpose of creating a case cognizable by the United States court where none in fact existed, the court should not retain jurisdiction of the case, but immediately dismiss it, as section 5, Act. Cong. March 3, 1875, requiring the circuit court to dismiss the suit when it satisfactorily appears that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, applies directly to such a case.—*Robinson v. Anderson*, 121 U. S. 522, 7 S. Ct. 1011, 30 L. Ed. 1021.

Where it appears, on appeal from a United States circuit court, that such court had no proper jurisdiction of the cause on account of defective allegations as to the citizenship of the parties, in the petition removing the cause thereto, the supreme court cannot grant leave to amend such petition, so as to give the circuit court jurisdiction.—*Cameron v. Hodges*, 127 U. S. 322, 8 S. Ct. 1154, 32 L. Ed. 132.

Under Act Cong. March 3, 1875, § 5, providing that if it shall appear to the satisfaction of the circuit court, at any time after suit has been brought or removed thereto, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," etc., the suit shall be dismissed, the court is bound to dismiss a suit depending for federal jurisdiction on the nonresidence of the plaintiff, when it is made to appear that he is not in fact a nonresident.—*Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690.

Where, on a writ of error in an action on a contract, commenced in the circuit court by an assignee, the record does not affirmatively show that the assignor could have brought the action in such court if no assignment had been made, the judgment will be reversed for want of jurisdiction.—*Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 9 S. Ct. 552, 32 L. Ed. 905.

A remittitur of damages is not such a part of the record that an allegation of citizenship therein will give the court jurisdiction.—*Denny v. Pironi*, 141 U. S. 121, 11 S. Ct. 966, 35 L. Ed. 657.

Although diverse citizenship of the parties should be covered in proper averments by the plaintiff, to give the federal court jurisdiction, the fact that it appears in the summons forming a part of the record is sufficient when the question is first raised in the supreme court.—*Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 S. Ct. 657, 36 L. Ed. 360.

Where the federal court has exercised jurisdiction on the ground of diverse citizenship, the proceedings cannot be attacked in another action between different parties, on the ground that the citizenship was not diverse.—*Lacassagne v. Chapuis*, 12 S. Ct. 659, 144 U. S. 119, 36 L. Ed. 368.

A cause was removed from a state court upon a record which failed to show complainant's citizenship at the commencement of the action, and was tried without objection in the federal court. From its judgment an appeal was taken to the supreme court while Act Feb. 25, 1889 (25 Stat. 693), was in force. This act gave the supreme court appellate jurisdiction in all cases in which the jurisdiction of the circuit court was in issue, but provided that, when the judgment or decree did not exceed \$500, only the jurisdictional question should be reviewed. *Held*, that as the supreme court is bound, of its own motion, to take notice that the record fails to show jurisdiction of the court below, it could not dismiss the appeal, even if it appeared that the amount in controversy was not sufficient to sustain the appellate jurisdiction under previous statutes, but must reverse the decree, with directions to remand the cause to the state court.—*Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53, 15 S. Ct. 725, 39 L. Ed. 894.

A consideration of the averments of an answer in determining whether the circuit court has jurisdiction of a suit commenced therein is necessitated by Jurisdictional Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], which requires the circuit court to dismiss the cause whenever "at any time after such suit has been brought" it shall appear that its jurisdiction has been improperly invoked. Decree, 109 F. 497, 48 C. C. A. 349, reversed.—*Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 22 S. Ct. 681, 185 U. S. 282, 46 L. Ed. 910.

The question of the jurisdiction of a federal circuit court, invoked on the ground of diversity of citizenship, may be raised by a motion to dismiss based upon the proofs taken by the master to whom the cause has been referred.—*Steigleder v. McQuesten*, 25 S. Ct. 616, 198 U. S. 141, 49 L. Ed. 986.

A suit for the recovery of land of the alleged value of \$5,000, and for \$2,000 damages for its detention, cannot be dismissed by a federal Circuit Court, acting under the authority of Act March 3, 1875, c. 137, § 5, 18 Stat. 470 [U. S. Comp. St. 1901, p. 511], as not really and substantially involving a dispute or controversy properly within its jurisdiction, because, after hearing evidence, the court is satisfied that the defendants did not act jointly, as plaintiff alleged and defendants denied, and that the land taken and held by each defendant was of less value than \$2,000, since in so deciding the court did not determine a jurisdictional fact, but an essential element of the merits, upon which the parties were entitled to the finding of a jury.—*Smithers v. Smith*, 27 S. Ct. 297, 204 U. S. 632, 51 L. Ed. 656.

A federal Circuit Court should not dismiss on its own motion, for want of jurisdiction, a suit against the dairy and food commissioner of a state, on the ground that such suit is one against the state, but such question should be raised by demurrer or other pleading.—*Scully v. Bird*, 28 S. Ct. 597, 209 U. S. 481, 52 L. Ed. 899.

Affidavits filed in connection with a plea to the jurisdiction, whether actually offered to

be read in evidence or not, should be considered by a federal Circuit Court in deciding the question raised by a plea to the jurisdiction, setting up the objection that the defendant was a foreign corporation not doing business in the state, and that the person attempted to be served with process was not its agent at that time.—*Mechanical Appliance Co. v. Castleman*, 30 S. Ct. 125, 215 U. S. 437, 54 L. Ed. 272.

(B) JURISDICTION DEPENDENT ON NATURE OF SUBJECT-MATTER.

Admiralty jurisdiction, see Admiralty, 1-23. Federal question as ground for removal from state to federal court, see Removal of Causes, 18-25.

281. Cases in law and equity in general.

See 12 Cent. Dig. Courts, §§ 820-825.

A circuit court issued an injunction to restrain city authorities from removing a police judge from office. *Held*, that the court, sitting as a court of equity, had no jurisdiction to try and determine itself, nor to restrain the tribunals of the state or city from trying and determining, the matter, and this whether the proceeding of the city authorities be regarded as criminal or civil, judicial or administrative.—*In re Sawyer*, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402.

A claim that a municipal ordinance impairs the obligation of a contract will not sustain the jurisdiction of a federal court unless the ordinance is authorized, or supposed to be authorized, by a law of the state.—*Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 S. Ct. 80, 36 L. Ed. 963, affirming judgment (C. C.) 37 F. 832.

While, under Rev. St. §§ 916, 967, judgments recovered in federal courts were liens in all cases where they were such by the laws of the states, these sections did not recognize any rights in the states to regulate the operation of federal judgments; and, in a case where the laws of the state respecting the liens of judgments were changed after the enactment of these sections into the Revised Statutes, the question whether a judgment thereafter recovered in a federal court constituted a lien upon land was one which depended upon a construction of the federal laws and rules of court, and was therefore a question of federal jurisdiction.—*Cooke v. Avery*, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

The question whether the contract rights created by the charter of a railroad company by a state are violated by subsequent acts of the state, limiting the right to collect tolls, is one for the determination of which a citizen of another state, who, under the laws of the state creating the corporation, has become the beneficial owner of its property, may invoke the judgment of the federal courts, in a suit to restrain state officers from enforcing such acts.—*Ittegan v. Farmers' Loan & Trust Co.*, 154 U. S. 352, 14 S. Ct. 1047, 38 L. Ed. 1014.

The allegation in the bill filed in the circuit court that in certain proceedings, under which the defendant claimed, said court acted "entirely without jurisdiction, and without color of authority save as the agent and organ of said territory," is too indefinite to show that such proceedings were wanting in due process of law, so as to confer jurisdiction on the federal courts.—*Hanford v. Davies*, 163 U. S. 273, 16 S. Ct. 1051, 41 L. Ed. 157.

To give a federal court jurisdiction of a suit on the ground that it involves a federal question, there must be a real and substantial dispute as to the effect or construction of a provision of the constitution or of some law of the United States, upon the determination of which the right of recovery depends. Decree

(C. C.) 84 F. 726, affirmed.—*McCain v. City of Des Moines*, 19 S. Ct. 644, 174 U. S. 168, 43 L. Ed. 936.

The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employes in charge of it will exercise due care, so as to confer jurisdiction on a federal court, under Tucker Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], of an action to recover damages for personal injuries sustained by reason of the negligence of such employes, on the theory that such action is upon a "contract, express or implied, with the government of the United States," within the meaning of that act; but the case is one "sounding in tort," which by that act is excluded from judicial cognizance. Judgment (C. C.) 103 F. 597, affirmed.—*Bigby v. United States*, 23 S. Ct. 468, 188 U. S. 400, 47 L. Ed. 519.

◀282. Cases arising under Constitution of United States.

See 13 Cent. Dig. Courts, §§ 820-824.

An action for damages against a collector of taxes in Virginia for seizing plaintiff's property for the purpose of enforcing payment of taxes due to the state, after refusing to receive from plaintiff in payment thereof coupons made receivable for such taxes by Act Va. March 30, 1871, is not within Rev. St. § 629, cl. 16, giving the United States circuit courts cognizance, without reference to the sum or value in controversy or the citizenship of the parties, of suits to redress the deprivation, under color of any law, etc., of any state, of any right, privilege, or immunity secured by the constitution of the United States, such suits being authorized by Rev. St. § 1979. Although the right to have such coupons received in payment of taxes is founded on a contract with the state, protected by Const. art. 1, § 10, forbidding any state to pass laws impairing the obligation of contracts, the only right secured to an individual by that clause is the right to have a judicial determination declaring the nullity of the attempt to impair its obligation. A direct action for the denial of the right is not authorized.—*Carter v. Greenhow*, 114 U. S. 317, 5 S. Ct. 928, 962, 29 L. Ed. 202; *Pleasants v. Same*, 114 U. S. 323, 5 S. Ct. 931, 962, 29 L. Ed. 204.

In an action against a municipal corporation to recover an alleged balance due on a contract, plaintiff alleged that, by a constitutional provision of the state relative to taxation by municipalities, defendant could not raise funds to pay its just debts, and that by reason thereof plaintiff could not enforce payment by the levy of taxes, though his contract was entered into prior to the adoption of the constitution, and that such provision impaired the obligations of his contract. *Held* insufficient to confer jurisdiction on the federal circuit court, as involving a question arising under the constitution and laws of the United States, especially as the constitutional provision did not indicate on its face that it was to be applied to antecedent contracts, and the state supreme court had held that it could not be so applied.—*City of Shreveport v. Cole*, 129 U. S. 36, 9 S. Ct. 210, 32 L. Ed. 589; *Currie v. United States*, 129 U. S. 44, 9 S. Ct. 213, 32 L. Ed. 592.

Act La. 1868, No. 74, uniting several municipalities in a police district, and creating therefor a police board, with power to issue warrants and certificates for payment of police expenses, and to make apportionments of such expenses against the municipalities, which were to be binding upon them, respectively, and to be paid by taxes raised by them, and subsequent acts making such warrants and certificates receivable for municipal licenses, taxes, and debts, were repealed by Act Extra Sess. 1877, No. 35, which transferred the police sys-

tem to the municipalities. *Held*, that a suit in equity against the municipalities, brought by a holder of warrants and certificates issued by the board, for the application thereto, as assets of the board, of amounts due to it on apportionments made and taxes levied and collected, was not within the jurisdiction of the United States circuit court, as a case arising under the constitution of the United States, on the ground that the repealing act impaired the obligation of the contract arising on the warrants and certificates, as that act left in force substantially the mode of payment provided, and the bill did not seek to enforce the acceptance of the warrants and certificates for taxes.—*City of New Orleans v. Benjamin*, 153 U. S. 411, 14 S. Ct. 905, 38 L. Ed. 764.

The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it; and this is equally the case whether the grant is made directly by the legislature, or by municipal authorities to whom the right has been delegated by a charter, and the courts of the United States have jurisdiction of a suit to protect such contract rights from impairment by subsequent legislation by either the state or the municipality, as the case may be. Decree, *Walla Walla Water Co. v. City of Walla Walla* (C. C.) 60 F. 957, affirmed.—*City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77, 172 U. S. 1, 43 L. Ed. 341.

Both under Rev. St. Ohio 1880, § 5848, which expressly authorizes suits to enjoin the illegal levy of taxes and assessments, and upon general principles aside from such statute, a federal court in Ohio may entertain a suit to enjoin the enforcement of a special assessment made under a rule or system in violation of the constitution of the United States.—*Village of Norwood v. Baker*, 19 S. Ct. 187, 172 U. S. 269, 43 L. Ed. 443, affirming judgment (C. C.) *Baker v. Village of Norwood*, 74 F. 997.

A suit to enjoin the levy and collection of a special tax for local improvements by a city cannot be entertained by a federal court where the only ground of jurisdiction is a claim that the collection of the tax would be a taking of the complainant's property without due process of law, based solely on the ground that a legislative act extending the boundaries of the city to include the territory in question is void under the state constitution, as the right to the relief sought depends entirely on the validity of the city government,—a question which does not involve, and cannot be affected by, a construction of the federal constitution, but must be determined solely by the laws of the state. Decree (C. C.) 84 F. 726, affirmed.—*McCain v. City of Des Moines*, 19 S. Ct. 644, 174 U. S. 168, 43 L. Ed. 936.

The rights for the deprivation of which suits may be brought in a circuit court of the United States under Rev. St. U. S. § 629, cl. 16, for the protection of rights secured by the constitution of the United States or by any law providing for equal rights of citizens, include civil rights only, as the provisions of that section were brought forward from the act of congress of April 20, 1871, to enforce the provisions of the fourteenth amendment. Decree 80 F. 1, 25 C. C. A. 301, affirmed.—*Holt v. Indiana Mfg. Co.*, 20 S. Ct. 272, 176 U. S. 68, 44 L. Ed. 374.

Regulations respecting the pursuit of a lawful trade or business, being an exercise of the police power, are within the authority of the state, and form no subject for federal interference, unless they are so utterly unreason-

able and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law. Judgment 52 N. E. 44, 176 Ill. 340, 48 L. R. A. 230, affirmed. —*Gundling v. City of Chicago*, 20 S. Ct. 633, 177 U. S. 183, 44 L. Ed. 725.

A federal question is presented by a bill which alleges contract exemptions of a railroad company from taxation, existing and recognized for many years, which the state statutes are now attempting to impair and destroy. —*Illinois Cent. R. Co. v. Adams*, 21 S. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

A case arises under the constitution of the United States, of which the circuit court has original jurisdiction without diversity of citizenship, where the plaintiff's right of recovery depends upon the unconstitutionality of an act of congress. —*Patton v. Brady*, 22 S. Ct. 493, 184 U. S. 608, 46 L. Ed. 713.

A complaint in ejectment against private individuals, which alleges that plaintiff was ousted in violation of Const. U. S. Amend. art. 5, and of the provision of the treaty with France of October 21, 1803, for the protection of the inhabitants of the territory ceded in the enjoyment of their property, does not show a cause arising under the constitution or a treaty of the United States, of which the circuit court of the United States has jurisdiction, where no right, title, privilege, or immunity is asserted as derived from the constitution or treaty, as against the defendants, and it is not charged that they took possession by direction by the United States government. —*Filhiol v. Maurice*, 22 S. Ct. 560, 185 U. S. 108, 46 L. Ed. 827.

A case presented by a bill in equity which alleges that a contract right of a waterworks company with whose predecessors a municipality, with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on any contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract, is one so arising under the laws and constitution of the United States as to give a circuit court of the United States jurisdiction. —*Vicksburg Waterworks Co. v. City of Vicksburg*, 22 S. Ct. 585, 185 U. S. 65, 46 L. Ed. 808.

An action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the house of representatives, at a national election held in the district where he resided, is one arising under the constitution of the United States, of which a circuit court of the United States has jurisdiction. —*Swafford v. Templeton*, 22 S. Ct. 783, 185 U. S. 487, 46 L. Ed. 1005, reversing judgment (C. C.) 108 F. 309.

A federal court is not vested with jurisdiction of a suit in equity to enjoin the collection of a state tax, because the case is one arising under the Constitution and laws of the United States, within the meaning of Judiciary Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], unless there is apparent some ground of equitable jurisdiction recognized by the federal courts. —*Indiana Mfg. Co. v. Koehne*, 23 S. Ct. 452, 188 U. S. 681, 47 L. Ed. 651.

The averment that if a temporary injunction granted by an inferior state court, restraining the future payment of rentals accruing under the alleged contract of a municipality with a water company because of the invalidity of the contract, should ultimately be made per-

petual, such company would thereby be deprived of its property without due process of law, does not justify a federal Circuit Court in assuming jurisdiction of a suit by the water company to restrain the municipality from attempting to annul the rental contract, as being a case arising under the federal Constitution or laws. —*Defiance Water Co. v. City of Defiance*, 24 S. Ct. 63, 191 U. S. 184, 48 L. Ed. 140.

The assertion, in a bill filed by a water company against a municipality and its common council, that the obligation of the municipality's rental contract with the company was impaired by an ordinance which, while denying the validity of the contract, allowed a claim for rentals, with a saving clause to prevent estoppel, is too clearly unfounded to present a case arising under the Constitution or laws of the United States, of which a federal Circuit Court has jurisdiction without regard to the diversity of citizenship. —*Id.*

The assertion in a suit to enjoin municipal construction of an underground railway that complainants had a prior exclusive right to the use of the city streets for that purpose does not bring the cause within the jurisdiction of a federal Circuit Court as really and substantially involving a dispute or controversy respecting the federal Constitution, where such contention is based upon the effect claimed for the filing of a map and profile of the proposed route and for the payment of an incorporation tax, and involves the unfounded assumption that the determination by the rapid transit board created by Laws N. Y. 1891, c. 4, to construct an underground railway, together with the consents of the municipal authorities and abutting owners to the municipal construction of such road, was the equivalent of the requisite consents to the construction of complainants' proposed road which had never been obtained. Decree (C. C.) 116 F. 952, affirmed. —*Underground R. R. of City of New York v. City of New York*, 24 S. Ct. 494, 193 U. S. 416, 48 L. Ed. 733.

The averment in a bill to enjoin the construction of a rapid transit railroad tunnel under a city street that, by such construction, complainant, as an abutting owner, is deprived of his property without due process of law, does not bring the case within the jurisdiction of a federal Circuit Court, where the bill, on its face, proceeds on the theory that the action sought to be enjoined was not only unauthorized, but was forbidden by state legislation. —*Barney v. City of New York*, 24 S. Ct. 502, 193 U. S. 430, 48 L. Ed. 737; *Huntington v. Same*, 24 S. Ct. 505, 193 U. S. 441, 48 L. Ed. 741, affirming decree (C. C.) 118 F. 683.

The averment in a bill that the property of a water company was taken without due process of law by Laws Mass. 1894, p. 550, c. 474, enabling it to sell its property to a municipality to defeat municipal construction of a water supply system, because such statute was construed by the highest state court as not entitling the company to compensation for its franchise and other incorporeal rights, and the averment that the obligation of the company's contract with the city to furnish water for fire protection was impaired by the failure to value future profits arising from such contract, are so devoid of merit, where the water company's charter was not exclusive, and was subject to repeal, alteration, and amendment, as to be insufficient to sustain the jurisdiction of a Circuit Court of the United States on the theory that the case arose under the federal Constitution within the meaning of Act August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. Decree (C. C.) 113 F. 677, reversed. —*Newburyport Water Co. v. City of Newburyport*, 24 S. Ct. 553, 193 U. S. 561, 48 L. Ed. 795; *Gloucester Water Supply Co. v. City of Gloucester*, 24 S. Ct. 557, 193 U. S. 580, 48 L. Ed. 801.

A substantial controversy respecting rights under the federal Constitution, presented by the averments of the bill, is sufficient to support the jurisdiction of a federal Circuit Court, irrespective of the actual sufficiency of the facts alleged to justify the relief sought, or of the facts as they may subsequently turn out. *Decree, Pacific Electric Co. v. City of Los Angeles* (C. C.) 118 F. 746, affirmed.—*Pacific Electric Ry. Co. v. City of Los Angeles*, 24 S. Ct. 586, 194 U. S. 112, 48 L. Ed. 896.

An allegation in a complaint that full faith and credit will not be given to the public acts of Minnesota if a New Jersey corporation organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business in Minnesota is allowed to carry out the object of its incorporation does not present a cause arising under the federal Constitution, of which a Circuit Court of the United States can take jurisdiction. *Decree* (C. C.) 123 F. 692, reversed.—*State of Minnesota v. Northern Securities Co.*, 24 S. Ct. 598, 194 U. S. 48, 48 L. Ed. 870.

Jurisdiction of a federal Circuit Court, of a suit to enjoin the enforcement of a municipal ordinance reducing street railway rates cannot be defeated on the theory that a lack of delegated power to adopt the ordinance withdrew from the case any question as to the impairment of contract obligations, where the municipality's defense is that certain other ordinances asserted as contracts did not deprive it of its continued power to exert authority over such rates, because the state law prevented it from abrogating, by subsequent contracts, the right of regulation expressly reserved in a prior ordinance. *Decree, Cleveland City Ry. Co. v. City of Cleveland* (C. C.) 94 F. 385, affirmed.—*City of Cleveland v. Cleveland City Ry. Co.*, 24 S. Ct. 756, 194 U. S. 517, 48 L. Ed. 1102; *Same v. Cleveland Electric Ry. Co.*, 24 S. Ct. 764, 194 U. S. 538, 48 L. Ed. 1109.

An objection that no question as to the impairment of contract obligations could arise from the enforcement of a municipal ordinance reducing street railway rates, because the right to regulate such rates was expressly reserved in a prior ordinance, cannot be successfully urged to defeat the jurisdiction of a federal Circuit Court of a suit to enjoin such enforcement, where complainant relies wholly upon contracts alleged to have resulted from subsequent ordinances which, it was in substance asserted, had deprived the municipality of the power to exercise such reserved right.—*Id.*

A federal court cannot enjoin the collection of a franchise tax assessed under the authority of a state because of inequality in valuation as compared with other taxable property, nor can it order the State Treasurer to issue a receipt in full to the complainant, which has paid so much of the tax as it thinks was justly due. *Decree* (C. C.) *Louisville & N. R. Co. v. Coulter*, 131 F. 282, reversed.—*Coulter v. Louisville & N. R. Co.*, 25 S. Ct. 342, 196 U. S. 599, 49 L. Ed. 615.

Inequality in valuation for taxation of a franchise, as compared with other taxable property, must be systematic and intentional in order to justify a federal court in enjoining the apportionment and certification of the tax to the several counties, where the assessment does not appear to have been made on such a different scale of values from that adopted elsewhere as to deny the equal protection of the laws guaranteed by Const. U. S. Amend. 14, which was the only ground invoked to sustain the federal jurisdiction.—*Id.*

The formal repudiation by a municipality of its contract with a waterworks company, and its refusal to perform its obligations under it, cannot give rise to a suit under the federal Con-

stitution, of which a federal circuit court can take jurisdiction without reference to the citizenship of the parties.—*City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co.*, 25 S. Ct. 420, 197 U. S. 178, 49 L. Ed. 713.

The contention that a state court, in admitting a nuncupative will to probate without giving the statutory notice to the next of kin, violated the due process of law clause of Const. U. S. Amend. 14, is too lacking in merit to afford a basis for the jurisdiction of a federal Circuit Court of a suit to set aside the probate, even assuming that such notice is essential to the preliminary probate, where the bill proceeds on the theory, which finds support in the law of the state, that, despite the mere preliminary admission to probate, there remained a right to assail the existence of the will and its probate, which was not lost by the failure to give notice.—*O'Callaghan v. O'Brien*, 25 S. Ct. 727, 199 U. S. 89, 50 L. Ed. 101, affirming judgment *Carrau v. O'Calligan*, 125 F. 657, 60 C. C. A. 347, which reversed judgment (C. C.) *O'Callaghan v. O'Brien*, 116 F. 934.

The assertion that, because real estate cannot be devised by a nuncupative will, the attempt of a probate court to exert authority over property of that character by admitting such a will to probate deprived the heirs of such property without due process of law, cannot give a federal Circuit Court jurisdiction to pass upon the construction and effect of such will, where this question is wholly subordinate to the determination of another question of which that court had no jurisdiction, such as the nonexistence of the will and the consequent invalidity of its probate.—*Id.*

A case, arising under the Constitution of the United States, of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties, is made by a bill filed by a water company to restrain the municipal construction of a waterworks system on the ground that it had a contract with the municipality giving it exclusive privileges, the obligations of which, it insists, would be impaired by the establishment of municipal waterworks under the authority of subsequent legislation.—*Knoxville Water Co. v. City of Knoxville*, 26 S. Ct. 224, 200 U. S. 22, 50 L. Ed. 353.

A suit to enjoin the diversion or intended diversion by a municipality of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, but which were not applied to that object, on the theory that such failure of duty on the part of the municipality may ultimately cause increased taxation, and thereby deprive the taxpayers of their property without the due process of law, guaranteed by Const. U. S. Amend. 14, if the full amount originally intended to be applied to the particular object named by the Legislature is to be collected, is not one arising under the Constitution of the United States, of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties.—*Owensboro Waterworks Co. v. City of Owensboro*, 26 S. Ct. 249, 200 U. S. 38, 50 L. Ed. 361.

Averments that patentees from the United States, whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under Act March 3, 1851, c. 41, § 9 Stat. 631, were deprived of their property without due process of law, and allegations that their contract obligations were impaired, by certain enumerated California statutes and charters of the city of Los Angeles, which conferred upon the city only such rights in respect to the waters of a river as may have been vested in the state,

afford no proper basis for the jurisdiction of the federal Circuit Court, as of a case arising under the federal Constitution.—*Devine v. City of Los Angeles*, 26 S. Ct. 652, 202 U. S. 313, 50 L. Ed. 1046.

A controversy arising under the federal Constitution, of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties, is presented by a bill which asserts that the obligation of a contract for the exclusive privilege of supplying water to a city and its inhabitants is impaired by a subsequent municipal ordinance and a legislative enactment under which the municipality is proceeding to issue and market its bonds for the purpose of constructing its own water-works system.—*Mercantile Trust & Deposit Co. v. City of Columbus*, 27 S. Ct. 83, 203 U. S. 311, 51 L. Ed. 198.

The claim that the action of a state board of equalization in making an assessment for a tax pursuant to the command of a writ of mandamus was the action of the state, and, if carried out, would violate Const. U. S. Amend. 14, by taking property without due process of law, and denying the equal protection of the laws, constitutes a federal question within the original jurisdiction of a federal Circuit Court. Judgment, *Chicago Union Traction Co. v. State Board of Equalization* (C. C. 1902) 114 F. 557, affirmed.—*Raymond v. Chicago Union Traction Co.*, 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; *Same v. Chicago Edison Co.*, 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

No federal question respecting due process of law or full faith and credit which will sustain a writ of error from the federal Supreme Court to the highest court of a state is involved in a suit in which the state court, after reversing a judgment for defendant on the ground that a judgment of a federal Circuit Court, set up as res judicata in a special replication to two of four pleas in set-off, is binding, decided on rehearing that, conceding the judgment of the federal court to be binding as to the two pleas to which the replication of res judicata applies, judgment for defendant can be upheld upon the other two pleas referring to earlier stages of the same transaction; nor does it matter that the federal Supreme Court may think the state court wrong in believing that there is evidence to support these pleas.—*Leathe v. Thomas*, 28 S. Ct. 30, 207 U. S. 93, 52 L. Ed. 118.

A case arising under the federal Constitution, of which a federal Circuit Court has jurisdiction without diversity of citizenship, is presented by a bill which alleges a contract exemption from taxation which the state is, by subsequent legislation, attempting to destroy.—*Jetton v. University of the South*, 28 S. Ct. 375, 208 U. S. 489, 52 L. Ed. 584, reversing decree (C. C. 1907) *University of the South v. Jetton*, 155 F. 182.

Whether or not the enforcement of a state statute providing for the establishment of rates for railroad transportation will take property of the railroad companies without due process of law raises a federal question within the jurisdiction of a circuit court of the United States, if the requisite amount is involved, although its determination may incidentally involve a question of fact.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

Whether or not a railroad company is deprived of the equal protection of the laws, and its property rendered liable to be taken without due process of law, by a state statute providing for the establishment of rates of transportation, because the penalties fixed for violation of the statute are so enormous as to require obedience to the law rather than risk the penalties in testing it, although such obedience might, in the end, result in confiscation of the

railroad property, is a federal question, within the jurisdiction of the Circuit Court of the United States.—Id.

The Circuit Court of the United States has jurisdiction at the suit of stockholders of a railroad company to enjoin the company from putting in force transportation rates established by a state statute, which are so low as to be confiscatory of the company's property, and, as preliminary thereto, to institute an inquiry as to whether or not the rates are in fact too low.—Id.

Allegations in a bill to enjoin the enforcement, as in violation of Const. U. S. Amend. 14, of an order of a State Railroad Commission, that such commission was not vested with power to make that order, do not defeat the jurisdiction of a federal Circuit Court because, in such case, the action of the commission is not that of the state, where the bill sets up several entirely separate federal questions, some of which are directed to the invalidity, on various constitutional grounds, of the state statute under the supposed authority of which the order was made, and some of which are founded upon the terms of the order.—*Siler v. Louisville & N. R. Co.*, 29 S. Ct. 451, 213 U. S. 175, 53 L. Ed. 753; *Same v. Illinois Cent. R. Co.*, 29 S. Ct. 458, 213 U. S. 199, 53 L. Ed. 760; *Same v. Southern Ry. Co. in Kentucky, Id.*; *Same v. Cincinnati, N. O. & T. P. Ry. Co., Id.*

The jurisdiction of a federal Circuit Court of a suit by a street railway company to enjoin the enforcement of a municipal ordinance as impairing contract rights cannot be sustained where such ordinance, after reciting that questions as to the company's rights have been raised, orders it to remove its tracks, and directs the city solicitor to take action to enforce the city's position, since such direction must contemplate enforcement by suit, and not the forcible removal of the tracks. Decree (C. C. 1907) *Des Moines City Ry. Co. v. City of Des Moines*, 151 F. 854, reversed.—*City of Des Moines v. Des Moines City Ry. Co.*, 29 S. Ct. 553, 214 U. S. 179, 53 L. Ed. 958.

A suit to enjoin the officers of a municipality from violating its contract to take over the laterals of a drainage company, to be paid for by tax warrants, can present no real or substantial federal question respecting the impairment of contract obligations or taking of property without due process of law which will sustain the original jurisdiction of a federal Circuit Court, without regard to the citizenship of the parties.—*Shawnee Sewerage & Drainage Co. v. Stearns*, 31 S. Ct. 452, 220 U. S. 462, 55 L. Ed. 544.

Errors committed by state court when passing on effect of contract under laws in existence when it was made cannot give rise to a question of impairment of contracts, reviewable in federal Supreme Court by writ of error, where no effect has been given to any subsequent legislation.—(1912) *Cross Lake Shooting & Fishing Club v. State of Louisiana*, 32 S. Ct. 577, 224 U. S. 632, 56 L. Ed. 924, dismissing writ of error (1909) *State v. Cross Lake Shooting & Fishing Club*, 48 So. 891, 123 La. 208.

Decree of state court avoiding a conveyance by commissioners of the Caddo levee district under supposed authority of Act La. No. 74 of 1892, § 9, on the ground that the board had no authority to sell until a deed conveying the land to the board had been executed by proper state officers, does not give effect to Act No. 171 of 1902, repealing the earlier act, so as to present a question of impairment of contracts.—Id.

A federal District Court may not decline jurisdiction of a suit to enjoin enforcement of municipal ordinance as violating the due process clause of Const. U. S. amend. 14, because it was also in conflict with a similar provision of the state Constitution until the court of last

resort of the state had adjudged to the contrary.—*Home Telephone & Telegraph Co. v. City of Los Angeles*, 33 S. Ct. 312, 227 U. S. 278, 57 L. Ed. 510.

Groundlessness of claim that Laws N. Y. 1895, c. 985, empowering a water company to acquire land and water as permitted by General Railroad Act (Laws 1850, c. 140), gave, without notice, a vested right, requires dismissal for lack of jurisdiction of a suit to enjoin municipal interference with such alleged right.—*Ramapo Water Co. v. City of New York*, 35 S. Ct. 442, 236 U. S. 579, 59 L. Ed. 731.

Bill to establish a trust in land, brought against trustees of the Internal Improvement fund of Florida, alleging that their action is a taking of complainant's property without due process of law within Const. Amend. 14, will not confer jurisdiction on a federal court where the allegations show a breach of contract.—*Manila Inv. Co. v. Trammell*, 36 S. Ct. 12, 239 U. S. 31, 60 L. Ed. 129.

The federal District Court has jurisdiction without diversity of citizenship of a bill to prevent a municipality from appropriating complainant's water rights without compensation, the bill alleging that the city is insolvent and that its act will violate the contract and due process clauses of the federal Constitution.—*Cuyahoga-River Power Co. v. City of Akron*, 36 S. Ct. 402, 240 U. S. 462, 60 L. Ed. 743, reversing decree (D. C.) 210 F. 524.

②—283. Cases arising under laws of United States.

See 13 Cent. Dig. Courts, §§ 820-839.

②—284. — In general.

See 13 Cent. Dig. Courts, §§ 820-826, 831.

A decision by the court of appeals that the acts of congress establishing a system of water supply in the District, and regulating the method of assessment, are constitutional, and that an assessment thereunder without notice to a property holder was valid, involves the validity of statutes of the United States.—*Parsons v. District of Columbia*, 18 S. Ct. 521, 170 U. S. 45, 42 L. Ed. 943.

A suit by the United States to determine the question of fraud in obtaining an award against Mexico, brought under authority of the act of congress of December 28, 1892, is a "case," within the meaning of Const. U. S. art. 3, § 2, extending the judicial power of the United States to cases in law and equity arising under that instrument, the laws of the United States, or treaties, since the proceeding involves a right which in its nature is susceptible of judicial determination; and the statute makes the decision of the court of claims a final and indisputable basis of action by the parties, and not simply an ancillary or advisory decision. Decree, 32 Ct. Cl. 462, affirmed.—*La Abra Silver Min. Co. v. United States*, 20 S. Ct. 168, 175 U. S. 423, 44 L. Ed. 223.

A bill does not show that the suit arises under the constitution and laws of the United States by an averment, in a suit by a telegraph company for specific performance of a contract for the use of a railroad right of way and for an injunction against interference with its rights, to the effect that it has a right to maintain its telegraph line on the railroad "under the provisions of the statute of the United States," as it has long been settled that the statute does not confer on telegraph companies the right to enter on private property without the consent of the owner. Decree 90 F. 379, 33 C. C. A. 113, reversed.—*Western Union Tel. Co. v. Ann Arbor R. Co.*, 20 S. Ct. 867, 178 U. S. 239, 44 L. Ed. 1052.

The question whether a right of selection recognized as between mortgagor and mortga-

gee is also applicable as between a purchaser upon execution and the mortgagee is not a federal question, even when a purchase has been made under an execution from a federal court, if no discrimination be made against executions from those courts.—*Avery v. Popper*, 21 S. Ct. 94, 179 U. S. 305, 45 L. Ed. 203, dismissing writ of error 49 S. W. 219, 50 S. W. 122, 92 Tex. 337, 71 Am. St. Rep. 849.

A suit on the bond of a clerk of a court of the United States, which depends upon the scope and effect of the bond and the meaning of the statutes in conformity with which it was given, is a suit arising under the laws of the United States, of which a circuit court has original jurisdiction without diversity of citizenship. Judgment 102 F. 77, 42 C. C. A. 169, affirmed.—*Howard v. United States*, 22 S. Ct. 543, 184 U. S. 676, 46 L. Ed. 754.

The claim that grazing cattle owned by a Jesuit society are exempt from state taxation, based either upon the theory that, because the income of the society was devoted to the charitable work of improving and educating the Indians on the Flathead reservation, in Montana, the entire beneficial use or ownership of the property taxed was in tribal Indians, or upon the ground that the federal government, by permitting and approving the work of the society, and by aiding it from time to time by making appropriations in its behalf had constituted it one of the agencies to carry out its obligation to the Indians, is too clearly lacking in merit to confer jurisdiction on a federal Circuit Court.—*Montana Catholic Missions v. Missoula County*, 26 S. Ct. 197, 200 U. S. 118, 50 L. Ed. 398.

A case arising under the laws of the United States, of which a federal Circuit Court has jurisdiction without reference to diversity of citizenship, is presented by a bill filed by the holder of a nonnegotiable note, given by a national bank which afterwards went into voluntary liquidation, to exact in behalf of himself and all other creditors of the bank the stockholder's liability imposed by Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], which, under Act of June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509], may be enforced by a bill in the nature of a creditors' bill whenever the bank has availed itself of the provisions of Rev. St. U. S. § 5220 [U. S. Comp. St. 1901, p. 3503], for voluntary liquidation. Decree, *George v. Wallace*, 135 F. 286, 68 C. C. A. 40, affirmed.—*Wyman v. Wallace*, 26 S. Ct. 495, 201 U. S. 230, 50 L. Ed. 738; *Frenzer v. Same*, 26 S. Ct. 498, 201 U. S. 244, 50 L. Ed. 742; *Poppleton v. Same*, 26 S. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

Allegations in a bill to quiet title, framed under Code Civ. Proc. Cal. § 738, that defendant's adverse claims are based upon an erroneous construction of Treaty of Guadalupe Hidalgo (9 Stat. 922), and Act Cong. March 3, 1851, c. 41, 9 Stat. 631, and upon certain enumerated acts of the California Legislature, and ordinances and charters of the city of Los Angeles, adopted and approved in pursuance of such construction, do not present a case arising under the federal Constitution, laws, or treaties, of which a federal Circuit Court has jurisdiction without diversity of citizenship.—*Devine v. City of Los Angeles*, 26 S. Ct. 652, 202 U. S. 313, 50 L. Ed. 1046.

A case arising under the federal Constitution and laws, of which a federal Circuit Court has jurisdiction without diversity of citizenship, is not presented by a bill which asserts the invalidity, under the federal Constitution, of certain statutes and ordinances alleged to constitute a cloud on title, which the bill seeks to remove.—*Id.*

State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, by the provision of Act Aug. 15, 1894, c. 290, 28 Stat. 286, delegating to the federal Circuit Courts the power to determine such questions, since the purpose of that act to continue the exclusive federal control over disputes concerning allotments which, prior to that act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of Act Feb. 6, 1901, c. 217, 31 Stat. 760, that in such suits "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Judgment, *Kalyton v. Kalyton* (1903) 74 P. 491, 45 Or. 116, reversed.—*McKay v. Kalyton*, 27 S. Ct. 346, 204 U. S. 458, 51 L. Ed. 566.

Suit on supersedeas bond given under Rev. St. §§ 1000, 1007 (Comp. St. 1913, §§ 1660, 1666), to supersede judgment in action for breach of contract pending writ of error, arises out of the laws of the United States within Judicial Code, § 24, so as to give District Court jurisdiction.—*American Surety Co. of New York v. Schultz*, 35 S. Ct. 525, 237 U. S. 159, 59 L. Ed. 892.

285. — Laws relating to public lands in general.

See 13 Cent. Dig. Courts, §§ 827, 828.

Act Cong. July 4, 1884, granting to the Southern Kansas Railway Company a right of way through the Indian Territory, and providing (section 8) that the federal circuit and district courts for the Northern district of Texas, Western district of Arkansas, and district of Kansas shall have jurisdiction, without reference to amount, over "all controversies" arising between said company and the nations or tribes and their inhabitants through whose territory the railway shall be constructed, confers jurisdiction of a suit by an inhabitant of the Chickasaw Nation to recover for the wrongful killing of stock by the company's trains.—*Southern Kansas Ry. Co. v. Briscoe*, 144 U. S. 133, 12 S. Ct. 538, 36 L. Ed. 377, affirming (C. C.) judgment *Briscoe v. Southern Kansas Ry. Co.*, 40 F. 273.

Act Cong. July 4, 1884, grants to the Southern Kansas Railway Company a right of way through the Indian Territory. Held that, as the company derives from the act all its rights in relation to the construction and operation of its road in the territory, a controversy growing out of the exercise of those rights is necessarily a controversy arising under the laws of the United States, and congress, therefore, had constitutional power to give jurisdiction thereof to the federal circuit and district courts for the Northern district of Texas, Western district of Arkansas, and district of Kansas.—*Id.*

The declaration in the latter part of section 8 that the civil jurisdiction of said courts is hereby extended within the limits of said territory, without distinction as to citizenship of the parties, "so far as may be necessary to carry out the provisions of this act," does not restrict the words "all controversies" to controversies growing out of the construction of the road, since it was the purpose of the act to regulate not only its construction, but its operation as well.—*Id.*

In an action brought against the company under the act by a person as an inhabitant of the Chickasaw Nation, the fact that he was such inhabitant was not specifically denied, but there was a general denial of liability. Defendant requested an instruction that he was not such inhabitant, which was refused, as there was evidence tending to show that he was.

Held, that this left the question for the jury, and by returning a verdict for him they determined it in his favor, and this determination was binding upon the supreme court.—*Id.*

A suit over the ownership of real property, in which plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Railroad land grant act of July 2, 1864 (13 Stat. 365, c. 217), is one arising under the laws of the United States, of which a circuit court has jurisdiction, wholly independent of citizenship. Decree, 104 F. 425, 43 C. C. A. 620, affirmed.—*Northern Pac. Ry. Co. v. Soderberg*, 23 S. Ct. 365, 188 U. S. 526, 47 L. Ed. 575.

The petition in an action of ejectment does not present a case arising under the laws of the United States of which a federal Circuit Court has jurisdiction without diversity of citizenship because it states that there is a dispute between the parties over the construction of the patent from the United States and several acts of Congress set out as the source of plaintiff's title, where its averments show that the real controversy is over the claim of plaintiff that he is entitled to the land formed by accretion, since the patent was issued, and after the statutes were passed.—*Joy v. City of St. Louis*, 26 S. Ct. 478, 201 U. S. 332, 50 L. Ed. 776, affirming order (C. C.) 122 F. 524.

A suit involving rights to land acquired under law of the United States does not arise under that law for jurisdictional purposes unless it involves a dispute as to the validity or effect of such law.—*Shulthis v. McDougal*, 32 S. Ct. 704, 225 U. S. 561, 56 L. Ed. 1205.

286. — Laws relating to mines and mining rights.

See 13 Cent. Dig. Courts, § 829.

A suit brought in support of a protest and adverse claim under Rev. St. U. S. §§ 2325, 2326, is not a suit arising under the laws of the United States, in such a sense as to confer jurisdiction on a federal court regardless of the citizenship of the parties, where no question is made as to the meaning and construction of the statutes of the United States.—*Blackburn v. Portland Gold-Min. Co.*, 20 S. Ct. 222, 175 U. S. 571, 44 L. Ed. 276.

A suit brought in support of an adverse claim to a mine under Rev. St. U. S. §§ 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal court without regard to the citizenship of the parties, unless it involves the determination of a question as to the construction or effect of the mining laws. Judgment 87 F. 801, 31 C. C. A. 223, reversed.—*Shoshone Min. Co. v. Rutter*, 20 S. Ct. 726, 177 U. S. 505, 44 L. Ed. 864.

287. — Laws relating to water courses and water rights.

See 13 Cent. Dig. Courts, § 830.

The questions of priority of possession of a water right, and of conformity to local customs, laws, and decisions, do not constitute federal questions, under Rev. St. U. S. § 2339, which will give jurisdiction to a federal court, but are merely preliminary to or the possible basis of a federal question.—*Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co.*, 20 S. Ct. 245, 175 U. S. 639, 44 L. Ed. 305, dismissing appeal 51 P. 146, 16 Utah, 125.

The nature and extent of the riparian rights and the rights in percolating waters of certain patentees from the United States whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under Act March 3, 1851, c. 41, 9 Stat. 631, are not federal questions which will sustain the jurisdiction of a

federal Circuit Court, but are questions of state or general law.—*Devine v. City of Los Angeles*, 26 S. Ct. 632, 202 U. S. 313, 50 L. Ed. 1046.

◀288. — **Laws relating to navigable waters.**

See 13 Cent. Dig. Courts, § 830.

The question as to the rights of a state over marsh and tide lands on the borders of the sea or its estuaries is one of local law, to be determined by the supreme court of the state.—*Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, affirming judgment *Bowlby v. Shively*, 22 Or. 410, 30 P. 154.

The conformity of a log boom to the provisions of a state statute, so as to exempt it from prohibition under section 10 of the river and harbor act of 1890, is not a question for the state courts alone, but must be decided by a federal court, when suit is brought for an injunction against the boom as an obstruction to navigation prohibited by the federal law. Decree 81 F. 658, 26 C. C. A. 547, reversed.—*United States v. Bellingham Bay Boom Co.*, 20 S. Ct. 343, 176 U. S. 211, 44 L. Ed. 437.

A suit which involves the question of the right to construct a dock in a navigable river under certain acts of Congress and a permit from the Secretary of War, which are alleged to be in execution of the power of Congress, under the Constitution, over the navigable waters of the United States, is one arising under the Constitution and laws of the United States; of which, under Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], a circuit court of the United States has jurisdiction without diversity of citizenship.—*Cummings v. City of Chicago*, 23 S. Ct. 472, 188 U. S. 410, 47 L. Ed. 525; *Calumet Grain & Elevator Co. v. Same*, 23 S. Ct. 477, 188 U. S. 431, 47 L. Ed. 532.

The contention that rights below the high-water mark of navigable nontidal waters can be asserted by the patentees from the United States as appurtenant to the uplands conveyed to them, as against the title of the state when subsequently admitted into the Union is too clearly unfounded, in view of the prior decisions of the federal Supreme Court, to raise a federal question. Decree (1908) 164 F. 604, 90 C. C. A. 398, reversed.—*McGillvra v. Ross*, 30 S. Ct. 27, 215 U. S. 70, 54 L. Ed. 95.

◀289. — **Laws relating to commerce.**

See 13 Cent. Dig. Courts, § 830.

A bill by one railroad company against another and its employés to enforce the interstate commerce act by enjoining defendants from refusing to receive plaintiff's cars presents a case arising under the constitution and laws of the United States.—*Ex parte Lennon*, 17 S. Ct. 658, 166 U. S. 548, 41 L. Ed. 1110, affirming judgment 64 F. 320, 12 C. C. A. 134; *Ex parte Lennon* (1893) 14 S. Ct. 123, 150 U. S. 393, 37 L. Ed. 1120, dismissing appeal (C. C.) *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 F. 746.

Jurisdiction, in a federal circuit court, of an original proceeding by mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the act to regulate commerce to require, cannot be inferred from the grant of authority to the commission to enforce that act, or from the direction to district attorneys of the United States or the Attorney General to institute all necessary proceedings for the enforcement of its provisions.—*United States v. Lake Shore & M. S. Ry. Co.*, 25 S. Ct. 538, 197 U. S. 536, 49 L. Ed. 870.

◀290. — **Patent laws.**

See 13 Cent. Dig. Courts, § 832.

An action against a patentee for specific performance of a contract to permit the plaintiff to make and use the patented article, and for an injunction restraining defendant from interfering with such use, does not involve a federal question, and is consequently not within the jurisdiction of the United States courts.—*Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 11 S. Ct. 798, 35 L. Ed. 413, affirming judgment 61 Mich. 509, 28 N. W. 699.

While the federal courts have no jurisdiction, under the patent laws, of litigation in respect to patents, when it appears that the rights of the parties are governed by contract, yet where a bill for infringement is in the usual form, and asks the usual relief, without any suggestion as to the existence of any contract relation between the parties, the mere fact that the answer sets up an alleged contract for an assignment of an interest in the patent, and that a copy thereof, together with other papers, is embodied in a "stipulation of submission and agreed facts," under a provision that it may be offered in evidence subject to any objections that might be urged against the original, will not warrant a federal court in dismissing the cause for want of jurisdiction, without any finding as to the existence or validity of the alleged contract.—*White v. Rankin*, 144 U. S. 628, 12 S. Ct. 768, 36 L. Ed. 569, distinguishing *Wilson v. Sandford*, 51 U. S. (10 How.) 99, 13 L. Ed. 344.

A suit to rescind the contract for the exchange of a stock of goods for an invention and letters patent applied for (which were subsequently issued), on the ground of fraudulent representations as to the utility and value of the invention, is a suit arising upon or out of a contract, and does not raise any federal question.—*Wade v. Lawder*, 17 S. Ct. 425, 165 U. S. 624, 41 L. Ed. 851.

A suit to enjoin state taxes as illegal, because levied in effect on patents or patent rights, is not one "arising under the patent laws," of which the circuit court of the United States can take jurisdiction under Rev. St. U. S. § 629, cl. 9. Decree 80 F. 1, 25 C. C. A. 301, affirmed.—*Holt v. Indiana Mfg. Co.*, 20 S. Ct. 272, 176 U. S. 68, 44 L. Ed. 374.

A suit by a licensee against his patentee and a third person, in which the bill sets up title under the license and alleges the validity of the patent and infringement, is a case arising under the patent laws, of which, under Rev. St. U. S. § 629, subsec. 9 [U. S. Comp. St. 1901, p. 504], the circuit court has original jurisdiction, and not a suit on a contract, although the answer raises no issue as to the validity of the patent or as to the infringement, and admits the license, but denies that it is a subsisting one, and pleads abandonment, forfeiture, and revocation. Decree 109 F. 497, 48 C. C. A. 349, reversed.—*Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 22 S. Ct. 681, 185 U. S. 282, 46 L. Ed. 910.

A suit by the owner of a patent to make the directors of a corporation answerable for a judgment previously recovered against it for infringing the patent is not within the original jurisdiction of a federal Circuit Court unless there is diversity of citizenship, since the suit is neither one upon the patent nor one ancillary to the judgment in the former suit.—*H. C. Cook Co. v. Beecher*, 30 S. Ct. 601, 217 U. S. 497, 54 L. Ed. 855, affirming judgment (C. C. 1909) 172 F. 166.

Agreement for purchase of rotary mimeograph subject to a license restriction held not collateral, so that its validity would be depend-

ent on general law, of which a federal court will have no jurisdiction.—*Henry v. A. B. Dick Co.*, 32 S. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

Supreme Court of United States will not refrain from ruling that a patentee may sell patented articles subject to restrictions as to their use and predicate infringement on a different use on the ground that the ruling might draw to the federal court cases otherwise not within that jurisdiction.—*Id.*

Action by patentee of rotary mimeograph sold under a license restriction against one selling ink to the purchaser to be used in connection with such mimeograph held one arising under patent laws of which the federal court has jurisdiction.—*Id.*

Whether a patentee selling a rotary mimeograph under a license restriction reserves to himself, as patentee, the exclusive right to all permitted uses of his invention, is a question of which a federal court has jurisdiction.—*Id.*

A case arises under the federal patent laws and the federal courts have jurisdiction irrespective of diversity of citizenship, though the bill can be construed to confine the claim of infringements to alleged sales of the patented devices in violation of a price restriction imposed on second purchasers.—*The Fair v. Kohler Die & Specialty Co.*, 33 S. Ct. 410, 228 U. S. 22, 57 L. Ed. 716.

Where the bill alleges infringement of patents and prays for an injunction and an accounting, it is one arising under the patent laws, of which the federal courts have original jurisdiction, without regard to citizenship.—*Healy v. Sea Gull Specialty Co.*, 35 S. Ct. 658, 237 U. S. 479, 59 L. Ed. 1056.

So much of a bill as charges defendants with inducing patent licensees from plaintiff to sell devices embodying the patents in a manner not permitted by their licenses and praying for an injunction presents a case arising under the patent laws of which a federal court has jurisdiction under Judicial Code, §§ 24, 48, and 256.—*Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 35 S. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

A suit does not arise under the patent laws of the United States, where it is brought to enforce payment of royalties under a contract and to annul a patent for an improvement issued after the contract and assigned to defendant.—*Briggs v. United Shoe Machinery Co.*, 36 S. Ct. 6, 239 U. S. 48, 60 L. Ed. 138.

Suit by owner, manufacturer, and seller of a claimed patented pump alleging slander of title to his patent arises under the law of the state, rather than patent laws of the United States.—*American Wells Works Co. v. Layne & Bowler Co.*, 36 S. Ct. 585, 241 U. S. 257, 60 L. Ed. 987.

291. — Copyright laws.

See 13 Cent. Dig. Courts, § 833; 11 Cent. Dig. Copyr. §§ 49, 67.

Whether the owners of the copyright in a book can have relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of an alleged conditional sale, is a question which the Federal courts cannot consider in a suit to restrain the sale of the book at retail at less than the fixed price, in which there is no claim of damages in the sum of \$2,000, and no diversity of citizenship. Judgment (1906) 147 F. 28, 78 C. C. A. 122, affirmed.—*Scribner v. Straus*, 28 S. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094.

292. — Laws relating to trade-marks.

See 13 Cent. Dig. Courts, § 834.

A federal court has no jurisdiction of a suit for the infringement of a trade-mark by a citizen

of the same state as the complainant, unless such infringement consists in using the trade-mark by the defendant upon goods intended to be transported to a foreign country, or used in lawful commercial intercourse with an Indian tribe.—*Ryder v. Holt*, 128 U. S. 525, 9 S. Ct. 145, 32 L. Ed. 529.

Jurisdiction of a suit for an injunction against infringement of a trade-mark used in commerce with foreign nations or with the Indian tribes cannot be entertained by a circuit court of the United States, where the parties are citizens of the same state, if the trade-mark is not one that can be lawfully registered under Act Cong. March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401], and the right to relief must be based on the fact that defendant is using the word as an instrument of fraud. Judgment, *Illinois Watch Case Co. v. Elgin Nat. Watch Co.*, 94 F. 667, 35 C. C. A. 237, affirmed.—*Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 21 S. Ct. 270, 179 U. S. 865, 45 L. Ed. 365.

A federal Circuit Court has jurisdiction of a controversy between foreign subjects and a domestic corporation in which the bill asserts a right under a federal statute by virtue of the registration of a trade-mark.—(1911) *Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1908) 164 F. 25, 90 C. C. A. 499.

293. — Actions by or against United States corporations in general.

See 13 Cent. Dig. Courts, § 835.

A suit for personal injuries against a railroad corporation which derived its corporate powers from acts of congress is one arising under the constitution and laws of the United States, and is therefore within the federal jurisdiction.—*Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

Since enactment of Act Jan. 28, 1915, § 5, no suit by or against any railroad incorporated under act of Congress is an action arising under the laws of the United States, unless there was other reason therefor other than that the company was thus incorporated.—*Bankers' Trust Co. v. Texas & P. Ry. Co.*, 36 S. Ct. 569, 241 U. S. 295, 60 L. Ed. 1010.

A suit to foreclose mortgage of railroad incorporated under federal laws does not arise under laws of the United States so as to be within jurisdiction of federal court, since the enactment of Act Jan. 28, 1915, § 5.—*Id.*

294. — Actions by or against national banks or receivers thereof.

See 13 Cent. Dig. Courts, § 836; 6 Cent. Dig. Banks, §§ 1056, 1069.

An action by the assignors of national bank stock against their assignee to recover payments which they have been compelled to make towards the bank's liabilities, owing to the fact that the transfer was not properly registered on the bank's books, is not within federal jurisdiction as arising out of the national banking act, that act imposing no duty on the assignee of shares to register his ownership for his assignor's protection.—*Lessassier v. Kennedy*, 123 U. S. 521, 8 S. Ct. 244, 31 L. Ed. 262.

Under Act Cong. July 12, 1882, providing that the jurisdiction for suits by or against any national bank, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against banks not organized under any law of the United States, etc., the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors

of sums lost by reason of their illegal conduct.—*Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 10 S. Ct. 592, 33 L. Ed. 1002.

Nor is jurisdiction of such suit conferred on the circuit court of the United States by Rev. St. § 5209, prescribing punishment for embezzlement or willful misapplication of the funds or credits of a national banking association, by its officers or directors; nor by section 5239, providing for a suit by the comptroller of the currency to forfeit the franchises of national banks for the intentional violation by their directors of the law relating to national banks.—*Id.*

Act Cong. March 3, 1887 (24 Stat. 552), as corrected by Act Aug. 13, 1888 (25 Stat. 433) declares in section 4 that national banks shall, for the purposes of all actions and suits in equity by or against them, be deemed citizens of the states in which they are located, and that in such cases the federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." *Held*, that the provision quoted does not, when one of the parties is a national bank, take away the jurisdiction inhering in the federal courts by reason of diverse citizenship, but is merely intended to preserve such jurisdiction in cases in which both parties are citizens of the same state and a federal question is involved, or there are conflicting claims to land under grants of different states; thus placing national banks on precisely the same footing with individuals or other corporations, with respect to the right to sue or be sued in the federal courts.—*Petri v. Commercial Nat. Bank of Chicago*, 142 U. S. 644, 12 S. Ct. 325, 35 L. Ed. 1144.

Act Aug. 13, 1888, § 4, providing that national banks, for the purposes of all suits by or against them, shall be deemed citizens of the states in which they are located, deprives such banks of the right to sue or be sued in the federal courts, except where the suit is based on the diversity of citizenship of the parties.—*Ex parte Jones*, 17 S. Ct. 222, 164 U. S. 691, 41 L. Ed. 601.

A receiver of a national bank is an officer of the government, and an action against him in his representative capacity is one arising under the laws of the United States, and jurisdiction of a circuit court therein is not dependent on diversity of citizenship of the parties; hence a judgment of affirmance of a circuit court of appeals in such an action is not final, but an appeal or writ of error lies therefrom to the supreme court.—*Auten v. United States Nat. Bank*, 19 S. Ct. 628, 174 U. S. 125, 43 L. Ed. 920.

An action for rent, brought against the agent for the shareholders of an insolvent national bank to whom the comptroller of the currency has released the estate of the bank, is one to wind up the affairs of the bank, and, as such, is within the jurisdiction of the federal Circuit Court. Judgment, 139 F. 5, 71 C. C. A. 417, affirmed.—*International Trust Co. v. Weeks*, 27 S. Ct. 69, 203 U. S. 364, 51 L. Ed. 224.

In absence of diverse citizenship, an action by a stockholder of a national bank against the bank and its directors to recover moneys lost by their misconduct was not justiciable by a federal District Court under Act Aug. 13, 1888, § 4.—*Herrmann v. Edwards*, 35 S. Ct. 839, 238 U. S. 107, 59 L. Ed. 1224.

The omission in re-enactment by Judicial Code, § 24, par. 16, of provisions of Act Aug. 13, 1888, § 4, defining federal jurisdiction of suits by and against national banks, does not extend jurisdiction of federal courts to suits based on common-law liability of officers of such

bank, where there is no diversity of citizenship.—*Id.*

◀295. — Actions by or against receivers appointed by United States courts.

See 13 Cent. Dig. Courts, § 837.

A suit for personal injuries against a receiver of a corporation which derived its corporate powers from acts of Congress is one arising under the Constitution and laws of the United States, and is therefore within the federal jurisdiction.—*Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

The mere order of a federal court appointing a receiver on a creditors' bill does not enable the receiver to invoke federal jurisdiction independently of the ground of jurisdiction of the creditors' suit, where his cause of action did not originate in the order of appointment or the assignments made to him by the debtor pursuant to that order, and does not depend thereon, and no right claimed by him by virtue of his order of appointment or of his deeds of assignment is alleged to have been denied.—*Pope v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 500, 173 U. S. 573, 43 L. Ed. 814, dismissing appeal *Louisville, N. A. & C. Ry. Co. v. Pope*, 80 F. 745, 26 C. C. A. 131.

◀297. — Revenue laws.

See 13 Cent. Dig. Courts, § 839.

Claims to recover back internal revenue taxes wrongfully collected under Act Aug. 5, 1909, § 38, are founded on that act, within Judicial Code, § 24, par. 20, conferring jurisdiction on District Courts of claims based on any law of Congress.—*United States v. Emery, Bird, Thayer Realty Co.*, 35 S. Ct. 499, 237 U. S. 28, 59 L. Ed. 825, affirming judgment (D. C.) *Emery, Bird, Thayer Realty Co. v. United States*, 198 F. 242.

◀298. Cases arising under treaties.

See 13 Cent. Dig. Courts, § 840.

A suit on a judgment of the second class named in Act Cong. June 5, 1882, re-establishing the court of commissioners of Alabama claims, and providing for the distribution of unappropriated moneys of the Geneva award, is not embraced within the class of cases, growing out of a treaty, of which the court of claims, under Rev. St. § 1066, has no jurisdiction; the award, under the treaty of Washington of May 8, 1871, being direct to the United States, while Act Cong. June 2, 1886, making specific appropriation for the distribution of the balance of the Geneva award fund among the judgment creditors, brings such suit within the meaning of Rev. St. § 1059, giving the court of claims jurisdiction of cases founded on a law of congress.—*United States v. Weld*, 127 U. S. 51, 8 S. Ct. 1000, 32 L. Ed. 62.

A suit to establish water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of the treaty with Mexico, is held to involve no federal question for the purpose of giving jurisdiction to the federal courts. Decree (C. C.) 82 F. 114, affirmed.—*Crystal Springs Land & Water Co. v. City of Los Angeles*, 20 S. Ct. 573, 177 U. S. 169, 44 L. Ed. 720.

◀299. Allegations in pleadings.

See 13 Cent. Dig. Courts, § 841.

Where the original jurisdiction of the circuit court is invoked on the sole ground that the determination of the suit depends upon a federal question, it must appear, at the outset, from the declaration or bill, that the suit is of that character. If retained, the want of juris-

diction at the outset is not cured by an answer or by a suggesting a federal question.—*Metcalf v. City of Watertown*, 128 U. S. 586, 9 S. Ct. 173 32 L. Ed. 543.

Under Act Aug. 13, 1888, giving circuit courts original jurisdiction of suits "arising under the constitution or laws of the United States," plaintiff's statement of his cause of action must show that he relies on some right under such constitution or laws, and a suggestion in his bill that defendant will claim that acts relied on by plaintiff violate the Constitution of the United States cannot give jurisdiction.—*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511.

In an action to enjoin a turnpike company from charging tolls in excess of the rates fixed by a statute, the answer set out the average annual receipts and expenses for several years prior to the statute, and alleged that the net earnings for those years had not allowed dividends greater than 4 per cent.; that the statute reduced the rates 50 per cent. below those before allowed; and that such reduction would so diminish its income that it could not maintain its road, meet ordinary expenses, and earn any dividend. *Held*, that these allegations were sufficient, assuming them to be true, to raise the question whether the statute deprived the defendant of its property without due process of law.—*Covington & L. Turnpike Road Co. v. Sandford*, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

The jurisdiction of a federal court on the ground of a federal question is to be determined by the allegations of the bill, and not on the facts as they subsequently appear.—*City Ry. Co. v. Citizens' St. R. Co.*, 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree *Citizens' St. R. Co. v. City Ry. Co.* (C. C.) 64 F. 647.

Where a national bank is sought to be charged as stockholder in another corporation, the averment in its answer that the stock was issued to it "without authority of law" must be construed as referring to the law of the United States governing national banks, and therefore raises a federal question.—*California Nat. Bank v. Kennedy*, 17 S. Ct. 831, 167 U. S. 362, 42 L. Ed. 198.

Jurisdiction of an action to enjoin the taxation of a bridge by the local authorities as a toll bridge, it being taxed by the state as a part of complainant's railroad, is not conferred on a federal court, on the ground that a federal question is involved, by an allegation that the bridge was built under authority of an act of congress, where the right of the state to tax the bridge is conceded, the controversy being as to the method of taxation under the state laws.—*St. Joseph & G. I. R. Co. v. Steele*, 17 S. Ct. 925, 167 U. S. 659, 42 L. Ed. 315, reversing decree 63 F. 867, 11 C. C. A. 470.

A bill invoking the jurisdiction of the circuit court of the United States on the ground that the case arises under the Constitution of the United States by reason of the violation and impairment of a contract will be dismissed when it does not aver facts to show such violation. Decree (C. C.) 95 F. 539, affirmed.—*Bienville Water-Supply Co. v. City of Mobile*, 20 S. Ct. 40, 175 U. S. 109, 44 L. Ed. 92.

Merely setting up a general right under a federal statute does not present a case within the first category of cases specified in Rev. St. U. S. § 709, of "an authority exercised under the United States," where the validity of the statute is not in question.—*Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co.*, 20 S. Ct. 245, 175 U. S. 639, 44 L. Ed. 305, dismissing appeal *Rio Grande W. Ry. Co. v. Telluride Power-Transmission Co.*, 51 P. 146, 16 Utah, 125.

The federal question relied upon as conferring original jurisdiction on a circuit court must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up, or which they rely upon.—*Florida Cent. & P. R. Co. v. Bell*, 20 S. Ct. 399, 176 U. S. 321, 44 L. Ed. 486, reversing judgment 87 F. 369, 31 C. C. A. 9.

A bill invoking the jurisdiction of the circuit court of the United States on the ground that the case arises under the constitution of the United States by reason of the violation and impairment of a contract will be dismissed when it does not aver facts to show such violation. Decree (C. C.) 95 F. 539, affirmed.—*Bienville Water-Supply Co. v. City of Mobile*, 22 S. Ct. 820, 186 U. S. 212, 46 L. Ed. 1132.

Jurisdiction, if conferred on a circuit court of the United States by averments in the bill as to the defense which defendants intend to assert, is ousted by the filing of answers which disclaim any intention of relying on such defense.—*Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co.*, 23 S. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; *Id.*, 23 S. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; *Same v. Chile Gold Min. Co.*, *Id.*

A suit over the ownership of ore taken by defendants from a mining claim alleged to be the property of complainant by virtue of a patent from the United States is not brought within the jurisdiction of a circuit court of the United States by allegations in the bill that defendants intend to assert a defense based on certain other patents and the mining laws of the United States, on the theory that such suit, being alleged to have been brought in equity to avoid a multiplicity of suits, is in effect one to quiet title, and that such averments are therefore necessarily set forth as part of the cause of action.—*Id.*

The federal question relied upon as conferring original jurisdiction on a circuit court must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up, or which they rely upon.—*Id.*

Averments in a complaint in ejectment, that defendant's possession rests upon an infraction by the United States of its treaty obligations, and upon a taking of private property for public use without just compensation, do not bring the case within the jurisdiction of a federal Circuit Court, where the averments respecting plaintiff's title disclose no case within the jurisdiction of that court. Judgment (C. C.) 119 F. 974, affirmed.—*Filhiol v. Torney*, 24 S. Ct. 698, 194 U. S. 356, 48 L. Ed. 1014.

A suit to compel the specific performance by a carrier of its agreement to issue free passes annually to the complainants is not brought within the original jurisdiction of a federal Circuit Court as one arising under the Constitution or laws of the United States, within the meaning of Act Aug. 13, 1888, c. 866, § 5 Stat. 434 (U. S. Comp. St. 1901, p. 509), by allegations in the bill that the refusal to comply with the contract is based upon the provisions of Act Cong. June 29, 1906, c. 3591, § 4 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), and that such act does not prohibit the giving of passes under the circumstances of the case, and, if construed as having such effect, violates Const. Amend. 5, by denying due process of law. Judgment, *Mottley v. Louisville & N. R. Co.* (C. C. 1907) 150 F. 406, reversed.—*Louisville & N. R. Co. v. Mottley*, 29 S. Ct. 42, 211 U. S. 149, 53 L. Ed. 126.

An allegation in a bill that a municipal ordinance providing for the summary seizure and destruction of food in cold storage when unfit for human consumption violates Const. U. S. Amend. 14, because it provides neither for

notice nor for an opportunity to be heard before such seizure and destruction, presents, although unfounded, a constitutional question within the original jurisdiction of the federal Circuit Court. Decree (C. C. 1907) 151 Fed. 120, modified.—*North American Cold Storage Co. v. City of Chicago*, 29 S. Ct. 101, 211 U. S. 306, 53 L. Ed. 195, 15 Ann. Cas. 276.

Allegations in an action of ejectment that defendants were asserting ownership under a certain deed, which was void under congressional legislation restricting alienation of lands allotted to the Choctaw and Chickasaw Indians, does not present a case arising under the Laws of the United States of which a federal Circuit Court has jurisdiction.—*Taylor v. Anderson*, 34 S. Ct. 724, 234 U. S. 74, 58 L. Ed. 1218, affirming judgment (C. C.) 197 F. 383.

Allegations in bill of lessee of an oil and gas mining lease from the heirs of an Indian homestead allottee for recovery of possession and for an injunction, alleging that a subsequent lease to defendant approved by Secretary of Interior was void under Act May 27, 1908, presented a cause of action within the jurisdiction of a federal District Court.—*Lancaster v. Kathleen Oil Co.*, 36 S. Ct. 711, 241 U. S. 551, 60 L. Ed. 1161.

(C) JURISDICTION DEPENDENT ON CITIZENSHIP, RESIDENCE, OR CHARACTER OF PARTIES.

Citizenship or alienage as ground for removal of cause to federal court, see Removal of Causes, —26-61.

Requisite of jurisdiction of Circuit Court in bankruptcy proceedings, see Bankruptcy, —294.

—301. Cases affecting ambassadors, other public ministers, or consuls.

See 13 Cent. Dig. Courts, § 342.

The jurisdiction of a United States circuit court of a suit by a citizen against an alien is not defeated by the fact that the defendant is the consul of a foreign government.—*Bors v. Preston*, 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419.

One who was duly accredited to and received and recognized by the United States under the title of agent from the Swiss Confederation was indicted under the provisions of Rev. St. § 5209, relating to embezzlement or falsification of accounts by bank officers. Defendant was president of a bank in the city of Washington. He had been, for many years, consul general of the Swiss Confederation, and, on February 28, 1869, was accredited their political agent. He was requested, on May 30, 1881, to resign both these positions, by his own government, and his resignation was accepted on June 20th. The indictment had been found on June 17th. The records of the state department showed, with reference to his relations with this government as political agents, simply a letter, under date of March 30, 1868, from him to secretary of state, inclosing his credentials, and soliciting an interview for the formal presentation; also a letter from the secretary, granting this interview, and a later one from another secretary, informing him that his relations to the United States did not accord him the privilege of the free entry of goods imported for his own use. *Held*, that the United States supreme court would not issue a writ of certiorari, commanding the supreme court of the District of Columbia to certify to it the indictment and proceedings under it.—*Ex parte Hitz*, 111 U. S. 766, 4 S. Ct. 698, 28 L. Ed. 592.

Rev. St. § 687, gives the supreme court exclusive jurisdiction of suits against ambassa-

dors and other public ministers. Section 563 gives the district courts jurisdiction of suits against consuls and vice consuls. Section 4130 provides that the word "minister" shall mean the person invested with and exercising the principal diplomatic functions. In absence of the minister from Guatemala, the consul general, a citizen of the United States, exercised the minister's functions by consent of the secretary of state. Official letters were addressed to him as consul general, and two were addressed to him as in charge of the legation. His own letters he signed as consul general. *Held*, that the district court had jurisdiction over a suit against him, as he is not a public minister, within the meaning of section 687.—*In re Baiz*, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222.

—302. Controversies to which United States is a party.

See 13 Cent. Dig. Courts, §§ 343, 986.

A suit by a state to enjoin the secretary of the interior and the commissioner of the land office from selling school lands in the Red Lake Indian reservation must be regarded as a controversy to which the United States is a party, and of which, as a state is also a party, the supreme court of the United States has, under Const. U. S. art. 3, § 2, original jurisdiction, in view of the provision of Act March 2, 1901, c. 808, 31 Stat. 950 [U. S. Comp. St. 1901, p. 1384], that the Indians need not be made parties to such a suit if the secretary of the interior is made a party thereto, and that the attorney general, on request of the secretary, shall represent and defend the Indian rights.—*State of Minnesota v. Hitchcock*, 22 S. Ct. 650, 185 U. S. 373, 46 L. Ed. 954.

The United States is the real, and not merely the nominal, plaintiff, so as to sustain the original jurisdiction of a federal Circuit Court under Judiciary Acts March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], without regard to the amount in dispute, in a suit authorized by Act Aug. 13, 1804, c. 282, § 5, 28 Stat. 279 [U. S. Comp. St. 1901, p. 2316], to be brought in its name, for the use and benefit of a materialman, upon the bond of a contractor for a public work, which the statute requires shall contain the specific, special obligation directly to the United States that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work. Judgment, *United States v. Churchyard* (C. C. 1904) 132 F. 82; *Same v. Fidelity & Deposit Co. of Maryland, Id.*; *Same v. United States Fidelity & Guaranty Co., Id.*, affirmed.—*United States Fidelity & Guaranty Co. v. United States*, 27 S. Ct. 381, 204 U. S. 349, 51 L. Ed. 516.

—303. Suits against states.

See 13 Cent. Dig. Courts, §§ 344, 344½; 44 Cent. Dig. States, §§ 191, 192.

Though a law passed by a state, withdrawing from its officers the power of carrying out the contract embodied in its bonds and coupons or certificates of indebtedness, is unconstitutional, as impairing the obligation thereof, a suit cannot be maintained in the federal courts to compel such state officers by mandamus to do the acts which constitute a performance of the contract. Such a suit is in effect a suit against the state itself.—*State of Louisiana v. Jumel*, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 S. Ct. 91, 27 L. Ed. 468; *Hagood v. Southern*, 117 U. S. 52, 6 S. Ct. 608, 29 L. Ed. 805.

A state cannot take an assignment of the bonds of another state, held by one of its citizens, and maintain an action thereon in its own name against the other state for the bene-

fit of the bondholder. Such an action is within the provision of the eleventh amendment, that the judicial power of the United States does not extend to suits against a state by citizens of another state.—*State of New Hampshire v. Louisiana*, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656.

One state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other state to its citizens; and the supreme court is prohibited both by the letter and spirit of the constitution of the United States from entertaining such suits.—*Id.*

The immunity from suit belonging to a state is a personal privilege which it may waive at pleasure, so that, in a suit otherwise well brought in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction.—*Clark v. Barnard*, 108 U. S. 436, 2 S. Ct. 878, 27 L. Ed. 780.

Where a bond has been deposited with a state treasurer to secure the performance of certain conditions by a railroad corporation, and on breach a bill is filed by the assignees in bankruptcy of the railroad company to restrain the treasurer from realizing on a collateral deposited therewith, to which the treasurer demurs on the ground that the real party in interest is the state, an appearance by the state, "without prejudice to the demurrer," claiming the proceeds of the collateral, is a submission to the jurisdiction of the court.—*Id.*

The governor of Georgia, under Act Ga. Dec. 3, 1866, indorsed the bonds of the defendant railroad company, which by the terms of the statute then became a first mortgage lien on the property of the company, and the company subsequently executed a written mortgage confirming the lien created by the statute. Subsequently another series of bonds, secured by mortgage, were issued, and indorsed by the governor, under Act Ga. Oct. 27, 1870. Upon default in interest the lien of the first mortgage was foreclosed in accordance with the terms of the statute, and the road sold, and purchased by the state for a sum much less than the first series of bonds, which were then taken up by the state, and her own bonds substituted therefor. A holder of some of the second series of bonds, which were not provided for in the foreclosure, filed a bill in equity against the governor and treasurer of the state, the railroad company, and certain directors thereof, to set aside the sale. *Held*, that the action was in effect a suit against the state, and that the court had no jurisdiction.—*Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 S. Ct. 292, 609, 27 L. Ed. 992.

Suits to which a state is a party are not exempted from the operation of Const. art. 3, § 2, extending the judicial power of the United States to all cases arising under the constitution and laws of the United States, and of the act of March 3, 1875 (18 Stat. 470), which commits the exercise of that power to the circuit courts.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

Plaintiff tendered coupons on state bonds in payment of his taxes, as permitted by Act Va. March 30, 1871. The tax collector refused the coupons because of Act Va. Jan. 26, 1882, providing that such coupons should not be received in payment of taxes, and levied on the personal property of the plaintiff for his taxes. *Held*, that the act of 1882 being void as impairing the obligation of the contract contained in the act of 1871, an action of detinue against the tax collector for such personalty could not be defeated on the ground that defendant was simply obeying the command of the state, and

that therefore the action was substantially against the state within the meaning of the eleventh amendment to the constitution securing to the states immunity from suits.—*Poin-dexter v. Greenhow*, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. Ed. 185; *Chaffin v. Taylor*, 116 U. S. 567, 6 S. Ct. 518, 29 L. Ed. 727.

A suit by trustees, under a trust deed executed by a railroad company, against state officers, to compel the latter to assign to plaintiffs a lien held by the state upon the property covered by the trust deed, in accordance with the provisions of a state statute, is not a suit against the state within the prohibition of the eleventh amendment to the constitution of the United States.—*Rolston v. Crittenden*, 120 U. S. 390, 7 S. Ct. 599, 30 L. Ed. 721.

The Virginia acts of March 30, 1871, and March 28, 1879, provided for the issue of bonds, with interest-bearing coupons, which should be received in payment of taxes and other demands due the state. By subsequent acts it was provided that in suits brought to collect taxes, where the defendant pleaded tender of coupons in payment, he should produce the bond from which they had been cut, and prove that they were cut therefrom. The burden of proving the coupons to be genuine was placed upon the defendant, but he was not allowed to avail himself of expert evidence for that purpose. An action was brought to restrain the attorney general of the state and the attorneys and treasurers of the various counties from the enforcement of these acts as being a breach of the contract entered into by the state when the bonds and coupons were issued. *Held*, that, under the provisions of the eleventh amendment to the constitution, such an action would not lie though the laws in question might impair contract obligation.—*Ex parte Ayers*, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216.

The Virginia act of May 12, 1887, provided that all taxes due the commonwealth, in payment of which what purported to be coupons of state bonds had been offered, and, on refusal to accept, not otherwise paid, should be recovered in a suit to be instituted in the name of the commonwealth; that the treasurers of the counties and cities should return to the auditor of the state the names of such delinquents; and that the attorneys of the commonwealth should thereupon institute the suits to recover. An action was brought in the circuit court of the United States by citizens of England against the attorney general, and the attorneys and treasurers of the various counties and cities, as parties defendant, to enjoin them from proceeding under the act. *Held*, that this was an action against the state of Virginia, she being the real party in interest, though not nominally a party to the record, and as such it is prohibited by the eleventh amendment to the constitution of the United States, which provides that the judicial power of the United States shall not extend to actions against one of the United States by citizens of another or a foreign state.—*Id.*

The counties of Nevada being made liable to suit as individuals by Const. Nev. art. 8, § 5, the jurisdiction of the circuit court, in suits against such counties, which are municipal corporations, by citizens of another state, is not affected by the eleventh amendment to the constitution of the United States, which only limits such jurisdiction as to cases in which a state is a party defendant.—*Lincoln County v. Luning*, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

A suit against a state and the state auditor, to compel the levy of taxes and the application by the auditor of the amount so raised to payment of bonds issued by the state, is a suit against the state only, and, not being maintainable against the state, cannot be maintained against the auditor.—*Hans v. State of Louisiana*, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842;

State of North Carolina v. Temple, 134 U. S. 22, 10 S. Ct. 509, 33 L. Ed. 849.

Neither Const. art. 3, § 2, declaring that "the judicial power of the United States shall extend to all cases, in law and equity, arising under this constitution," nor Act Cong. March 3, 1875, providing that "circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States, * * *" confers upon the circuit courts jurisdiction of suits against a state by a citizen thereof, involving questions arising under the constitution of the United States.—Id.

A suit to compel the auditor to proceed under Act La. March 8, 1869, authorizing him to levy a tax to pay the interest on certain bonds, is, in effect, a suit against the state, and is not maintainable in the federal courts.—*State of Louisiana v. Steele*, 134 U. S. 230, 10 S. Ct. 511, 33 L. Ed. 891.

A suit by a citizen of one state against the persons constituting the board of land commissioners of another state, to enjoin them from reselling swamp lands claimed by plaintiff, on the ground that the statute under which they propose to act is unconstitutional as impairing plaintiff's contract of purchase from the state under a previous act, is not a suit against the state, in violation of Const. U. S. Amend. 11, but is a suit against the commissioners individually, to prevent action contrary to law.—*Pennoyer v. McConaughy*, 140 U. S. 1, 11 S. Ct. 699, 35 L. Ed. 363, affirming decree (D. C.) *McConaughy v. Pennoyer*, 43 F. 339.

Const. art. 3, § 2, extending the judicial power of the United States "to all cases" in law and equity arising under the constitution, laws, and treaties of the United States, and providing that the supreme court shall have original jurisdiction of all cases "in which a state shall be a party," authorizes the supreme court to entertain an original suit brought by the United States against a state to determine a controversy as to the boundary between the state and a territory of the United States.—*United States v. Texas*, 143 U. S. 621, 12 S. Ct. 488, 36 L. Ed. 285.

A proceeding for contempt against a state officer who has seized under tax warrants property in the hands of a receiver of a federal court, and has disobeyed an order for its release, is not a suit against the state. Const. Amend. 11.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689; *Ex parte Riser*, 149 U. S. 191, 13 S. Ct. 793, 37 L. Ed. 698.

A suit against railroad commissioners of a state to restrain enforcement of their regulations, as unjust and unreasonable—the state having no direct pecuniary interest therein—is not within Const. Amend. art. 11, providing that the judicial power of the United States shall not extend to any suit against a state by citizens of another state.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014.

A suit to enjoin state officers from seizing private property under authority of an unconstitutional statute is not a suit against the state.—*Scott v. Donald*, 17 S. Ct. 262, 165 U. S. 107, 41 L. Ed. 648.

A suit for damages against state officers who, under color of an unconstitutional statute, have seized and carried away liquors belonging to plaintiff, is not a suit against the state, within the prohibition of the eleventh amendment to the federal constitution.—*Scott v. Donald*, 17 S. Ct. 265, 165 U. S. 58, 41 L. Ed. 632.

A suit against state officers to recover possession of real property which they claim to hold for the state is not a suit against the state within the meaning of the eleventh amendment to the constitution, so as to deprive a federal court of jurisdiction.—*Tindal v. Wesley*, 17 S. Ct. 770, 167 U. S. 204, 42 L. Ed. 137, affirming judgment *Tindal v. Wesley*, 65 F. 731, 13 C. C. A. 160.

A suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional statute to the injury of plaintiff's rights, is not a suit against the state, within the meaning of the eleventh amendment to the federal constitution.—*Smyth v. Ames*, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, affirming decree (C. C.) *Ames v. Union Pac. Ry. Co.*, 64 F. 165.

A federal court is without jurisdiction of a suit brought by a private person against the executive and law officers of a state, to test the constitutionality of a statute by enjoining any proceedings for its enforcement, where the defendants are charged by the statute with no specific duty in the matter, and have neither done nor attempted any act of wrong or trespass against the person or property of complainant, and, should they act, must do so by formal legal proceedings in the courts in the name of the state. Such a suit is, in effect, one against the state, and is within the prohibition of the eleventh constitutional amendment.—*Fitts v. McGhee*, 19 S. Ct. 269, 172 U. S. 516, 43 L. Ed. 535.

A circuit court of the United States has no jurisdiction of a suit in reality against a state, and brought without its consent, by a citizen thereof, though it involves a question under the constitution of the United States.—Id.

An action against a state treasurer in his official capacity, which is in effect to compel the state, through him, to perform its promise to return to taxpayers money that may be adjudged to have been taken under an illegal assessment, is in substance an action against the state itself, within the meaning of Const. U. S. Amend. 11.—*Smith v. Reeves*, 20 S. Ct. 919, 178 U. S. 436, 44 L. Ed. 1140, affirming *Same v. Rackliffe*, 87 F. 964, 31 C. C. A. 328.

The consent of the state to be sued, which is given by Pol. Code Cal. § 3669, providing that the state treasurer may demand trial in the superior court of Sacramento county, must be deemed to be limited to actions in the state court, and not to authorize such action in a federal court.—Id.

A state has a right to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments a condition that the suit be brought in one of its own courts.—Id.

A suit against the Nebraska board of transportation for the purpose of preventing the enforcement of the Nebraska act of April 12, 1893, fixing maximum railroad rates, on the ground of the invalidity of such statute under the Constitution and laws of the United States, is not a suit against the state within the meaning of the eleventh amendment to the federal Constitution. Decree, *Starr v. Chicago, R. I. & P. Ry. Co.* (C. C.) 110 F. 3, affirmed.—*Prout v. Starr*, 23 S. Ct. 398, 188 U. S. 537, 47 L. Ed. 584.

A federal court is not without jurisdiction of a suit to enjoin the Attorney General of Nebraska from enforcing, as a member of the Nebraska board of transportation, the provisions of an unconstitutional state statute fixing maximum railroad rates, on the theory that it seeks to restrain him as Attorney General from enforcing the criminal laws of the state. Decree,

Starr v. Chicago, R. I. & P. Ry. Co. (C. C.) 110 F. 3, affirmed.—Id.

A federal court has jurisdiction to extend to and against the successors in the office of Attorney General of a state, duly substituted, the provisions of an order enjoining the enforcement of an unconstitutional state statute fixing maximum railroad fares by a board of which the Attorney General is a member. *Decree, Starr v. Chicago, R. I. & P. Ry. Co.* (C. C.) 110 F. 3, affirmed.—Id.

No waiver by the state of its constitutional immunity from a suit in a federal court to set aside the title of the state to lands sold for unpaid taxes can be gathered from the provision of Pub. Acts Mich. 1899, p. 140, No. 97, for making the Auditor General a party defendant to all actions or proceedings to set aside a sale for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, since the statute makes such requirements with reference to procedure and costs as to indicate that the Legislature had in mind only proceedings in the state courts.—*Chandler v. Dix*, 24 S. Ct. 766, 194 U. S. 590, 48 L. Ed. 1129.

Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the state, within the inhibition of the federal Constitution, because such officers have been forbidden by the state Legislature to exercise any such power. Judgment (C. C.) *Ex parte Folsom*, 131 F. 496, affirmed.—*Graham v. Folsom*, 26 S. Ct. 245, 200 U. S. 248, 50 L. Ed. 464.

A suit to restrain the interference by a state corporation commission with the property and interstate business of a railway company upon the assumed authority of a state statute, which the bill alleges to violate rights of the railway company protected by the Constitution of the United States, is not, in any proper sense, a suit against the state. *Decree* (C. C.) *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 F. 82, modified.—*McNeill v. Southern Ry. Co.*, 26 S. Ct. 722, 202 U. S. 543, 50 L. Ed. 1142.

A suit to enjoin the enforcement of an order of the Mississippi railroad commission compelling a railroad company to stop its trains at a specified station is not a suit against the state. Judgment, *Illinois Cent. R. Co. v. Mississippi Railroad Commission* (1905) 138 F. 327, 70 C. C. A. 617, affirmed.—*Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 27 S. Ct. 90, 203 U. S. 335, 51 L. Ed. 209.

A federal court may enjoin the Attorney General of a state, whose general duty is to enforce the state statutes, from proceeding to enforce against persons affected a state statute which violates the federal Constitution; such proceeding being not prohibited by the provision of the federal Constitution forbidding the maintenance of actions against a state.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

The general discretion of the Attorney General of a state, regarding the enforcement of the laws when and as he deems appropriate, is not interfered with by an injunction restraining him from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of a complainant.—Id.

That the Attorney General of a state must, to enforce a state statute, resort to mandamus, in which proceeding he ordinarily represents the state in its governmental capacity, does not prevent a federal court from enjoining him from so doing, where the statute violates the federal Constitution, since, in such case, his act in attempting, in the name of the state, to enforce a void enactment, is merely illegal,

because in conflict with the superior authority of the federal Constitution, and he is stripped of his official character, and the prohibition against his proceeding does not therefore affect the state in its governmental capacity.—Id.

The power of a federal court to enjoin state officials from enforcing a state statute, the validity of which, under the federal Constitution, has been questioned before it, does not extend to restraining a state court from acting in a case brought before it to enforce the statute, nor investigation or action by a grand jury under it.—Id.

The provision of the federal Constitution that no suit shall be brought against any state by citizens of another state applies to a suit brought against a state by its own citizens as well as to one brought by a citizen of another state.—Id.

A suit against the dairy and food commissioner of a state to restrain certain action taken under cover of his office, but alleged to be in violation of the state laws, which injuriously affects the reputation and sale of certain products manufactured by complainants, is not a suit against the state, forbidden by Const. U. S. Amend. 11.—*Scully v. Bird*, 28 S. Ct. 597, 209 U. S. 481, 52 L. Ed. 899.

A bill filed in a federal court against a state commission to restrain its members from enforcing railway passenger rates established by such commission, on the ground that such rates are confiscatory, is not bad as an attempt to enjoin legislation or as a suit against the state.—*Prentiss v. Atlantic Coast Line Co.*, 29 S. Ct. 67, 211 U. S. 210, 53 L. Ed. 150.

The immunity of a state from suit, under Const. U. S. Amend. 11, is not violated by maintaining a suit in a federal court to enjoin the threatened proclamation by the Secretary of State, in his official capacity, under the authority of a state statute which violates the federal Constitution, that a foreign telegraph company is forbidden, under the penalty prescribed by such law, to continue to do local business in the state. *Decree, Chicago, R. I. & P. Ry. Co. v. Ludwig* (C. C. 1907) 156 F. 152, affirmed.—*Ludwig v. Western Union Telegraph Co.*, 30 S. Ct. 280, 216 U. S. 146, 54 L. Ed. 423.

Suits to enjoin prosecuting attorneys from bringing actions, under the authority of a state statute which violates the federal Constitution, to recover the penalties fixed by that statute for violations of its provisions, are not suits against a state, within the meaning of Const. U. S. Amend. 11, securing to the states immunity from suit. *Decree* (C. C. 1907) 154 F. 95, reversed.—*Western Union Telegraph Co. v. Andrews*, 30 S. Ct. 286, 216 U. S. 165, 54 L. Ed. 430.

The immunity of a state from suit is not violated by entertaining a suit in a federal Circuit Court, brought by a foreign railway company to restrain a prosecuting attorney from enforcing a state statute requiring the stoppage of interstate passenger trains at junction points, and to restrain the Secretary of State from proceeding under the authority of another state statute to revoke the company's license and right to do local business because of bringing suit in a federal court.—(1910) *Herndon v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; *Swanger v. Atchison, T. & S. F. Ry. Co.*, 30 S. Ct. 639, 218 U. S. 159, 54 L. Ed. 978. Affirming decree *Chicago, R. I. & P. Ry. Co. v. Swanger* (C. C. 1908) 157 F. 783.

A suit to enjoin state officers from violating, under state statute, the constitutional rights of complainant, is not a suit against the state.—*Harrison v. St. Louis & S. F. R. Co.*, 34 S. Ct. 333, 232 U. S. 318, 58 L. Ed. 621, 1 L. R. A.

1915F, 1187, affirming decree (C. C.) St. Louis & S. F. R. Co. v. Cross, 171 F. 480.

The title of the state to the bank depositor's guaranty fund created under Laws Okl. 1911, c. 31, as amended by Laws 1913, c. 22, and the interest which the state has that such fund be administered by the state banking board, are such that a suit by a depositor to compel the board to pay the deposit of the fund is a suit against the state, which under Const. U. S. Amend. 11, cannot be maintained without the state's consent.—*Lankford v. Platte Iron Works Co.*, 35 S. Ct. 173, 235 U. S. 461, 59 L. Ed. 316; *American Water Softener Co. v. Lankford*, 35 S. Ct. 184, 235 U. S. 496, 59 L. Ed. 329.

Immunity of Oklahoma State Banking Board from liability to suit to control administration of depositor's guaranty fund created under Laws Okl. 1911, c. 31, as amended by Laws 1913, c. 22, was not waived by unauthorized participation by the board in a prior suit.—*Farish v. State Banking Board of State of Oklahoma*, 35 S. Ct. 185, 235 U. S. 498, 59 L. Ed. 330.

Suit by an alien to enjoin attorney general and county attorney from enforcing Anti-Alien Labor Law, Ariz., as repugnant to the federal Constitution, is not a suit against the state.—*Truax v. Raich*, 36 S. Ct. 7, 239 U. S. 33, 60 L. Ed. 131, affirming order (D. C.) *Raich v. Truax*, 219 F. 273.

The state's immunity from suit by the Eleventh Amendment prevents a federal court from taking jurisdiction of a suit against the individual members of the South Carolina Dispensary Commission to recover for moneys removed by them from county dispensaries under authority of a state statute.—*Carolina Glass Co. v. State of South Carolina*, 36 S. Ct. 293, 240 U. S. 305, 60 L. Ed. 658, affirming judgments 69 S. E. 391, 87 S. C. 270, and *Same v. Murray* (D. C.) 197 F. 392, reversing judgment 206 F. 635, 124 C. C. A. 423.

The state's immunity from suit does not extend to a suit against state officers to enjoin the threatened enforcement of a state statute attacked as repugnant to the federal Constitution.—*Tanner v. Little*, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree (D. C.) *Little v. Tanner*, 208 F. 605; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

◀304. Controversies between states.

See 13 Cent. Dig. Courts, §§ 986, 987.

An original bill by one state against another cannot be maintained as against a health officer of the latter state alone, on the theory that his conduct is in violation or in excess of a valid law of the state, when there is no refusal of the state authorities to fulfill their duty in regard to a remedy.—*State of Louisiana v. State of Texas*, 20 S. Ct. 251, 176 U. S. 1, 44 L. Ed. 347.

A mere maladministration of the laws of a state, to the injury of the citizens of another state, does not constitute a controversy between states, which is justiciable in the supreme court of the United States.—*Id.*

The original jurisdiction of the supreme court of the United States over controversies between states does not embrace the determination of political questions.—*Id.*

A controversy between two states, of which the supreme court of the United States can take original jurisdiction under Const. art. 3, § 2, is not created by the enforcement of rules and regulations established by a health officer, which the state has not authorized or confirmed, but which the governor permits to be executed, although he has power to modify or change them, whereby an embargo is put on interstate com-

merce from another state, with a view to benefit the former state, and one city thereof in particular, at the expense of the other state, and especially of a certain city therein.—*Id.*

The construction by a public corporation, as an agency of the state, of a system of public works to promote the health and prosperity of its inhabitants, but which endangers the health and prosperity of the inhabitants of another and adjacent state, furnishes a sufficient basis for a controversy between the states, of which the supreme court of the United States can take original jurisdiction.—*State of Missouri v. State of Illinois*, 21 S. Ct. 331, 180 U. S. 208, 45 L. Ed. 497.

A controversy between states, of which the supreme court of the United States has original jurisdiction, is presented by a bill filed by the state of Kansas against the state of Colorado, whose averments raise the question whether the latter state has the power wholly to deprive the state of Kansas of the benefit of water from the Arkansas river, which rises in Colorado and by nature flows into and through Kansas.—*State of Kansas v. State of Colorado*, 22 S. Ct. 552, 185 U. S. 125, 46 L. Ed. 838.

The original jurisdiction of the federal Supreme Court, under Const. art. 3, § 2, over "controversies between two or more states," extends to a suit by the state of South Dakota as the donee of the holders of certain bonds issued by the state of North Carolina, and secured by a mortgage of railroad stock belonging to that state, to compel payment of the bonds and a subjection of the mortgaged property to the satisfaction of the debt.—*State of South Dakota v. State of North Carolina*, 24 S. Ct. 269, 192 U. S. 286, 48 L. Ed. 448.

A conflict between the authorities of the states of Louisiana and Mississippi, arising out of the enforcement of the oyster legislation of those states, which involves a dispute respecting the true boundary line, creates a controversy between the states in their sovereign capacity, which is within the original jurisdiction of the Supreme Court of the United States.—*State of Louisiana v. State of Mississippi*, 26 S. Ct. 408, 202 U. S. 1, 50 L. Ed. 913.

The original jurisdiction of the Supreme Court of the United States does not extend to a bill filed by the Attorney General of Kansas on behalf of the state as trustee for the Missouri, Kansas & Texas Railway Company of certain lands in the Indian Territory, alleged to have been granted by Congress to the state for the benefit of the railway company, where the name of the state is being used simply for the prosecution of the claim of the railway company.—*State of Kansas v. United States*, 27 S. Ct. 388, 204 U. S. 331, 51 L. Ed. 510.

The original jurisdiction of the Supreme Court of the United States extends to a controversy between the states of Kansas and Colorado and the United States, presenting the questions whether Kansas has a right to the continuous flow of the waters of the Arkansas river as that flow existed before any human interference therewith, or whether Colorado has the right to appropriate the waters of that stream so as to prevent that continuous flow, or whether the amount of the flow is subject to the superior authority and supervisory control of the United States.—*State of Kansas v. State of Colorado*, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 956.

The original jurisdiction of the Supreme Court of the United States extends to a suit by the commonwealth of Virginia against the state of West Virginia to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state.—*Common-*

wealth of Virginia v. State of West Virginia, 27 S. Ct. 732, 206 U. S. 290, 51 L. Ed. 1068.

The determination of the just and equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state is within the original jurisdiction of the federal Supreme Court, although, by Const. W. Va. 1861, art. 8, § 8, it is provided that the Legislature shall ascertain the proportion as soon as may be practicable.—*Commonwealth of Virginia v. State of West Virginia*, 31 S. Ct. 330, 220 U. S. 1, 55 L. Ed. 353.

The commonwealth of Virginia has a sufficient interest to enable it to maintain a suit in the federal Supreme Court against the state of West Virginia to determine the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, although, by reason of certain transactions with her creditors, Virginia may have been discharged from all liability as to West Virginia's share, other than to turn over the proceeds of the suit.—*Id.*

305. Controversies between a state and citizens of another state.

See 13 Cent. Dig. Courts, §§ 844, 844½, 986.

Rev. St. Wis. § 1920, imposing a forfeiture of \$500 per month upon any insurance company of another state doing business in Wisconsin without having deposited with the proper officers a full statement of its property and business during the preceding year, such forfeiture to be recovered in an action in the name of the state, is strictly a penal statute punishing an offense against the state; and, therefore, under Judiciary Act Sept. 24, 1789, c. 20, § 13 (Rev. St. § 687), giving the supreme court of the United States "exclusive jurisdiction of controversies of a civil nature where a state is a party," etc., that court has no jurisdiction of an action brought by the state of Wisconsin against an insurance company of another state upon a judgment for the penalty imposed by that statute.—*State of Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U. S. 265, 8 S. Ct. 1370, 32 L. Ed. 239.

The counties of Nevada being made liable to suit as individuals by Const. Nev. art. 8, § 5, the jurisdiction of the circuit court, in suits against such counties, which are municipal corporations, by citizens of another state, is not affected by the eleventh amendment to the constitution of the United States, which only limits such jurisdiction as to cases in which a state is a party defendant.—*Lincoln County v. Luning*, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

A suit against railroad commissioners of a state to restrain enforcement of their regulations, as unjust and unreasonable,—the state having no direct pecuniary interest therein,—is not within Const. Amend. art. 11, providing that the judicial power of the United States shall not extend to any suit against a state by citizens of another state.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; *Id.*, 154 U. S. 420, 14 S. Ct. 1062, 38 L. Ed. 1031.

The original jurisdiction of the supreme court in cases between a state and citizens of another state rests solely on the character of the parties, and not at all on the nature of the case; and hence, where the parties are not as prescribed by the constitution, the jurisdiction cannot be aided by showing that a federal question is involved.—*People of State of California v. Southern Pac. Co.*, 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683.

The original jurisdiction of the supreme court does not extend to a suit brought by a state against a citizen of another state, with

whom is joined a citizen of the state bringing the action.—*Id.*

A controversy between a state and citizens of another state, within the meaning of Const. art. 3, § 2, is not created by the enforcement of quarantine regulations by the health officer of one state, acting under valid laws, to the damage of the citizens of another state.—*State of Louisiana v. State of Texas*, 20 S. Ct. 251, 176 U. S. 1, 44 L. Ed. 347.

An action against a state by a corporation created by congress is not authorized by Const. U. S. art. 3, § 2, as a case arising under the constitution and laws of the United States, although the eleventh amendment in terms prohibits actions against a state "by citizens of another state, or by citizens or subjects of any foreign state." *Smith v. Rackliffe*, 87 F. 964, 31 C. C. A. 328, affirmed.—*Smith v. Reeves*, 20 S. Ct. 919, 176 U. S. 436, 44 L. Ed. 1140.

Original jurisdiction of the supreme court of the United States cannot be exercised in a suit between a state and a citizen of another state, when, with the latter, citizens of the complainant state must necessarily be joined as parties.—*State of Minnesota v. Northern Securities Co.*, 22 S. Ct. 308, 184 U. S. 199, 46 L. Ed. 490.

The state of Oklahoma has no such interest in its corporate capacity as enables it to invoke the original jurisdiction of the federal Supreme Court by a suit to enjoin a foreign railway company from charging more than certain specified rates on domestic shipments of lime, cement, plaster, brick, stone, and crude and refined oil; the state not being engaged, in its governmental capacity, in the sale or transportation of such commodities, and having no property interest in them.—*State of Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 31 S. Ct. 434, 220 U. S. 277, 55 L. Ed. 466.

The federal Supreme Court cannot take original jurisdiction of a suit by a state against persons or corporations of other states, where such suit, though in the form of a civil action, is, in its essential character, one to enforce by injunction the penal or criminal legislation of the state against traffic in intoxicating liquors.—*State of Oklahoma v. Gulf, C. & S. F. Ry. Co.*, 31 S. Ct. 437, 220 U. S. 290, 55 L. Ed. 469, Ann. Cas. 1912C, 524.

A state may not invoke the original jurisdiction of the federal Supreme Court by suit on its behalf against persons or corporations of other states, where the primary purpose of the suit is to protect its citizens generally against the violation of its laws by the corporations or persons sued.—*Id.*

306. Controversies between citizens of different states.

See 13 Cent. Dig. Courts, §§ 850-875.

307. — In general.

See 13 Cent. Dig. Courts, §§ 850-854.

While the fact that a change of domicile is induced for the purpose of invoking federal jurisdiction does not affect the right, yet where the sole object in removing from one state to another is to be enabled to sue in the federal court, and the removal is without any present intention to remain permanently or for an indefinite time, but with a present intention to return as soon as the purposes of the suit are accomplished, there is no change of domicile.—*Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690.

The courts of the United States have no jurisdiction upon the ground of diverse citizenship of cases between citizens of the District of Columbia and citizens of a state.—*Hooe v. Jamieson*, 17 S. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049.

The motive with which a creditor invokes the jurisdiction of a federal Circuit Court is

immaterial if he has a justifiable demand and the requisite diversity of citizenship exists. *Decree, Govin v. City of Chicago* (C. C.) 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

The failure of a complaining stockholder, in an action by him against the corporation, to bring his case within the terms of equity rule 94, while justifying the dismissal of the bill for want of equity, does not defeat the jurisdiction of the federal Circuit Court over the suit, if the requisite diversity of citizenship exists, the jurisdictional amount is involved, and defendant is properly served with process within the district.—(1908) *Venner v. Great Northern Ry. Co.*, 28 S. Ct. 323, 209 U. S. 24, 52 L. Ed. 666, affirming judgment (C. C. 1907) 153 F. 408.

A change of domicile is effected by removal from one state to another with intent of making a home there for an indefinite time, though the motive for the change is the bringing of a suit in a federal court on the ground of diverse citizenship.—*Williamson v. Osenton*, 34 S. Ct. 442, 232 U. S. 619, 58 L. Ed. 753.

Where a wife justifiably left her husband and removed to another state with no intent of living elsewhere, she acquired a domicile in the latter state, so that she could sue a citizen of the state in which her husband resided in the federal court.—*Id.*

◀308. — Coplaintiffs and codefendants.

See 13 Cent. Dig. Courts, §§ 855, 856.

A. and B., citizens of Michigan, and C., D., and E., citizens of Ohio, filed a bill in the United States circuit court in Iowa against F., a citizen of New York, an Iowa corporation, an Illinois corporation, and G., a citizen of Ohio, to bring G. and F. to an accounting under a contract made by F. with complainants and others, by which he was to purchase a railroad at foreclosure sale, and hold the property in trust for the bondholders who should surrender their bonds to him to pay the purchase money, and contribute such other sums as might be needed; it being alleged that G. had become a trustee with F. of the proceeds of the sale, and that they claimed the same adversely to complainants and the other bondholders. *Held*, that although, as between themselves, complainants had separate interests under the contract which they need not have sued jointly to enforce, that having sued jointly, and there being such a conflict of interest between E. and G., both citizens of the same state, that they could not be placed on the same side of the controversy, the circuit court acquired no jurisdiction of the case under the act of March 3, 1875, c. 137, § 2, and could not render a decree dismissing the bill on its merits.—*Peninsular Iron Co. v. Stone*, 121 U. S. 631, 7 S. Ct. 1010, 30 L. Ed. 1020.

In an action on a bond secured by a mortgage, brought by citizens of one state against the citizens of another, one of the defendants, by her answer, prayed that the mortgage and bond be declared valid and foreclosed for her benefit and that of plaintiffs. The bond and mortgage were not divisible. All the defendants, including the one praying for relief, were citizens of the same state. *Held*, that the federal court had no jurisdiction, as it was substantially an action between citizens of the same state.—*Blacklock v. Small*, 127 U. S. 96, 8 S. Ct. 1096, 32 L. Ed. 70.

To support the jurisdiction of the United States courts upon the ground of diverse citizenship where there are two or more joint plaintiffs, each must be capable of suing in such courts; and voluntary joinder has the same effect for the purposes of jurisdiction as if they had been compelled to unite.—*Hooe v.*

Jamieson, 17 S. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049.

Plaintiffs who elect to assert a joint claim and title with other persons, and recover a joint judgment for their undivided interests, cannot, when there is no federal question involved, support jurisdiction of a circuit court of the United States on the ground that they are not citizens of the same state as the defendant, when such jurisdiction cannot be sustained on that ground with respect to their coplaintiffs. Judgment 87 F. 369, 31 C. C. A. 9, reversed.—*Florida Cent. & P. R. Co. v. Bell*, 20 S. Ct. 399, 176 U. S. 321, 44 L. Ed. 486.

◀309. — Nominal or formal parties.

See 13 Cent. Dig. Courts, § 857.

In an action by the state, on the relation of the holder of notes illegally executed by a township trustee, on the trustee's official bond, for such illegal execution, the relator will be considered the sole plaintiff, for determining the jurisdiction of the circuit court on the ground of diverse citizenship.—*State of Indiana v. Glover*, 155 U. S. 513, 15 S. Ct. 186, 39 L. Ed. 243.

◀310. — Necessary and unnecessary parties.

See 13 Cent. Dig. Courts, § 857.

One who appears by the proceedings in the land office to be the applicant for a patent to a mining claim, and to be asserting his compliance with the statute, is a proper and necessary party defendant in a suit in support of an adverse claim under Rev. St. U. S. §§ 2325, 2326, and not merely a nominal party, who can be disregarded in determining the question of the jurisdiction of a federal court on the ground of diverse citizenship.—*Blackburn v. Portland Gold-Min. Co.*, 20 S. Ct. 222, 175 U. S. 571, 44 L. Ed. 276.

◀311. — Representative or fiduciary capacity.

See 13 Cent. Dig. Courts, § 858.

In Maryland, administrators' bonds are payable to the state, but are held for the security of persons interested in the estate of decedent, and an action on an administrator's bond is brought in the name of the state for the use of the person interested. *Held* that, for the purposes of jurisdiction depending on citizenship, the use plaintiff will be regarded as the person bringing the suit.—*State of Maryland v. Baldwin*, 112 U. S. 490, 5 S. Ct. 278, 28 L. Ed. 822.

In an action for the assignment of dower brought by a citizen of Illinois, it appeared that, of the defendants in possession of the property, one, a citizen of New York, held the legal title for the codefendant, a citizen of Illinois. It did not appear that the trustee was authorized to represent his interests in the property for the purposes of this suit. *Held* that, as the beneficiary is a necessary party, and is a citizen of the same state as plaintiff, the federal court has no jurisdiction.—*Rand v. Walker*, 117 U. S. 340, 6 S. Ct. 769, 29 L. Ed. 907.

In an action against the trustee of a deed of trust and his cestui que trust, brought by the grantor in the deed, and his assignee in insolvency, to permit a sale of the property under the deed, and for an accounting between the grantor and cestui que trust, the trustee is an indispensable party adverse in interest to the plaintiffs, and, being a resident of the same state as the plaintiffs, the United States circuit court has no jurisdiction of the action as being a controversy between citizens of different states, although the cestui que trust is a citizen of a different state, as there is no separable

controversy between the plaintiffs and the cestui que trust. The jurisdiction must appear on the face of the record.—*Peper v. Fordyce*, 119 U. S. 469, 7 S. Ct. 287, 30 L. Ed. 435, reversing decree (C. C.) *Fordyce v. Peper*, 16 F. 516, 5 McCrary, 221.

A suit to foreclose a deed of trust is properly brought in the name of the trustee, and the fact that the beneficiary is a citizen of the same state as the grantor does not defeat the jurisdiction of the federal court, if the trustee is a citizen of a different state.—*Dodge v. Tulleys*, 144 U. S. 451, 12 S. Ct. 728, 36 L. Ed. 501.

A trust company, to which bonds are delivered merely to be held by it until the performance of a condition by the payee entitling it to possession, is a necessary, and not merely a formal, party to an action by such payee against it and the maker of the bonds to obtain their possession; and the United States circuit court of the state of which such maker is a resident has no jurisdiction of such action, where plaintiff and such trust company are both nonresidents of such state, but residents of the same state.—*Massachusetts & S. Const. Co. v. Cane Creek Tp.*, 155 U. S. 283, 15 S. Ct. 91, 39 L. Ed. 152.

The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name.—*Mexican Cent. Ry. Co. v. Eckman*, 23 S. Ct. 211, 187 U. S. 429, 47 L. Ed. 245.

312. — Assignees.

See 13 Cent. Dig. Courts, §§ 865-875.

The holder of a coupon payable to bearer is not an assignee of a cause of action, within Act March 3, 1875, § 1 (18 Stat. 470), which provides that no federal circuit court shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." Such coupon is a promissory note, within such section.—*Town of Thompson v. Perrine*, 106 U. S. 589, 1 S. Ct. 564, 563, 27 L. Ed. 293; *Chickaming Tp. v. Carpenter*, 106 U. S. 663, 1 S. Ct. 620, 27 L. Ed. 307.

In a bill charging that defendant had purchased a valuable tract of land at a foreclosure sale while acting as attorney for the defendant therein, who was the complainant's grantor, it appeared that complainant's grantor and defendant were citizens of the same state, and, after a suit begun in the state court was decided in defendant's favor, and pending an appeal to the supreme court of the state, the conveyance was made to her son-in-law, who was a resident of another state, and who, she testified, offered to "take the matter off her hands." It did not appear that any part of the purchase money stipulated in the deed had ever been paid, or that the deed had ever been delivered to the complainant, or that any bond for costs was ever given by complainant or any one for him. Immediately after the conveyance, suit was begun in his name in the federal court. *Held* clearly a case of simulated jurisdiction, which should have been dismissed, under Act March 3, 1875, c. 137.—*Hayden v. Manning*, 106 U. S. 580, 1 S. Ct. 617, 27 L. Ed. 306.

Where the maker and payee of a negotiable promissory note, secured by mortgage, are both citizens of the same state, an indorsee who is a citizen of another state may maintain an action in the federal courts to foreclose the mortgage, under the exception in favor of negotiable paper to the provision of Act March 3, 1875, c. 137, § 1, that the circuit and district courts shall not have jurisdiction of a suit by an as-

signee where such suit could not have been maintained in those courts if no assignment had been made.—*Tredway v. Sanger*, 107 U. S. 323, 2 S. Ct. 691, 27 L. Ed. 582.

Pending an action in a New York court against a corporation of that state by a citizen of New Jersey, upon a policy of insurance on the life of her husband, the plaintiff assigned the policy to a citizen of New York in trust for her benefit, and was afterwards nonsuited by order of the court. Upon a subsequent petition by the trustee to another court of the state to be relieved of his trust, a citizen of New Jersey was, at her request, appointed trustee in his stead. One object of this appointment was to enable a suit on the policy to be brought in the circuit court of the United States, which was afterwards brought accordingly. *Held*, that the suit should not be dismissed, under Act March 3, 1875, c. 137, §§ 1, 5, relating to assignees and persons made parties improperly to confer jurisdiction, as the circuit court would have had jurisdiction without the assignment.—*Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 S. Ct. 99, 27 L. Ed. 878.

A bill in equity in the circuit court of the United States against a town in one state by a citizen of another, for relief against the accidental omission of seals from bonds of the defendant, payable to bearer, and held by the plaintiff, some of which are owned by him, and others of which are owned in different amounts, part by citizens of the state in which the town is, and part by citizens of other states, and have been transferred to him by the real owners for the mere purpose of being sued, should be dismissed, under the act of March 3, 1875, c. 137, § 5, so far as regards all bonds held by citizens of the same state as the defendant, and bonds held by a citizen of another state to a less amount than \$500.—*Township of Bernards v. Stebbins*, 109 U. S. 341, 3 S. Ct. 252, 27 L. Ed. 956.

Act Cong. March 3, 1875 (18 Stat. 470), giving circuit courts jurisdiction of suits between citizens of different states, provides that "no circuit * * * court shall have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in case of promissory notes, negotiable by the law merchant." *Held*, that the circuit court had jurisdiction of a suit between citizens of different states to foreclose a mortgage made to secure the payment of a negotiable promissory note of which plaintiff was indorsee, though the payee and mortgagee was a citizen of the same state with the mortgagor.—*Mersman v. Werges*, 112 U. S. 139, 5 S. Ct. 65, 28 L. Ed. 641.

Municipal bonds are negotiable instruments, within the meaning of 18 Stat. 470, c. 137, § 1, providing that a suit can be brought on those instruments in the federal courts by an assignee thereof, notwithstanding it could not have been brought there had no assignment been made.—*Independent School Dist. v. Hall*, 113 U. S. 135, 5 S. Ct. 371, 28 L. Ed. 954; *Township of New Providence v. Halsey*, 117 U. S. 336, 6 S. Ct. 764, 29 L. Ed. 904.

Act Cong. March 3, 1875, § 5, provides that if, in any suit commenced in a circuit court, or removed from a state court, it shall appear, at any time after such suit has been brought or removed, that the parties to the suit have been improperly or collusively made or joined for the purpose of creating a case cognizable or removable under the act, the circuit court shall dismiss the suit, etc. Two years after the decision of a state court pronouncing bonds issued by the defendant municipality void, owners of the bonds, citizens of the state, cut off the coupons and transferred them to plaintiff, a citizen of another state, under an arrangement by which the latter gave his nonnegotiable note

for an amount much less than the face of the coupons, payable in two years from date, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay to the owners of the bonds one-half the amount collected above the face of the note. *Held*, that an action by plaintiff on the coupons, brought in the United States circuit court, should be dismissed as coming within the prohibition of the above section.—*Farmington Village Corporation v. Pillsbury*, 114 U. S. 138, 5 S. Ct. 807, 29 L. Ed. 114.

Recovery cannot be had in the federal courts on municipal bonds actually owned by citizens of the state where issued, and only transferred to plaintiff, who is a citizen of another state, to collect for their account.—*Township of New Providence v. Halsey*, 117 U. S. 336, 6 S. Ct. 764, 29 L. Ed. 904.

A municipal bond in the ordinary form is "a promissory note, negotiable by the law merchant," within Act Cong. March 3, 1875 (18 Stat. 470, c. 137, § 1), and suit may be brought in a federal court by an assignee thereof, who is a citizen of another state, notwithstanding it could not have been maintained if no assignment had been made.—*Id.*

The assignment of a note, to cut off an anticipated defense to the mortgage by which it is secured, will not be considered collusive, and justify a dismissal of a suit brought in a United States court by the assignee, if the title made by the transfer is such as would enable the assignee to maintain suit in his own name at all.—*Lanier v. Nash*, 121 U. S. 404, 7 S. Ct. 919, 30 L. Ed. 947.

Rev. St. § 629, provides that the circuit court shall not have cognizance of a suit on a promissory note, or other chose in action in favor of an assignee, unless such suit could have been prosecuted in that court if no assignment had been made. Plaintiff sues for specific performance of a contract to convey land. His right to sue is based on a deed of trust in the land embraced by the contract given to him by the person originally contracting. *Held*, that this deed of trust was substantially an assignment of the contract, and the assignee could not bring his action in the federal court, as the original parties to the contract could not have done so.—*Shoecraft v. Trustees of the Internal Imp. Fund of the State of Florida*, 124 U. S. 730, 8 S. Ct. 686, 31 L. Ed. 574.

The obligee in a bond secured by a mortgage assigned the bond in trust for his children. Plaintiffs, the cestuis que trustent, a number of years afterwards, brought suit in the federal circuit court against the obligor, alleging payment of the bond by him to the trustee in Confederate currency, and prayed that the bond, which had been surrendered to him, be redelivered to them, and that the pretended payments thereon, and the satisfaction of the mortgage which had been entered, be declared void. Plaintiffs were residents of Georgia, and the obligor of South Carolina, but the obligee, at the time of the assignment, and when suit was brought, was a resident of South Carolina. *Held*, that the court had no jurisdiction, under Act March 3, 1875, c. 137, § 1 (18 Stat. 470), providing that no circuit or district court shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."—*Blacklock v. Small*, 127 U. S. 96, 8 S. Ct. 1096, 32 L. Ed. 70.

A suit on a judgment is one "founded on contract," within the provisions of Act Cong. March 3, 1875, relating to suits by assignees in the circuit courts.—*Metcalf v. City of Water-*

town, 128 U. S. 586, 9 S. Ct. 173, 32 L. Ed. 543.

Act Cong. March 3, 1887, declaring that the United States circuit and district courts shall not have cognizance of any suit, except upon foreign bills of exchange, to recover on any note, or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court, if no assignment or transfer had been made, does not deprive those courts of jurisdiction of an action by an assignee to recover damages for a trespass in entering upon lands and cutting down trees.—*Ambler v. Eppinger*, 137 U. S. 480, 11 S. Ct. 173, 34 L. Ed. 765.

A creditor who has become subrogated to a right of his debtor may sue on such right in the federal court, if he and the defendant are citizens of different states, though the debtor and the defendant are citizens of the same state, and the debtor has assigned his right to the creditor, since such assignment does not create the creditor's right of action, but merely aids it.—*City of New Orleans v. Whitney*, 133 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (C. C.) *Whitney v. City of New Orleans*, 43 F. 215.

Under 25 Stat. 433, c. 866, § 1, providing that no federal court shall have cognizance of any suit to recover on a note in the hands of an assignee, unless such suit might have been prosecuted in such court if no assignment or transfer had been made, a circuit court has no jurisdiction of an action by an assignee of a note payable to the payee's order, where the record fails to show the citizenship of the original payee.—*Parker v. Ormsby*, 141 U. S. 81, 11 S. Ct. 912, 35 L. Ed. 654.

When notes and mortgages are transferred to a nonresident of the state for a valuable consideration, and the assignor's interest thereupon entirely determines, the mere fact that one of the purposes of the transfer is to establish the diversity of citizenship necessary to make the case cognizable in a federal court does not render the transaction collusive, within the meaning of Act March 3, 1875, § 5.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree (C. C.) *Allen v. O'Donald*, 28 F. 346.

A note which is not paid at maturity does not cease to be "negotiable by the law merchant," within the meaning of Act Cong. March 3, 1875, § 1, providing that no suit founded on contract shall be maintained in a federal court in favor of an assignee, unless maintainable therein before the assignment was made, "except in cases of promissory notes negotiable by the law merchant and bills of exchange."—*Id.*

Where the transfer of a judgment gives the diversity of citizenship necessary to render a suit thereon cognizable in the federal courts, the fact that this is one of the motives of the transfer does not affect the federal jurisdiction, if the change of title is in fact absolute and for a good consideration.—*Crawford v. Neal*, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552.

Under Act Aug. 13, 1888 (25 Stat. 434), restricting the jurisdiction of circuit and district courts over suits by assignees to cases where such suit might have been prosecuted if no assignment or transfer had been made, the circuit court has jurisdiction of an action on a promissory note by the indorsee against the maker thereof, although the payee is a citizen of the same state as the maker, where it appears that the note was made for the accommodation of the payee, and that he is, in legal effect, a maker or original promisor, and therefore did not, by his indorsement, assign or transfer any right of action held by him against

the accommodation maker.—*Holmes v. Goldsmith*, 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118, affirming judgment (C. C.) *Goldsmith v. Holmes*, 36 F. 484, 1 L. R. A. 816.

Under Judiciary Act March 3, 1875, the federal courts have no jurisdiction of a suit by the assignee of a judgment to subject thereto property of the judgment debtor standing in the name of a third person, when the assignor is a citizen of the same state as the defendant.—*Mississippi Mills v. Cohn*, 150 U. S. 202, 14 S. Ct. 75, 37 L. Ed. 1052, reversing decree (C. C.) 39 F. 865.

A corporation which constructs a railroad, in consideration of receiving from the railroad company certain lands to which it is entitled by a grant from the state of Florida and a contract with the trustees of the Florida internal improvement fund, is an "assignee" of a "chose in action," within the meaning of the judiciary acts (Rev. St. § 629, and Act March 3, 1887), and cannot maintain in a federal court a suit to compel a conveyance to it by such trustees, unless the railroad company itself could have maintained the action in such court.—*Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 14 S. Ct. 483, 38 L. Ed. 353.

A suit in equity against certain municipalities by an alien assignee of warrants issued by the police board of such municipalities prior to the repeal of an act which gave the board power to issue warrants for police expenses, and to apportion the expenses against the municipalities, to be paid by taxes raised by them, for the application thereto, as assets of the board, of amounts due to it, on apportionments made and taxes levied and collected, is a suit to establish a claim on the warrants, and to enforce payment by a decree over against the municipalities, dispensing with judgment against the board by reason of the dissolution, and hence a suit to recover the contents of choses in action, of which the United States circuit court had no jurisdiction, in the absence of an averment in the bill that it could have been maintained by the assignors.—*City of New Orleans v. Benjamin*, 153 U. S. 411, 14 S. Ct. 905, 38 L. Ed. 704.

Rev. St. § 629, providing that an action in favor of the assignee of a note cannot be brought in the circuit court to recover the contents of the note, unless it could have been brought, had there been no assignment, does not apply to an action, on the relation of the assignee of the note, on the official bond of a township trustee, for illegally executing the note.—*State of Indiana v. Glover*, 155 U. S. 513, 15 S. Ct. 186, 39 L. Ed. 243.

A claim, founded on contract, to recover a sum of money out of a fund in the hands of a railroad company, is a "chose in action," within the meaning of that provision in the first section of the judiciary act (Act March 3, 1887, as corrected by Act Aug. 13, 1888) which denies to an assignee of a chose in action the right to sue in the federal courts if no action could have been maintained there in the absence of an assignment.—*Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 15 S. Ct. 563, 39 L. Ed. 672.

Where there is an actual sale and transfer of the subject-matter of the suit, the fact that it was made for the purpose of giving jurisdiction to the federal court is immaterial.—*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444, affirming judgment (C. C.) 64 F. 401.

Under Judiciary Act 1887-88, § 1 (24 Stat. 552, c. 373; 25 Stat. 433, c. 860), a circuit court has jurisdiction, in a case of diverse citizenship, of an action by an assignee on a chose in action payable to bearer, and made by a corporation (in this case a municipal corporation), without regard to whether the assignor could have maintained the suit.—*City of New Orleans*

v. Quinlan, 19 S. Ct. 329, 173 U. S. 191, 43 L. Ed. 664, affirming judgment (C. C.) *Quinlan v. City of New Orleans*, 92 F. 695.

By the judiciary act of 1887-88, an instrument payable to the bearer, and made by a corporation, is excepted from the general rule thereby prescribed, that an assignee or transferee of a chose in action cannot sue in a federal court, unless his assignor or transferrer could have sued in such court.—*Board of Com'rs of Lake County, Colo., v. Dudley*, 19 S. Ct. 398, 173 U. S. 243, 43 L. Ed. 684, reversing judgment *Dudley v. Board of Com'rs of Lake County, Colo.*, 80 F. 672, 26 C. C. A. 82.

The provision in the fifth section of the judiciary act of 1875 relating to dismissal applies to a case in which citizens of a state, owning coupons cut from bonds of a county of that state, transfer the same, without consideration, to a citizen of another state, in order that he may join the causes of action thereon with the causes of action on other coupons transferred to him for the same purpose by other persons, and thereby make a case cognizable in a federal court, though these latter persons might themselves have sued in the federal court.—*Id.*

A purchaser of warrants at a judicial sale under authority of an order of the probate court is an assignee, within the meaning of the act of congress of March 3, 1875, which allows an assignee of such contracts to sue in the federal court only when suit might have been brought in that court if no assignment had been made.—*Glass v. Police Jury of Parish of Concordia*, 20 S. Ct. 346, 176 U. S. 207, 44 L. Ed. 436.

A municipal corporation is within the words "any corporation," in the judiciary act of Aug. 13, 1888, c. 860, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], under which the assignee of a chose in action made by a corporation and payable to bearer may invoke the jurisdiction of a federal court on the ground of diverse citizenship without regard to the citizenship of the original holder. Judgment (C. C.) 91 F. 37, reversed.—*Loeb v. Trustees of Columbia Tp.*, 21 S. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

A circuit court of the United States has jurisdiction, on the ground of diverse citizenship, of a suit by the assignee of the payees of police warrants, if such payees might, at the time the suit was commenced, have themselves prosecuted suit therein on that ground if there had been no assignment or transfer.—*Emsheimer v. City of New Orleans*, 22 S. Ct. 770, 186 U. S. 33, 46 L. Ed. 1042.

The jurisdiction of a circuit court of the United States, on the ground of diverse citizenship, of a suit by a foreign corporation against residents of the state, is not defeated on the theory that plaintiff is suing as the assignee of a domestic corporation, where the bill, although emphasizing the existence of certain contracts between defendants and its assignor, and alleging that it became substituted for such assignor as a party thereto, contains allegations which show that the parties having the old contracts before them, entered into new agreements determined by reference to the terms of the old contracts, but none the less personal and immediate.—*American Colortype Co. v. Continental Colortype Co.*, 23 S. Ct. 265, 188 U. S. 104, 47 L. Ed. 404.

The relief sought by way of foreclosure of certain trust deeds stamps the suit as one to recover the contents of a chose in action, which can only be maintained in the federal Circuit Court; under Act Aug. 13, 1888, c. 860, § 1, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508], where the assignor could have sued in that court if no assignment had been made,

although the bill also prays for a cancellation of a release of the trust deeds to the grantor, as in fraud of the rights of the complainant, who held the deeds and the notes secured thereby as collateral security for a loan to the trustee.—*Kolze v. Hoadley*, 26 S. Ct. 220, 200 U. S. 76, 50 L. Ed. 377.

A New York corporation may bring suit in a federal Circuit Court on the notes of an Illinois corporation, although the treasurer of the latter corporation, to whose order the notes were made payable, and by whom they were, before delivery, indorsed to the New York corporation, which loaned the money for which they were given, may be a citizen of Illinois. Decree, *Govin v. City of Chicago* (C. C.) 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

A suit to declare and enforce a lien on certain interests in distributive shares of the property of a decedent in the hands of an ancillary administrator is not within the provision of Rev. St. U. S. § 629 (U. S. Comp. St. 1901, p. 508), governing federal jurisdiction of suits by assignees of choses in action, because plaintiff's right is derived from an heir whose citizenship is the same as that of such administrator, where the plaintiff, who sues as administratrix, and who is a citizen of a different state from the defendant administrator, is suing primarily on the obligation of such heir to her intestate, to secure which a lien was given upon such heir's distributive share. Decree, *Coram v. Ingersoll* (1906) 148 Fed. 169, 78 C. C. A. 303, reversed.—*Ingersoll v. Coram*, 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208.

A suit to enforce rights in the corpus of a trust estate of persons claiming under the assignee of a part of the beneficiary's interest in the trust, by which the income was to be paid to the beneficiary until he reached a certain age, when the fund was to become his absolutely, is not within Judicial Code, § 24, governing suits to recover on a chose in action by an assignee or subsequent holder.—*Brown v. Fletcher*, 35 S. Ct. 154, 235 U. S. 589, 59 L. Ed. 374.

A suit to enforce the rights in the trust estate of persons claiming under the assignee of part of the beneficiary's interest in the testamentary trust, the corpus to be the property of the beneficiary when of age, is not within Judicial Code, § 24, governing suits to recover on a chose in action in favor of any assignee.—*Brown v. Fletcher*, 35 S. Ct. 750, 237 U. S. 583, 59 L. Ed. 1128, reversing decree 206 F. 461, 124 C. C. A. 367.

—313. — Interveners and substituted parties.

See 13 Cent. Dig. Courts, § 859.

Where the jurisdiction of a United States court has completely attached in ejectment against a tenant in possession by a citizen of another state, it is not affected by the substitution of the landlord for such tenant as defendant.—*Hardenbergh v. Ray*, 151 U. S. 112, 14 S. Ct. 305, 38 L. Ed. 93, affirming judgment (C. C.) *Hardenbergh v. Same*, 33 F. 812, 13 Sawy. 158.

—314. — Corporations.

See 13 Cent. Dig. Courts, § 860.

The state which grants its charter and within which it does business determines the jurisdiction of the federal courts of actions to which a corporation is a party, and not the citizenship of its members.—*National S. S. Co. v. Tugman*, 106 U. S. 118, 1 S. Ct. 53, 27 L. Ed. 87; *St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 S. Ct. 621, 40 L. Ed. 802.

Where the jurisdiction of a federal court depends on citizenship, a corporation will be regarded as a citizen of the state under whose

laws it was created.—*Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 S. Ct. 208, 28 L. Ed. 794, reversing order (C. C.) 13 F. 106, 2 McCrary, 550.

A railroad company, chartered by the state of Illinois, was permitted by act of the Legislature of Indiana to extend its road into that state. All the property of this company was sold under foreclosure, and the purchasers organized a new company, which, under an act of Illinois, succeeded to all the franchises of the old one. A certificate of the organization of the new company, with the names of its first directors, was filed in the office of the secretary of state of Indiana, but the stockholders and incorporators never did anything recognizing the existence of an Indiana corporation of the same name. Held that, as to its rights to sue in the federal courts, the railroad company was a citizen of Illinois, and not a citizen or corporation of Indiana.—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 S. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 S. Ct. 24, 30 L. Ed. 284.

Plaintiff was created a corporation in New Hampshire. Subsequently the same persons forming such corporation were constituted a corporation under the same name by the Legislature of Massachusetts. Thereafter acts were passed, first in Massachusetts and then in New Hampshire, to unite the two corporations, and providing that all the tolls, franchises, rights, and property of the two corporations should be held and enjoyed by the stockholders in proportion to their number of shares in either or both of the corporations. Held that, for the purpose of determining the jurisdiction of the federal court claimed on the ground of diverse citizenship in a suit by plaintiff against a citizen of Massachusetts, plaintiff would be considered as a citizen of New Hampshire.—*Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 S. Ct. 1004, 34 L. Ed. 363, reversing 8 F. 458.

There is an entire want of federal jurisdiction under both the act of 1875 and the act of 1887 when two corporations on opposite sides of a controversy are created under the laws of the same state, whether the suit is brought in that state or in another state, where the defendant corporation has a place of business.—*Empire Coal & Transportation Co. v. Empire Coal & Mining Co.*, 150 U. S. 159, 14 S. Ct. 66, 37 L. Ed. 1037.

Act Ark. March 13, 1889, § 2, providing that every railroad corporation of any other state which had leased or purchased any railroad in Arkansas should file a certified copy of its articles of incorporation with the secretary of state, and should thereupon become a corporation of Arkansas, did not create an Arkansas corporation out of a foreign railroad corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the federal constitution, so as to subject it, as such, to a suit in the federal circuit court by a citizen of the state of its origin.—*St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 S. Ct. 621, 40 L. Ed. 802.

In a suit in the federal circuit court for the district of Kentucky by a railroad company, suing as a corporation of Indiana, against citizens of Kentucky and Illinois, the court is without jurisdiction to adjudicate questions between the defendants and the complainant as a corporation either of Kentucky or of Illinois.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

For the purposes of the jurisdiction of courts of the United States, a corporation remains a citizen of the state by which it was

created, though it is afterwards also made a corporation of another state.—Id.

A foreign railroad corporation does not become a citizen of North Carolina, so far as to affect the jurisdiction of the federal courts upon the question of diverse citizenship, by complying with Pub. Acts N. C. 1899, c. 62, which declares that such a corporation becomes a domestic corporation by filing with the Secretary of State duly authenticated copies of its charter and by-laws. Judgment, *Allison v. Southern Ry. Co.*, 40 S. E. 91, 129 N. C. 336, reversed.—*Southern Ry. Co. v. Allison*, 23 S. Ct. 713, 190 U. S. 326, 47 L. Ed. 1078.

Incorporators under a charter which declares that they "are hereby created a body politic and corporate" become a corporation under the laws of Mississippi for the purpose of suing and being sued in the federal courts as a citizen of that state upon the approval of such charter by the Governor, and the certification of such approval by the Secretary of State, under the great seal of the state, although there has been no compliance with the subsequent provision of the charter conferring the power to commence business when a certain proportion of the capital stock shall be subscribed and paid for. Judgment, *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.*, 128 F. 369, 63 C. C. A. 111, which reversed (C. C.) *W. L. Wells Co. v. Avon Mills*, 118 F. 190, reversed.—*W. L. Wells Co. v. Gastonia Cotton Mfg. Co.*, 25 S. Ct. 640, 198 U. S. 177, 49 L. Ed. 1003.

A suit by Pennsylvania and New Jersey corporations against a New York corporation operating a street railway system in the city of New York, the bill in which avers an unsatisfied indebtedness due each complainant from the defendant, substantially involves a controversy between citizens of different states within the meaning of Act Aug. 13, 1888, c. 886, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, pp. 507, 508], defining the jurisdiction of the federal Circuit Courts, although the defendant admits the indebtedness and the other allegations of the bill, and joins with the complainants in a request that receivers be appointed.—(1908) *In re Reisenberg*, 28 S. Ct. 219, 208 U. S. 90, 52 L. Ed. 403, dismissing petitions (C. C. 1907) *Pennsylvania Steel Co. v. New York City R. Co.*, 157 F. 440.

Incorporation in Nevada by direction of a California corporation, for the sole purpose of having the matters in dispute between such California corporation and another corporation of that state determined in a federal rather than in the state court, where they were pending and undetermined must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the federal court, which under Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, pp. 508, 511), requires the dismissal of the suit, where the new corporation assumes to be the owner of the property rights which the old company had asserted only that it may have a standing in the federal court as a litigant in respect of those rights, and the old corporation can control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration.—*Miller & Lux v. East Side Canal & Irrigation Co.*, 29 S. Ct. 111, 211 U. S. 293, 53 L. Ed. 189.

Corporation originally incorporated in Missouri, which admits the existence of diverse citizenship relied on to support jurisdiction of the federal Circuit Court for the district of Nebraska, cannot urge, to defeat such jurisdiction, that it had become a Nebraska corporation under the laws of that state, as construed

by its courts.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

A corporation originally incorporated in the Indian Territory under the Arkansas statutes, put in force by Act Cong. Feb. 18, 1901, became an Oklahoma corporation for purposes of jurisdiction when that state was admitted.—*Shulthis v. McDougal*, 32 S. Ct. 704, 225 U. S. 561, 56 L. Ed. 1205.

Railroad incorporated by act of Congress to carry on business in different states is not a citizen of any particular state for purpose of giving federal court jurisdiction of suit against it for diversity of citizenship.—*Bankers' Trust Co. v. Texas & P. Ry. Co.*, 38 S. Ct. 569, 241 U. S. 295, 60 L. Ed. 1010.

315. — Unincorporated associations and partnerships.

See 13 Cent. Dig. Courts, § 861.

A limited partnership association created under Laws Pa. 1874, p. 271, although it may be called a quasi corporation, and is declared by the state statute to be a citizen of the state, is not, like a corporation created under the laws of the state, to be deemed a citizen of that state, within the meaning of the clause of the federal constitution which extends the judicial powers of the United States to controversies between citizens of different states. Judgment, *Jones v. Great Southern Fireproof Hotel Co.*, 86 F. 370, 30 C. C. A. 108, reversed.—*Great Southern Fireproof Hotel Co. v. Jones*, 20 S. Ct. 690, 177 U. S. 449, 44 L. Ed. 842.

Diverse citizenship is not available to sustain the jurisdiction of a federal Circuit Court of a suit to enjoin a sale of railway stock by a firm of bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of the sale sufficient to satisfy any judgment which may be recovered by complainant in a suit to foreclose a mortgage on the property of the railway company, where some of the members of such firm are citizens of the same state with complainant. Judgment (C. C.) 118 F. 777, affirmed.—*Raphael v. Trask*, 24 S. Ct. 647, 194 U. S. 272, 48 L. Ed. 973.

316. — Improper or collusive making or joinder of parties.

See 13 Cent. Dig. Courts, § 862.

In a suit by a gas company against a city to restrain the enforcement of an ordinance forfeiting its property and franchises, where it appeared that two of the three directors refused to institute proceedings in the local courts because of the excited condition of the public mind, in order that the third, who was a non-resident, might be driven to a proceeding in his own name, in the federal courts, held a case of collusive jurisdiction, within Act March 3, 1875, c. 137, § 5, and that the bill should be dismissed without prejudice to a suit in the state court.—*City of Detroit v. Dean*, 106 U. S. 537, 1 S. Ct. 560, 27 L. Ed. 300.

The county of S., Cal., desiring to enjoin a certain nuisance maintained by a California corporation, but being unable to sue in the United States court, agreed to furnish the attorneys for the plaintiff and bear all the expenses of the present suit. The plaintiff was interested in the result of the suit as well as the county. Held, that this was a suit collusively made, and the United States court had no jurisdiction.—*Cashman v. Amador & S. Canal Co.*, 118 U. S. 58, 6 S. Ct. 926, 30 L. Ed. 72.

The organization, by the individual stockholders and officers of a Virginia corporation, of a corporation under the laws of Pennsylvania for the express purpose of bringing a suit in a federal court for land claimed by the former corporation against citizens of Virginia, and conveyed, without the payment of a valuable consideration, to the Pennsylvania corporation

after its organization, and before the bringing of suit, will not enable the grantee to maintain the suit in such court.—*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444, affirming judgment (C. C.) 64 F. 401.

The provision in the fifth section of the judiciary act of 1875, making it the duty of the court to dismiss a case if it shall appear that it does not really and substantially involve a controversy properly within the jurisdiction of such court, or if the parties have been collusively joined for the purpose of creating a case cognizable therein, was not superseded by Act 1887-88.—*Board of Com'rs of Lake County, Colo., v. Dudley*, 19 S. Ct. 398, 173 U. S. 243, 43 L. Ed. 684, reversing judgment *Dudley v. Board of Com'rs of Lake County, Colo.*, 80 F. 672, 26 C. C. A. 82.

A federal circuit court has no jurisdiction, on the ground of diversity of citizenship, of a suit brought against a municipality by the mortgagee of a waterworks company, to enforce the municipality's contract with that company, where there is no diversity of citizenship between the municipality and the waterworks company, and the interests of the latter and its mortgagee are not antagonistic, it obviously being made a defendant instead of plaintiff solely for the purpose of reopening, in the federal courts, a controversy which had been decided against the waterworks company in the state court.—*City of Dawson v. Columbia Ave. Sav. Fund. Safe Deposit, Title & Trust Co.*, 25 S. Ct. 420, 197 U. S. 178, 49 L. Ed. 713.

The jurisdiction of the Circuit Court of the United States for the Northern District of Illinois of a suit brought by a California stockholder of an Illinois gas company, after the company's refusal to sue, to enjoin the city of Chicago from enforcing an ordinance regulating gas rates, on the ground of want of power in the municipality to pass the ordinance, cannot be regarded as collusively or fraudulently invoked because of complainant's motive in preferring a federal tribunal, or because subsequent events made it to the interest of the company to make common cause with him against the enforcement of the ordinance, or because an officer and large stockholder in such company personally contributed to the expenses of the suit, or because complainant's counsel was afterwards retained in a suit then pending between the company and the municipality. *Decree, Mills v. City of Chicago* (C. C. 1906) 143 F. 430, affirmed.—*City of Chicago v. Mills*, 27 S. Ct. 286, 204 U. S. 321, 51 L. Ed. 504.

Collusion requiring the dismissal, pursuant to Act March 3, 1875, c. 137, § 5, 18 Stat. 470 [U. S. Comp. St. 1901, p. 511], of a suit against a street railway company in a federal Circuit Court, cannot be inferred because the parties desired that the administration of the railway affairs be taken in hand by the court, to which end the defendant admitted the averments in the bill and united with complainants in their request for the appointment of receivers, where no claim is made that the averments in the bill were untrue, or that the debts named therein as owing to the complainants did not in fact exist, and there is no question made as to the citizenship of the complainants, and not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the federal court.—(1908) *In re Reisenberg*, 28 S. Ct. 219, 208 U. S. 90, 52 L. Ed. 403, dismissing petitions (C. C. 1907) *Pennsylvania Steel Co. v. New York City R. Co.*, 157 F. 440.

An action brought by a South Dakota corporation against a citizen of Georgia, in a federal Circuit Court sitting in the latter state, will be dismissed under Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), as collusive, where such corporation is

merely the agent of Georgia attorneys, who brought it into existence as a corporation that individual citizens of Georgia having controversies with other individual citizens of that state might, in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the federal court.—*Southern Realty Inv. Co. v. Walker*, 29 S. Ct. 211, 211 U. S. 603, 53 L. Ed. 346.

If the parties before a federal Circuit Court are properly aligned as plaintiffs and defendants, the suit may not be dismissed, under Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), for collusion because necessary parties are omitted, either as plaintiff or defendant, whose presence would defeat the jurisdiction of the court.—*Helm v. Zarecor*, 32 S. Ct. 10, 222 U. S. 32, 56 L. Ed. 77.

A suit by nonresident taxpayers on behalf of themselves and all other taxpayers to restrain a municipal public utilities commission from acquiring a waterworks system, on the ground that it was an unconstitutional body, should not be dismissed on the theory that the complainants were collusively made parties because solicited to bring the suit and indemnified by the existing waterworks company.—*Wheeler v. City and County of Denver*, 33 S. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

—317. — Rearrangement of parties.

The fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the parties to a cause, for the purpose of determining the jurisdiction of a federal circuit court, invoked on the ground of diversity of citizenship, that such corporation be grouped on the side of complainants, where the bill alleges that the corporation is under a control antagonistic to complainants, and is made to act in a way detrimental to their rights.—*Doctor v. Harrington*, 25 S. Ct. 355, 196 U. S. 579, 49 L. Ed. 606.

The corporate defendant and the complaining stockholder will not be aligned on the same side of the controversy for the purpose of determining the jurisdiction of a federal Circuit Court, invoked on the ground of diverse citizenship, because it may be for the financial interests of the corporation that the suit shall succeed, where the corporation unites with the other defendant in resisting the claim of illegality and fraud, and both are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action.—*Venier v. Great Northern Ry. Co.*, 28 S. Ct. 328, 209 U. S. 24, 52 L. Ed. 666, affirming judgment (C. C. 1907) 153 F. 408.

Neither the attitude of the alleged members of the Board of Publication of the Cumberland Church, incorporated merely as a convenient agency for the publishing work of such church, who believed the alleged union with the Presbyterian Church to have been consummated, nor the fact that it does not appear that such members have surrendered possession, requires that, when testing the jurisdiction of a federal Circuit Court, invoked on the ground of diversity of citizenship, such corporation be aligned on the side of complainants in a suit to enforce the alleged rights of the members of the United Church to use and control the corporate agency and to have the benefit of the corporate property in its denominational work, as against defendants who repudiate the alleged union, and insist that the religious association which they represent is still the original Cumberland Church, continuing with all its separate powers unimpaired.—*Helm v. Zarecor*, 32 S. Ct. 10, 222 U. S. 32, 56 L. Ed. 77.

Trustees holding legal title to church property need not, when testing jurisdiction of federal Supreme Court invoked for diversity of citizenship, be aligned on complainants' side in controversy between two religious societies over right to control the church property, but are properly made parties defendant.—*Sharpe v. Bonham*, 32 S. Ct. 420, 224 U. S. 241, 56 L. Ed. 747.

319. — Change of citizenship pending suit.

See 13 Cent. Dig. Courts, § 864.

Jurisdiction of a suit once acquired by a court of the United States by reason of the requisite citizenship of the parties is not lost by a change in the citizenship of either party pending the suit.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

321. Controversies between a state or citizens thereof and foreign states, citizens, or subjects.

See 13 Cent. Dig. Courts, §§ 845, 847-849.

The Circuit Court has jurisdiction over a proceeding to impeach its own former decree, although the parties are new and are both aliens.—*Lacassagne v. Chapuis*, 12 S. Ct. 659, 144 U. S. 119, 36 L. Ed. 368.

A federal Circuit Court, whose action was invoked by the Republic of Colombia to set aside an award made against it in arbitration proceedings, has the same power to decree the payment of interest from the date fixed for payment by the award as in an ordinary case.—*Ex parte Republic of Colombia*, 25 S. Ct. 107, 195 U. S. 604, 49 L. Ed. 338.

A federal Circuit Court in New York cannot take jurisdiction of a suit against nonresident aliens to establish title to bonds held by them as executors on the theory that they were within the district within Act March 3, 1875, § 8, because that state, by virtue of probate of testator's will and appointment of defendants as executors, may treat both them and the estate as constructively present and subject to jurisdiction.—*Chase v. Wetzlar*, 32 S. Ct. 659, 225 U. S. 79, 56 L. Ed. 990.

322. Allegations in pleadings.

See 13 Cent. Dig. Courts, §§ 876-881, 887.

Where federal jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts constituting it, must be distinctly or positively averred in the pleadings, or affirmatively appear in other parts of the record. An allegation that a firm, the members of which are parties, is "of" a state, is not sufficient to show their citizenship there.—*Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 S. Ct. 207, 27 L. Ed. 932.

Where the jurisdiction of the United States circuit court is an action on a life insurance policy depends alone on the citizenship of the parties, a declaration which alleges that the assured, plaintiff's intestate, was a citizen of Pennsylvania, and that defendant is a citizen of Connecticut, but does not allege plaintiff's own citizenship, is not sufficient to show the jurisdiction of the circuit court, and it cannot be amended on appeal.—*Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380.

Where the record does not show that the circuit court had jurisdiction of the suit, which depends alone on the citizenship of the parties, its judgment will be reversed by the supreme court of the United States; and where the citizenship of a defendant was in fact such, at the commencement of the suit, as to give the circuit court jurisdiction, it will be in the power of

that court, when the case gets back, to allow the necessary amendment to be made, and then proceed to trial.—*Halsted v. Buster*, 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462.

Where the citizenship of a defendant was in fact such, at the commencement of the suit, as to give the circuit court jurisdiction, it will be in the power of that court to allow the necessary amendment to be made.—*Id.*

In an action brought in the circuit court of the United States, by the assignee of two county warrants, one payable to A., and the other payable to A. or order, the latter not being indorsed by him, the citizenship of A. must affirmatively appear; otherwise, the court has no jurisdiction, by reason of Act March 3, 1875, § 1, which excludes from the cognizance of a circuit or district court of the United States any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes and bills of exchange.—*King Iron Bridge & Manufacturing Co. v. Oteo County*, 120 U. S. 225, 7 S. Ct. 552, 30 L. Ed. 623.

An averment that a party is "of" or a "resident" of a particular state is not sufficient. It must be alleged that he is a citizen.—*Everhart v. Huntsville Female College*, 120 U. S. 223, 7 S. Ct. 555, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 7 S. Ct. 873, 30 L. Ed. 914; *Denny v. Pironi*, 141 U. S. 121, 11 S. Ct. 966, 35 L. Ed. 657; *Wolfe v. Hartford Life & Annuity Ins. Co.*, 148 U. S. 389, 13 S. Ct. 602, 37 L. Ed. 493; *Horne v. George H. Hammond Co.*, 155 U. S. 393, 15 S. Ct. 167, 39 L. Ed. 197; *Cooper v. Newell*, 155 U. S. 532, 15 S. Ct. 355, 39 L. Ed. 249.

Where the declaration simply avers that the plaintiff is a joint-stock company organized under the laws of a state other than that of defendant, the members of the company not being shown to be citizens of some state other than that of defendant, it is not shown that the federal court has jurisdiction.—*Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800.

A bill was filed in the federal court against a citizen of Florida by F. and W., "citizens of the state of New York," as executors. On finding that defendant was in fact a citizen of New York, it was amended by striking out complainant F., who, since the bill was filed, had had his letters testamentary revoked, and leaving W., as "a citizen of Great Britain," as he in fact was, as surviving executor and sole complainant. *Held*, that the amendment could not give jurisdiction, which depended on the condition and citizenship of the parties when the suit was commenced.—*Anderson v. Watts*, 138 U. S. 694, 11 S. Ct. 449, 35 L. Ed. 1078.

In an action in the federal circuit court, where the jurisdiction depended on the citizenship of the parties, the complaint alleged that plaintiffs are "residents" of North Carolina and South Carolina, and that defendant is a "corporation chartered under the laws of the state of Alabama, and doing business within said state." The complaint was amended by adding other plaintiffs, without any averment as to their citizenship; but the bill of exceptions, which formed part of the record, stated that plaintiffs were "nonresidents" of Alabama. *Held*, that the record did not sufficiently show the diverse citizenship of the parties to confer jurisdiction on the circuit court.—*Timmons v. Elyton Land Co.*, 139 U. S. 378, 11 S. Ct. 585, 35 L. Ed. 195.

When the original petition contains the proper averments, as to the citizenship of the parties, to bring the case within the jurisdiction of the United States circuit court, it cannot be objected that "the record fails to show the residence and citizenship of the parties at the

time of the institution of the suit," simply because the averments as to these matters in an amended petition on which the case was tried refer to the time of its filing, and not to the time when the action was brought.—*Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699.

Jurisdiction of a circuit court, on the ground of the citizenship of the parties to an action brought therein, is not shown of record by the mere description, contained in the title of the cause and the declaration therein, of the plaintiff, an administratrix, as "of" a certain place in the district in which suit is brought, the decedent as "late of" the same place, and the defendant as "a corporation organized under the laws of" a different state.—*Horne v. George H. Hammond Co.*, 155 U. S. 393, 15 S. Ct. 167, 39 L. Ed. 197.

Jurisdiction dependent on the alienage of one of the parties cannot be sustained upon the mere description of such party, throughout the record, as a "citizen of London, England."—*Stuart v. City of Easton*, 156 U. S. 46, 15 S. Ct. 268, 39 L. Ed. 341.

Allegations in a bill filed by a railroad company that it is a corporation created and existing under and by virtue of the laws of two states, and that the defendant is a citizen of one of such states, does not show that complainant and defendant are citizens of different states within the meaning of the jurisdiction clause of the constitution.—*St. Joseph & G. I. R. Co. v. Steele*, 17 S. Ct. 925, 167 U. S. 659, 42 L. Ed. 315, reversing decree 63 F. 867, 11 C. C. A. 470.

The citizenship of the individual members of a limited partnership association created by the laws of Pennsylvania must be alleged in a suit by that association in a federal court, where jurisdiction depends upon diverse citizenship of the parties. Judgment, *Jones v. Great Southern Fireproof Hotel Co.*, 86 F. 370, 30 C. C. A. 108, reversed.—*Great Southern Fireproof Hotel Co. v. Jones*, 20 S. Ct. 690, 177 U. S. 449, 44 L. Ed. 842.

A defect in a bill in a federal court, which fails to aver the citizenship of a party, may be cured by amendment.—*Howard v. De Cordova*, 20 S. Ct. 817, 177 U. S. 609, 44 L. Ed. 908.

Complainants' description of themselves, in a bill in a suit against a citizen of Nebraska, as "all of Cognac in France, and citizens of the republic of France," is sufficient, without any averment of alienage, to bring the suit within the provisions of Act Aug. 13, 1888, c. 856, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], conferring original jurisdiction upon Circuit Courts of the United States of all suits in which there is "a controversy between citizens of a state and foreign states, citizens, or subjects."—*Hennessy v. Richardson Drug Co.*, 23 S. Ct. 532, 189 U. S. 25, 47 L. Ed. 697; *Same v. Moise*, 23 S. Ct. 534, 189 U. S. 35, 47 L. Ed. 698.

An averment that plaintiff is a resident of the state of Delaware will be regarded by an appellate court as a sufficient averment of citizenship in that state, for the purpose of giving jurisdiction to a federal Circuit Court, where the uncontradicted testimony shows a legal domicile therein, and that any absence from the state was without intention to abandon such domicile.—*Sun Printing & Publishing Ass'n v. Edwards*, 24 S. Ct. 696, 194 U. S. 377, 48 L. Ed. 1027.

An allegation of a complaint admitted by answer that "defendant is a domestic corpora-

tion duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Northern District of New York," sufficiently avers that the corporation is a citizen of New York, for the purpose of giving jurisdiction to a federal Circuit Court.—*Id.*

The jurisdiction of a federal Circuit Court on the ground of diverse citizenship over a suit between a citizen of Michigan and the board of trustees of the Ohio State University will sufficiently appear, so far as the pleadings are concerned, without bringing the several persons constituting the board before the court as defendants, where it is averred that the board was created by and exists as an organized body under the laws of Ohio, with power to sue and be sued by its collective name, if it is also alleged that each individual trustee is a citizen of that state.—*Thomas v. Board of Trustees of Ohio State University*, 25 S. Ct. 24, 195 U. S. 207, 49 L. Ed. 160.

The citizenship of the individual members of the board of trustees of the Ohio State University does not sufficiently appear for the purpose of conferring jurisdiction on a federal Circuit Court of a suit against such board from averments that show that the board, while not an Ohio corporation, was created by and exists as an organized body under the laws of that state, although, under the Ohio Constitution, no person can be elected or appointed to any office in the state unless he possesses the qualifications of an elector, and an elector must be a citizen of the state.—*Id.*

An allegation that the defendant, the board of trustees of the Ohio State University, is a citizen of and domiciled in that state, and was created by and exists under certain designated laws of that state, with power to sue and be sued, will be held not sufficient to aver that such body is an Ohio corporation, within the jurisdictional rule of the federal courts imputing to the members of a corporation citizenship in the state creating it, where the statute creating the board has been upheld by the highest court of the state as not conferring and not intended to confer corporate powers in violation of a prohibition in the state Constitution against conferring corporate powers by special act.—*Id.*

The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a federal Circuit Court by an averment in the complaint that "the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden," although, at the time the action was brought, Sweden was under a monarchical form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff, viz., the country to which he bore allegiance.—*C. H. Nichols Lumber Co. v. Franson*, 27 S. Ct. 102, 203 U. S. 278, 51 L. Ed. 181.

Averments in bill as to foreign citizenship of corporate complainant are not insufficient for jurisdictional purposes because of subsequent allegations from which doubt may argumentatively be inferred, where such statements referred to an alleged impairment of a contract and were not addressed to the subject of citizenship.—*Railroad Commission of the State of Mississippi v. Louisville & N. R. Co.*, 32 S. Ct. 756, 225 U. S. 272, 56 L. Ed. 1087.

Failure to allege citizenship of the original payee of a note does not require dismissal of an action brought by the assignee in a federal court based on diverse citizenship of plaintiff and defendant; the error being subject to correction by amendment.—*Springstead v. Crawfordsville*

State Bank, 84 S. Ct. 195, 231 U. S. 541, 58 L. Ed. 354.

Curing by amendment in a federal court a failure to allege citizenship of the original payee in an action by the assignee of a note is not objectionable though after the suit was begun and before amendment the jurisdictional amount was increased by Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1169 [U. S. Comp. St. Supp. 1911, p. 246]), in view of the saving clause in section 299.—Id.

—323. Evidence.

See 13 Cent. Dig. Courts, §§ 885, 886.

In a suit in a federal court, the bill averred that plaintiffs were citizens of New York, and defendant a citizen of Florida, but the evidence showed that she was the wife of a citizen of New York, with whom she lived for several months in the summer, but for her health lived most of the time on her farm in Florida. Several deeds and mortgages to her land, filed in the suit, described her as "of the city of New York." Held, that she was a citizen of New York, and the bill should have been dismissed.—*Anderson v. Watts*, 138 U. S. 694, 11 S. Ct. 449, 35 L. Ed. 1078.

The presumption that the stockholders of a corporation are citizens of the state which created it does not preclude them from asserting their actual citizenship to sustain the jurisdiction of a federal circuit court of a suit brought by them as such stockholders.—*Doctor v. Harrington*, 25 S. Ct. 355, 198 U. S. 579, 49 L. Ed. 606.

Complainant invoking jurisdiction of federal Circuit Court of a suit against nonresident aliens under Act March 3, 1875, § 8, has the burden of proving the jurisdictional fact that the property to be affected is within the jurisdiction, where averments in this respect are traversed.—*Chase v. Wetzel*, 82 S. Ct. 659, 225 U. S. 79, 56 L. Ed. 990.

—324. Objections, how and when taken or made.

See 13 Cent. Dig. Courts, §§ 882-884.

Under Code Civ. Proc. Neb. §§ 94, 96, providing that, if it appears on the face of the petition that the court has no jurisdiction, the objection may be taken by demurrer, but if it does not so appear it may be by answer; and section 99, requiring an answer to contain a "general or specific" denial of each material allegation,—an allegation in the petition of diverse citizenship necessary to support federal jurisdiction is negatived by an answer denying "each and every allegation in the petition," and in that event requires the introduction of evidence to show diverse citizenship before the federal court can acquire jurisdiction.—*Roberts v. Lewis*, 144 U. S. 653, 12 S. Ct. 781, 36 L. Ed. 579.

Where the want of jurisdiction in a federal court is apparent on the face of the petition, it may be taken advantage of by demurrer; and a plea in abatement is unnecessary.—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942.

The objection that plaintiff in a suit for an injunction against the taxation of the property of a corporation has not complied with the ninety-fourth equity rule, so as to show his right to maintain the suit, does not go to the jurisdiction of the court over the action, although it might be raised as a defense by demurrer.—*Illinois Cent. R. Co. v. Adams*, 21 S. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

A motion to dismiss a suit in the supreme court of the United States, on the ground that a suit against a state officer is in effect a suit against the state, will not be sustained, since the objection goes to the merits of the case, and, even if it goes to the jurisdiction, should

not be raised by motion, but by demurrer or other pleadings in the regular progress of the cause.—Id.

The refusal by the circuit court of the United States of an application for leave to file a plea in an ancillary action, alleging that plaintiff was a citizen of the same state with defendant at the time the original action was brought, and had so continued down to the filing of the bill, but had fraudulently otherwise represented, and that defendant had no knowledge of these facts until after exceptions to the master's report were filed, is not an abuse of discretion, where nothing was said in the proposed plea as to the citizenship of a co-plaintiff, who was a necessary or proper party, and who, the record showed, was an alien. Decree 91 F. 574, 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

A plea to the jurisdiction of a federal Circuit Court, based upon the ground that the complainants had collusively made parties complainants and defendants for the purpose of showing the requisite diversity of citizenship, is insufficient in law if it does not specify what parties are alleged collusively to have been made.—*Helm v. Zarecor*, 32 S. Ct. 10, 222 U. S. 32, 56 L. Ed. 77.

Citizenship of plaintiff was in issue, where defendants averred that they had no knowledge or information as to such citizenship and would "leave him to prove thereof."—*Gilbert v. David*, 35 S. Ct. 164, 235 U. S. 561, 59 L. Ed. 360.

The issue of citizenship of plaintiff in a suit in a federal court may be disposed of by the court on the evidence on that question.—Id.

—325. — Waiver of objection.

See 13 Cent. Dig. Courts, § 884.

Under Code Civ. Proc. Neb. §§ 134, 135, providing that every material allegation of the petition shall be considered as true by failure of the answer to controvert it, there is no question for the jury involving the jurisdiction of the circuit court in an action of ejectment, where the averment of diverse citizenship in the petition is uncontroverted by the answer.—*Deputron v. Young*, 134 U. S. 241, 10 S. Ct. 539, 33 L. Ed. 923, affirming judgment (C. C.) *Young v. De Putron*, 37 F. 46.

Resort may be had to the entire record for the purpose of curing a defective averment of citizenship, where the jurisdiction of the lower federal court is asserted to depend upon diversity of citizenship.—*Sun Printing & Publishing Ass'n v. Edwards*, 24 S. Ct. 696, 194 U. S. 377, 48 L. Ed. 1027.

A delay of several years in forcing to trial a cause in a federal court, where the issue of citizenship was made when the answer was filed, some two years after filing the complaint, is not laches, precluding consideration of such issue at the trial.—*Gilbert v. David*, 35 S. Ct. 164, 235 U. S. 561, 59 L. Ed. 360.

(D) JURISDICTION DEPENDENT ON AMOUNT OR VALUE IN CONTROVERSY.

Proof, see Pleading, —377.

Removal of causes to federal court as dependent on amount in controversy, see Removal of Causes, —71-76.

—326. Cases subject to pecuniary limitation.

See 13 Cent. Dig. Courts, § 883.

Judiciary Act 1887, § 1, as corrected by Act 1888, gives the circuit courts cognizance of civil suits where the matter in dispute exceeds \$2,000, and arising under the federal constitu-

tion or laws or treaties, or in which the United States are plaintiffs, or in a controversy between citizens of different states, in which the matter in dispute exceeds the sum aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states. *Held*, that a circuit court may take cognizance of an action for conversion, in which the United States are plaintiffs, without regard to the amount involved.—*United States v. Sayward*, 160 U. S. 493, 16 S. Ct. 371, 40 L. Ed. 508.

A circuit court has no jurisdiction of a suit by a telegraph company against the clerks of different counties to enjoin the collection of taxes on its line in each of such counties, when the bill does not show that the amount of any one of the district county assessments equals the jurisdictional amount of \$2,000.—*Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 16 S. Ct. 506, 40 L. Ed. 630.

A suit to restrain the collection of taxes not exceeding \$2,000 in amount, though arising under the constitution or laws of the United States, is not within the jurisdiction of a circuit court of the United States under Act Cong. Aug. 13, 1888, § 1; and future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute. Decree 80 F. 1, 25 C. C. A. 301, affirmed.—*Holt v. Indiana Mfg. Co.*, 20 S. Ct. 272, 176 U. S. 68, 44 L. Ed. 374.

—328. Matter in dispute and amount or value claimed or involved.

See 13 Cent. Dig. Courts, §§ 890-896.

The discretion granted the circuit court under Act March 3, 1875, § 5, to dismiss a case on the ground that it does not "really and substantially involve a dispute or controversy properly within" its jurisdiction, will not extend to the dismissal of an action of tort charging a malicious injury, and alleging damages at more than \$500, because it appears that the actual damages are less than that amount.—*Barry v. Edmunds*, 116 U. S. 550, 6 S. Ct. 501, 29 L. Ed. 729.

Where, in a creditors' bill, to subject the stockholders of a corporation to liability for unpaid subscriptions, the amount of the sum claimed by the original plaintiffs exceeds \$2,000, the circuit court has full jurisdiction as to all creditors, including those who afterwards come in, although some of them claim for sums less than \$2,000.—*Handley v. Stutz*, 137 U. S. 368, 11 S. Ct. 117, 34 L. Ed. 706.

In a suit by a railroad company against officers of several counties to avoid assessments and taxes levied on its lands, the amount involved cannot be brought within the jurisdiction of the circuit court by taking the aggregate of the sums involved as to each defendant; but the jurisdiction as to each must be determined by the amount in controversy between him and the railroad company.—*Walter v. Northeastern R. Co.*, 147 U. S. 370, 13 S. Ct. 348, 37 L. Ed. 206; *Keels v. Central R. Co.*, 147 U. S. 374, 13 S. Ct. 350, 37 L. Ed. 206; *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 13 S. Ct. 650, 37 L. Ed. 494.

A federal circuit court has jurisdiction of a suit on certain notes aggregating over \$2,000, brought in good faith by a plaintiff, relying on a state statute which allows a creditor to bring an action on claims not due when the debtor intends fraud (*Cobbey*, Consol. St. Neb. 1891, p. 1003), although the amount of the notes already due is less than \$2,000.—*Schunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500, 13 S. Ct. 416, 37 L. Ed. 255, following *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524, *Upton v. McLaughlin*, 105 U. S. 640, 26 L. Ed. 1197,

and distinguishing *Bowman v. Chicago & N. W. Ry. Co.*, 115 U. S. 611, 6 S. Ct. 192, 29 L. Ed. 502.

Where an evicted grantee sues the grantor in Nebraska for \$6,000 damages, the amount in controversy, exclusive of interest and costs, exceeds \$2,000, though the price paid by plaintiff for the land was only \$1,200; and the law of such state, in case of eviction, imposes a responsibility only for the return of the price, with interest thereon.—*Brown v. Webster*, 156 U. S. 328, 15 S. Ct. 377, 39 L. Ed. 440.

When the interest evidenced by a coupon is due, the demand based on the promise contained in the coupon is no longer a mere incident of the principal debt, but becomes a principal obligation, and hence is not "interest," within Act March 3, 1887, conferring jurisdiction on the circuit court of suits between citizens of different states when the matter in dispute exceeds \$2,000, exclusive of "interest" and costs; and the amount of such coupons may be added to the amount of the bond to confer jurisdiction.—*Edwards v. Bates County*, 163 U. S. 269, 16 S. Ct. 967, 41 L. Ed. 155.

In a suit by a bank to enjoin the collection of taxes for certain years on property claimed to be exempt, the amount of the tax being insufficient to give jurisdiction, the fact that the value of the exemption during the continuance of the charter of the bank will exceed the jurisdictional amount will not give jurisdiction.—*Citizens' Bank of Louisiana v. Cannon*, 17 S. Ct. 89, 164 U. S. 319, 41 L. Ed. 451.

Jurisdiction cannot be conferred on a court to enjoin the collection of taxes assessed in several parishes by joining in one bill, against the different collectors, the whole amount of such taxes, the separate assessments not being sufficient to give jurisdiction.—*Id.*

Where the jurisdiction of a federal court of a claim for damages in excess of the jurisdictional amount has once attached, it is not defeated by the fact that recovery is had for less than the jurisdictional amount.—*Scott v. Donald*, 17 S. Ct. 265, 165 U. S. 58, 41 L. Ed. 632.

Where a number of separate property owners join in a suit to restrain the collection by a city of special taxes assessed upon their separate lots, and to recover back certain parts of the assessments already paid by them respectively, the jurisdictional amount, on an appeal to the supreme court, is to be determined, not by the aggregate of all the assessments, but by the amount assessed against the property of each individual owner; and, if some of such amounts are less than the jurisdictional sum, the appeal must be dismissed as to them. Judgment, *Armstrong v. Ogden City*, 43 P. 119, 12 Utah, 476, affirmed.—*Ogden City v. Armstrong*, 18 S. Ct. 98, 168 U. S. 224, 42 L. Ed. 444.

A bill by a building and loan association, to foreclose a mortgage securing a contract under which the association loaned or advanced to a shareholder \$2,000 in anticipation of the maturity of his shares, and by which the latter agreed to pay interest thereon and the monthly dues on the shares until they reached the par value of \$4,000, or, in case of default in payment of such dues, to pay the association \$4,000 less the dues previously paid, which alleges a default, and that but \$1,200 in dues has been paid, shows on its face that the matter in dispute exceeds the amount of \$2,000 exclusive of interest and costs.—*Building & Loan Ass'n of Dakota v. Price*, 18 S. Ct. 251, 169 U. S. 45, 42 L. Ed. 655.

A suit cannot properly be dismissed by a circuit court as not substantially involving an amount sufficient to give it jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.—

Wetmore v. Rymer, 18 S. Ct. 293, 169 U. S. 115, 42 L. Ed. 682.

An action of replevin for liquors valued at \$1,000, brought in a state where consequential damages are not recoverable in such actions, does not involve the requisite amount to give a federal court jurisdiction, though special damages for injury to plaintiff's trade and business are claimed in a large sum. Judgment, *W. A. Vandercook Co. v. Vance* (C. C.) 80 F. 786, affirmed in part, and reversed in part—*Vance v. W. A. Vandercook Co.*, 18 S. Ct. 645, 170 U. S. 468, 42 L. Ed. 1111.

The amount of damages which plaintiff shall recover in an action for rejecting his vote for a member of congress is peculiarly appropriate for the determination of a jury, and therefore, when the damages are laid at the sum of \$2,500, no opinion of the court upon that subject can justify it in holding that the amount in controversy is less than the sum or value of \$2,000, so as to be insufficient to support the jurisdiction of the circuit court of the United States.—*Wiley v. Sinkler*, 21 S. Ct. 17, 179 U. S. 58, 45 L. Ed. 84.

An action against election officers to recover damages for the rejection of a vote for a member of the house of representatives for the United States, in which the damages are laid at the sum of \$2,500, is within the jurisdiction of the circuit court of the United States, concurrent with the courts of the state.—Id.

Distinct and separate interests of complainants in a suit for relief against assessments, whether they have been made or merely threatened, cannot be united for the purpose of making up the amount necessary to give jurisdiction to a circuit court of the United States. Decree (C. C.) 96 F. 865, affirmed.—*Wheless v. City of St. Louis*, 21 S. Ct. 402, 180 U. S. 379, 45 L. Ed. 583.

A suit by a transferee of bonds and coupons "does not really and substantially involve a dispute or controversy within the jurisdiction" of a circuit court of the United States, within the meaning of Act Cong. March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], if the transfers to him are made for the purpose of collection only, and if the amount necessary to give jurisdiction to the court is made up by uniting in his hands the bonds or coupons of owners who separately had less than the jurisdictional amount. Judgment, *City of Santa Cruz v. Waite*, 98 F. 387, 39 C. C. A. 106, reversed.—*Waite v. City of Santa Cruz*, 22 S. Ct. 327, 184 U. S. 302, 46 L. Ed. 552.

A matter in dispute exceeding the value of \$2,000 is presented by a cross-bill which seeks to recover a balance of \$1,700 due on a contract for the exchange of soda fountain apparatus, where the original bill, which was dismissed on complainant's own motion, asked for the cancellation of his agreement to pay \$2,025 in consideration of the exchange.—*Kirby v. American Soda Fountain Co.*, 24 S. Ct. 619, 194 U. S. 141, 48 L. Ed. 911.

A suit to enjoin the enforcement of a tax levied on lands under authority of a state by the sale of timber from such lands, where it is not alleged that the tax is illegal, but merely that it was erroneously levied, is not a suit to remove a cloud on title, and the amount involved for the purpose of determining the jurisdiction of a federal court is the amount of the tax, and not the value of the land. Decree (C. C.) 110 F. 812, affirmed.—*Douglas Co. v. Stone*, 24 S. Ct. 843, 191 U. S. 557, 48 L. Ed. 301.

The federal court in Arkansas, in an action of unlawful detainer, by analogy to the requirements of Sand. & H. Dig. c. 70, § 3449, requiring as a preliminary to the issuance of a writ of possession a bond in double the

amount of two years' rent, will, in determining the value of possession as affecting its jurisdiction, regard the amount in controversy as a sum double the amount of the rent of the premises detained for two years. Decree (C. C.) 115 F. 384, affirmed.—*Battle v. Atkinson*, 24 S. Ct. 845, 191 U. S. 559, 48 L. Ed. 302.

The law of Arkansas (Sand. & H. Dig. c. 70, § 3458) having limited plaintiff's recovery in an action of unlawful detainer to the rent due at the commencement of the suit and up to the time of rendering judgment, or the value of the occupation during the time of the unlawful detention of the premises and damages for withholding the same, a federal court in that state does not have jurisdiction of such an action when the complaint alleges that the amount due is the rent for nine months at \$25 per month, though damages are also claimed in the sum of \$2,500, but without showing that plaintiff is entitled to anything but actual damages.—Id.

The courts of Arkansas having settled that the action for unlawful detainer under Sand. & H. Dig. c. 70, §§ 3349-3468, is merely for the purpose of restoring possession unlawfully detained, when the relation of landlord and tenant exists, without regard to ownership, the federal court in that state does not obtain jurisdiction of such an action by virtue of the allegation in the complaint that the value of the premises unlawfully detained is \$5,000, with a rental value of \$25 per month; the amount in controversy not depending on the value of the premises in fee, but on the rental value for the limited time.—Id.

The value of the matter in dispute, in a suit to set aside judgments of a probate court establishing claims against the estate of an intestate, which are a lien on his real property inherited by complainants, on the ground that they were fraudulently obtained by defendants acting in concert, is the aggregate amount of the claims whose allowance was procured in furtherance of the unlawful combination. Decree (C. C.) 123 F. 333, reversed.—*McDaniel v. Traylor*, 25 S. Ct. 369, 196 U. S. 415, 49 L. Ed. 533; Id., 29 S. Ct. 343, 212 U. S. 428, 53 L. Ed. 584.

A controversy between a state corporation commission and a railway company, which involves not only the right to enforce against the railway company the payment of statutory penalties in excess of \$2,000, but also the right of that company to carry on interstate commerce in the state without being subject to orders and directions of the corporation commission, which so directly burdened such commerce as to amount to a regulation thereof, which right is alleged in the bill to be of the necessary jurisdictional value, such allegation being supported by testimony, and found to be the fact, is within the jurisdiction of a federal Circuit Court, although a dispute of some \$146 demurrage may have been the origin of the litigation. Decree (C. C.) *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 F. 82, modified.—*McNeill v. Southern Ry. Co.*, 26 S. Ct. 722, 202 U. S. 543, 50 L. Ed. 1142.

The jurisdictional amount involved in a suit brought by the New York Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such exchange until he shall have acquired the right to receive them from the exchange, or, with its consent and approval, from one of the telegraph companies authorized to distribute them, is to be measured by the value to the exchange of the right to control the quotations, and not by the rate paid by the defendant under his contract with the telegraph company furnishing him with such quotations. Decree, *New York Cotton Exch. v. Hunt* (C. C. 1906) 144 F. 511; Same v. *Duncan*, Id., affirmed.—*Hunt v. New York Cotton Exch.*, 27 S. Ct. 529, 205 U. S. 322, 51 L. Ed. 821.

The amount of all the judgments against a municipality concerning which relief was sought, and which were directly adjudicated to be barred by the statute of limitations, and not simply the judgment fund in the hands of the treasurer, is the amount in controversy, for the purpose of a writ of error from the federal Supreme Court to a territorial Supreme Court, to review a judgment denying relief by mandamus, where the prayer was for a continuous levy of taxes by the municipal officers for the amount permitted by law annually to be applied in payment of the judgments. Judgment (1906) 87 P. 292, 17 Okl. 162, reversed.—*Beadles v. Smyser*, 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849.

The undivided interests of joint owners and holders of the bonds and coupons on which suit is brought may be united for the purpose of making up the amount necessary to give jurisdiction to a federal Circuit Court. Judgment (C. C. A. 1908) *Thomas v. Green County*, 159 F. 339, 89 C. C. 405, affirmed.—*Green County, Ky., v. Thomas' Ex'r*, 29 S. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

Claims or demands assigned for collection only, the assignors remaining the absolute owners, and paying pro rata the expenses of collection, including costs and attorneys' fees, cannot be added to the amount of the assignee's own claim to create an amount in dispute in excess of \$2,000, for the express purpose of enabling suit to be brought in a Federal Circuit Court. Judgment *Woodside v. Vasey* (C. C. 1906) 142 F. 617, affirmed.—*Woodside v. Beckham*, 30 S. Ct. 367, 216 U. S. 117, 54 L. Ed. 408.

The aggregate sum of the possible penalties sued for in several actions brought by the United States against a carrier under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), requiring the unloading of live stock during transit, and consolidated, is the amount in dispute for the purpose of sustaining the appellate jurisdiction of the federal Supreme Court.—(1911) *Baltimore & O. S. W. R. Co. v. United States*, 31 S. Ct. 368, 220 U. S. 94, 55 L. Ed. 384, modifying judgment *United States v. Baltimore & O. S. W. R. Co.* (1908) 159 F. 33, 86 C. C. A. 223.

A suit by the assignees, respectively, of two promissory notes given for the unpaid portion of the purchase price of real property, to enforce the vendor's lien, which, under the local law, passed to the assignees as a common security for the payment of both notes, without any priority of right in either assignee, involves the amount essential to sustain the jurisdiction of a federal Circuit Court, under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), if the interests of such assignees collectively equal the jurisdictional amount.—(1911) *Troy Bank of Troy, Ind., v. G. A. Whitehead & Co.*, 32 S. Ct. 9, 222 U. S. 39, 56 L. Ed. 81, reversing decree (C. C. 1910) *Same v. Whitehead*, 184 F. 932.

A suit to enjoin the collection of taxes on the property of an educational institution on the ground of a perpetual contract of exemption from taxation, protected from impairment by the contract clause of the federal Constitution, involves the amount essential to sustain the original jurisdiction of a federal Circuit Court, where the contract right exceeds in value that amount, although the particular tax assessed and levied is less than that sum.—(1912) *Berryman v. Board of Trustees of Whitman College*, 32 S. Ct. 147, 222 U. S. 334, 56 L. Ed. 225, reversing decree (C. C. 1907) *Board of Trustees of Whitman College v. Berryman*, 156 F. 112.

An attorney's fee provided for in a note may be considered in determining the amount necessary to confer original jurisdiction on a federal court.—*Springstead v. Crawfordville State Bank*, 34 S. Ct. 195, 231 U. S. 541, 58 L. Ed. 354.

Value of complainant's right to maintain its electric plant free from interference by a rival company, rather than the cost of removal of defendant's poles and wires, interfering with complainant's, and their replacement, is the test in determining whether amount in controversy supports jurisdiction of federal District Court of a suit for injunction.—*Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 36 S. Ct. 30, 239 U. S. 121, 60 L. Ed. 174.

Members of a chamber of commerce cannot unite their individual assessments to confer jurisdiction on the federal District Court to prevent the collection of such taxes as illegal.—*Rogers v. Hennepin County*, 36 S. Ct. 217, 239 U. S. 621, 60 L. Ed. 469.

A suit by two children to establish title to an undivided interest in their deceased father's real property based upon his mistaken omission to provide for them in his will does not involve the amount requisite to the jurisdiction of the federal District Court, where the interest of neither complainant taken separately equals such amount.—*Pinel v. Pinel*, 36 S. Ct. 416, 240 U. S. 594, 60 L. Ed. 817.

—329. Allegations and prayers in pleadings.

See 12 Cent. Dig. Courts, § 397.

The fact that there is a good defense apparent on the face of the plaintiff's pleadings to a part of the amount in controversy, and that the rest is less than \$2,000, does not oust a federal circuit court of jurisdiction.—*Schunk v. Moline Milburn & Stoddard Co.*, 147 U. S. 500, 13 S. Ct. 416, 37 L. Ed. 255.

When, from the nature of the action as set forth in plaintiff's complaint, there could not legally be a judgment for the amount, necessary to the jurisdiction of a federal court, jurisdiction cannot attach, though the damages are laid in a larger sum.—*Vance v. W. A. Vandercook Co.*, 18 S. Ct. 645, 170 U. S. 468, 42 L. Ed. 1111.

An allegation that the "amount in dispute" is more than \$2,000, exclusive of interest and costs, is not insufficient to show that the case is within the jurisdiction of a federal court, merely because it says the "amount" instead of the "matter" in dispute.—*Blackburn v. Portland Gold-Min. Co.*, 20 S. Ct. 222, 175 U. S. 571, 44 L. Ed. 276.

A mere ad damnum clause will not confer jurisdiction on a circuit court of the United States, where the plaintiff asserts as his cause of action a claim which he cannot be legally permitted to sustain, by evidence, to the extent of the jurisdictional amount. Judgment *Morrison v. North American Transportation & Trading Co.* (C. C.) 85 F. 802, reversed.—*North American Transportation & Trading Co. v. Morrison*, 20 S. Ct. 869, 178 U. S. 262, 44 L. Ed. 1061.

A bill for injunction against taxes, brought by a railroad company against a revenue agent who represents all the parties interested, sufficiently states the jurisdictional amount when it alleges that the taxes assessed amount to a specified sum, much larger than the jurisdictional limit; and a question not arising on the face of the bill, as to how the taxes, when collected, would be disposed of, and in what proportions and amounts they would be parceled out to interested municipalities, is immaterial.—*Illinois Cent. R. Co. v. Adams*, 21 S. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

When, from the nature of the action as set forth in plaintiff's complaint, there could not legally be a judgment for the amount, necessary to the jurisdiction of a federal court, jurisdiction cannot attach, though the damages are laid in a larger sum.—*Battle v. Atkinson*,

24 S. Ct. 845, 191 U. S. 559, 48 L. Ed. 302, affirming decree (C. C.) 115 F. 384.

Plaintiff's allegations of value govern in determining the jurisdiction of a federal Circuit Court except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, or where such allegations are fraudulently made for the purpose of creating the jurisdiction.—*Smithers v. Smith*, 27 S. Ct. 297, 204 U. S. 632, 51 L. Ed. 656.

The jurisdictional amount averred in a bill filed in a federal Circuit Court to enjoin ticket brokers from dealing in nontransferable reduced-rate excursion tickets cannot be deemed colorable and fictitious when considered with the averments as to the large number of such tickets issued, the recurring occasions for their issuance, the magnitude of the wrong dealings by the defendants, the cost and risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complaining railroad company, and the operation of the illegal dealing in such tickets upon the company's right to issue them in the future, coupled with the admissions in the answer that defendants had not only in the past dealt in such tickets, but intended to carry on the business as to all future issues. Decree, *Louisville & N. R. Co. v. Bitterman* (1906) 144 F. 34, 75 C. C. A. 192, affirmed.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693.

In a suit by two heirs to establish an interest in land of a decedent, an allegation that one of the complainants was entitled to a one-eighth interest, and the other to a two-eighths interest, "which said interests are of the value of \$4,500 and upwards," does not amount to an averment that the interest of either complainant is of the value of more than \$3,000 in order to confer jurisdiction on the federal District Court.—*Pinel v. Pinel*, 36 S. Ct. 416, 240 U. S. 594, 60 L. Ed. 817.

330. Evidence.

See 13 Cent. Dig. Courts, § 598.

Where it is sought to enjoin the collection of taxes for certain years, and there is evidence of the amount of taxes for but one of such years, it will not be assumed, to make up the jurisdictional amount, that a like tax was assessed for each of the other years.—*Citizens' Bank of Louisiana v. Cannon*, 17 S. Ct. 89, 164 U. S. 319, 41 L. Ed. 451.

Recitals in an agreed statement of facts in a suit to enjoin state officers from seizing liquors imported by plaintiff, that defendants had seized, and intended and threatened to seize in the future, all liquors imported, and that the value of the right to import liquors exceeded \$2,000, are a concession that the value of plaintiff's rights in controversy is sufficient to give jurisdiction.—*Scott v. Donald*, 17 S. Ct. 262, 165 U. S. 107, 41 L. Ed. 648, modifying decree (C. C.) *Donald v. Scott*, 67 F. 854.

The jurisdiction of a federal court in a controversy between citizens of different states, in which the matter in dispute is alleged to be over the sum or value of \$2,000, is not terminated by ex parte affidavits denying that the property is of the value alleged, unless this fact is made to appear to the satisfaction of the court.—*Put-in-Bay Waterworks, Light & Ry. Co. v. Ryan*, 21 S. Ct. 709, 181 U. S. 409, 45 L. Ed. 927.

The effect of testimony in a suit by the New York Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such exchange, that the value of the right to control these quotations is much greater than \$2,000, is not impaired by evidence that the value of quotations of sales varies with the volume of business. Decree, *New York Cotton*

Exch. v. Hunt (C. C. 1906) 144 F. 511; *Same v. Duncan, Id.*, affirmed.—*Hunt v. New York Cotton Exch.*, 27 S. Ct. 529, 205 U. S. 322, 51 L. Ed. 821.

An attorney for one of the claimants against a decedent's estate and for the administrator as well will not be presumed to have been acting for all the claimants in advising the administrator to allow all the claims, so as to make the aggregate amount of the claims allowed the amount in dispute in a suit to set aside judgments of the probate court establishing claims against the estate which are a lien on the real property inherited by complainants, on the ground that such judgments were fraudulently obtained by defendants, acting in concert, although he is also the attorney for several of the claimants in such suit.—*McDaniel v. Traylor*, 29 S. Ct. 343, 212 U. S. 428, 53 L. Ed. 584.

(E) PROCEDURE, AND ADOPTION OF PRACTICE OF STATE COURTS.

Reversal without granting new trial as denial of right to jury trial, see *Jury*, ¶37.

331. Statutory provisions regulating procedure.

See 13 Cent. Dig. Courts, § 900.

Act Va. Jan. 26, 1882, as amended by Act March 13, 1884, forbidding the tax collector to receive coupons cut from the bonds of the state issued under Act March 30, 1871, and providing that no action should be brought against the tax collector, in cases where he has refused to receive coupons for taxes, other than an action to recover back money paid for taxes under protest, being unconstitutional, as impairing the obligation of a contract, cannot be regarded as a rule of practice, within section 914, providing that the practice and pleading in civil cases other than equity and admiralty causes in the United States circuit or district courts shall conform as near as may be to the practice and pleadings of the state courts.—*Poindexter v. Greenhow*, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. Ed. 185; *White v. Same*, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. Ed. 199; *Chaffin v. Taylor*, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. Ed. 198; *Allen v. Baltimore & O. R. Co.*, 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. Ed. 200; *Chaffin v. Taylor*, 116 U. S. 567, 6 S. Ct. 518, 29 L. Ed. 727.

332. Rules of court.

See 13 Cent. Dig. Courts, § 911.

The supreme court cannot, by rule, add to its powers, but, having the power to admit to bail in criminal cases pending proceedings in error, it may, by rule, regulate the manner of taking bail.—*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450, 39 L. Ed. 424.

333. Conformity to state practice in general.

See 13 Cent. Dig. Courts, §§ 899-910, 914.

334. — Civil causes in general.

See 13 Cent. Dig. Courts, §§ 899, 909, 910.

An action at law to recover money from a township on railroad aid bonds or interest coupons attached may be maintained in the United States circuit court, although, by the laws of the state in which the court is held, the remedy is by mandamus against the proper officer to require him to do his duty under the law; as the United States courts proceed by mandamus only in aid of existing jurisdiction.—*Chickaming Tp. v. Carpenter*, 106 U. S. 663, 1 S. Ct. 620, 27 L. Ed. 307.

The United States circuit courts have no jurisdiction to issue writs of mandamus, even when, by the law of the state where the court sits, mandamus is regarded as a civil action, except in cases where the writ is ancillary to

some other proceedings.—*Rosenbaum v. Bauer*, 120 U. S. 450, 7 S. Ct. 633, 30 L. Ed. 743.

A proceeding under Code Civ. Proc. Colo., to ascertain the compensation for land taken for public use, is a suit at law, within the meaning of the constitution, and the acts of congress conferring jurisdiction on federal courts, notwithstanding the provision of the Code for the appointment, by the court, of a commission of three freeholders to assess damages unless defendant demand a jury.—*Searl v. School Dist. No. 2*, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415.

In Act July 11, 1890 (26 Stat. 268), which incorporates the North River Bridge Company, gives it power to condemn lands, and provides that the compensation therefor shall be ascertained according to the laws of the state in which they are situated, the provision of section 4, that the condemnation proceedings in the federal circuit court shall conform "as nearly as may be to the practice in the courts of the state," must, like Rev. St. § 914, relating to practice and pleadings in actions at law, be construed to be an adoption of the state laws only when they are consistent with the federal legislation; and therefore a circuit court should not follow the provisions of the New Jersey statutes requiring the condemnation commissioners appointed by the court to file the report of their assessment in the county clerk's office, but the same should be filed in the clerk's office of the circuit court; and, if a trial by jury should be had by way of appeal, as allowed by the state statutes, such trial must likewise be had in the circuit court.—*Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194.

—335. — Exclusion of equity causes.

See 13 Cent. Dig. Courts, §§ 902-907½.

The Nebraska statute providing that anyone, whether in actual possession or not, claiming title to real estate, may bring an action against any adverse claimant for the purpose of quieting his title, enlarges, but does not change, the character of the equitable rights of persons claiming title to real property, and a federal court, sitting in such state as a court of equity, has jurisdiction to give the relief accorded by the statute.—*Holland v. Challen*, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52.

Rev. St. Ind. 1881, § 1070, providing that anyone, whether in actual possession or not, claiming title to real estate, may bring an action to quiet his title, enlarges, but does not change, the character of the equitable right of persons claiming title to land, and a federal court, sitting in such state as a court of equity, has jurisdiction to give the relief accorded by the statute.—*Reynolds v. First Nat. Bank*, 112 U. S. 405, 5 S. Ct. 213, 28 L. Ed. 733.

Where the local statute gives the remedy by a bill in equity to remove a cloud upon a legal title, without requiring complainant to obtain prior possession, it may be administered in appropriate cases by the courts of the United States, but there is no statute in Tennessee giving an equitable remedy in such cases.—*United States v. Wilson*, 118 U. S. 86, 6 S. Ct. 991, 30 L. Ed. 110.

The ancient jurisdiction of courts of equity in administration suits and in creditors' bills, brought against executors or administrators, or, after distribution, against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payment of his debts, belongs to the federal court unaffected by the statutes of the various states.—*Borer v. Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532, affirming decree (C. C.) *Chapman v. Borer*, 1 F. 274.

A bill, filed in the federal circuit court in Louisiana, by a vendor, praying for cancellation of the act of sale and retrocession of the property, or, if that be refused, for a decree of nullity of executory proceedings and a sale under a mortgage by the vendee, and for the recovery of the balance of the price, with an allowance of a vendor's privilege and mortgage, with priority over the mortgage by the vendee, is an equitable proceeding. It is immaterial that an action of nullity would lie in the state court, as there are no courts of equity in that state.—*Ridings v. Johnson*, 128 U. S. 212, 9 S. Ct. 72, 32 L. Ed. 401.

Under Judiciary Act 1789, § 16 (Rev. St. § 723), declaring that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy can be had at law," a bill to quiet title to lands against a person in possession cannot be sustained in the United States courts, although brought under Code Iowa, § 3273, which expressly authorizes such an action. A state statute cannot do away with the act of congress as to proceedings in federal courts, nor deprive the parties of their constitutional right of trial by jury.—*Whitehead v. Shattuck*, 138 U. S. 146, 11 S. Ct. 276, 34 L. Ed. 873.

A suit in equity cannot be brought in the federal courts to set aside fraudulent conveyances, and subject the property to payment of a simple contract debt, on which a judgment at law has not been recovered, under Code Miss. 1880, §§ 1843, 1845, giving the state courts of chancery jurisdiction of bills of creditors, who have not obtained judgments at law, to set aside fraudulent conveyances, and to subject the property to their demands; since Const. Amend. art. 7, gives the right of trial by jury in suits at law, and since Rev. St. § 723, provides that suits in equity cannot be sustained in the United States courts where a remedy at law may be had.—*Scott v. Neely*, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358.

The procedure of United States courts in equity not being controlled by state laws, a court may, in accordance with the general principles of equity, allow the trustee a reasonable attorney's fee.—*Dodge v. Tulleys*, 144 U. S. 451, 12 S. Ct. 728, 36 L. Ed. 501.

No state has the power to pass a statute which will impair the general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person, within its jurisdiction.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

Simple contract creditors, who have not reduced their claims to judgment, have no standing in the United States circuit court, sitting as a court of equity, on a bill to vacate a fraudulent assignment for the benefit of creditors, though by Code Miss. 1880, §§ 1843, 1845, the state courts of chancery are given jurisdiction of bills of creditors, who have not obtained judgments at law, to vacate such assignments, and subject the property to their demands.—*Cates v. Allen*, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. Ed. 804.

The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for, in order to invoke equity interposition in the federal courts, the lien must exist at the time the bill is filed.—*Id.*

The fact that a state statute gives an action at law to enforce a mechanic's lien will not deprive the federal courts of jurisdiction to foreclose such liens by bill in equity, for the question whether legal or equitable remedies shall be adopted in the federal courts is determined, not by the state practice or legislation, but by the nature of the case, and the fore-

closure of a mechanic's lien is essentially an equitable proceeding.—*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 S. Ct. 936, 37 L. Ed. 853.

A suit which is substantially a creditors' bill to subject to a judgment property belonging to the judgment debtor, but which fraudulently stands in the name of a third person, is within the equity jurisdiction of the federal courts, although the state statutes give a remedy at law.—*Mississippi Mills v. Cohn*, 150 U. S. 202, 14 S. Ct. 75, 37 L. Ed. 1052, reversing decree (C. C.) 39 F. 865.

State statutes making equitable rights and remedies enforceable in actions at law cannot affect the equity jurisdiction of the federal courts; and in determining whether there is an adequate remedy at law, which will defeat equitable jurisdiction, the inquiry is whether, by the principles of common law and equity, as distinguished and defined in this country and England at the time of the adoption of the constitution of the United States, the relief sought was obtainable at law, or is such as only a court of equity was fully competent to give.—*Id.*

Suits under a state statute which enlarges the ordinary equitable action to quiet title and remove a cloud (Rev. St. Wis. § 3186) may be brought in the federal circuit court.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree (C. C.) *Land & River Imp. Co. v. Bardon*, 45 F. 706.

Although a state statute cannot restrict or limit the equity powers of the federal courts, yet its provisions may be justly observed, to the extent to which the court is authorized to exercise a discretion, within the general rules of equity jurisprudence.—*Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 16 S. Ct. 127, 40 L. Ed. 263.

In an equity foreclosure in a federal court in Louisiana, while the state practice should be complied with as nearly as practicable, it is proper for the officer who makes the sale to make a return to the court for confirmation.—*Nalle v. Young*, 160 U. S. 624, 16 S. Ct. 420, 40 L. Ed. 560.

The enforceability in equity of a lien for the enforcement of which there is no special statutory provision is a matter as to which the federal courts will recognize the practice of the state courts as expressive of the local law. Decree, 52 N. E. 898, 178 Ill. 107, 69 Am. St. Rep. 290, affirmed.—*Knapp, Stout & Co. Company v. McCaffrey*, 20 S. Ct. 824, 177 U. S. 638, 44 L. Ed. 921.

An averment of possession in the complainant is essential to the maintenance of a bill to quiet title in a federal court, although under the state practice a person not in possession may maintain an action to quiet title.—*Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co.*, 23 S. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; *Id.*, 23 S. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; *Same v. Chile Gold Min. Co.*, *Id.*

Remedies and modes of procedure in federal courts in equity are determined by general principles of equity having uniform operation in those courts wherever sitting.—*Guffey v. Smith*, 35 S. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; *Id.*, 35 S. Ct. 532, 237 U. S. 120, 59 L. Ed. 866. Reversing decree *Smith v. Guffey*, 202 F. 106, 120 C. C. A. 436.

The settled Illinois rule that presence of clause in oil and gas lease giving option to surrender prevents the lessee from enforcing it in equity does not control federal courts.—*Id.*

337. — Exclusion of criminal causes.

See 13 Cent. Dig. Courts, § 908.

The provision of Rev. St. § 858, that the laws of the state in which the court is held

shall be the rules of decision as to the competency of witnesses in the courts of the United States "in trials at common law and in equity and admiralty," is not applicable to criminal trials, such trials not being embraced within the words "at common law."—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

338. — Jurisdiction of courts.

See 13 Cent. Dig. Courts, § 901.

Objection to the jurisdiction of a federal court is not waived by answering to the merits after a demurrer for the sole purpose of raising such objection has been overruled.—*In re Atlanta City R. Co.*, 17 S. Ct. 208, 164 U. S. 633, 41 L. Ed. 579.

In cases which concern the jurisdiction of the federal courts, notwithstanding the provisions of the so-called conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), neither the statutes of the state nor the decisions of its courts are conclusive upon the federal courts.—*Mechanical Appliance Co. v. Castleman*, 30 S. Ct. 125, 215 U. S. 437, 54 L. Ed. 272.

339. — Procedure adopted in general.

See 13 Cent. Dig. Courts, § 914.

The conformity "as near as may be" to the state practice, enjoined upon the federal courts by Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), does not prevent a federal court, under the broad powers conferred by section 716 (page 580), from framing its process and writs so as to give the full relief in one action by way of the forfeiture and penalties prescribed by section 4965 (page 3414), in case of the infringement of a copyright in engravings, although the state practice may afford no form of action in which this double remedy may be enforced.—*Hills & Co. v. Hoover*, 31 S. Ct. 402, 220 U. S. 329, 55 L. Ed. 485, Ann. Cas. 1912C, 562.

340. — Effect of United States statutes regulating procedure.

See 13 Cent. Dig. Courts, § 900.

The local practice under which one indicted for a crime is not entitled to a preliminary examination prior to the trial on the merits has no application to the proceedings under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], for the arrest and removal to another federal district for trial of a person there charged with an offense against the United States.—*Tinsley v. Treat*, 27 S. Ct. 430, 205 U. S. 20, 51 L. Ed. 689; *Kessler v. Same*, 27 S. Ct. 434, 205 U. S. 33, 51 L. Ed. 695.

342. Forms of action.

See 13 Cent. Dig. Courts, §§ 912, 913.

Equitable defenses are inadmissible in actions at law in United States courts, although state practice allows them.—*Burnes v. Scott*, 117 U. S. 582, 6 S. Ct. 865, 29 L. Ed. 991; *Scott v. Armstrong*, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059, reversing judgment (C. C.) *Armstrong v. Scott*, 36 F. 63.

The adoption of the state practice in circuit courts of the United States does not allow a suit to enjoin collection of taxes—an equitable suit—to be brought therein on the law side of the court, though in the state court no distinction is made between the legal and equitable remedies.—*Lindsay v. First Nat. Bank of Shreveport*, 156 U. S. 485, 15 S. Ct. 472, 39 L. Ed. 505.

The remedy of ejectment in favor of a riparian owner to prevent interference with his rights in his submerged water front, when recognized by the state court, will be sustained as a proper one by the supreme court of the United States on writ of error to the state court. Judgment 71 N. W. 1091, 113 Mich. 595, 4 De-

troit Leg. N. 409, 67 Am. St. Rep. 484, affirmed.—*Scranton v. Wheeler*, 21 S. Ct. 48, 179 U. S. 141, 45 L. Ed. 126.

—344. Process.

See 13 Cent. Dig. Courts, § 917.

Under Rev. St. § 914, requiring the practice, pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, to conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding in like causes in the state courts of the state within which the circuit and district courts are held, the mode of service of process is governed by the state law and practice.—*Amy v. City of Watertown*, 130 U. S. 301, 9 S. Ct. 530, 32 L. Ed. 946.

A foreign corporation may be sued, for a personal tort committed abroad, in a federal court in New York, by serving process upon the agents conducting its business there, though, by the state statutes, service upon such agents would not be sufficient to bring the corporation within the jurisdiction of the state courts.—*Barrow S. S. Co. v. Kane*, 18 S. Ct. 526, 170 U. S. 100, 42 L. Ed. 964.

The conformity requirement of Rev. St. U. S. § 914 (U. S. Comp. St. 1901, p. 684), does not necessitate altering a rule of a federal Circuit Court as to the return day for process, adopted under the authority of section 918 (page 685), in conformity with the state practice then existing, so as to conform to a change in such practice made by subsequent state legislation.—(1908) *Boston & M. R. R. v. Gokey*, 28 S. Ct. 657, 210 U. S. 155, 52 L. Ed. 1002, affirming judgment (1906) 149 F. 42, 79 C. C. A. 64, 9 Ann. Cas. 384, which affirmed (C. C. 1904) *Gokey v. Boston & M. R. Co.*, 130 F. 992.

Provision for service of nonresidents of the district with duplicate writs, made by Act March 11, 1902, c. 183, 32 Stat. 68 (U. S. Comp. St. Supp. 1907, p. 163), dividing Texas into four judicial districts, is not limited to local actions described in Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), providing for bringing in nonresidents in suits to enforce any legal or equitable lien or claim to, or to remove any encumbrance or cloud upon, real or personal property in the district where such suit is brought.—In re *Dunn*, 29 S. Ct. 299, 212 U. S. 374, 53 L. Ed. 558.

The presence of one of the defendants in the federal district in which suit by the United States under the anti-trust act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201) is brought to restrain violation of that act justifies the court in making an order under section 5 for the service of process upon all the other defendants, wherever they may be found.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 784, affirming decree (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

—345. Appearance.

See 13 Cent. Dig. Courts, § 917.

Rev. St. Tex. 1879, arts. 1241-1244, providing that any appearance in behalf of defendant, though in terms limited to the purpose of objecting to the jurisdiction, shall constitute a waiver of objection to the jurisdiction on the ground of nonresidence, are not rendered applicable to the federal courts by Rev. St. § 914, which requires the forms of procedure to conform "as nearly as may be" to the state practice; and such an appearance in a federal court constitutes no waiver of the jurisdictional ques-

tion.—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942.

The provision of the Texas statutes that a special appearance for the purpose of objecting to the service of process becomes a general appearance to the next term of the court is not controlling upon the United States circuit court, sitting in that state, whose jurisdiction is defined by acts of congress; and hence a party sued therein, who appears specially to object to the jurisdiction, and, when his objection is overruled, pleads to the merits, does not thereby submit himself to the jurisdiction of the court, or waive his right to a review of its action thereupon.—*Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 690.

A district court, having adopted a rule, in conformity with the state statute, as to the time within which a defendant is required to appear after service, is not required by Rev. St. § 914, to change such rule to conform to every change in the statute, and it is not without jurisdiction over a defendant because the time fixed by the rule and the summons issued and served thereunder is shorter than that prescribed by the statute then in force.—*Shepard v. Adams*, 18 S. Ct. 214, 168 U. S. 618, 42 L. Ed. 602.

The lack of any valid service of process upon a foreign corporation does not defeat the jurisdiction of a federal circuit court of an action in which such corporation pleaded in its answer a demand in recoupment, especially since, under the local practice, as defined in Rev. St. Ill. c. 110, §§ 30, 31, the defendant may have a verdict and judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other, and, after the cross-claim is set up, the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown.—*Merchants' Heat & Light Co. v. James B. Clow & Sons*, 27 S. Ct. 285, 204 U. S. 236, 51 L. Ed. 488.

—346. Attachment and garnishment.

See 13 Cent. Dig. Courts, § 918.

Attorney's fees incurred in dissolving an attachment, which by the local law of the state in which the attachment was issued can be recovered in an action in a court of such state on the attachment bond, are no less an element of damages, because the action has been removed to a federal court. Judgment, *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland*, 109 F. 393, 48 C. C. A. 436, affirmed.—*Fidelity & Deposit Co. of Maryland v. L. Bucki & Son Lumber Co.*, 23 S. Ct. 582, 189 U. S. 135, 47 L. Ed. 744.

—347. Pleading.

See 13 Cent. Dig. Courts, § 921.

While, under Rev. St. § 914, the provisions of the statutes of a state in regard to pleadings in civil suits in personam apply to like causes in the federal courts, they do not apply to suits in rem by the United States for the forfeiture of property after its seizure for a violation of the internal revenue laws, which are in general conformity to the course in admiralty.—*Coffey v. United States*, 117 U. S. 233, 6 S. Ct. 717, 29 L. Ed. 890.

Under equity rule 94, regulating suits by stockholders against the corporation and others, the United States circuit court will not entertain jurisdiction of a suit in equity, brought by a stockholder to enforce collection of a claim in favor of the corporation, where the bill does not allege that plaintiff was a stockholder at the time of the transaction of which he complains, or that the suit is not a collusive one to confer jurisdiction on the circuit court of a case of

which it would not otherwise have cognizance (an allegation that the suit is brought in good faith not being an equivalent of the allegation required by rule 94), where the only effort appearing to have been made by him to induce the corporation to assert its rights consists of a written demand to the directors, made 16 days before suit brought, and where the facts fairly justify the inference of an attempt by a simulated arrangement to foist on the court jurisdiction in a case not belonging to it.—*City of Quincy v. Steel*, 120 U. S. 241, 7 S. Ct. 520, 30 L. Ed. 624.

349. Witnesses.

See 13 Cent. Dig. Courts, § 925.

The competency of witnesses in criminal trials in the federal courts in Texas is not governed by the statutes of the state passed since its admission into the Union, but by the common law, which was the law of Texas at the time of its admission.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

350. Depositions.

See 13 Cent. Dig. Courts, § 922.

The examination of a party before trial, authorized by Code Civ. Proc. N. Y. § 870, cannot be required by a federal Circuit Court sitting in that state, by virtue of the declaration of Act March 3, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], that, in addition to the mode of taking the depositions of witnesses in causes pending in the federal District and Circuit Courts, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.—*Hanks Dental Ass'n v. International Tooth Crown Co.*, 24 S. Ct. 700, 194 U. S. 303, 48 L. Ed. 989.

351. Discovery.

See 13 Cent. Dig. Courts, § 924.

The practice in the federal courts does not permit plaintiff in an action at law to file, with his complaint, interrogatories to be answered by defendant.—*Ex parte Fisk*, 113 U. S. 713, 5 S. Ct. 724, 28 L. Ed. 1117.

Rev. St. § 861, provides that the mode of proof in the federal courts, "in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." Section 863 provides that the testimony of a witness may be taken by deposition *de bene esse* when the witness lives at a greater distance from the place of trial than 100 miles, or is obliged to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles, before the time of trial, or when he is old or infirm. The following sections provide that, where it is necessary in order to prevent a failure of justice, the federal courts may grant a *dedimus potestatem* to take depositions according to common usage; and that any circuit court may, according to the usages of chancery, direct depositions to be taken in *perpetuum rei memoriam*. *Held*, that an order made by the New York state court as authorized by the statute of that state, requiring a party to a suit to be examined by his adversary previous to the trial, could not, on the removal of the cause to the federal court, be enforced.—*Id.*

Rev. St. § 914, providing that the practice, pleading, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, does not apply to a physical examination of plaintiff before trial in an action for personal injuries.—*Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734.

The power of a circuit court of the United States to order a surgical examination of the plaintiff in an action for damages for a personal injury, in accordance with the provisions of a statute of the state in which the court is sitting, there being no law of congress in conflict therewith, is conferred by Rev. St. U. S. § 721, providing that the laws of the states shall be rules of decision in trials at common law in courts of the United States, in cases in which they apply.—*Camden & S. Ry. Co. v. Stetson*, 20 S. Ct. 617, 177 U. S. 172, 44 L. Ed. 721.

352. Trial.

See 13 Cent. Dig. Courts, §§ 926-932.

A state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.—*St. Louis, I. M. & S. Ry. Co. v. Vickers*, 122 U. S. 360, 7 S. Ct. 1216, 30 L. Ed. 1116.

In an action in the federal court on an accident insurance policy, for the death of the policy holder, alleged to have been accidentally caused in a certain manner, refusal to submit a special verdict as to whether the death was caused in that manner is not error, though the submission of special verdicts on request is required by the rules of practice in the state where the court is held, as such refusal is neither pleading, practice, nor form or mode of proceeding, within Rev. St. § 914, providing that the practice, pleadings, and forms and modes of proceeding in the federal courts shall conform as near as may be to those existing in the courts of the state wherein such federal courts are held.—*United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60, affirming (C. C.) *Barry v. United States Mut. Acc. Ass'n*, 23 F. 712.

Judges of federal courts are not controlled, under Rev. St. § 914, in charging juries, by state statutes requiring that all instructions of the court to the jury shall be in writing.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

While the laws of the respective states relating to the qualifications and exemptions of jurors have been made controlling in the federal courts (Rev. St. § 800; 21 Stat. 43), the state laws and usages regulating the designation and impaneling of jurors have not been so adopted, and are not binding on the federal courts, except as the latter may adopt the same by standing rule or special order.—*Pointer v. United States*, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208.

In the absence of a rule of court or a special order adopting state law and practice to the contrary, the rights of the accused are not infringed by requiring him to make his peremptory challenges from a list of qualified jurors not subject to challenge for cause, without knowing the peremptory challenges made by the government, although this may result in both parties challenging the same person.—*Pointer v. United States*, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208, following *Lewis v. United States*, 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011.

The competency of grand jurors summoned by the District Court of the United States for the District of Porto Rico after a valid local statute relating to the qualification of jurors went into effect must be tested by that statute, in view of the provision of Act April 12, 1900, c. 191, § 14 (31 Stat. 85), that the statutory laws of the United States not locally inapplicable, except as otherwise provided, shall have the same force and effect in Porto Rico as in the United States, and of section 34, that, in addition to the ordinary jurisdiction of federal District Courts, the District Court of the United States for Porto Rico shall have jurisdiction

"in all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court," read in connection with Rev. St. U. S. § 800 [U. S. Comp. St. 1901, p. 623], which declares that jurors to serve in federal courts, in each state respectively, shall have the same qualifications as jurors of the highest court of law in that state at the time when such jurors are summoned.—*Crowley v. United States*, 24 S. Ct. 731, 194 U. S. 461, 48 L. Ed. 1075.

A federal circuit court may properly consolidate, under U. S. Comp. St. 1901, p. 685, several actions brought by the United States against a carrier to recover the penalty prescribed by Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1173], for violations of its requirement as to unloading live stock during transit.—(1911) *Baltimore & O. S. W. R. Co. v. United States*, 31 S. Ct. 368, 220 U. S. 94, 55 L. Ed. 384, modifying judgment *United States v. Baltimore & O. S. W. R. Co.* (1908) 159 F. 33, 86 C. C. A. 223.

Judgment under federal Employers' Liability Act April 22, 1903, as amended April 5, 1910, will not be reversed because the jury was not required to specify in its verdict the amount given for decedent's conscious suffering and that for pecuniary loss sustained where the verdict seems in harmony with local practice.—*Kansas City Southern R. Co. v. Leslie*, 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment 167 S. W. 88, 112 Ark. 305.

—353. New trial.

See 12 Cent. Dig. Courts, § 323.

Statutory provisions granting one new trial as of right to each party in ejectment are binding on the federal courts in that state.—*Equator Mining & Smelting Co. v. Hall*, 106 U. S. 86, 1 S. Ct. 128, 27 L. Ed. 114; *Smale v. Mitchell*, 143 U. S. 99, 12 S. Ct. 353, 36 L. Ed. 90.

A motion for a new trial, on the ground that the verdict is against the weight of evidence, may be heard by the trial judge, under the provision of section 804, authorizing him to hear such a motion on his minutes, where the verdict is attacked "for insufficient evidence." The phrase quoted is not to be limited to evidence insufficient in point of law, but includes insufficiency in point of fact, and is thus equivalent to "against the weight of evidence."—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022.

The federal courts are not bound by the statutes or practice prevailing in the courts of the state where the trial is had, in regard to motions for new trials and bills of exceptions.—*Fishburn v. Chicago, M. & St. P. Ry. Co.*, 137 U. S. 60, 11 S. Ct. 8, 34 L. Ed. 585.

The local practice as to right of jurors to impeach their own verdict does not, because of conformity provision of Rev. St. § 914 (Comp. St. 1913, § 1537), control federal courts.—*McDonald v. Pless*, 35 S. Ct. 783, 238 U. S. 264, 59 L. Ed. 1300, affirming judgment 206 F. 263, 124 C. C. A. 131.

—354. Judgment.

See 12 Cent. Dig. Courts, § 324.

Act Cong. March 3, 1875 (18 Stat. 472, c. 137, § 8), authorizes an order to be made directing a nonresident defendant in any suit in a federal circuit court to enforce a lien upon, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, to appear, plead, answer, or demur by a designated day. This order must be served upon such defendant, but, if service be impracticable, publication may be made. If the defendant fails to appear, the court may, upon proof of service,

entertain jurisdiction, and proceed to adjudicate the cause as if the defendant had been served with process within the district. *Held*, that an action by a creditor of a corporation to set aside as fraudulent a trust deed of the property of the corporation, given to secure certain of its guarantors, and to subject the trust fund to the payment of the debts of the corporation, is an action to remove an incumbrance or lien or cloud upon title, within the meaning of the above act.—*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

The trust deed was given to secure W., C., and H., who was the nonresident defendant. C. and H. were directors of the corporation. The bill was filed August 1, 1883, making the corporation, the trustee, and the cestuis que trustent parties. After the defendants served had answered, upon the application of complainant, a receiver was appointed to take charge of the property. November 28, 1883, W. filed a cross bill, alleging that his debt and that of C. were valid, and that the trust deed had been executed without C.'s co-operation, but that H. had used his position as director to secure his debt, and asked that the deed be held invalid as to H., but valid as to the others. He also alleged that the property was depreciating in value, and ought to be sold. An order was entered requiring the defendants to appear and plead, which directed that if H. was served with a copy of the order by a certain time, and failed to appear, the cross bill would be taken as confessed. The order was served on H. in time, but he failed to appear. On December 22d, on the application of the receiver, the property was ordered sold, and sale was made to W., and in time confirmed. On March 3, 1884, H. was ordered to appear and plead to the original bill, or judgment would be taken for confessed. The order was duly served, and, upon his failure to appear, judgment was taken for confessed, and, on final hearing, it was decreed that H. was not entitled to any lien by reason of said trust deed. *Held*, that the act of 1875 was complied with.—*Id.*

If the sale of the property was irregular by reason of being made before H. had been ordered to appear and plead to the original bill, that would not affect the jurisdiction of the court to render a final decree in respect to his interest in the property.—*Id.*

The irregularity, if any, in taking the cross bill for confessed before H. had been ordered to appear and plead to the original bill, constitutes no ground for attacking the final decree in a collateral proceeding.—*Id.*

—355. Execution and other proceedings after judgment.

See 12 Cent. Dig. Courts, §§ 325, 326.

Under Rev. St. § 916, providing that, in the enforcement of judgments in common-law causes in the federal courts, only such remedies shall be pursued "as are now provided in like causes by the laws of the state," or, if provided by subsequent laws, are adopted by rule of court, the issuance of an execution against the sureties on a stay bond, in accordance with a subsequent law of the state, which had not then been adopted by the federal courts, was void.—*Lamaster v. Keeler*, 123 U. S. 376, 8 S. Ct. 197, 31 L. Ed. 238.

Under Rev. St. § 916 (Act June 1, 1872), giving similar remedies, by execution or otherwise, to enforce judgments at law in the federal courts as are now provided by the laws of the state in similar cases, and authorizing the court, by general rules, to adopt subsequent state legislation upon the same subject, the remedies on federal judgments are such as were provided by the state laws in force when the act was passed, or re-enacted into the Revised Stat-

utes, or by subsequent laws of the state, which have been adopted by rules of the federal courts.—*Cooke v. Avery*, 147 U. S. 875, 13 S. Ct. 840, 37 L. Ed. 209.

356. Appeal and error.

See 12 Cent. Dig. Courts, § 937; 2 Cent. Dig. App. & E. § 2397.

A statute of a state providing that a verdict returned on several counts shall not be set aside or reversed if one count is sufficient governs proceedings in cases tried in the federal courts within that state, and is applicable to judgments lawfully rendered, without a verdict.—*Bond v. Dustin*, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835.

Rev. St. § 914, requiring the pleading, practice, and forms in the circuit court to conform, as near as may be, to those of the courts of the state in which it is held, does not govern the preparation and perfecting of a bill of exceptions.—*In re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 S. Ct. 150, 32 L. Ed. 508.

On appeal to the supreme court of Montana, the record contained a statement, prepared for the purpose of a motion for a new trial, of all the proceedings at the trial, which was approved by counsel and authenticated by the judge as a correct statement of the proceedings. *Held* that, as this practice was authorized by the Montana statutes, the statement is sufficient to enable the United States supreme court, on error to the territorial supreme court, to review the rulings of the trial court.—*Montana Ry. Co. v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. Ed. 681, affirming judgment 6 Mont. 275, 12 P. 641.

The New Jersey practice, whereby the action of the state courts in appointing condemnation commissioners, as well as the award of damages made by the commissioners, may be reviewed by the state supreme court on certiorari, is inapplicable to condemnation proceedings in the federal circuit court; and such proceedings can only be reviewed by a writ of error taken from a final judgment.—*Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194.

A state statute making errors in written charges to jurors reviewable on appeal, though not excepted to (Pen. Code Cal. § 1176), does not control a court of the United States sitting in the state.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

When a case comes to the supreme court from the highest court of a state or territory, and, by statute or settled practice in such state or territory, the opinion of the court is a part of the record, the supreme court is authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment.—*Thompson v. Maxwell Land-Grant & Railway Co.*, 18 S. Ct. 121, 168 U. S. 451, 42 L. Ed. 539.

The provision of Mansf. Dig. § 1311 (Ind. T. Ann. St. 1899, § 813) adopted and in force in the Indian Territory, which requires an appellate court, upon the affirmance of a judgment for the payment of money, which has been superseded, to award against the appellant 10 per cent. damages on the amount superseded, is obligatory on the United States court of appeals for the Indian Territory.—*Missouri, K. & T. Ry. Co. v. Trussett*, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259, affirming judgment 104 F. 728, 44 C. C. A. 179; (C. C. A.) *Missouri, K. & T. Ry. Co. v. Elliott*, 102 F. 96, 42 C. C. A. 188, judgment affirmed 22 S. Ct. 937, 184 U. S. 695, 46 L. Ed. 763.

Writ of error, and not appeal, is the proper mode of reviewing a judgment or order of a federal court finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing

a fine therefor.—*Bessette v. W. B. Conkey Co.*, 24 S. Ct. 865, 194 U. S. 324, 48 L. Ed. 997.

A Circuit Court of Appeals cannot, without statutory authority, permit the prosecution in forma pauperis of a writ of error sued out of that court and such right is not given by Act July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706].—*Bradford v. Southern Ry. Co.*, 25 S. Ct. 55, 195 U. S. 243, 49 L. Ed. 178.

The allowance of a writ of error in forma pauperis under Act July 20, 1892, rests in the discretion of the court in respect to the meritorious character of the cause notwithstanding the amendment of June 25, 1910.—*Kinney v. Plymouth Rock Squab Co.*, 35 S. Ct. 236, 236 U. S. 43, 59 L. Ed. 457.

After the Circuit Court of Appeals has twice decided that the clerk of the District Court rightfully refused to enter a default judgment, a writ of error in forma pauperis will not be allowed under Act July 20, 1892, as amended by Act June 25, 1910, to review a judgment denying the existence of the default.—*Id.*

357. Fees and costs.

See 12 Cent. Dig. Courts, § 933; 2 Cent. Dig. App. & E. § 2072.

The attorney's fees for procuring the dissolution of the injunction cannot be allowed as an element of damages on an injunction bond given in a federal court, notwithstanding the fact that by the local law of the state in which the bond was executed such fees could be recovered in a suit on the bond. Judgment 60 P. 749, 61 Kan. 650, reversed.—*Tullock v. Mulvana*, 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

The rule of the federal courts must govern as to the allowance of attorney's fees on an injunction bond given in a federal court, though the action on the bond is brought in a state court. Judgment, *Elliott v. Missouri, K. & T. Ry. Co.*, 77 Mo. App. 652, reversed.—*Missouri, K. & T. Ry. Co. v. Elliott*, 22 S. Ct. 446, 184 U. S. 530, 46 L. Ed. 673.

The Supreme Court will not, in absence of a controlling decision by the state courts, limit to natural persons the benefits of Acts Tex. 31st Leg. c. 47, allowing attorney's fee to successful plaintiff in action against railroad for loss or injury to freight or killing of stock, where claim was not paid within 30 days.—*Missouri, K. & T. Ry. Co. of Texas v. Cade*, 34 S. Ct. 678, 233 U. S. 642, 58 L. Ed. 1135.

(F) STATE LAWS AS RULES OF DECISION.

Effect in United States courts of judgments of state courts, see Judgment, 358.

358. Nature and extent of authority.

See 12 Cent. Dig. Courts, §§ 939-949, 954, 977, 978.

359. — Local law in general.

See 12 Cent. Dig. Courts, §§ 939-949.

Whether a contract under which goods were delivered to bankrupts was a conditional sale, and valid without record, are questions on which a bankruptcy court follows local law. Judgment (1907) *In re E. M. Newton & Co.*, 153 F. 841, 83 C. C. A. 23 affirmed.—*Bryant v. Swoford Bros. Dry Goods Co.*, 29 S. Ct. 614, 214 U. S. 279, 53 L. Ed. 997.

Holders of oil and gas lease are precluded from maintaining ejectment in federal courts, if the action is not maintainable in state court.—*Guffey v. Smith*, 35 S. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; *Id.*, 35 S. Ct. 532, 237 U. S. 120, 59 L. Ed. 866.

A substantive right or defense under the federal Employer's Liability Act April 22, 1908, cannot be lessened by a local rule of practice.—*Norfolk Southern R. Co. v. Ferebee*, 35 S. Ct. 781, 238 U. S. 269, 59 L. Ed. 1303, affirming judgments *Ferebee v. Norfolk Southern R. Co.*

79 S. E. 685, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, and *Id.*, 83 S. E. 360, 187 N. C. 290.

◀360. — **Matters of general jurisprudence.**

See 13 Cent. Dig. Courts, §§ 977, 978.

A clause in a bill of lading exempting the carrier from liability for loss caused by the negligence of its servants will be held invalid in the federal courts, though the law of the state where the bill of lading was executed may be otherwise.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Same v. Insurance Co. of North America*, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800. Affirming decree (C. C.) *The Montana*, 22 F. 715.

Where a municipal corporation is not, under the laws of the state in which it is situated, liable for personal injuries sustained by a citizen by reason of defective sidewalks, an action cannot be maintained against it in the federal courts sitting in such state, for such injuries received by a citizen of another state.—*City of Detroit v. Osborne*, 135 U. S. 492, 10 S. Ct. 1012, 34 L. Ed. 260, reversing judgment (C. C.) *Osborne v. City of Detroit*, 32 F. 36.

◀363. **Authority of state statutes, constitutions, and ordinances.**

See 13 Cent. Dig. Courts, §§ 939-949.

An amendatory statute reducing the rate of interest from 10 to 8 per cent. operated *proprio vigore*, and effected a modification of the rule without a formal order.—*Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 2 S. Ct. 236, 27 L. Ed. 648.

A statute of a state, enacting that two concurring verdicts and judgments in ejectment shall be conclusive of the title, establishes a rule of property in land within the state, and binds the courts of the United States.—*Britton v. Thornton*, 112 U. S. 526, 5 S. Ct. 291, 28 L. Ed. 816, affirming judgment (C. C.) *Thornton v. Britton*, 8 F. 308.

Rev. St. § 721, provides that the laws of the several states, except where the constitution otherwise provides, shall be regarded as rules of decision in the federal courts in cases where they apply. Section 914 provides that the practice and pleading in civil cases, other than equity and admiralty causes in the United States circuit court or district courts, shall conform, as near as may be, to the practice and pleadings in the state courts. *Held*, that such sections did not render valid the provision of the acts of 1882 and 1884 that no action should be brought against the tax collector, in cases where he has refused to receive coupons for taxes, other than an action to recover back money paid for taxes under protest.—*Poin Dexter v. Greenhow*, 114 U. S. 270, 5 S. Ct. 908, 962, 29 L. Ed. 185; *White v. Same*, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. Ed. 199; *Chaffin v. Taylor*, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. Ed. 198; *Allen v. Baltimore & O. R. Co.*, 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. Ed. 200; *Chaffin v. Taylor*, 116 U. S. 567, 6 S. Ct. 518, 29 L. Ed. 727.

Though the federal courts ordinarily decline to declare against the title to land on the ground that it is strictly within the province of the state courts, yet in a suit by a railway corporation, resident in one state, against citizens of another state, seeking to recover from defendants land awarded to the corporation in violation of the state law that a railway corporation can only hold land for the purposes for which it is organized, the federal court will hold title to the land invalid according to the provisions of the state law.—*Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513.

The law of a state making shares of corporate stock personal property should be en-

forced by a circuit court of the United States sitting in that state, as part of the law of the state in respect of corporations created by it. Decree (C. C.) 82 F. 778, reversed.—*Jellenik v. Huron Copper-Min. Co.*, 20 S. Ct. 559, 177 U. S. 1, 44 L. Ed. 647.

A federal court cannot enforce the statutory liability of a nonresident stockholder of a foreign corporation at the suit of a receiver of its assets, where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder.—*Evans v. Nellis*, 23 S. Ct. 74, 187 U. S. 271, 47 L. Ed. 173.

The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, are conclusive on the federal Supreme Court in determining, on writ of error to the state court, the question of the validity of the statute under the federal Constitution. Judgment, *Commonwealth v. Pear*, 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935, affirmed.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 197 U. S. 11, 49 L. Ed. 643.

The policy, wisdom, justice, and fairness of a state statute is not subject to review or criticism by the federal Supreme Court.—Judgment, *In re City of Pittsburg*, 66 A. 348, 217 Pa. 227; *Appeal of Hunter, Id.*, affirmed.—*Hunter v. City of Pittsburg*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151.

The interpretation of a state Constitution and the conformity of an enactment of the State Legislature to that Constitution are questions solely for the consideration of the state courts, whose decision thereon concludes the federal Supreme Court.—*Id.*

The United States Supreme Court will not adjudge a state tax on gross receipts of sleeping car companies in violation of the state Constitution, because not a license tax, in advance of the decision to that effect by the state Supreme Court.—*Pullman Co. v. Knott*, 35 S. Ct. 2, 235 U. S. 23, 59 L. Ed. 105.

Authority to vacate and modify final judgments after the term can neither be conferred upon nor withheld from the federal district courts by the statute of a state or practice of its courts.—*United States v. Mayer*, 35 S. Ct. 16, 235 U. S. 55, 59 L. Ed. 129.

◀364. **Authority of decisions of state courts.**

See 13 Cent. Dig. Courts, §§ 960-971.

◀365. — **In general.**

See 13 Cent. Dig. Courts, §§ 950, 952, 955, 969-971.

In an action for personal injuries received by a passenger while traveling on Sunday, where, on a former trial in the state court, it had been ruled that plaintiff's evidence did not show that he was traveling either from necessity or for charity, and he subsequently took a nonsuit, and brought his action in the United States circuit court, on the same evidence the circuit court, following the state court, properly refused to submit the question of necessity or charity to the jury.—*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 S. Ct. 974, 31 L. Ed. 795.

In an action for injuries received by plaintiff while traveling on defendant's railroad in the state of Massachusetts on the Sabbath, the adjudications of the supreme court of that state holding that no recovery can be had for injuries received while traveling on the Sabbath in violation of the Massachusetts statutes are binding on the United States supreme court as the local law, though its own views may not accord with such ruling.—*Id.*

In cases in which the supreme court of the United States is bound by the decisions of the state supreme court, it will presume that those decisions were made after thorough consideration of the question involved, and cannot entertain a suggestion that they were rendered without full argument and upon the mistaken assumption that the question had been previously decided by the state court.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree (C. C.) *Allen v. O'Donald*, 28 F. 46.

In a suit to foreclose a mortgage on Nebraska land executed by a resident of that state, it is the duty of the federal court to follow a decision of the state supreme court that a provision in a mortgage for the payment of attorney's fees is invalid.—*Dodge v. Tulleys*, 144 U. S. 451, 12 S. Ct. 728, 36 L. Ed. 501.

Where a commission to dispose of part of the business on the docket of the supreme court of a state is appointed under an amendment of the state constitution giving the commission, in regard to such business, like jurisdiction and power as may be vested in the court, its decision on a question properly presented to it in a judicial proceeding is entitled, in the supreme court of the United States, to like consideration and weight as a decision upon the same question by the supreme court of the state.—*Ankeney v. Hannon*, 147 U. S. 118, 13 S. Ct. 206, 37 L. Ed. 106.

Upon a question of priority between a mortgage of a vessel and a lien given by a state statute for supplies and repairs in her home port, the determination of which depends upon principles of general jurisprudence and the construction of an act of congress, and which arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution, the supreme court is not controlled by the decisions of the highest courts of the state or of the circuit or district courts of the United States.—*The J. E. Rumbell*, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345.

Decisions by the highest court of the state are not "laws" of the state, within the meaning of Rev. St. § 721, which provides that, in the absence of federal legislation, "the laws of the several states" shall be regarded as rules of decision in actions at law in the federal courts, in cases where they apply.—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772.

The federal courts are bound to follow state decisions in relation to all proceedings for the collection of state taxes, and the effect to be given to tax deeds, unless it is claimed that some right protected by the federal constitution has been invaded.—*Lewis v. Monson*, 151 U. S. 545, 14 S. Ct. 424, 38 L. Ed. 265.

The decision of the supreme court of Minnesota in *Minneapolis Mill Co. v. Board of Water Com'rs of St. Paul*, 58 N. W. 33, that a municipality has a right to take water from a navigable stream, without making compensation to riparian owners below, who are using the flow of the stream for water power, is not inconsistent with any prior decision of that court, and the federal courts are bound to follow it, as the law of that state.—*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 18 S. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

The Minnesota doctrine, that one suing to cancel a Minnesota contract for usury need not offer to repay the money loaned, will be applied in the federal court, where the suit was commenced in the state court, and removed on the ground of diverse citizenship. Decree 77 F. 32, 23 C. C. A. 1, affirmed.—*Missouri, K. & T. Trust Co. v. Krumseig*, 19 S. Ct. 179, 172 U. S. 351, 43 L. Ed. 474, affirming decree 77 F. 32,

32 C. C. A. 1, which affirms *Krumseig v. Missouri K. & T. Trust Co.*, 71 F. 350.

A decision of the highest court of a state, holding that a contract exempting a railroad company from liability for negligence in setting fire to a storage warehouse on the railroad right of way is not against public policy, is conclusive upon a federal court sitting in that state. Judgment 70 F. 201, 17 C. C. A. 62, 30 L. R. A. 193, affirmed.—*Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 20 S. Ct. 33, 175 U. S. 91, 44 L. Ed. 84.

Questions as to the right to a possessory lien upon a raft under state laws, and the extent thereof, as well as the existence of possession, are local questions dependent upon the law of the state, in respect to which the federal courts will follow the state decisions. Decree 52 N. E. 898, 178 Ill. 107, 69 Am. St. Rep. 290, affirmed.—*Knapp, Stout & Co. Company v. McCaffrey*, 20 S. Ct. 824, 177 U. S. 638, 44 L. Ed. 921.

The local law of a state is taken by the supreme court of the United States as announced by the state court of last resort. Judgment, Appeal of *Clarke*, 40 A. 111, 70 Conn. 483, affirmed.—*Clarke v. Clarke*, 20 S. Ct. 873, 178 U. S. 186, 44 L. Ed. 1028.

Federal statutes must be interpreted by the federal courts independently of local considerations, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, until they are construed by the supreme court of the United States. Judgment 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17, affirmed.—*Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 21 S. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200.

The settled rule of a state court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on the Supreme Court of the United States on writ of error to the state court. Judgment 30 So. 685, 43 Fla. 446, affirmed.—*Tarrance v. State of Florida*, 23 S. Ct. 402, 188 U. S. 519, 47 L. Ed. 572.

The decision of the highest state court that the owner of property abutting on a local improvement can, by mandamus or injunction, compel a hearing by the body making the assessment, or prevent the approval of the engineer's report until such hearing has been accorded, is conclusive on the Supreme Court of the United States in reviewing a judgment of the state court, foreclosing the lien of such assessment.—Judgment 62 N. E. 447, 158 Ind. 206, affirmed.—*Hibben v. Smith*, 24 S. Ct. 88, 191 U. S. 310, 48 L. Ed. 195.

The determination by a state court that the property covered by a mortgage of all the property and franchises of a railway company remains liable, after a sale under a federal court decree of foreclosure, for the debts thereafter accruing against the mortgagee, because of the purchaser's failure to organize a domestic corporation, is not conclusive on the federal Supreme Court in determining the rights secured by the purchaser under such decree. Judgment 115 F. 956, 53 C. C. A. 438, affirmed.—*Julian v. Central Trust Co.*, 24 S. Ct. 399, 193 U. S. 93, 48 L. Ed. 629.

Whether and to what extent a chattel mortgage covering after-acquired property is valid is a local question on which the decisions of the state courts will be followed by the federal Supreme Court in determining whether the taking possession of the mortgaged chattels after condition broken amounted to a preference voidable by the mortgagor's trustee in bankruptcy. Judgment 56 A. 11, 75 Vt. 381, 104 Am. St.

Rep. 899, affirmed.—*Thompson v. Fairbanks*, 25 S. Ct. 308, 196 U. S. 516, 49 L. Ed. 577.

The decisions of the highest court of a state that an owner of land abutting on a city street has no easement of light, air, and access as against the public use of the street, or any structure which may be erected thereon to subserve and promote that public use, are conclusive upon the Supreme Court of the United States, when determining, on writ of error to the state court, whether such abutting owner has been deprived of his property without due process of law by the erection in the street of an elevated iron viaduct for general public use under the authority of a statute which makes no provision for compensation to abutting owners. Judgment (1904) 72 N. E. 579, 180 N. Y. 27, 70 L. R. A. 717, affirmed, which affirms 85 N. Y. S. 636, 90 App. Div. 36.—*Sauer v. City of New York*, 27 S. Ct. 688, 206 U. S. 536, 51 L. Ed. 1176.

The meaning and construction of a policy of insurance issued by a New York company, and both executed and to be carried out in that state, as declared by the highest court of the state, is of most persuasive influence, even if not of binding force, in the federal courts, in the absence of any federal question arising in the case.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682, reversing decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402.

It is for the state courts alone to decide whether the display of exterior advertisements upon automobile stages is ultra vires of a domestic corporation operating stage routes in the streets of a city for the carriage of passengers and property for hire.—(1911) *Fifth Ave. Coach Co. v. City of New York*, 31 S. Ct. 709, 221 U. S. 467, 55 L. Ed. 815, affirming decree (1909) 86 N. E. 824, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 16 A. & E. Ann. Cas. 695, which affirms (1908) 110 N. Y. S. 1037, which affirms (1908) 111 N. Y. S. 759.

Where a court of a state has adjudged an affidavit on information and belief as the basis of an order for publication sufficient, it will be assumed to be in accord with the local state practice.—*Thompson v. Thompson*, 33 S. Ct. 129, 226 U. S. 551, 57 L. Ed. 347, affirming decree 35 App. D. C. 14.

A decree of an inferior state court will be assumed by the federal court to be within its powers, in the absence of statute or decision to the contrary.—*Michigan Trust Co. v. Ferry*, 33 S. Ct. 550, 228 U. S. 348, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221 and 175 F. 681, 99 C. C. A. 235.

A judgment in personam for a devastavit rendered against an executor de bonis non by a Michigan probate court will be assumed within its powers until the state Supreme Court decides otherwise, in view of Comp. Laws Mich. 1897, §§ 9428, 9435, relating to accounting by an executor for goods of the deceased that come into his possession, and of decisions of the highest state court that money received by an administrator and unjustifiably paid out is still in his hands in contemplation of law, and that assets are not regarded as administered until collected and applied as required by law or by will.—Id.

Decisions of state courts as to matters of local law must be regarded by the federal courts as controlling, where no infraction of any right granted by the Constitution of the United States is involved.—*Old Colony Trust Co. v. City of Omaha*, 33 S. Ct. 967, 230 U. S. 100, 57 L. Ed. 1410.

The construction by a state court of a contract for the lease of a safe deposit box is conclusive on the federal Supreme Court in determining the constitutionality of Inheritance Tax Law Ill. July 1, 1909 (Laws 1909, p. 316) § 9, requiring the selling of safe deposit boxes for a specified period unless such construction violates amendment 14 as being arbitrary.—*National Safe Deposit Co. v. Stead*, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

Whether the title to the beds of navigable rivers is in the state in which the rivers are situated or in their abutting owners is a question of local law.—*Archer v. Greenville Sand & Gravel Co.*, 34 S. Ct. 567, 233 U. S. 60, 58 L. Ed. 850, reversing judgment 194 F. 1020, 114 C. O. A. 664.

—366. — Validity and construction of state Constitution and statutes.

See 13 Cent. Dig. Courts, §§ 954-957, 960-968.

In deciding whether a judgment of the supreme court of a state gives effect to a law of the state, which, in violation of the constitution of the United States, impairs the obligation of a contract, this court will decide, independently of the decisions of the state courts, whether there is a contract and whether its obligation is impaired; and, if the decision of the question as to the existence of the alleged contract requires a construction of state constitutions and laws, the court will not necessarily be governed by the previous decisions of the state courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property.—*Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

The supreme court of the United States will follow the decision of a state court as to the construction of a state statute, where such construction was announced before the contract in question was entered into.—*German Sav. Bank v. County of Franklin*, 128 U. S. 526, 9 S. Ct. 159, 32 L. Ed. 519.

The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question on which the decisions of the highest court of the state are controlling in the courts of the United States.—*Jencks v. Quidnick Co.*, 135 U. S. 457, 10 S. Ct. 655, 34 L. Ed. 200; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 10 S. Ct. 1013, 34 L. Ed. 341; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 S. Ct. 318, 35 L. Ed. 1136; *May v. Tenney*, 148 U. S. 60, 13 S. Ct. 491, 37 L. Ed. 368.

Decisions of state courts of last resort construing state statutes will be followed by United States courts.—*Leeper v. State of Texas*, 139 U. S. 462, 11 S. Ct. 577, 35 L. Ed. 225; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043; *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 16 S. Ct. 1096, 41 L. Ed. 107; *Missouri, K. & T. Ry. Co. v. McCann*, 19 S. Ct. 755, 174 U. S. 580, 43 L. Ed. 1093; *Tullis v. Lake Erie & W. R. Co.*, 20 S. Ct. 136, 175 U. S. 348, 44 L. Ed. 192.

A decision by the supreme court of Wisconsin that Act June 29, 1848, providing for the improvement of the Fox and Wisconsin rivers, and for connecting the same by a canal, failed to give the landowner a right to institute condemnation proceedings to have his compensation determined, or to make adequate provision for such compensation, is binding on the supreme court of the United States.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirm-

ing decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

A city ordinance prohibiting the sale of spirituous liquors in quantities of one gallon or more, without first obtaining a license, is local in its application, and involves no federal question or natural rights; and the decision of the state court affirming its validity is therefore conclusive in the federal courts as against a citizen of such state, even though the transaction giving rise to the controversy accrued before the date of such decision.—*Miller v. Ammon*, 145 U. S. 421, 12 S. Ct. 884, 36 L. Ed. 759.

The question whether Act Ky. March 11, 1869, authorizing a designated portion of Shelby county to subscribe stock, issue bonds, and levy taxes, in effect created a corporation, was one of a purely local nature, and a decision in the affirmative by the highest state court is of conclusive authority in the federal courts.—*Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 12 S. Ct. 969, 36 L. Ed. 755.

Code Civ. Proc. § 1211, provides that a judgment shall bear interest from the date of its entry. Laws N. Y. 1879, c. 538, p. 598, § 1, changing the rate of interest from 7 to 6 per cent., contains a proviso that nothing therein shall affect any prior contract. The New York court of appeals decided that a judgment for breach of contract, obtained prior to the date when the latter act went into effect, bore 7 per cent. interest until that date, and only 6 per cent. thereafter. *Held*, that this decision was conclusive in the federal supreme court as to the meaning of the New York statute.—*Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 13 S. Ct. 54, 36 L. Ed. 825, following *O'Brien v. Young*, 95 N. Y. 428, and *Prouty v. Lake Shore & M. S. Ry. Co.*, *Id.* 687.

Where there is no appeal under state laws, the decision of the trial court, as to the validity of a statute under the state constitution, is binding upon the supreme court of the United States.—*Hallinger v. Davis*, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986.

On writ of error to review the judgment of the highest court of a state on the ground that the judgment was against a right claimed under the constitution of the United States, the supreme court is not bound by the state court's construction of a statute of the state, when the question is whether the statute provided for the notice required to constitute due process of law.—*Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108, 38 L. Ed. 896, reversing judgment 5 Wash. 309, 31 P. 873, 34 Am. St. Rep. 863.

Questions as to the validity of a tax deed arising either on a consideration of the regularity and effect of the proceedings to collect taxes, or the form and efficacy of the deed itself, are matters peculiarly within the jurisdiction of the states, and the decisions of the state courts thereon will be followed by the federal courts.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree (C. C.) *Land & River Imp. Co. v. Bardon*, 45 F. 706.

Decisions by judges of the supreme court of New Jersey, upon applications by a convicted murderer for writs of habeas corpus and certiorari, overruling his contention that the word "conviction," as used in the state constitution (article 5, § 9), refers to the verdict of the jury, and not to the sentence passed by the court, and that, consequently, a reprieve, granted by the governor more than 90 days after the date of the verdict, but less than 90 days from the date of the sentence, was granted after the expiration of the time within which he had constitutional authority to do so, are conclusive upon the federal courts; and they therefore have no power to discharge the prisoner on habeas corpus, on the ground that he was, by such deci-

sions, deprived of due process of law, or of any privilege or immunity secured to him by the constitution of the United States.—*Lambert v. Barrett*, 157 U. S. 697, 15 S. Ct. 722, 39 L. Ed. 865.

Decisions by a state court, in cases involving railroad corporations created by the state, holding that the construction and maintenance of railroads does not constitute a public purpose, such as will authorize municipal donations in aid thereof under the constitution of the state, are not binding upon the federal courts, in a case involving a railroad company created by the laws of the United States, and subjected by its charter to important public duties, such as becoming a postal route and military road and a means of interstate commerce; especially when the state legislature has declared that for the purposes set forth in the acts of congress under which such company was organized it should be vested within the state with all its rights, powers, privileges, and immunities given by the acts of congress.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

It seems that a decision of the highest court of a state as to the existence of a liability of a corporation is conclusive upon the United States supreme court, as to the existence of such liability, in a suit to charge a director of the corporation therefor under a statute of the state.—*National Park Bank of New York v. Remsen*, 158 U. S. 337, 15 S. Ct. 891, 39 L. Ed. 1008.

The question whether the legislatures regarded the provision for the taxation of real property which had escaped taxation for previous years as so dependent on that for the taxation of personal property under the same circumstances that the unconstitutionality of the latter invalidated the section entirely is one to be determined finally by the state court.—*Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247.

When the highest court of a state has decided that a certain statute is in harmony with the state constitution, a federal court will not be justified in holding adversely on the ground that the decision of the state court is in conflict with the general principles of constitutional law.—*Fallbrook Irrigation Dist. v. Bradley*, 17 S. Ct. 56, 164 U. S. 112, 41 L. Ed. 369, reversing judgment (C. C.) *Bradley v. Fallbrook Irr. Dist.*, 68 F. 948.

A decision of the supreme court of a state construing a statute relative to insurance by any "company, corporation, association, or partnership" as separable in its provisions with respect to these different bodies, is conclusive upon federal courts.—*Noble v. Mitchell*, 17 S. Ct. 110, 164 U. S. 367, 41 L. Ed. 472.

The determination of a state supreme court as to whether a statute imposing a license tax is sufficiently certain upon which to ascertain the amount of such tax is conclusive upon the federal supreme court.—*Osborne v. State of Florida*, 17 S. Ct. 214, 164 U. S. 650, 41 L. Ed. 586.

The decision of the highest court of a state that a certain statute does not conflict with the state constitution will be accepted by the United States supreme court as conclusive, though the case in which it was rendered was prepared to obtain a decision of the question, and did not involve an actual controversy.—*Sanford v. Poe*, 17 S. Ct. 306, 165 U. S. 194, 41 L. Ed. 683, affirming decree 69 F. 546, 16 C. C. A. 305.

When the circuit court of appeals bases its judgment on a state statute, and, pending an appeal to the supreme court, the court of last resort of the state declares the statute void, as in conflict with the state constitution, this latter ruling is binding on the federal supreme court,

in the consideration of the appeal.—*Oakes v. Mase*, 17 S. Ct. 345, 165 U. S. 363, 41 L. Ed. 746, reversing judgment *Northern Pac. R. Co. v. Mase*, 63 F. 114, 11 C. C. A. 63.

A single verdict and judgment in ejectment, in the Pennsylvania courts, not being conclusive of the rights of the parties, a decision of the state supreme court construing a will in a first ejectment suit is not controlling in a subsequent ejectment suit in the federal court, unless its opinion is simply declaratory of the settled law of the state as to the effect of such devises, and not merely a construction of the particular devise.—*Barber v. Pittsburgh, F. W. & C. Ry. Co.*, 17 S. Ct. 488, 166 U. S. 83, 41 L. Ed. 925, determined in certificate (C. C.) 69 F. 501.

A decision by a state supreme court that, under the state constitution and laws, the state courts have jurisdiction over the matter of extending city boundaries, is binding on the federal courts.—*Forsyth v. City of Hammond*, 17 S. Ct. 665, 166 U. S. 506, 41 L. Ed. 1095, reversing decree 71 F. 443, 18 C. C. A. 175.

The decisions of the highest court of a state on questions of procedure in condemnation proceedings, or as to alleged conflicts between the statute authorizing them and the state constitution, are controlling on the federal courts.—*Long Island Water-Supply Co. v. City of Brooklyn*, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

The decision of the highest court of a state, that a statute is not in conflict with the Constitution of the state, is conclusive on the federal courts.—*Merchants' & Manufacturers' Nat. Bank v. Commonwealth of Pennsylvania*, 17 S. Ct. 829, 167 U. S. 461, 42 L. Ed. 236; *Brown v. State of New Jersey*, 20 S. Ct. 77, 175 U. S. 172, 44 L. Ed. 119; *Rasmussen v. State of Idaho*, 21 S. Ct. 594, 181 U. S. 198, 45 L. Ed. 820, affirming judgment *State v. Rasmussen* 59 P. 933, 7 Idaho, 1, 52 L. R. A. 78, 97 Am. St. Rep. 234; *Carstairs v. Cochran*, 24 S. Ct. 318, 193 U. S. 10, 48 L. Ed. 596, affirming judgment 52 A. 601, 95 Md. 488.

A decision of the Georgia supreme court that a so-called "resentence" of a criminal after the original sentence had been superseded was in legal effect but a fixing of a new date for the execution of the previous sentence, which had remained constantly in force, being but a construction of the state statutes, is binding on the federal supreme court. Judgment *Baughn v. State*, 28 S. E. 68, 100 Ga. 554, 38 L. R. A. 577, affirmed.—*Nobles v. State of Georgia*, 18 S. Ct. 87, 168 U. S. 398, 42 L. Ed. 515.

The decisions of the Georgia supreme court that the state statute (Code 1882, § 4666) providing for inquisitions of lunacy in criminal cases is sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after a verdict of guilty is binding on the supreme court of the United States.—*Id.*

A decision by a state supreme court that the procedure by which a state officer has been suspended or removed from office by the governor was regular, and pursuant to a valid state statute, is not reviewable by the federal supreme court, unless fundamental rights protected by the federal constitution have been infringed.—*Wilson v. State of North Carolina*, 18 S. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

1 How. Ann. St. Mich. § 3468, provides that, in case an award in condemnation proceedings is set aside on appeal after the amount has been paid, and a new appraisal is had, if the amount is diminished, the difference shall be refunded, and judgment therefor and all costs shall be rendered "against the party so appealing." Under this statute an award was set

aside, and a new appraisal had, on an appeal by the plaintiff. The new award being less than the former one, judgment for the difference was entered against the defendants. *Held* that, though this judgment was not against the party "so appealing," but against the opposite party, the judgment was merely a construction of the state statute by the state court, and was conclusive upon the federal supreme court. Judgment 61 N. W. 787, 103 Mich. 556, affirmed.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

The state court's construction of state usury laws will be followed by the federal courts.—*Missouri, K. & T. Trust Co. v. Krumseig*, 19 S. Ct. 179, 172 U. S. 351, 43 L. Ed. 474, affirming decree 77 F. 32, 23 C. C. A. 1, which affirms (C. C.) *Krumseig v. Missouri, K. & T. Trust Co.*, 71 F. 350.

A federal court is bound by a decision of the supreme court of a state holding that, while an act of the legislature extending the boundaries of a city so as to embrace territory formerly included within other municipal corporations was void as in conflict with the state constitution, yet it constituted color of law, and the validity of the city government established thereunder could not be inquired into after it had been organized, and had exercised authority over the annexed territory, for a number of years, without question, and the prior municipal governments therein had been for that length of time dissolved, and their records surrendered to the city, the question being one purely of local law; nor can the effect of such decision be avoided by allegations in a bill that complainants, as residents of the annexed territory, never acquiesced in or consented to the jurisdiction of the city over them or their property, where they took no steps to test its legality. Decree (C. C.) 84 F. 726, affirmed.—*McCain v. City of Des Moines*, 19 S. Ct. 644, 174 U. S. 168, 43 L. Ed. 936.

Decisions of the courts of Maryland rendered since the cession of the District of Columbia to the United States, giving a construction to state statutes different from that prevailing at that time, cannot control their construction by courts of the United States as affecting property within the District, over which they were continued in force by congress.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

Decisions by the court of last resort of a state construing state laws, on the faith of which a subsequent contract is made, will be adopted and applied by the supreme court of the United States in considering the nature of the contract right relied upon. Judgment 52 P. 233, 532, 18 Wash. 511, affirmed.—*Warburton v. White*, 20 S. Ct. 404, 176 U. S. 484, 44 L. Ed. 555.

The interpretation of a state statute by the state courts with respect to its application to policies issued by a foreign insurance company is binding on the supreme court of the United States. Judgment, *Cravens v. New York Life Ins. Co.*, 50 S. W. 519, 148 Mo. 583, 71 Am. St. Rep. 628, affirmed.—*New York Life Ins. Co. v. Cravens*, 20 S. Ct. 962, 178 U. S. 389, 44 L. Ed. 1116.

The competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract, are matters which the supreme court of the United States, on writ of error to a state court, must determine for itself by an independent judgment, as an exception to the general rule that it will accept the decision of the state supreme court on the construction of the state constitu-

tion, though in determining the matter it may lean towards the interpretation placed thereon by the state court. Judgment, *State v. Stearns*, 75 N. W. 210, 72 Minn. 200, reversed.—*Stearns v. State of Minnesota*, 21 S. Ct. 73, 179 U. S. 223, 45 L. Ed. 162.

The decision of the highest court of the state sustaining the constitutionality of St. Ky. 1802, § 1, requiring separate coaches for white and colored passengers, on the ground that the statute applies only to transportation between points in that state, or, if not, that the regulation of such transportation is severable from that as to interstate business, constitutes a determination of the local law, which is binding on the supreme court of the United States. Judgment 51 S. W. 160, 21 Ky. Law Rep. 228, affirmed.—*Chesapeake & O. Ry. Co. v. Commonwealth*, 21 S. Ct. 101, 179 U. S. 388, 45 L. Ed. 244.

The rights of the holders of county bonds are determinable in a federal court by the law of the state as it was declared by the state court to be at the time the bonds were made and put upon the market.—*Board of Com'rs of Wilkes County v. W. N. Coler & Co.*, 21 S. Ct. 458, 180 U. S. 506, 45 L. Ed. 642, answering questions certified *Same v. Coler*, 109 F. 1057, 47 C. C. A. 680.

The decisions of the highest court of a state, to the effect that provisions of the state constitution respecting the passage of a statute are mandatory, must be followed on that question by a federal court, irrespective of the rule adopted by the federal court in respect to federal statutes.—Id.

The question what functions the circuit courts of a state may have is a matter of state law, on which the decisions of the state courts will be followed by a federal court.—*Freeport Water Co. v. City of Freeport*, 21 S. Ct. 493, 180 U. S. 587, 45 L. Ed. 679, affirming judgment 57 N. E. 862, 186 Ill. 179; *Danville Water Co. v. City of Danville*, 21 S. Ct. 506, 180 U. S. 619, 45 L. Ed. 696, affirming judgment 67 N. E. 1129, 186 Ill. 326.

A construction of state statutes adopted by the court of last resort in that state will be adopted by the supreme court of the United States, even in a case where that court may exercise an independent judgment, if there is any reasonable doubt on the question. Rehearing, 21 S. Ct. 240, 180 U. S. 1, 45 L. Ed. 395, denied.—*Yazoo & M. V. R. Co. v. Adams*, 21 S. Ct. 729, 181 U. S. 580, 45 L. Ed. 1011.

A construction of a state statute by a state court on the question of deductions for purposes of taxation is binding on the supreme court of the United States. Judgment 61 P. 560, 21 Utah, 324, 56 L. R. A. 346, affirmed.—*Commercial Nat. Bank v. Chambers*, 21 S. Ct. 863, 182 U. S. 556, 45 L. Ed. 1227.

The construction put by the Kentucky court of appeals upon the provisions of Const. Ky. § 218, by which a different effect is given to it than to similar language in the interstate commerce law, is binding upon the supreme court of the United States in a case governed by the state constitution. Judgment 51 S. W. 164, 1012, 106 Ky. 633, 21 Ky. Law Rep. 232, 90 Am. St. Rep. 236, affirmed.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 22 S. Ct. 95, 183 U. S. 503, 46 L. Ed. 298.

The federal courts are concluded upon the question as to how an incumbence by a mining corporation of mining ground in California may be ratified by the stockholders, by a decision of the supreme court of that state that the manner of ratification prescribed by Act Cal. April 30, 1880, is exclusive. Judgment 102 F. 372, 42 C. C. A. 401, affirmed.—*Wil-*

Hams v. Gaylord, 22 S. Ct. 798, 186 U. S. 157, 46 L. Ed. 1102.

The decision of the supreme court of California that any person who connects himself with the title of a mining corporation may take advantage of Act Cal. April 30, 1880, prohibiting the directors of mining corporations from selling or incumbering its mining ground unless ratified by the stockholders, is binding on the federal courts.—Id.

The validity of an assignment for the benefit of creditors which requires a release by creditors as a condition of preference is determinable by the state law as interpreted by its highest courts. Judgment 100 F. 718, 40 C. C. A. 664, affirmed.—*J. M. Robinson & Co. v. Belt*, 23 S. Ct. 16, 187 U. S. 41, 47 L. Ed. 65.

A nonresident owner of a claim against a decedent's estate cannot maintain a suit against the administrator in a federal court, where the suit, if brought in the state courts, would have been barred by the statutes of the state as construed by its courts because instituted after the expiration of the period limited by the order of the probate court for the presentation of claims against the estate, and after the administrator's final account had been allowed and the final distribution of the estate decreed. Judgment 104 F. 1006, 43 C. C. A. 683, reversed.—*Security Trust Co. v. Black River Nat. Bank of Louisville*, 23 S. Ct. 52, 187 U. S. 211, 47 L. Ed. 147.

An amendatory state statute will not be declared invalid by the supreme court of the United States on the ground that some of its provisions are not within the scope of its title, where such title contains a reference to the statute amended, which, under the decisions of the state courts, is sufficient to sustain its validity. Judgment 104 F. 638, 44 C. C. A. 93, affirmed.—*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 S. Ct. 108, 187 U. S. 197, 47 L. Ed. 139.

The decisions of the Missouri supreme court that a repeal of Rev. St. Mo. 1879, § 5982, declaring that suicide shall be no defense to a suit on a policy of insurance, was effective as to all policies issued upon the assessment plan after the insurance company had obtained its certificate of authority to do business as an assessment insurance company under Laws Mo. 1887, p. 199, by the provision of section 10 of that act, that corporations doing business thereunder shall not be subject to any provisions of the general insurance law of the state, "except as herein distinctly set forth," are binding on the supreme court of the United States.—Id.

The construction by the state courts of a state statute which penalizes life insurance companies for failure to pay losses, as requiring a demand of payment notwithstanding the company's denial of liability, which demand can be made, however, after suit, and can be set up by an amended petition as an original suit, will be adopted by the federal courts.—*Iowa Life Ins. Co. v. Lewis*, 23 S. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

The ruling of the highest court of a state, that, under the state constitution and laws, property situated in that state, the title to which is vested in a nonresident executor to whom letters testamentary have been issued by a court of another jurisdiction, may be attached and sold in an action of debt against such nonresident executor, is binding upon the supreme court of the United States on writ of error to the state court. Judgment 64 P. 28, 62 Kan. 553, affirmed.—*Manley v. Park*, 23 S. Ct. 208, 187 U. S. 547, 47 L. Ed. 296.

A judgment of a state court sustaining the exemption claimed by a bank, under its charter, from municipal taxation on its capital

stock, which, under the local law of the state, is only *res judicata*, in respect to the identical taxes litigated in the suit, can be accorded no greater efficacy in the federal courts. Decree 111 F. 581, 49 C. C. A. 455, reversed.—*Union & Planters' Bank of Memphis v. City of Memphis*, 23 S. Ct. 604, 189 U. S. 71, 47 L. Ed. 712.

A decision of the highest state court that a conspiracy to defraud is a crime under the laws of the state concludes the Supreme Court of the United States on habeas corpus to inquire into a detention under a conviction for that crime in a court of the state. Writ of error, *State v. Howard*, 40 S. E. 71, 129 N. C. 584, dismissed.—*Howard v. Fleming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. Ed. 121.

The interpretation of a state statute against usury by a state court as applicable to a loan made by a foreign building and loan association to a resident of the state through a local agent, and as expressing the public policy of the state, which the parties could not, by their contract, contravene, is binding on the Supreme Court of the United States on a writ of error to review a judgment of the state court which is claimed to have denied full faith and credit to the public acts and records of the state where the association is domiciled. Judgment 31 So. 840, 80 Miss. 407, 57 L. R. A. 793, affirmed.—*National Mut. Building & Loan Ass'n v. Brahan*, 24 S. Ct. 532, 193 U. S. 635, 48 L. Ed. 823.

A state tax, though in form levied upon land conveyed by the United States to a corporation for dry dock purposes, with a reserved right in the grantor to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes, will be held to create a lien upon the company's interest alone, where the highest state court so regards the effect of the tax, although it neglects to modify its judgment sustaining the tax to conform to its view. Judgment 64 A. 623, 97 Md. 97, affirmed.—*Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore*, 25 S. Ct. 50, 195 U. S. 375, 49 L. Ed. 242.

The construction of a state statute by the state court is to be accepted by the federal court in determining whether the statute violates the federal constitution.—(Kan.) *Smiley v. State of Kansas*, 25 S. Ct. 289, 196 U. S. 447, 49 L. Ed. 546, affirming judgment *State v. Smiley*, 60 P. 190, 65 Kan. 240, 67 L. R. A. 908; (Minn.) *W. W. Cargill Co. v. State of Minnesota*, 21 S. Ct. 423, 180 U. S. 452, 45 L. Ed. 619, affirming judgment *State v. W. W. Cargill Co.*, 79 N. W. 962, 77 Minn. 223.

The decisions of the California Supreme Court that the repeal by Act Cal. March 23, 1901, of the authority conferred on county and municipal legislative bodies to license for revenue abates a suit previously brought to recover a license fee imposed under an ordinance which, under the decisions of that court, must be deemed a revenue measure, will be followed by the federal courts.—*Flanigan v. Sierra County*, 25 S. Ct. 314, 196 U. S. 553, 49 L. Ed. 597, reversing judgment 122 F. 24, 58 C. C. A. 340; *Wheeler v. Plumas County*, 25 S. Ct. 316, 196 U. S. 562, 49 L. Ed. 599, reversing judgment 122 F. 1022, 58 C. C. A. 683.

The validity, under the state laws, of an ordinance adopted by a board of county supervisors, is settled, so far as the federal courts are concerned, by a decision of the highest court of that state upholding a similar ordinance.—*Id.*

The construction given by the state courts to Act Tex. May 25, 1890, as removing the discriminatory features of prior anti-trust laws,

is conclusive on the federal Supreme Court in determining, on writ of error to the state court, whether such statute denies the equal protection of the laws.—*National Cotton Oil Co. v. State of Texas*, 25 S. Ct. 379, 197 U. S. 115, 49 L. Ed. 689, affirming judgment (Civ. App.) 72 S. W. 615; *Southern Cotton Oil Co. v. Same*, 25 S. Ct. 383, 197 U. S. 134, 49 L. Ed. 696, affirming judgment (Civ. App.) 72 S. W. 1135.

The construction of a state statute by the highest court of the state as a legislative change of the grade of a street for its full width is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute impairs the obligation of any contract right of abutting owners to appropriate the street or an extension thereof for wharfage purposes. Decree 76 P. 347, 45 Or. 1, affirmed.—*Mead v. City of Portland*, 26 S. Ct. 171, 200 U. S. 148, 50 L. Ed. 413.

The conclusion of a state court that a tax is uniform, within the meaning of the requirement of the state Constitution, when it is equal upon all persons belonging to the described class on which it is imposed, is not open to review upon writ of error from the Supreme Court of the United States to the state court. Judgment, *Lacy v. Armour Packing Co.*, 47 S. E. 53, 134 N. C. 567, affirmed.—*Armour Packing Co. v. Lacy*, 26 S. Ct. 232, 200 U. S. 226, 50 L. Ed. 451.

A decision of the Supreme Court of North Carolina, that the provision of Pub. Laws N. C. 1903, c. 247, imposing a tax on "every meat-packing house doing business in this state," does not apply to the interstate business of a foreign corporation, but only to its local business, such as the sale within the state of products already stored there, on orders received after the products are thus stored, is conclusive on the federal Supreme Court in determining, on writ of error to the state court, whether the tax is an interference with interstate commerce.—*Id.*

Whether a repealable exemption from state taxation has been in fact repealed by a subsequent state statute is a question of state law, upon which the decisions of the highest courts of the state, in the absence of any contract rights, are binding on the federal courts. Decree (1905) 135 F. 977, 70 C. C. A. 287, reversed.—*Wicomico County Com'rs v. Bancroft*, 27 S. Ct. 21, 203 U. S. 112, 51 L. Ed. 112.

The construction given by the highest state court to a statute of that state is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute is repugnant to the federal Constitution. Judgment, *State v. Gatewood* (1905) 51 S. E. 53, 138 N. C. 749, affirmed.—*Gatewood v. State of North Carolina*, 27 S. Ct. 167, 203 U. S. 531, 51 L. Ed. 305.

The decision of the highest court of a state, that a state statute is repugnant to the Constitution of that state, is conclusive upon the Supreme Court of the United States in reviewing the judgment of the state court. Judgment (Mont. 1906) 83 P. 874, affirmed.—*State of Montana v. Rice*, 27 S. Ct. 281, 204 U. S. 291, 51 L. Ed. 490.

Rulings of the highest court of the state on questions involving the powers of corporations under the laws of that state are conclusive on the federal Supreme Court, when reviewing the judgment of the state court. Judgment, *Southern Illinois & M. Bridge Co. v. Stone* (1906) 92 S. W. 475, 194 Mo. 175, affirmed.—*Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

Whether the notice to a corporation to produce books and papers before a grand jury is broader than that provided for by Act Vt. Oct. 9, 1906, p. 79, No. 75, is a question of the construction of the statute and of the notice, on which the decision of the state court is final, and not reviewable by the federal Supreme Court on writ of error. Judgment, *In re Consolidated Rendering Co.* (Vt. 1907) 66 A. 790, affirmed.—*Consolidated Rendering Co. v. State of Vermont*, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

A decision of the highest state court that the Michigan indeterminate sentence act (Pub. Acts 1903, No. 136), was not repealed as to those sentenced under it by Pub. Acts 1905, No. 184, will be followed by the federal Supreme Court on writ of error to the state court.—*Ughbanks v. Armstrong*, 28 S. Ct. 372, 208 U. S. 481, 52 L. Ed. 582.

Decisions of the highest court of the state of New York as to the construction of the charter of an insurance company obtained under a general law of the state are binding upon the federal courts. Decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversed.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

The construction by the highest state court of a statute of that state creating a right of action for death in favor of the surviving relatives of the deceased as not extending to such relatives as are nonresident aliens must be accepted by the federal Supreme Court on a writ of error to the state court. Judgment (1907) 65 A. 1077, 216 Pa. 402, 116 Am. St. Rep. 778, affirmed.—*Maiorano v. Baltimore & O. R. Co.*, 29 S. Ct. 424, 213 U. S. 268, 53 L. Ed. 792.

The Supreme Court of the United States will assume that a refusal by a purchaser in possession of personal property to pay for it, to satisfy a mortgage lien on it, or release it, unless the seller will execute another contract to his detriment, which, if persisted in, both parties understand will lead to an immediate foreclosure and the ruin of the seller, amounts to undue influence within the meaning of a state statute permitting a contract to be set aside for such cause, until the Supreme Court of the state says otherwise. Judgment, *Snyder v. Stribling* (1907) 89 P. 222, 18 Okl. 168, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

The decision of the highest court of a state upon the question whether or not the state statutes require claims for damages because of poor quality of material for the purchase price of which a note was given to be set up in an action on the note, so as to be concluded by the judgment, is binding on the federal courts. Judgment, *Kirven v. Virginia-Carolina Chemical Co.* (1907) 58 S. E. 424, 77 S. C. 493, affirmed.—*Virginia-Carolina Chemical Co. v. Kirven*, 30 S. Ct. 424, 215 U. S. 252, 54 L. Ed. 179.

The construction by the highest state court of the tax imposed by Act Ky. March 28, 1906 (Acts 1906, p. 549), upon persons engaged in compounding, rectifying, adulterating, or blending distilled spirits, as being a license or occupation tax, and not a property tax, will be followed by the federal Supreme Court.—(1910) *Brown-Forman Co. v. Commonwealth of Kentucky*, 30 S. Ct. 578, 217 U. S. 563, 54 L. Ed. 883, affirming judgment *Brown-Forman Co. v. Commonwealth of Kentucky* (1907) 101 S. W. 321, 125 Ky. 402.

The construction given by a state court to the immunity of railway companies from taxation, granted by the state Constitution as extending to a special tax in aid of another railway company, is conclusive on the federal Supreme Court in determining, on writ of error

to the state court, whether such constitutional provision impairs contract obligations.—(1910) *Arkansas Southern Ry. Co. v. Louisiana & A. Ry. Co.*, 31 S. Ct. 56, 218 U. S. 431, 54 L. Ed. 1097, affirming decree *Louisiana & A. Ry. Co. v. Shaw* (1908) 46 So. 994, 121 La. 997.

The construction placed by the highest court of the state upon Laws N. Y. 1908, c. 429, enacted to safeguard natural mineral springs against waste and impairment, must be accepted by the federal courts in determining the validity of such statute under the federal Constitution.—(1911) *Lindsley v. Natural Carbonic Gas Co.*, 31 S. Ct. 337, 220 U. S. 61, 55 L. Ed. 369, Ann. Cas. 1912C, 160, affirming decree (C. C. 1909) 170 F. 1023.

The federal Supreme Court on writ of error to a state court will accept that court's construction of a state statute giving a lien on vessels for injuries committed by them to persons or property, as including injuries to a bridge, caused by a foreign vessel engaged in interstate commerce.—(1911) *Martin v. West*, 32 S. Ct. 42, 222 U. S. 191, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592, affirming judgment (1908) *West v. Martin*, 97 P. 1102, 51 Wash. 85, 21 L. R. A. (N. S.) 324.

Federal courts must follow the adjudications of the courts of a state upon the question as to whether a particular law of that state has been passed in such a manner as to become a valid law under the state Constitution.—*Peters v. Gilchrist*, 32 S. Ct. 122, 222 U. S. 483, 56 L. Ed. 278.

An independent judgment upon the question of the validity of a grant of lands by a state statute which the highest court of the state has held invalid because the title of the act, as shown in the legislative journals, differing in this respect from the published session laws, was not broad enough to include such grant, cannot be exercised by the federal courts, upon the theory that such decision was rendered after rights under such grant had arisen, where the state court, long before the statute was passed, had laid down the rule that, if the legislative journals should show that a law had not been validly enacted, this fact would be fatal.—Id.

Construction given by Supreme Court of Minnesota to Rev. Laws Minn. 1905, §§ 794-1038, taxing nonresident express companies, as to what is included in gross receipts where transportation is wholly within state, is binding on federal Supreme Court.—(1912) *United States Express Co. v. State of Minnesota*, 32 S. Ct. 211, 223 U. S. 335, 56 L. Ed. 459, affirming judgment (1911) *State v. United States Express Co.*, 131 N. W. 489, 114 Minn. 346.

Ruling of highest court of the state that, under its Constitution, it had authority to render judgment of ouster in civil quo warranto proceedings against foreign corporations holding licenses in said state, is conclusive on writ of error in Supreme Court.—(1912) *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 32 S. Ct. 406, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913D, 936, affirming judgment (1908) *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1.

The construction given by the highest state court to a municipal ordinance preventing the sale of loaves of bread short in weight is binding on the federal Supreme Court when determining, on writ of error to a state court, the validity of the ordinance under the due process of law clause of the federal Constitution.—*Schmidinger v. City of Chicago*, 33 S. Ct. 182, 226 U. S. 578, 57 L. Ed. 304, Ann. Cas. 1914B, 284, affirming judgments *City of Chicago v. Schmidinger*, 90 N. E. 369, 243 Ill. 167 and 92 N. E. 244, 245 Ill. 317.

A decision of the highest state court that railway rates are unreasonable as against a

given locality comes within Laws Or. 1907, p. 67, empowering the railroad to remedy a discrimination in rates, is binding on the federal Supreme Court on writ of error.—*Portland Ry., Light & Power Co. v. Railroad Commission of Oregon*, 33 S. Ct. 820, 229 U. S. 397, 57 L. Ed. 1248, affirming judgment 105 P. 709, 56 Or. 468; *Id.*, 33 S. Ct. 827, 229 U. S. 414, 57 L. Ed. 1259.

The question whether certain ordinances are within the power conferred by the Legislature on municipalities is a question of state law, the decision of which by the highest court is conclusive on the federal Supreme Court.—*Atlantic Coast Line R. Co. v. City of Goldsboro*, 34 S. Ct. 364, 232 U. S. 548, 58 L. Ed. 721, affirming decree 71 S. E. 514, 155 N. C. 356.

The federal Supreme Court will follow the ruling of the Supreme Court of New Mexico that the town of Las Vegas to which a grant was confirmed by Act Cong. June 21, 1860, was not properly impleaded or served under the designation "unknown claimants" of adverse interest, in a suit to quiet title to land within the boundaries of the grant under Comp. Laws N. M. 1897, §§ 4010, 4011, providing that parties defendant shall be designated by their names as near as they can be ascertained.—*Priest v. Board of Trustees of Town of Las Vegas*, 34 S. Ct. 443, 232 U. S. 604, 58 L. Ed. 751, affirming judgment 120 P. 894, 16 N. M. 692.

Judgment of a federal District Court based on the statute creating a cause of action, which otherwise would not exist, will be reversed on writ of error, where, since the trial, the statute has been held unconstitutional by the highest state court.—*Metzger Motor Car Co. v. Parrott*, 34 S. Ct. 575, 233 U. S. 36, 58 L. Ed. 837.

Determination of a state court that a state railroad commission was authorized to make the order under review is conclusive in the federal Supreme Court on writ of error to the state court.—*Chicago, M. & St. P. Ry. Co. v. State of Iowa*, 34 S. Ct. 592, 233 U. S. 334, 58 L. Ed. 988, affirming judgment *State v. Chicago, M. & St. P. Ry. Co.*, 130 N. W. 802, 152 Iowa, 317.

Whether an assessment of benefits from the widening of a street could have been levied if the land had not been sold is a question on which the decision of the state court will be followed by the federal Supreme Court.—*Willoughby v. City of Chicago*, 35 S. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error *City of Chicago v. Willoughby*, 94 N. E. 513, 249 Ill. 249.

Decision of highest state court that city ordinance is within the powers conferred by the Legislature is conclusive on the federal Supreme Court.—*Reinman v. City of Little Rock*, 35 S. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment *City of Little Rock v. Reinman*, 155 S. W. 105, 107 Ark. 174.

Federal Supreme Court will not disturb decision of the highest New York court that contract exemption from tax conferred by Laws N. Y. 1894, c. 752, § 35, Laws N. Y. 1896, c. 729, § 4, and Laws N. Y. 1900, c. 616, § 4, on any firm or corporation operating New York city subway as to their interest therein and as to equipment, does not exempt corporation operating the subway from a tax measured by its capital stock and gross earnings under Tax Law N. Y. §§ 182, 184.—*People of State of New York ex rel. Interborough Rapid Transit Co. v. Sohmer*, 35 S. Ct. 549, 237 U. S. 276, 59 L. Ed. 951, affirming orders 135 N. Y. S. 1135, 151 App. Div. 911 and 100 N. E. 813, 207 N. Y. 270.

Settled construction by state court of Const. Cal. art. 6, §§ 6, 8, as to sessions of said court,

and the power of the judges of one county in another county, will be accepted as correct, notwithstanding subsequent amendment of November 8, 1910, relating to such sessions.—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

The construction given by the highest state court of St. Wis. 1911, § 1862, empowering municipalities to grant use of streets to street railway companies on terms, as not authorizing the contract preventing future exercise of authority by the state to fix rates, will be followed.—*Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin*, 35 S. Ct. 820, 238 U. S. 174, 59 L. Ed. 1254, affirming judgment 142 N. W. 491, 153 Wis. 592, Ann. Cas. 1915A, 911.

The correctness of a state court's construction of a state statute is a question of local law, which the federal Supreme Court cannot review, when determining validity of such statute under the federal Constitution.—*Price v. People of State of Illinois*, 35 S. Ct. 892, 238 U. S. 446, 59 L. Ed. 1400, affirming judgment *People v. Price*, 101 N. E. 196, 257 Ill. 587, Ann. Cas. 1914A, 1154.

Conclusion of highest state court that Laws Wash. 1911, c. 74, took away any right under Rem. & Bal. Code, §§ 183, 194, to maintain an action for wrongful death of an employé, must be accepted by the federal courts.—*Northern Pac. Ry. Co. v. Meese*, 36 S. Ct. 223, 239 U. S. 614, 60 L. Ed. 467, reversing judgment (*C. C.*) *Meese v. Northern Pac. Ry. Co.*, 211 F. 254, 127 C. C. A. 622.

Federal Supreme Court, on writ of error to state court to review judgment dismissing writ of prohibition, will follow rulings of state court as to asserted invalidity of condemnation laws under state Constitution, and errors in proceedings under those laws.—*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 36 S. Ct. 234, 240 U. S. 30, 60 L. Ed. 507, affirming judgment *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 65 So. 287, 186 Ala. 622.

A ruling of a state court that the "next of kin" under Act April 22, 1908, as amended by Act April 5, 1910, are the legitimate children of the same mother, who is dead, negatives any right to trace the parentage to the father.—*Seaboard Air Line Ry. v. Kenney*, 36 S. Ct. 458, 240 U. S. 489, 60 L. Ed. 762, affirming judgment *Kenney v. Seaboard Air Line R. Co.*, 82 S. E. 968, 167 N. C. 14.

Federal Supreme Court will accept ruling of highest state court under state statute that a proceeding authorized by 3 Lord's Or. Laws, tit. 43, c. 6 (Laws 1913, cc. 82, 86, 97), to determine irrigation rights, is, while before state board, administrative and not judicial.—*Pacific Live Stock Co. v. Lewis*, 36 S. Ct. 637, 241 U. S. 440, 60 L. Ed. 1084, affirming decree (*D. C.*) 217 F. 95.

←367. — Rules of property.

See 13 Cent. Dig. Courts, §§ 953, 959.

Const. art. 4, § 1, and Rev. St. § 905, providing that the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered, does not preclude the United States supreme court from inquiring, in determining its jurisdiction of an action brought upon a judgment of a state court, whether the cause of action upon which the judgment was rendered was such that this court would have had original jurisdiction of it.—*State of Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U. S. 265, 8 S. Ct. 1370, 32 L. Ed. 239.

State decisions establishing a rule of property will be followed by the supreme court of the United States, when called upon to interpret the state law, if it is possible to do so. Judgment 52 P. 233, 532, 18 Wash. 511, affirmed.—Warburton v. White, 20 S. Ct. 404, 176 U. S. 484, 44 L. Ed. 555.

The conclusion of the highest court of a state as to sale and record of title of real estate, and the nature of the rights of a mortgagee creditor, are part of the local law to be accepted by the supreme court of the United States. Decree, Lacassagne v. Abraham, 25 So. 441, 51 La. Ann. 840, affirmed.—H. Abraham & Son v. Casey, 21 S. Ct. 88, 179 U. S. 210, 45 L. Ed. 156.

The policy of the law in Illinois not to permit the owner of personal property to sell it and still continue in possession, so as to exempt it from seizure or attachment at the suit of creditors of the vendor, will be followed by the courts of the United States in a case in which the validity of a sale of such property in that state as against attachment creditors is in question. Judgment 88 F. 446, 31 C. C. A. 582, affirmed.—Dooley v. Pease, 21 S. Ct. 329, 180 U. S. 126, 45 L. Ed. 457.

Decisions of the courts of a state respecting the title acquired by individual Indians under the treaty of September 24, 1819, with the Chippewa Nation, to the lands therein reserved for their use, will not be disturbed by the Supreme Court of the United States, where they have become a rule of property, and do not clearly involve a misinterpretation of the words of the treaty.—Judgment (1904) 99 N. W. 14, 136 Mich. 288, affirmed.—Francis v. Francis, 27 S. Ct. 129, 203 U. S. 233, 51 L. Ed. 165.

The construction given by the highest court of a state to a conveyance of mining property, as not including the portion of a vein beneath the surface and within the converging lines, produced, of the grantor's location, will be followed by the federal Supreme Court, on writ of error to the state court. Decree, Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 P. 834, 146 Cal. 147, affirmed.—East Central Eureka Min. Co. v. Central Eureka Min. Co., 27 S. Ct. 258, 204 U. S. 266, 51 L. Ed. 476.

A decision of the highest state court that the grantor in a deed conveying the coal under a tract of land, with the right to enter upon and under said land, and to mine, excavate, and remove all of the coal, cannot maintain an action for damages in tort, founded upon the failure of the grantee or his successors to leave sufficient support to the overlying or surface land, is not binding upon the federal courts in a similar action based on almost identical facts and circumstances, the granting clause of the two deeds being in fact identical, where such decision was handed down after the deed upon which the defendant relies was executed, and after the injury complained of was sustained, and the action begun, and where the point decided had not been previously adjudged by the State Supreme Court.—Kuhn v. Fairmont Coal Co., 30 S. Ct. 140, 215 U. S. 349, 54 L. Ed. 228.

Federal court *held* to have improperly refused to follow decision of state court, that the sons of testator took not merely a life estate, but a fee subject to be defeated only by their death without lineal descendants under their father's will.—(1912) Messinger v. Anderson, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152, reversing judgment (1909) 171 F. 785, 96 C. C. A. 445.

Decisions of state courts that oil lease passes to lessee a freehold interest taxable as real property, and that a clause giving option to surrender is valid, does not create a tenancy at will, nor make the lease void for want of mutuality, are rules of property to be followed by the federal courts.—Guffey v. Smith, 35 S.

Ct. 526, 237 U. S. 101, 59 L. Ed. 856; Id., 35 S. Ct. 532, 237 U. S. 120, 59 L. Ed. 866. Reversing decree Smith v. Guffey, 202 F. 106, 120 C. C. A. 436.

368. — Inconsistent decisions.

See 13 Cent. Dig. Courts, § 251.

While the courts of the United States accept and apply the construction of a state constitution or of a local statute by the state courts, rights accruing under one construction will not be lost by merely a change of opinion in the state court; and the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment.—Anderson v. Santa Anna Tp., 116 U. S. 356, 6 S. Ct. 413, 29 L. Ed. 633; Confarr v. Same, 116 U. S. 366, 6 S. Ct. 418, 29 L. Ed. 636.

The Illinois supreme court having at one time held that the terms "towns" and "villages" are used synonymously, in the laws of Illinois, but having afterwards, in a suit relating to certain bonds, construed the word "village" in the Illinois act of February 24, 1869, § 10, amendatory of the charter of the Illinois Southeastern Railway Company, authorizing any "village" to make subscriptions in aid of such railroad as excluding "towns," *held*, that neither decision was binding upon the federal supreme court in a suit upon bonds issued prior to either decision, and which were the same bonds in controversy in the latter suit.—Town of Enfield v. Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 623.

In 1871, the supreme court of Ohio declared constitutional Act Ohio May 4, 1869, which authorized the city of Cincinnati to construct and equip a continuous line of railroad. Laws Ohio 1880, p. 157, authorized a designated township, a quasi corporation, to construct through its territory a few miles of railroad forming part of a line intended to be ultimately owned and operated by private capital. An adjudication by the supreme court of Ohio, made after the purchase of the bonds in question, declared the act of 1880 unconstitutional. *Held* not to prevent the federal courts, in an action brought therein for the enforcement of the bonds, from exercising their independent judgment in the matter, in view of the unsettled character of the decisions of the supreme court of Ohio on this question.—Pleasant Tp. v. Aetna Life Ins. Co., 138 U. S. 67, 11 S. Ct. 215, 34 L. Ed. 864.

Bonds issued by a township under authority of acts passed in 1882 and 1885 were purchased by plaintiff in 1886, in reliance upon their validity; such bonds being then treated as valid. In 1888 the state supreme court, by a majority of two to one, held the bonds to be invalid. In 1889 the same court affirmed the constitutionality of an act declaring bonds previously issued by a township to be valid,—a decision apparently in conflict with the previous one. *Held*, that the supreme court would not be bound by the decision rendered in 1888 by the state supreme court.—Folsom v. Township Ninety-Six, Abbeville County, 159 U. S. 611, 16 S. Ct. 174, 40 L. Ed. 278.

The laws of a state, which the courts of the United States are required by Rev. St. § 721, to follow as rules of decision in trials at common law, are to be determined by the latest settled adjudications of the highest court of the state, rather than by earlier ones, where there is any inconsistency between them (unless rights acquired on the faith of the former decisions are involved), and in case a construction has been placed on a state law, or constitutional provision, by its highest court, different from that previously given it by a federal court, though the latter may have followed a former state decision, the supreme court, in passing upon the case in review, will apply the law as determined by the subsequent holding

of the state court. Judgment 81 F. 742, 26 C. C. A. 539, reversed.—*Wade v. Travis County, Tex.*, 19 S. Ct. 715, 174 U. S. 499, 43 L. Ed. 1060.

The federal courts, in determining contract rights as affected by a state constitution, will enforce the contract in accordance with the constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made. Judgment (C. C.) 91 F. 37, reversed.—*Loeb v. Trustees of Columbia Tp.*, 21 S. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

—369. — Decisions impairing obligation of contracts.

Whether or not a state statute creates a valid contract is a question upon which the supreme court is not bound by the decision of the supreme court of the state, in a suit in which such contract is claimed, and the question of the impairment of its obligation by subsequent legislation is involved. Judgment 19 S. E. 114, 90 Va. 597, reversed.—*McCullough v. Commonwealth of Virginia*, 19 S. Ct. 134, 172 U. S. 102, 43 L. Ed. 382.

In determining whether a contract exists between a corporation and a state protected from impairments by the United States constitution, the United States supreme court forms an independent judgment in each case, unaffected by the decision of the state courts in other like cases.—*Citizens' Sav. Bank v. City of Owensboro*, 19 S. Ct. 530, 571, 173 U. S. 636, 43 L. Ed. 840.

The rule that, in considering whether a state law impairs the obligation of a contract, state decisions construing its laws in determining the existence of the contract, etc., are not binding on the federal courts, does not apply when a prior state judgment is set up as *res judicata*. Decree (C. C.) *Bank of Kentucky v. Stone*, 88 F. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 S. Ct. 881, 174 U. S. 408, 799, 43 L. Ed. 1187.

Although it is the duty of the United States supreme court to exercise an independent judgment as to the nature and scope of a contract, when its jurisdiction is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, nevertheless, when the contract alleged to have been impaired arises from a state statute, the federal court, for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the state courts, if the question seems balanced with doubt. Judgment, *State ex rel. Wilder v. Board of Liquidation of City Debt*, 26 So. 679, 51 La. Ann. 1849, affirmed.—*Board of Liquidation of City Debt of New Orleans v. State of Louisiana*, 21 S. Ct. 263, 179 U. S. 622, 45 L. Ed. 347.

Federal courts, in determining the validity, in the hands of bona fide purchasers, of county bonds issued in aid of railroad construction under the authority of Code N. C. §§ 1996-1999, are not bound by the construction given such statute by a decision of the highest state court subsequent to such purchase, but will exercise an independent judgment as to its meaning. Decree, *Board of Com'rs of Stanly County v. Coler*, 113 F. 705, 51 C. C. A. 379, reversing 96 F. 284, 37 C. C. A. 484, affirmed.—*Board of Com'rs of Stanly County v. W. N. Coler & Co.*, 23 S. Ct. 811, 190 U. S. 437, 47 L. Ed. 1126.

An independent judgment as to the constitutionality, under a state Constitution, of a mechanic's lien law, may be exercised by a federal court, notwithstanding decisions of the state courts, rendered before the commencement of the suit in the federal court, but not until

after the rights of the parties had been fixed by their contracts, declaring such law to be repugnant to the state Constitution. Decree 116 F. 793, 54 C. C. A. 165, affirmed.—*Great Southern Fire Proof Hotel Co. v. Jones*, 24 S. Ct. 576, 193 U. S. 532, 48 L. Ed. 778.

The decision of the highest state court that a state statute which is claimed to create a contract is valid will be followed by the Supreme Court of the United States in determining whether any contract obligations have been impaired by subsequent legislation. Decree, *Detroit, G. H. & M. Ry. Co. v. Powers* (C. C.) 138 F. 264, affirmed.—*Powers v. Detroit, G. H. & M. Ry. Co.*, 26 S. Ct. 556, 201 U. S. 543, 50 L. Ed. 860.

—370. — Decisions of United States courts previous to decision of question by state court.

See 13 Cent. Dig. Courts, §§ 953, 953½.

The federal courts, in the exercise of their co-ordinate jurisdiction in the administration of state laws, will ordinarily defer to and follow state decisions construing state statutes, but where the rule is not so settled they will exercise an independent judgment. Thus, where, after a decision by the United States circuit court, the state court renders a contrary decision in another case growing out of the identical transactions, the supreme court, in reviewing the judgment of the circuit court, will not be bound by the ruling of the state court, but will examine the question for itself.—*Burgess v. Seligman*, 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359.

The provision of the Illinois constitution of 1870 forbidding any municipality to subscribe to the stock of, or to make a donation in aid of, any private corporation, except in the case of "subscriptions" previously voted under existing laws, having been construed by several decisions of the Illinois supreme court as including, under the word "subscriptions" in the excepting clause, "donations," held, that the federal supreme court would follow such decisions, although it had previously construed the provision differently.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

When, pending an appeal from a territorial court to the United States supreme court upon a question of local law, the territory is admitted as a state, and the state supreme court thereof, in another case, reaches an opposite conclusion upon the same question, the latter decision will be followed by the supreme court of the United States.—*Stutsman County v. Wallace*, 142 U. S. 293, 12 S. Ct. 227, 35 L. Ed. 1018.

A judgment of a territorial court on a question of practice should not be reversed by the supreme court of the United States because of the decision of the state courts in subsequent cases while the former cases are pending on appeal in the supreme court, the territory having been in the mean time admitted to the Union.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 20 P. 583, 1 Wash. St. 549.

—371. Enforcement of rights under state statutes.

See 13 Cent. Dig. Courts, §§ 907, 972-976.

Cobbey, Consol. St. Neb. 1891, p. 1003, § 237, gives a creditor the right of attachment against the property of a debtor for a claim before it is due when the debtor intends fraud. Held, that a federal circuit court, under Rev. St. § 915, has jurisdiction to determine whether a plaintiff is entitled to an attachment on such a claim.—*Schunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500, 13 S. Ct. 416, 37 L. Ed. 255.

The validity and effect of a guaranty of a note made in Alabama is governed by the statute of frauds of that state when sued on in the federal courts; for that statute is such a law of the state as has been declared to be a rule of decision in the courts of the United States by the judiciary act of 1789. Rev. St. § 721. —*Moses v. National Bank of Lawrence County*, 149 U. S. 298, 13 S. Ct. 900, 37 L. Ed. 743.

The possibility that a judgment obtained by a married woman in her own name for personal injuries, in an action brought in the state where she was injured, would not be recognized as a bar to an action by her husband in the state of their domicile for the same cause of action, will not preclude the court in her action, which is removed into a federal court, from sustaining her right of action in her own name, in accordance with the law of the state in which she was injured. Judgment 97 F. 837, 38 C. C. A. 502, affirmed.—*Texas & P. Ry. Co. v. Humble*, 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

The right of a married woman to bring an action for personal injuries in her own name under Sand. & H. Dig. Ark. § 5641, is not lost by defendant's removal of the action into a federal court; but the law of the state furnishes the rule of decision, under Rev. St. U. S. § 721.—*Id.*

The holder, through a patent from the United States, of the legal title to a lode mining claim, in possession, may maintain a suit in equity, in a federal Circuit Court sitting in Utah, without a prior adjudication in an action at law of its legal title, to quiet title and to restrain defendants from further mining or removing ore from beneath the surface of such claim, in view of the provisions of Rev. St. Utah, § 3511, that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. Judgment, United States Min. Co. v. Lawson (1904) 134 F. 769, 67 C. C. A. 587, affirmed.—*Lawson v. United States Min. Co.*, 28 S. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

—372. Commercial or other general law.

See 13 Cent. Dig. Courts, §§ 977-979.

The question of the liability of a railroad company on a contract of transportation over a connecting line beyond its terminus is a question of general, and not local, law, and the supreme court will not be bound in passing thereon by the decisions of the state where the contract was made, but will exercise its own judgment.—*Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325.

The federal courts, when called upon to construe the general commercial law of a state in respect to a question which is a new one in the federal courts, should give weight to the state decisions, although they are not absolutely bound thereby.—*Burgess v. Seligman*, 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359.

Though the supreme court of the United States may yield against its own judgment to a state supreme court, and accept as local law its decision that the fact that an election, held to authorize the issue of township bonds in aid of a railroad, was presided over by a moderator chosen by the electors present, instead of by the supervisor, assessor, and collector as ex officio judges of elections, is such an irregularity as renders the election void, it will not follow the state court in the conclusion drawn therefrom, that the bonds issued in pursuance thereof are void in the hands of bona fide holders.—*Town of Pana v. Bowler*, 107 U. S. 529, 2 S. Ct. 704, 27 L. Ed. 424.

The application of the rule recognized in the federal supreme court, protecting purchasers of negotiable paper before maturity against

pending suits calling in question the validity of the paper, cannot be affected by state laws or decisions, when the rights of persons not residing and not being in the state are involved.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

An issue of municipal bonds not originally authorized, but which the legislature might have authorized, and did in fact subsequently ratify, will be held valid in the federal courts, upon the well-settled doctrine of the United States supreme court of the power of a legislature, in the absence of any constitutional provision to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the state supreme court adverse to such doctrine, made after the issue of the bonds, and the passage of the curative act.—*Bolles v. Town of Brimfield*, 120 U. S. 759, 7 S. Ct. 736, 30 L. Ed. 786, following *Anderson v. Santa Anna Tp.*, 116 U. S. 358, 6 S. Ct. 413, 29 L. Ed. 633.

The question whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger is a question, not of local law, but of general jurisprudence, upon which the judgment of the supreme court of the United States, in the absence of express statute regulating the subject, is not controlled by decisions of state courts.—*Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 S. Ct. 261, 37 L. Ed. 97.

Decisions of the supreme court of Missouri to the effect that, under Gen. St. 1866, c. 63, § 17, the assent of two-thirds of all the registered voters is necessary to render valid an issue of county bonds in aid of a railroad, are not binding upon a federal court so as to require it to declare invalid an issue of bonds made before such decisions were rendered, and approved by two-thirds of those actually voting, being a less number than two-thirds of the registered voters.—*Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 S. Ct. 267, 37 L. Ed. 93, affirming judgment (C. C.) *Ninth Nat. Bank v. Knox County*, 37 F. 75.

In determining the validity of town bonds which came into the hands of the owner before that question had been adjudicated by the supreme court of the state in which the bonds were situated, the supreme court of the United States will not consider itself bound by such subsequent adjudication, unless it regards it as intrinsically sound.—*Barnum v. Town of Okolona*, 148 U. S. 393, 13 S. Ct. 638, 37 L. Ed. 495.

The question whether the engineer and fireman of a locomotive are fellow servants, so as to preclude the fireman from recovering damages against the company for personal injuries caused by the engineer's negligence, is a question of general law, as to which the federal courts are not controlled by state decisions, but are free to exercise an independent judgment.—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772.

The liabilities of railroad companies for injuries to their employes is a matter of general law, as to which, in the absence of statutory regulations by the state, the federal courts are not bound by the state decisions.—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 S. Ct. 140, 37 L. Ed. 1107.

The construction of a policy of marine insurance, depending on questions of general commercial law, is a matter on which courts of the United States are at liberty to exercise their own judgment, and are not bound to accept the decisions of the courts of the state in which the contract was made.—*Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 21 S. Ct. 1, 179 U. S. 1, 45 L. Ed. 49, affirming judgment

82 F. 296, 27 C. C. A. 134; (C. C.) Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 106 F. 116.

The federal courts will follow their own understanding of the common law in determining who are fellow servants, when no settled rule of property intervenes.—Beutler v. Grand Trunk Junction R. Co., 32 S. Ct. 402, 224 U. S. 85, 56 L. Ed. 679.

The question as to the effect of the knowledge of the local agent of a life insurance company upon the right of the company to insist upon a condition in respect to misrepresentations made in the application is one of general jurisprudence upon which the federal courts are not controlled by the decisions of state courts.—Aetna Life Ins. Co. v. Moore, 84 S. Ct. 186, 231 U. S. 543, 58 L. Ed. 356.

374. Laws relating to procedure in general.

See 13 Cent. Dig. Courts, §§ 981, 982.

A state statute provided that, if the mortgagor's right of redemption from foreclosure sale was not exercised within 12 months, a judgment creditor of the mortgagor might, after 12 and before 15 months after the sale, redeem the property therefrom by the payment to the purchaser or to the officer for his benefit of the amount for which the premises were sold, with interest from the date of sale at 10 per cent. per annum. The rules of the United States court, designed to follow this practice, provided for payment by the judgment creditor to the purchaser or to the clerk of the court instead of to the officer having the execution. Held an immaterial variation in a matter purely of practice, within the control of the federal court, that did not affect the substantial right and rule of property created by the statute.—Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 S. Ct. 236, 27 L. Ed. 648.

In an action of ejectment in a federal court a previous judgment of the state supreme court in an action between the same parties, rendered under a statute (Act Pa. April 13, 1807, 1 Brightly, *Purd.* Dig. p. 535) requiring two successive verdicts and judgments in favor of the same party to defeat a third ejectment, though entitled to peculiar respect, will not have conclusive force.—Gibson v. Lyon, 115 U. S. 439, 6 S. Ct. 129, 29 L. Ed. 440.

Whether, on the death of a plaintiff, another party may be substituted after judgment before suing out a writ of error to the supreme court of the United States, is question of state practice, as to which the determination of the state court is conclusive.—Renaud v. Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. Ed. 629.

The decision of the supreme court of Illinois that no amendment of its record in derogation of its final judgment must be made after the expiration of a term is binding on the supreme court of the United States.—Fielden v. People of State of Illinois, 143 U. S. 452, 12 S. Ct. 528, 36 L. Ed. 224, affirming judgment 128 Ill. 595, 21 N. E. 584.

Whether a state appellate court may correct its interlocutory decision upon the first appeal when the case comes before it again is a question of local law as to which the state decisions control.—Moss v. Ramey, 36 S. Ct. 183, 239 U. S. 538, 60 L. Ed. 425, affirming judgment A. B. Moss & Bro. v. Same, 136 P. 608, 25 Idaho, 1.

375. Limitation laws.

See 13 Cent. Dig. Courts, § 983.

A proceeding in rem in admiralty against a vessel for the negligent death of a human being, for which a right of action is given by a state statute, cannot be maintained after the

expiration of the time limited by such statute for the bringing of the action.—The Harrisburg, 7 S. Ct. 140, 119 U. S. 199, 30 L. Ed. 358.

In a suit in equity in a federal court to open a settlement on the ground of fraud, the court will follow the statute of limitations of the state where the action is brought, except that the established rule of equity, that time will not run in favor of defendant until the discovery of the fraud, or until, with reasonable diligence it might have been discovered, will be applied, irrespective of the provisions of the state statute.—Kirby v. Lake Shore & M. S. R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. Ed. 569.

Statutes of limitation, even in personal actions, including actions on judgments, were "laws of the several states," which, under Judiciary Act Cong. Sept. 24, 1789, and before Act June 1, 1872, c. 255, § 5, must "be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," except where otherwise provided by the constitution, treaties, or statutes.—Michigan Ins. Bank v. Eldred, 130 U. S. 693, 9 S. Ct. 690, 32 L. Ed. 1080.

A federal court applies the statute of limitations of the state in which it sits, and adopts the same rules in regard to it as prevail in the state courts.—Bauserman v. Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316; Balkam v. Woodstock Iron Co., 154 U. S. 177, 14 S. Ct. 1010, 38 L. Ed. 953, affirming judgment 43 Fed. 648; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 16 S. Ct. 939, 41 L. Ed. 72.

The statutes of limitations of the several states apply to actions at law for the infringement of patents brought within their borders.—Campbell v. City of Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280.

The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the state in which the action is brought, as construed by the highest courts of the state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.—Great Western Tel. Co. v. Purdy, 16 S. Ct. 810, 162 U. S. 329, 40 L. Ed. 986, affirming judgment 50 N. W. 45, 83 Iowa, 430.

A federal court of equity will apply, in a suit to quiet title as against the purchaser of notes for the purchase price of which a vendor's lien has attached, the rule of local law that, when a debt is barred by the statute of limitations, an action to foreclose a lien or mortgage given as security for the debt is also barred. Decree (1907) Mansur v. Dupree, 150 F. 329, 80 C. C. A. 213, reversed.—Dupree v. Mansur, 29 S. Ct. 548, 214 U. S. 161, 53 L. Ed. 950.

The application of a state statute of limitation is not precluded because the action arises under the laws of the United States in the absence of any limitation prescribed by Congress.—O'Sullivan v. Felix, 34 S. Ct. 596, 233 U. S. 318, 58 L. Ed. 980, affirming judgment 194 F. 88, 114 C. C. A. 166.

The one year's limitation prescribed by Civ. Code La. art. 3536, for actions for damages, and not the five year limitation under Rev. St. U. S. § 1047 (U. S. Comp. St. 1901, p. 727) against penalties and forfeitures, governs a civil action for assault with intent to prevent plaintiff from voting contrary to Rev. St. §§ 1977-1991 (U. S. Comp. St. 1901, pp. 1256-1267), securing equal rights to citizens in view of Rev. St. §§ 1979-1981, 5508, 5510 (U. S. Comp. St. 1901, pp. 1262, 1263, 3712, 3713), which provide criminal proceedings for public wrong and actions for redress of private injury without prescribing specific limitations.—Id.

376. Law of evidence.

See 13 Cent. Dig. Courts, § 884.

Rev. St. U. S. § 721, provides that "the laws of the several states, except where the constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." *Held*, that Code Civ. Proc. N. Y. § 834, providing that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States sitting within that state in trials at common law.—*Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 5 S. Ct. 119, 112 U. S. 250, 28 L. Ed. 708.

When the statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws or the practice of the state in which the court is held, if they are different.—*Whitford v. Clark Court*, 119 U. S. 522, 7 S. Ct. 306, 30 L. Ed. 500.

In a suit by a client against an attorney who has received money for his client under an award against the United States, the question whether the award and the receipt for the money paid under it are admissible in evidence depends either upon the local or general law of evidence, and presents no federal question.—*Sherman v. Grinnell*, 144 U. S. 198, 12 S. Ct. 574, 36 L. Ed. 403.

Whether the relation of physician and patient so existed as to exclude the former's testimony, under Code Civ. Proc. N. Y. §§ 834, 836, involves a question of the construction of a state statute on which the decisions of the highest state court will be accepted on a writ of error from the Supreme Court of the United States to that court. *Judgments, Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 178 N. Y. 63, 64 L. R. A. 840, and 81 N. Y. S. 813, 82 App. Div. 359, affirmed.—*Supreme Lodge K. P. v. Meyer*, 25 S. Ct. 754, 198 U. S. 508, 49 L. Ed. 1146.

(G) SUPREME COURT.

Appellate jurisdiction, see—

Appeal and Error, 379, 20.

Criminal Law, 376, 1018.

Authority to admit to bail, see Bail, 374.

Damages for appeals for delay, see Costs, 376, 260.

Judicial notice, see Evidence, 375, 10.

Jurisdiction acquired by appeal or other proceeding for review, see Appeal and Error, 375, 455.

Jurisdiction of mandamus proceedings, see Mandamus, 376, 141.

Omission in record, grounds for dismissal, see Appeal and Error, 375, 635.

Original jurisdiction as affected by interest of United States, see United States, 375, 127.

Proper mode of review, see Appeal and Error, 374, 5.

Review of decisions relating to removal of causes, see Removal of Causes, 375, 107.

379. Original jurisdiction and procedure in exercise thereof.

See 13 Cent. Dig. Courts, §§ 985-989, 991-995, 1353.

Under Rev. St. § 688, declaring that "the supreme court shall have power to issue writs of prohibition in the district courts when proceeding as courts of admiralty and maritime jurisdiction," that court has jurisdiction to proceed by prohibition against the United States district court for the district of Alaska

in respect to an admiralty cause.—*In re Cooper*, 138 U. S. 404, 11 S. Ct. 289, 34 L. Ed. 993.

The supreme court of the United States has no jurisdiction to issue a writ of mandamus to the circuit court of appeals, to compel it to receive and consider new proofs in an admiralty appeal, in a cause which is within the legitimate jurisdiction of that court.—*In re Hawkins*, 147 U. S. 486, 13 S. Ct. 512, 37 L. Ed. 251.

The supreme court of the United States has no jurisdiction to control, by mandamus, the discretion of the circuit court in granting or refusing a supersedeas, upon an appeal to the circuit court of appeals from an interlocutory order granting or continuing an injunction.—*In re Haberman Mfg. Co.*, 147 U. S. 525, 13 S. Ct. 527, 37 L. Ed. 266.

When an original cause is pending in the supreme court, to be disposed of there in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed to judgment in the absence of parties whose rights would be, in effect, determined thereby, even though they might not be technically bound in subsequent litigation in other tribunals. *Held*, therefore, that, where such absent parties could not be made parties to the suit without ousting the jurisdiction of the court, the case would be dismissed.—*State of California v. Southern Pac. Co.*, 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683.

The second clause of section 2, art. 3, of the constitution merely distributes the jurisdiction conferred upon the federal judiciary by the first clause, and does not itself confer any additional jurisdiction; and therefore, when it declares that the supreme court shall have original jurisdiction "in all cases * * * and those in which a state shall be a party," it means the cases previously enumerated in the first section, in which a state shall be a party.—*Id.*

In cases of original jurisdiction, the supreme court will frame its proceedings according to those which have been adopted in the English courts in similar cases, and the rules of court in chancery should govern in conducting the case to a final issue; but the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities, or defeat the purposes of justice.—*Id.*

The original jurisdiction of the supreme court is limited, and manifestly intended to be sparingly exercised, and should not be expanded by construction.—*Id.*

In an original suit in the supreme court to establish the boundary between Virginia and Tennessee, a decree was rendered declaring the boundary line established by compact in 1803 to be the true line; but leave was given to file an application during the term for an order for the identification and restoration of the markings of such line. Application being accordingly made by Virginia, the consideration thereof was postponed until the next term, at which term the motion was denied. *Held*, that the power of the court over the cause ceased with the expiration of the latter term, and it could not entertain another application at a subsequent term for a decree for the re-marking of the line; and that such an application should be denied, but without prejudice to the filing of a new bill or petition for the purpose stated.—*State of Virginia v. State of Tennessee*, 158 U. S. 267, 15 S. Ct. 818, 39 L. Ed. 976.

Leave to file an original bill in the supreme court of the United States is ordinarily a matter of course, and may be granted without intimating any opinion upon a question raised as to want of jurisdiction.—*State of*

Washington v. Northern Securities Co., 22 S. Ct. 623, 185 U. S. 254, 46 L. Ed. 897.

Neither the silence of counsel nor the express consent of the parties will justify the supreme court of the United States in ignoring the question whether it has original jurisdiction of a suit commenced therein.—*State of Minnesota v. Hitchcock*, 22 S. Ct. 650, 185 U. S. 373, 385, 46 L. Ed. 954.

The question of the liability of the state of West Virginia for its equitable proportion of the public debt of the commonwealth of Virginia was not so submitted to the West Virginia Legislature as to defeat the original jurisdiction of the United States of a suit between the states by the provision of Const. W. Va. art. 8, § 8 [Code 1906, p. lxxi], that an equitable proportion of such public debt shall be assumed by the state, and the Legislature "shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof," since such provision, when read in pari materia with the Virginia ordinance of August 20, 1861, that the new state shall take upon itself a just proportion of the public debt, to be ascertained as therein provided, must be regarded as meaning only that the Legislature should ascertain, as soon as practicable, the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained.—*Commonwealth of Virginia v. State of West Virginia*, 27 S. Ct. 782, 206 U. S. 290, 51 L. Ed. 1068.

A suit between the commonwealth of Virginia and the state of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, is to be considered by the federal Supreme Court in the untechnical spirit proper for dealing with a quasi international controversy.—*Commonwealth of Virginia v. State of West Virginia*, 31 S. Ct. 330, 220 U. S. 1, 55 L. Ed. 353.

Objections as to multifariousness, laches, and the like, except so far as they affect the merits, will not be considered by the federal Supreme Court in a suit by the commonwealth of Virginia against the state of West Virginia to determine the amount due to the former by the latter as the equitable proportion of the public debt of Virginia which was assumed by West Virginia at the time of its creation as a state.—*Id.*

The disposition of the authorities of the state of West Virginia to await the next regular session of the Legislature, convening more than one year hence, before considering the matters left open by the federal Supreme Court when determining the amount which such state should pay as its equitable share of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, does not furnish sufficient reason for granting a motion on behalf of the state of Virginia that the court proceed to settle and determine all the questions left open by its decision.—*Commonwealth of Virginia v. State of West Virginia*, 32 S. Ct. 4, 222 U. S. 17, 56 L. Ed. 71.

The assurance by the Attorney General of West Virginia on behalf of that state, that a commission appointed by the state Legislature is endeavoring to settle the controversy with the commonwealth of Virginia, and needs further time, requires the denial of a motion by such commonwealth to determine all questions left open when determining the amount West Virginia should pay as a share of Virginia's public debt.—*Commonwealth of Virginia v. State of West Virginia*, 34 S. Ct. 20, 231 U. S. 89, 58 L. Ed. 135.

The extraordinary nature of a suit between Virginia and West Virginia, to determine the amount due by the latter as its share of the public debt of the original state of Virginia, which was assumed by West Virginia, requires that West Virginia be permitted, after the federal Supreme Court has adjudged the amount due, to file a supplemental answer setting up credit which would materially reduce the sum so fixed, and alleging objections to the allowance of interest, though most of the items set up were contained in the master's report, and all were available then for every defense if their consideration had been pressed with the assertions of right now made.—*Commonwealth of Virginia v. State of West Virginia*, 34 S. Ct. 889, 234 U. S. 117, 58 L. Ed. 1243.

◀380. Appellate jurisdiction and procedure in general.

See 13 Cent. Dig. Courts, §§ 996-1018, 1026; 2 Cent. Dig. App. & E. §§ 177, 185.

Review of decision correct on merits, see Appeal and Error, ▶1028.

Sup. Ct. Rules 1, 10, are so amended that records on appeals and writs of error, exclusive of the original papers sent up therewith, may be taken from the files and sent to the printer, except in cases prohibited by the rules; that the clerk shall supervise the printing, and receive one-half the rates for making a manuscript copy; and that, when a manuscript copy is required, full fees shall be paid, but nothing in addition for the other services.—In re Amendments to Rules 1 and 10, 108 U. S. 1, 1 S. Ct. 125, 27 L. Ed. 629.

Though the supreme court of the United States has, under the constitution, no appellate jurisdiction in criminal cases, yet, upon the matter being properly presented, it will intervene in the interest of a prisoner under sentence of a court of the United States which was not competent to try him.—*The Ku-Klux Cases*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274.

The Supreme Court of the United States has no appellate jurisdiction over a naval court-martial, nor over the offenses which that court has power to try.—*Wales v. Whitney*, 5 S. Ct. 1050, 114 U. S. 564, 29 L. Ed. 277.

Where, in a suit brought in the circuit court, the bill shows that complainants are citizens of the state where the suit was brought, and contains no allegations as to defendants' citizenship, and that fact nowhere appears in the record, the supreme court on appeal will take notice of the absence of the averment of the necessary facts to give the court jurisdiction, and reverse the decree.—*Johnson v. Christian*, 125 U. S. 642, 8 S. Ct. 989, 31 L. Ed. 820.

Although the appellate powers of the supreme court are given by the constitution, they are limited and regulated by acts of congress.—*National Exch. Bank of Baltimore v. Peters*, 144 U. S. 570, 12 S. Ct. 767, 36 L. Ed. 545.

The United States supreme court has no general authority to review on error or appeal, any judgments in criminal cases, whether rendered in the circuit or district courts, or the supreme courts of the territories or the District of Columbia, and an intention to confer such jurisdiction should be expressed in explicit terms.—*Cross v. United States*, 145 U. S. 571, 12 S. Ct. 842, 36 L. Ed. 821.

After the United States supreme court determined (*Romney v. United States* [1889] 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481) that the forfeited property of the Mormon Church should be applied, under the doctrine of cy pres, either by congress or by the court, for the promotion of the general purposes of religion and charity, and, pending an appeal from a subsequent decree of the court below prescribing a mode of application, congress, by the

joint resolution of October 25, 1893, directed a different mode of application, *held*, that the said subsequent decree should be reversed, with directions for further proceedings in accordance with the joint resolution.—*United States v. Late Corporation of Church of Jesus Christ of Latter-Day Saints*, 150 U. S. 145, 14 S. Ct. 44, 37 L. Ed. 1033.

Even if the provisions of Act March 3, 1891 (26 Stat. 854, c. 539, § 9), that on appeal from the court of private land claims to the supreme court the latter may allow further proof and amendment of the record, are in whole or in part in excess of the legislative power of congress, the right of appeal is not thereby taken away; nor can the question of such invalidity arise on motion to dismiss appeal, but only when action under the provisions is asked.—*United States v. Coe*, 155 U. S. 76, 15 S. Ct. 16, 39 L. Ed. 76.

Under Act March 3, 1887, authorizing suits against the United States, and showing a purpose in its provisions, as to actions commenced in the district and circuit courts, to preserve the distinction between cases at law, in equity, and in admiralty, and authorizing appeal or writ of error, the case, if at law, will be reviewed by the supreme court on writ of error; if in equity or admiralty, on appeal.—*Chase v. United States*, 155 U. S. 489, 15 S. Ct. 174, 39 L. Ed. 284, affirming judgment (C. C.) 44 F. 732.

Sup. Ct. Rule 36, par. 1 (11 Sup. Ct. iv.), providing that an appeal or writ of error from a circuit or district court to the supreme court in the cases provided for by Act March 3, 1891, §§ 5, 6, may be allowed in term time or in vacation by any justice of the supreme court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal, recognizes the authority of any justice of the supreme court to order plaintiff in error to be admitted to bail, notwithstanding paragraph 2, providing that, where such writ of error is allowed in case of a conviction of an infamous crime, or in any other criminal case, under said sections, the circuit court or district court or any justice or judge thereof shall have power, after the citation is served, to admit the accused to bail.—*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450, 39 L. Ed. 424.

The supreme court, having acquired jurisdiction of a case on the ground that the constitutionality of a law of the United States is drawn in question, may dispose of all the questions in the case, whether of jurisdiction or of merits.—*Chappell v. United States*, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

The proceedings of military tribunals cannot be reviewed by the supreme court of the United States by certiorari, under Rev. St. § 716 [U. S. Comp. St. 1901, p. 580], giving that court power to issue all writs, not specifically provided for by the statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usage and principles of law; and the question of the issue of the writ in the exercise of inherent general power cannot arise in respect of such tribunals, since they are not courts with jurisdiction in law or equity, within the meaning of those terms as used in Const. U. S. art. 3.—*In re Vidal*, 21 S. Ct. 48, 179 U. S. 128, 45 L. Ed. 118.

A proceeding to obtain from the district court of the United States for the district of Alaska the license for ocean and coastwise vessels plying in Alaskan waters prescribed by Act Cong. March 3, 1899, § 460 (30 Stat. 1253, 1336, c. 429), is not an action or suit in which a final judgment can be rendered from which petitioners can appeal to the supreme court of the United States, although their petition is

coupled with a protest against being compelled to take out such a license. Order (D. C.) *Corbus v. Alaska Treadwell Gold Min. Co.*, 99 F. 334, affirmed.—*Pacific Steam Whaling Co. v. United States*, 23 S. Ct. 154, 187 U. S. 447, 47 L. Ed. 253; *Pacific Coast S. S. Co. v. Same*, 23 S. Ct. 157, 187 U. S. 454, 47 L. Ed. 256; *Corbus v. Alaska Treadwell Gold Mining Co.*, 23 S. Ct. 157, 187 U. S. 455, 47 L. Ed. 256; *Stewart v. Washington & Alaska S. S. Co.*, 23 S. Ct. 161, 187 U. S. 466, 47 L. Ed. 261.

381. Review of decisions of Circuit Courts of Appeals.

See 13 Cent. Dig. Courts, §§ 1019, 1020.

382. — Appeal and error.

See 13 Cent. Dig. Courts, §§ 1019, 1020.

Amount in controversy, see Appeal and Error, 383.
Review of decisions of intermediate court, see Appeal and Error, 382.

In determining whether federal jurisdiction depends entirely upon diverse citizenship, so as to make the case "final" in the circuit court of appeals, under Act March 3, 1891, § 6 (13 Sup. Ct. xv.), the inquiry is limited to the face of the record in the circuit court at the institution of the suit; and, if at that time jurisdiction was sustainable only on that ground, the fact that a federal question was subsequently raised by the defenses set up will not warrant an appeal from the circuit court of appeals to the supreme court.—*Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 14 S. Ct. 35, 37 L. Ed. 1030.

The supreme court has jurisdiction to review on writ of error a judgment of the circuit court of appeals refusing jurisdiction of an appeal from a territorial supreme court, on the ground that the case is not of the kind made "final" in the circuit court of appeals by Act March 3, 1891, § 6.—*Aztec Min. Co. v. Ripley*, 151 U. S. 79, 14 S. Ct. 236, 38 L. Ed. 80, affirming judgment 53 F. 7, 3 C. C. A. 383.

Where jurisdiction on foreclosure, in which receivers were appointed, depended on citizenship, jurisdiction of a petition of intervention, asking for damages by reason of the negligence of the defendants, is also dependent on citizenship; and therefore, under Act March 3, 1891, c. 6, appeal does not lie to the supreme court from the circuit court of appeals.—*Rouse v. Letcher*, 156 U. S. 47, 15 S. Ct. 266, 39 L. Ed. 341.

In an action by a citizen of one state against a federal corporation, alleged to be a citizen of another state, the judgment of the circuit court of appeals is not final, though jurisdiction is invoked on the sole ground of diverse citizenship, as the fact that defendant is a federal corporation would support jurisdiction; and by Act March 3, 1891, § 6, the judgment of the circuit court of appeals in this class of cases is final only where jurisdiction is dependent entirely on the opposite parties to the controversy being citizens of different states.—*Union Pac. Ry. Co. v. Harris*, 153 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003.

The applicability of Act March 3, 1891, § 6, making judgments or decrees of the circuit courts of appeals final when the jurisdiction is dependent upon the parties being citizens of different states, is to be determined by the showing made by the summons and statement of claim or declaration; and the fact that another ground for supporting the jurisdiction of the circuit court was developed in the course of subsequent proceedings is immaterial.—*Borgmeyer v. Idler*, 159 U. S. 408, 16 S. Ct. 34, 40 L. Ed. 199.

In a suit to recover a certain percentage of an award made to defendant under a treaty with a foreign state, based on an alleged con-

tract for the payment of such percentage for services as counsel in procuring the award, the introduction of the treaty and the award merely as part of the history of the case does not involve the validity of the treaty or its construction, so as to authorize a review by the supreme court.—*Id.*

Act March 3, 1891 (26 Stat. 828), § 6, making the decisions of the circuit courts of appeals final in all cases arising under the patent laws, refers only to suits for infringement and interference and to obtain patents. It does not apply to suits brought by the United States to cancel patents, for in such suits the circuit courts of appeals have jurisdiction on the additional ground that the United States is a party, and in suits coming within their jurisdiction on that ground their decisions are not made final. Therefore an appeal will lie in such cases from the circuit courts of appeals to the supreme court under the provision allowing appeals "in all cases not hereinbefore, in this section, made final."—*United States v. American Bell Tel. Co.*, 159 U. S. 548, 16 S. Ct. 69, 40 L. Ed. 255.

Act March 3, 1891 (26 Stat. 827, c. 517), authorizes appeals or writs of error from the district or circuit courts directly to the supreme court in cases of conviction of an infamous crime, and section 6 gives the circuit court of appeals power to review decisions in the circuit or district courts in cases not provided for by the preceding section, and in terms makes its judgments final in criminal cases. *Held*, that the decisions of the circuit courts of appeals are not final in cases of infamous crimes.—*Folsom v. United States*, 160 U. S. 121, 16 S. Ct. 222, 40 L. Ed. 363.

Act March 3, 1891, making the judgments of the circuit court of appeals final when the jurisdiction is dependent upon adverse citizenship of the parties, renders the decree of such court final when rendered on appeal in a suit of which the circuit court had jurisdiction only because it was ancillary or supplemental to a previous suit, jurisdiction of which was based entirely on the diverse citizenship of the parties.—*Carey v. Houston & T. C. Ry. Co.*, 161 U. S. 115, 16 S. Ct. 537, 40 L. Ed. 638.

When, in a suit in a circuit court, based on adverse citizenship, a receiver is appointed, who takes possession of the property, the court's jurisdiction to pass upon conflicting claims to its possession and control is also to be regarded as based on adverse citizenship, so as to render the decree of the circuit court of appeals final under Act March 3, 1891, § 6.—*Id.*

In the case of an intervening petition to recover damages against railroad receivers for personal injuries, the jurisdiction of the court is referable to its jurisdiction in the original suit, and, where that depends on diverse citizenship alone, a judgment by the circuit court of appeals disposing of the intervening petition is "final," within the meaning of the act of March 3, 1891, and not reviewable by the supreme court.—*Rouse v. Hornsby*, 161 U. S. 588, 16 S. Ct. 610, 40 L. Ed. 817.

The supreme court has no jurisdiction to review, upon writ of error, the action of a circuit court of appeals in affirming the judgment of a circuit court rendered in a suit to recover damages for infringement of a copyright, where the plaintiff had claimed no right under the copyright laws of the United States, but had maintained the action wholly upon the right given by the common law.—*Press Pub. Co. v. Monroe*, 17 S. Ct. 40, 164 U. S. 105, 41 L. Ed. 367, dismissing writ of error 73 F. 196, 19 C. C. A. 429.

A suit on an assigned chose in action was dismissed by the circuit court because the only ground of jurisdiction was diverse citizenship,

and plaintiff had failed to show that his assignor could have maintained the suit. This decision was affirmed by the circuit court of appeals. *Held*, that the decree of affirmance was final, under section 6 of the act of March 3, 1891, because the case was one "dependent entirely upon the opposite parties to the suit or controversy" being citizens of different states, and, hence, that the supreme court had no jurisdiction of an appeal therefrom.—*Benjamin v. City of New Orleans*, 18 S. Ct. 298, 169 U. S. 161, 42 L. Ed. 700, dismissing appeal 74 F. 417, 20 C. C. A. 591.

No appeal lies to the supreme court from a decree of the circuit court of appeals affirming an interlocutory order of the circuit court granting a temporary injunction.—*Kirwan v. Murphy*, 18 S. Ct. 592, 170 U. S. 205, 42 L. Ed. 1009, dismissing appeal 83 F. 275, 28 C. C. A. 348.

Where a United States marshal was joined as defendant in an action in the circuit court against an attaching creditor of an insolvent residing in another state, for the wrongful seizure of the insolvent's assets, jurisdiction is not dependent on diversity of citizenship alone; and hence Act Cong. 1891, § 6, making a judgment of the court of appeals affirming a judgment of the circuit court in such cases final, does not apply, and an appeal may be taken to the supreme court. Judgment 75 F. 350, 21 C. C. A. 390, affirmed.—*Sonnentheil v. Christian Moerlein Brewing Co.*, 19 S. Ct. 233, 172 U. S. 401, 43 L. Ed. 492.

Where jurisdiction of the circuit court originally depended on diversity of citizenship, the decree of the Circuit Court of Appeals is final, and prevents an appeal to the supreme court, though another ground of jurisdiction, under which such appeal might be taken, is developed in the course of the proceedings.—*Third Street & Suburban Ry. Co. v. Lewis*, 19 S. Ct. 451, 173 U. S. 457, 43 L. Ed. 763, dismissing appeal 79 F. 196, 24 C. C. A. 482.

Where a receiver appointed by a circuit court in a creditors' suit files a bill to collect assets, jurisdiction thereof is referable to the suit in which he was appointed; and, if that depends on diverse citizenship alone, a judgment of the circuit court of appeals in the receiver's suit is not reviewable. Act March 3, 1891, § 6 (26 Stat. 828).—*Pope v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 500, 173 U. S. 573, 43 L. Ed. 814, dismissing appeal Louisville, N. A. & C. Ry. Co. v. Pope, 80 F. 745, 26 C. C. A. 131.

Act March 3, 1891, making the judgment of the circuit court of appeals final where its jurisdiction is based on the diverse citizenship of the parties, applies where the jurisdiction is originally invoked on that ground, though another ground is developed in course of the proceedings.—*Pope v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 500, 173 U. S. 573, 43 L. Ed. 814, dismissing appeal Louisville, N. A. & C. Ry. Co. v. Pope, 80 F. 745, 26 C. C. A. 131; *Ex parte Jones*, 17 S. Ct. 222, 164 U. S. 691, 41 L. Ed. 601.

A receiver of a national bank is an officer of the government, and an action against him in his representative capacity is one arising under the laws of the United States, and jurisdiction of a circuit court therein is not dependent on diversity of citizenship of the parties; hence a judgment of affirmance of a circuit court of appeals in such an action is not final, but an appeal or writ of error lies therefrom to the supreme court.—*Auten v. United States Nat. Bank*, 19 S. Ct. 628, 174 U. S. 125, 43 L. Ed. 920.

A suit to review a decision of the board of general appraisers in the matter of the classification of imported articles is one "arising un-

der the revenue laws," in which, by the judiciary act of March 3, 1891, the decision of the circuit court of appeals is final, so that no appeal can be taken to the supreme court.—*Anglo-Californian Bank v. United States*, 20 S. Ct. 19, 175 U. S. 37, 44 L. Ed. 64.

Judgment of the circuit court of appeals cannot be held final, on the ground that the jurisdiction of the circuit court was dependent entirely upon diverse citizenship, where the plaintiff's declaration claimed that the controversy turned on a construction of the laws of the United States, and both courts below dealt with the case on that assumption. Judgment 87 F. 369, 31 C. C. A. 9, reversed.—*Florida Cent. & P. R. Co. v. Bell*, 20 S. Ct. 399, 176 U. S. 321, 44 L. Ed. 486.

Proceedings under the act of congress to limit the liability of shipowners, and the rules of the supreme court in that regard, are admiralty cases within the meaning of Judiciary Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], making the judgments or decrees of the circuit court of appeals from admiralty cases final, from which no appeal can be taken to the supreme court.—*Oregon Ry. & Nav. Co. v. Balfour*, 21 S. Ct. 28, 179 U. S. 55, 45 L. Ed. 82, dismissing appeal 90 F. 295, 33 C. C. A. 57.

A writ of error cannot be sustained when it is taken without waiting for any further proceedings after the appointment of commissioners in condemnation proceedings, and the sustaining of a demurrer to an answer which is filed, and a refusal to permit testimony in support of the answer, since there is no final decision in the case. Judgment 93 F. 393, 35 C. C. A. 366, affirmed.—*Southern Ry. Co. v. Postal Tel. Cable Co.*, 21 S. Ct. 249, 179 U. S. 641, 45 L. Ed. 355.

A decision of the circuit court of appeals, reversing a decree of the circuit court which denied a motion to remand a case to the state court, and ordering the circuit court to remand the case, is not appealable to the supreme court of the United States under Act Cong. March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], as such a decision is not a final judgment. Appeal, *Speckert v. German Nat. Bank*, 98 F. 151, 38 C. C. A. 682, dismissed.—*German Nat. Bank v. Speckert*, 21 S. Ct. 688, 181 U. S. 405, 45 L. Ed. 926.

No right of appeal from a decree of the circuit court of appeals, which is made final by Act Cong. March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], is given by the provision of that section that such case may be brought to the United States supreme court "by certiorari or otherwise," as, if some other order or writ may be resorted to, it must be *ejusdem generis* with certiorari. Appeal 36 C. C. A. 236, 94 F. 269, dismissed.—*Huguley Mfg. Co. v. Galetton Cotton Mills*, 22 S. Ct. 452, 184 U. S. 290, 46 L. Ed. 546.

Error lies to the circuit court of appeals to review a judgment of that court in a case in which the jurisdiction of the circuit court was not dependent entirely upon the diversity of citizenship shown by the petition, but was also rightfully invoked on federal grounds, but which could not have been brought to the supreme court of the United States directly from the circuit court. Judgment 102 F. 77, 42 C. C. A. 169, affirmed.—*Howard v. United States*, 22 S. Ct. 543, 184 U. S. 676, 46 L. Ed. 754.

A judgment of the circuit court of appeals, in a case in which the jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship, cannot be reviewed in the supreme court of the United States on writ of error because a federal question arose in the course of the proceedings in the circuit court, even though such question may not be of such

a character as would permit the case, under section 5 of the judiciary act of 1891 (26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 549]), to be brought directly from the circuit court to the supreme court. Writ of error 105 F. 737, 45 C. C. A. 24, dismissed.—*Ayres v. Poldorfer*, 23 S. Ct. 196, 187 U. S. 585, 47 L. Ed. 314.

A judgment of the circuit court of appeals which is made final by the judiciary act of March 3, 1891, § 6 (26 Stat. 828, c. 517 [U. S. Comp. St. 1901, pp. 549, 550]), is not reviewable by the supreme court of the United States on writ of error, although the suit involves constitutional rights, and therefore might have been brought directly from the circuit court to the supreme court. Writ of error 108 F. 873, 48 C. C. A. 118, dismissed.—*Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 23 S. Ct. 211, 187 U. S. 427, 47 L. Ed. 244.

The judgment of the Circuit Court of Appeals is not final, under Circuit Court of Appeals Act March 3, 1891, § 6, 26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549], unless the original jurisdiction of the Circuit Court was dependent "entirely" upon diverse citizenship. Decree 104 F. 425, 43 C. C. A. 620, affirmed.—*Northern Pac. Ry. Co. v. Soderberg*, 23 S. Ct. 365, 188 U. S. 526, 47 L. Ed. 575.

A decree of the Circuit Court of Appeals affirming a judgment of a Circuit Court in a cause in which the latter's jurisdiction depended on the sole ground that the cause of action arose under the federal Constitution will, on appeal to the Supreme Court of the United States, be reversed for the lack of jurisdiction in the Circuit Court of Appeals to review the Circuit Court judgment. Decree 111 F. 561, 49 C. C. A. 455, reversed.—*Union & Planters' Bank of Memphis v. City of Memphis*, 23 S. Ct. 604, 189 U. S. 71, 47 L. Ed. 712.

An appeal lies to the Supreme Court of the United States from a decree of a Circuit Court of Appeals in a controversy between a foreign state and citizens of one of the United States, since such decree is not made final by the provision of Act March 3, 1891, c. 517, § 6, 26 Stat. 826, 828 [U. S. Comp. St. 1901, p. 550], declaring decrees of such court to be final "in all cases where the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states." Decree 113 F. 1020, 51 C. C. A. 604, reversed.—*Republic of Colombia v. Cauca Co.*, 23 S. Ct. 704, 190 U. S. 524, 47 L. Ed. 1159.

The jurisdiction of the United States Supreme Court to review a judgment of the Circuit Court of Appeals must be first considered, where the question in regard thereto arises on the face of the record. Writ of error 114 F. 290, 53 C. C. A. 14, dismissed.—*Continental Nat. Bank of Memphis, Tenn., v. Buford*, 24 S. Ct. 54, 191 U. S. 119, 48 L. Ed. 119.

The judgment of the Circuit Court of Appeals is final, and not subject to review by the United States Supreme Court, in an action by a national bank against a corporation of another state, where no federal questions are presented upon which the suit depends, under Judiciary Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, pp. 488, 547], making the judgment of the Circuit Court of Appeals final where the jurisdiction of the court below depended entirely on the diverse citizenship of the parties, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 514], providing that in an action against national banking associations the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.—*Id.*

Averments in a bill which charge the infringement of a trade-mark registered under

Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401], sufficiently invoked the jurisdiction of a federal Circuit Court on the ground that the case arose under a law of the United States to deprive the judgment of the Circuit Court of Appeals in the suit of that finality which would exist had jurisdiction depended entirely on diverse citizenship. *Decree, Searle & Hereth Co. v. Warner*, 112 F. 674, 50 C. C. A. 321, affirmed.—*Warner v. Searle & Hereth Co.*, 24 S. Ct. 79, 191 U. S. 195, 48 L. Ed. 145.

A bill to enjoin a state official from charging that coffee coated with a glaze of sugar and eggs comes within the prohibition of the Ohio pure food law (2 Bates' Ann. St. 1897, p. 2229, tit. 5, c. "a"), against coating an article to conceal damage or inferiority, or to make it appear better or of greater value than it really is, and to restrain him from instituting proceedings to prevent its sale, does not present a case arising under the federal Constitution so as to deprive the decree of the Circuit Court of Appeals therein of that finality which exists, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], when the case is one in which the jurisdiction of the lower court depends entirely upon diverse citizenship, although it contains averments that the construction which such official places upon the statute will render it repugnant to the federal Constitution. Appeal 113 F. 616, 51 C. C. A. 122, 65 L. R. A. 864, dismissed.—*Arbuckle v. Blackburn*, 24 S. Ct. 148, 191 U. S. 405, 48 L. Ed. 239.

The removal from a state court to a federal Circuit Court for diverse citizenship, of a suit by a trustee in bankruptcy for the conversion of property, the title to which vested in him by the adjudication in bankruptcy, places such suit in the federal court as if it had been commenced there on that ground of jurisdiction, within the rule making the judgment of the Circuit Court of Appeals final when the jurisdiction of the Circuit Court depends entirely on diverse citizenship, and not as if it had been commenced there by consent of defendant, under section 23, Bankr. Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. Writ of error, *Duplan Silk Co. v. Spencer*, 115 F. 689, 53 C. C. A. 321, dismissed.—*Spencer v. Duplan Silk Co.*, 24 S. Ct. 174, 191 U. S. 526, 48 L. Ed. 287.

A case does not arise under the laws of the United States so as to deprive the judgment of the Circuit Court of Appeals therein of that finality which exists when the jurisdiction of the Circuit Court depends entirely on diverse citizenship, unless it appears by plaintiff's pleading that the suit really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends.—*Id.*

A suit against a railway company engaged in carrying the United States mails under the federal laws and postal regulations, to recover the value of a registered package alleged to have been lost through its negligence, does not arise under the federal Constitution and laws so as to deprive the judgment of the Circuit Court of Appeals therein of the finality which exists when the jurisdiction of the Circuit Court depends entirely on diverse citizenship, where plaintiff relied on principles of general law, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States. Writ of error, 117 F. 434, 54 C. C. A. 608, 65 L. R. A. 397, dismissed.—*Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. M. Ry. Co.*, 24 S. Ct. 325, 192 U. S. 371, 48 L. Ed. 484.

A suit to recover the amount of a tax exacted under War Revenue Act June 13, 1898, c. 448, § 27, 30 Stat. 448, 464 [U. S. Comp. St. 1901, p. 2306], and paid under protest, in which not only is the construction of that statute involved, but the rights of the parties depend, on the plaintiff's own showing, upon the constitutionality of such statute and the construction or application of the federal Constitution, is not one arising under the revenue laws, within the meaning of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, pp. 549, 550], which makes the judgment of the Circuit Court of Appeals in such cases final; and such judgment may therefore be brought to the federal Supreme Court for review as of right. Judgment 113 F. 244, 51 C. C. A. 201, reversed.—*Spreckels Sugar Refining Co. v. McClain*, 24 S. Ct. 376, 192 U. S. 397, 48 L. Ed. 496.

The jurisdiction of a federal Circuit Court over a controversy between citizens of different states, claiming under grants from different states, depends entirely upon the diversity of citizenship, within the meaning of the rule that makes the decrees of a Circuit Court of Appeals final in cases in which diversity of citizenship is the sole ground of original jurisdiction, since Congress, in the various judiciary acts, has only conferred original jurisdiction on the Circuit Courts over controversies of this character when the parties are citizens of the same state. Appeal 116 F. 147, 53 C. C. A. 467, dismissed.—*Stevenson v. Fain*, 25 S. Ct. 6, 195 U. S. 165, 49 L. Ed. 142.

The mere assertion of title under a patent from the United States presents no question which, of itself, deprives the judgment of the Circuit Court of Appeals, in a petitory action for real property, of that finality which exists if the jurisdiction of the Circuit Court depends solely upon diversity of citizenship. Writ of error, *Gonsoulin's Heirs v. Gulf Co.*, 116 F. 251, 53 C. C. A. 31, dismissed.—*Bonin v. Gulf Co.*, 25 S. Ct. 608, 198 U. S. 115, 49 L. Ed. 970.

Appellants cannot invoke the supposed presence of a constitutional question in a cause as the ground for sustaining an appeal from the United States Circuit Court of Appeals, where, if any such question was disposed of by the decree, it was decided in their favor.—*Empire State-Idaho Mining & Developing Co. v. Hanley*, 25 S. Ct. 691, 198 U. S. 292, 49 L. Ed. 1056.

An allegation by a party claiming an interest in a mining claim by virtue of a purchase from an administrator under a decree of the probate court, that a subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence, does not amount to an assertion that he was deprived of his interest by the court without due process of law, which would support the jurisdiction of a federal Circuit Court irrespective of diversity of citizenship, and therefore permit an appeal to the Supreme Court from a decree of the Circuit Court of Appeals in the cause.—*Id.*

Rights asserted under the Constitution of the United States may be so wholly wanting in merit as not to afford a basis for an appeal to the Supreme Court from a decree of a Circuit Court of Appeals.—*O'Callaghan v. O'Brien*, 25 S. Ct. 727, 199 U. S. 89, 50 L. Ed. 101, affirming judgment *Carrau v. O'Callaghan*, 125 F. 657, 60 C. C. A. 347, which reversed judgment (C. C.) *O'Callaghan v. O'Brien*, 116 F. 934.

The jurisdiction of the federal Circuit Court depended entirely upon diversity of citizenship within the meaning of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], making the Circuit Court of Ap-

peals the court of last resort in such cases, where the cause was removed for prejudice or local influence from a state court, under the provision of Act March 3, 1887, c. 373, 24 Stat. 553, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 U. S. Comp. St. 1901, p. 508], for removals on those grounds of suits embracing a controversy between a citizen of the state in which the suit is brought and a citizen of another state, by "any defendant, being such citizen of another state." Judgment 128 F. 1019, 62 C. C. A. 680, reversed.—*Cochran v. Montgomery County*, 26 S. Ct. 58, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451.

The want of any money value in controversy precludes an appeal to the Supreme Court of the United States from an order of a Circuit Court of Appeals, discharging, on a writ of certiorari issued on a petition for habeas corpus and certiorari, a person convicted of introducing liquors into an Indian reservation, and sentenced to fine and imprisonment. Order, *Ex parte Dick*, 141 F. 5, 72 C. C. A. 667, reversed.—*Whitney v. Dick*, 26 S. Ct. 584, 202 U. S. 132, 50 L. Ed. 963.

An appeal from a Circuit Court of Appeals to the federal Supreme Court will not be dismissed on the ground that the jurisdiction of the Circuit Court was invoked solely on the grounds of diverse citizenship, where grounds of suit and relief were also based upon federal statutes which were necessary elements of the decision of the Circuit Court of Appeals. Decree (1906) 143 F. 810, 74 C. C. A. 484, affirmed.—*Henningsen v. United States Fidelity & Guaranty Co.*, 28 S. Ct. 389, 208 U. S. 404, 52 L. Ed. 547.

A judgment of a Federal circuit court in favor of plaintiff in an action to recover damages for the infringement of a copyrighted map, in which a prior judgment sustaining a demurrer to and dismissing the declaration on the ground that the copyright law gave no such action was reversed by the circuit court of appeals, to which the case was carried by the plaintiff, may be reviewed by the Federal Supreme Court on a direct writ of error sued out by the defendant below under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), as presenting the question of the jurisdiction of the circuit court. Judgment, *Walker v. Globe Newspaper Co.* (1905) 140 F. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274, reversed.—*Globe Newspaper Co. v. Walker*, 28 S. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096.

Jurisdiction below depends entirely upon diverse citizenship within the meaning of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), making judgments of the Circuit Courts of Appeals final in such cases, where that is the only ground of jurisdiction disclosed by the complaint, although a federal question may have been raised at the trial.—*Bagley v. General Fire Extinguisher Co.*, 29 S. Ct. 341, 212 U. S. 477, 53 L. Ed. 605.

A question as to the full faith and credit to be given judgments of another state is not disclosed so as to permit a review in the federal Supreme Court, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), of a judgment of the Circuit Court of Appeals, by a complaint in which such judgments seem to be referred to primarily, if not solely, as fixing the amount of the plaintiff's claim.—*Id.*

A complaint invoking full faith and credit for judgments of another state does not present a case arising under the federal Constitution so as to permit a review in the federal Supreme Court under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), of the judgment of a Circuit Court of Appeals, where the defendant was not a party to the judgments, and, if bound by them, is so bound not by their own operation, but by an estoppel

arising out of the contract relations between the parties and notice to defend the suits in which the judgments were rendered, the ground of the decision of the courts below being that there was no such estoppel, the decision turning wholly on construction of the contract as excluding liability over in the event that happened.—*Id.*

The absence of any specific reference to the federal Supreme Court in the provisions of Act March 1, 1895, c. 145, § 11, 28 Stat. 698, and Act March 3, 1905, c. 1479, § 12, 33 Stat. 1081 (U. S. Comp. St. Supp. 1907, p. 208), for an appellate review in the Circuit Court of Appeals for the Eighth Circuit of the final decisions of the Court of Appeals in the Indian Territory in the same manner as decisions of the Circuit Courts, precludes any further review in the Supreme Court by appeal from or writ of error to the Circuit Court of Appeals.—*Laurel Oil & Gas Co. v. Morrison*, 29 S. Ct. 394, 212 U. S. 291, 53 L. Ed. 517.

A judgment of a Circuit Court of Appeals in a case of which the District Court had jurisdiction solely because arising under the criminal laws is by the very terms of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), "final," and is not reviewable in the federal Supreme Court, although constitutional rights were invoked by the accused, and the case might therefore, under section 5 of that act, have been brought directly from the District Court to the Supreme Court.—*MacFadden v. United States*, 29 S. Ct. 490, 213 U. S. 288, 53 L. Ed. 801.

A decision of a Circuit Court of Appeals that certain creditors from whom a bankrupt obtained goods by fraud were entitled to preferential payment of their claim, presented by an intervening petition after their further prosecution of an action of replevin against a receiver appointed by a state court had been enjoined by the bankruptcy court, is not reviewable in the federal Supreme Court, as involving a question which would sustain a writ of error to a state court, because the replevin suit in the state court was considered by the Circuit Court of Appeals as showing the purpose of the creditors to rescind the sale of the goods replevied, and as a means of identifying what part of the goods used for was in the possession of the state court, and, afterwards, what proceeds of sales went into the possession of the bankruptcy court under an order of the state court for the delivery of the property to the receiver in bankruptcy, upon the condition that the latter should assume and pay the liabilities incurred in the state court.—*Blake v. William Openhym & Sons*, 30 S. Ct. 309, 216 U. S. 322, 54 L. Ed. 498.

A decree of a Circuit Court of Appeals affirming a decree of dismissal rendered by a federal Circuit Court is not reviewable in the federal Supreme Court where, if the allegations which set up diversity of citizenship were stricken from the bill, the Circuit Court would have had no jurisdiction of the suit.—*Weir v. Rountree*, 30 S. Ct. 418, 216 U. S. 607, 54 L. Ed. 635.

A final decree of a Circuit Court of Appeals in a suit to enjoin the infringement of a trade-mark registered under Act Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1906, p. 1275), cannot be reviewed by the federal Supreme Court by appeal, in view of section 18 of that act, placing suits brought under its provisions within the scope of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), which makes decisions of the Circuit Courts of Appeals final "in all cases under the patent laws, under the revenue laws, under the criminal laws, and in admiralty cases," with power in the Supreme Court to require any such case to be certified thereto for review and determination, with the same power and authority in the case as if it had been carried up by appeal or writ of error.—*Hutch-*

Inson, Pierce & Co. v. Loewy, 30 S. Ct. 613, 217 U. S. 457, 54 L. Ed. 838.

The issue of unfair competition must be regarded as open for consideration by the federal Supreme Court, on an appeal from the Circuit Court of Appeals, where there was both diversity of citizenship and the assertion of a valid trade-mark to give jurisdiction to the Circuit Court, in view of the statutory provision making the judgments of Circuit Courts of Appeals final only where the jurisdiction below depended entirely upon diversity of citizenship, or where the case arose under the patent, revenue, criminal, or admiralty laws.—(1911) *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 31 S. Ct. 456, 220 U. S. 446, 55 L. Ed. 536, affirming decree (1908) *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 F. 977, 90 C. C. A. 185.

A constitutional question first advanced on the trial of a cause cannot serve as the basis for a writ of error from the federal Supreme Court to a Circuit Court of Appeals.—(1911) *Chicago Junction Ry. Co. v. King*, 32 S. Ct. 79, 222 U. S. 222, 56 L. Ed. 173, affirming judgment (1909) 169 F. 372, 94 C. C. A. 652.

An action to recover damages for personal injuries, based upon the federal safety-appliance act, is one in which the judgment of a Circuit Court of Appeals may be reviewed in the federal Supreme Court.—Id.

The federal Supreme Court, when reviewing a judgment of a Circuit Court of Appeals, affirming a judgment of a Circuit Court in an action to recover damages for personal injuries, discharges its whole duty, with reference to the contention that the plaintiff was so clearly guilty of contributory negligence that it was the duty of the court to have directed a verdict for defendant, by giving to the record such examination and consideration as may be necessary in order to determine whether plain error was committed by the court below, and is not called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw inferences therefrom which may possibly conflict with the conclusions below as to the tendencies of the proof.—Id.

Jurisdiction of federal Circuit Court of a suit by an Indiana corporation to enjoin a common carrier incorporated in Kentucky from refusing to accept interstate shipments of intoxicating liquors held not dependent upon diverse citizenship alone so as to make the judgment of the Circuit Court of Appeals final.—(1912) *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 32 S. Ct. 189, 223 U. S. 70, 56 L. Ed. 355, affirming judgment (1909) 172 F. 117, 96 C. C. A. 322, 40 L. R. A. (N. S.) 798.

Plain error alone will justify reversing a judgment of a Circuit Court of Appeals in a personal injury case brought to the Supreme Court on the ground that defendant corporation has a charter from the United States.—(1912) *Texas & P. R. Co. v. Howell*, 32 S. Ct. 601, 224 U. S. 577, 56 L. Ed. 892, affirming judgment (1911) 191 F. 1006, 111 C. C. A. 674.

A decree of a federal Circuit Court of Appeals which, on appeal under Act March 3, 1891, § 7, as amended by Act April 14, 1906, to review interlocutory decree granting an injunction, reversed such decree and directed that bill be dismissed, is a final decree and appealable to the Supreme Court under section 6 of the former act, where jurisdiction was invoked for diverse citizenship and on the ground that the suit arose under act of Congress.—(1912) *United States Fidelity & Guaranty Co. v. Bray*, 32 S. Ct. 620, 225 U. S. 205, 56 L. Ed. 1055, affirming decree (1909) *Bray*

v. United States Fidelity & Guaranty Co., 170 F. 689, 96 C. C. A. 9.

Thirty-day limitation prescribed by Act March 3, 1891, § 7, as amended by Act April 14, 1906, for appeal in injunction cases, applies only to appeals to the Circuit Court of Appeals.—Id.

Jurisdiction of a federal Circuit Court of a suit by a receiver of a railroad, appointed in another suit in that court, to enjoin the enforcement of an order of a state railroad commission interfering with interstate commerce and depriving owners of their property without due process of law, and denying the equal protection of the laws, was not dependent entirely on diverse citizenship within Act March 3, 1891, § 6, making decrees of Circuit Courts of Appeals final in such cases.—(1912) *Railroad Commission of Ohio v. Worthington*, 32 S. Ct. 653, 225 U. S. 101, 56 L. Ed. 1004, affirming decree (1911) 187 F. 965, 110 C. C. A. 85.

The finality of a decision of a Circuit Court of Appeals under Act March 3, 1891, § 6, on the theory that diverse citizenship was the sole ground of jurisdiction, is not affected by a petition in intervention.—*Shulthis v. McDougal*, 32 S. Ct. 704, 225 U. S. 561, 56 L. Ed. 1205.

Whether the jurisdiction of the federal Circuit Court depended on diverse citizenship alone, within Act March 3, 1891, § 6, or was rested on other grounds as well, must be determined from complainant's statement.—Id.

A decree of a Circuit Court of Appeals is none the less final under Act March 3, 1891, § 6, on the theory that jurisdiction depended on diverse citizenship alone, because other grounds of jurisdiction may be argumentatively inferred.—Id.

A suit to determine conflicting claims to land allotted to Creek Indians does not arise under federal statutes, so as to permit appeal to the federal Supreme Court under Act March 3, 1891, § 6, from the decree of the Circuit Court of Appeals, where the bill makes no mention of the statutes constituting source of complainant's title or of any controversy respecting their validity or effect.—Id.

A prior decision of a Circuit Court of Appeals is not the law of the case for the Supreme Court, reviewing a later decision of the former court in the same case.—(1912) *Messenger v. Anderson*, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152, reversing judgment (1909) 171 F. 785, 96 C. C. A. 445.

The federal Supreme Court, having acquired jurisdiction of a decree of the Circuit Court of Appeals which revised on appeal a decree reviewable only by writ of error, will reverse the judgment and remand with instructions to dismiss the appeal.—*Four Hundred and Forty-Three Cans of Frozen Egg Product v. United States*, 33 S. Ct. 50, 226 U. S. 172, 57 L. Ed. 174, reversing judgment *United States v. Four Hundred and Forty-Three Cans of Frozen Egg Product*, 193 F. 589, 113 C. C. A. 457.

Writ of error lies from the Supreme Court to review judgment of the Circuit Court of Appeals affirming judgment founded on Employer's Liability Act April 22, 1908, where matter in controversy exceeds \$1,000.—*Missouri, K. & T. Ry. Co. v. Wulf*, 33 S. Ct. 135, 226 U. S. 570, 57 L. Ed. 355, Ann. Cas. 1914B, 134, affirming judgment 192 F. 919, 113 C. C. A. 665.

A petition, in an action by trustee in bankruptcy on a bond given to retain property within the jurisdiction, does not disclose as a ground of federal jurisdiction that the case arose under the laws of the United States so as to permit a writ of error to review the judgment of

the Circuit Court of Appeals where the trustee relies solely on the ownership of the property by the bankrupts.—*Lovell v. Isidore Newman & Son*, 33 S. Ct. 375, 227 U. S. 412, 57 L. Ed. 577.

The constitutional question imported into the case by an amendment to the petition allowed by a federal Circuit Court after the cause had been taken to the Circuit Court of Appeals, where the judgment of the trial court sustaining a demurrer to the answer had been reversed and the case remanded with directions for further proceedings in accordance with the opinion, will not sustain a direct writ of error from the federal Supreme Court to review the final judgment.—*Union Trust Co. of St. Louis v. Westhus*, 33 S. Ct. 593, 228 U. S. 519, 57 L. Ed. 947.

Where the jurisdiction of the court depended entirely upon diverse citizenship, it precluded any appeal from the decree of the Circuit Court of Appeals, though the bill contains a general allegation that the suit arises under the federal Constitution and refers to conjectured violation of contract and due process of law clauses of that instrument which are without merit.—*City and County of Denver v. New York Trust Co.*, 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

The Circuit Court's jurisdiction is none the less dependent on diverse citizenship, so as to preclude an appeal to the Supreme Court from the Circuit Court of Appeals, because the cross-bill may be broader than the original bill, and may seek relief on a federal ground, while the original bill discloses diverse citizenship as the sole ground for jurisdiction.—*Id.*

Dismissal of a suit by a shipper against a carrier for violation of Act Feb. 4, 1887, will not be stayed by the Supreme Court, where it concurs in the view of the two courts below that the Circuit Court had no jurisdiction because of no action by the Interstate Commerce Commission, until plaintiff can apply to the Commission and obtain a ruling, if a right to apply was barred by Act June 29, 1906, when the action was begun in the court below.—*Morrisdale Coal Co. v. Pennsylvania R. Co.*, 33 S. Ct. 938, 230 U. S. 304, 57 L. Ed. 1494, affirming judgment 183 F. 929, 106 C. C. A. 269.

Jurisdiction of the federal Circuit Court of a suit by an electric light company to enjoin the threatened disconnection of its wires under a resolution of the city must be deemed to have been invoked on the ground of diverse citizenship, so as to make decision of the Circuit Court of Appeals final, where it did not appear that complainant was asserting a right or immunity under the federal Constitution, but was planting its right to relief on the doctrine of estoppel.—*Omaha Electric Light & Power Co. v. City of Omaha*, 33 S. Ct. 974, 230 U. S. 123, 57 L. Ed. 1419, dismissing appeal 179 F. 455, 102 C. C. A. 601.

A writ of error will not lie from the federal Supreme Court to review a judgment of a Circuit Court of Appeals in a suit in which the jurisdiction of the federal court was invoked on the ground of citizenship, though there arose a question as to the validity under the federal Constitution of an ordinance which was the foundation of the successful party's right, and the unsuccessful party could have brought the case directly to the federal Supreme Court from the District Court.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 33 S. Ct. 1003, 230 U. S. 98, 57 L. Ed. 1409, dismissing appeal *Boise City v. Boise Artesian Hot & Cold Water Co.*, 186 F. 705, 108 C. C. A. 523.

An appeal to the federal Supreme Court to review decision of Circuit Court of Appeals under Trade-Mark Act Feb. 20, 1905, cannot be

maintained under Judicial Code, § 241 (Act March 3, 1911, c. 231, 36 Stat. 1157 [U. S. Comp. St. Supp. 1911, p. 229]), as one not made final under that Code, though trade-mark cases are not included in section 128 of the decisions which shall be final except as reviewable under sections 239, 240, on certified questions or certiorari, since these sections, in view of sections 292, 294, and 297 of the Code, must be read in connection with section 18 of the Trade-Mark Act, relating to remedy by certiorari in trade-mark and patent cases.—*Street & Smith v. Atlas Mfg. Co.*, 34 S. Ct. 73, 231 U. S. 348, 58 L. Ed. 262, dismissing appeal *Atlas Mfg. Co. v. Street & Smith*, 204 F. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002.

Jurisdiction of Circuit Court of Appeals is not final because original jurisdiction of the District Court depended only on diverse citizenship, where by a supplemental bill there were added constitutional grounds which might have been in the original bill.—*City of Vicksburg v. Henson*, 34 S. Ct. 95, 231 U. S. 259, 58 L. Ed. 209, reversing judgment 203 F. 1023, 121 C. C. A. 664.

A judgment of a federal Circuit Court of Appeals in an action under Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, will be affirmed where all the questions presented are of general law, not involving the interpretation of a statute.—*Southern Ry. Co. v. Gadd*, 34 S. Ct. 696, 233 U. S. 572, 58 L. Ed. 1099, affirming judgment 207 F. 277, 125 C. C. A. 21.

A question of interpretation of Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, is not presented for review on writ of error to a Circuit Court of Appeals by refusal of request of defendant to take the case from the jury, where such request was absolutely without merit.—*Id.*

A suit arises under the laws of the United States within Judicial Code, § 24, so as to permit an appeal to the Supreme Court from the Circuit Court of Appeals when brought by persons not parties to a bankruptcy proceeding in opposition to the adjudication and appointment of trustees therein, and to have the trustees restrained from prosecuting an equity suit against them in a state court.—*Hull v. Burr*, 34 S. Ct. 892, 234 U. S. 712, 58 L. Ed. 1557, affirming decree 207 F. 543, 125 C. C. A. 221, which denies rehearing 206 F. 1, 124 C. C. A. 135.

The federal Supreme Court, reviewing judgment of a Circuit Court of Appeals on the ground that defendant corporation has a United States charter, will only inquire whether there was plain error.—*Texas & P. Ry. Co. v. Rosborough*, 35 S. Ct. 117, 235 U. S. 429, 59 L. Ed. 299, affirming judgment 209 F. 205, 126 C. C. A. 299.

The federal Supreme Court on writ of error to the Circuit Court of Appeals in an action under the Employers' Liability Act April 22, 1908, involving no contention as to its meaning, need not review alleged error in relation to principles of general law.—*Yazoo & M. V. R. Co. v. Wright*, 35 S. Ct. 130, 235 U. S. 376, 59 L. Ed. 277, affirming judgment 207 F. 281, 125 C. C. A. 25.

A bill to quiet title to land commencing in grant from Spain, depending on a treaty with Spain and laws of the United States, does not depend wholly on citizenship or alienage of the parties, so as to make decree of Circuit Court of Appeals final.—*Wilson Cypress Co. v. Pozo*, 35 S. Ct. 446, 236 U. S. 635, 59 L. Ed. 758, reversing decree 202 F. 742, 121 C. C. A. 578.

Jurisdiction of Circuit Court over suit by nonresident to compel municipality to perform paving contracts held dependent on diverse citizenship, so as to make decree of Circuit Court of Appeals final, though bill also asserted violation of vested rights under the federal Con-

stitution.—*McCormick v. Oklahoma City*, 35 S. Ct. 455, 236 U. S. 657, 59 L. Ed. 771, dismissing appeal 203 F. 921, 122 C. C. A. 215.

Judgment of federal Circuit Court of Appeals in action against federal corporation may be brought up for review in the federal Supreme Court.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918; *Same v. Marcus*, 35 S. Ct. 578, 237 U. S. 215, 59 L. Ed. 924.

Jurisdiction of federal court of a suit by New York telegraph company against Kentucky railway company to expropriate under a state statute a telegraph right of way over the right of way of a railroad is dependent on diverse citizenship, and pending judgment of court of appeals final, though there is an unexplained averment by a telegraph company that it had accepted provisions of Act July 24, 1866.—*Louisville & N. R. Co. v. Western Union Tel. Co.*, 35 S. Ct. 598, 237 U. S. 300, 59 L. Ed. 965, dismissing appeal 203 F. 1022, 121 C. C. A. 664.

Decree affirming dismissal in District Court of suit to restrain use of name "Webster" as applied to dictionaries, *held* not appealable to federal Supreme Court when suit was not based on diverse citizenship but on allegations of unfair competition, and containing no cause of action under federal Constitution or laws and on trade-marks having the word "Webster" registered under Act March 3, 1881, after expiration of copyright, and under Act Feb. 20, 1906, making jurisdiction of Circuit Courts of Appeal final.—*G. & C. Merriam Co. v. Syndicate Pub. Co.*, 35 S. Ct. 708, 237 U. S. 618, 59 L. Ed. 1148, dismissing appeal 207 F. 515, 125 C. C. A. 177.

Vague references to the federal Constitution in a bill seeking redress for injury from the operation of a railway on a highway *held* insufficient to show that the jurisdiction of the federal Circuit Court of Appeals was invoked on ground other than diversity of citizenship so as to permit an appeal to the federal Supreme Court.—*Roman Catholic Church of St. Anthony of Padua v. Pennsylvania R. Co.*, 35 S. Ct. 729, 237 U. S. 575, 59 L. Ed. 1119, dismissing appeal 207 F. 897, 125 C. C. A. 629.

Allegations in action of employé of a railway company to recover for injuries while mining coal, that the coal was intended for use by the railroad for interstate commerce, do not bring the case within the federal Employers' Liability Act April 22, 1908, so as to deprive the judgment of the Court of Appeals of finality when jurisdiction is based on diverse citizenship alone.—*Delaware, L. & W. R. Co. v. Yurkonis*, 35 S. Ct. 902, 238 U. S. 439, 59 L. Ed. 1397, dismissing appeal 220 F. 429, 137 C. C. A. 23.

Cases requiring determination of the validity of a state statute under the federal Constitution are within Act Jan. 28, 1915, § 4, making final all judgments of Circuit Courts of Appeals in cases under the bankruptcy act.—*Central Trust Co. of Illinois v. George Lueders & Co.*, 36 S. Ct. 1, 239 U. S. 11, 60 L. Ed. 119, dismissing appeal 221 F. 829, 137 C. C. A. 387.

Jurisdiction of federal District Court over suit by landowner on the Minnesota side of water in Lake Superior against owners of land on Wisconsin side to enforce riparian rights out to a navigable channel constructed by the United States *held* not to rest on any claim of federal right irrespective of citizenship so as to justify appeal to the federal Supreme Court.—*Norton v. Whiteside*, 36 S. Ct. 97, 239 U. S. 144, 60 L. Ed. 186, dismissing appeal *Whiteside v. Norton*, 205 F. 5, 123 C. C. A. 313, 45 L. R. A. (N. S.) 112.

Jurisdiction of federal Circuit Court of Appeals is not final, where the jurisdiction below did not rest solely on diverse citizenship, but

involved construction of an act of Congress prescribing authority of a territorial legislature.—*Christianson v. King County*, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

Writ of error to Circuit Court of Appeals in suit against federal corporation which had removed the case from the state court will not be dismissed where questions raised are not frivolous.—*Texas & P. Ry. Co. v. Bigger*, 36 S. Ct. 127, 239 U. S. 330, 60 L. Ed. 310, affirming judgment 218 F. 990, 133 C. C. A. 673.

Allegations in the bill and in a petition in intervention, asserting a lien under a judgment of a federal court and title under a decree of such court, raised federal questions, conferring jurisdiction on the federal Supreme Court on appeal from a decree of a Circuit Court of Appeals in the suit.—*Kansas City Southern R. Co. v. Guardian Trust Co.*, 36 S. Ct. 334, 240 U. S. 166, 60 L. Ed. 579, affirming decree *Central Imp. Co. v. Cambria Street Co.*, 201 F. 811, 120 C. C. A. 121, and 210 F. 696, 127 C. C. A. 184.

A decision of a Circuit Court of Appeals that a claim against a bankrupt for damages for an anticipatory breach of an executory contract should not be allowed beyond the period during which the contract was mutually obligatory is not reviewable in the federal Supreme Court under Bankr. Act, § 25b-1, as presenting a federal question which would sustain a writ of error to a state court.—*Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, 36 S. Ct. 412, 240 U. S. 581, 60 L. Ed. 811, affirming decree *In re Frank E. Scott Transfer Co.*, 216 F. 308, 132 C. C. A. 452.

—383. — Certiorari.

While, under the authority given to the federal courts to issue "all writs which may be agreeable to the usages and principles of law" (Rev. St. § 716), certiorari has ordinarily been used merely as an auxiliary process, yet, when the circumstances imperatively demand it, the writ may be allowed by the supreme court, as at common law, to correct excesses of jurisdiction, and in furtherance of justice.—*Ex parte Chetwood*, 17 S. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

Certiorari will not lie to review the action of the circuit court of appeals in dismissing, on motion, an appeal from the dismissal by the circuit court of a bill for injunction, in obedience to a decree of the circuit court of appeals, made on the merits in an appeal from the interlocutory decree of the circuit court granting the injunction.—*Smith v. Vulcan Iron Works*, 17 S. Ct. 407, 165 U. S. 518, 41 L. Ed. 810.

In a cause which is made "final" by section 6 of the judiciary act of March 3, 1891, the supreme court may issue certiorari to the circuit court of appeals to bring up a cause pending therein, before that court has acted upon it; and the writ will be issued in a case of great public concern, involving the interpretation of our neutrality laws, pending an insurrection against a foreign government.—*The Three Friends*, 17 S. Ct. 495, 166 U. S. 1, 41 L. Ed. 897, reversing decree 78 F. 175.

Certiorari may issue to a circuit court of appeals after final disposition of the case in that court, and it is immaterial that the mandate has already gone down.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D. C.) 49 F. 99.

It seems that an application for certiorari to review a decision of a circuit court of appeals may be made within one year, by analogy to the time allowed for taking an appeal or writ of error to review its decisions.—*Id.*

A decree was entered by a circuit court of appeals June 6th, immediately after the ad-

jourment of the supreme court, and an application to the supreme court for certiorari to review the same was made on April 16th following. *Held*, that as the application was made during the next term, and within one year from the date of the decree, it was not too late.—*Id.*

Where the circuit court of appeals has reversed a decree dismissing a libel, with directions to assess damages, and a second appeal is taken from the decree assessing damages, which is affirmed, the supreme court, on certiorari thereafter sued out, may review the whole case.—*Panama R. Co. v. Napier Shipping Co.*, 17 S. Ct. 572, 166 U. S. 280, 41 L. Ed. 1004, affirming decree *The Stroma*, 50 F. 557, 1 C. C. A. 576, and *Panama R. Co. v. Napier Shipping Co.*, 61 F. 408, 9 C. C. A. 553.

The power of the supreme court in certiorari extends to every case pending in the circuit courts of appeals, and may be exercised at any time during such pendency, if the case is one which would otherwise be finally determined in that court; and, while this power will be sparingly exercised, it is properly exercised where there is a conflict between a circuit court of appeals and the supreme court of the state as to whether a large body of land has been validly annexed to the territory of a city.—*Forsyth v. City of Hammond*, 17 S. Ct. 685, 166 U. S. 506, 41 L. Ed. 1095, reversing decree 71 F. 443, 18 C. C. A. 175.

A decision of a circuit court of appeals, dismissing for want of jurisdiction a case in which its judgment is final, is properly reviewable by the supreme court on certiorari.—*Kingman & Co. v. Western Mfg. Co.*, 18 S. Ct. 786, 170 U. S. 675, 42 L. Ed. 1192.

Under the provision of the judiciary act of March 3, 1891, making judgments or decrees of the circuit courts of appeals, which are thereby made final, reviewable by the supreme court on writ of certiorari, with the same power and authority as if the case had been carried to that court by appeal or writ of error, only the errors assigned by the petitioner at whose instance the writ of certiorari was issued can be considered, though the case was heard in the circuit court of appeals on appeals by both parties. Decree 22 C. C. A. 606, 76 F. 905, affirmed.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

Certiorari cannot properly be issued to require the circuit court of appeals to send up a cause over which it has no jurisdiction for determination on the merits, when it has not rendered any decision in the case, but has merely certified the question of its jurisdiction.—*Good Shot v. United States*, 21 S. Ct. 33, 179 U. S. 87, 45 L. Ed. 101.

On petition for certiorari or mandamus to a circuit court of appeals which has erroneously dismissed a writ of error for want of jurisdiction, where the record is before the supreme court on the return to a rule to show cause and full argument has been had, the writ of certiorari is issued, and the return to the rule is allowed to stand as a return to the writ, and judgment thereupon reversed, and the cause remanded, with a direction to take jurisdiction and dispose of the cause. Judgment, 104 F. 2, 43 C. C. A. 393, reversed.—*American Sugar-Refining Co. v. City of New Orleans*, 21 S. Ct. 646, 181 U. S. 277, 45 L. Ed. 859.

A writ of certiorari to perfect the record on an appeal from the circuit court of appeals by supplying alleged omissions does not operate to bring the case before the United States supreme court, nor in itself to add any support to the appeal, which must stand or fall according as Act Cong. March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], did or did not allow such appeal to be taken. Appeal 36 C. C. A. 236, 94 F. 269, dismissed.

—*Huguley Mfg. Co. v. Galetton Cotton Mills*, 22 S. Ct. 452, 184 U. S. 290, 46 L. Ed. 546.

Certiorari to the circuit court of appeals, sought because of the apprehension that a writ of error was improperly sued out, will not be granted where the judgment sought to be reviewed was rendered December 7, 1900, a rehearing denied February 23, 1901, the writ of error brought April 15, 1901, and the record filed and case docketed April 29, 1901, and the motion for such certiorari was not made until October 9, 1902. Writ of error 105 F. 737, 45 C. C. A. 24, dismissed.—*Ayres v. Polsdorfer*, 23 S. Ct. 196, 187 U. S. 585, 47 L. Ed. 314.

The Supreme Court of the United States will, by its direction to the Circuit Court, finally dispose of a cause brought before it on writ of certiorari to a Circuit Court of Appeals, where the record presented the whole case to that court so that it might properly have been finally disposed of by its decree, although it did nothing more than to reverse the decree of the Circuit Court granting a preliminary injunction.—*Harriman v. Northern Securities Co.*, 25 S. Ct. 493, 197 U. S. 244, 49 L. Ed. 739, affirming decree *Northern Securities Co. v. Harriman*, 134 F. 331, 67 C. C. A. 245, which reversed (C. C.) *Harriman v. Northern Securities Co.*, 132 F. 464.

The lack of finality in a decree reversing an order of a circuit court granting a preliminary injunction will not prevent a review in the Supreme Court of the United States by writ of certiorari issued to a Circuit Court of Appeals, where the record presented the whole case to that court so that it might properly have been finally disposed of in terms by its decree.—*Id.*

Certiorari to a Circuit Court of Appeals will not be granted upon dismissing, for lack of jurisdiction, a writ of error to that court, where the judgment sought to be reviewed was entered May 27, 1902, the writ of error was allowed May 22, 1903, the cause docketed June 1, 1903, and the petition for certiorari filed February 17, 1906. Writ of error *Gonsoulin's Heirs v. Gulf Co.*, 116 F. 251, 53 C. C. A. 31, dismissed.—*Bonin v. Gulf Co.*, 25 S. Ct. 608, 198 U. S. 115, 49 L. Ed. 970.

Certiorari cannot independently be used to supply the place of a writ of error for the mere correction of errors below, because of the provision of Act Sept. 24, 1789, c. 20, § 14, 1 Stat. 81 [U. S. Comp. St. 1901, p. 580], substantially re-enacted as Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], giving the federal Supreme Court power to issue all writs not especially provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law.—*United States v. Dickinson*, 29 S. Ct. 485, 213 U. S. 92, 53 L. Ed. 711.

The federal Supreme Court may issue certiorari to bring up for review the denial by a Circuit Court of Appeals of an original application for mandamus to compel the judge of a Circuit Court to proceed with and determine an action pending before it, since the power of the Supreme Court to issue certiorari is not limited to the cases mentioned in the Circuit Courts of Appeals act (Act March 3, 1891 c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 488]), but the writ may issue in the exercise of the power, under Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law.—*McClellan v. Carland*, 30 S. Ct. 501, 217 U. S. 268, 54 L. Ed. 762.

The federal Supreme Court will determine a cause brought before it by certiorari to a Circuit Court of Appeals upon the record made

in that court, and certified to the Supreme Court.—Id.

The Circuit Court of Appeals, and not the Circuit Court, is the court to which the cause will be remanded by the federal Supreme Court for hearing and decision upon reversing, on certiorari, a judgment of the Circuit Court of Appeals which affirmed a judgment of the Circuit Court on the ground that the defenses relied upon below were of an equitable nature, not cognizable in a court of law, while the trial court, with the acquiescence of all parties, treated the defenses interposed by the answer as legal in their nature, and no such question was raised by either party or considered when the cause was submitted to the Circuit Court of Appeals. Judgment (1907) 156 F. 1022, 84 C. C. A. 679, reversed.—*Lutcher & Moore Lumber Co. v. Knight*, 30 S. Ct. 505, 217 U. S. 257, 54 L. Ed. 757.

The power of the federal Supreme Court to require a Circuit Court of Appeals by certiorari to send up for review cases pending before the latter court extends to a case pending in that court on an appeal from a decree of a Circuit Court entered pursuant to the mandate of the Circuit Court of Appeals on a prior appeal. Decree (1907) 152 F. 849, 81 C. C. A. 643, modified.—*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 30 S. Ct. 510, 217 U. S. 247, 54 L. Ed. 752.

Certiorari to a federal Circuit Court of Appeals should be granted by the Supreme Court in a case in which is involved the construction of a prior decree of a Circuit Court, affirmed by the Supreme Court, upon which depends the extent of the use by one railway company of the track, right of way, and terminal facilities of another, as well as the rights of access by the one company to industries established along the line of the other.—Id.

A final decree of a Circuit Court of Appeals in a suit to enjoin the infringement of a trade-mark registered under Act Feb. 20, 1906, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1909, p. 1275), can be reviewed by the federal Supreme Court only upon certiorari in view of section 18 of that act placing suits brought under its provisions within the scope of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), which makes decisions of the Circuit Court of Appeals final "in all cases under patent laws, under the revenue laws, under the criminal laws, and in admiralty cases," with power in the Supreme Court to require any such case to be certified thereto for review, in determination, with the same power and authority in the case as if it had been carried up by appeal or writ of error.—*Hutchinson, Pierce & Co. v. Loewy*, 30 S. Ct. 613, 217 U. S. 457, 54 L. Ed. 838.

A writ of certiorari to a Circuit Court of Appeals, granted on the application of the United States, upon the ground that the decision below involved a principle of far-reaching importance, will be dismissed where the federal Supreme Court is convinced, after final hearing, that the action of the court below did not deal with that principle.—*United States v. Rimer*, 31 S. Ct. 596, 220 U. S. 547, 55 L. Ed. 578.

A reversal on certiorari for error in construing Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), of the judgment of a Circuit Court of Appeals reversing a judgment of a Circuit Court in favor of an employé in an action against a carrier to recover damages for personal injuries alleged to have been caused by its negligence, furnishes no reason for disturbing the judgment of the trial court, where no error of law appears to have been committed in that court to the prejudice of the carrier.—

(1911) *Delk v. St. Louis & S. F. R. Co.*, 31 S. Ct. 617, 220 U. S. 580, 55 L. Ed. 590, reversing judgment (1908) *St. Louis & S. F. R. Co. v. Delk*, 158 F. 931, 86 C. C. A. 95, 14 Ann. Cas. 233.

The judgment of a Circuit Court of Appeals in condemnation proceedings, not a suit within the removal statutes, reversing the decree of Circuit Court granting temporary injunction on a bill in aid of an attempt to remove such proceedings from a state court, held equivalent of a direction to enter a final decree against the complainant for want of jurisdiction.—*Metropolitan Water Co. v. Kaw Valley Drainage Dist. of Wyandotte County, Kan.*, 32 S. Ct. 246, 223 U. S. 519, 56 L. Ed. 533.

Questions passed upon by the Circuit Court of Appeals will be considered in the federal Supreme Court on writ of certiorari, though not raised in the trial court.—*Friend v. Talcott*, 33 S. Ct. 506, 228 U. S. 27, 57 L. Ed. 718, affirming judgment *Talcott v. Friend*, 179 F. 676, 103 C. C. A. 80.

Certiorari lies under Judicial Code, § 240 (Act March 3, 1911, c. 231, 36 Stat. 1157 [U. S. Comp. St. Supp. 1911, p. 228]), to review a decision of a Circuit Court of Appeals on an appeal from an interlocutory order, where under section 128 no appeal would lie from a final decree from that court because the original jurisdiction depends entirely upon diverse citizenship.—*City and County of Denver v. New York Trust Co.*, 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

The Supreme Court, when reviewing by certiorari a decree of a Circuit Court of Appeals which affirmed an order granting temporary injunction, may determine also whether there is any objection, in point of jurisdiction or merits, to the maintenance of either the bill or cross-bill, and may direct a decree dismissing it.—Id.

The action of the trial court in entering a pro forma decree to expedite a final decision of the cause in the Circuit Court of Appeals does not authorize a writ of certiorari from the Supreme Court when no objection was made at the trial court or in the Circuit Court of Appeals.—*William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co.*, 33 S. Ct. 722, 228 U. S. 645, 57 L. Ed. 1003, reversing decree, *International Curtis Marine Turbine Co. v. William Cramp & Sons Ship & Engine Bldg. Co.*, 202 F. 932, 121 C. C. A. 290.

Certiorari will issue from the federal Supreme Court to a Circuit Court of Appeals, where the judge who heard it also sat in the Circuit Court of Appeals, contrary to Judicial Code, § 120 (Act March 3, 1911, c. 231, 36 Stat. 1132 [U. S. Comp. St. Supp. 1911, p. 191]), where no objection was made in the appellate court.—Id.

The federal Supreme Court on allowing certiorari to a Circuit Court of Appeals because the trial judge sat in the Circuit Court of Appeals contrary to the proviso to Judicial Code, § 120 (Act March 3, 1911, c. 231, 36 Stat. 1132 [U. S. Comp. St. Supp. 1911, p. 191]), will not set the cause for a hearing on the merits, but will remand the cause to the court below to be heard by a competent court.—Id.

The power conferred on the federal Supreme Court by Judicial Code, § 240, to require by writ of certiorari that cases in the Circuit Courts of Appeals be certified for review, is confined to that class of cases in which, according to the provisions of such Code, §§ 128, 241, the final judgments of those courts are not reviewable on appeal or writ of error.

—United States v. Beatty, 34 S. Ct. 392, 232 U. S. 463, 58 L. Ed. 686, dismissing appeal Beatty v. United States, 203 F. 620, 122 C. C. A. 16.

Employment of a writ of certiorari to a federal Circuit Court of Appeals to correct mere errors committed by that court in rendering an interlocutory judgment which may be corrected on writ of error from the final judgment is not contemplated by Judicial Code, § 262.—Id.

The Supreme Court will not consider the merits on a writ of certiorari to a Circuit Court of Appeals finding that the latter court erred when it reversed for lack of diverse citizenship a decree of a Circuit Court with directions to dismiss not on the merits, but will remand the case that such court may decide the case on the merits.—Brown v. Fletcher, 35 S. Ct. 750, 237 U. S. 583, 59 L. Ed. 1128, reversing decree 206 F. 461, 124 C. C. A. 367.

Discretion of trial court in granting interlocutory injunction against infringement of letters patent will not be disturbed on certiorari to the Circuit Court of Appeals which affirmed the injunction order where questions of fact were disputed.—Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co., 36 S. Ct. 86, 239 U. S. 156, 60 L. Ed. 191, affirming decree 198 F. 650, 117 C. C. A. 354.

Refusal of federal Supreme Court to review by certiorari decree in trade-mark suit treated as settling the law of the case does not preclude the Supreme Court, when reviewing on certiorari final decree of Circuit Court of Appeals on second appeal, from rectifying errors in interlocutory proceedings.—Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co., 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629, affirming decree Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 F. 611, 124 C. C. A. 409.

Federal Supreme Court, having corrected on certiorari error of Circuit Court of Appeals dismissing writ of error to review conviction on refusal of plaintiff in error to elect whether to pursue that writ or one sued out in the Supreme Court, will dispose of the case on the merits, because of doubt arising from certificate as to jurisdiction of question as to which there was no foundation.—Lamar v. United States, 36 S. Ct. 535, 241 U. S. 103, 60 L. Ed. 912, affirming judgment 227 F. 1019.

—384. Questions certified from Circuit Courts of Appeals.

See 12 Cent. Dig. Courts, § 1021.

In view of the fact that the Chinese treaty of 1868 guaranteed the right of all Chinese subjects to enter the United States without restrictions, and that the treaty of 1880 only restricted that right so far as Chinese laborers were concerned, a decision by the circuit court of appeals that a Chinese merchant domiciled here for 17 years, and having an established business of \$100,000 a year, must, on returning from a visit to China, present to the collector the certificate required by the Chinese exclusion act (Act Cong. May 6, 1882, § 6, as amended by Act July 5, 1884), notwithstanding that he has given that official satisfactory evidence of his status as a merchant here, presents a question of such importance as will justify the supreme court in requiring the circuit court of appeals to certify the case to it for review under Act Cong. March 3, 1891, establishing that court, and (section 6) making its decisions final in certain cases, but providing that the supreme court may require any such case to be certified to it for review as if it had been taken there on appeal or writ of error.—Ex parte Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43, 35 L. Ed. 868.

A certificate of the circuit court of appeals which asserts that, as its judgment "differs from that of a co-ordinate court, the instruction of

the supreme court is requested upon the question," is essentially defective, since it neither specifically sets forth the question to be answered nor states that instruction is desired for the proper decision of such question.—Columbus Watch Co. v. Robbins, 148 U. S. 266, 13 S. Ct. 594, 37 L. Ed. 445.

A certificate of questions of law on which a circuit court of appeals desires the instruction of the supreme court is irregular when a quorum of the circuit court of appeals does not sit in the case.—Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259, 13 S. Ct. 840, 37 L. Ed. 725.

Where a certificate of questions of law on which a circuit court of appeals desires the instruction of the supreme court does not contain a proper statement of the facts upon which the questions of law arise, the case should be dismissed, under Sup. Ct. Rule 37, although the record is sent up. It is for the supreme court to say whether it will answer the questions as propounded, or direct the whole record to be sent up, in order to decide the case as if it were on writ of error or appeal.—Id.

A writ of error from the circuit court to the circuit court of appeals was dismissed for want of jurisdiction, and afterwards the case was taken on writ of error from the circuit court to the supreme court, on the ground that the only question in the case was as to the circuit court's jurisdiction. Held that, in the absence of any certificate of that question by the circuit court, the writ of error must be dismissed.—Davis & Rankin Bldg. & Mfg. Co. v. Barber, 157 U. S. 673, 15 S. Ct. 719, 39 L. Ed. 853, following Maynard v. Hecht, 151 U. S. 324, 14 S. Ct. 353, 38 L. Ed. 179, and Colvin v. City of Jacksonville, 157 U. S. 368, 15 S. Ct. 634, 39 L. Ed. 736.

A certificate from the circuit court of appeals setting out the whole case, and propounding a question which, to be properly answered, would require an analysis of all the facts, and which, in the absence of power in the supreme court to deal with the whole case, amounts only to an inquiry whether there is not an irreconcilable conflict between two prior decisions of that court, with a request to put an end to that conflict, if it be found to exist, should be dismissed, as not stating a question of law in a particular case, such as the supreme court is required to give instructions upon.—Graver v. Faurot, 162 U. S. 435, 16 S. Ct. 799, 40 L. Ed. 1030.

In civil cases, the intention of congress as to the certification provided for by the act of March 3, 1891, §§ 5, 6 (26 Stat. 826), is to be ascertained in the light of the rules prevailing prior to that date in relation to certificates of division of opinion under Rev. St. §§ 650, 652, 693; and hence the question certified must be a distinct point or proposition of law (not of fact, or of mixed law and fact), clearly stated, so that it may be definitely answered, without regard to any other issue of law in the case.—Id.

When questions certified to the supreme court by a circuit court of appeals under the judiciary act of 1891 are so general in their nature as to require the court to determine all questions of law which may be lurking in the record, the certificate will be dismissed.—Cross v. Evans, 17 S. Ct. 733, 167 U. S. 60, 42 L. Ed. 77.

The circuit courts of appeal are authorized to certify to the supreme court only questions or propositions of law, unmixd with questions of fact or of mixed law and fact, and care must be taken that the certificate shall not be in such form as to present the whole case for consideration.—Warner v. City of New Orleans, 17 S. Ct. 892, 167 U. S. 467, 42 L. Ed. 239.

A question certified from a circuit court of appeals which requires the supreme court to

determine whether its decision in a former case, involving many questions, is applicable to the facts of the case at bar, and operates as a bar to the action, does not come within the power given by the judiciary act to certify "questions or propositions of law," but is in effect submitting the whole case instead of a question of law, and will not be considered.—*Id.*

A question certified to the supreme court by a circuit court of appeals, which refers to the pleadings for a statement of the facts on which the answer depends or the issues on which such question arose, or fails to state the precise objections relied on, does not state a distinct point or proposition of law, such as is required to give the supreme court jurisdiction.—*McHenry v. Alford*, 18 S. Ct. 242, 168 U. S. 651, 42 L. Ed. 614.

Questions which may be certified by the circuit court of appeals to the supreme court of the United States under the judiciary act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], must present a distinct point or proposition of law, and not require the latter court to search the entire record, and in effect determine whether the judgment of the trial court should be affirmed or reversed.—*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 S. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; *United States v. Union Pac. Ry. Co.*, 18 S. Ct. 167, 168 U. S. 505, 42 L. Ed. 559.

An answer to a question certified by the circuit court of appeals respecting its jurisdiction may be given, although the certificate has been recalled, where the answer to the question is against the jurisdiction of the circuit court of appeals, and will result in the dismissal of the writ of error from that court, which is the same result that would follow the dismissal of the certificate.—*Good Shot v. United States*, 21 S. Ct. 33, 179 U. S. 87, 45 L. Ed. 101.

Questions which may be certified by the circuit court of appeals to the supreme court of the United States under the judiciary act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], must present a distinct point or proposition of law, and not require the latter court to search the entire record, and in effect determine whether the judgment of the trial court should be affirmed or reversed.—*Emsheimer v. City of New Orleans*, 22 S. Ct. 770, 186 U. S. 33, 46 L. Ed. 1042; *Felsenheld v. United States*, 22 S. Ct. 740, 186 U. S. 126, 46 L. Ed. 1085.

A question containing more than a single question or proposition of law cannot be certified by a circuit court of appeals to the Supreme Court of the United States for determination.—*Quinlan v. Green County*, 27 S. Ct. 505, 205 U. S. 410, 51 L. Ed. 860.

A question of mixed law and fact, upon the decision of which the whole case turns, cannot be certified by a circuit court of appeals to the federal Supreme Court for determination.—*Chicago, B. & Q. Ry. Co. v. Williams*, 27 S. Ct. 559, 205 U. S. 444, 51 L. Ed. 875.

Mixed questions of law and fact which require the construction of various acts of Congress and the determination, in the light of all the testimony in a criminal case, of the question of whether or not the accused can be held guilty of any offense legally punishable by the United States, cannot be certified by a Circuit Court of Appeals, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), to the federal Supreme Court for decision.—*Hallowell v. United States*, 28 S. Ct. 498, 209 U. S. 101, 52 L. Ed. 702.

A question presented to the federal Supreme Court by a certificate from a Circuit Court of Appeals need not be answered where it does not propound a distinct issue of law,

but, in effect, calls for a decision of the whole case.—*Jahn v. The Folmina*, 29 S. Ct. 363, 212 U. S. 354, 53 L. Ed. 546, 15 Ann. Cas. 748.

Questions which involve the determination of the whole case cannot be sent up to the federal Supreme Court by a certificate from a Circuit Court of Appeals.—*Chicago, B. & Q. Ry. Co. v. Williams*, 29 S. Ct. 514, 214 U. S. 492, 53 L. Ed. 1058.

Affirmances in the federal Supreme Court, upon equal division of opinion, of rulings of the Circuit Courts of Appeals against the legality of a tax, are not such authoritative determinations of the question as to preclude one of the latter courts, when called upon again to consider the question, and finding a decision of another Circuit Court of Appeals opposed, from certifying such question to the Supreme Court for determination.—*Hertz v. Woodman*, 30 S. Ct. 621, 218 U. S. 205, 54 L. Ed. 1001.

Defendants, in an action for infringement of a patented rotary mimeograph by violation of a license restriction that it should be used only with ink made by patentee, cannot claim, where the facts certified to the Supreme Court state that they made a direct sale of the ink to the user of the mimeograph with knowledge that under the license she could not use the ink without infringement, that the sale of ink was not an infringement as it might be used in noninfringing way.—*Henry v. A. B. Dick Co.*, 32 S. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

Only the several propositions of law certified by a Circuit Court of Appeals under Act March 3, 1891, § 6, will be answered by the Supreme Court.—*Stratton's Independence v. Howbert*, 34 S. Ct. 136, 231 U. S. 399, 58 L. Ed. 285, answering certified questions 211 F. 1023, 127 C. C. A. 667.

Questions certified by a federal Circuit Court of Appeals to the Supreme Court must go unanswered where they are not apposite to the facts stated in the certificate.—*Seim v. Hurd*, 34 S. Ct. 406, 232 U. S. 420, 58 L. Ed. 667, certified questions answered *Woodward Co. v. Hurd*, 34 S. Ct. 409, 232 U. S. 428, 58 L. Ed. 670.

A writ of error sued out of a Circuit Court of Appeals on behalf of the United States because of disallowance of interest in a suit for the recovery of a tax will be treated by the federal Supreme Court, to which the Circuit Court of Appeals has certified such question as pending on a cross-writ of error, where defendant has brought the case up by a direct writ of error, sued out on constitutional grounds.—*Billings v. United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, affirming judgment (C. C.) *United States v. Billings*, 190 F. 359; *United States v. Billings*, 34 S. Ct. 428, 232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *United States v. Blair*, 190 F. 372.

Ⓖ385. Review of decisions of Circuit and District Courts.

See 13 Cent. Dig. Courts, §§ 1022-1025, 1031; 3 Cent. Dig. App. & E. §§ 332, 333; 3 Cent. Dig. App. & E. §§ 3302, 3394, 3395, 3397-3393, 3398, 3399.

Form of remedy, see Appeal and Error, Ⓖ4.

Ⓖ385 (1). In general.

An order awarding a peremptory writ of mandamus is a final judgment in a civil action, within the meaning of that term as used in the statute regulating writs of error to the United States supreme court.—*Davies v. Corbin*, 112 U. S. 36, 5 S. Ct. 4, 28 L. Ed. 627.

Rev. St. § 649, provides that issues of fact may be tried by the court without a jury, whenever the parties file a stipulation waiving a jury, and that the finding of the court on the facts shall have the same effect as the verdict

of a jury. Section 700 provides that the rulings of the court, in such case, when excepted to and presented by a bill of exceptions, may be reviewed on error or appeal. *Held*, that rulings of the court cannot be reviewed in such case, unless the record shows the filing of the stipulation in writing required by section 649.—*Bond v. Dustin*, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835; *Davenport v. Paris*, 136 U. S. 580, 10 S. Ct. 1064, 34 L. Ed. 548.

Where the parties to an action in the district court on an official bond waive a jury, and the cause is tried by the court, which hears evidence and makes findings and renders judgment thereon, the circuit court, and the supreme court on proceedings in error, can only affirm the judgment without considering the merits, for that mode of trying issues of fact was unknown to the common law, and there is no statutory provision authorizing it in the district court; so that the reviewing court cannot consider the facts found as judicially determined, nor examine any questions of law thence arising.—*Rogers v. United States*, 141 U. S. 548, 12 S. Ct. 91, 35 L. Ed. 853.

Act Cong. March 3, 1891 (26 Stat. 826), establishing the circuit courts of appeals, took away the appellate jurisdiction of the supreme court in cases where the federal jurisdiction depends upon diverse citizenship, but by the joint resolution of the same date (26 Stat. 1115) such jurisdiction was preserved as to pending cases, and cases in which the appeal or writ of error should be allowed before July 1, 1891. *Held*, that the supreme court would refuse to redocket a cause of this kind which was once dismissed, and in which a new appeal was allowed after the 1st of July.—*Wauton v. De Wolf*, 142 U. S. 138, 12 S. Ct. 173, 35 L. Ed. 965.

In a case where federal jurisdiction depends on the diverse citizenship of the parties, a writ of error which was filed after July 1, 1891, must be dismissed, notwithstanding that it was allowed by the court, and a supersedeas filed and approved before that date.—*Wauton v. De Wolf*, 142 U. S. 138, 12 S. Ct. 173, 35 L. Ed. 965; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.*, 146 U. S. 54, 13 S. Ct. 13, 36 L. Ed. 885.

Under Judiciary Act March 3, 1891, §§ 4, 14, and the joint resolution of the same date, the supreme court cannot entertain jurisdiction of any direct appeal or writ of error from the circuit or district courts except in the six classes of cases enumerated in section 5, unless the cause was pending at the date of the act, and the appeal was allowed or the writ sued out before July 1, 1891.—*National Exch. Bank of Baltimore v. Peters*, 144 U. S. 570, 12 S. Ct. 767, 36 L. Ed. 545.

A writ of error from the circuit court to the supreme court in a case in which a direct appeal or writ of error is not provided for by the judiciary act of March 3, 1891, must be dismissed if sued out after July 1, 1891.—*Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.*, 146 U. S. 54, 13 S. Ct. 13, 36 L. Ed. 885; *Lutcher v. United States*, 157 U. S. 427, 15 S. Ct. 718, 39 L. Ed. 759.

In an action against a collector to recover duties paid, no writ of error will lie to the supreme court when the judgment was entered and the writ sued out after July 1, 1891.—*Hubbard v. Soby*, 146 U. S. 56, 13 S. Ct. 13, 36 L. Ed. 886, following *McLish v. Roff*, 141 U. S. 661, 12 S. Ct. 118, 35 L. Ed. 893, and *Lau Ow Bew v. United States*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

Act Feb. 16, 1875 (18 St. p. 315), "to facilitate the disposition of cases in the supreme court," is to be construed as settling the following propositions: That the findings by the court below are conclusive, and have practically the same effect as the special verdict of a

jury; that a bill of exceptions cannot be used to bring up the evidence for a review of the findings; that the only rulings on which the supreme court is authorized to pass are such as may be presented by a bill of exceptions prepared as in an action at law; that the lower court is bound to find only the ultimate facts; that the supreme court will not take notice of a refusal to find incidental facts, which only amount to evidence from which an ultimate fact is obtained; and that, where the court below refuses to make a finding as to the existence of a material fact which has been established by uncontradicted evidence, or where it finds a fact not supported by evidence, and an exception is taken, the question may be brought to the supreme court for review in that particular.—*Alexandre v. Machan*, 147 U. S. 72, 13 S. Ct. 211, 37 L. Ed. 84, 85, affirming decree (C. C.) *The City of New York*, 35 F. 604.

Under the judiciary act of March 3, 1891, an appeal from a decree of a circuit court in a suit by contractors, against the United States, to recover for materials furnished for the construction of a levee, must go in the first instance to the circuit court of appeals, and not to the supreme court.—*Ogden v. United States*, 148 U. S. 390, 13 S. Ct. 602, 37 L. Ed. 493, following *National Exch. Bank v. Peters*, 144 U. S. 570, 12 S. Ct. 767, 36 L. Ed. 545, and *Hubbard v. Soby*, 146 U. S. 56, 13 S. Ct. 13, 36 L. Ed. 886.

Section 16 of the interstate commerce law, as amended by the act of March 2, 1889 (25 Stat. 855, c. 382), which gives to the interstate commerce commission a summary proceeding in the circuit court to enforce its orders, was repealed by the judiciary act of March 3, 1891 (26 Stat. 826, c. 517), in so far as it allowed an appeal direct to the supreme court, when the matter in dispute exceeded \$2,000, and the appeal should now be taken to the circuit court of appeals.—*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264, 13 S. Ct. 837, 37 L. Ed. 727, following *McLish v. Roff*, 141 U. S. 661, 12 S. Ct. 118, 35 L. Ed. 893, *Lau Ow Bew v. United States*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340, *Hubbard v. Soby*, 146 U. S. 56, 13 S. Ct. 13, 36 L. Ed. 886, and *Chicago & N. W. Ry. Co. v. Osborne*, 146 U. S. 354, 13 S. Ct. 281, 36 L. Ed. 1002.

The declaration in the joint resolution of March 3, 1891 (26 Stat. 1115), that nothing in the act establishing the circuit court of appeals should be construed to impair the jurisdiction of the supreme court in cases wherein appeals were taken before July 1, 1891, operated merely to preserve jurisdiction, and did not give jurisdiction as to an appeal allowed, but not perfected.—*Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986.

An appeal from a decree dismissing a bill brought to vacate a prior foreclosure decree cannot be taken direct from the circuit court to the supreme court, under the fourth subdivision of the fifth section of the act creating the circuit court of appeals (13 Sup. Ct. xiv), when no question as to the construction or application of the constitution of the United States was raised by the parties or determined by the court, and the only contention is that because of fraud, error, irregularities, and jurisdictional defects, the foreclosure decree which was sought to be set aside operated to deprive complainants of their property without due process of law.—*Carey v. Houston & T. C. Ry. Co.*, 150 U. S. 170, 14 S. Ct. 63, 37 L. Ed. 1041.

The supreme court has no jurisdiction of a cause in which federal jurisdiction depends on diverse citizenship alone, and in which the circuit court entertained a motion for rehearing, and did not deny the same until after July 1, 1891. Judiciary act and joint resolution of March 3, 1891.—*Vorhees v. John T. Noye Mfg. Co.*, 151 U. S. 135, 14 S. Ct. 295, 38 L. Ed. 101.

The supreme court has no jurisdiction of an appeal from a circuit court not within Judiciary Act March 3, 1891, § 5, unless it was taken, as allowed by the joint resolution of the same date, before July 1, 1891.—*Mason v. Pewabic Min. Co.*, 153 U. S. 361, 14 S. Ct. 847, 38 L. Ed. 745.

Under Act March 3, 1887, requiring the trial court to file findings of fact and conclusions of law, a judgment will be reviewed only where the record contains such findings and conclusions, and then only as to the sufficiency of the findings to support the judgment.—*Chase v. United States*, 155 U. S. 489, 15 S. Ct. 174, 39 L. Ed. 234, affirming judgment (C. C.) 44 F. 732.

The petition for a writ of error from the supreme court to the circuit court showed that a writ of error had been previously sued out from the circuit court of appeals, and stated that that court refused to allow the cause to be docketed and the transcript filed, on the ground that the case should have been taken to the supreme court. *Held*, that as the last clause in section 6 of the judiciary act of March 3, 1891, refers to the circuit court of appeals, and not to the circuit court, a writ of error to the latter court could not reach the proceedings in the former.—*Lutcher v. United States*, 157 U. S. 427, 15 S. Ct. 713, 39 L. Ed. 759.

The judiciary act of March 3, 1891, does not govern an appeal in which the appeal bond was given and filed prior to its passage, although the citation was not signed or served until afterwards.—*Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53, 15 S. Ct. 725, 39 L. Ed. 894.

The judiciary act of March 3, 1891, does not authorize a review by the supreme court on appeal or writ of error of a decree filed in October, 1891, dismissing a bill praying for a mandatory injunction to compel certain railroad companies to afford the complainants the same facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable.—*Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*, 159 U. S. 698, 16 S. Ct. 189, 40 L. Ed. 311.

Where, in a suit between citizens of different states, the decree of a circuit court of appeals is final, by force of Act March 3, 1891, a decree upon intervention in the same suit, involving the right to property in the actual possession of the circuit court, is likewise final.—*Gregory v. Van Ee*, 160 U. S. 643, 16 S. Ct. 431, 40 L. Ed. 566.

As an appeal will lie from the circuit court to the supreme court only in the cases prescribed in Act March 3, 1891, it will not lie in a copyright case, which may be appealed from the circuit court of appeals, merely because the circuit court, by the form of its entry, made the decree of the circuit court of appeals, affirming a previous decree of the circuit court, its own decree.—*Webster v. Daly*, 163 U. S. 155, 16 S. Ct. 961, 41 L. Ed. 111.

Under the federal statute, if on a trial by the court without a jury the findings attacked are general, only such rulings in the progress of the trial can be reversed as are presented by a bill of exceptions, and the bill cannot be used to bring up the whole testimony for review, any more than on a trial by jury.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

A case in the circuit court involving the validity of an act of congress and the construction of a treaty was decided on the merits against defendant, who took appeals on the whole case both to the supreme court direct and to the circuit court of appeals. The latter court affirmed the decree on the merits, deciding all the questions raised. *Held* that, by invoking

the jurisdiction of the circuit court of appeals on the whole case, defendant waived his right to a decision by the supreme court on the direct appeal, and the same must be dismissed.—*Robinson v. Caldwell*, 17 S. Ct. 343, 165 U. S. 359, 41 L. Ed. 745, dismissing appeal 67 F. 391, 14 C. C. A. 448.

Act Cong. March 3, 1891, does not impose a pecuniary limit on the appellate jurisdiction of the supreme court over appeals from a district or circuit court of the United States.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320; *Kirby v. American Soda Fountain Co.*, 24 S. Ct. 619, 194 U. S. 141, 48 L. Ed. 911.

A direct appeal to the supreme court of the United States from a decision of a circuit court involving a constitutional right cannot be taken, under the act of congress of March 3, 1891, after the cause has been appealed to and decided by the circuit court of appeals, as that act does not permit independent appeals to both courts.—*Carter v. Roberts*, 20 S. Ct. 713, 177 U. S. 496, 44 L. Ed. 861, dismissing appeal *In re Carter*, 97 F. 496.

A writ of error from the supreme court of the United States to a circuit court will be dismissed if taken while a prior writ of error from a circuit court of appeals is pending in that court.—*Cincinnati, H. & D. R. Co. v. Thiebaut*, 20 S. Ct. 822, 177 U. S. 615, 44 L. Ed. 911.

Questions which can be raised under any of the subdivisions of section 5 of the Judiciary Act March 3, 1891, c. 517, 26 Stat. 823 [U. S. Comp. St. 1901, p. 549], for the purpose of a direct appeal to the supreme court of the United States from a circuit court, must be real, and must present controversies that are substantial, not only from the nature of the principles invoked, but from the relation to them of the party by whom they are invoked.—*City of Lampasas v. Bell*, 21 S. Ct. 368, 180 U. S. 276, 45 L. Ed. 527.

No direct appeal lies to the supreme court of the United States from a decree of a district court dismissing the petition in a suit to enforce a final decree of confirmation of a California private land claim, entered on November 30, 1859, since, even if the provision of Court of Appeals Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], restricting direct appeals to certain excepted cases, of which this is not one, does not apply, the appellate jurisdiction of the supreme court over decrees of approval or correction in proceedings to confirm such claims was, by the express language of Act July 1, 1864, § 3, taken away, except as to cases where an appeal had already been taken. Appeal, *United States v. Peralta* (D. C.) 102 F. 1006, dismissed.—*Gwin v. United States*, 22 S. Ct. 526, 184 U. S. 669, 46 L. Ed. 741.

The circuit court of the United States for the Northern district of West Virginia is the court to which a cause appealed from the circuit court for the district of West Virginia, which, if it had been pending in that court on January 22, 1901, would have been transferred to the Southern judicial district of West Virginia, created by an act of congress of that date (Act Jan. 22, 1901, c. 105, 31 Stat. 736 [U. S. Comp. St. 1901, p. 440]), will be remanded by the supreme court of the United States in order that the further proceedings ordered by its mandate may be had before the judge who rendered the original decree, in view of a provision of the eighth section of the act (31 Stat. 737 [U. S. Comp. St. 1901, p. 441]) that motions and causes submitted, in which evidence has been taken, shall be proceeded with and

disposed of in the Northern judicial district.—*Hatfield v. King*, 22 S. Ct. 871, 186 U. S. 178, 46 L. Ed. 1112.

A direct appeal to the federal Supreme Court from a final decree of a Circuit Court in a proceeding to compel the production of papers and the giving of testimony before the Interstate Commerce Commission is authorized by the proviso in Act Feb. 19, 1903, c. 708, § 3, 32 Stat. 849 [U. S. Comp. St. Supp. 1903, p. 365], making applicable to "any case" brought under the direction of the Attorney General, in the name of the commission, the provisions of Act Feb. 11, 1903, c. 544, 32 Stat. 823 [U. S. Comp. St. Supp. 1903, p. 376], the second section of which authorizes direct appeals from the federal Circuit Courts to the Supreme Court in cases brought under the anti-trust or interstate commerce acts, although this section has reference only to suits in equity, and the paragraphs preceding the proviso in the later statute do not include proceedings of this character. Order (C. C.) *Interstate Commerce Commission v. Philadelphia & R. Ry. Co.*, 123 F. 969, reversed.—*Interstate Commerce Commission v. Baird*, 24 S. Ct. 563, 194 U. S. 25, 48 L. Ed. 860.

The appeal required by Act June 22, 1860, c. 188 (12 Stat. 85, 87), § 11, to be taken to the Supreme Court of the United States if the decree of the District Court in certain private land claim cases is against the United States, is "otherwise provided by law" within the meaning of Act March 3, 1891, c. 517, 26 Stat. 823 [U. S. Comp. St. 1901, p. 550], § 6, making the Circuit Court of Appeals the proper tribunal for the review of final decisions of the District Court in other than certain excepted cases, which include those where it is otherwise provided by law.—*United States v. Dalcour*, 27 S. Ct. 58, 203 U. S. 408, 51 L. Ed. 248.

Color for defendant's contention that the requirements of Mining Act Ill. April 18, 1899 (Laws 1899, p. 300), as to licensed employes, are repugnant to the federal Constitution, when applied to the first count in the declaration, will sustain a writ of error from the Supreme Court of the United States to a Circuit Court, as against a motion to dismiss, based on the theory that the first count in the declaration charges a violation of duty imposed by the statute directly upon the mineowner, irrespective of the statutory requirements as to licensed employes.—*Wilmington Star Min. Co. v. Fulton*, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

Assertions of errors of construction of federal statutes furnish no basis for jurisdiction on constitutional grounds under Act March 3, 1891, c. 517, § 5, 26 Stat. 827, as amended by Act Jan. 20, 1897, c. 68, 29 Stat. 492 (U. S. Comp. St. 1901, p. 549), of a writ of error from the federal Supreme Court to a District Court.—*Rakes v. United States*, 29 S. Ct. 244, 212 U. S. 55, 53 L. Ed. 401.

The decree of a federal Circuit Court, entered pursuant to the mandate of a Circuit Court of Appeals, upon a petition to enforce rights granted by a decree in intervention proceedings in a foreclosure suit, is not appealable to the federal Supreme Court where the jurisdiction of the original foreclosure suit was based solely upon diverse citizenship, although, when the case went back from the Circuit Court of Appeals to the Circuit Court, the latter court authorized an amendment to the petition, alleging that the decree ordered by the Circuit Court of Appeals failed to give full faith and credit to the original decree in the intervention proceedings. Decree 152 F. 849, 81 C. C. A. 643, modified.—*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 30 S. Ct. 510, 217 U. S. 247, 54 L. Ed. 752.

A writ of error will not lie from the Supreme Court of the United States to review an order of a Circuit Court committing a district attorney for contempt in refusing to obey an order directing him to return to the owner certain books and papers in his possession which the court found had been seized in violation of constitutional rights.—*Wise v. Mills*, 31 S. Ct. 597, 220 U. S. 549, 55 L. Ed. 579.

A judgment of a federal Circuit Court will be affirmed on motion under Supreme Court rule 6, subd. 5, where the questions urged have been so plainly foreclosed by decisions of the Supreme Court as to make further argument unnecessary.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 58 L. Ed. 875.

A decision of a federal Circuit Court in a suit against a foreign corporation dismissing an intervention filed by the foreign receiver of such corporation, where the question of jurisdiction was not raised, cannot be reviewed where based on the ground that no corporate assets passed to the receiver, and that he had no standing in court.—*Keatley v. Furey*, 33 S. Ct. 121, 226 U. S. 399, 57 L. Ed. 273.

Writ of error from the federal Supreme Court will not be dismissed because the constitutional questions raised had, since allowance of the writ, been decided by such court adversely to plaintiff in error in another case.—*Michigan Cent. R. Co. v. Vreeland*, 33 S. Ct. 192, 227 U. S. 59, 57 L. Ed. 417, Ann. Cas. 1914C. 176, reversing judgment (C. C.) *Vreeland v. Michigan Cent. R. Co.*, 189 F. 495.

Appeals and cross-appeals from decrees of a federal court, entered under stipulations to abide decrees that might be entered in certain other suits, present no question for consideration of the federal Supreme Court.—*Knott v. St. Louis Southwestern Ry. Co.*, 33 S. Ct. 984, 230 U. S. 509, 57 L. Ed. 1595, dismissing appeal (C. C.) *St. Louis & S. F. R. Co. v. Hadley*, 168 F. 317.

A decision of the federal Supreme Court which reversed without prejudice, because the evidence of confiscation was not so clear as to dispense with the test of actual experiment, a decree of a District Court enjoining the enforcement as confiscatory of an ordinance fixing telephone rates, and remanded the cause for further proceedings, gives the District Court discretion to retain the case for an actual experiment with the rates, which is not abused by a subsequent order appointing a master to ascertain the net income after the rate ordinance had gone into effect, where an actual experiment with the rates had been voluntarily undertaken.—*In re City of Louisville*, 34 S. Ct. 255, 231 U. S. 639, 58 L. Ed. 413; *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 34 S. Ct. 260, 231 U. S. 652, 58 L. Ed. 419.

An appeal held not to lie to the federal Supreme Court from a decree of the District Court in a suit by a major in the inspector general's department of the Ohio National Guard to test the validity of an order of the state adjutant general where plaintiff's personal rights are not directly violated.—*Lieutenant Colonel Daniel C. Stearns v. Brigadier General George H. Wood*, 35 S. Ct. 229, 236 U. S. 75, 59 L. Ed. 475.

The jurisdiction of the federal Supreme Court on appeal from the decree of a District Court dismissing on the merits a bill involving a federal question extends to every question properly arising on the record.—*Northwestern Laundry v. City of Des Moines*, 36 S. Ct. 206, 239 U. S. 486, 60 L. Ed. 396.

385 (1½). *Criminal prosecutions in general.*

The United States may bring error under Act March 2, 1907, c. 2564, 34 Stat. 1246 [U. S. Comp. St. Supp. 1907, p. 209], to review a judgment of a federal Circuit Court, quashing an indictment for violating Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, by willfully permitting an alien to land at another place than that designated by the immigration officers, because the indictment disclosed that the alien in question was a seaman.—*Taylor v. United States*, 28 S. Ct. 53, 207 U. S. 120, 52 L. Ed. 130, reversing judgment 152 F. 1, 81 C. C. A. 197; (1908) *Schrotter v. United States*, 157 F. 1005, 85 C. C. A. 679.

The whole case is not open to review in the Supreme Court of the United States on the writ of error to a federal District or Circuit Court, authorized on behalf of the government in criminal cases by Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), but the scope of review is limited to the particular decisions enumerated in that statute.—*United States v. Keitel*, 29 S. Ct. 123, 211 U. S. 370, 53 L. Ed. 230, reversing order (D. C. 1907) 157 F. 396; *Same v. Herr*, 29 S. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; *Id.*, 29 S. Ct. 135, 211 U. S. 406, 53 L. Ed. 252.

Interpretation as well as construction of the statute, conceding an abstract distinction between these two terms, is comprehended by the provision of Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), authorizing a writ of error on behalf of the government from the federal Supreme Court to review a judgment of a District or Circuit Court, quashing an indictment, when based upon the construction of the statute upon which the indictment is founded.—*Id.*

Jurisdiction of the federal Supreme Court of a writ of error sued out under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), to review a judgment of a federal District Court quashing an indictment for a conspiracy illegally to acquire coal lands from the United States, because of the opinion that the federal statute did not prohibit the acts complained of, cannot be successfully challenged on the theory that the indictment, and not the statute, was construed.—*Id.*

Every question of the character referred to in Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), authorizing a writ of error by the government from the federal Supreme Court, to review certain judgments in criminal cases, need not be decided by the Supreme Court when the decision of one question disposes of the case. Interpretation is included in the term "construction," as used in such act. The action of the court below as to the mere construction of an indictment is not open to review on the writ of error authorized by such act.—*United States v. Biggs*, 29 S. Ct. 181, 211 U. S. 507, 53 L. Ed. 305, affirming judgment (D. C. 1907) 157 F. 264; *Same v. Freeman*, 29 S. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; *Same v. Sullenberger*, 29 S. Ct. 186, 211 U. S. 522, 53 L. Ed. 311.

The various grounds of demurrer to the indictment cannot be considered on a writ of error sued out by the government in a criminal case, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), to review a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy," but the court has jurisdiction to review only the ruling of the court below on the sufficiency of such plea.—*United States v. Mason*, 29 S. Ct. 480, 213 U. S. 115, 53 L. Ed. 725.

The sufficiency of the indictment upon general principles of criminal law is not open for review in the federal Supreme Court on the

writ of error to a federal District Court authorized on behalf of the government by Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), to review judgments or decisions sustaining demurrers to an indictment, when based upon the construction of the federal statute on which the indictment is founded.—*United States v. Stevenson*, 30 S. Ct. 35, 215 U. S. 190, 54 L. Ed. 153.

A judgment of a federal District Court sustaining a demurrer to an indictment upon two grounds, one of which involves the construction of the federal statute on which the indictment is founded, and the other the sufficiency of such indictment upon general principles of criminal law, is reviewable in the federal Supreme Court on writ of error, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), authorizing such writs of error to review a judgment sustaining a demurrer to an indictment, when such judgment is "based upon the invalidity or construction of the statute upon which the indictment is founded."—*Id.*

The construction of a statute is concerned so as to give the Supreme Court of the United States jurisdiction of a writ of error to the United States District Court in behalf of the government in a criminal case, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), where an indictment against a national bank officer for making false reports to the Comptroller of the Currency is quashed because such officer is not an agent within the meaning of the statute defining the crime. Judgment (D. C. 1908) 162 F. 687, reversed.—*United States v. Corbett*, 30 S. Ct. 81, 215 U. S. 233, 54 L. Ed. 173.

The decision of a federal Circuit Court sustaining a special plea in bar to an indictment is reviewable in the Supreme Court, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), although the decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded.—*United States v. Celestine*, 30 S. Ct. 93, 215 U. S. 278, 54 L. Ed. 195.

The decision of a federal District Court sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable in the federal Supreme Court by writ of error, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), where the question whether the indictment charges any offense against the United States involves the validity of Act Jan. 30, 1897, c. 109, 29 Stat. 506, as applied to the facts stated. Judgment (Wash. 1908) 185 F. 253, reversed.—*United States v. Sutton*, 30 S. Ct. 116, 215 U. S. 291, 54 L. Ed. 200.

The contention that under Rev. St. § 1342, art. 62 (U. S. Comp. St. 1901, p. 957), a court-martial has exclusive jurisdiction over the crimes committed by a military officer which are cognizable by courts-martial under the provisions of that article, is too clearly unfounded to serve as the basis of a writ of error from the federal Supreme Court to review a conviction in a Circuit Court.—*Franklin v. United States*, 30 S. Ct. 434, 216 U. S. 559, 54 L. Ed. 615.

The claim that power of legislation is unconstitutionally delegated to the state Legislatures by Act July 7, 1898, c. 576, § 2, 30 Stat. 717 (U. S. Comp. St. 1901, p. 3652), adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated "now provide" for a like offense, the punishment therefor not being otherwise provided for by any law of the

United States, is too clearly unfounded to serve as the basis of a writ of error from a federal Supreme Court to a Circuit Court.—Id.

A judgment of a federal Circuit Court entered upon a verdict directed in favor of the government on the issues raised by a special plea in bar, by which the accused claimed immunity from prosecution under Act Feb. 25, 1903, c. 755, 32 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 1142), as amended by Act June 30, 1906, c. 3920, 34 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1168), because of his testimony before the grand jury, is not a final judgment, reviewable under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), by a direct writ of error from the federal Supreme Court, where leave was given to plead over, and a plea of not guilty was entered, upon which no trial has been had.—*Heike v. United States*, 30 S. Ct. 539, 217 U. S. 423, 54 L. Ed. 821, dismissing writ of error (C. C.) *United States v. Heike*, 175 F. 852.

A judgment of a federal Circuit Court holding insufficient on demurrer certain counts of an indictment charging willful misapplication of the funds of a national bank, in violation of Rev. St. U. S. § 5209 (U. S. Comp. St. 1901, p. 3497), because the facts alleged did not constitute a crime under that section, as it should be construed, is reviewable in the Supreme Court, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), as based upon the construction of the statute upon which the indictment was founded.—*United States v. Heinze*, 31 S. Ct. 98, 218 U. S. 532, 54 L. Ed. 1439, 21 Ann. Cas. 884.

A judgment of a federal Circuit Court, quashing, on motion, certain counts of an indictment for willfully misapplying the funds of a national bank, in violation of Rev. St. U. S. § 5209 (U. S. Comp. St. 1901, p. 3497), because they possessed the defects which that court had found in a prior indictment, which it held did not charge a crime under the statute, is reviewable in the federal Supreme Court under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), as a decision quashing a count in an indictment based upon the construction of the statute upon which the indictment is founded.—*United States v. Heinze*, 31 S. Ct. 102, 218 U. S. 547, 54 L. Ed. 1145.

The only question before the federal Supreme Court on an appeal taken under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy, is whether such plea in bar can be sustained.—(1910) *United States v. Kissel*, 31 S. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168, reversing judgment (C. C. 1909) 173 F. 823.

The judgment actually entered below, and not the terms of a stipulation of counsel previously made and filed, controls the federal Supreme Court in determining whether such judgment is reviewable on writ of error under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), as one sustaining a special plea in bar when the defendant has not been put in jeopardy.—*United States v. Barber*, 31 S. Ct. 209, 219 U. S. 72, 55 L. Ed. 99.

A judgment of a federal District Court purporting to dismiss an indictment upon the ground that the statute of limitations was a bar to the prosecution is one sustaining a special plea in bar within the meaning of Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), governing the right of the government to a review in a criminal case, although the plea of the statute of limitations filed and heard by consent and stip-

ulation was denominated a plea in abatement.—Id.

The federal Supreme Court when reviewing under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), the act of the trial court sustaining a plea in bar of the statute of limitations to an indictment charging a continuing conspiracy, is not concerned with the technical sufficiency or redundancy of the indictment, or even with any consideration of the nature of the overt acts alleged.—Id.

The Supreme Court reviewing under Criminal Appeals Act March 2, 1907, judgment of federal Circuit Court sustaining a demurrer to counts in an indictment charging violation of Anti-Trust Act July 2, 1890, must accept the Circuit Court's construction of the counts, and consider only whether the decision that the acts charged are not within the statute is based on an erroneous construction thereof.—*United States v. Patten*, 33 S. Ct. 141, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, reversing judgment (C. C.) 187 F. 664.

Judgment of a federal Circuit Court sustaining demurrer to counts in an indictment charging violation of Anti-Trust Act July 2, 1890, as not within the statute, is based on the construction of the statute within Act March 2, 1907, governing the right of the government to a review in a criminal case.—Id.

District Court's construction of indictment must be accepted by the federal Supreme Court when reviewing, under Act March 2, 1907, judgment sustaining demurrer to the indictment, based on construction of the federal statute.—*United States v. Winslow*, 33 S. Ct. 253, 227 U. S. 202, 57 L. Ed. 481, affirming judgment (D. C.) 195 F. 578.

Criminal Appeals Act March 2, 1907, was not repealed by Judicial Code March 3, 1911, since the former act is not mentioned among the statutes repealed by Judicial Code, § 297, nor superseded by any other regulations of the matter.—Id.

Decision of federal District Court on demurrer that the averments of indictment charging violations of the Anti-Trust Act were insufficient to connect individual defendants with the offense charged, cannot be reviewed in the federal Supreme Court at the instance of the government.—*United States v. Pacific & A. Ry. & Nav. Co.*, 33 S. Ct. 443, 228 U. S. 87, 57 L. Ed. 742.

The federal Supreme Court when reversing a judgment of a federal District Court sustaining demurrers to an indictment charging violations of the Anti-Trust Act, based on the construction of that act, will leave it open to that court to pass on such grounds of demurrer as were not considered in the former ruling.—Id.

A judgment of a federal District Court in a prosecution of an express company sustaining motion to quash service, which the court treated as a demurrer, dismissing the case because the express company was a joint-stock association, is reviewable in the federal Supreme Court under Act March 2, 1907, because the dismissal was based on the construction of the statute on which the indictment was founded.—*United States v. Adams Exp. Co.*, 33 S. Ct. 878, 229 U. S. 381, 57 L. Ed. 1237.

Decision of a federal District Court quashing as "bad in law" certain counts of an indictment charging violations of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), is not reviewable by the Supreme Court under Act March 2, 1907, as based on the construction of the statute on which the indictment was founded.—*United States v. Carter*, 34 S. Ct. 173, 231 U. S. 492, 58 L. Ed. 330.

The Supreme Court will not examine the entire record to determine in favor of its jurisdiction a doubt as to whether a ruling

quashing certain counts of an indictment as bad in law based on the construction of a statute within the meaning of the Criminal Appeals Act March 2, 1907, or was based on the mere insufficiency of the indictment.—*Id.*

A judgment of a federal District Court sustaining a demurrer to an indictment under Criminal Code, § 215, Act March 4, 1909, c. 321, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), cannot be reviewed in the Supreme Court by writ of error, where it does not appear from the record on what ground the court acted.—*United States v. Moist*, 34 S. Ct. 255, 231 U. S. 701, 58 L. Ed. 444.

A decision of a federal District Court sustaining a demurrer to an indictment on the ground that the acts charged were not within the condemnation of the statute on which the indictment is founded is reviewable in the federal Supreme Court.—*United States v. Birdsall*, 34 S. Ct. 512, 233 U. S. 223, 58 L. Ed. 930, reversing judgment (D. C.) 206 F. 818.

A decision of the federal District Court sustaining a demurrer to an indictment charging conspiracy to defraud the United States by unlawfully increasing the gross post office receipts on which a salary is to be based is based on the construction of the statute, and therefore within the appellate jurisdiction of the Supreme Court; a construction of a statute being necessary to determine the validity of the regulations of the postmaster general.—*United States v. Foster*, 34 S. Ct. 686, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C.) 211 F. 206.

The meaning of Act March 4, 1913, relating to operation by carriers from a quarantine state to another state on which an indictment is founded may be misconstrued within Act March 2, 1907, allowing direct writ of error from the federal Supreme Court to a judgment of the District Court sustaining a demurrer to an indictment based on the construction of the statute, not only by misinterpreting the language of the statute, but by overlooking its existence.—*United States v. Nixon*, 35 S. Ct. 49, 235 U. S. 231, 59 L. Ed. 207.

The ruling of the District Court on a plea of *nolo contendere* cannot be reviewed by direct writ of error from the federal Supreme Court, where the ruling results from applying principles laid down for the District Court by the Circuit Court of Appeals in reversing a prior conviction.—*Shapiro v. United States*, 35 S. Ct. 122, 235 U. S. 412, 59 L. Ed. 291.

New constitutional questions raised after conviction has been reversed and cause remanded for proceedings in accordance with the decision will not sustain a writ of error from the Supreme Court to the District Court to review a second conviction.—*Id.*

Construction of Cr. Code, § 215, relating to use of mails in a scheme to defraud, held involved in a decision of the District Court by which a demurrer to an indictment under that section was sustained so as to sustain an appeal by the United States.—*United States v. New South Farm & Home Co.*, 36 S. Ct. 505, 241 U. S. 64, 60 L. Ed. 890.

⚡385 (2). *Conviction of capital or otherwise infamous crime.*

Act Cong. March 3, 1891, providing that a writ of error may be taken from an existing circuit court direct to the supreme court of the United States in cases, among others, of conviction of a capital or otherwise infamous crime, went into immediate operation, so as to permit a writ of error to be allowed where the conviction occurred before its passage, but sentence was not pronounced until afterwards.—*In re Claassen*, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409.

Act March 3, 1891, § 5 (26 Stat. 826, c. 517), authorizing appeals or writs of error from the district and circuit courts in cases of conviction of an infamous crime, does not authorize the review of a judgment of conviction in such a case by appeal, instead of by writ of error.—*Bucklin v. United States*, 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. Ed. 304, 305.

The violation of Act Cong. June 29, 1888 (25 Stat. 209, c. 496), prohibiting obstructive and injurious deposits in New York harbor, not being punishable by imprisonment for over one year, or at hard labor, or by imprisonment in a penitentiary, is not an infamous crime, within the meaning of Act March 3, 1891, § 5 (26 Stat. 827, c. 517), determining the appellate jurisdiction of the supreme court.—*Ansbro v. United States*, 159 U. S. 695, 16 S. Ct. 187, 40 L. Ed. 310.

A conviction for murder, punishable with death, is a conviction for a capital crime within the meaning of the act of congress of March 3, 1891, as amended by the act of January 20, 1897, providing for writs of error to a district court from the supreme court of the United States, although the jury is given the power by the act of January 15, 1897, to qualify the verdict by adding the words "without capital punishment," and by reason of their exercise of that power the punishment actually imposed is imprisonment for life.—*Fitzpatrick v. United States*, 20 S. Ct. 944, 178 U. S. 304, 44 L. Ed. 1078.

A conviction in a federal District Court of murder in the second degree, punishable only by imprisonment, is not reviewable in the Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827, as amended by Act Jan. 20, 1897, c. 68, 29 Stat. 492 (U. S. Comp. St. 1901, p. 549), as a case of "conviction of capital crime," although accused could have been convicted of a capital offense.—*Rakes v. United States*, 29 S. Ct. 244, 212 U. S. 55, 53 L. Ed. 401.

⚡385 (3). *Prize causes.*

Jurisdiction of appeals from all final sentences and decrees in prize cases may be taken by the supreme court of the United States, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320.

⚡385 (4). *Cases involving jurisdiction.*

The Supreme Court will take notice that the record does not show jurisdiction in the court below.—*Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462.

An appeal from a circuit court on the question of jurisdiction will not be dismissed on the ground that appellant, by taking a stay of execution under a state statute (Act Neb. Feb. 23, 1875), waived that question, as, even if it is waived by a party, it will be considered by this court.—*Parker v. Ormsby*, 141 U. S. 81, 11 S. Ct. 912, 35 L. Ed. 654.

The act establishing the circuit court of appeals (26 Stat. 826) provides, in section 5, that appeals or writs of error may be taken from the district courts or the existing circuit courts direct to the supreme court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court" for decision. *Held*, that the omission of the word "final" from this provision does not enlarge the power of review so as to permit a cause to be brought up before final judgment.—

McLish v. Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. Ed. 893.

Section 14 of the act establishing the circuit court of appeals, and providing for appeals and writs of error from the circuit or district courts directly to the supreme court in any case involving jurisdiction, did not, by repealing Rev. St. § 691, and Act Cong. Feb. 16, 1875, § 3, authorize a review of the question of jurisdiction before final judgment, since such repeal applied only to those provisions limiting the jurisdictional amount on appeal, and not to the provision relating to final judgments.—Id.

There is no merit in the suggestion that, by requiring the cause to proceed to final judgment, an appeal might be taken to the supreme court on the question of jurisdiction, and at the same time to the circuit court of appeals on the merits, as the party defeated on final judgment must elect whether he will go to the supreme court on the question of jurisdiction alone, or to the circuit court of appeals on the whole case.—Id.

Act Cong. March 3, 1887, as corrected by Act Cong. Aug. 13, 1888, providing that no appeal or writ of error shall be allowed to the supreme court from an order of the district or circuit courts remanding a cause to the state court, is not affected, so as to make such an appeal allowable, by Act Cong. March 3, 1891 (26 Stat. 826), allowing appeals or writs of error to the supreme court from the district or circuit courts "in any case in which the jurisdiction of the court is in issue," since the latter act does not make an appeal, or writ of error allowable before the cause has proceeded to final judgment.—Chicago, St. P., M. & O. Ry. Co. v. Roberts, 141 U. S. 690, 12 S. Ct. 123, 35 L. Ed. 905.

Under Act Cong. March 3, 1891, § 5 (26 Stat. 827, 828, 1115), to establish circuit courts of appeal, a case involving the constitutionality of a law of the United States may be taken direct to the supreme court, notwithstanding the appeal was taken after the act took effect.—Horner v. United States, 143 U. S. 570, 12 S. Ct. 522, 36 L. Ed. 266.

Under the judiciary act of March 3, 1891 (26 Stat. 828), in a suit where the jurisdiction of the circuit court depends on diverse citizenship, the only question that can be considered by the supreme court on writ of error to the circuit court is whether or not the circuit court had jurisdiction. McLish v. Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. Ed. 893, followed.—Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 500, 13 S. Ct. 416, 37 L. Ed. 255.

Under the judiciary act of March 3, 1891, providing that, in cases where the jurisdiction of the court below is in issue, that question, and that alone, shall be certified to the supreme court of the United States for decision, the inquiry is limited to the question thus certified.—Passavant v. United States, 148 U. S. 214, 13 S. Ct. 572, 37 L. Ed. 426; The Bayonne, 159 U. S. 687, 16 S. Ct. 185, 40 L. Ed. 305.

To warrant a direct appeal to the supreme court under the first subdivision of the fifth section of the act creating the circuit court of appeals (13 Sup. Ct. xiv.), there must be an issue as to the jurisdiction of the circuit court in the very case in which the appeal is taken; and, where the suit is one to set aside a foreclosure decree, it is not sufficient that there is an issue as to the jurisdiction of the circuit court to enter that decree.—Carey v. Houston & T. O. Ry. Co., 150 U. S. 170, 14 S. Ct. 63, 37 L. Ed. 1041.

The supreme court cannot review a decision of the circuit court on a jurisdictional question, in the absence of a certificate by that court of the question in issue.—Maynard v. Hecht, 151 U. S. 324, 14 S. Ct. 353, 38 L. Ed. 179; Moran v. Hagerman, 151 U. S. 329, 14

S. Ct. 354, 38 L. Ed. 181; Colvin v. City of Jacksonville, 157 U. S. 368, 15 S. Ct. 634, 39 L. Ed. 736; Ansbro v. United States, 159 U. S. 695, 16 S. Ct. 187, 40 L. Ed. 310; Davis v. Geissler, 162 U. S. 290, 16 S. Ct. 796, 40 L. Ed. 972.

Where the jurisdiction of the circuit court is in issue, and the jurisdiction is sustained, but there is a judgment for defendant on the merits, plaintiff must appeal to the circuit court of appeals, which may certify the question of jurisdiction, if it arises in such court.—United States v. Jahn, 155 U. S. 109, 15 S. Ct. 39, 39 L. Ed. 87.

Under Act March 3, 1891, establishing the circuit court of appeals, where the jurisdiction of the circuit court is in issue, and is decided in favor of defendant, plaintiff should have the question certified and appealed directly to the supreme court.—Id.

Where the jurisdiction of the circuit court is in issue, and the jurisdiction is sustained, and there is a judgment for plaintiff on the merits, defendant may elect either to have the question of jurisdiction certified directly to the supreme court, or to carry the whole case to the circuit court of appeals, which may certify such question.—Id.

Where, in an action in the circuit court in which the only question involved is one of jurisdiction, the judgment not only recites that, for reasons filed as part of the order, the court considers it has no jurisdiction, and dismisses it for want of jurisdiction, but the judge certifies, in the bill of exceptions, that it was "held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed," and, in the order allowing a writ of error, certifies that it is allowed on "the question of jurisdiction," there is a sufficient compliance with Judiciary Act March 3, 1891, § 5, which provides that in any cause in which the jurisdiction of the circuit court is in issue the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.—In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 15 S. Ct. 375, 39 L. Ed. 438.

Rev. St. § 1011, as amended by Act Feb. 18, 1875, c. 80, providing that there shall be no reversal in the supreme court "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court," does not prevent review of a decision, even on plea in abatement, of any question of jurisdiction to render judgment against defendant, though depending on the sufficiency of the service of the writ.—Goldey v. Morning News of New Haven, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517, affirming judgment (C. C.) Golden v. Same, 42 F. 112.

Where an appeal is allowed direct from the circuit court to the supreme court on a question of jurisdiction, under section 5 of the judiciary act of March 3, 1891, it is not necessary that, in stating such question, the word "certify" be formally used; and, while no mere suggestion that the jurisdiction of the court was in issue will answer, it is yet sufficient if there is a plain declaration that the single matter which is by the record sent up is a question of jurisdiction, and the precise question is clearly, fully, and separately stated.—Shields v. Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. Ed. 660, following United States v. Jahn, 155 U. S. 109, 15 S. Ct. 39, 39 L. Ed. 87, and In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 15 S. Ct. 375, 39 L. Ed. 438.

A prayer for the allowance of an appeal from the district to the supreme court stated that the appeal was "upon the ground that this court was without jurisdiction to make said decree," but specified no question of jurisdiction, and asked that a transcript of the record, proceedings, and papers upon which said final decree was made should be sent up, as if

the appeal were on the whole case. The judge entered thereon, "Appeal allowed." *Held*, that this was entirely insufficient to answer the purposes of a certificate of jurisdictional questions.—*The Bayonne*, 159 U. S. 687, 16 S. Ct. 185, 40 L. Ed. 305, distinguishing *In re Lehigh Min. & Mfg. Co.*, 156 U. S. 322, 15 S. Ct. 375, 39 L. Ed. 438, and *Shields v. Coleman*, 157 U. S. 168, 15 S. Ct. 570, 39 L. Ed. 660.

An order directing the filing of an assignment of errors, which alleges error of the court below in taking jurisdiction of the cause for reasons therein separately stated, is not equivalent to the certificate of jurisdictional questions required by the act of March 3, 1891, in cases of appeal to the supreme court on the ground that the jurisdiction of the court below was in question, nor a compliance with the statutory provisions in relation to such certificate.—*The Bayonne*, 159 U. S. 687, 16 S. Ct. 185, 40 L. Ed. 305.

Where the record shows that the only matter tried and decided in the circuit court was a demurrer to the plea to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment of the circuit court that it had no jurisdiction of the action, the question of jurisdiction is sufficiently certified for review by the supreme court, as required by Act March 3, 1891, c. 517, § 5.—*Interior Const. & Imp. Co. v. Gibney*, 160 U. S. 217, 16 S. Ct. 272, 40 L. Ed. 401.

The fact that, in an equity proceeding in the federal circuit court, a demurrer to the petition on the ground that a proper and final decree had been made, adjudicating all of the issues in the cause, and that the court had no power to grant the petitioners relief, was sustained, does not so clearly show that the jurisdiction of the circuit court was an issue as to dispense with the necessity of a certificate to that effect to the federal supreme court, as required by Act March 3, 1891, § 5.—*Van Wageningen v. Sewall*, 160 U. S. 369, 16 S. Ct. 370, 40 L. Ed. 460.

Where the allowance of the writ of error is general, and not expressly limited to the question of jurisdiction of the court, and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the "rulings, judgments, and orders" of the court "upon the question of jurisdiction raised in said exceptions, pleas, and demurrers, and the other papers on file in this cause," without defining or indicating any specific question of jurisdiction, there is no such full, clear, and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under Act March 3, 1891, c. 517, § 5.—*Chappell v. United States*, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

The record disclosed that defendants appealed on the express ground that the circuit court "erred in taking jurisdiction, and in not dismissing the bill for want of jurisdiction, and prayed that their appeal be allowed, and the question of jurisdiction be certified to the supreme court, and that said appeal was allowed." The certificate further stated that there was sent a true copy of so much of the record as was necessary to determine the question of jurisdiction, and, "as part of the record so certified," was "the opinion of the court below, in accordance with which the motion to dismiss for want of jurisdiction was denied." *Held*, that it appeared that the appeal was granted solely on the question of jurisdiction, and that hence an express certificate to that effect was not necessary to authorize a review.—*Smith v. McKay*, 161 U. S. 355, 16 S. Ct. 490, 40 L. Ed. 731.

Act March 3, 1891, § 5, providing for the certification to the supreme court of the ques-

tion of jurisdiction of the circuit court, when that is in issue, does not apply when the only question is whether the case was properly brought in equity or at law.—*Id.*

The question whether a district court acquired jurisdiction over the defendant by valid service is one of jurisdiction, and a judgment in which it is involved is reviewable by writ of error directly from the supreme court.—*Shepard v. Adams*, 18 S. Ct. 214, 168 U. S. 618, 42 L. Ed. 602.

After removal of a cause to a federal court, the plaintiff moved to remand because the removal papers were not filed in proper time. His motion was overruled, but at the trial he still insisted that the court was without jurisdiction, and, declining to prosecute the action therein, a final judgment was rendered against him. *Held*, that the question of jurisdiction thus raised was one which might be certified directly to the supreme court, under section 5 of the act of March 3, 1891. Judgment (C. C.) 65 F. 129, affirmed.—*Powers v. Chesapeake & O. Ry. Co.*, 18 S. Ct. 264, 169 U. S. 92, 42 L. Ed. 673.

Under Act 1875, c. 137, § 5 (18 Stat. 472), Act Feb. 25, 1889 (25 Stat. 693), and Act March 3, 1891, § 5 (26 Stat. 826), the supreme court has jurisdiction to review a judgment of the circuit court dismissing a suit because the value of the thing in controversy is less than \$2,000. And if the circuit court, instead of submitting the question of value to the jury itself, determines it upon the evidence and affidavits, the supreme court will review its finding, on the evidence contained in the record.—*Wetmore v. Rymer*, 18 S. Ct. 293, 169 U. S. 115, 42 L. Ed. 682.

Where the record on an appeal shows that the case plainly involves the jurisdiction of a circuit court of the United States to discharge from custody, on a writ of habeas corpus, a prisoner confined under an indictment in a state court, it is immaterial that the certificate does not expressly state the jurisdictional question involved.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

An appeal from a circuit court direct to the United States supreme court, on certificate, from a decree dismissing a bill on the ground that complainant's remedy was at law, and not in equity, cannot be sustained, since such question does not involve the jurisdiction of the circuit court as a federal court, which is the only question presented by such an appeal.—*Blythe v. Hinckley*, 19 S. Ct. 497, 173 U. S. 501, 43 L. Ed. 783, dismissing appeal (C. C.) 84 F. 246.

Nor can it be sustained on the ground that the circuit court dismissed the bill on the ground that the questions involved had been decided by judgments of the state courts, which could not be reviewed, since this was not in itself a decision of want of jurisdiction of the circuit court as a federal court, but a decision that the circuit court was unable to grant relief because of the state court judgments.—*Id.*

A direct appeal from a circuit court to the supreme court of the United States, on the ground that the jurisdiction of the circuit court is in issue, may be sustained when the final decree dismissing a bill and the order allowing the appeal therefrom, as well as the distinct and contemporaneous certificate by the court, show that the only question on which the decree was based was that of jurisdiction.—*Huntington v. Laidley*, 20 S. Ct. 526, 176 U. S. 668, 44 L. Ed. 630.

A sufficient certification of a question of jurisdiction by the circuit court to the supreme court of the United States is not made by an

order allowing an appeal from a decision that a special agent of the land office is entitled to his discharge from the custody of a sheriff, and stating the question whether the court has jurisdiction to discharge him, or whether it should remand him to the custody of the sheriff to be dealt with by the state court, where there is no intimation that the federal court did more than pass upon the merits of the controversy, and the questions merely imply that the court assumed that it had discretion, either to dispose of the case on its merits or to remand the case to the state court and require him to resort to his remedy by writ of error.—*State of Arkansas v. Schlierholz*, 21 S. Ct. 229, 179 U. S. 598, 45 L. Ed. 335.

An appeal from a decree of the circuit court refusing an injunction against the collection of taxes under state laws will not be dismissed, on the ground that the appeal is abortive and improper, because before the appeal was taken the taxes had been held lawful by a state court and had been collected, and therefore the very things the bill was filed to prevent are accomplished facts, and the remedy, if any, should be sought by writ of error to the state court, since the decision of the state court does not affect the jurisdiction on appeal from the federal court, even if it could be held to be res judicata on the merits.—*Illinois Cent. R. Co. v. Adams*, 21 S. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

The action of the circuit court of the United States in striking off as irregular a plea to the jurisdiction which was put upon the files without leave of court is not open to review. Decree 91 F. 574, 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

An appeal from a circuit court of the United States to the supreme court, solely for a review of a decision sustaining the jurisdiction of the circuit court, will be dismissed when that court has rendered a decree for the defendant sustaining a demurrer to the bill "for want of equity, with full reservation of complainant's right to sue and proceed at law," since this decree does not injure the defendant, but sustains its contention, and cannot be reversed at defendant's instance because put upon one, rather than another, of the grounds which defendant alleged.—*City of New Orleans v. Emshimer*, 21 S. Ct. 584, 181 U. S. 153, 45 L. Ed. 794.

A recital, in an order allowing an appeal from a decree of a circuit court, that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction," is a sufficient certificate of the circuit court that the jurisdiction of that court was in issue to warrant a direct appeal to the supreme court. Decree 109 F. 497, 48 C. C. A. 349, reversed.—*Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 22 S. Ct. 681, 185 U. S. 282, 46 L. Ed. 910.

A direct appeal to the supreme court of the United States from a judgment of a district court dismissing a petition in involuntary bankruptcy, entered after directing the jury to find that the alleged bankrupt was engaged chiefly in farming, and was therefore by the express terms of the bankruptcy act not subject to its provisions, cannot be maintained on the theory that the jurisdiction of the district court was drawn in issue within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], especially where no question of jurisdiction was certified by the district court, as required by that section.—*First Nat. Bank v. Klug*, 22 S. Ct. 899, 186 U. S. 202, 46 L. Ed. 1127.

A judgment of the District Court of the United States imposing imprisonment for contempt cannot be reviewed in the Supreme Court

of the United States on writ of error to that court, on the theory that the case is one "in which the jurisdiction of the court is in issue" within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], where jurisdiction over the person and subject-matter was not challenged, and the question asserted in the certificate of the lower court was whether it had jurisdiction to try and punish the defendant for contempt upon the facts and for the causes stated.—*O'Neal v. United States*, 23 S. Ct. 776, 190 U. S. 36, 47 L. Ed. 945.

A plaintiff cannot maintain a direct appeal from the federal Circuit Court to the Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], because the jurisdiction of the lower court was in issue, where that jurisdiction was sustained and a decree rendered in favor of defendants on the merits. Appeal (C. C.) 112 F. 574, dismissed.—*Anglo-American Provision Co. v. Davis Provision Co.*, 24 S. Ct. 93, 191 U. S. 376, 48 L. Ed. 228.

The question whether a federal Circuit Court, under the principles of equity and comity governing all courts having concurrent jurisdiction over the same subject-matter, has authority to administer a trust estate after a suit with reference thereto has been begun in a state court, does not involve the jurisdiction of the Circuit Court as a federal tribunal, which alone, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], can furnish ground for a direct appeal to the federal Supreme Court as a case in which "the jurisdiction of the court is in issue."—*Louisville Trust Co. v. Knott*, 24 S. Ct. 119, 191 U. S. 225, 48 L. Ed. 159, dismissing appeal (C. C.) *Knott v. Evening Post Co.*, 124 F. 342, which is reversed *Louisville Trust Co. v. Knott*, 130 F. 820, 65 C. C. A. 158, writ of certiorari denied *Knott v. Louisville Trust Co.*, 25 S. Ct. 789, 195 U. S. 631, 49 L. Ed. 353.

A suit in which the jurisdiction of a United States Circuit Court was only questioned under the established rules of practice as to bringing in parties to ancillary or pro interesse suo proceedings, and those governing courts of concurrent jurisdiction as between themselves, does not involve a question of jurisdiction which, under Act March 3, 1891, c. 517, § 5, 26 Stat. 826 [U. S. Comp. St. 1901, p. 549], may be certified directly to the federal Supreme Court.—*Bache v. Hunt*, 24 S. Ct. 547, 193 U. S. 523, 48 L. Ed. 774.

The record does not show an equivalent of the certificate of jurisdiction required to sustain a direct review in the federal Supreme Court of a judgment of the Circuit Court which had dismissed a complaint for want of jurisdiction, where the assignment of errors is directed both to the jurisdiction and the merits, and the petition for the writ of error, which was allowed generally and without any limitation or specification, prays for a review to the end that the rulings and judgment of the court may be reversed. Judgment (C. C.) 119 F. 974, affirmed.—*Filhiol v. Torney*, 24 S. Ct. 698, 194 U. S. 356, 48 L. Ed. 1014.

A direct appeal from a federal District Court to the Supreme Court cannot be maintained, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], because the jurisdiction of the lower court was questioned, unless it was the jurisdiction of that court as a court of the United States that was in issue, and that question is certified to the appellate court.—*Schweer v. Brown*, 25 S. Ct. 15, 195 U. S. 171, 49 L. Ed. 144.

The objection that an attachment suit in aid of an action at law was not cognizable

in a federal circuit court, to which it had been removed from the state court for diversity of citizenship, because the proceeding was equitable in form, is not open to consideration by a direct appeal to the federal Supreme Court, which is sought to be maintained under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], as a case in which the jurisdiction of the circuit court was in issue.—*Courtney v. Pradt*, 25 S. Ct. 208, 196 U. S. 89, 49 L. Ed. 398.

The denial of a motion to remand a cause which has been removed from the state court to a federal circuit court does not so present the question of that court's jurisdiction as to sustain a direct appeal to the federal Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], where such motion did not, in terms, put in issue the power of the circuit court as a court of the United States to hear and determine the cause.—*Id.*

The dismissal by a federal circuit court of a suit against a foreign executor for the want of jurisdiction in the state court, from which it had been removed for diversity of citizenship, does not present a question of the jurisdiction of the circuit court as a federal court, which will authorize a direct appeal under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], to the federal Supreme Court.—*Id.*

The jurisdiction of the court below as a federal court was so involved as to sustain a direct review, in the Supreme Court of the United States, of a federal Circuit Court judgment dismissing an action which had been removed from the state court, where the ground of the judgment was lack of a valid service of process on the defendant, and the plaintiff had moved to remand the cause.—*Remington v. Central Pac. R. Co.*, 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

Evidence bearing on the question of the citizenship of the respective parties to a suit in a federal Circuit Court must be examined on appeal by the Supreme Court of the United States, although the motion to dismiss for lack of jurisdiction in the court below did not distinctly aver the absence of diverse citizenship, but merely charged that the parties were residents of the same state, where the Circuit Court treated the question of jurisdiction as raised, and passed upon it.—*Steigler v. McQuesten*, 25 S. Ct. 618, 198 U. S. 141, 49 L. Ed. 986.

The question of the validity of the service of process of a federal Circuit Court on certain persons as the agents of a foreign corporation involves the jurisdiction of that court so as to sustain a direct appeal to the Supreme Court of the United States under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], from a decree dismissing the bill for lack of valid service.—*Board of Trade of City of Chicago v. Hammond Elevator Co.*, 25 S. Ct. 740, 198 U. S. 424, 49 L. Ed. 1111.

The question of the validity of the service of a subpoena issued by a federal Circuit Court upon the resident treasurer of a foreign corporation involves the jurisdiction of that court as a federal court so as to sustain a direct appeal to the Supreme Court of the United States, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], from an order setting aside the service.—*Kendall v. American Automatic Loom Co.*, 25 S. Ct. 768, 198 U. S. 477, 49 L. Ed. 1133.

The question of the jurisdiction of a federal Circuit Court is sufficiently certified to sustain a writ of error from the Supreme Court, under Act March 3, 1891, c. 517, § 5, 26

Stat. 827 [U. S. Comp. St. 1901, p. 549], irrespective of any irregularity in the bill of exceptions or formal certificate, where the judgment dismissing the action and the prior proceedings clearly exhibit the ground on which the judgment was based, and make apparent on the record the fact that the only matters tried and decided were demurrers to pleas to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court was without jurisdiction.—*Petri v. F. E. Creelman Lumber Co.*, 26 S. Ct. 133, 199 U. S. 487, 50 L. Ed. 281.

In deciding the question of the jurisdiction below which is shown by the certificate of the federal Circuit Court to have been raised, the Supreme Court cannot resort to the statements in the certificate for the purpose of supplying elements of decision which it could not properly consider in an action at law without a bill of exceptions.—*C. H. Nichols Lumber Co. v. Franson*, 27 S. Ct. 102, 203 U. S. 278, 51 L. Ed. 181.

The certificate of a federal Circuit Court may be considered by the Supreme Court on the direct review authorized by Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488], for the purpose of supplying the failure of the record to show when and how the question of jurisdiction was raised, if the elements necessary to decide the question are in the record, although it is the better practice to make apparent on the record, by a bill of exceptions or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based.—*Id.*

The failure of the certificate of a federal Circuit Court to show the exact nature of the jurisdictional question relied upon to sustain a direct appeal to the Supreme Court does not defeat the jurisdiction of the latter court, where an examination of the record, aided by the opinion of the circuit court, contained therein and made part thereof, distinctly shows the nature of the question of jurisdiction passed upon. *Decree, Mills v. City of Chicago* (C. C. 1906) 143 F. 430, affirmed.—*City of Chicago v. Mills*, 27 S. Ct. 286, 204 U. S. 321, 51 L. Ed. 504.

A case cannot be brought up to the Supreme Court of the United States by direct appeal from a federal circuit court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 488], as one in which the jurisdiction of the court is in issue, where the jurisdiction challenged is not that of the court rendering the decree from which the appeal is taken, but is that of the court which rendered a former decree, which is set up in the bill as the basis of the title in suit.—*Empire State-Idaho Mining & Developing Co. v. Hanley*, 27 S. Ct. 476, 205 U. S. 225, 51 L. Ed. 779.

A writ of error from the federal Supreme Court to a Circuit Court, authorized by Act March 3, 1891, c. 517, § 5, 30 Stat. 827 [U. S. Comp. St. 1901, p. 549], when the jurisdiction of the lower court is in issue, cannot be maintained because of a question as to the jurisdiction of that court in respect to its general authority as a judicial tribunal, or its power as a court of equity.—(1908) *Bien v. Robinson*, 28 S. Ct. 379, 208 U. S. 423, 52 L. Ed. 556, dismissing writ of error (C. C. 1906) *Bowker v. Haight & Freese Co.*, 146 F. 257.

A judgment of a federal District Court, dismissing, for want of a lawful seizure in the district, an information for the forfeiture of certain jewels alleged to have been smuggled into the United States, does not present a question respecting the jurisdiction of that court as a federal court, which is essential to sustain the direct writ of error from the Supreme Court

of the United States authorized by Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), when the jurisdiction of the lower court is in issue.—*United States v. Larkin*, 28 S. Ct. 417, 208 U. S. 333, 52 L. Ed. 517.

The ground of the action of a federal Circuit Court in dismissing a bill, as recited in the certificate presenting a question of jurisdiction, will be accepted by the Supreme Court on appeal, where a different course requires an assumption of inconsistency between the lower court's opinion and order of dismissal and such certificate.—*Scully v. Bird*, 28 S. Ct. 597, 209 U. S. 481, 52 L. Ed. 899.

Whether the bill presents a case for equitable relief or not does not involve a question of the jurisdiction of a federal Circuit Court as a federal court, so as to sustain a direct appeal to the Supreme Court.—*Id.*

The objection that a Federal circuit court to which a suit has been removed from a state court was without jurisdiction because the removal was improper is not open on a direct appeal to the Supreme Court, presenting the question of the jurisdiction of the circuit court, where the record and certificate show that the jurisdiction of that court was denied on the single ground that the state court where the proceedings started was without jurisdiction.—(1908) *Kansas City Northwestern R. Co. v. Zimmerman*, 28 S. Ct. 730, 210 U. S. 336, 52 L. Ed. 1084, dismissing appeal (1906) *Zimmerman v. Kansas City N. W. R. Co.*, 144 F. 622, 75 C. C. A. 424.

The contention that a Federal circuit court has no jurisdiction of a suit founded on a decree of that court because the state court from which the suit was removed was without jurisdiction does not present a question of the jurisdiction of the circuit court as a Federal court, so as to sustain a direct appeal to the Supreme Court, on the ground that the jurisdiction of the circuit court was in issue.—*Id.*

A defendant which, on an appeal to a circuit court of appeals from a decree of a Federal circuit court sustaining a demurrer to a bill on the ground of want of jurisdiction of the state court from which the case was removed, does not insist upon the jurisdictional objection, but takes its chances on the merits, stands in no better position, so far as its right to appeal to the Supreme Court from a decree of the circuit court, entered pursuant to the direction of the circuit court of appeals, is concerned, than if it had itself taken the appeal to that court.—*Id.*

A bill of exceptions is not essential to a writ of error from the federal Supreme Court to a District Court, presenting the sole question of the jurisdiction of the latter court, where it can add nothing to what is apparent on the face of the record. Judgment (D. C. 1903) *In re Frederic L. Grant Shoe Co.*, 125 F. 578, affirmed.—*Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 29 S. Ct. 332, 212 U. S. 445, 53 L. Ed. 591.

The decision below, even on a question of fact, may, if clearly erroneous, be set aside by the federal Supreme Court on a direct writ of error sued out to a Circuit Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), to review a case in which the question of jurisdiction alone is involved, and which is duly certified for decision.—*Commercial Mut. Accident Co. v. Davis*, 29 S. Ct. 445, 213 U. S. 245, 53 L. Ed. 782.

The absence of a certificate of the question of jurisdiction is not fatal to the right to maintain a direct appeal from a federal District Court to the Supreme Court, where, upon the face of the record, aside from the recitals in the order made on the allowance of the appeal, it is apparent that the only question which was decided below was one of jurisdiction, and

the decree appealed from on its face shows that the cause was dismissed for want of jurisdiction. Decree, *The Jefferson* (D. C. 1908) 158 F. 358, reversed.—*Simmons v. The Jefferson*, 30 S. Ct. 54, 215 U. S. 130, 54 L. Ed. 125, 17 Ann. Cas. 907.

The jurisdiction of a federal District Court of the United States was in issue so as to sustain a direct appeal to the federal Supreme Court, where the exceptions to a libel and intervening petition claiming salvage for services rendered to a vessel on fire in a dry dock challenged the jurisdiction because, from the situation of the vessel, the place where the services were rendered, and their nature and character, they afforded no basis for the jurisdiction of the court as a court of admiralty of the United States, and this was the conception upon which that court acted in dismissing such libel and intervening petition.—*Id.*

The contention that there was no valid service of process upon a foreign corporate defendant in a suit removed by it from a state to a federal court, because the corporation was not doing business in the state, and the person attempted to be served was not its agent at that time, involves the jurisdiction of the latter court as a federal court, so as to sustain a direct review of the judgment of that court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), by writ of error from the federal Supreme Court.—*Mechanical Appliance Co. v. Castleman*, 30 S. Ct. 125, 215 U. S. 437, 54 L. Ed. 272.

The question of the jurisdiction of the federal Circuit Court must be regarded as fairly presented, so as to sustain a writ of error from the federal Supreme Court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), despite the indefiniteness of the allegations of the plea to the jurisdiction, where the certificate below states that the defendant raised by such plea the objections that it was a foreign corporation not doing business in the state, and that the person attempted to be served was not its agent at the time, and shows that the court did not consider the affidavits which the bill of exceptions states were filed, but overruled the plea on the sole ground that the facts stated in the return of the sheriff to the summons were conclusive, and also recites that when the case was filed for trial the same objection was made and overruled for the same reason.—*Id.*

The jurisdiction of a federal Circuit Court as a federal court is so involved as to sustain a direct writ of error from the federal Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), in a judgment dismissing the suit on the ground of the invalidity of the attachment and garnishment of the property of the nonresident defendant, and upon the lack of a general appearance by such defendant.—*Davis v. Cleveland, C. C. & St. L. Ry. Co.*, 30 S. Ct. 463, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

The jurisdiction of the federal Supreme Court of a direct appeal from a decree of a federal District Court sitting as a court of admiralty, which dismissed a libel for contribution in favor of a joint wrongdoer who had paid a judgment recovered against him in a suit at common law, founded on the wrong, to which the other wrongdoer was not made a party, cannot be defeated on the theory that the dismissal, although expressed to be for want of jurisdiction, is really upon the merits, because payment of a judgment at common law is not a ground for contribution from a wrongdoer not a party to the suit.—(1910) *Lehigh Valley R. Co. v. Cornell Steamboat Co.*, 31 S. Ct. 17, 218 U. S. 264, 54 L. Ed. 1039, 20 Ann. Cas. 1235, reversing decree *The Ira M. Hedges* (D. C. 1908) 163 F. 587.

The question whether a federal Circuit Court, in a suit in which the requisite diversity of citizenship exists may enforce a cause of action based on a state statute alleged to be penal in its nature does not involve the jurisdiction of the court as a federal court, which alone can support a direct writ of error from the federal Supreme Court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), as a case in which the jurisdiction of the Circuit Court was in issue.—*Fore River Shipbuilding Co. v. Hagg*, 31 S. Ct. 185, 219 U. S. 175, 55 L. Ed. 163.

The ruling of the District Court in a proceeding under Food and Drugs Act, § 10, imposing costs on the claimant, where the court has jurisdiction of the person as well as the res, may be considered as a question of construction of the statute, and not one of jurisdiction, reviewable by the Supreme Court.—*Hipolite Egg Co. v. United States*, 31 S. Ct. 364, 220 U. S. 45, 55 L. Ed. 364.

The objection that an action brought by the United States against the principal and sureties on the bond of a public contractor, given conformably to Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), for his failure to pay certain designated subcontractors for labor and materials used in construction, should, under such statutes, when rightly construed, have been brought in the federal Circuit Court for the district wherein the contract was to be performed, instead of in the court for the district where the defendants reside, raises a question of the jurisdiction of the Circuit Court which will sustain a direct writ of error from the federal Supreme Court.—*United States v. Congress Const. Co.*, 32 S. Ct. 44, 222 U. S. 199, 56 L. Ed. 163.

A direct appeal will not lie to the federal Supreme Court under Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 488), to review, as presenting a question of jurisdiction, a decree of a Circuit Court entered pursuant to the mandate of a circuit court of appeals, which, being of the opinion that the bill was within the ancillary jurisdiction of the Circuit Court, had reversed a decree of that court dismissing such bill for want of jurisdiction, since there was an opportunity afforded by the statute to obtain a review of the jurisdictional question in the Supreme Court, either upon a certificate of the Circuit Court of Appeals, or on writ of certiorari to that court.—*Brown v. Alton Water Co.*, 32 S. Ct. 156, 222 U. S. 325, 56 L. Ed. 221.

The federal Supreme Court cannot review a decree of federal Circuit Court dismissing a bill in aid of an attempt to remove condemnation proceedings from a state court, which decree was necessitated by a mandate of the Circuit Court of Appeals, there being opportunity to review the jurisdictional question, either on a certificate of the Circuit Court of Appeals, or on certiorari to that court.—*Metropolitan Water Co. v. Kaw Valley Drainage Dist. of Wyandotte County, Kan.*, 32 S. Ct. 246, 223 U. S. 519, 56 L. Ed. 533.

A decree of a federal circuit court sustaining a plea to the jurisdiction may be brought to the federal Supreme Court under Act March 3, 1891, § 5, by direct appeal, where issues of fact as to whether the corporate defendant was doing business in the state, and whether the person served was agent, were presented.—*Herdon-Carter Co. v. James N. Norris, Son & Co.*, 32 S. Ct. 550, 224 U. S. 496, 56 L. Ed. 857.

A decree showing dismissal for want of jurisdiction takes the place of the certificate required by Act March 3, 1891, § 5, governing

the direct review in the federal Supreme Court of decrees of the Circuit Court.—Id.

The direct appeal from the federal Circuit Court to the Supreme Court, where the lack of a certificate of jurisdiction is supplied by a decree showing dismissal for want of jurisdiction, may be perfected after the term, if within two years from the decree.—Id.

Dismissal of a bill filed against nonresident aliens in a federal Circuit Court because complaint did not establish the fact that the property to be affected was within the district, as contemplated by Act March 3, 1875, § 8, involves a question as to the power of the federal court, reviewable by direct appeal to the Supreme Court.—*Chase v. Wetzlar*, 32 S. Ct. 659, 225 U. S. 79, 56 L. Ed. 990.

The lack of a certificate of jurisdiction is not fatal to an appeal from the decree of a Circuit Court which necessarily decided constitutional questions raised in the bill.—*Railroad Commission of the State of Mississippi v. Louisville & N. R. Co.*, 32 S. Ct. 756, 225 U. S. 272, 56 L. Ed. 1087.

Issue of jurisdiction of federal Circuit Court is open on appeal to the Supreme Court from a decree which necessarily decided constitutional questions.—Id.

Dismissal by a federal Circuit Court of an action by a domestic corporation to recover from nonresident railway companies the excess over reasonable freight rate, because the declaration did not aver that Interstate Commerce Commission had sustained plaintiff's right to reparation, does not present the question of jurisdiction of that court as a federal court.—*R. J. Darnell v. Illinois Cent. R. Co.*, 32 S. Ct. 760, 225 U. S. 243, 56 L. Ed. 1072.

The absence of a formal certificate does not defeat an appeal to the federal Supreme Court from a decree of a Circuit Court, based solely on the question of jurisdiction, the decree being pro confesso, after defendant had filed a plea to the jurisdiction.—*The Fair v. Kohler Die & Specialty Co.*, 33 S. Ct. 410, 228 U. S. 22, 57 L. Ed. 716.

A decree of a federal Circuit Court on removal from a state court, dismissing the suit for defect of parties, unaffected by Rev. St. U. S. § 737 (U. S. Comp. St. 1901, p. 587), or Equity Rule 47 (29 Sup. Ct. xxxi), where a certain nonresident corporation had not been served, does not present any question of jurisdiction which, under Act March 3, 1891, § 5, will sustain appeal to the federal Supreme Court.—*Bogart v. Southern Pac. Co.*, 33 S. Ct. 497, 228 U. S. 137, 57 L. Ed. 768, dismissing appeal (C. C.) *Lawrence v. Southern Pac. Co.*, 180 F. 822.

The jurisdiction of the federal Circuit Court was in issue in a suit by a shipper under Act Feb. 4, 1887, §§ 8, 9, to recover damages from a carrier for rebates to other shippers, so as to support a direct writ of error from the federal Supreme Court, where the lower court dismissed it because of the lack of previous action by the Interstate Commerce Commission.—*Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 33 S. Ct. 916, 230 U. S. 247, 57 L. Ed. 1472, modifying judgment (C. C.) 183 F. 908.

A direct writ of error will not lie from the federal Supreme Court under Judicial Code, § 238, to the District Court, to review a conviction for introducing intoxicating liquors into Indian territory, where the grounds on which the jurisdiction was challenged are not disclosed by the record and no constitutional or treaty question is involved.—*Pronovost v. United States*, 34 S. Ct. 391, 232 U. S. 487, 58 L. Ed. 696.

A judgment of compulsory nonsuit in an action in a federal District Court under the Employers' Liability Act April 22, 1908, on the ground that the evidence does not show that plaintiff, when injured, was engaged in interstate commerce, does not present a question as to the power of that court to determine the case which is essential under Judicial Code, § 238 (Act March 3, 1911, c. 231, 36 Stat. 1157 [U. S. Comp. St. Supp. 1911, p. 228]), to sustain a direct writ of error from the federal court sued out on the ground that jurisdiction below was in issue.—*Farrugia v. Philadelphia & R. Ry. Co.*, 34 S. Ct. 591, 233 U. S. 352, 58 L. Ed. 996.

A question of jurisdiction below is inadequate to sustain a direct writ of error from the federal Supreme Court to a District Court, where such writ brings up the whole case, and not the question of jurisdiction, as provided by Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (U. S. Comp. St. Supp. 1911, p. 228), and there is no certificate as to jurisdiction as required by that section.—*Apapas v. United States*, 34 S. Ct. 704, 233 U. S. 587, 58 L. Ed. 1104.

A judgment of a District Court held reviewable in the Supreme Court under Judicial Code, § 238, where the controversy must have been understood to involve the jurisdiction of the District Court, as the court on this issue dismissed the action.—*United States, for Use of Alexander Bryant Co., v. New York Steam Fitting Co.*, 35 S. Ct. 108, 235 U. S. 327, 59 L. Ed. 253.

Whether causes of action eliminated from a suit in a federal District Court against the non-resident defendant may be retained as against other defendants is not a question of federal jurisdiction within Judicial Code, § 238, but is one of equity jurisdiction applicable to state and federal courts.—*Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 35 S. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

Questions of jurisdiction of the federal District Court, depending on the district of residence, are, when decided below, questions of federal jurisdiction, which may be brought to the Supreme Court under Judicial Code, § 238, by direct appeal.—*Male v. Atchison, T. & S. F. R. Co.*, 36 S. Ct. 351, 240 U. S. 97, 60 L. Ed. 544.

The jurisdiction of a federal District Court is involved so as to sustain a direct appeal to the federal Supreme Court under Judicial Code, § 238, where orders are made quashing substituted service of process against the representative of a nonresident within the district, and setting aside all proceedings based thereon.—*G. & C. Merriam Co. v. Saalfeld*, 36 S. Ct. 477, 241 U. S. 22, 60 L. Ed. 868.

385 (5). *Construction or application of Constitution of United States.*

The fact that the circuit court directs the jury to return a verdict for one of the parties does not entitle the opposite party to bring the case direct to the supreme court, on the ground that he was deprived of the right of trial by jury, and that, therefore, the case "involves the construction or application of the constitution of the United States."—*C. A. Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 674, 15 S. Ct. 718, 39 L. Ed. 853.

A plea in abatement on the ground that the parties were "improperly or collusively" joined for the purpose of making a case cognizable in the federal courts, in the meaning of Act March 3, 1875, § 3, raises no issue involving the construction or application of the constitution, so as to make the case appealable directly from the circuit court to the supreme court, under Act March 3, 1891, § 5.—*Merritt v. President, etc., of Bowdoin College*, 18 S. Ct. 415, 169 U. S. 551, 42 L. Ed. 850, dismissing appeal President,

etc., of Bowdoin College v. Merritt (C. C.) 59 F. 6.

The question whether or not the constitution of the United States allows regulations of the treasury department adopted by merely executive officers to be regarded as having the force of law is one that involves the construction or application of the constitution of the United States, within the meaning of the provision of the act of congress of March 3, 1891, with respect to appeals to be taken from the district or circuit courts direct to the supreme court of the United States. Judgment, *In re Comingore* (D. C.) 96 F. 552, affirmed.—*Boske v. Comingore*, 20 S. Ct. 701, 177 U. S. 459, 44 L. Ed. 846.

The constitutional objection that a sentence of an army court-martial imposed a double punishment for the same offense can hardly be deemed to be raised in a United States circuit court, so as to authorize a direct appeal to the supreme court of the United States, by a bare averment in a petition for a writ of habeas corpus that, petitioner having suffered the punishment of dismissal and of publication, his "imprisonment is without authority of law," and his further punishment and detention "and the carrying out of said sentence is contrary to law and to the provision of the constitution of the United States, and is illegal."—*Carter v. Roberts*, 20 S. Ct. 713, 177 U. S. 496, 44 L. Ed. 861, dismissing appeal *In re Carter* (C. C.) 97 F. 496.

A criminal case may be taken directly from a circuit court to the supreme court of the United States under Act Cong. March 3, 1891 (26 Stat. 826, c. 517), although it is not a case of conviction of a capital crime, where it involves the construction or application of the constitution of the United States.—*Motes v. United States*, 20 S. Ct. 993, 178 U. S. 458, 44 L. Ed. 1150.

The right to vote for members of the congress of the United States has its foundation in the constitution of the United States, and therefore a case involving the question may be brought directly from the circuit court to the supreme court, under Act Cong. March 3, 1891, c. 517, § 5, cl. 4, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549].—*Wiley v. Sinkler*, 21 S. Ct. 17, 179 U. S. 58, 45 L. Ed. 84.

A constitutional question which will give jurisdiction to the supreme court of the United States on appeal from a circuit court is not presented by a record which does not show that the question was presented to the court below, and merely shows that the question is contained in an assignment of errors made for the purposes of the appeal.—*State of Arkansas v. Schlierholz*, 21 S. Ct. 229, 179 U. S. 598, 45 L. Ed. 335.

A contention that by the sentence of an army court-martial the accused was twice punished for the same offense is so raised as to authorize a direct appeal to the supreme court of the United States from an order of a circuit court discharging a writ of habeas corpus, as a case involving the construction and application of the constitution of the United States, where such contention was put forward in the petition and was argued on the return. Order (C. C.) 105 F. 614, affirmed.—*Carter v. McClaughry*, 22 S. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

A suit which involves the consideration of questions relating to the power of Congress, under the Constitution, over the navigable waters of the United States, is one which involves the construction or application of the federal Constitution, within the meaning of Act March 3, 1891, 26 Stat. 827, c. 517 [U. S. Comp. St. 1901, p. 549], authorizing direct appeals from a Circuit Court to the Supreme

Court of the United States.—*Cummings v. City of Chicago*, 23 S. Ct. 472, 188 U. S. 410, 47 L. Ed. 525; *Calumet Grain & Elevator Co. v. Same*, 23 S. Ct. 477, 188 U. S. 431, 47 L. Ed. 532.

The record, and not a certificate of the trial judge, furnishes the basis for determining whether the suit is one which involves the construction or application of the Constitution of the United States, within the meaning of Judiciary Act March 3, 1891, c. 517, § 5, 26 Stat. 826 [U. S. Comp. St. 1901, p. 549], authorizing the taking of appeals or writs of error in such cases from District or Circuit Courts of the United States direct to the Supreme Court.—*Cosmopolitan Min. Co. v. Walsh*, 24 S. Ct. 489, 193 U. S. 460, 48 L. Ed. 749.

The contention by a foreign corporation that the rendition of certain judgments in the state courts, sought to be introduced in evidence against it, was without due process of law, does not make the suit one involving the construction or application of the federal Constitution within the meaning of the provisions of Judiciary Act March 3, 1891, c. 517, § 5, 26 Stat. 826 [U. S. Comp. St. 1901, p. 549], for a direct review of a federal Circuit Court judgment in the Supreme Court, where this claim is based solely upon the theory that, under the circumstances, the service of process in the suits in the state courts upon the corporation's designated agent was unauthorized either by the state Constitution and laws or the principles of general jurisprudence.—*Id.*

A cross appeal to review only the non-federal questions decided against the defendant may be taken directly to the federal Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], from a decree of the Circuit Court in a case in which jurisdiction was invoked both because of diverse citizenship and on constitutional grounds, where the complainant has appealed from so much of the decree as denied his prayer for relief on the federal grounds alleged. Decree (C. C.) 117 F. 925, modified.—*Field v. Barber Asphalt Pav. Co.*, 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

The application of the due process of law clause of Const. U. S. Amend. 5, is involved so as to sustain a direct appeal to the federal Supreme Court from a Circuit Court, where the latter court gave effect, as *res judicata*, to the judgment of a state court which is claimed unlawfully to have deprived the parties of their property under the forms of law, without any judicial finding of the vital fact, which alone could justify such deprivation. Decree (C. C.) *The Fayerweather Will Cases*, 118 F. 943, affirmed.—*Fayerweather v. Ritch*, 25 S. Ct. 58, 195 U. S. 276, 49 L. Ed. 193.

A question respecting an alleged privilege or freedom from arrest as a United States senator, under Const. U. S. art. 1, § 6, is one involving the construction and application of the federal Constitution, which will sustain a writ of error from the federal Supreme Court to review a conviction in a district court. Judgment (D. C.) *United States v. Burton*, 131 F. 552, reversed.—*Burton v. United States*, 25 S. Ct. 243, 196 U. S. 283, 49 L. Ed. 482.

A case which involves the application of the Constitution of the United States, and is therefore the subject of a direct appeal from a Circuit Court to the Supreme Court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], is presented by a bill in equity which alleges that a contract right of a waterworks company, with whose predecessors a municipality, with legislative sanction, contracted for a municipal water sup-

ply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on a contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 26 S. Ct. 660, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

A case in which the contention is made that the decree which is the basis of suit is void as violating the right, under the federal Constitution, to a jury trial and to due process of law, does not involve the construction or application of such Constitution, within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 488], authorizing direct appeals from the Circuit or District Courts to the federal Supreme Court, where the real issue as to such prior decree was whether it was *res judicata* between the parties, or, as is contended by the appellants, was rendered without jurisdiction.—*Empire State-Idaho Mining & Developing Co. v. Hanley*, 27 S. Ct. 476, 205 U. S. 225, 51 L. Ed. 779.

The contention that the constitutional privilege of a congressman from arrest embraces arrest and punishment for a criminal offense while Congress is not in session is not so frivolous as not to sustain a direct writ of error from the Supreme Court of the United States to a circuit court.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

A writ of error from the federal Supreme Court to review the conviction of a congressman in a circuit court, presenting a question respecting his alleged constitutional privilege from arrest, will not be dismissed because the Congress of which the accused was a member has ceased to exist, since, even if the question has thus become a mere abstraction, jurisdiction of the writ of error depends upon the existence of a constitutional question when the writ was sued out, and carries with it the duty of reviewing the whole case.—*Id.*

Habeas corpus proceedings on behalf of a person whose interstate extradition is sought pursuant to the Federal Constitution and laws, and who contends that his detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of Const. U. S. art. 4, § 2, par. 2, regulating extradition, involve the construction of the Constitution of the United States, within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488], governing direct appeals from the circuit courts to the Supreme Court. Judgment, *Ex parte Pierce* (C. C. 1907) 155 F. 663, affirmed.—*Pierce v. Creecy*, 28 S. Ct. 714, 210 U. S. 387, 52 L. Ed. 1113.

A contention by importers that the treasury regulations respecting the polariscopic test for sugar assumed to add something to the dutiable standard prescribed by Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], and that the Secretary of the Treasury thus exercised legislative power confided by the Constitution solely to Congress, does not constitute a real and substantial dispute or controversy concerning the construction or application of the federal Constitution within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], so as to sustain a direct appeal from a federal Circuit Court to the Supreme Court.—*American Sugar Refining Co. of New York v. United States*, 29 S. Ct. 89, 211 U. S. 155, 53 L. Ed. 129.

A decision on the merits may be had in the federal Supreme Court on a direct appeal taken under Act March 3, 1891, c. 517, 26 Stat. 827, c. 517 (U. S. Comp. St. 1901, p. 488) § 5, in a case involving a question under the federal Constitution, although the Circuit Court dismissed the case for want of jurisdiction, and has certified the question of jurisdiction alone to the Supreme Court for decision. Decree (C. C. 1907) 151 Fed. 120, modified.—*North American Cold Storage Co. v. City of Chicago*, 29 S. Ct. 101, 211 U. S. 308, 53 L. Ed. 195, 15 Ann. Cas. 276.

The construction of the federal Constitution is not involved so as to sustain a direct appeal to the federal Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), from a decree of a Circuit Court enjoining state gaugers from proceeding under Acts La. 1904, p. 201, Act No. 80, to gauge coal except as to coal sold or intended for sale by boat or barge loads or some aliquot part thereof, unless there is a question as to the relation between some provision of the federal Constitution and the state statute.—*Knop v. Monongahela River Consol. Coal & Coke Co.*, 29 S. Ct. 188, 211 U. S. 485, 53 L. Ed. 294.

An order of a federal District Court denying relief by habeas corpus to a person convicted in a United States court for the Indian Territory is not reviewable in the federal Supreme Court as involving the construction of the federal Constitution, where the allegation in the petition that the accused was deprived of his liberty without due process of law was based entirely upon the supposed want of jurisdiction in the court where the conviction was had over an offense committed during the interim between the passage of the Oklahoma enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), and the admission of the state into the Union, which is a question involving the construction, and not the constitutionality, of the enabling act.—*Childers v. McClaghry*, 30 S. Ct. 370, 216 U. S. 139, 54 L. Ed. 420.

The question of the accused's constitutional right to a speedy trial is not so involved as to give the federal Supreme Court jurisdiction of a writ of error to a District Court, where the latter court has permitted the entry of a nolle prosequi.—*Lewis v. United States*, 30 S. Ct. 438, 216 U. S. 611, 54 L. Ed. 637.

A judgment of a federal Circuit Court discharging a writ of habeas corpus to inquire into a detention under an order committing a district attorney for contempt in refusing to obey an order directing him to return to the owners certain books and papers in his possession is not reviewable in the federal Supreme Court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), as involving a federal question, although the reason assigned for the order for the return of the books and papers was that they had been seized in violation of constitutional rights.—*Wise v. Henkel*, 31 S. Ct. 599, 220 U. S. 556, 55 L. Ed. 581.

A decree of a federal District Court in a suit in which it was claimed that a municipal ordinance imposing license fees for the use of the city streets by a water distributing system is in contravention of the Federal Constitution is one which, under Act March 3, 1891, § 5, may be reviewed by writ of error from the federal Supreme Court.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 33 S. Ct. 997, 230 U. S. 84, 57 L. Ed. 1400.

Jurisdiction of the federal Supreme Court on writ of error to review a decision of a federal District Court, where a constitutional question is involved, extends to every other question arising in the case.—*Id.*

A ruling against defendant below on a non-federal question may be brought up for review

by a cross-writ of error, where a plaintiff below has sued out on constitutional grounds a direct writ of error to a District Court.—*Id.*

A direct appeal from a federal District Court to the Supreme Court cannot be maintained on the theory that rights under the federal Constitution were involved, where the constitutional questions have been twice decided by such court to be so wanting in merit as to afford no jurisdiction.—*De Gallard de Brassac de Bearn v. Safe Deposit & Trust Co. of Baltimore*, 34 S. Ct. 584, 233 U. S. 24, 58 L. Ed. 833, dismissing appeal 196 F. 981.

The admission over objection of evidence as to an admission of accused does not affect his constitutional right to protection against compulsory self-crimination, which, under Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (U. S. Comp. St. Supp. 1911, p. 228), will sustain writ of error from the federal Supreme Court to review the conviction, where no reference to the Constitution was made when the objection was raised.—*Apapas v. United States*, 34 S. Ct. 704, 233 U. S. 587, 58 L. Ed. 1104.

A case otherwise within the jurisdiction of a federal District Court, and reviewable in a Circuit Court of Appeals, is not one which may come direct to the Supreme Court under Judicial Code, § 247, as involving construction of the Constitution of the United States, because the question arose as to the effect on a railroad construction contract of a subsequent change of decision in the state courts holding that contractors were not included in the local mechanics' lien law.—*Moore-Mansfield Const. Co. v. Electrical Installation Co.*, 34 S. Ct. 941, 234 U. S. 619, 58 L. Ed. 1508.

Federal Supreme Court cannot take jurisdiction of writ of error of District Court on theory that construction of federal Constitution was involved in decision that Congressman is an officer of the United States within Cr. Code, § 32.—*Lamar v. United States*, 36 S. Ct. 255, 240 U. S. 60, 60 L. Ed. 526.

385 (6). *Constitutionality of act of Congress or validity or construction of treaty.*

Where an appeal or writ of error is taken direct to the supreme court under Act Cong. March 3, 1891, § 5, in a case in which the constitutionality of a law of the United States is drawn in question, the court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States.—*Horner v. United States*, 143 U. S. 570, 12 S. Ct. 522, 36 L. Ed. 286.

The fact that a party, in stating his claim of title, alleges that he will rely on certain written evidences of title, enumerating among them a treaty between the United States and a foreign country, and also the fifth amendment to the federal Constitution, will not give the Supreme Court jurisdiction of a writ of error direct to the circuit court, under the fifth section of the act of March 3, 1891, where at the trial no right, title, privilege, or immunity was asserted to have been derived either from the treaty or the Constitution, and no question as to the application or construction of the Constitution, or the validity or construction of the treaty, was decided by the court.—*Muse v. Arlington Hotel Co.*, 18 S. Ct. 109, 168 U. S. 430, 42 L. Ed. 531.

A suit to establish a land claim by virtue of the treaty of 1821 with Spain is properly brought by direct appeal from the circuit court to the Supreme Court of the United States.—*Mitchell v. Furman*, 21 S. Ct. 430, 180 U. S. 402, 45 L. Ed. 596.

The construction of an Indian treaty is not drawn in question in a suit in a federal Circuit

Court, so as to justify a direct appeal to the Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], where the contentions with reference to the proper construction of such treaty are only made by way of founding an argument as to the proper construction of Act Aug. 7, 1882, c. 434 (22 Stat. 342), providing for allotments in an Indian reservation, which is the issue directly in question. Appeal (C. C.) 118 F. 283, dismissed.—*Sloan v. United States*, 24 S. Ct. 570, 193 U. S. 614, 48 L. Ed. 814.

The construction of the extradition treaties, on which the determination of the case depended in part, at least, was none the less so drawn in question by habeas corpus proceedings in a federal Circuit Court as to permit a direct review of the judgment in the Supreme Court, because it also became necessary or appropriate for the court below to construe the acts of Congress passed to carry into effect the provisions of such treaties. Judgment (C. C.) *In re Walshe*, 125 F. 572, affirmed.—*Pettit v. Walshe*, 24 S. Ct. 657, 194 U. S. 205, 48 L. Ed. 938.

The constitutionality of the provision of Rev. St. U. S. § 5509 (U. S. Comp. St. 1901, § 3712), for such punishment of persons committing any other felony or misdemeanor, when conspiring contrary to the preceding section, as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed—is too well settled to permit the question as to such constitutionality to serve as the basis of a writ of error from the federal Supreme Court to a District Court.—*Rakes v. United States*, 29 S. Ct. 244, 212 U. S. 55, 53 L. Ed. 401.

The contention that merchandise coming into the United States from the Canal Zone in the Isthmus of Panama could not be subjected, as is attempted by Act March 2, 1905 (33 Stat. 843, c. 1310), to the duties imposed on merchandise imported from foreign countries, is too frivolous to serve as the basis of a direct writ of error from the federal Supreme Court to a Circuit Court.—*David Kaufman & Sons v. Smith*, 30 S. Ct. 419, 216 U. S. 610, 54 L. Ed. 636.

A direct appeal lies to the federal Supreme Court from a Circuit Court in a revenue case in which is involved the construction of a federal law, or validity of a treaty, within Act March 3, 1891, § 5, notwithstanding provision of section 6, making Circuit Courts of Appeals final tribunals in revenue cases, and special provision of Act May 27, 1908, amendatory of the revenue act June 10, 1890, providing for the review by Circuit Courts of Appeals of decisions as to the construction of tariff laws.—(1912) *B. Altman & Co. v. United States*, 32 S. Ct. 593, 224 U. S. 583, 56 L. Ed. 894, affirming judgment (C. C. 1909) *Altman & Co. v. Same*, 172 F. 161.

The commercial reciprocal agreement with France, negotiated under authority of Act July 24, 1897, § 3, giving power to make reciprocal agreements with reference to certain articles is a treaty within the meaning of Act March 3, 1891, § 5, giving direct appeal to the Supreme Court where validity of any treaty is drawn in question.—*Id.*

Jurisdiction of federal Supreme Court to review judgment of a District Court where constitutionality of an act of Congress is drawn in question is not lost because the question has since been settled adversely to plaintiff in error, but the case will be retained to pass on other questions in the record.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

Contention that ancestors of certain Indians, charged with a murder on an Indian reserva-

tion within a state, became, by virtue of the treaty of Guadalupe Hidalgo with Mexico of February 2, 1848, citizens of the United States and of the state, so as to exclude jurisdiction of the federal courts is so wanting in merit as not to involve construction of the treaty within Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (U. S. Comp. St. Supp. 1911, p. 228), governing writs of error from the federal Supreme Court.—*Apapas v. United States*, 34 S. Ct. 704, 233 U. S. 587, 58 L. Ed. 1104.

A decree of a federal District Court enjoining federal officers from closing saloons in territory ceded to the United States by Indian tribes, because the treaty stipulated against the manufacture or sale of intoxicating liquors within the ceded territory, was repealed by the admission of the state, is reviewable in the federal Supreme Court by direct appeal.—*Johnson v. Gearlds*, 34 S. Ct. 794, 234 U. S. 422, 58 L. Ed. 1383, reversing decree (C. C.) *Gearlds v. Johnson*, 183 F. 611.

The construction of federal treaties held involved so as to sustain a writ of error from the Supreme Court to the District Court to review a judgment directing verdict for defendant in an action under Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, on the ground that the action could not be maintained for the benefit of nonresident aliens.—*McGovern v. Philadelphia & R. Ry. Co.*, 35 S. Ct. 127, 235 U. S. 389, 59 L. Ed. 283, reversing judgment (D. C.) 209 F. 975.

An objection that Act Feb. 9, 1909, § 2, punishing the receipt, concealment, or facilitation of transportation of opium, is unconstitutional, is too frivolous to serve as a foundation for writ of error.—*Brolan v. United States*, 35 S. Ct. 285, 236 U. S. 216, 59 L. Ed. 544.

Averment in a suit by nonresident aliens that their right to inherit was secured by treaty is too frivolous as the basis of writ of error, where the treaty did not go into effect until two years after the death of their intestate.—*Toop v. Ulysses Land Co.*, 35 S. Ct. 739, 237 U. S. 580, 59 L. Ed. 1127.

The contention on habeas corpus that immigration officers, in denying admission to a Chinaman as a returning merchant, superadded qualifications to Act Nov. 3, 1893, § 2, and hence infringed the treaty of November 17, 1880, does not involve the construction of a treaty within Judicial Code, § 238, authorizing direct appeal from the District Courts to the federal Supreme Court.—*Chin Fong v. Backus*, 36 S. Ct. 490, 241 U. S. 1, 60 L. Ed. 859, dismissing appeal (D. C.) *Ex parte Chin Fong*, 213 F. 288.

←385 (7). *Constitution or law of state contravening Constitution of United States.*

A suit in the circuit court to enjoin the enforcement of a city ordinance to establish and operate a system of waterworks, on the ground that such ordinance and a statute of the state authorizing the city to construct such works impair the obligations of a previous contract made by the city with a water company, is one "in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States," within the act of March 3, 1891, and an appeal lies directly to the supreme court.—*Penn Mut. Life Ins. Co. v. City of Austin*, 18 S. Ct. 223, 168 U. S. 685, 42 L. Ed. 626.

On a writ of error to review a decision of the circuit court on a constitutional question, under section 5 of the act of March 3, 1891, the jurisdiction of the supreme court does not depend on the question whether the right claimed under the constitution of the United States has been upheld or denied below; and the juris-

diction of the supreme court is not limited to the constitutional question, but includes the whole case. Judgment Aultman, Miller & Co. v. Holder (C. C.) 68 F. 467, affirmed.—Holder v. Aultman, Miller & Co., 18 S. Ct. 269, 169 U. S. 81, 42 L. Ed. 669.

A question as to the constitutionality of a state statute, first raised in the assignment of errors in the circuit court of appeals, with nothing to present it in the circuit court except a general exception to an instruction in favor of the plaintiff's right to recover under the statute, will not sustain a writ of error to the circuit court of the United States from the supreme court under Act Cong. March 3, 1891, c. 517, § 5.—Cincinnati, H. & D. R. Co. v. Thiebaud, 20 S. Ct. 822, 177 U. S. 615, 44 L. Ed. 911.

The opinion of a circuit court of the United States, regularly filed, and which has been annexed to and transmitted with the record to the supreme court of the United States, in accordance with rule 8, may be examined on the question of the jurisdiction to review the case by reason of a constitutional question, in order to ascertain whether either party claimed in the lower court that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the constitution of the United States. Judgment (C. C.) 91 F. 37, reversed.—Loeb v. Trustees of Columbia Tp., 21 S. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

The contention that a new incorporation of a city, bringing in people who were not formerly in the city, without giving them any opportunity to be heard, is in violation of their constitutional rights, cannot be made by the city on behalf of such people, who have not objected to the incorporation on that ground, so as to raise a constitutional question for the purpose of a direct appeal to the supreme court of the United States from a circuit court under Judiciary Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], in an action against the city on unpaid coupons for interest on bonds issued after the new incorporation.—City of Lampasas v. Bell, 21 S. Ct. 368, 180 U. S. 276, 45 L. Ed. 527.

The jurisdiction of the supreme court of the United States on writ of error to a circuit court, under the circuit court of appeals act, when the constitutionality of a state statute is in question, extends to all cases in which such a question is decided against the claim of either party, and therefore includes a case in which the writ of error is taken by a defendant who set up in defense of the action a statute which the court held unconstitutional.—Judgment, Union Sewer Pipe Co. v. Connelly (C. C.) 90 F. 354, affirmed.—Connolly v. Union Sewer Pipe Co., 22 S. Ct. 431, 184 U. S. 540, 46 L. Ed. 679.

A writ of error may be maintained from the supreme court of the United States to a circuit court, in a case in which the validity of a state statute is drawn in question as being in contravention of the constitution of the United States.—Fidelity Mut. Life Ass'n v. Mettler, 22 S. Ct. 662, 185 U. S. 306, 46 L. Ed. 922.

An appeal lies directly to the Supreme Court of the United States from a decree of a circuit court dismissing a bill which is based, not only upon diversity of citizenship, but upon the alleged unconstitutionality of certain municipal ordinances as impairing the obligation of a contract with the municipality under prior ordinances.—Davis & Farnum Mfg. Co. v. City of Los Angeles, 23 S. Ct. 498, 189 U. S. 207, 47 L. Ed. 778, affirming decree (C. C.) 115 F. 537.

The jurisdiction of the Supreme Court of the United States to consider the whole case on a direct appeal from a Circuit Court taken

under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], in a case in which a state Constitution is claimed to violate the Constitution of the United States, cannot be narrowed to a review of the question of the jurisdiction of the Circuit Court as a court of the United States, by a certificate of the circuit judge which raises that single question.—Giles v. Harris, 23 S. Ct. 639, 189 U. S. 475, 47 L. Ed. 909.

The mere fact that the defeated party in a suit in the federal Circuit Court set up the repugnancy of a state law to the federal Constitution does not authorize him to maintain a direct appeal to the Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], where his contention on that point was sustained. Appeal (C. C.) 112 F. 574, dismissed.—Anglo-American Provision Co. v. Davis Provision Co., 24 S. Ct. 93, 191 U. S. 376, 48 L. Ed. 228.

A decree of a federal Circuit Court, dismissing, for want of jurisdiction, a bill to quiet title, on the theory that either complainant's rights as mortgagee in possession had not been held by a decision of the highest state court, in a prior ejectment suit between the same parties, to have been destroyed by a subsequent state statute, and hence no constitutional question was involved, or that, if the state court so held, the remedy was by writ of error from the federal Supreme Court, will be affirmed on appeal, where the judgment of the state court, on a second appeal in the ejectment suit, and in a subsequent suit to quiet title, has been reversed by the federal Supreme Court for error in deciding the federal questions involved.—Bradley v. Lightcap, 24 S. Ct. 753, 195 U. S. 25, 49 L. Ed. 76.

The contention that the provisions of Acts La. 1904, p. 201, Act No. 80, for gauging coal, apply to sales by weight and measurement, and, if so construed, violate the federal Constitution, does not present a federal question which will sustain a direct appeal to the federal Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], from a decree of a federal Circuit Court enjoining the state gaugers from proceeding under the state statute except as to coal sold or intended for sale by boat or barge load or some aliquot part thereof, where the statute, construed as applying to boat and barge loads, has been declared valid by the federal Supreme Court, and appellee does not contend that the statute is invalid, but only that it is inapplicable to the facts.—Knop v. Monongahela River Consol. Coal & Coke Co., 29 S. Ct. 188, 211 U. S. 485, 53 L. Ed. 294.

A claim that 10 days' statutory notice of the time appointed for action upon a petition for the settlement of the final account of an executor and for the final distribution of the decedent's estate is so unreasonable as to a nonresident claimant as to be wanting in due process of law is too clearly unsubstantial and devoid of merit to furnish a basis for a direct appeal to the Supreme Court from a decree of a Circuit Court.—Goodrich v. Ferris, 29 S. Ct. 580, 214 U. S. 71, 53 L. Ed. 914.

The contention that due process of law is denied by a tax imposed under the authority of Code Pub. Gen. Laws Md. 1904, art. 81, §§ 214, 215, upon a custodian of distilled spirits, which rests upon the theory that the taxing power of the state is, by its Constitution, confined exclusively to the levy of taxes in personam upon the owners of property, is too devoid of merit to present a substantial federal question which will sustain a direct writ of error from the federal Supreme Court to a circuit court, where the highest state court has upheld the statute in controversy as an exercise of the taxing power of the state, and, in so doing, declared that it but reiterated and re-expounded the rulings by it previously made.—Hannis

Distilling Co. v. City of Baltimore, 30 S. Ct. 326, 216 U. S. 285, 54 L. Ed. 482.

Any question respecting the invalidity of the provisions of the West Virginia Constitution for the forfeiture of lands to the state for five years' neglect to pay taxes is too clearly foreclosed by prior decisions of the federal Supreme Court to serve as the basis of a writ of error to a Circuit Court.—*Fay v. Crozer*, 30 S. Ct. 568, 217 U. S. 455, 54 L. Ed. 837.

A suit to enjoin the enforcement of a municipal ordinance regulating telephone rates is not one in which the Constitution or law of a state is "claimed" to violate the federal Constitution within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), governing direct review in the federal Supreme Court of decrees of Circuit or District Courts, where the first and only reference to the federal Constitution is in the opinion of the circuit judge, on final hearing, holding that the rates are confiscatory and destructive of the telephone company's rights under that Constitution; the case as made by the bill being that the ordinance was passed without legislative authority, and its further allegations as to the confiscatory character of the ordinance being referable only, if consistency with its other provisions is to be observed, to the state Constitution, which would be violated if such allegations were true.—*City of Memphis v. Cumberland Telephone & Telegraph Co.*, 31 S. Ct. 115, 218 U. S. 624, 54 L. Ed. 1185.

A suit to enjoin state official from enforcing provisions of the inspection law is one in which the law of the state is claimed to be in contravention of the United States Constitution, within Act March 3, 1891, § 5, so as to permit direct appeal to federal Supreme Court from decree of a circuit court sustaining general demurrer to the bill for want of equity.—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.

The Supreme Court on appeal from the Circuit Court under Act June 18, 1910, § 17, in reviewing order denying preliminary injunction to restrain enforcement of state statute as unconstitutional, may consider both local as well as federal questions.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 43, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

A contention that a state statute forbidding ownership of realty by nonresident aliens is repugnant to Const. U. S. Amend. 14, is too frivolous to support jurisdiction in the federal Supreme Court.—*Toop v. Ulysses Land Co.*, 35 S. Ct. 739, 237 U. S. 580, 59 L. Ed. 1127.

◀386. Cases certified on division of opinion in Circuit Courts.

See 13 Cent. Dig. Courts, §§ 1027-1030; 2 Cent. Dig. App. & E. § 332.

On appeal on certificate of division where the matter in controversy is less than \$5,000, the supreme court cannot take jurisdiction, where the questions on which the judges were divided were such as to present the whole case for adjudication, and involve a finding of fact by that court.—*Weeth v. New England Mortgage Security Co.*, 106 U. S. 605, 1 S. Ct. 91, 27 L. Ed. 99.

The omission to state in a certificate of division that the point of difference between the judges was certified, "upon the request of either party or their counsel," where neither party challenges the jurisdiction of the supreme court, is not fatal.—*United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290.

Rev. St. § 650, provides that whenever, in a civil proceeding in a circuit court, there occurs a difference of opinion between the judges hold-

ing the court as to any matter to be decided, the opinion of the presiding judge shall prevail for the time being. Section 652 provides that, when final judgment is rendered, the points of disagreement shall be certified and entered of record under the direction of the judges. Section 693 provides that, where such division of opinion has been certified, the final judgment entered in the case may be reviewed on writ of error, etc. *Held*, that a proceeding by habeas corpus is a civil proceeding, though petitioner is detained on a criminal charge, and the supreme court of the United States cannot take jurisdiction of a certificate of division in opinion between the judges of a circuit court in such case until final judgment has been rendered in accordance with the opinion of the presiding justice or judge.—*Ex parte Tom Tong*, 108 U. S. 556, 2 S. Ct. 871, 27 L. Ed. 826; *Ex parte Cota*, 110 U. S. 385, 4 S. Ct. 25, 28 L. Ed. 172.

Rev. St. § 652, provides that, when a judgment or decree is entered in a circuit court held by two judges, in the trial whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall be stated and certified to the supreme court. *Held*, that the difference of opinion in the court below which may be certified is not a difference of opinion on the general case, but only a difference on a special point of law, which can be distinctly stated, and that in a suit to enjoin the infringement of plaintiff's patent, and for an order to show cause why defendant should not be punished for contempt in disobeying a former injunction, a certificate of division of opinion as to whether defendant has infringed will be dismissed.—*California Artificial Stone Pav. Co. v. Molitor*, 113 U. S. 609, 5 S. Ct. 618, 28 L. Ed. 1106.

Where a whole cause, and not particular points in a cause, is certified on division of opinion in the circuit court to the supreme court, the case will be remanded.—*City of Waterville v. Van Slyke*, 116 U. S. 699, 6 S. Ct. 622, 29 L. Ed. 772; *Williamsport Nat. Bank v. Knapp*, 119 U. S. 357, 7 S. Ct. 274, 30 L. Ed. 446; *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 8 S. Ct. 1199, 32 L. Ed. 196.

Under the acts of congress authorizing questions arising on a trial or hearing before two judges, in the circuit court, and upon which they are divided in opinion, to be certified to the supreme court of the United States for decision, it has always been held that each question certified must be one of law, and not of fact, nor of mixed law and fact.—*Williamsport Nat. Bank v. Knapp*, 119 U. S. 357, 7 S. Ct. 274, 30 L. Ed. 446.

If a question contained in a certificate of difference of opinion from a circuit court of the United States to the supreme court be too indefinite, even in connection with facts appearing in the record, to admit of an answer, it will be passed over as immaterial to the decision.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

In cases taken to the supreme court of the United States upon certificate of division of opinion, if the amount of the judgment below is sufficient to give the court jurisdiction independently of such certificate, questions arising in the record may be reviewed without regard to whether they are duly stated in the certificate.—*Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

The act of congress which authorizes any question upon which the judges of the United States circuit court are divided to be certified to the supreme court does not authorize the certificate of a division of opinion upon a question so vague and general, as whether "either of the counts of the indictment charges the defendant

with an offense under the laws of the United States."—*United States v. Northway*, 120 U. S. 327, 7 S. Ct. 580, 30 L. Ed. 664.

In a case involving the right of the holder to recover upon checks drawn upon a bank which was a depository of the United States district court by the clerk of court, the two judges of the circuit court certified, upon the facts, that they were "opposed in opinion as to the legal right of the plaintiff to recover on the checks in controversy." *Held*, that the office of a certificate of opinion between two judges in the circuit court being to submit to the supreme court one or more points of law, and not the whole case, the question certified could not be answered, and the writ of error must be dismissed.—*State Nat. Bank v. St. Louis Rail-Fastening Co.*, 122 U. S. 21, 7 S. Ct. 1054, 30 L. Ed. 1121.

Under Rev. St. §§ 650, 652, 693, providing that when, in a civil suit in the circuit court, a disagreement occurs, the opinion of the presiding judge shall prevail, and the point shall be stated and certified for revision in the supreme court, the questions so stated must be distinct and independent questions of law; and a statement of facts found which is merely a narrative of certain transactions of a debtor, alleged to be fraudulent as to creditors, no ultimate facts being stated, with questions as to whether certain conduct rendered a transfer void as to creditors, and whether under the circumstances such transfer was fraudulent, submits mixed matters of law and fact, and does not comply with the statute.—*Jewell v. Knight*, 123 U. S. 426, 8 S. Ct. 193, 31 L. Ed. 190.

A case-made, submitting the questions as to whether an understanding between a merchant and a bank that, in consideration of advances from the bank, the merchant would, if he became insolvent, secure them, was fraudulent as to creditors, no finding as to actual fraud being made; and as to whether a stipulation in the bill of sale that the bank would employ the merchant at a certain salary, as long as it should continue the business, the evidence showing that the business was wound up as soon as possible, and the salary not appearing exorbitant,—submits mixed questions of law and fact, and will not be considered.—*Smith v. Craft*, 123 U. S. 436, 8 S. Ct. 196, 31 L. Ed. 267.

Under Rev. St. § 693, which gives the supreme court appellate jurisdiction over all cases in the circuit court in which the judges below "certify that their opinions were opposed upon any question which occurred on the trial," the question whether the court should have instructed the jury to find for the defendant is not a proper one to be certified, because it is not a question of law only, and also because it embraces the whole case.—*Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 9 S. Ct. 113, 32 L. Ed. 503.

The question whether parol evidence is admissible to explain a number of written instruments—all in the nature of receipts, and all introduced to prove that the claim sued on had been satisfied—may properly be certified, since it presents a single point, and is purely a question of law.—*Id.*

A certificate of difference of opinion presented questions of law as follows: Whether the answer showed that the law under which the bonds sued on were issued is in conflict with the constitution of the state, and therefore void; whether, if the law is in conflict with the state constitution, there had been such decision of the state courts, before its passage or the sale of the bonds, that such or similar legislation was valid, as entitles plaintiff to recover under the decisions of the federal courts, though the state court of last resort declared the law void after the bonds were sold; whether the former proceedings in the state courts, or any of them,

alleged in the answer, are such adjudications of the questions involved as to bar plaintiff's right to recover. *Held* bad, as attempting to refer the whole case to the supreme court by the device of splitting it into several questions; and, further, because neither of the questions presents a clear and distinct point of law, but requires the court to find out the point by referring to the answer and the statute relied on by plaintiff, and examining the whole constitution of the state, or else reports or records of its courts referred to in the answer.—*Dublin Tp. v. Milford Five-Cent Sav. Inst.*, 128 U. S. 510, 9 S. Ct. 148, 32 L. Ed. 583.

Defendants were indicted in three counts for conspiracy to defraud the United States. To each count a demurrer setting up thirty grounds for its support was filed. After argument the judges certified seven questions as to each count on which they differed in opinion which could not be decided without determining whether under the facts defendants were liable to indictment. *Held* not to present such a difficult question of law as to admit its certification to the supreme court.—*United States v. Perrin*, 131 U. S. 55, 9 S. Ct. 681, 33 L. Ed. 88.

On a certificate of division of opinion of the judges of the circuit court on demurrer to an indictment, questions "whether the demurrer to the first three counts of the indictment ought to be sustained," and whether the matters therein alleged "constitute an offense," under a certain section of the Revised Statutes or under any law of the United States, are too general to be considered.—*United States v. Brewer*, 139 U. S. 278, 11 S. Ct. 538, 35 L. Ed. 190.

Differences of opinion on a motion for a new trial may be certified up if the question presented, instead of resting merely in the court's discretion, goes to the merits; as, for example, in a criminal case, the question whether the court has jurisdiction of the offense.—*United States v. Thomas*, 151 U. S. 577, 14 S. Ct. 426, 38 L. Ed. 273.

The supreme court cannot consider any evidence or agreed statement of facts or other matters sent up with the certificate, which are not included in the pleadings or public statutes or treaties bearing on the question certified.—*Id.*

Act March 3, 1891, § 5, authorizes appeals or writs of error directly to the supreme court in certain cases, including those of conviction of a capital or otherwise infamous crime. Section 6 makes the judgments or decrees of the circuit courts of appeals final "in all cases arising under the criminal laws," and in certain other cases, unless questions are certified to the supreme court, or the whole case ordered up by a writ of certiorari. Section 14 repeals all acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error, in sections 5 and 6. *Held*, that Rev. St. §§ 651, 697, authorizing a certificate of division of opinion on the part of the circuit court in criminal cases in order to obtain the opinion of the supreme court, were impliedly repealed.—*United States v. Rider*, 163 U. S. 132, 16 S. Ct. 983, 41 L. Ed. 101.

Rev. St. §§ 651, 697, in relation to certificates of division of opinion in criminal cases by the judges of the circuit court, having been repealed by Act March 3, 1891, the United States cannot obtain such certificate.—*United States v. Hewecker*, 17 S. Ct. 18, 164 U. S. 46, 41 L. Ed. 345.

The provisions of Act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), permitting the judges sitting in a suit arising under the acts involving monopolies and interstate commerce, in case of division in opinion, to certify the case to the Supreme Court of the United States for review, does not au-

thorize the sending up of the whole case, and therefore that court will not consider a case where no final judgment, order, or decree determinative of the merits is rendered, but the lower court orders that this case be certified for review to the Supreme Court, and that "a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to" that court, "and the same is transmitted accordingly."—*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 30 S. Ct. 86, 215 U. S. 216, 54 L. Ed. 164; *Southern Pac. Co. v. Same*, 30 S. Ct. 89, 215 U. S. 226, 54 L. Ed. 169.

☞387. Review of decisions of territorial courts.

See 13 Cent. Dig. Courts, §§ 1032-1037; 2 Cent. Dig. App. & E. § 308; 3 Cent. Dig. App. & E. § 8397.

☞387 (1). In general.

Review in habeas corpus cases, see *Habeas Corpus*, ☞113.

Act Cong. March 3, 1885, § 2 (22 Stat. 443), which allows an appeal or writ of error from the supreme court of a territory, regardless of the sum or value in dispute, "in any case * * * in which is drawn in question * * * an authority exercised under the United States," does not give the supreme court of the United States jurisdiction of a writ of error to a territorial court in a criminal case, where neither the validity of the existence of the court nor its jurisdiction over the crime or over the person of defendant is drawn in question.—*Snow v. United States*, 118 U. S. 346, 6 S. Ct. 1059, 30 L. Ed. 207; *Cannon v. Same*, 118 U. S. 355, 6 S. Ct. 1064, 29 L. Ed. 561.

Rev. St. § 702, which provides that the final judgments and decrees of the supreme court of any territory, except Washington, in cases where the amount in dispute exceeds \$1,000, may be reviewed in the supreme court, on writ of error or appeal, in the same manner as the final judgments and decrees of the circuit courts, and that any final judgment or decree of the supreme court of said territory, in a cause involving the constitution, statutes, or treaties of the United States, may be reviewed in like manner, does not give the supreme court authority to review the decision of the supreme court of the territory of Montana in a criminal case.—*Farnsworth v. Montana*, 129 U. S. 104, 9 S. Ct. 253, 32 L. Ed. 616.

Nor is such authority conferred by section 1909, which provides that writs of error and appeals from the final decisions of the supreme court of the territory of Montana shall be allowed to the supreme court of the United States in the same manner as from the circuit courts of the United States, where the amount in controversy exceeds \$1,000, except that writs of error or appeals shall be allowed upon writs of habeas corpus involving the question of personal freedom.—*Id.*

Act Cong. March 3, 1885, § 2, which provides "that the preceding section shall not apply" to cases in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, but in all such cases an appeal or writ of error may be brought without regard to the amount in dispute, does not apply to criminal cases, but is only an exception carved out of the first section.—*Id.*

The appellate jurisdiction of the supreme court over the judgments and decrees of the supreme courts of the territories was not affected by the judiciary act of March 3, 1891, except in the classes of cases in which the judgments of the circuit courts of appeal are made "final" by section 6, the appellate jurisdiction in such cases being transferred to those

courts by section 15; and hence an appeal will still lie to the supreme court in a suit brought by a private individual against a sheriff and others to enjoin a threatened sale of certain property claimed by plaintiff under an execution issued on a judgment against a third party, when the matter in dispute exceeds \$5,000.—*Shute v. Keyser*, 149 U. S. 649, 13 S. Ct. 960, 37 L. Ed. 884.

The supreme court has jurisdiction of a cause brought directly from the United States court for the Indian Territory by a writ of error sealed June 5, 1891, since the joint resolution of March 3, 1891, preserved jurisdiction in cases where the writ of error or appeal was sued out or taken before July 1, 1891.—*Gulf, C. & S. F. Ry. Co. v. Shane*, 157 U. S. 348, 15 S. Ct. 641, 39 L. Ed. 727.

The Indian appropriation act of July 1, 1898 (30 Stat. c. 545), provides that "appeals shall be allowed from the United States courts in the Indian Territory direct to the supreme court of the United States to either party, in all citizenship cases, and in all cases between either of the five civilized tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases." *Held*, that the limiting clause, "involving the constitutionality or validity of any legislation," etc., should be read as though preceded by a comma, and as applying to both classes of cases previously enumerated, and that in cases to which the act applies the jurisdiction of the supreme court is limited to a determination of the constitutionality or validity of the legislation involved, the decision of the territorial courts remaining, as before the passage of the act, final as to all other questions in issue.—*Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174 U. S. 445, 43 L. Ed. 1041.

A decree for alimony and counsel fees, although in one sense an incident to a suit for divorce, if it is a distinct and severable final judgment for a sum of money of a sufficient jurisdictional amount, may be appealed from the Supreme Court of a territory to the Supreme Court of the United States.—*Simms v. Simms*, 20 S. Ct. 58, 175 U. S. 162, 44 L. Ed. 115, modifying judgment 81 P. 1128, 5 Ariz. 212.

In the absence of any findings by the supreme court of a territory, and of anything in the nature of a bill of exceptions, there is nothing on which to base a reversal of the judgment in the case on appeal to the supreme court of the United States, and the judgment must therefore be affirmed.—*Armijo v. Armijo*, 21 S. Ct. 707, 181 U. S. 558, 45 L. Ed. 1000.

The jurisdiction of the supreme court of the United States to review judgments of the courts of the territory of Hawaii is, under Act April 30, 1900, § 86 (31 Stat. 141, c. 339), to be measured by the power conferred upon the former court to review judgments of state courts.—*Equitable Life Assur. Soc. v. Brown*, 23 S. Ct. 123, 187 U. S. 308, 47 L. Ed. 190.

The action of a territorial Supreme Court on both the first and second writs of error in a case may be revised by the Supreme Court of the United States on writ of error, although the lower court considered itself bound by its decision on the first writ of error as the law of the case, where its judgment upon such writ lacked the requisite finality to warrant a review in the higher court. Judgment, 66 P. 550, reversed.—*United States v. Denver & R. G. R. Co.*, 24 S. Ct. 33, 191 U. S. 84, 48 L. Ed. 106.

A direct review in the Supreme Court of the United States of a judgment of the district

court for the district of Porto Rico in an action on a policy of insurance issued by a foreign corporation in which the matter in dispute exceeds the sum of \$5,000 may be had on writ of error to the latter court, under Act April 12, 1900, c. 191 (31 Stat. 85) § 35, providing for the allowance of such writs of error in the same manner, under the same regulations, and in the same cases as from the Supreme Courts of the territories, since the judgment, if rendered by a territorial Supreme Court, would not have been reviewable in the Circuit Court of Appeals under Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547] § 15, on the theory that the case was one of the class in which the judgments of the latter court are made final by section 6 of that act, nor is the question affected by the provision in the acts relating to the re-examination in certain designated Circuit Courts of Appeals of judgments of the highest courts of the Indian Territory, Hawaii, and Alaska.—*Royal Ins. Co. v. Martin*, 24 S. Ct. 247, 192 U. S. 149, 48 L. Ed. 385.

The federal Supreme Court has jurisdiction of an appeal from the District Court of the United States for the District of Porto Rico, under Act April 12, 1900, c. 191, § 35 (31 Stat. 85), where the final judgment in a like case in the Supreme Court of one of the territories of the United States could be so reviewed.—*Ribas y Hijo v. United States*, 24 S. Ct. 727, 194 U. S. 315, 48 L. Ed. 994.

The general rule that the federal courts have no jurisdiction of the subjects of divorce or alimony does not preclude an appeal to the Supreme Court of the United States under Act July 1, 1902, c. 1369, § 10, 32 Stat. 691-695 [U. S. Comp. St. Supp. 1905, p. 154], allowing appeals to that court from the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings in which the value in controversy exceeds \$25,000, to review a decree of that court reversing a decree of the court of first instance, granting a divorce to the wife, and awarding her a sum in excess of that amount as alimony pendente lite, and as her share of the conjugal property.—*De La Rama v. De La Rama*, 26 S. Ct. 485, 201 U. S. 303, 50 L. Ed. 765.

The contention that, because the district Court of the United States for the district of Porto Rico is required, by Act April 12, 1900, c. 191, § 34, 31 Stat. 77, to proceed in the same manner as a federal circuit court, a term of that court held at Mayaguez, under the authority of the further provision of that section that regular terms of such court shall be held at stated times in San Juan and Ponce, and special terms at Mayaguez at such other times as the judge may deem expedient, is a "special," as contradistinguished from a "regular," term, within the meaning of Rev. St. U. S. § 670 [U. S. Comp. St. 1901, p. 545], forbidding jury trials at special terms of the Circuit Courts, except in certain specified districts, is too clearly lacking in merit to sustain a writ of error from the federal Supreme Court, in view of the substantially uniform requirement of Rev. St. U. S. §§ 664-669 [U. S. Comp. St. 1901, pp. 543-545], that special terms of the Circuit Courts are to be held where the regular sessions are held.—*American R. Co. of Porto Rico v. Castro*, 27 S. Ct. 466, 204 U. S. 453, 51 L. Ed. 564; *Same v. De Castro*, 27 S. Ct. 468, 210 U. S. 440, 51 L. Ed. 1187.

A writ of error from the federal Supreme Court to the Supreme Court of the territory of Hawaii, which would not lie when final judgment was entered, cannot be sustained as an exercise of the appellate jurisdiction conferred by Act March 3, 1905, c. 1465, § 3, 33 Stat. 1035, amending Act April 30, 1900, c. 339, § 86, 31 Stat. 141, 153, because a petition for rehearing, which the territorial Supreme Court entertained and acted upon, was not denied by that court

until after the later statute went into effect.—*Harrison v. Magoon*, 27 S. C. 577, 205 U. S. 501, 51 L. Ed. 900.

A conviction of falsification of documents under Pen. Code P. I. art. 300, cla. 4, 7, is not reviewable in the federal Supreme Court as involving the denial of the protection afforded by the Philippine Bill of Rights, where the most that can be gathered from the record is that the accused contended that the complaint was bad by the rules of criminal pleading.—*Paraiso v. United States*, 28 S. Ct. 127, 207 U. S. 368, 52 L. Ed. 249.

A writ of error directed, on its face, to the supposed judgment of the Supreme Court of the territory of Hawaii, disposing of exceptions on nonfederal grounds, prior to Act March 3, 1905, c. 1465, 33 Stat. 1035, enlarging the appellate jurisdiction of the federal Supreme Court over the territorial court, cannot be sustained on the theory that a final judgment in the case was not rendered until after the passage of that act, when judgment on the verdict was entered in the trial court in connection with a nunc pro tunc entry, since such judgment must necessarily have been entered after the judgment which the writ seeks to review.—*Notley v. Brown*, 28 S. Ct. 385, 208 U. S. 429, 52 L. Ed. 559.

Jurisdiction of a writ of error directed, on its face, to a supposed judgment of the Supreme Court of the territory of Hawaii, disposing of exceptions on nonfederal grounds prior to Act March 3, 1905, c. 1465, 33 Stat. 1035, enlarging the appellate jurisdiction of the federal Supreme Court over the territorial court, cannot be taken by treating the writ as addressed to a later judgment of that court, quashing a writ of error to the trial court, which judgment was not formally entered until long after the writ of error from the federal Supreme Court was sued out, where to regard the entry as relating back to the time when the opinion of the court was announced would, if the same rule be applied to the nunc pro tunc entry of the judgment of the trial court, require an affirmance of the judgment of the territorial Supreme Court on the ground that the writ of error to the trial court was not sued out in time.—*Id.*

Only matters of law can be considered by the federal Supreme Court on the appeal authorized by Act April 12, 1900, c. 191, § 35, 31 Stat. 85, to be taken from the District Court of the United States for the District of Porto Rico in the same manner and under the same regulations as from the Supreme Courts of the territories.—*Garzot v. Rios De Rubio*, 28 S. Ct. 548, 209 U. S. 283, 52 L. Ed. 794.

The federal Supreme Court will adopt the view of officers concerned with administration of law respecting a public improvement, concurred in by the court in which condemnation proceedings were conducted, and apparently, also, by the territorial Supreme Court, as to which of two sections of Arizona Revised Statutes governs appointment of commissioners, where the statute will bear that construction, though plausible objections may be urged against it. Decree (*Ariz.* 1907) 89 P. 501, affirmed.—*English v. Territory of Arizona ex rel. Griffith*, 29 S. Ct. 658, 214 U. S. 359, 53 L. Ed. 1030.

No right to have an order of the District Court of the United States for Porto Rico sitting as a court of bankruptcy disallowing certain claims against a bankrupt's estate reviewed in the federal Supreme Court is given by the provisions of Act April 12, 1900, c. 191, § 35, 31 Stat. 85, for appeals to the federal Supreme Court from final judgments of the District Court of Porto Rico "in the same manner and under the same regulations and in the same cases as from the supreme courts of territories."—*Tefft, Weller & Co. v. Munsuri*, 32 S. Ct. 67, 222 U. S. 114, 56 L. Ed. 118.

The general right under the prior law to a direct review in the federal Supreme Court of judgments of the district court of Alaska in capital cases was taken away by Judicial Code (Act March 3, 1911, c. 231) § 134, 36 Stat. 1134 (U. S. Comp. St. Supp. 1911, p. 195), making judgments of Circuit Court of Appeals of the Ninth Circuit final in criminal cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States under section 247.—*Itow v. United States*, 34 S. Ct. 699, 233 U. S. 581, 58 L. Ed. 1102.

—387 (2). *Cases involving a federal question.*

A judgment of a territorial supreme court, involving merely the construction of an act of congress, and the scope of the authority conferred on the territorial legislature, does not draw in question the validity of a statute, or an authority exercised under the United States, so as to give the supreme court jurisdiction to review such judgment under 23 Stat. 443, c. 355.—*Lanford v. Ellison*, 155 U. S. 503, 15 S. Ct. 179, 39 L. Ed. 239.

The claim that a territory is without authority, under its organic act, to extend its taxing power to a railroad through an Indian reservation created by congress, presents a question within the appellate jurisdiction of the supreme court under 23 Stat. 443, giving an appeal to it from the supreme court of a territory, where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.—*Mari-copa & P. R. Co. v. Territory of Arizona*, 156 U. S. 347, 15 S. Ct. 391, 39 L. Ed. 447.

Issues involving the regularity of the tax, the sum of the penalties due, and the extent of the lien given by the territorial law, do not present any question of the exercise of authority under laws of the United States.—*Id.*

Where a territorial court refused to exercise any jurisdiction under an act of the territorial legislature on the ground that the act was invalid, which decision was affirmed by the territorial supreme court, 26 Stat. 85, § 9, a writ of error lies from that court to the United States supreme court.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

Appeal to the supreme court of the United States from the United States court for the Central district of the Indian Territory, in a case in which the constitutionality of an act of congress is brought in question, but which is not affected by the Indian appropriation act of July 1, 1898, is not authorized by Act Cong. March 3, 1891, § 13, providing for appeals from the United States court in that territory to the supreme court of the United States, or to a circuit court of appeals in the Eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, but the appeal should be prosecuted to the court of appeals in the Indian Territory.—*Ansley v. Ainsworth*, 21 S. Ct. 364, 180 U. S. 253, 45 L. Ed. 517.

A case in which "an act of Congress is brought in question and the right claimed thereunder is denied," within the meaning of Act April 12, 1900, c. 191, § 35 (31 Stat. 85), providing for a review in the federal Supreme Court of final decisions of the District Court of the United States for the District of Porto Rico, is presented by an unsuccessful contention by an accused, that, pursuant to that act, the trial court, in the matter of the qualifications of grand jurors, should have been controlled by the provisions of the local law relating to jurors, in connection with the statutes of the United States relating to the organization of grand juries, and the trial and disposi-

tion of criminal causes.—*Crowley v. United States*, 24 S. Ct. 731, 194 U. S. 461, 48 L. Ed. 1075.

The review in the federal Supreme Court of final judgments of the District Court of the United States for the District of Porto Rico is not necessarily confined, by Act April 12, 1900, c. 191, § 35 (31 Stat. 77, 85) to the class of cases therein described as those where the Constitution of the United States, or a treaty thereof, or an act of Congress, is brought in question, and the right claimed thereunder is denied, in view of the prior clause of that section, authorizing such review if the case be one which, if determined in a territorial Supreme Court, may be carried up to the federal Supreme Court.—*Amado v. United States*, 25 S. Ct. 13, 195 U. S. 172, 49 L. Ed. 145.

The claim in a written motion in arrest of judgment or sentence that the indictment did not set forth "an offense under the statutes of the United States" is too indefinite to give the federal Supreme Court jurisdiction of a writ of error to the District Court of the United States for the District of Porto Rico, under Act April 12, 1900, c. 191, § 35 (31 Stat. 77, 85), as of a case where the Constitution of the United States, or a treaty thereof, or an act of Congress, was brought in question, and the right claimed thereunder denied.—*Id.*

The overruling of a motion in arrest of judgment, in which the accused asserted that the grand jurors were not selected or drawn as required by the federal statutes, presents a case in which "an act of Congress is brought in question and the right claimed thereunder is denied," within the meaning of Act April 12, 1900, c. 191, § 35, 31 Stat. 85, providing for a review in the Supreme Court of the United States of the final decisions of the District Court of the United States for the district of Porto Rico.—*Rodriguez v. United States*, 25 S. Ct. 617, 198 U. S. 156, 49 L. Ed. 994.

A judgment of the Supreme Court of Porto Rico requiring an indebtedness to be liquidated in United States currency at the rate of 100 cents for each peso of indebtedness, on the ground that Act April 12, 1900, c. 191, § 11, 31 Stat. 77, 80, under which the debtor claimed the right to pay in such currency at the rate of 60 cents for each peso of indebtedness, had no application to the case, is reviewable in the Supreme Court of the United States under section 35 of that act, as denying a right claimed under a federal statute.—*Succession of Serralles v. Esbri*, 26 S. Ct. 176, 200 U. S. 103, 50 L. Ed. 391.

The ruling of the District Court of the United States for the district of Porto Rico that the recovery for the breach of a promise to marry was not limited to the expense incurred in reliance on the promised marriage, as provided by Civ. Code Porto Rico, art. 44, is not the equivalent, for the purpose of sustaining a writ of error from the Supreme Court of the United States, of a denial of a right claimed under a law of the United States, on the theory that this article became a law of the United States by reason of Act April 12, 1900, c. 91, § 8, 31 Stat. 77, continuing local laws in force.—*Ortega v. Lara*, 26 S. Ct. 707, 202 U. S. 339, 50 L. Ed. 1055.

A suit in which the matter in dispute is the right of consignors to have a consignment shipped by a common carrier to its destination involves a valuable right measurable in money, and therefore satisfies the requirements of Act March 3, 1885, c. 355, § 2, 23 Stat. 443 [U. S. Comp. St. 1901, p. 572], conferring upon the Supreme Court of the United States appellate jurisdiction over the Supreme Courts of the territories without regard to the sum or

value in dispute, where the validity of a treaty or statute of, or authority exercised under, the United States is involved. Judgment (N. M. 1904) 78 P. 74, affirmed.—Territory of New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co., 27 S. Ct. 1, 203 U. S. 38, 51 L. Ed. 78.

Some sum or value must be in dispute in order to sustain the appellate jurisdiction of the United States Supreme Court over the Supreme Courts of the territories which is conferred by Act March 3, 1885, c. 355, § 2, 23 Stat. 443 [U. S. Comp. St. 1901, p. 572], without regard to the sum or value in dispute, in cases involving the validity of a treaty or statute of, or authority exercised under, the United States.—Id.

A controversy as to the constitutional right of a territorial Legislature to pass a specified law under the broad legislative power conferred by Rev. St. U. S. § 1851, involves the validity of an authority exercised under the United States within the meaning of Act March 3, 1885, c. 355, § 2, 23 Stat. 443 [U. S. Comp. St. 1901, p. 572], defining the appellate jurisdiction of the Supreme Court of the United States over the Supreme Courts of the territories.—Id.

A determination by the Supreme Court of the territory of Arizona in a habeas corpus case as to which custodian a child of tender years shall be committed is not appealable to the Supreme Court of the United States under Rev. St. U. S. § 1909, as a case "involving the question of personal freedom" within the meaning of that section. Appeal (1905) 79 P. 231, dismissed.—New York Foundling Hospital v. Catti, 27 S. Ct. 53, 203 U. S. 429, 51 L. Ed. 254.

The federal question presented by the contention that the changes made by the Porto Rico Legislature in the boundaries of judicial districts and in the number of judges deprived the courts affected of their validity, under Act April 12, 1900, c. 191, § 33, 31 Stat. 85, legalizing existing tribunals, must be deemed too frivolous to sustain a writ of error to the Supreme Court of Porto Rico under section 35 of that act, when the whole of section 33 is considered together with the context of the act, and especially with section 15, giving the local Legislature the power of amendment, alteration, modification, or repeal.—Kent v. People of Porto Rico, 28 S. Ct. 55, 207 U. S. 113, 52 L. Ed. 127.

A suit to restrain the defendant from setting up title to certain gold mines in the Philippine Islands, or interfering with the same, and to obtain an accounting, in which the meaning and effect of the provisions of Act July 1, 1902 (32 Stat. 703, c. 1369) § 45, concerning mining titles, are in question, is one in which a statute of the United States is "involved," within the meaning of section 10 of the act (32 Stat. 695 [U. S. Comp. St. Supp. 1907, p. 214]) defining the appellate jurisdiction of the Supreme Court of the United States over the Supreme Court of the Philippine Islands.—Reavis v. Fianza, 30 S. Ct. 1, 215 U. S. 16, 54 L. Ed. 72.

The judgment of a territorial Supreme Court for the recovery of fees by a de jure officer from a de facto one is not reviewable in the federal Supreme Court, as involving the validity of an authority exercised under the United States in the passage of the territorial legislation from which it was contended that the right to the fees was derived, where the decision was rested in fact upon the construction of the statute, and not upon the want of power of the territorial Legislature to pass them.—Albright v. Sandoval, 30 S. Ct. 321, 216 U. S. 342, 54 L. Ed. 509.

Judgments of the Supreme Court of the Philippine Islands denying any liability of the

present city of Manila upon municipal obligations incurred prior to the cession of the Philippine Islands to the United States by treaty with Spain (Act Dec. 10, 1898, 30 Stat. 1754), are rendered in cases in which a treaty of the United States is involved, within the meaning of Act July 1, 1902, c. 1369, § 10, 32 Stat. 695 (U. S. Comp. St. Supp. 1909, p. 226), governing the appellate jurisdiction of the federal Supreme Court, although no distinct claim under that treaty was made in the pleadings.—Vilas v. City of Manila, 31 S. Ct. 416, 220 U. S. 345, 55 L. Ed. 491.

An attempt to have reviewed in the federal Supreme Court an order of the District Court of the United States for Porto Rico, sitting as a court of bankruptcy, holding a member of a bankrupt partnership to be a general partner and generally liable for the firm debts, cannot be sustained under Judiciary Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), as an appeal solely upon the question of jurisdiction.—Munsuri v. Fricker, 32 S. Ct. 70, 222 U. S. 121, 56 L. Ed. 121.

General objections to the jury panel, based upon the political status of the clerk of the court and of the jury commissioner, or upon the political opinions of the jurors, are too frivolous and wanting in merit to afford any support for the contention that the court, in overruling a motion to quash the panel on those grounds, denied a right claimed under an act of Congress, within the meaning of Act Cong. April 12, 1900, c. 191, § 35 (31 Stat. 85), governing the appellate jurisdiction of the federal Supreme Court over the District Court of the United States for the district of Porto Rico.—Aran v. Zurinach, 32 S. Ct. 162, 222 U. S. 395, 56 L. Ed. 246.

Ruling of Hawaiian Supreme Court that daily sales of fish in basket lots were sales at public auction, within Rev. Laws Hawaii, § 1343, prescribing a license fee, presents no federal question which under Act April 30, 1900, § 86, can be reviewed on writ of error from the federal Supreme Court.—Toyota v. Territory of Hawaii, 33 S. Ct. 47, 226 U. S. 184, 57 L. Ed. 180.

Contention that summary process provided by Porto Rico law on foreclosure was so deficient in notice as to be repugnant to due process clause of Const. U. S. Amend. 5, cannot be considered by Supreme Court on appeal from the Supreme Court of Porto Rico, where the question was not raised in the trial court.—Zayas v. Lothrop, Luce & Co., 34 S. Ct. 106, 231 U. S. 171, 58 L. Ed. 172.

Decision as to proper classification, under Philippine Tariff Act, of commodity imported into the islands, involved a statute of the United States within Act July 1, 1902, defining appellate jurisdiction over the Philippine Islands.—Geell v. Insular Collector of Customs, 36 S. Ct. 39, 239 U. S. 93, 60 L. Ed. 163.

887(3). Amount or value in controversy. See Appeal and Error, 833-65.

887(4). Procedure and review.

Form and arrangement of statement of facts, see Appeal and Error, 563. Objections for purpose of review, see Appeal and Error, 203, 228. Presumptions as to facts or evidence not shown by record, see Appeal and Error, 907. Proper mode of review, see Appeal and Error, 4, 5. Review of decisions of intermediate courts as to questions of fact, see Appeal and Error, 1094.

Since only "a statement of facts in the nature of a special verdict," and rulings made at the trial and duly excepted to, on the admission

or rejection of evidence, are brought up by an appeal from a territorial court, the authority of the supreme court on such appeal is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings on the evidence, and does not extend to a consideration of the weight of evidence, or its sufficiency to support the conclusions of the court.—*Idaho & O. Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hasb.) 239, 10 P. 620.

The district court of Washington territory, in deciding this case, made certain findings of fact and conclusions of law. On appeal to the supreme court of the territory, findings of fact were made by that court, substantially identical with those of the district court. On appeal to this court, the record omitting the proofs and containing no bill of exceptions, *held*, that the only question before this court was whether the findings of fact made by the supreme court of the territory supported the conclusions of law which it made.—*The Blue Jacket*, 144 U. S. 371, 12 S. Ct. 711, 36 L. Ed. 469.

On an appeal from the supreme court of a territory the review is limited to determining whether the judgment or decree is supported by the findings of fact made and certified by the court in pursuance of Act April 7, 1874 (18 Stat. 27), and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence, and does not extend to the question whether the evidence supports the findings of fact.—*San Pedro & Canon Del Agua Co. v. United States*, 146 U. S. 120, 13 S. Ct. 94, 36 L. Ed. 911, affirming decree *United States v. San Pedro Cañon del Agua Co.*, 17 P. 337, 4 N. M. (Gild.) 405.

On an appeal from a territorial supreme court, the question whether the evidence supports the findings below is not open to examination, and, apart from exceptions taken to the admission or rejection of evidence, the review is limited to the inquiry whether the findings support the decree.—*Mammoth Min. Co. v. Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 14 S. Ct. 384, 38 L. Ed. 229, affirming decree *Salt Lake Foundry & Machine Co. v. Mammoth Min. Co.*, 6 Utah, 351, 23 P. 760.

Where the supreme territorial court affirms and adopts the findings of the trial court, they subserve the purpose of a finding of fact on appeal to the United States supreme court.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 S. Ct. 282, 40 L. Ed. 436.

Since, under Act April 7, 1874, the jurisdiction of the court, on appeal from the judgment of a territorial supreme court, is limited to determining whether the facts found are sufficient to sustain the judgment, and to reviewing the rulings on testimony, the court cannot investigate the preponderance of proof, but must confine itself to the findings, and their sufficiency to support the conclusions.—*Id.*

Conclusions of fact, reached by a territorial supreme court upon a review of the testimony, which is all in the record, are not reviewable upon an appeal to the supreme court of the United States.—*Kelsey v. Crowther*, 162 U. S. 404, 16 S. Ct. 808, 40 L. Ed. 1017.

The dismissal on motion of a writ of error to the supreme court of the territory of Hawaii, which is governed by the principles controlling writs of error to state courts, will be ordered, instead of granting a motion to affirm, where the subject-matter of the controversy is not inherently federal, and the only federal question raised has been so explicitly decided by the supreme court of the United States in accordance

with the ruling of the lower court as to foreclose further argument on the subject.—*Equitable Life Assur. Soc. v. Brown*, 23 S. Ct. 123, 187 U. S. 308, 47 L. Ed. 190.

There is a finding of facts upon which a review can be had in the Supreme Court of the United States by writ of error to the Oklahoma Supreme Court, where the latter court states in its opinion that on a prior appeal it had made "a full statement and findings of facts" and had enunciated the law as applied thereto, and that finding the record the same as stated in its former opinion, and being satisfied with the law as therein declared, no new question being raised, the judgment of the trial court is affirmed. Judgment (1905) 79 P. 1134, affirmed.—*National Live Stock Bank v. First Nat. Bank*, 27 S. Ct. 79, 203 U. S. 296, 51 L. Ed. 192.

The statement of facts made by the territorial Supreme Court will not be held defective on appeal to the Supreme Court of the United States because it may be confused and may give a mass of unnecessary details, if a sufficient statement finally emerges therefrom.—*Crowe v. Trickey*, 27 S. Ct. 275, 204 U. S. 228, 51 L. Ed. 454, affirming judgment *Trickey v. Crowe* (Ariz. 1903) 71 P. 965; *Crowe v. Harmon*, 27 S. Ct. 280, 204 U. S. 241, 51 L. Ed. 461, affirming judgment *Harmon v. Crowe* (Ariz. 1903) 71 P. 1125.

The jurisdiction of the Supreme Court of the United States on an appeal from a territorial Supreme Court is limited to determining whether the findings of fact support the judgment, where the exceptions to rulings of the trial court in the admission or rejection of evidence were not insisted upon in the territorial Supreme Court, and were not considered by that tribunal.—*Id.*

Errors assigned with respect to the action of the trial court with reference to an alleged confession of guilt furnish no basis for the exercise by the Supreme Court of the United States of its appellate jurisdiction over the Porto Rican Supreme Court, under Act April 12, 1900, c. 191, § 35, 31 Stat. 85, where the record does not show even the semblance of the assertion or denial of a right under the federal Constitution.—*Kent v. People of Porto Rico*, 28 S. Ct. 55, 207 U. S. 113, 52 L. Ed. 127.

The denial of a motion for rehearing by the Supreme Court of the Philippine Islands cannot serve to bring federal questions into the record, so as to sustain a writ of error from the Supreme Court of the United States.—*Paraiso v. United States*, 28 S. Ct. 127, 207 U. S. 368, 52 L. Ed. 249.

A decree of the Supreme Court of the Territory of Oklahoma, affirming a decree of the trial court, setting aside a sale made under attachment proceedings as a cloud on title, and directing the enforcement of a trust deed by sale, is reviewable in the Supreme Court of the United States only by appeal. Judgment (1906) 85 P. 459, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

The jurisdiction of the Supreme Court of the United States on an appeal from a decree of the Supreme Court of the territory of Oklahoma in a case submitted to the trial court by stipulation, without a jury, is confined to determining whether there was evidence tending to support the findings, and whether such findings sustained the judgment; since the trial court, by virtue of Rev. St. Okl. 1903, § 279, was empowered to make findings of fact as the basis of its conclusions of law, and the Supreme Court of the territory was confined to determining whether the findings below sustained the judgment, if there was evidence supporting the find-

ings, and was not at liberty to consider the mere weight of the evidence upon which the findings were made by the trial court.—Id.

The failure of the record to show that any federal question was raised or suggested before the assignment of error in the federal Supreme Court precludes the maintenance of a writ of error from that court under Act April 30, 1900, c. 339, § 86, 31 Stat. 141, to review a judgment of the Hawaiian Supreme Court.—Honolulu Rapid Transit & Land Co. v. Wilder, 29 S. Ct. 46, 211 U. S. 144, 53 L. Ed. 124.

The mere entry upon the minutes by the clerk of the Supreme Court of the territory of a decision overruling exceptions taken under Rev. Laws Haw. 1905, § 1862 et seq., which did not bring up the whole case, and called upon the reviewing court merely to pass upon specific questions raised by the bill, does not make such decision a final judgment, so as to be subject to review in the federal Supreme Court.—Cotton v. Territory of Hawaii, 29 S. Ct. 85, 211 U. S. 162, 53 L. Ed. 131.

The order of a territorial Supreme Court, reversing the order of the court below, granting a new trial, cannot be reviewed by the federal Supreme Court on a writ of error directed alone to a later decision in the same case, overruling exceptions, the record of which cannot be regarded as embracing the proceedings had below in respect to the matter of a new trial.—Id.

There is no final judgment below to sustain an appeal to the federal Supreme Court from the Supreme Court of the territory of Hawaii in a case in which the latter court has pursued the usual course upon exceptions, and has not entered or directed a judgment.—Hutchins v. William W. Bierce, 29 S. Ct. 122, 211 U. S. 429, 53 L. Ed. 267.

A property owner and taxpayer has no such personal interest in a suit brought by him to restrain territorial officers from exchanging certain public lands of the territory of Hawaii for other lands as will sustain a writ of error from the federal Supreme Court to review a judgment of the territorial Supreme Court, denying the relief sought, where the suit is grounded on the theory that the proposed exchange is illegal under the territorial laws because the lands sought to be exchanged are under lease and are in parcels of more than 1,000 acres.—McCandless v. Pratt, 29 S. Ct. 144, 211 U. S. 437, 53 L. Ed. 271.

Error in the instructions as to the apportionment of accretions does not require the federal Supreme Court, without the evidence before it, to reverse a judgment for plaintiff in ejectment on a writ of error to the Supreme Court of Hawaii, where that court, though believing that the instructions were wrong, believed that the verdict was right, and declined to set it aside or require a remittitur as a condition of not doing so.—Spreckels v. Brown, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

An instruction that a grant from the King of Hawaii of the upland above a street down to what was then its upper side, "and also the sea beach in front of the same down to low-water mark," includes the strip between the front lines of the upland, as described by metes and bounds, and high-water mark, cannot be deemed erroneous by the federal Supreme Court without having the evidence before it, where the Supreme Court of Hawaii, in upholding the instruction, said that the area between the part described and high-water mark was not very extensive, was of little value, and was closely connected with the upper part in use.—Id.

Only questions of law are brought up for review by a writ of error from the federal Supreme Court to the Supreme Court of the Philippine Islands.—Santos v. Holy Roman Catholic and Apostolic Church, 29 S. Ct. 338, 212 U. S. 463, 53 L. Ed. 599.

The facts, when the courts below differ, will be reviewed by the federal Supreme Court under Act July 1, 1902, c. 1369, § 10, 32 Stat. 695 (U. S. Comp. St. Supp. 1907, p. 214), on appeal from or writ of error to the judgment of the Supreme Court of the Philippine Islands.—Strong v. Repide, 29 S. Ct. 521, 213 U. S. 419, 53 L. Ed. 853.

Findings of a territorial Supreme Court that commissioners appointed in a street improvement proceeding examined the locality thereof, ascertained the extent of public benefit, and of benefits to property, found amounts that property would be benefited, and apportioned and assessed the amounts on the several parcels in the proportion of which they were severally benefited, and that no lot was assessed for more than it was actually benefited—foreclose any contention in the federal Supreme Court that assessment was made according to the front-foot rule, and not on basis of benefits.—English v. Territory of Arizona ex rel. Griffith, 29 S. Ct. 658, 214 U. S. 359, 53 L. Ed. 1080.

There is no such manifest error as calls for reversal of judgment below by the federal Supreme Court in a decision of the territorial Supreme Court that a method of collecting delinquent taxes, prescribed by Laws Ariz. 1903, No. 92, viz., a suit by county tax collector in the name and for use of the territory, is made applicable to delinquent special assessments for public improvements by reason of provisions of sections 84 and 96 of that act, requiring, respectively, the clerks of county boards to correctly list all tracts on which back taxes shall be due, and all back taxes of whatever kind to be collected by the collector under authority of such statute.—Id.

The construction placed by a territorial Supreme Court upon a local statute will not be disturbed by the federal Supreme Court on appeal, unless manifestly erroneous. Judgment, Territory v. Board of Com'rs of Santa Fé County (N. M. 1907) 89 P. 252, affirmed.—Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

The question of the power of a territorial Supreme Court, under its local statutes and procedure, to render a modified judgment on appeal in mandamus, will ordinarily not be reviewed by the federal Supreme Court.—Id.

The construction given by a territorial Supreme Court to the statutes of that territory will ordinarily not be disturbed by the federal Supreme Court on writ of error to the territorial court. Judgment (1908) Sandoval v. Albright, 93 P. 717, affirmed.—Albright v. Sandoval, 30 S. Ct. 318, 216 U. S. 331, 54 L. Ed. 502.

The jurisdiction of the federal Supreme Court, under Act April 7, 1874, c. 80, 18 Stat. 27, on an appeal from a territorial court, is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence.—(1910) Eagle Mining & Improvement Co. v. Hamilton, 31 S. Ct. 27, 218 U. S. 513, 54 L. Ed. 1131, affirming decree (1907) 91 P. 718, 41 N. M. 511.

The findings of a territorial district court, having been adopted and affirmed by the Supreme Court of the territory, serve the purpose of the statement of facts required by Act April 7, 1874, c. 80, 18 Stat. 27, on appeal to the federal Supreme Court.—Id.

The findings of a district court of a territory furnish a sufficient statement of the facts for the purposes of an appeal from the territorial Supreme Court, where the latter court made no express findings of fact, but entered a

general judgment of affirmance, manifestly based upon the correctness of the findings of the trial court.—(1910) *Montezuma Canal Co. v. Smithville Canal Co.*, 31 S. Ct. 67, 218 U. S. 371, 54 L. Ed. 1074, reversing decree (1907) 89 P. 512, 11 Ariz. 99.

The right to registration of a land title in the Philippine Islands on the ground of established possession when a composition deed from the Spanish authorities was issued will not be considered by the federal Supreme Court, when reviewing a judgment of the Supreme Court of the Philippine Islands, which affirmed a judgment of the trial court, refusing registration on the opposition of the insular government, where the case, as made by the pleadings, is rested solely upon the right to register resulting from the composition deed, without the slightest averment of possession prior to the time such deed was issued, except as it may be considered that such possession was alleged as a necessary result of the averments as to the deed, and no evidence whatever was offered concerning the possession prior to, or at the time of, the composition deed, irrespective of the administration proceedings leading up to the issue of such deed, and following upon its annulment, the validity of the deed, as depending upon the competency of the administrative officers to avoid it and to annul the composition proceedings, being the one issue which, as understood by the court below and by the parties, arose upon the opposition of the government.—*Roura v. Government of the Philippine Islands*, 31 S. Ct. 73, 218 U. S. 386, 54 L. Ed. 1080.

The entire case is open for the consideration of the federal Supreme Court on a writ of error to a territorial Supreme Court, to review a judgment of that court, which, on a second writ of error, affirmed a judgment below, entered pursuant to its mandate, issued on the first writ of error.—*William W. Bierce v. Waterhouse*, 31 S. Ct. 241, 219 U. S. 320, 55 L. Ed. 237.

Errors assigned in the Supreme Court of a territory, but passed by it without decision, are open for review in the federal Supreme Court on writ of error, if that court finds that the former court erred in reversing the judgment of the trial court upon the single error considered.—*Id.*

A judgment of the Hawaiian Supreme Court did not become final before the enactment of Act March 3, 1905, c. 1465, 33 Stat. 1035, and hence not reviewable in the federal Supreme Court under that act, where, although the opinion was filed prior to that enactment, a petition for rehearing was duly filed and entertained by the court, and was not denied until after the passage of such statute.—*Id.*

A judgment of the Supreme Court of the Philippine Islands which directs the entry of judgment for the plaintiff below, in accordance with its decision, but leaves to the lower court the judicial determination of the exact amount for which the judgment shall be entered, is not final for the purpose of an appeal to the federal Supreme Court.—*Martinez v. International Banking Corporation*, 31 S. Ct. 408, 220 U. S. 214, 55 L. Ed. 438.

The decision of the Arizona Supreme Court that a railway company organized in 1901 under Laws Ariz. 1897, No. 3, for the purpose of buying the property of a railroad sold on foreclosure, may claim the benefit of the provision of Laws Ariz. 1899, No. 63, that property used or necessary in the construction and operation of railroads thereafter constructed, whether owned or operated by a person, association, or railway corporation, their successors or assigns, shall be exempt from all manner of taxation for 10 years from the date of

the act, although by section 8 of the earlier act it was provided that that act should not be construed to give to any corporation created under it any exemption from taxation created by any existing or future exemption laws—is not so clearly erroneous as to require reversal in the federal Supreme Court.—*Treat v. Grand Canyon Ry. Co.*, 32 S. Ct. 125, 222 U. S. 448, 56 L. Ed. 265, affirming decree 100 P. 438, 12 Ariz. 117.

Findings of fact by the District Court of the United States for Porto Rico will not enable the federal Supreme Court to determine whether they support the judgment on an appeal, which under Act April 12, 1900, § 35, is governed by rules applicable to appeals in territorial Supreme Courts, where the findings merely embody conflicting statements of counsel.—*Gonzales v. Buist*, 32 S. Ct. 463, 224 U. S. 126, 56 L. Ed. 693.

Hypothetical assumption by a territorial Supreme Court of the correctness of findings of the trial court, and thereupon reversing the decree for complainant and remanding the cause to enter a final decree against it, instead of making a statement of facts under Act April 7, 1874, calls for reversal in the federal Supreme Court, where the action arose from misconception as to the extent of the court's powers, and where the final order which made clear the court's misconception was not entered until months after appeal to the federal Supreme Court.—(1912) *Nielsen v. Steinfeld*, 32 S. Ct. 609, 224 U. S. 534, 56 L. Ed. 872, reversing decree (1909) *Steinfeld v. Nielsen*, 100 P. 1094, 12 Ariz. 381.

The holding of the territorial Supreme Court on the first appeal is not the law of the case for the federal Supreme Court, reviewing a decree rendered on second appeal.—(1912) *Zeckendorf v. Steinfeld*, 32 S. Ct. 728, 225 U. S. 445, 56 L. Ed. 1156, modifying decree (1909) 100 P. 784, 12 Ariz. 245.

Writ of error from the Supreme Court to the Supreme Court of the Philippine Islands will be dismissed where the evidence is contradictory and there is no question of law involved.—*Harty v. Municipality of Victoria*, 33 S. Ct. 4, 226 U. S. 12, 57 L. Ed. 103.

The failure of the Porto Rican Supreme Court when reversing a decree for defendant in an action of filiation, because prescription had not been pleaded, to remand and permit defendant to cross-examine the claimants, is one of discretion and not reviewable by a federal Supreme Court.—*Burnet v. Desmornes y Alvarez*, 33 S. Ct. 63, 226 U. S. 145, 57 L. Ed. 159.

The ruling of a territorial Supreme Court that a judicial sale was within Comp. Laws N. M. 1897, § 2716, governing the sale of attached perishable property, will ordinarily be followed by a federal Supreme Court on appeal.—*Jones v. Springer*, 33 S. Ct. 64, 226 U. S. 148, 57 L. Ed. 161, affirming decree 103 P. 265, 15 N. M. 98.

The federal Supreme Court will not assume on writ of error to a territorial Supreme Court, that the trial court refused to give an instruction because not contained in the bill of exceptions, where the territorial Supreme Court took notice of such instruction.—*Southwestern Brewery & Ice Co. v. Schmidt*, 33 S. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment *Schmidt v. Southwestern Brewery & Ice Co.*, 107 P. 677, 15 N. M. 232.

On the question whether the original judgment creditors alone can sue on a judgment in favor of a trustee and the beneficiary, where a new trustee has been appointed and the judgment has been assigned to him, the Supreme Court

will not go behind the local practice.—*Kalaniana'ole v. Smithies*, 33 S. Ct. 169, 226 U. S. 462, 57 L. Ed. 303.

Decision of New Mexico Supreme Court sustaining territorial statute over objections that it was not approved by the Governor, and did not reach him more than three days before the adjournment of the Legislature, so as to become a law under Rev. St. U. S. § 1842, and that the bill was not duly signed by the president of the council or the speaker of the house, will not be disturbed by the federal Supreme Court, where the statute appears in the laws of the year, and the Governor returned the bill to the council with the statement that he had allowed it to become a law by limitation.—*Gray v. Taylor*, 33 S. Ct. 199, 227 U. S. 51, 57 L. Ed. 413, affirming decree 113 P. 588, 15 N. M. 742, and affirming judgment *Territory v. Board of Com'rs of Lincoln County*, 117 P. 1127, 16 N. M. 467.

Objection that petition asking county commissioners to submit to a vote the proposition to remove the county seat did not ask for the removal, as required by Laws N. M. 1909, c. 80, will not prevail on appeal from the territorial Supreme Court holding such petition sufficient.—*Id.*

A ruling of a territorial Supreme Court adverse to objections based on the misleading form of the ballots used in an election to change a county seat will not be revised in the federal Supreme Court, where they conformed to the provisions of Comp. Laws N. M. 1897, § 631.—*Id.*

An objection that allegations of bill in taxpayer's suit to restrain erection of county building were admitted because not denied will not be considered on appeal to the federal Supreme Court from a decree of a territorial Supreme Court, affirming a judgment dismissing the bill.—*Id.*

The federal Supreme Court will not reverse rulings of territorial Supreme Court that the provisions of Comp. Laws N. M. 1897, § 1709, for registration of voters, did not apply to a special county seat election, held conformably to Laws N. M. 1909, c. 80.—*Id.*

The jurisdiction of the federal Supreme Court on appeal from the Supreme Court of Porto Rico governed by Act April 12, 1900, § 35, is confined to determining whether the facts found by the Supreme Court of Porto Rico support the judgment, or whether there was material error in rulings on evidence shown by certified exceptions.—*Rosaly v. Graham y Frazer*, 33 S. Ct. 333, 227 U. S. 584, 57 L. Ed. 655.

Statement of facts in an opinion may be accepted in lieu of more formal findings on an appeal to the federal Supreme Court from the Supreme Court of Porto Rico, where such opinion was made part of the judgment.—*Id.*

The Supreme Court will not disturb the decision of the Supreme Court of Porto Rico, construing the fourth transitory provision of the Civil Code of 1889 so as to make it applicable to an action by a natural child seeking filiation and a share of her parent's estate, the provisions of sections 133 and 137 prescribing limitation for such actions not amounting to a solemn recognition, though the law in force at her alleged parent's death was Law 11 of Toro (Novisima Recopilacion, book 10, tit. 5, law 1), under which she acquired rights of inheritance by the informal acts of recognition alleged.—*Cordova v. Folgueras y Rijos*, 33 S. Ct. 350, 227 U. S. 375, 57 L. Ed. 556.

Decision of territorial Supreme Court that a purchaser at execution sale with notice that his debtor held the legal title in trust will take subject to their rights, notwithstanding Civ. Code Ariz. 1901, par. 749, will be followed by the federal Supreme Court on appeal.—*Luke v.*

Smith, 33 S. Ct. 356, 227 U. S. 379, 57 L. Ed. 558, affirming judgment 108 P. 494, 13 Ariz. 155.

A decision of a territorial Supreme Court, declining to review assignments of error, both because they were too general and because the abstract did not contain the evidence contrary to rule of court will not be disturbed by the federal Supreme Court.—*Sanford v. Ainsa*, 33 S. Ct. 704, 228 U. S. 705, 57 L. Ed. 1033, affirming judgment 114 P. 560, 13 Ariz. 287.

Jurisdiction of the federal Supreme Court on appeal from the District Court of the United States for Porto Rico, under Act April 12, 1900, § 35, which subjected such appeals to regulations applicable to appeals from the territorial Supreme Courts, is confined to determining whether the facts support the judgment.—*Ochoa v. Hernandez y Morales*, 33 S. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

The construction given by the territorial Supreme Court to the words "in accordance with this act" contained in Laws N. M. 1899, c. 22, § 25, restricting the grounds on which tax titles after sale in accordance with this act, may be attacked, as meaning "under this act," is not so clearly erroneous as to justify the Supreme Court in rejecting it.—*Straus v. Foxworth*, 34 S. Ct. 42, 231 U. S. 162, 58 L. Ed. 168.

Appeal and not error is the proper method of reviewing in the Supreme Court a decree of the Supreme Court of Porto Rico, affirming a decree of the District Court in suit to set aside judicial sale on foreclosure.—*Zayas v. Lothrop, Luce & Co.*, 34 S. Ct. 108, 231 U. S. 171, 58 L. Ed. 172.

Conclusion of Porto Rico Supreme Court that Code of Civil Procedure, relating to foreclosure, so far as it directed service of citation in ordinary cases, was not applicable to proceedings under the mortgage law, will be followed by the federal Supreme Court in the absence of clear conviction of error.—*Id.*

The federal Supreme Court, reviewing a judgment of the territorial Supreme Court, will accept the construction placed by that court upon Civ. Code Ariz. 1901, pars. 2764-2766, giving a right of action for death, as not requiring plaintiff to allege or prove the existence of beneficiaries or the amount of damages suffered by them.—*Phoenix Ry. Co. v. Landis*, 34 S. Ct. 179, 231 U. S. 578, 58 L. Ed. 377, affirming judgments 108 P. 247, 13 Ariz. 80, and 112 P. 844, 13 Ariz. 279.

An objection that a verdict is against the evidence, or that the damages are excessive, cannot be considered in the federal Supreme Court on writ of error under Act April 7, 1874, § 2, to review a judgment of the territorial Supreme Court; there being some evidence to go to the jury.—*Id.*

An objection to instructions as to damages cannot be raised for the first time in the federal Supreme Court.—*Id.*

Refusal of a territorial Supreme Court to scrutinize the reporter's transcript in response to a general objection to the action of the court in permitting answers to certain hypothetical questions addressed to physicians will not be disturbed by the federal Supreme Court.—*Id.*

The federal Supreme Court cannot consider on writ of error to a territorial Supreme Court errors not fundamental, not brought under review in that court.—*Gila Valley, G. & N. Ry. Co. v. Hall*, 34 S. Ct. 229, 232 U. S. 94, 58 L. Ed. 521, affirming judgment 112 P. 845, 13 Ariz. 270.

The Supreme Court will not revise the refusal of a territorial Supreme Court to control the discretion of the trial court in remitting a part of an excessive verdict instead of granting

a new trial on the ground that the verdict was tainted with prejudice.—*Id.*

A defense founded on the statute of frauds is not available in the federal Supreme Court if there is nothing in the record to show that it was raised in the territorial Supreme Court.—*Bank of Arizona v. Thomas Haverty Co.*, 34 S. Ct. 235, 232 U. S. 106, 58 L. Ed. 526, affirming judgment 115 P. 73, 13 *Ariz.* 418.

The findings of fact may be reviewed by the federal Supreme Court on appeal from the District Court of United States for Porto Rico to pass on objections that the findings were solely on inferences from parol proof conflicting with declarations of parties in notarial acts which under the local law were not susceptible of being overthrown by parol proof and that the effect of such findings are to give effect to the parties' own fraud and deceit.—*Van Syckel v. Arsuaga*, 34 S. Ct. 263, 231 U. S. 601, 58 L. Ed. 393.

A territorial Supreme Court commits no reversible error in holding that a foreign corporation may plead limitations in a suit to quiet title where it had complied with the local laws, was in possession of the property, paying taxes, and conducting business by means of its use and subject to be sued, having an agency for that purpose.—*Work v. United Globe Mines*, 34 S. Ct. 274, 231 U. S. 595, 58 L. Ed. 389, affirming decree 100 P. 813, 12 *Ariz.* 339.

A ruling of a territorial Supreme Court, that a reference by way of recital to an earlier defective deed in the deed relied on as color of title in support of a claim of adverse possession did not render the latter deed insufficient for that purpose where otherwise adequate, is not so manifestly erroneous as to require reversal.—*Id.*

A ruling of the Porto Rico Supreme Court that the dismissal of a suit to establish filiation by judgment is a bar to a subsequent suit between the same parties to nullify a will which ignored the child whose filiation was sought to be established in the earlier suit will not be disturbed on appeal unless clearly erroneous.—*Calaf v. Calaf*, 34 S. Ct. 411, 232 U. S. 371, 58 L. Ed. 642.

The federal Supreme Court will ordinarily not disturb on appeal the ruling of the Porto Rico Supreme Court on the question whether there was a final judgment in a suit which could be set up as a bar to a later suit.—*Id.*

Errors not fundamental or jurisdictional will not be considered on writ of error to a territorial Supreme Court when not brought to the notice of such court.—*Grant Bros. Const. Co. v. United States*, 34 S. Ct. 452, 232 U. S. 647, 58 L. Ed. 776, affirming judgment 114 P. 955, 13 *Ariz.* 388.

The federal Supreme Court will not lightly disturb on writ of error the decision of a territorial Supreme Court, turning largely upon the local practice.—*Tevis v. Ryan*, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 P. 461, 13 *Ariz.* 120, and 114 P. 557, 13 *Ariz.* 282.

The federal Supreme Court will not disturb the rulings of the territorial Supreme Court that Civ. Code *Ariz.* 1887, par. 2654, gave the county board of equalization no authority to raise the assessment of some only of a group of mining claims originally assessed en masse on the return of the owner.—*Territory of Arizona ex rel. Gaines v. Copper Queen Consol. Min. Co.*, 34 S. Ct. 546, 233 U. S. 87, 58 L. Ed. 863, affirming judgment 108 P. 960, 13 *Ariz.* 198.

Decision of territorial Supreme Court that the question whether the evidence supported a default judgment cannot be raised by moving specially to quash the service and set aside the

judgment will be followed by the federal Supreme Court.—*Herbert v. Bicknell*, 34 S. Ct. 562, 233 U. S. 70, 58 L. Ed. 854.

The federal Supreme Court will not disturb the ruling of the territorial Supreme Court that leaving a copy of a summons at the place where the principal defendant, in garnishment, last had stopped, satisfied the requirement of Rev. Laws Hawaii, § 2114, that it be left at his last and usual place of abode.—*Id.*

Admission of oral testimony of chief engineer of railroad to prove the adoption by directors of the line of the proposed railroad will not require reversal of decree of the territorial Supreme Court, affirming the decree, where, notwithstanding Comp. Laws N. M. 1897, § 3832, directors had failed to keep a record of all proceedings in a special book.—*Denver & R. G. R. Co. v. Arizona & C. R. Co. of New Mexico*, 34 S. Ct. 691, 233 U. S. 601, 58 L. Ed. 1111, affirming decree *Arizona & C. R. Co. of New Mexico v. Denver & R. G. R. Co.*, 117 P. 730, 16 N. W. 281.

Decision of territorial Supreme Court that a railroad is entitled to protection against interference with its right of way from final location, notwithstanding delay in filing map thereof, if it is filed within the reasonable time allowed by Comp. Laws N. M. 1897, § 3874, will not be reversed by federal Supreme Court, though under section 3850, a petition for condemnation must allege survey and location according to survey.—*Id.*

The jurisdiction of the federal Supreme Court under Judicial Code (Act March 3, 1911, c. 231) § 247, 36 Stat. 1158 (U. S. Comp. St. Supp. 1911, p. 230), to review judgments of district courts of Alaska because of presence of a constitutional question exists only when such question was actually raised in the trial court.—*Itow v. United States*, 34 S. Ct. 699, 233 U. S. 581, 58 L. Ed. 1102.

Rulings of a territorial Supreme Court as to pleadings and practice will ordinarily be accepted by the federal Supreme Court.—*Schmidt & Story v. Bank of Commerce*, 34 S. Ct. 730, 234 U. S. 64, 58 L. Ed. 1214, reversing judgment *Bank of Commerce v. Broyles*, 120 P. 670, 16 N. M. 414.

Jurisdiction of the federal Supreme Court on appeal from Supreme Court of Porto Rico under Act April 12, 1900, § 35, relating to the power of the former court to review judgments of territorial Supreme Court, is confined to determining whether the facts found below support the judgment or whether there was error in rulings on evidence shown by duly certified exceptions.—*People of Porto Rico v. Emmanuel*, 35 S. Ct. 33, 235 U. S. 251, 59 L. Ed. 215.

Proceedings to review in the federal Supreme Court judgment of Porto Rico Supreme Court under Act April 12, 1900, § 35, relating to appellate jurisdiction possessed by the former court to review territorial Supreme Court judgments, must be by appeal, unless there was a trial by jury under Act April 7, 1874, § 2, in which case appellate jurisdiction must be exercised by writ of error.—*Id.*

Jurisdiction of the federal Supreme Court on appeal from Supreme Court of Porto Rico is confined to determining whether error of law was committed in admitting or rejecting evidence and whether the findings of fact sustained the conclusions based on them.—*Monagas v. Albertucci*, 35 S. Ct. 95, 235 U. S. 81, 59 L. Ed. 139.

Finding of fact of the Porto Rico Supreme Court on which is based its ruling that a contract is one of conditional sale may be treated as conclusive by the federal Supreme Court, without reviewing rulings of the former court on exceptions to testimony showing that the

contract was a mortgage where the conclusion that error had been committed did not arise from the ruling that there was want of power to admit any testimony, but from the fact that the testimony offered was found to bear no legal relation to such purpose, and to be of no probative force tending to support the varying of the contract.—*Id.*

Federal Supreme Court will defer to rulings of local courts as to validity under Hawaiian laws of a judgment of the Hawaiian courts.—*Kapiolani Estate v. Atcherley*, 35 S. Ct. 832, 238 U. S. 119, 59 L. Ed. 1229.

A writ of error to the district Court of the United States for the District of Porto Rico must be dismissed, where there is no bill of exceptions and nothing enabling the court to ascertain the constitutional questions relied on.—*Cerecedo v. United States*, 36 S. Ct. 3, 239 U. S. 1, 60 L. Ed. 113.

Local law as applied below will be accepted by the federal Supreme Court on appeal from the Philippine Supreme Court unless error was clearly committed.—*De Villanueva v. Villanueva*, 36 S. Ct. 109, 239 U. S. 293, 60 L. Ed. 293.

The facts cannot be reviewed by the federal Supreme Court on appeal from the Porto Rico Supreme Court, where the evidence is not in the record, except as shown in the opinion of the court below or in a statement of facts prepared by that court for the purposes of the appeal.—*Cardona v. Quinones*, 36 S. Ct. 346, 240 U. S. 83, 60 L. Ed. 538.

The action of the Supreme Court of Porto Rico as to matters of local law in respect to procedure will not be disturbed by the federal Supreme Court, unless error clearly appears.—*Id.*

Legal propositions, ignoring or disputing the findings of fact on which the conclusions of the court below are based, cannot be urged in the federal Supreme Court as grounds for reversal of a decree of the Porto Rico Supreme Court, where the record is such that the facts cannot be reviewed.—*Id.*

Federal Supreme Court will not reverse decree of Supreme Court of the Philippine Islands, where objection is not presented to the court below nor assigned as error on appeal.—*De La Rama v. De La Rama*, 36 S. Ct. 518, 241 U. S. 154, 60 L. Ed. 932.

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See 13 Cent. Dig. Courts, §§ 1038-1040; 2 Cent. Dig. App. & E. §§ 309, 324; 3 Cent. Dig. App. & E. § 3394.

According to the practice in the district of Columbia, when the general term of the supreme court sustains exceptions of the defendant against whom the verdict and judgment went in the special term for circuit court business, and orders a second trial, the case stands as if it had never been tried before; and, on a writ of error from the United States supreme court to the general term which affirmed a verdict of the special term on the second trial in favor of the plaintiff, only the rulings at the second trial, and no rulings, whether similar or different, at the former trial, can be brought up.—*Shepherd v. Thompson*, 122 U. S. 231, 7 S. Ct. 1229, 30 L. Ed. 1156.

Where the second comptroller and fourth auditor of the treasury of the United States have disallowed a naval officer's claim for mileage, under Act Cong. March 3, 1835, and he applies to the supreme court of the District of Columbia for a writ of mandamus to those officers, on the ground that their duty in the premises is to allow his claim, under the decisions of the supreme court of the United States, and that this duty is purely ministerial, the case involves no question of the validity of an authority exercised under the United States,

but only whether the exercise of an authority thereunder was erroneous; and, where the amount involved is not within the jurisdiction of the supreme court of the United States, a writ of error will not lie to the supreme court of the District to review its action in denying the petition for mandamus.—*United States v. Lynch*, 137 U. S. 280, 11 S. Ct. 114, 34 L. Ed. 700.

Rev. St. D. C. § 846, giving the same right of appeal from the supreme court of the District as is "provided by law" for appeals from circuit courts, does not render applicable to that court the provision of the subsequent judiciary act of March 3, 1891, § 5, allowing appeals from the existing circuit courts to the United States supreme court in cases of conviction of a capital or otherwise infamous crime.—*In re Heath*, 144 U. S. 92, 12 S. Ct. 615, 36 L. Ed. 358.

The supreme court of the United States has no jurisdiction to review, on writ of error, a judgment of the supreme court of the District of Columbia sentencing a prisoner to death for murder.—*Cross v. United States*, 145 U. S. 571, 12 S. Ct. 842, 36 L. Ed. 821; *In re Schneider*, 148 U. S. 157, 13 S. Ct. 572, 37 L. Ed. 404.

The supreme court of the United States has no authority to review by writ of error a sentence of death imposed by the supreme court of the District of Columbia. Act Cong. Feb. 6, 1889, § 6 (25 Stat. 655), giving such authority with respect to federal courts in general, does not apply to that court, as it was not the purpose of the act to secure a double review.—*Cross v. United States*, 145 U. S. 571, 12 S. Ct. 842, 36 L. Ed. 821.

Rev. St. § 706, and Rev. St. D. C. § 847, providing for the allowance of appeals and writs of error by the justices of the supreme court of the United States under special circumstances, are no longer in force. 20 Stat. 320; 23 Stat. 443.—*Cross v. Burke*, 146 U. S. 82, 13 S. Ct. 22, 36 L. Ed. 896; *United States v. Wanamaker*, 147 U. S. 149, 13 S. Ct. 279, 37 L. Ed. 118.

Rev. St. D. C. § 846, giving the same right of appeal from the supreme court of the District as is "provided by law" for appeals from circuit courts, does not render applicable to that court the provisions of subsequent acts regulating appeals from circuit courts.—*Cross v. Burke*, 146 U. S. 82, 13 S. Ct. 22, 36 L. Ed. 896.

A judgment of the court of appeals of the District of Columbia refusing a mandamus to the commissioner of patents to register a trademark is not reviewable as drawing in question the validity of a statute or an authority exercised under the United States (Act Feb. 9, 1893, c. 74, § 8), where the only controversy is as to the construction of the act of congress under which registration is claimed, and consequently as to the nature and extent of the commissioner's authority.—*United States v. Seymour*, 153 U. S. 353, 14 S. Ct. 871, 33 L. Ed. 742.

Upon an appeal to the United States supreme court from a final decree of the general term of the supreme court of the District of Columbia, the entire record is brought up for a rehearing.—*Spalding v. Mason*, 161 U. S. 375, 16 S. Ct. 592, 40 L. Ed. 738.

The supreme court cannot review a decision of the court of appeals of the District of Columbia in an action of forcible detainer to recover possession, under a trust deed, of certain property, on default in payment of the debt secured thereby, though the value of the property exceeds \$5,000; there being nothing to show that the value of the possession reaches that amount, defendant being in possession under a lease for one year at a rental of \$1,560.—*Willis v. East-*

ern Trust & Banking Co., 17 S. Ct. 739, 167 U. S. 76, 42 L. Ed. 83.

A decision by the court of appeals of the District of Columbia that the acts of congress establishing a system of water supply in the District, and regulating the method of assessment, are constitutional, and that an assessment thereunder without notice to a property holder was valid, involves the validity of statutes of the United States, and of an authority exercised thereunder, so as to be reviewable by the supreme court.—*Parsons v. District of Columbia*, 18 S. Ct. 521, 170 U. S. 45, 42 L. Ed. 943.

A judgment in a criminal case cannot be reviewed on writ of error from the federal Supreme Court to the Court of Appeals of the District of Columbia, under Act Cong. March 3, 1901, c. 854 (31 Stat. 1189) § 233, providing for a review of judgments of that court in the federal Supreme Court upon writ of error or appeal, without regard to the amount in dispute, in cases in which the validity of any patent or copyright is involved, or in which is drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States. Writ of error 20 App. D. C. 336, dismissed.—*Sinclair v. District of Columbia*, 24 S. Ct. 212, 192 U. S. 16, 48 L. Ed. 322.

A suit in which the validity of a regulation established by the Commissioners of Patents, under the authority of Rev. St. U. S. § 482 [U. S. Comp. St. 1901, p. 272], for the conduct of proceedings in the Patent Office, is assailed, is one in which there is drawn in question the validity of "an authority exercised under the United States" within the meaning of Act Feb. 9, 1893, c. 74, § 8, 27 Stat. 436 [U. S. Comp. St. 1901, p. 573], giving an appeal in such cases from the final judgment or decree of the Court of Appeals of the District of Columbia to the federal Supreme Court.—*United States ex rel. Steinmetz v. Allen*, 24 S. Ct. 416, 192 U. S. 543, 48 L. Ed. 555.

Writ of error, and not appeal, is the only mode of reviewing a judgment of the Court of Appeals of the District of Columbia, sustaining an assessment and award in condemnation proceedings instituted under Act Cong. June 6, 1900, c. 810 (31 Stat. 668), in view of the provision of Code D. C. § 233, that the power to review judgments or decree of that court is to be exerted only in the same manner, and under the same regulations, as prevailed before its organization in cases of writs of error to, or appeals from, the Supreme Court of that District. Judgment 20 App. D. C. 421, affirmed.—*Metropolitan R. Co. v. MacFarland*, 25 S. Ct. 28, 195 U. S. 322, 49 L. Ed. 219.

The validity of an authority exercised under the United States was not drawn in question so as to sustain the appellate jurisdiction of the Supreme Court of the United States over the Court of Appeals of the District of Columbia, under Code D. C. § 233, by a petition for mandamus to compel the restoration to her position in the classified civil service of a clerk whose contention is not that the President and his representatives were without authority to dismiss her, but that her dismissal was illegal because the requisite formalities prescribed by the civil service regulations were not observed. Writ of error (1904) 24 App. D. C. 95, dismissed.—*United States v. Taft*, 27 S. Ct. 148, 203 U. S. 461, 51 L. Ed. 269.

An appeal after a verdict of not guilty in a criminal case was not authorized on behalf of the government by the provisions of Code of Laws D. C. 1901, § 935, that, "in all criminal prosecutions, the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of excep-

tions; provided, that if, on such appeal, it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."—*United States v. Evans*, 29 S. Ct. 507, 213 U. S. 297, 53 L. Ed. 803.

The specification of errors in appellant's brief on appeal from the court of appeals of the District of Columbia does not satisfy the requirements of Rev. St. §§ 997, 1012 (U. S. Comp. St. 1901, pp. 712, 716) and Supreme Court Rule 35 (29 Sup. Ct. xxii) that an assignment of errors be filed with the transcript of record.—(1911) *Briscoe v. Rudolph*, 31 S. Ct. 679, 221 U. S. 547, 55 L. Ed. 848, affirming decree (1908) *Same v. MacFarland*, 32 App. D. C. 167.

The federal Supreme Court on reversing a decree of the Court of Appeals of the District of Columbia with directions to affirm the decree of the Supreme Court of the district, dismissing the bill in the suit to enjoin an army officer from making or causing to be made guns or gun carriages embodying patented inventions, may direct that the affirmance may be without prejudice to proceed for compensation under Act June 25, 1910.—*Crozier v. Fried. Krupp Aktiengesellschaft*, 32 S. Ct. 488, 224 U. S. 290, 56 L. Ed. 771, reversing judgment *Fried. Krupp Aktiengesellschaft v. Crozier*, 32 App. D. C. 1, 15 Ann. Cas. 1108.

Congressional acts having general authority throughout the United States are meant by the provision of Federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1158 [U. S. Comp. St. Supp. 1911, p. 231]) § 250, for appellate review in the federal Supreme Court of judgments of the Court of Appeals of the District of Columbia where the construction of any law of the United States is drawn into question by defendant.—*American Security & Trust Co. v. Commissioners of District of Columbia*, 32 S. Ct. 553, 224 U. S. 491, 56 L. Ed. 856, denying writ of error *Same v. Rudolph*, 38 App. D. C. 32.

The right to review in the federal Supreme Court of a judgment of the Court of Appeals of the District of Columbia, where the matter in dispute exceeds \$5,000, was not saved as to a cause pending in the Court of Appeals January 1, 1912, when the Federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1159 [U. S. Comp. St. Supp. 1911, p. 246]) took effect, by section 299 of that Code.—*Washington Home for Incurables v. American Security & Trust Co.*, 32 S. Ct. 554, 224 U. S. 496, 56 L. Ed. 854, denying writ of error and leave to appeal 38 App. D. C. 421.

The validity of an authority exercised under the United States or the scope of any power of United States officers was not "drawn in question" within Judicial Code, § 250 (Act March 3, 1911, c. 231, 36 Stat. 1159 [U. S. Comp. St. Supp. 1911, p. 231]), governing the appellate jurisdiction of the Supreme Court over the Court of Appeals of the District of Columbia, in a case in which the validity of the action of the Land Department in withholding a patent under Act March 3, 1891, § 7, was involved.—*United States ex rel. Champion Lumber Co. v. Fisher*, 33 S. Ct. 329, 227 U. S. 445, 57 L. Ed. 591, denying petition for writ of error 39 App. D. C. 158.

A decision refusing mandamus to compel the Secretary of the Navy to record the petitioner's name on the register of retired officers of the navy as a paymaster's clerk held not one in which the validity of an authority exercised under the United States or the power of an officer of the United States was drawn in question within Judicial Code, § 250 (Act March 3, 1911, c. 231, 36 Stat. 1159 [U. S. Comp. St. Supp. 1911, p. 231]).—*United States ex rel.*

Foreman v. Meyer, 33 S. Ct. 331, 227 U. S. 452, 57 L. Ed. 594, denying petition for writ of error 38 App. D. C. 472.

A suit to enjoin the maintenance of a party wall under regulation of commissioners of the District of Columbia under Act June 14, 1878, is one drawing in question validity of an authority exercised under the United States within Code D. C. § 233, governing the appellate jurisdiction of the Supreme Court.—*Smoot v. Heyl*, 33 S. Ct. 336, 227 U. S. 518, 57 L. Ed. 621, affirming decree 34 App. D. C. 480.

A decision of the District Court of Appeals of the District of Columbia that an exterior wall of a one-story bay window is not a party wall within building regulations promulgated under Act June 14, 1878, which defines such a wall as one built on the dividing line for common use, is not so clearly erroneous as to require reversal.—*Id.*

An appeal from the Court of Appeals of the District of Columbia reversing a decree enforcing a lien of attorneys on a fund or a claim against the United States allowed by the federal Supreme Court over the objection that the question raised concerning the construction of Rev. St. U. S. § 3477 (U. S. Comp. St. 1901, p. 2320), as to assignment of claims against the United States, has been so foreclosed that the construction of the statute was not in question, in view of the difference between the two lower courts as to the effect of an interlocutory consent decree, and the effect of the statute on the rights of the parties to make the agreement, irrespective of its operation on the United States and the application of the statute to the case presented.—*McGowan v. Parish*, 33 S. Ct. 521, 228 U. S. 312, 57 L. Ed. 849.

The federal Supreme Court is not limited to the points presented by plaintiff in error on writ of error to the District of Columbia Court of Appeals, to review a judgment reversing a judgment of the Supreme Court of the district, but must enter judgment which should have been rendered by the court below.—*Baker v. Warner*, 34 S. Ct. 175, 231 U. S. 588, 58 L. Ed. 384, reversing judgment 36 App. D. C. 493.

A decree of the Court of Appeals of the District of Columbia holding invalid a departmental regulation under the Food and Drugs Act of June 30, 1906, is appealable to the federal Supreme Court as involving the validity of an authority exercised under the United States.—*United States v. Antikamnia Chemical Co.*, 34 S. Ct. 222, 231 U. S. 654, 58 L. Ed. 419, Ann. Cas. 1915A, 49, reversing decree 37 App. D. C. 343.

Contentions that the exercise by the Secretary of the Interior of his power under Act Cong. June 28, 1906, § 9, to remove member of the Osage Indian Tribal Council for good cause is conditioned on notice or hearing and that, if the statute does not provide for hearing, it conflicts with the due process clause of Const. U. S. Amend. 5, were frivolous so as not to give the federal Supreme Court jurisdiction under Judicial Code, § 250, to review decisions of the Court of Appeals of the District of Columbia.—*United States ex rel. Brown v. Lane*, 34 S. Ct. 449, 232 U. S. 598, 58 L. Ed. 748, denying writ of error 40 App. D. C. 533.

Equity rule 22 for transfer of action at law, erroneously begun in equity, cannot be invoked on appeal to the federal Supreme Court from the Court of Appeals of the District of Columbia, which affirmed decree sustaining a demurrer to the bill.—*Curriden v. Middleton*, 34 S. Ct. 458, 232 U. S. 633, 58 L. Ed. 765, affirming decree 37 App. D. C. 568.

A writ of error will not lie from the federal Supreme Court to the District of Columbia Court of Appeals to review a judgment

rendered on an appeal from the Supreme Court of the District in proceedings to punish an alleged criminal contempt of an injunction.—*Gompers v. United States*, 34 S. Ct. 693, 233 U. S. 604, 58 L. Ed. 1115, Ann. Cas. 1915D, 1044, reversing judgment in re *Gompers*, 40 App. D. C. 293.

Errors not of a fundamental character not presented to the Court of Appeals of the District of Columbia for consideration, and which were waived, will not be considered on an appeal which lies only by reason of the amount involved.—*Magruder v. Drury*, 35 S. Ct. 77, 235 U. S. 106, 59 L. Ed. 151.

An allowance to two trustees appointed to perform testamentary trusts of 5 per cent. commission on the principal and 10 per cent. on the income will not be disturbed by the federal Supreme Court on appeal from the Court of Appeals of the District of Columbia, where such allowance was approved by both courts below.—*Id.*

Original Employers' Liability Act June 11, 1906, having been held unconstitutional except in the District of Columbia and the territories, is not a law of the United States, within Judicial Code, § 250, relating to appellate review of judgments of Court of Appeals of the District of Columbia.—*Washington, A. & Mt. V. Ry. Co. v. Downey*, 35 S. Ct. 408, 236 U. S. 190, 59 L. Ed. 533, dismissing appeal 40 App. D. C. 147.

Laws only general in their operation through the United States are within Judicial Code, § 250, as to appellate review in the federal Supreme Court of judgments of Court of Appeals of the District of Columbia, in cases where the construction of any law of the United States is in question.—*Id.*

Whether a statute is general or local within the rule that laws only general are within Judicial Code, § 250, as to review in the federal Supreme Court of judgments of Court of Appeals of the District of Columbia, depends on the exertion of legislative power which the statute shows and its general operation.—*Id.*

Federal Supreme Court on appeal from the Court of Appeals of the District of Columbia on ground specified in Judicial Code, § 250, may determine all questions presented by the record.—*McGowan v. Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parish v. McGowan*, 39 App. D. C. 184.

Jurisdiction of federal Supreme Court under Judicial Code, § 250, does not extend to a case in the Court of Appeals of the District of Columbia in which the question of authority of the government arises under the patent laws of the United States.—*United States ex rel. Chott v. Ewing*, 35 S. Ct. 571, 237 U. S. 197, 59 L. Ed. 913, dismissing appeal *Moore v. United States ex rel. Chott*, 40 App. D. C. 591.

Contention that due process of law is denied surety in a bond for release of attached property, because bond, as prescribed by Code D. C. § 454 (31 Stat. 1261, c. 854), requires parties to agree to abide by a judgment of the court as to the property attached, while under section 455, if the judgment goes for plaintiff, it shall be against both defendant and his sureties, is not a basis for writ of error from the federal Supreme Court, because frivolous.—*United Surety Co. v. American Fruit Product Co.*, 35 S. Ct. 828, 238 U. S. 140, 59 L. Ed. 1238, dismissing appeal 40 App. D. C. 239.

Quo warranto sections of Code D. C. §§ 1538-1540 (31 Stat. 1419, 1420, c. 854), authorizing proceedings by proper officers or persons against national officers of the United States performing duties in the district, must be considered in determining jurisdiction of federal Supreme Court of writ of error to the Court of Appeals of the District, where construction of

such sections is involved.—*Newman v. United States of America ex rel. Frizzell*, 35 S. Ct. 881, 238 U. S. 537, 59 L. Ed. 1446.

—389. Review of decisions of Court of Claims.

See 13 Cent. Dig. Courts, §§ 1041-1044; 3 Cent. Dig. App. & E. § 3395.

A private act of congress (Act Feb. 24, 1874, 18 Stat. 531), passed for the relief of a paymaster, authorizing him to present his accounts to the court of claims, in order that it might determine whether "just and equitable" grounds existed for certain credits claimed by him, with a right of appeal "as in other cases," confers a jurisdiction in law, and not in equity; and, an appeal to the supreme court being governed by the same rules as in other cases, a motion to direct the court of claims to send up the evidence, or to remand the case with instructions to make specific findings presenting an issue of fact for the determination of the supreme court, will be overruled.—*McClure v. United States*, 116 U. S. 145, 6 S. Ct. 321, 29 L. Ed. 572.

Under Rev. St. § 5261, authorizing certain railroads to bring suit in the court of claims for compensation for transportation services to the government, a jurisdiction at law and not in equity is conferred, and, on appeal to the supreme court of the United States, a motion that the court of claims be directed to send up all the evidence and interlocutory rulings, or to make specific findings upon incidental facts in addition to its general finding, will be overruled.—*Union Pac. Ry. Co. v. United States*, 116 U. S. 154, 6 S. Ct. 325, 29 L. Ed. 584.

Rev. St. § 236, providing that all claims and demands against the United States treasury shall be settled and adjusted in the department of the treasury, does not give that department power to go behind or revise judgments of the court of claims, or operate to deny an appeal from a decision of the court of claims to the United States supreme court; the claims mentioned in this section referring to a different class from those passed on by the court of claims, and Rev. St. § 1089, making it the duty of the secretary of the treasury to pay judgments of the court of claims "on presentation of a copy of said judgment certified according to law."—*United States v. Jones*, 119 U. S. 477, 7 S. Ct. 283, 30 L. Ed. 440.

It was argued, in support of a motion to dismiss an appeal from a judgment of the court of claims, that the treasury had the right to revise the judgment, and that no appeal lay from the court of claims to the United States supreme court, and that this reasoning was supported by Act Cong. March 3, 1875, c. 149, which provides for deducting any debt due the United States from any judgment recovered against the United States by such debtor. *Held*, that that act gave the accounting officers of the United States no authority to re-examine the judgment, but merely to offset it with another claim, and that hence the treasury had no appellate jurisdiction, but that the same was vested in the United States supreme court.—*Id.*

The findings of fact and conclusions of law which the court of claims makes and transmits to a department on any "claims or matter" referred to it by such department with the claimant's consent, under the provisions of section 12, Act March 3, 1887 (1 Supp. Rev. St. [2d Ed.] p. 559), is advisory only, and is, therefore, not a judgment which is subject to review in the supreme court under section 9 of that act.—*In re Sanborn*, 148 U. S. 222, 13 S. Ct. 577, 37 L. Ed. 429.

Under Act June 30, 1886, referring a claim for the use by the government of a patented

improvement to the court of claims, with authority to award judgment according to its value to the government, that court gave judgment for the amount of such value as found by it. *Held*, that the supreme court could not review such finding.—*Talbert v. United States*, 155 U. S. 45, 15 S. Ct. 4, 39 L. Ed. 64.

The repeal by Act Cong. March 3, 1897, c. 387 (29 Stat. 665, 669), of Act Feb. 13, 1895, c. 87 (28 Stat. 664); and the enactment that all proceedings pending under the act so repealed shall be vacated, and that no judgment heretofore rendered in pursuance of said act shall be paid, precludes the supreme court of the United States from taking jurisdiction of an appeal by the District of Columbia from a judgment allowing certain claims, although the application for the appeal had been made and notice given before the repeal of the statute.—*District of Columbia v. Eslin*, 22 S. Ct. 17, 183 U. S. 62, 46 L. Ed. 85.

The finality of a judgment of the court of claims cannot be contested by the defendant on account of the filing of amended findings of fact, where this was done at his own request in connection with a motion for a new trial, and he also subsequently took an appeal from the judgment after his motion for new trial was overruled. Judgment, *St. Louis & M. V. Transp. Co. v. United States*, 33 Ct. Cl. 251, affirmed.—*United States v. St. Louis & M. V. Transp. Co.*, 22 S. Ct. 350, 184 U. S. 247, 46 L. Ed. 520.

The refusal of the Court of Claims to make an allowance for the transportation from the Philippine Islands to Spain, under a contract with the United States, of certain Spanish prisoners of war, certified by an American consul to have been landed in a Spanish port, will not be disturbed on appeal where the method prescribed by the contract for determining the initial fact that such persons had been taken on board in the Philippine Islands had not been pursued, and the evidence did not establish to the satisfaction of that court that such persons were entitled to transportation under the contract. Judgment (1907) *J. M. Ceballos v. United States*, 42 Ct. Cl. 318, reversed.—*J. M. Ceballos & Co. v. United States*, 29 S. Ct. 583, 214 U. S. 47, 53 L. Ed. 904.

The record on cross-appeals from an award by the Court of Claims under a contract for a public work will be remanded for correction, where the court failed to make an explicit finding as to the knowledge and good faith of the government inspector whose action is alleged to have impeded greatly the progress of the work, to the claimant's injury, or to find as a fact whether or not complaint of the inspector's action was made by the claimant to a superior officer, and, if made, as to the date of such complaint, and the action taken upon it.—(1911) *Ripley v. United States*, 31 S. Ct. 478, 220 U. S. 491, 55 L. Ed. 557, remanding record for additional findings (1910) 45 Ct. Cl. 621.

Additional findings made by the Court of Claims do not conform to the mandate of the federal Supreme Court, remanding the record on cross-appeals from an award under a contract for a public work, for an explicit finding as to the knowledge and good faith of the government inspector whose action is alleged to have impeded greatly the progress of the work, to the claimant's injury, where the statement in such findings that the inspector was knowingly acting in bad faith is qualified by other language which shows that such knowledge and bad faith are inferred solely from lapse of time, with nothing to indicate that such an inference is a necessary conclusion.—*Ripley v. United States*, 32 S. Ct. 60, 222 U. S. 144, 56 L. Ed. 131.

A contractor for screen-wagon mail service whose petition for compensation from the government has been dismissed by the Court of Claims cannot avail himself of the objection, first raised on appeal, to the absence of any pleading setting up as a counterclaim or set-off the difference between the cost of the service under a reletting and the entire contract price for the full term under his contract.—(1912) *Huse v. United States*, 32 S. Ct. 119, 222 U. S. 496, 56 L. Ed. 285, affirming judgment (1908) 44 Ct. Cl. 19.

Supplemental decree of Court of Claims in controversy over rights of Cherokee freedmen in distribution of tribal property *held*, in determining right to appeal, not merely in the nature of an execution of the original decree.—(1912) *Cherokee Nation v. Whitmire*, 32 S. Ct. 200, 223 U. S. 108, 56 L. Ed. 370, reversing decree (1911) *Whitmire v. United States*, 46 Ct. Cl. 227.

A case will not be remanded to the Court of Claims on a motion calling for certification of the evidence because contravening a rule of the federal Supreme Court which requires the record on appeal from the Court of Claims to contain a finding of the facts and not the evidence establishing it.—(1912) *United States v. Société Anonyme Des Anciens Etablissements Cail*, 32 S. Ct. 479, 224 U. S. 309, 56 L. Ed. 778, affirming judgment (1907) *Société Anonyme Des Anciens Etablissements Cail v. United States*, 43 Ct. Cl. 25.

A finding of the Court of Claims as to compensation to be paid by United States for its use of a patent to which no objection was taken or exception reserved is conclusive on the federal Supreme Court.—*Id.*

Findings of fact that there was no mutual mistake in execution of a government contract and of a release to the government of claims growing out of it are conclusive on the Supreme Court on appeal from a decree of the Court of Claims brought under Act March 3, 1887, on recommendation of the Secretary of Navy given under Act June 10, 1896, dismissing the petition of a contractor for recovery of damages from the government for delay caused by the latter's fault.—*William Cramp & Sons Ship & Engine Building Co. v. United States*, 36 S. Ct. 70, 239 U. S. 221, 60 L. Ed. 238, affirming judgment 46 Ct. Cl. 521.

Findings of Court of Claims determine all matters of fact, and the Supreme Court is not at liberty to refer to the opinion of such court to modify or affect the scope of the findings.—*Crocker v. United States*, 36 S. Ct. 245, 240 U. S. 74, 60 L. Ed. 533, affirming judgment 49 Ct. Cl. 85.

Failure of the Court of Claims to find certain facts which it had assumed in its decision does not require a sending back of the case where the facts not found are not controverted.—*Ackerlind v. United States*, 36 S. Ct. 438, 240 U. S. 531, 60 L. Ed. 783, reversing judgment 49 Ct. Cl. 635.

A fact which the Court of Claims states that it does not find stands unproved in the federal Supreme Court on appeal.—*Id.*

A judgment of the Court of Claims for damages for destruction of plantation by building of dike across it by the government will be reversed for more particular findings, where those rendered do not fairly distinguish between injuries caused by the United States and those caused by the state.—*United States v. Archer*, 36 S. Ct. 521, 241 U. S. 119, 60 L. Ed. 918.

§390. Review of decisions of state courts.

See 12 Cent. Dig. Courts, §§ 1045-1093; 3 Cent. Dig. App. & E. §§ 3384-3394, 3396, 3398, 3399.

§391. — In general.

See 12 Cent. Dig. Courts, §§ 1045, 1092.

On an issue whether the supreme court of the United States has jurisdiction to review a judgment of the supreme court of Louisiana, brought to the former court by writ of error, the opinion of the court below, as set out in the return to the writ, may be referred to.—*Crossley v. City of New Orleans*, 108 U. S. 105, 2 S. Ct. 300, 27 L. Ed. 667.

A judgment of the highest court of a state will not be reviewed by the supreme court, if it involved the determination of a question, not federal, which is sufficient in itself to sustain the judgment, although a federal question may also have been raised and decided.—*Jenkins v. Loewenthal*, 110 U. S. 222, 3 S. Ct. 638, 23 L. Ed. 129; *Jacks v. City of Helena*, 115 U. S. 288, 6 S. Ct. 39, 29 L. Ed. 392; *Hale v. Akers*, 132 U. S. 554, 10 S. Ct. 171, 33 L. Ed. 442; *Beatty v. Benton*, 135 U. S. 244, 10 S. Ct. 747, 34 L. Ed. 124; *Haley v. Breeze*, 144 U. S. 130, 12 S. Ct. 836, 36 L. Ed. 373; *Eustis v. Bolles*, 150 U. S. 361, 14 S. Ct. 131, 37 L. Ed. 1111; *Winter v. City Council of Montgomery*, 156 U. S. 385, 15 S. Ct. 649, 39 L. Ed. 460; *Gillis v. Stinchfield*, 159 U. S. 658, 16 S. Ct. 131, 40 L. Ed. 295; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 16 S. Ct. 823, 40 L. Ed. 970; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 16 S. Ct. 939, 41 L. Ed. 72; *Bacon v. State of Texas*, 163 U. S. 207, 16 S. Ct. 1023, 41 L. Ed. 132. CONTRA, see (1833) *Crossley v. City of New Orleans*, 108 U. S. 105, 2 S. Ct. 300, 27 L. Ed. 667.

Denial of application to approve a writ of error to the federal Supreme Court. See (1882) *State Sav. Ass'n v. Boatmen's Sav. Bank*, 11 Mo. App. 596, memorandum, appeal dismissed *Boatmen's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265, 5 S. Ct. 878, 29 L. Ed. 174.

In an action by one claiming title to land to recover from another a crop raised on it by the latter while holding possession adversely to the former, *held*, that as the question of title to the land was not necessarily involved, and as the decision in the court below was put entirely on the ground that the owner of land out of possession cannot recover from one in possession holding adversely under claim of title the crops raised by him, a federal question was not presented, and a writ of error to a state supreme court from the United States supreme court should be dismissed.—*Martin v. Thompson*, 120 U. S. 376, 7 S. Ct. 586, 30 L. Ed. 679.

Where the record in a writ of error from the supreme court to a state court, sued out on the ground that the state had passed a law impairing the obligation of the contract in controversy, shows that the state court determined the case without giving any effect to the acts complained of, the writ will be dismissed.—*New Orleans Water-Works Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 S. Ct. 741, 31 L. Ed. 607; *Kreiger v. Shelby R. Co.*, 125 U. S. 39, 8 S. Ct. 752, 31 L. Ed. 675.

Plaintiff tendered the treasurer of Charleston county, S. C., coupons of certain state bonds in payment of taxes, and the tender was refused. He then paid the taxes under protest, and sued in the state court to recover, under Act S. O. Dec. 24, 1878, which provides that any person who pays, under protest, taxes which he conceives to be unjust or illegal, may sue the county treasurer therefor, and, if successful in his suit, shall be repaid his taxes from the state treasury. The state supreme court having decided for defendant, on the ground that plaintiff's case did not come within the provisions of the statute, plaintiff brought error. *Held*, that this court has no jurisdiction, the construction of such statute not being a federal question, or one arising under the constitution of the United States, or of any

law or treaty made in pursuance thereof.—*De Saussure v. Gaillard*, 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125.

It makes no difference in such case that the state court decided the federal question that Act S. C. Feb. 9, 1882, providing that all taxes shall be paid only in money or coupons on the state bonds, known as "brown consols," does not impair the obligation of any contract, and therefore affords defendant a valid defense for his refusal to receive plaintiff's coupons for taxes, since the decision of that point was unnecessary, in view of the other.—*Id.*

Plaintiff filed his bill against the administrator of his former partner, alleging that on dissolution the latter assumed the firm debts and agreed to save plaintiff harmless, but that plaintiff had been compelled to pay certain of such debts. Defendant pleaded the discharge in bankruptcy of his intestate, and also the statute of limitations. The supreme court of the state affirmed the judgment of the trial court for defendant, but filed no written opinion. Plaintiff took the case on error to the supreme court of the United States, but failed to procure the certificate of the state supreme court that it had been disposed of by the decision of the federal question involved. The bill was not filed within six years after the breach of the contract, as required by Code Tenn. 1884, § 3472, nor within two years and six months after letters of administration were issued to defendant, as required by sections 3117, 3454, plaintiff being a resident of Tennessee. *Held* that, as it does not appear that the decision is erroneous if based on the defense of the statute of limitations, it is not shown that the decision of the federal question was necessary, and the writ of error to the supreme court of the state will be dismissed.—*Johnson v. Risk*, 137 U. S. 300, 11 S. Ct. 111, 34 L. Ed. 683.

Plaintiffs and defendants, firms in Minnesota, sold goods to a merchant in Montana, who made an assignment to his clerk for benefit of creditors, with whose consent the business was carried on for the benefit of all. Afterwards defendants attached the goods, alleging actual fraud as to them, and also that the assignment was constructively fraudulent, under St. Mont. § 169, which, as against creditors, requires a sale or assignment of chattels to be accompanied by immediate delivery, and followed by actual and continued change of possession. Pending the determination of the attachment, plaintiffs purchased the goods, and, being refused possession, sued in Minnesota to recover their value, averring that defendants consented to the assignment and subsequent continuance of the business. Judgment for plaintiffs was affirmed in the state supreme court on the ground that defendants had waived any invalidity in the assignment. *Held* that, as no federal question is involved, and as the decision disposes of the cause, the supreme court will not inquire whether the assignment was void under the statute.—*Beaupre v. Noyes*, 138 U. S. 397, 402, 11 S. Ct. 296, 298, 34 L. Ed. 991, 993.

The city of Henderson, Ky., whose corporate limits extend to low water on the Indiana shore of the Ohio river, by an ordinance granted to a Kentucky bridge company the right to build a railroad bridge within its boundaries, and made certain stipulations as to taxation thereof. The company afterwards resisted the collection of taxes levied upon that part of the bridge extending beyond low water on the Kentucky shore, claiming, among other things, that such taxation was contrary to the constitution of the United States. The state courts upheld the tax on the ground that by accepting the ordinance the company agreed that the bridge might be taxed. *Held*, that the case fell within the rule that, although a federal question was raised below, yet the supreme

court will refuse jurisdiction when the decision was placed on grounds which involve no federal question, and which are broad enough to dispose of the case.—*Henderson Bridge Co. v. City of Henderson*, 141 U. S. 679, 12 S. Ct. 114, 35 L. Ed. 900.

In ejectment brought in a Missouri court by the heirs of a judgment debtor to recover lands sold under the judgment, it was contended that the legal title was in the United States at the time of the sale, and that the sheriff's deed was therefore a nullity. The supreme court of the state conceded that the title was in the United States, but held that the debtor had an equitable interest in the lands, and that, under the Missouri statutes, such interest was passed by the sheriff's deed. The court then stated that this ruling was sufficient to dispose of the case, but that it had passed on other questions presented by the record, in order to enable the parties to have the cause reviewed in the supreme court of the United States. *Held*, that an appeal to the latter court must be dismissed under the rule that when a state supreme court decides a question not federal in its nature, which is broad enough to dispose of the case, the supreme court will not review any federal questions raised therein.—*Hammond v. Johnston*, 142 U. S. 73, 12 S. Ct. 141, 35 L. Ed. 941, following *Henderson Bridge Co. v. City of Henderson*, 141 U. S. 679, 12 S. Ct. 114, 35 L. Ed. 900.

The supreme court has no jurisdiction of a writ of error to review the judgments of state courts unless a real, and not a fictitious, federal question is involved.—*City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943; *Hamblin v. Western Land Co.*, 147 U. S. 531, 13 S. Ct. 353, 37 L. Ed. 267; *St. Louis, C. & Ft. S. Ry. Co. v. State of Missouri*, 156 U. S. 478, 15 S. Ct. 443, 39 L. Ed. 502.

In assumpsit to recover money received on a claim against the United States, plaintiff declared in two counts: First, for money had and received, under which he gave evidence at the trial that defendant, regarding the claim as worthless, agreed that he might have all he could collect upon it; second, on a quantum meruit for prosecuting the claim, under which he gave evidence of time and labor spent therein. As one ground of defense the defendant set up Rev. St. § 3477, forbidding the assignment of any claim against the United States except under certain conditions not existing in this case. The court's charge was broad enough to warrant a recovery on either count, and the verdict was for plaintiff without specifying under which count it was rendered; but the amount thereof was much less than the whole sum received by defendant from the United States. The state court of errors and appeals affirmed the judgment solely on the ground that the verdict was warranted under the count for work and labor. *Held*, that the case came within the rule that, although a federal question is raised, the supreme court of the United States will not review the decision of a state court which is based upon grounds broad enough to sustain its judgment, irrespective of the federal question.—*Delaware City, S. & P. Steamboat Nav. Co. v. Reybold*, 142 U. S. 636, 12 S. Ct. 290, 35 L. Ed. 1141.

In a prosecution for an attempt to defraud a town or county (the two being coterminous) defendant moved in arrest of judgment on the ground that the grand and traverse juries were composed wholly of citizens of the town and county, who would necessarily have been affected by the alleged fraud; that both juries were drawn by the selectmen from a list prepared by them while actively engaged in furthering the prosecution; and that some of the

grand jurors were present at a town meeting at which the prosecution was resolved on, and voted in favor thereof. For these reasons, defendant alleged that he was deprived of due process of law, in violation of the fourteenth amendment. Defendant also filed a paper entitled an "Exception to the Jurisdiction," reciting the same facts, and claiming that, by reason thereof, neither the grand nor traverse jury nor the court had jurisdiction of the cause. The state supreme court held that the so-called exception amounted to no more than the motion in arrest, and that the motion was properly overruled, under Pub. St. Mass. c. 170, §§ 39, 40, and Id. c. 214, § 27, which provide that an offender is not entitled after verdict to object to the qualifications of jurors, or to any irregularity in drawing them, nor to move in arrest of judgment for any cause existing before verdict, and not affecting the jurisdiction of the court. *Held*, that this decision involved no federal question, and as it was broad enough to dispose of the case, independently of the question as to due process of law, there was nothing for the United States supreme court to review. —*Brown v. Commonwealth of Massachusetts*, 144 U. S. 573, 12 S. Ct. 757, 36 L. Ed. 546.

A decision by the highest court of a state that the acceptance of a dividend on a note in composition proceedings under the state insolvency laws is a waiver of any right to enforce the debt after the debtor's discharge is broad enough to dispose of the case, without reference to any federal question, and a writ of error to the United States supreme court cannot be supported on the ground that the insolvency statutes, having been enacted after plaintiff received his note, impaired the obligation thereof. —*Eustis v. Bolles*, 150 U. S. 361, 14 S. Ct. 131, 37 L. Ed. 1111, following *Beaupre v. Noyes*, 138 U. S. 397, 11 S. Ct. 296, 34 L. Ed. 991.

Error will not lie to a state court unless a federal question was actually raised and decided, or necessarily involved in its judgment. It is not enough that a federal question might have been raised. —*Hagar v. People of the State of California*, 14 S. Ct. 1186, 154 U. S. 639, 24 L. Ed. 1044.

Where a case pending in a territorial supreme court, on a petition for rehearing, at the time the territory becomes a state, is continued in the state court, instead of being removed to the federal court on request, as it might have been, the judgment of the state court, on denying the rehearing, cannot be reviewed by the supreme court of the United States no federal question being involved. —*Northern Pac. R. Co. v. Holmes*, 155 U. S. 137, 15 S. Ct. 28, 39 L. Ed. 99.

Complainant claimed title to lands in the state of Washington, on two grounds: (1) By adverse possession commencing March 28, 1862; (2) by a deed made on that date by a husband, conveying his wife's lands, under a power of attorney from her. The state statute of February 2, 1888 (Gen. Laws, § 1447), provides that all powers of attorney theretofore executed by a husband or wife to the other, authorizing the disposition of real estate, and all conveyances by virtue of such powers, shall be valid, except as to vested rights of third parties. *Held* (defendant having claimed that this act was in violation of the federal constitution), that a judgment by the state supreme court affirming a judgment for complainant solely on the ground of the acquisition of title by adverse possession did not necessarily involve a decision that the statute was valid, since in Washington a void deed, accompanied by actual possession, is sufficient to set the statute of limitations in motion. —*Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 16 S. Ct. 939, 41 L. Ed. 72.

Although a federal question was raised and decided against the plaintiff in error, yet if another question, not federal, was also raised and

decided against him, and the decision of the latter question was sufficient of itself to sustain the judgment of the state court, that judgment will not be reviewed by the federal supreme court. —*Harrison v. Morton*, 18 S. Ct. 742, 171 U. S. 38, 43 L. Ed. 63.

The supreme court has no jurisdiction to review a decision of a state supreme court based entirely on grounds arising under the laws of the state, though it should appear that a question involving rights under the constitution or statutes of the United States might have been made under the pleadings. —*California Nat. Bank of San Francisco v. Thomas*, 19 S. Ct. 4, 171 U. S. 441, 43 L. Ed. 231, dismissing appeal *Chetwood v. California Nat. Bank*, 45 P. 704, 113 Cal. 414.

The supreme court is without jurisdiction to review a judgment of a state court based upon two grounds, either of which is sufficient to sustain it, one of which involves a federal question, while the other does not. —*Pierce v. Somerset Ry.*, 19 S. Ct. 64, 171 U. S. 641, 43 L. Ed. 316.

The fact that a case involving the question of the impairment of a contract by state legislation is disposed of by the state court upon a construction of the contract does not deprive the supreme court of jurisdiction to review such decision, it being the duty of that court in such cases to determine for itself the proper construction of the contract upon which the plaintiff relies. Decree 20 S. E. 1002, 43 S. C. 154, affirmed. —*Columbia Water-Power Co. v. Columbia Electric Street-Railway, Light & Power Co.*, 19 S. Ct. 247, 172 U. S. 475, 43 L. Ed. 521.

In a suit in a state court, the bill and an amended and supplemental bill were dismissed on demurrer, and the complainant appealed. More than two months later, while the appeal was still pending, he filed a petition for leave to file an ancillary bill, in which, for the first time, he set up a claim under the federal constitution. The petition was denied, and this ruling was affirmed by the state appellate court, solely on the ground that the application came too late. *Held* that, as this decision rested on grounds independent of any federal questions, it was not reviewable by the supreme court. —*Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 19 S. Ct. 265, 172 U. S. 465, 43 L. Ed. 517.

In an action in a state court, certain motions of plaintiff were denied, to which he excepted, on the ground that such rulings deprived him of a jury trial under the law of Maryland and the rules of court made in accordance therewith; which law and rules, he alleged, were repugnant to the constitution of the United States. He thereupon took an appeal, which was dismissed by the court of appeals of the state, on the sole ground that it was prematurely taken, no order having in fact been passed on the day in question except an order fixing the case for trial. *Held*, that no federal question was disposed of by the judgment dismissing the appeal, and such judgment was not reviewable by the federal supreme court. —*Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 19 S. Ct. 268, 172 U. S. 472, 43 L. Ed. 520.

A national bank defended against an action for the conversion of collaterals, which plaintiff alleged it had agreed to sell for him, on the ground that it was prohibited by the national banking act from making such a contract, and that such prohibition exempted it from any liability whatever growing out of the transaction. *Held*, that a decision of the state court permitting a recovery by plaintiff necessarily determined the contention of exemption adversely to defendant, and was reviewable by the federal

supreme court, although the judgment of the state court was based on general principles of law, independently of the question of ultra vires raised.—*First Nat. Bank of Grand Forks v. Anderson*, 19 S. Ct. 284, 172 U. S. 573, 43 L. Ed. 558.

A bill was filed in a state court by a city to enjoin an abutter from interfering with the completion of a change in grade. Defendant answered, alleging that, as he had never been compensated for the injury done to his property by the change, the city had no right to make it, and that to permit it to do so would result in a taking of his property without due process of law. The court decided that defendant had mistaken his remedy, and must resort to another proceeding against the city for damages. *Held*, that the ruling was broad enough to support a decree granting an injunction, regardless of any federal question, and therefore the supreme court had no jurisdiction.—*McQuade v. Inhabitants of City of Trenton*, 19 S. Ct. 292, 172 U. S. 636, 43 L. Ed. 581.

A party who has raised but one federal question in the state courts cannot, in the federal supreme court, argue, in addition thereto, another, not connected with it, not raised in any of the courts below, and not necessarily arising on the record, though the record discloses facts on which the question might have been raised. Judgment 70 N. W. 605, 101 Iowa, 416, reversed.—*Dowey v. City of Des Moines*, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

On error to a state court, the supreme court will pass on a federal question if the state court based its judgment solely on a ground involving a determination thereof, although the judgment might have been based on a ground involving only a question of general or local law.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

A writ of error to a state court to review a decision in favor of the lessor of a mining claim against lessees who have attempted to make a new location will be dismissed by the supreme court of the United States, when one ground of the decision, sufficient to dispose of the case, is that the lessees are estopped to contest the rights of the lessor.—*Lowry v. Silver City Gold & Silver Min. Co.*, 21 S. Ct. 104, 179 U. S. 196, 45 L. Ed. 151, dismissing writ of error *Silver City Gold & Silver Min. Co. v. Lowry*, 57 P. 11, 19 Utah, 334.

The ruling of a trial court in favor of the constitutionality of Act Tex. April 22, 1897, which makes the statutory provisions for ex parte depositions, to the effect that refusal to answer shall be taken as an admission, inapplicable to cases in which either party is a corporation does not present a federal question for review by the supreme court of the United States on writ of error, where the final decision of the trial court is based on the ground that there had been no such refusal to answer as would constitute an admission, even if the general statutory provisions were applicable to the case.—*Missouri, K. & T. Ry. Co. of Texas v. Ferris*, 21 S. Ct. 231, 179 U. S. 602, 45 L. Ed. 337.

Jurisdiction to review a decision of a state court, on the ground that a federal question as to the impairment of the obligation of a contract is raised, does not exist when the only question involved in the state court was the construction of a charter or contract, although it appeared that there were statutes subsequent thereto which might have been, but were not, relied upon as raising a federal question concerning the construction of the contract.—*Yazoo & M. V. R. Co. v. Adams*, 21 S.

Ct. 256, 180 U. S. 41, 45 L. Ed. 415, dismissing writ of error 25 So. 366, 76 Miss. 545.

A writ of error to a state court will be dismissed if there is nothing to support it except a contention of a federal right for which there is no color, especially when such contention was not made in the state courts. Judgment 56 N. E. 979, 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, affirmed.—*Lynde v. Lynde*, 21 S. Ct. 555, 181 U. S. 183, 45 L. Ed. 810.

A decision by a state court that a corporation is estopped to set up the invalidity of a statute, even if it is unconstitutional, by the action of its board of directors, cannot be reviewed on writ of error from the supreme court of the United States to the state court, since the nonfederal ground is broad enough to support the judgment.—*Hale v. Lewis*, 21 S. Ct. 677, 181 U. S. 473, 45 L. Ed. 959.

A federal question in respect to admission of evidence cannot be passed upon by the supreme court of the United States on writ of error to a state court, when the question as to the evidence was not dealt with by the state court as a federal question. Judgment, *State v. Mallett*, 34 S. E. 651, 125 N. C. 718, affirmed.—*Mallett v. State of North Carolina*, 21 S. Ct. 730, 181 U. S. 589, 45 L. Ed. 1015.

A writ of error to review a judgment of a state court ousting a corporation from its franchise for violation of the statutes of the state relating to the manufacture and sale of oleomargarine will not be dismissed on the ground that adequate support for the judgment, irrespective of any substantial federal question, is afforded by the finding of the state court that the corporation had violated a statute in refusing to furnish samples as therein required, where the judgment of the court was based upon the consideration given by it to all the asserted violations of the statutes jointly, which statutes were contended to be repugnant to the constitution of the United States. Judgment, *State v. Capital City Dairy Co.*, 57 N. E. 62, 62 Ohio St. 350, 57 L. R. A. 181, affirmed.—*Capital City Dairy Co. v. State of Ohio*, 22 S. Ct. 120, 183 U. S. 238, 46 L. Ed. 171.

Whether the pleadings in the cause justified a grant of affirmative relief, considered as a mere question of practice, presents no federal question. Judgment 81 N. W. 125, 105 Wis. 48, affirmed.—*National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 22 S. Ct. 111, 183 U. S. 216, 46 L. Ed. 157.

A writ of error to a state court must be dismissed where no federal question was raised in the record, and the case was disposed of in the state courts on a ground wholly independent of a federal question. Writ of error, *In re New York Cent. & H. R. R. Co.*, 63 N. Y. S. 52, 49 App. Div. 281, and 57 N. E. 1119, 163 N. Y. 604, dismissed.—*New York Cent. & H. R. R. Co. v. City of New York*, 22 S. Ct. 916, 186 U. S. 269, 46 L. Ed. 1153.

The jurisdiction of the Supreme Court of the United States to review a judgment of the highest court of a state sustaining a license tax imposed on a banking business cannot be defeated on the theory that such judgment rests upon nonfederal grounds sufficient to sustain it, even assuming that the state court rests its decision upon the grounds that by reason of the bank's acceptance of a certain state statute, and by virtue of an act extending its charter, it became subject to certain constitutional provisions authorizing or requiring the payment of such a tax, where the bank pleaded that at the time of the imposition of the tax it had a contract exemption from taxation. Judgment, *State v. Citizens' Bank of Louisiana*, 27 So. 709, 52 La. Ann. 1086, reversed.—*Citizens'*

Bank of Louisiana v. Parker, 24 S. Ct. 181, 192 U. S. 73, 48 L. Ed. 348.

A writ of error from the federal Supreme Court to a state court will be dismissed where the federal question relied upon to confer such jurisdiction manifestly lacks all color of merit. Writ of error 75 S. W. 691, 95 Mo. App. 477, dismissed.—*Wabash R. Co. v. Flannigan*, 24 S. Ct. 224, 192 U. S. 29, 48 L. Ed. 328.

The affirmance by the highest state court of an order awarding a peremptory writ of mandamus to compel the reduction of railroad rates to conform to the schedule made by the act under which the railroad was incorporated, on the ground that by its incorporation under that act the company became subject to its provisions, is not based on nonfederal grounds, so as to preclude a review in the federal Supreme Court, where the company relied upon the provisions of a prior act authorizing the incorporation of the purchasers of a railroad after a sale in foreclosure proceedings, with the rights and privileges of the original company as a contract right, protected from impairment by the Constitution of the United States. Judgment, *Commissioner of Railroads v. Grand Rapids & I. Ry. Co.*, 89 N. W. 967, 130 Mich. 248, affirmed.—*Grand Rapids & I. Ry. Co. v. Osborn*, 24 S. Ct. 310, 193 U. S. 17, 48 L. Ed. 598.

The denial by a state court of a writ of mandamus to compel a board of registrars to register a negro as an elector because the board would have no existence and no duties to perform if the truth of the allegation of the petition as to the unconstitutional character, under Const. U. S. Amend. arts. 14, 15, of the registration authorized under the Alabama Constitution be admitted, rests upon a ground adequate to sustain it, and wholly independent of the federal rights claimed, and is therefore not reviewable in the Supreme Court of the United States. Writ of error 33 So. 819, 136 Ala. 164, dismissed.—*Giles v. Teasley*, 24 S. Ct. 359, 193 U. S. 146, 48 L. Ed. 655.

The federal Supreme Court is without jurisdiction to review the judgment of a state court sustaining a demurrer to the petition in an action to recover damages for the refusal of a board of registrars to register a negro as an elector on the ground that, conceding the truth of the averments of the petition that such board was appointed and qualified under a state Constitution adopted for the purpose of disfranchising negroes, in violation of Const. U. S. Amend. arts. 14, 15, no damage has been suffered because no refusal to register by a board constituted in defiance of the federal Constitution could disqualify a legal voter otherwise entitled to exercise the elective franchise, since this amounts to a decision upon an independent nonfederal ground, sufficient to sustain the judgment without reference to the federal question presented.—*Id.*

The federal Supreme Court may review a decision of a state court sustaining the enforcement against a railway company of an alleged charter obligation to pay over the surplus profits to the state, which could not have been reached except by erroneously construing the charter, without relying on subsequent legislation flagrantly repugnant to the federal Constitution, and challenged for that reason, where the state court clearly did rely upon that legislation to some extent, although it put forward in its judgment the untenable construction more than the unconstitutional statutes. Judgment 65 N. E. 401, 159 Ind. 438, reversed.—*Terre Haute & I. R. Co. v. State of Indiana ex rel. Ketcham*, 24 S. Ct. 767, 194 U. S. 579, 48 L. Ed. 1124.

A writ of error to review a decision of a state court upholding a seizure, under the state laws, of intoxicating liquors shipped C. O. D.

into that state from another state, on the ground that the sale was complete in the former state, will not be dismissed on the theory that its ruling rests upon a nonfederal ground broad enough to sustain it, where the protection of the commerce clause of the federal Constitution was directly invoked in the state court.—*American Express Co. v. State of Iowa*, 25 S. Ct. 182, 196 U. S. 133, 49 L. Ed. 417; reversing judgment, *State v. American Express Co.*, 92 N. W. 66, 118 Iowa. 447; *Adams Express Co. v. Same*, 25 S. Ct. 185, 196 U. S. 147, 49 L. Ed. 424.

A decision sustaining the validity, under the ex post facto clause of the federal Constitution, of Act Fla. May 30, 1901, amending Rev. St. Fla. § 970, so as to prevent collateral attack on a judgment for a disqualification which does not appear of record in the cause, is not so necessarily involved in the denial by the highest state court of a petition to vacate a decree entered before the amendment, for the relationship existing between the judges and one of the parties, which was not known at the time, as to sustain the exercise by the federal Supreme Court of its appellate jurisdiction over state courts.—*Caro v. Davidson*, 25 S. Ct. 428, 197 U. S. 197, 49 L. Ed. 723.

The Supreme Court of the United States will not take jurisdiction of a writ of error directed to a state court, where the judgment of that court rests on two grounds, one of which does not involve a federal question, or where it does not appear on which of the two grounds the judgment was based, and the nonfederal ground is sufficient in itself to sustain the judgment.—*Allen v. Arguimbau*, 25 S. Ct. 622, 198 U. S. 149, 49 L. Ed. 990.

The presence of a question respecting the construction and application of the congressional legislation as to swamp and overflowed lands gives no jurisdiction to the Supreme Court of the United States to review the judgment of a state court in an action of ejectment, holding defendants' title invalid on the independent ground of noncompliance with an act of the state Legislature. Writ of error, *Vicksburg, S. & P. R. Co. v. Tibbs*, 36 So. 223, 112 La. 51, dismissed.—*Leonard v. Vicksburg, S. & P. R. Co.*, 25 S. Ct. 750, 198 U. S. 416, 49 L. Ed. 1108.

The Supreme Court of the United States is not without jurisdiction to review, by writ of error, a decision of a state court sustaining a state statute claimed to impair contract obligations, because the state court rests its conclusion of the nonexistence of the contract upon a construction of the state Constitution and laws. Judgment 92 N. W. 289, 131 Mich. 639, affirmed.—*Attorney General of State of Michigan v. Lowrey*, 26 S. Ct. 27, 199 U. S. 233, 50 L. Ed. 167.

A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.—*West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago*, 26 S. Ct. 518, 201 U. S. 506, 50 L. Ed. 845, affirming judgment, 73 N. E. 393, 214 Ill. 9; *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 26 S. Ct. 341, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175, affirming decree 72 N. E. 219, 212 Ill. 103, 4 Ann. Cas. 1175.

There has been no decision of the federal question in the highest court of the state in which a decision in the suit could be had, which is essential to sustain a writ of error from the Supreme Court of the United States, where the highest state court dismissed an appeal in the

suit because of a defect in the parties to such appeal. Writ of error (1904) 72 N. E. 638, 165 Ind. 171, dismissed.—*Newman v. Gates*, 27 S. Ct. 220, 204 U. S. 99, 51 L. Ed. 385.

The decision of a state court will not be deemed to present a question respecting due process of law which will sustain a writ of error from the Supreme Court of the United States, on the theory that such decision gave retroactive effect to a statute passed since the argument of the appeal before the state court, where the language of the court's opinion may equally well be interpreted as a declaration to pass upon a question not necessary to the decision, which had been set at rest for the future by legislation.—*Stickney v. Kelsey*, 28 S. Ct. 508, 209 U. S. 419, 52 L. Ed. 863.

The validity of Acts Ky. 1904, p. 181, c. 85, so far as it prohibits domestic corporations from teaching white and negro pupils in the same institution, cannot be deemed affected by its possible invalidity under the federal Constitution as to individuals, where the highest state court considers the act separable, and, while sustaining it as an entirety, gives an independent reason which applies only to corporations. Judgment (1906) 94 S. W. 623, 123 Ky. 209, affirmed.—*Berea College v. Commonwealth of Kentucky*, 29 S. Ct. 33, 211 U. S. 45, 53 L. Ed. 81.

The decision of the highest state court that a trustee of a bankrupt partnership can avoid a preference under the state law, without ascertaining the existence of creditors of the individual estate, does not rest on a nonfederal ground so as to defeat appellate jurisdiction of the federal Supreme Court. Judgment (1906) *New Orleans Acid & Fertilizer Co. v. O. Guillery & Co.*, 42 So. 829, 117 La. 821, affirmed.—*Miller v. New Orleans Acid & Fertilizer Co.*, 29 S. Ct. 176, 211 U. S. 496, 53 L. Ed. 300.

The Supreme Court will not review a judgment of a state court where the latter has decided the case on a sufficient ground not within the federal objections taken.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 227, 212 U. S. 112, 53 L. Ed. 431.

A decree of a state court dismissing a bill in a suit to remove a cloud is not reviewable in the Supreme Court because of a ruling that execution sale by a federal marshal, relied on as foundation of title, was made at the wrong place, where it is also based on grounds that the alleged return on the fi. fa. did not describe lands in controversy, that title had not been deraigned as required by the state statute under which suit was brought, and that suit was barred by the state statute of limitations.—*Rogers v. Jones*, 29 S. Ct. 635, 214 U. S. 196, 53 L. Ed. 965.

A question of a federal nature which will sustain a writ of error from the federal Supreme Court to a state court was raised by the contention, denied by the state court, that a right or privilege existed under a statute of the United States to remove the cause to a federal Circuit Court. Judgment (1908) 95 P. 457, 20 Okl. 274, affirmed.—*Williams v. First National Bank of Pauls Valley*, 30 S. Ct. 441, 216 U. S. 582, 54 L. Ed. 625.

The question whether the commerce clause of the federal Constitution is violated by the provisions of Laws Kan. 1907, c. 250, making it unlawful to sell or deliver black powder for use in any coal mines in the state except in original sealed packages containing 12½ pounds of powder, is not open on a writ of error from the federal Supreme Court to review a judgment of the state court refusing a writ of habeas corpus to one convicted of a violation of

the state statute, where the latter court refused to consider the contention because the fact of the importation of the package sold from outside the state did not appear at the trial.—(1912) *Williams v. Walsh*, 32 S. Ct. 137, 222 U. S. 415, 58 L. Ed. 253, affirming order (1908) *Ex parte Williams*, 98 P. 777, 79 Kan. 212.

Decision of state court dismissing suit by foreign corporation to recover back a franchise tax under a state statute alleged to contravene the federal Constitution, resting in part on ground that the tax was voluntarily paid, cannot be reviewed in federal Supreme Court.—(1912) *Gaar, Scott & Co. v. Shannon*, 32 S. Ct. 236, 223 U. S. 468, 56 L. Ed. 510, affirming judgment (1909) 115 S. W. 361, 52 Tex. Civ. App. 634.

A ruling that evidence is insufficient to sustain a recovery under petition which failed to state a cause of action under the safety appliance act of March 2, 1893, does not involve a federal question, so as to give Supreme Court jurisdiction on error to state court.—(1912) *Brinkmeier v. Missouri Pac. R. Co.*, 32 S. Ct. 412, 224 U. S. 268, 56 L. Ed. 758, affirming judgment (1909) 105 P. 221, 81 Kan. 101.

The exercise of the appellate jurisdiction of the federal Supreme Court over the state courts extends to the inquiry whether by some intervening event the federal questions have ceased to be material.—*Gulf, C. & S. F. R. Co. v. Dennis*, 32 S. Ct. 542, 224 U. S. 503, 56 L. Ed. 860.

Where the question for review was the validity under the federal Constitution (Const. Amend. 14) of a state statute under which attorney's fees were awarded to the successful plaintiff, the rule which would ordinarily limit the scope of review in the federal Supreme Court to the consideration of the federal question does not prevent it from recognizing the changed situation produced by decision of the highest state court pending a writ of error by which the statute is adjudged invalid.—*Id.*

Concession in counsel's brief in state court that stipulation in an express company's receipt limiting liability was void under the state law, and the Carmack Amendment June 29, 1906, to Act Feb. 4, 1887, § 20, does not show the lack of any federal question based on the validity of such shipping contract, but must be regarded as concession for purposes of argument as to a matter of law which could conclude no one, as it did not withdraw the shipping contract from the case.—*Wells Fargo & Co. v. Neiman-Marcus Co.*, 33 S. Ct. 267, 227 U. S. 469, 57 L. Ed. 600, reversing judgment (Tex. Civ. App.) 125 S. W. 614.

The asserted right to compensation for improvements in condemnation proceedings does not necessarily present a question under Const. U. S. Amend. 14, to sustain a writ of error to review a judgment of the highest court of the state denying such right, where due process of law, including compensation, is guaranteed by the state laws and Constitution, and the case could have been litigated on local law.—*Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 33 S. Ct. 510, 228 U. S. 328, 57 L. Ed. 857, dismissing writ of error *Norfolk & O. V. R. Co. v. Consolidated Turnpike Co.*, 68 S. E. 346, 111 Va. 131, Ann. Cas. 1912A, 239. Rehearing denied 33 S. Ct. 605, 228 U. S. 596, 57 L. Ed. 982.

A judgment of the Supreme Court of Arizona in a case begun before but tried after the conferring of statehood, and judgment rendered in a state court, is not reviewable in the federal Supreme Court by provisions of Arizona Enabling Act of June 20, 1910, § 32, relating to

the right to prosecute appeals or writs of error to the Supreme Court as permitted prior to the admission of said state into the Union.—*Van Dyke v. Cordova Copper Co.*, 34 S. Ct. 884, 234 U. S. 188, 58 L. Ed. 1273, dismissing appeal 132 P. 94, 14 Ariz. 499.

Contentions on alleged repugnancy to the commerce clause of the federal Constitution of a state statute restricting local transportation of intoxicating liquors are too frivolous to support a writ of error from the federal Supreme Court to the Supreme Court of the state.—*Overton v. State of Oklahoma*, 35 S. Ct. 14, 235 U. S. 31, 59 L. Ed. 112, dismissing writ of error 114 P. 1132, 7 Okl. Cr. 203, and 123 P. 175, 7 Okl. Cr. 203.

Federal question *held* open for consideration in state Supreme Court, though prior decision was the law of the case, where such court considered it on the second appeal when the state law was upheld as not repugnant to the Constitution of the United States.—*Coe v. Armour Fertilizer Works*, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027, reversing judgment *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 58 So. 231, 63 Fla. 64.

Statement in opinion of State Supreme Court that attack on validity of state statute under federal Constitution was by proceeding unknown to its practice does not mean that the court did not pass on the federal question, so as to defeat appellate jurisdiction of the federal Supreme Court.—*Id.*

A decree of the highest court of a state affirming the decree dismissing the bill in a suit to enjoin collection of taxes *held* to rest on independent state ground sustaining it, irrespective of federal rights asserted under Const. Amend. 14.—*Mellon Co. v. McCafferty*, 36 S. Ct. 94, 239 U. S. 134, 60 L. Ed. 181, dismissing writ of error 135 P. 278, 38 Okl. 534.

Writ of error is the only method of reviewing a decree of the Supreme Court of Arizona, affirming a decree entered under the mandate of the federal Supreme Court, reversing a decree on appeal taken while Arizona was still a territory on remand to the state court as successor of the territorial court.—*Steinfeld v. Zeckendorf*, 36 S. Ct. 14, 239 U. S. 26, 60 L. Ed. 125, affirming judgment *Zeckendorf v. Steinfeld*, 138 P. 1044, 15 Ariz. 335.

A judgment of the highest state court dismissing bill and cross-bill for want of jurisdiction is conclusive on the federal Supreme Court unless denial of federal right is involved.—*Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 36 S. Ct. 137, 239 U. S. 446, 60 L. Ed. 375, affirming judgment (*Tenn.*) 183 S. W. 739.

392. — Courts subject to review.

See 13 Cent. Dig. Courts, §§ 1046, 1047.

The supreme court of the United States cannot entertain a writ of error to the superior court of Kentucky, unless the record shows affirmatively that a decision of the case could not have been had in the court of appeals of the state by taking the case there for review, as, under Rev. St. § 709, the supreme court has no power to review any other judgments of the courts of a state than those of the highest court "in which a decision of the suit could be had," and it matters not that the judgment of the superior court was in accordance with what was decided by the court of appeals on a former appeal.—*Fisher v. Carrico*, 122 U. S. 522, 7 S. Ct. 1227, 30 L. Ed. 1192.

An order of a state judge at chambers remanding a prisoner in a habeas corpus proceeding is not an order of a "court," within Rev. St. § 709, allowing a writ of error from the supreme court of the United States only to the final judgment of the highest court of the state in which a decision in the suit can be had.—

McKnight v. James, 155 U. S. 685, 15 S. Ct. 248, 39 L. Ed. 310.

Where a petition for a writ of error to an intermediate or inferior court was presented to the highest court of the state, and denied, *held*, that a writ of error from the supreme court of the United States to review the judgment of the state court was properly addressed to the lower court, in which the record remained.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 29 S. W. 90, 8 Tex. Civ. App. 679; *Bacon v. State of Texas*, 163 U. S. 207, 16 S. Ct. 1023, 41 L. Ed. 132.

A judgment of an inferior state court, entered after reversal, by the highest court of the state, of a previous judgment, and the remand of the case for further proceedings, cannot be directly reviewed by the United States supreme court, although it involves a federal question, and even though the state supreme court, if a second appeal were taken, would necessarily affirm the judgment, on the ground that the question involved was decided on the former appeal.—*Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 16 S. Ct. 850, 40 L. Ed. 991, distinguishing *Northern Pac. R. Co. v. Ellia*, 144 U. S. 458, 12 S. Ct. 724, 36 L. Ed. 504.

In an action for communicating Texas fever to cattle in Colorado, the ground of complaint was that defendant had brought infected cattle from Texas, and suffered them to go at large in Colorado, contrary to the quarantine regulations prescribed by the agricultural department, under Act Cong. July 14, 1890. The verdict and judgment were for defendant, and plaintiff appealed to the state court of appeals, which is an intermediate appellate court. In the latter court, plaintiff relied on the regulations and their violation, while defendant contended that the regulations were not authorized by the act of congress, and, if they were, the act was unconstitutional. As shown by its opinion, the court seemed to think that congress had no power to regulate the disposition of the cattle after their arrival in the state, and hence that the regulations were not binding. At the same time, its judgment might fairly be said to have rested on the view that the statute did not assert any such power, and that the regulations were not authorized by it. Under *Sess. Laws Colo.* 1891, § 4, the judgment of the court of appeals was reviewable by the supreme court, provided it involved a constitutional question; otherwise, not. *Held* that, in the absence of any attempt to procure such review, it could not be said that the supreme court would not have taken cognizance of the case, and hence that the federal supreme court was without jurisdiction to review, directly, the judgment of the state court of appeals.—*Mullen v. Western Union Beef Co.*, 19 S. Ct. 404, 173 U. S. 116, 43 L. Ed. 635, dismissing appeal 49 P. 425, 9 Colo. App. 497.

The federal supreme court cannot review a decision of a subordinate appellate court of a state, when it does not affirmatively appear from the record that a decision could not have been had in the highest state court.—*Id.*

The Kansas City court of appeals is the court to which a writ of error will be issued by the supreme court of the United States to review a federal question decided by it, when the supreme court of the state has decided that it cannot review the decision. Judgment, *Elliott v. Missouri, K. & T. Ry. Co.*, 77 Mo. App. 652, reversed.—*Missouri, K. & T. Ry. Co. v. Elliott*, 22 S. Ct. 446, 184 U. S. 530, 46 L. Ed. 673.

A writ of error will lie from the Supreme Court of the United States to review the final judgment of a subordinate state court denying a federal right specially set up or claimed, if, under the local law, that court is the highest court of the state entitled to pass upon such claim of federal right. Order (*C. C.* 1905) 139 F. 452, reversed.—*Commonwealth of Kentucky*

v. Powers, 26 S. Ct. 387, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692.

An inferior state court is the final court of the state where the federal question involved can be decided, and therefore is the court to which a writ of error from the Supreme Court of the United States must be directed, where the highest state court, although discussing the federal question in its opinion, and declaring it to be without merit, dismissed a writ of error to the inferior court solely and expressly for want of jurisdiction. Writ of error (1905) 51 S. E. 225, 104 Va. 240, dismissed.—*Western Union Telegraph Co. v. Hughes*, 27 S. Ct. 162, 203 U. S. 505, 51 L. Ed. 294.

The Court of Civil Appeals of the state of Texas is the highest court of the state for the purpose of a review in the federal Supreme Court in a case in which the Supreme Court of the state has dismissed, for want of jurisdiction, an application to review the judgment of the Court of Civil Appeals. Judgment (Tex. Civ. App. 1906) 95 S. W. 645, affirmed.—*Sullivan v. State of Texas*, 28 S. Ct. 215, 207 U. S. 416, 52 L. Ed. 274.

The judgment of the trial court is that of the highest court of the state for the purpose of a writ of error from the federal Supreme Court, where the highest state tribunal has denied a writ of error to the trial court.—*Western Union Telegraph Co. v. Crovo*, 31 S. Ct. 399, 220 U. S. 364, 55 L. Ed. 498.

Judgment of Ohio district court of appeals is not that of the highest court of the state, which alone is reviewable in the federal Supreme Court, where the Supreme Court of Ohio has not been asked to exercise its discretionary powers under the state Constitution to review such judgment.—*Stratton v. Stratton*, 36 S. Ct. 26, 239 U. S. 55, 60 L. Ed. 142.

393. — Finality of determination.

See 13 Cent. Dig. Courts, § 1048.

See Appeal and Error, 67-84.

394. — Nature of decisions reviewable.

See 13 Cent. Dig. Courts, §§ 1049-1077.

394 (1). Decisions reviewable and federal questions in general.

Where the state of Colorado, as plaintiff in ejectment, offered in evidence defendant's deed of the premises to the territory of Colorado, an objection that the territory had no right to take a conveyance of real estate, without the consent of the United States, does not raise a federal question, and a writ of error to the supreme court will not lie.—*Brown v. State of Colorado*, 106 U. S. 95, 1 S. Ct. 175, 27 L. Ed. 132.

The judgment of a supreme court of a state, sustaining a decree of a foreign matrimonial court annulling a marriage, presents no question for the jurisdiction of the supreme court of the United States on writ of error, under Rev. St. § 709.—*Roth v. Ehman*, 107 U. S. 319, 2 S. Ct. 312, 27 L. Ed. 499.

The judgment of a state court finding that a patent had been erroneously issued to defendant, and decreeing that he hold it in trust for the plaintiff, raises a federal question, subject to review in the supreme court of the United States.—*Baldwin v. Starks*, 107 U. S. 463, 2 S. Ct. 473, 27 L. Ed. 526.

In a suit on a promissory note against an indorser, where the question is whether notice of protest left at the house formerly occupied by him within loyal territory in Virginia was sufficient when the fact that he had gone to reside within the Confederate lines was known or might have been known to the holder, the refusal to instruct, at request of plaintiff, that

neither the proclamations of the president of April, 1861, and August 16, 1861, nor the Virginia ordinance of secession, obliged the indorsee to be absent from his residence, or relieved the holder from the obligation to give notice of protest, was not error, for neither party claimed any title, right, privilege, or immunity under either the ordinance or proclamations.—*Allen v. McVeigh*, 107 U. S. 433, 2 S. Ct. 558, 27 L. Ed. 572.

In an action on a promissory note against an indorser, an instruction that if defendant before maturity abandoned his residence in loyal territory, and went to reside within the Confederate lines, notice of protest left at his former residence was not sufficient to charge him if his change of residence was known or might have been known to the holder, raises no federal question.—*Id.*

A petition for mandamus to compel a city to provide a fund for the payment of relator's judgment prayed that it should be required to include in its budget the proceeds of sales of certain privileges, and to exhaust its powers of taxation, and continue so to do until the judgment was paid, but made no request for the determination of the extent of such power of taxation. Pending the proceedings, the city applied the proceeds of the sale of the privileges to other debts, claiming that such application was required by the state laws. This action was sustained by the court, and otherwise the petition was granted as prayed. *Held*, that no federal question arises.—*State of Louisiana v. City of New Orleans*, 108 U. S. 568, 2 S. Ct. 955, 27 L. Ed. 823.

Whether, after the conquest and before the incorporation of the city of San Francisco, and before the adoption of the constitution of California, an alcalde of the pueblo of San Francisco could make a valid grant of pueblo lands, as such officers before such conquest had been accustomed to do, and, if so, what would be the effect of such grant, does not depend upon any legislation of congress, or on the terms of the treaty of Guadalupe Hidalgo, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws, and the decision of the state court thereon involves no federal question, and is not reviewable.—*City and County of San Francisco v. Scott*, 4 S. Ct. 688, 111 U. S. 768, 28 L. Ed. 593.

In an action on an insurance policy for loss by fire resulting from military operations at the time of the entry of United States troops into Richmond in April, 1865, the decision of a state court that such entry was an "invasion of a foreign enemy," within the meaning of the exception to liability contained in the policy, is not a federal question, and is therefore not reviewable by the United States supreme court.—*Grame v. Mutual Assur. Soc.*, 112 U. S. 273, 5 S. Ct. 150, 28 L. Ed. 716.

Where, on appeal to the supreme court of a state from a second conviction of murder, appellant claims immunity from a second trial under article 5 of the amendments to the constitution of the United States, which is denied him by the state court, the supreme court of the United States has jurisdiction to review that decision.—*Bohanan v. State of Nebraska*, 118 U. S. 231, 6 S. Ct. 1049, 30 L. Ed. 71.

A writ of error to the United States supreme court does not lie from a final judgment of the supreme court of this state, on the ground that the parties thereto are citizens of different states.—*French v. Hopkins*, 124 U. S. 524, 8 S. Ct. 589, 31 L. Ed. 536.

A decision of a state court, in an action between citizens of the same state, on an agreement in writing, by which plaintiff, the owner of letters patent already once reissued, grant-

ed to defendant an exclusive license to make and sell the patented article, defendant expressly acknowledging the validity of the patent, and stipulating that plaintiff might obtain reissues, and promising to pay royalties so long as no decision adverse to the patent should have been rendered, that defendant was estopped from denying the validity of subsequent reissues of the letters, is not a decision of any questions arising under the patent laws of the United States.—*Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 8 S. Ct. 756, 31 L. Ed. 683.

In an action between citizens of the same state, on a contract for certain royalties on a patent for rope reels, there was evidence that the reels made and sold by defendant were substantially like those mentioned in such contract. At the time of the admission of such evidence no letters patent were in the case, and in the instructions of the court plaintiff's right of recovery was carefully limited to such reels. *Held*, that the case did not arise under the patent laws of the United States.—*Felix v. Scharnweber*, 125 U. S. 54, 8 S. Ct. 759, 31 L. Ed. 687.

The supreme court, having no jurisdiction to review a judgment of the highest court of a state, unless a federal question has been decided by that court against the plaintiff in error, cannot review a judgment of such court, where the only question decided was that a former judgment, rendered against the plaintiff in error and in favor of the grantor of defendants in error, was a bar to this action.—*City and County of San Francisco v. Itsell*, 133 U. S. 65, 10 S. Ct. 241, 33 L. Ed. 570.

The denial by the supreme court of Louisiana of the exclusive right of plaintiffs to an award made under the convention of January, 1880, between the United States and France, providing for the determination of the claims of citizens of France against the United States, being a decision against a right claimed under a treaty of the United States, presents a question for the jurisdiction of this court, within the express terms of section 25 of the judiciary act (Rev. St. § 709).—*Burthe v. Denis*, 133 U. S. 514, 10 S. Ct. 335, 33 L. Ed. 768.

A decision of the state court that a writ of habeas corpus will not lie in behalf of a convicted prisoner, sentenced in excess of the maximum punishment fixed by the state law, presents no federal question, and will not be interfered with by the supreme court of the United States.—*Graham v. Weeks*, 138 U. S. 461, 11 S. Ct. 363, 34 L. Ed. 1051.

In an action to recover stipulated royalties for the use under license from plaintiff of an invention patented to him, defendant alleged that the device used was not the mechanical equivalent of plaintiff's patent, and that, if it were, then the patent was invalid. The referee found that plaintiff licensed defendant to use the patented device, and that defendant agreed to use it and pay for it, and on the strength of defendant's agreement the trial court rendered judgment for plaintiff, which was affirmed by the court of appeals of the state, which rendered no opinion. *Held* that, as the federal question of the validity and effect of the patent was not passed on by the state court, the supreme court of the United States has no jurisdiction of a writ of error to the state court, and it will accordingly be dismissed.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U. S. 293, 11 S. Ct. 528, 35 L. Ed. 193.

It was not a denial of the validity of any statute or authority of the United States for the state court to decide that, on the trial below in the territorial district court, a provision of the territorial Code requiring the plaintiff to furnish a copy of the items of his account

was substantially complied with, and that a provision for bills of particulars in certain cases left the matter largely within the discretion of the court, which discretion was not abused in this instance by denying a motion for such a bill.—*Ferry v. King County*, 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895; *Id.*, 141 U. S. 673, 12 S. Ct. 130, 35 L. Ed. 898.

Code Cr. Proc. N. Y. §§ 491, 492, provide that a criminal under sentence of death shall be kept in solitary confinement in the penitentiary until executed, and that the court shall designate a week during which the execution must take place, but that the warden shall fix the day and hour, keeping the same secret from the prisoner and the public. *Held*, that the determination of the legislature and courts of New York that such confinement is not cruel and unusual is conclusive upon the federal courts, and they cannot review such determination on the theory that it infringes on the immunities or privileges secured to citizens of the United States by the fourteenth amendment to the constitution.—*McElvaine v. Brush*, 142 U. S. 155, 12 S. Ct. 156, 35 L. Ed. 971; *Trezza v. Same*, 142 U. S. 160, 12 S. Ct. 158, 35 L. Ed. 974.

In a proceeding to oust a person from a state office on the ground that he is not a citizen of the United States, a demurrer to an answer which set up facts alleged to show a naturalization necessarily presents a federal question, which is reviewable in the United States supreme court.—*Boyd v. State of Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

A decision by the supreme court of a state that a person born in a foreign country, and claiming to have become a citizen of the United States by the operation of its laws and constitution, is not such citizen, and therefore not eligible to the office of governor, under the requirements of the state constitution, involves the denial of a right or privilege claimed under the constitution and laws of the United States, and is reviewable in the supreme court thereof.—*Id.*

A decision by a state court that an attorney, who has received money for his client under an award against the United States, is estopped from denying his client's title thereto, or from setting up as against him the fact that the award has been vacated, and that the matter is pending in the court of claims, involves no federal question, and is not reviewable in the supreme court.—*Sherman v. Grinnell*, 144 U. S. 198, 12 S. Ct. 574, 36 L. Ed. 403.

A decision by the supreme court of Louisiana that a question as to the validity of certain bonds of the state was res adjudicata by reason of a prior suit involving other bonds of the same series, and that, on the merits, such bonds were invalid, because issued by the state authorities in exchange for merchandise instead of for state or Confederate currency, as required by the act authorizing their issuance, involves no federal question, and is not reviewable in the United States supreme court.—*Adams v. Board of Liquidation of Louisiana*, 144 U. S. 651, 12 S. Ct. 756, 36 L. Ed. 578.

The question whether an action in a state court to foreclose a lien arising from a street assessment is in rem or in personam is for the state supreme court to determine, and its decision thereof is not reviewable in the United States supreme court.—*Wood v. Brady*, 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 961.

The fact that the jurisdiction of the state court is objected to on the untenable ground that the federal courts have exclusive jurisdiction of this class of cases would lay no founda-

tion for a writ of error to the United States supreme court, under section 709.—*Schuyler Nat. Bank v. Bollong*, 150 U. S. 85, 14 S. Ct. 24, 37 L. Ed. 1008; *Id.*, 150 U. S. 90, 14 S. Ct. 26, 37 L. Ed. 1010.

A decision of a state supreme court, in a suit between individuals, that an alleged Mexican land grant, which had been confirmed by the land commissioners and the district court, was made after the conquest of the country by the United States, and was fraudulently antedated, is not reviewable in the supreme court on the ground that it involves a right under the treaty of Guadalupe Hidalgo, whereby existing rights are to be protected, or under Act March 3, 1851, which declares that the final decrees of the special land tribunal thereby created, or of the district court, shall be conclusive only between the government and the claimant, and "shall not affect the interests of third persons."—*California Powder Works v. Davis*, 151 U. S. 389, 14 S. Ct. 350, 38 L. Ed. 206.

A decision by a state supreme court that a wife who abandons her husband for a paramour, and afterwards takes advantage of a decree of divorce procured by the former to solemnize a marriage with the latter, is thereby estopped from subsequently claiming property as the heir of her husband, although the decree of divorce was in fact void for want of service, involves no federal question, and is not reviewable in the supreme court of the United States, on the theory that it amounted to an attainder, ex post facto law, or a taking of property without due process of law.—*Israel v. Arthur*, 152 U. S. 355, 14 S. Ct. 583, 38 L. Ed. 474.

No appeal lies from the judgment of the supreme court of a state for the purchase price of slaves who had been emancipated by the amendment to the constitution, as no federal question is involved.—*Jackoway v. Denton*, 154 U. S. 583, 14 S. Ct. 1169, 20 L. Ed. 645.

In quo warranto to exclude defendant from further use of a lottery franchise, where the sole question determined by the supreme court of a state is whether the event upon which defendant's grant was to terminate had transpired, no appeal lies to this court, as no federal question is involved.—*France v. State of Missouri*, 154 U. S. 667, 14 S. Ct. 1191, 26 L. Ed. 86.

Decisions of state courts in relation to matters of general law cannot be reviewed in the supreme court of the United States on the theory that the law of the land is violated whenever their conclusions are not absolutely free from error.—*Sayward v. Denny*, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941.

To give the supreme court jurisdiction to review a judgment of the court of last resort because of the denial of a title, right, privilege, or immunity secured by the constitution or laws of the United States, the aggrieved party must not only have called the attention of the court to the right or privilege in question, but the decision must have been against it.—*Id.*

The refusal of a state court to give a judgment rendered by a court of that state its proper effect as an estoppel does not present a federal question.—*Phoenix Fire & Marine Ins. Co. of Memphis v. State of Tennessee*, 161 U. S. 174, 16 S. Ct. 471, 40 L. Ed. 660.

The rule established by the supreme court of Iowa, that a cause of action for unpaid subscriptions to the stock of a corporation accrues, so as to set the state statute of limitations running, at the time when an assessment might have been made, and not the date when it actually was made, is a matter of local law, upon

which the judgment of the state supreme court cannot be reviewed by the supreme court of the United States.—*Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 16 S. Ct. 810, 40 L. Ed. 986, affirming judgment 83 Iowa, 430, 50 N. W. 45.

A decision of the highest court of a state that, when an Indian tribe avails itself of the privilege given by a state statute to maintain suits in the state courts in the tribal name, such tribe is bound by a limitation in the statute as to the time in which the suit must be brought, involves no federal question, and is not reviewable in the supreme court of the United States.—*Seneca Nation of Indians v. Christy*, 162 U. S. 283, 16 S. Ct. 828, 40 L. Ed. 970.

A decision in an ejectment suit, adverse to the claim of the defendant, based solely upon the statute of limitations and an alleged estoppel arising from an agreement by plaintiff's predecessor giving to the citizens of a town the surface land in controversy for town purposes, involves no federal question.—*Carothers v. Mayer*, 17 S. Ct. 106, 164 U. S. 325, 41 L. Ed. 452.

A decision of the supreme court of New Hampshire that a party which avails itself of the privileges given by the general mill act of that state, of July 3, 1868, in respect to flowage of lands, and which joins in a trial for assessment of damages under its provisions, is thereby precluded from denying the validity of the clause prescribing that 50 per cent. shall be added to the verdict, is not based on any federal question, and is therefore not reviewable by the federal supreme court.—*Electric Co. v. Dow*, 17 S. Ct. 645, 166 U. S. 489, 41 L. Ed. 1088.

A decision by a state supreme court that the procedure by which a state officer has been suspended or removed from office by the governor was regular, and pursuant to a valid state statute, is not reviewable by the federal supreme court, unless fundamental rights protected by the federal constitution have been infringed.—*Wilson v. State of North Carolina*, 18 S. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

Where a state legislature authorized the sale of a canal and its appurtenances, expressly reserving to the state the full and absolute use of a certain amount of water power on the line of the canal, the question whether, in such case, a lease by the state of the water power so reserved carried with it, as an incident, the right to the lessee to erect certain buildings or other structures on lands appurtenant to the canal, is not a federal question, and its determination by the state courts cannot be reviewed by the supreme court. Decree 20 S. E. 1002, 43 S. C. 154, affirmed.—*Columbia Water-Power Co. v. Columbia Electric Street-Railway, Light & Power Co.*, 19 S. Ct. 247, 172 U. S. 475, 43 L. Ed. 521.

Where a creditor brought suit in attachment against a corporation in a federal court, which subsequently ordered the property seized surrendered to a receiver previously appointed therefor by a state court, unless application for its retention was made to such state court within five days, which the creditor failed to make, but brought suit to nullify the appointment of the receiver, and for damages, under a state statute, which was decided adversely to him by the supreme court of the state, there is no federal question presented by a writ of error to the United States supreme court from such decision, and the writ will therefore be dismissed.—*Remington Paper Co. v. Watson*, 19 S. Ct. 456, 173 U. S. 443, 43 L. Ed. 762.

Since the consent of parties cannot authorize a court to entertain jurisdiction over a

case in which it is powerless to grant relief, the laches of a party in failing to promptly bring to the notice of the court the facts which would render its judgment unavailing affords no ground for the court's assuming to decide the questions presented.—*Kimball v. Kimball*, 19 S. Ct. 639, 174 U. S. 158, 43 L. Ed. 932.

A decision that words used in a pleading in another suit cannot be made the foundation of an action for damages does not involve any question of a federal nature for review on writ of error to a state court by the supreme court of the United States. Judgment 56 P. 376, 20 Wash. 552, affirmed.—*Abbott v. National Bank of Commerce*, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217.

No federal question is involved in the inquiry whether a party has been given or refused the benefit of the law of estoppel. Judgment, *State v. Weyerhaeuser*, 75 N. W. 713, 72 Minn. 519, affirmed.—*Weyerhaeuser v. State of Minnesota*, 20 S. Ct. 485, 176 U. S. 550, 44 L. Ed. 583.

The decision by a state court that an allegation of false and fraudulent representations implies a knowledge of their falsity, and that, if an express allegation of the scienter were necessary, the omission would be cured by the verdict, does not involve any federal question for review by the supreme court of the United States. Judgment 52 N. E. 55, 176 Ill. 359, affirmed.—*Forsyth v. Vehmeyer*, 20 S. Ct. 623, 177 U. S. 177, 44 L. Ed. 723.

The question whether or not a delegation of power has been made to the mayor of a city by the common council is not a federal question for review on writ of error by the supreme court of the United States to a state court. Judgment 52 N. E. 44, 176 Ill. 340, 48 L. R. A. 230, affirmed.—*Gundling v. City of Chicago*, 20 S. Ct. 633, 177 U. S. 183, 44 L. Ed. 725.

A proceeding for a mandamus is a "suit," within the meaning of Rev. St. U. S. § 709, relating to the jurisdiction of the United States supreme court on writ of error to state courts. Judgment. *Attorney General v. American Exp. Co.*, 77 N. W. 317, 118 Mich. 682, 5 Detroit Leg. N. 669, reversed.—*American Exp. Co. v. Maynard*, 20 S. Ct. 695, 177 U. S. 404, 44 L. Ed. 823.

The guaranty of a republican form of government to each state, in Const. U. S. art. 4, § 4, gives no jurisdiction to the supreme court of the United States on writ of error under Rev. St. U. S. § 709, to review a decision of the highest court of a state sustaining a determination of an election contest for the office of governor made by the general assembly under authority of the state constitution, on the ground that such decision denies the right of the people to choose their own officers, where the legislative, executive, and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests.—*Taylor v. Beckham*, 20 S. Ct. 890, 178 U. S. 548, 44 L. Ed. 1187, dismissing writ of error 56 S. W. 177, 108 Ky. 278, 21 Ky. Law Rep. 1735, 49 L. R. A. 258, 94 Am. St. Rep. 357.

The decision by a state court that the purpose for which a corporation is formed is not lawful, or that the good faith of its members is immaterial on the question of such legality, is a matter of local law, and is not reviewable by the supreme court of the United States on writ of error.—*New Orleans Debenture Redemption Co. of Louisiana v. State of Louisiana*, 21 S. Ct. 378, 180 U. S. 320, 45 L. Ed. 550.

A suggestion of misjoinder of counts in an indictment, and an objection that instructions

on the charge of being an habitual criminal were first given after the jury had found the defendant guilty of the specific offenses charged, do not present any federal question.—*McDonald v. Commonwealth of Massachusetts*, 21 S. Ct. 389, 180 U. S. 311, 45 L. Ed. 542.

A writ of error to a state court from the supreme court of the United States will not be dismissed for want of jurisdiction, where a federal question is clearly raised, merely because the claim by which it is presented is not well founded.—*Blythe v. Hinckley*, 21 S. Ct. 390, 180 U. S. 333, 45 L. Ed. 557.

The action of a state court to which a cause had been remanded on reversal by the supreme court of the United States, by which it not only complies with the mandate by reversing and setting aside a judgment and an injunction decree which it affirmed, but goes beyond the mandate in directing the dismissal of the bill to restrain proceedings in a federal court, does not present any federal question for review by the supreme court of the United States, since the dismissal of the bill, not affecting any federal rights at all, was not a decision against the parties invoking them.—*Lake St. El. R. Co. v. Farmers' Loan & Trust Co.*, 21 S. Ct. 870, 182 U. S. 417, 45 L. Ed. 1161.

The fact that a state court, in deciding a federal question, erroneously declares that no federal question exists, does not preclude a review of its decision on writ of error from the United States supreme court. Judgment, *Elliott v. Missouri, K. & T. Ry. Co.*, 77 Mo. App. 652, reversed.—*Missouri, K. & T. Ry. Co. v. Elliott*, 22 S. Ct. 446, 184 U. S. 530, 46 L. Ed. 673.

No federal question arises from the forfeiture of a charter of a corporation for alleged violation of its terms, by a decree of a state court made after a full hearing by all the parties in a proceeding in the nature of quo warranto instituted in the name of the state by the attorney general, to whom the matter had been referred by the legislature to bring such suit or take such other action as he might think proper. Writ of error, *State v. New Orleans Waterworks Co.*, 31 So. 395, 107 La. 1, dismissed.—*New Orleans Waterworks Co. v. State of Louisiana*, 22 S. Ct. 691, 185 U. S. 336, 46 L. Ed. 936.

Whether the bondholders of a corporation are indispensable parties to a suit instituted by the attorney general in the name of the state to enforce a forfeiture of the company's charter for an alleged violation of its terms is not a question which the supreme court can review on writ of error to a state court.—Id.

The supreme court of the United States is not without jurisdiction of a writ of error to a state court because that court committed no error in deciding the federal question involved. Decree 57 N. E. 333, 176 Mass. 92, affirmed.—*Andrews v. Andrews*, 23 S. Ct. 237, 188 U. S. 14, 47 L. Ed. 306.

The question whether an advertising agent was entitled, on a proper construction of his contract with a newspaper corporation, to retain a specified sum each month out of the moneys received by him, is not federal in its nature; and a decision of a state court thereon is therefore not subject to review in the Supreme Court of the United States on writ of error to that court. Judgment 60 N. E. 642, 167 N. Y. 329, affirmed.—*Commercial Pub. Co. v. Beckwith*, 23 S. Ct. 382, 188 U. S. 567, 47 L. Ed. 598.

The question whether a municipality, by refusing to hear objections to a public improvement, is estopped to collect any portion of the cost thereof from the objector, is not a federal question which may be reviewed by the Supreme Court of the United States on writ of error to a state court. Judgment 60 N. E. 149,

156 Ind. 704, affirmed.—*Schaefer v. Werling*, 23 S. Ct. 449, 188 U. S. 516, 47 L. Ed. 570.

A decision of a state court refusing a petition for a writ of mandamus, in which relator claimed and set up a right under the Constitution of the United States, is tantamount to the denial of that right, and is therefore reviewable in the Supreme Court of the United States, Judgment, *Detroit, Ft. W. & B. I. Ry. v. Commissioner of Railroads*, 86 N. W. 842, 127 Mich. 219, 8 Detroit Leg. N. 343, 62 L. R. A. 149, affirmed.—*Detroit, Ft. W. & B. I. Ry. v. Osborn*, 23 S. Ct. 540, 189 U. S. 383, 47 L. Ed. 860.

A claim that a right under the federal Constitution would be denied by the rendition of a decree of foreclosure by a state court, unless leave to file a supplementary answer should be granted, is so clearly without foundation, where the defense sought to be interposed is without merit, as to confer no jurisdiction on the Supreme Court of the United States of a writ of error to the state court. Writ of error, *Piper v. Sawyer*, 80 N. W. 970, 78 Minn. 221, dismissed.—*Sawyer v. Piper*, 23 S. Ct. 633, 189 U. S. 154, 47 L. Ed. 757.

Whether the highest state court should apply the law of the place of contract to a controversy respecting the right of a common carrier to limit its liability for negligence to the agreed valuation is not a federal question which will sustain the jurisdiction of the Supreme Court of the United States over a writ of error to the state court. Judgment, *Hughes v. Pennsylvania R. Co.*, 51 A. 990, 202 Pa. 222, 63 L. R. A. 513, 97 Am. St. Rep. 713, affirmed.—*Pennsylvania R. Co. v. Hughes*, 24 S. Ct. 132, 191 U. S. 477, 48 L. Ed. 268.

A decision of a state court construing the provisions of a city charter authorizing the city to prohibit the erection of cow stables and dairies "within prescribed limits" so as to permit the city to make the limits for the operation of the ordinance coincident with the city limits presents no federal question, which can be reviewed on writ of error from the federal Supreme Court to a state court.—*Fischer v. City of St. Louis*, 24 S. Ct. 673, 194 U. S. 361, 48 L. Ed. 1018, affirming judgment *City of St. Louis v. Fisher*, 67 S. W. 872, 187 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614; *Schefe v. Same*, 24 S. Ct. 676, 194 U. S. 373, 48 L. Ed. 1024, affirming judgment *City of St. Louis v. Schefe*, 67 S. W. 1100, 187 Mo. 666.

The contention that a conveyance was either in fraud of creditors under the state law, or that a residuary estate remained in the grantor which would pass under an assignee's sale in proceedings in bankruptcy, presents a local, and not a federal, question, and cannot, therefore, be considered by the federal Supreme Court on writ of error to a state court. Judgment, 68 N. E. 869, 202 Ill. 83, affirmed.—*Cramer v. Wilson*, 25 S. Ct. 94, 195 U. S. 408, 49 L. Ed. 256.

Whether or not the courts of one state should, on principles of comity, permit an action to be maintained on a contract entered into in contravention of the laws of another state, is not a federal question which will sustain a writ of error from the federal Supreme Court to a state court.—*Allen v. Alleghany Co.*, 25 S. Ct. 311, 196 U. S. 458, 49 L. Ed. 551.

A federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error from the Supreme Court of the United States to a state court. Writ of error, *Vicksburg, S. & P. R. Co. v. Tibbs*, 36 So. 223, 112 La. 51, dismissed.

—*Leonard v. Vicksburg, S. & P. R. Co.*, 25 S. Ct. 750, 193 U. S. 416, 49 L. Ed. 1103.

The decision of a state court upon questions of local law is not subject to review in the federal Supreme Court on writ of error to the state court. Judgment *Delaney Forge & Iron Co. v. Iroquois Transp. Co.* (1905) 105 N. W. 527, 142 Mich. 84; *The Winnebago, Id.*, affirmed.—*Iroquois Transp. Co. v. De Laney Forge & Iron Co.*, 27 S. Ct. 509, 205 U. S. 354, 51 L. Ed. 836; *Same v. Edwards, Id.*

A decision of the highest state court that the defendant in a criminal case has been tried in accordance with the local procedure, although the names of all the witnesses were not indorsed on the indictment, cannot be reviewed in the Supreme Court of the United States on the theory that a meritorious federal question was involved in the claim that the accused was a subject of Great Britain, and by virtue of treaties, the law of nations, the laws and Constitution of the United States, and the laws of the state was entitled to know who were the witnesses against him. Writ of error, *State v. Barrington* (1906) 95 S. W. 235, 198 Mo. 23, dismissed.—*Barrington v. State of Missouri*, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890.

The citizenship of the parties is immaterial as affecting the jurisdiction of the federal Supreme Court, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], of a writ of error to a state court.—*Id.*

No federal question which will sustain a writ of error from the Supreme Court of the United States to a state court is involved in the contention that the defendant in a criminal case was compelled to be a witness against himself, contrary to Const. U. S. Amend. 5, since this amendment does not operate as a restriction of the powers of the state, but was intended to operate solely upon the federal government.—*Id.*

The exclusion from evidence in a suit to quiet title of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, which is clearly *res inter alios acta*, can present no federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. Writ of error (1906) 92 S. W. 534, 77 Ark. 338, dismissed.—*Chapman & Dewey Land Co. v. Bigelow*, 27 S. Ct. 679, 206 U. S. 41, 51 L. Ed. 953.

Questions respecting the impairment of contract obligations and the denial of due process of law because of the additional burden of taxation to which the citizens and taxpayers of a lesser city, annexed under the authority of Act Pa. Feb. 7, 1906, §§ 1-9 (P. L. 7-11), to an adjoining and larger city, will be subjected, are not so unsubstantial and devoid of all color of merit as to require the dismissal of a writ of error from the Supreme Court of the United States to a state court. Judgment, *In re City of Pittsburg*, 66 A. 348, 217 Pa. 227; Appeal of *Hunter, Id.*, affirmed.—*Hunter v. City of Pittsburgh*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151.

The contention that the courts of Arkansas have no jurisdiction of causes of action arising under the laws of the Indian Territory, giving a right of action for death, does not present a federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. Judgment, *St. Louis, I. M. & S. Ry. Co. v. Neal* (1906) 98 S. W. 958, 83 Ark. 591, reversed.—*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 28 S. Ct. 616, 210 U. S. 281, 52 L. Ed. 1061.

Questions whose determination depends upon the power of a state railroad commission, upon the petition of certain railway companies for the approval of a consolidation, and upon the

order of the commission, made on the petition, are local, and not federal, and cannot be reviewed on a writ of error from the federal Supreme Court to a state court. Judgment (1908) 41 So. 259, 89 Miss. 724, affirmed.—*Mobile, J. & K. C. R. Co. v. State of Mississippi*, 28 S. Ct. 650, 210 U. S. 187, 52 L. Ed. 1016.

A state court, by resting its decision in a suit to require railway companies to construct their railroad through a specified county seat, and to restrain them from abandoning a portion of the road, upon the ground that the petition by the railway companies to the railroad commission for approval of a consolidation, and its order thereon, constituted a binding contract, is not using a mere pretext to avoid the determination of the federal questions arising in the case under the contract and commerce clauses of the federal Constitution, where the power of the commission and the effect of its order were necessarily presented by the case.—*Id.*

Whether railway companies waive their charter rights to change the line of a narrow-gauge road, and are estopped to revoke such waiver, by obtaining the consent of the state, through its railroad commission, to broaden and standardize that line through its entire length, is a local, and not a federal, question, and cannot be reviewed on a writ of error from the Supreme Court of the United States to a state court.—*Id.*

Contentions that immunities secured by Const. U. S. Amend. 14, are violated by a decision of a state court, that forfeiture of a corporate franchise may be declared for nonuser, and by its ruling, following its conception of the rules of pleading, that the charges of nonuser contained in an information in the nature of quo warranto stand as confessed under the pleadings, so as to sustain a motion for final judgment of ouster, are too frivolous to serve as the basis of a writ of error from the Federal Supreme Court to a state court.—*Delmar Jockey Club v. State of Missouri*, 28 S. Ct. 732, 210 U. S. 324, 52 L. Ed. 1080.

If the record shows that the verdict and judgment of a state court can stand upon other grounds, free from objection so far as federal rights are concerned, no federal question is presented. Judgment (Tex. Civ. App. 1908) 106 S. W. 918, affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

The decision of a state court denying the force and effect specially claimed under the federal Constitution and laws for a territorial statute is reviewable in the Supreme Court of the United States under Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), as a case in which a right, title, privilege, or immunity under the federal Constitution, or under a statute of, or authority exercised under, the United States, was specially claimed and denied. Judgment (Tex. Civ. App. 1907) 90 S. W. 190, affirmed.—*Atchison, T. & S. F. Ry. Co. v. Sowers*, 29 S. Ct. 397, 213 U. S. 55, 53 L. Ed. 695.

A claim by a railway in a state court of immunity from liability for the negligent killing of an employé in the territory of New Mexico because of noncompliance with the requirements of a statute of that territory governing actions for personal injuries received therein presents a federal question within the meaning of Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), which, when adversely adjudicated, confers jurisdiction on the federal Supreme Court of a writ of error to the state court. Judgment, *Gutierrez v. El Paso & N. E. R. Co. (Tex.)* 117 S. W. 426, affirmed.—*El Paso & N. E. Ry. Co. v. Gutierrez*, 30 S. Ct. 21, 215 U. S. 87, 54 L. Ed. 106.

A judgment of the Texas Supreme Court, which, reversing the judgment of the Court of

Civil Appeals of that state, affirmed the judgment of the trial court entered on a verdict in favor of the plaintiff in an action against a railway company for the negligent killing of an employé in the territory of New Mexico, is reviewable in the federal Supreme Court as necessarily deciding against a federal right specially set up, within the meaning of Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), where the trial court sustained a demurrer to a plea setting up a defense under a statute of the territory, which, if applicable, was a complete bar to the action, because of noncompliance with its requirements, although the decision of the state Supreme Court proceeded upon the theory that the case was controlled by the federal employers' liability act, which it held to be valid.—*Id.*

The contention that Const. U. S. Amend. 14 is violated by the provisions of Const. W. Va. art. 13 (Code 1903, p. lxxxiv), and Code, ch. 105, for the forfeiture to the state of lands not listed by the owner for taxation for five successive years, with liberty to the owner to intervene and redeem, having been decided adversely in a prior decision of the federal Supreme Court, affords no basis for a writ of error from that court to a state court.—*King v. State of West Virginia*, 30 S. Ct. 225, 216 U. S. 92, 54 L. Ed. 396.

Riparian rights asserted to have been secured by the treaty of Guadalupe Hidalgo between the United States and Mexico, and Act Cong. March 3, 1851, c. 41, § 9 Stat. 631, for the confirmation of titles derived from Spanish and Mexican grants, are not rights of federal origin, which, when denied, lay the basis for a writ of error from the federal Supreme Court to a state court.—*Los Angeles Farming & Milling Co. v. City of Los Angeles*, 30 S. Ct. 452, 217 U. S. 217, 54 L. Ed. 736.

A writ of error to review a judgment of the highest court of a state will not be dismissed on the ground that the federal question relied upon to confer jurisdiction has been so conclusively foreclosed by prior decisions of the federal Supreme Court as to cause it to be frivolous, where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions upon the issue presented, and there is some conflict in the opinions of the various state courts of last resort upon the question, and a division of opinion in the court below.—(1910) *Louisville & N. R. Co. v. Melton*, 30 S. Ct. 676, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, affirming judgment (1907) 105 S. W. 366, 127 Ky. 276.

Claims by the United States, in proceedings under the supply lien law of a state, to establish the rights of creditors furnishing supplies for the construction of vessels building for the United States, that under the contract for the construction of one of the vessels the title vested in the government as fast as paid for; that a lien was reserved to the government under the contract for building the other vessels, superior to the claim of the supply lien creditors under the state law; that the right of the government to its superior claims could not be affected by, and was not subject to, such law; and that the state had no power to retard, impede, or control the operation of the federal government in making and carrying out such contracts—are assertions of rights and immunities, the creation of federal authority, which, when denied by a state court, present a case under Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), for a writ of error from the federal Supreme Court.—*United States v. Ansonia Brass & Copper Co.*, 31 S. Ct. 49, 218 U. S. 452, 54 L. Ed. 1107.

A decision of a state court enforcing common-law performing rights of owner of unpublished play as against owner of a copyrighted

adaption, who stood on his copyright, denies a federal right claimed within Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), governing writs of error from federal Supreme Court to state court.—(1912) *Ferris v. Frohman*, 32 S. Ct. 263, 223 U. S. 424, 56 L. Ed. 492, affirming judgment (1909) *Frohman v. Ferris*, 87 N. E. 327, 238 Ill. 430, 128 Am. St. Rep. 135.

A question of law arising out of contention that there was no evidence to support finding of fact, as the result of which a federal right was denied, is open to review in the federal Supreme Court on writ of error to a state court, if the evidence is in the record.—*Creswell v. Grand Lodge, K. P. of Georgia*, 32 S. Ct. 822, 225 U. S. 246, 56 L. Ed. 1074, reversing judgment 67 S. E. 188, 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453.

Whether officers of a state grand lodge of a fraternal order, incorporated under federal General Incorporation Act May 5, 1870, may prosecute in state court applications to be made a domestic corporation, cannot be reviewed by the federal Supreme Court on writ of error to a state court.—Id.

The question, What rights, if any, of a policeman in a pension fund are protected by the federal Constitution? is not so involved in a proceeding by mandamus to compel the restoration to the pay rolls of the name of a policeman who had been summarily removed from office, as to sustain a writ of error from the federal Supreme Court to the highest court of a state to review a judgment denying the writ.—*Preston v. City of Chicago*, 33 S. Ct. 177, 226 U. S. 447, 57 L. Ed. 293.

A decision that a state statute makes criminal certain acts done since its enactment is not subject to objection that such construction violates Const. U. S. art. 1, § 10, relating to ex post facto laws, so as to sustain writ of error from the federal Supreme Court to a state court.—*Ross v. State of Oregon*, 33 S. Ct. 220, 227 U. S. 150, 57 L. Ed. 458, Ann. Cas. 1914C, 224, dismissing appeal from *State v. Ross*, 106 P. 1022, 55 Or. 450.

An order of remand to a state court is not reviewable in the federal Supreme Court by writ of error bringing up the final judgment of the highest state court.—*McLaughlin Bros. v. Halliwell*, 33 S. Ct. 465, 228 U. S. 278, 57 L. Ed. 835, dismissing writs of error 111 N. W. 428, 136 Iowa, 279, and 121 N. W. 1039.

Contention that judgment below contravened Const. U. S. art. 4, § 4, guaranteeing to every state a republican form of government, does not render judgment of state court reviewable on writ of error, as the provision depends on federal and governmental action through powers conferred on Congress.—*Marshall v. Dye*, 34 S. Ct. 92, 231 U. S. 250, 58 L. Ed. 206, dismissing appeal *Ellingham v. Same*, 99 N. E. 1, 178 Ind. 338.

A question respecting an alleged violation of Const. U. S. Amendment 4, against unreasonable searches and seizures, cannot be reviewed by the federal Supreme Court on writ of error to a state court.—*National Safe Deposit Co. v. Stead*, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

Whether an election at which a county went dry was void because the question apparently submitted was the adoption of the original Michigan local option law, with its amendments (Pub. Acts 1889, No. 183, and Pub. Acts 1903, No. 170), when in reality only the original law was submitted, the amendments being unconstitutional, is exclusively for the state court to decide.—*Eberle v. People of State of Michigan*, 34 S. Ct. 464, 232 U. S. 700, 58 L. Ed. 803, af-

firming judgment *People v. Eberle*, 133 N. W. 519, 167 Mich. 477.

The contention that the Texas statute imposing upon life insurance companies a liability to pay damages and an attorney's fee on default is repugnant to the provisions of Const. U. S. Amend. 14, has been so foreclosed by prior decisions as not to serve as the basis of a writ of error from the federal Supreme Court to a state court to review a judgment enforcing such statutory penalty.—*Manhattan Life Ins. Co. of New York v. Cohen*, 34 S. Ct. 874, 234 U. S. 123, 58 L. Ed. 1245, dismissing appeal (Civ. App.) 139 S. W. 51.

The action of a state court in declaring an assignment of a life insurance policy void because of the gambling nature of the contract, while permitting the assignor to retain the price paid therefor, does not involve a federal question, where the action was based on applicable principles of both local and general law.—Id.

The federal Supreme Court cannot go behind the ruling of state court that state Railroad Commission acted in the exercise of the state's power of regulation of a steam railroad and interurban electric railway.—*Michigan Cent. R. Co. v. Michigan R. R. Commission*, 35 S. Ct. 422, 236 U. S. 615, 59 L. Ed. 750, affirming judgment *Michigan R. Commission v. Michigan Cent. R. Co.*, 132 N. W. 1068, 168 Mich. 230.

Whether distinctions recognized under Michigan laws between railroads and street railways were preserved by Pub. Acts Mich. 1907, No. 312, and Pub. Acts 1909, No. 300, and whether provisions of section 7 of these acts applied to both kinds of roads, are foreclosed by the decision of the state court.—Id.

Federal question resting on false assumption is so plainly devoid of merit as to give no appellate jurisdiction over state court.—*Parker v. McLain*, 35 S. Ct. 632, 237 U. S. 469, 59 L. Ed. 1051, dismissing appeals *McLain v. Parker*, 129 P. 1140, 88 Kan. 717, and Id., 131 P. 153, 88 Kan. 873.

A federal question, which is frivolous, cannot be made substantial, so as to serve as basis for a writ of error to state court, by asserting another proposition of the same character.—*Erie R. Co. v. Solomon*, 35 S. Ct. 648, 237 U. S. 427, 59 L. Ed. 1033, dismissing appeal 106 N. E. 1055, 89 Ohio St. 406.

The question whether a certain section of the Arkansas laws, extended over Indian Territory by Act May 2, 1890, was in force in Arkansas, is open for review in the federal Supreme Court on writ of error to a state court.—*Perryman v. Woodward*, 35 S. Ct. 830, 238 U. S. 148, 59 L. Ed. 1242, affirming decree 133 P. 244, 37 Okl. 792.

Writ of error from federal Supreme Court to a state court could not be dismissed, where federal questions involved are not wholly frivolous.—*Chicago, R. I. & Pac. Ry. Co. v. Devine*, 36 S. Ct. 27, 239 U. S. 52, 60 L. Ed. 140, affirming judgment *Devine v. Chicago, R. I. & P. Ry. Co.*, 107 N. E. 595, 266 Ill. 248.

A ruling of the highest state court in an action under the federal Employers' Liability Act that no issue as to assumption of risk was made, and that no question on that subject was presented on appeal, does not present a federal question, reviewable in the federal Supreme Court on writ of error.—*Southern Ry. Co. v. Lloyd*, 36 S. Ct. 210, 239 U. S. 496, 60 L. Ed. 402, affirming judgment *Lloyd v. Southern Ry. Co.*, 81 S. E. 1003, 166 N. C. 24.

—394 (2). Decisions construing the common law.

The highest court of the state may administer the common law according to its own understanding and interpretation, without liability to a review in the federal Supreme Court, un-

less some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied. Judgment, *Hughes v. Pennsylvania R. Co.*, 51 A. 990, 202 Pa. 222, 63 L. R. A. 513, 97 Am. St. Rep. 713, affirmed.—*Pennsylvania R. Co. v. Hughes*, 24 S. Ct. 132, 191 U. S. 477, 48 L. Ed. 268.

Whether certain railway companies were at common law liable as forwarders of freight to connecting carriers outside the state, and whether they were jointly and severally liable, when determined by the highest state court, furnished no basis for writ of error to the federal Supreme Court.—*Eastern Ry. Co. of New Mexico v. Littlefield*, 35 S. Ct. 489, 237 U. S. 140, 59 L. Ed. 878, dismissing appeal (Tex.) 154 S. W. 543.

Whether a declaration, in an action against a railway company for death of an employe, permitted recovery at common law is a question of local law, in the absence of a showing that the injury came within the federal Employers' Liability Act and is therefore not reviewable on error to a state court from the federal Supreme Court.—*Osborne v. Gray*, 36 S. Ct. 486, 241 U. S. 16, 60 L. Ed. 865.

←394 (3). *Construction or validity of state Constitutions and statutes in general.*

The decision of a state court that a railway postal clerk is not a passenger, within the meaning of a state statute giving an action for death caused by negligence, will not be reviewed on the ground that a federal question is involved because of Rev. St. § 4000, providing that every railway company carrying the mail shall carry the person in charge of it without extra compensation. The latter statute does not make such postal clerk a passenger, or deprive him of that character.—*Price v. Pennsylvania R. Co.*, 113 U. S. 218, 5 S. Ct. 427, 28 L. Ed. 980.

A writ of error to the highest court of a state will be dismissed where the record shows that the only decision was that it was within the jurisdiction of the trial court, by a decree of foreclosure, to direct that the property should be sold in one or several parcels, and that there was nothing in the statutes of the state to the contrary of this, the decision involving no federal question.—*French v. Hopkins*, 124 U. S. 524, 8 S. Ct. 589, 31 L. Ed. 536.

A decision by the supreme court of Louisiana that certain state bonds, issued in 1864, were invalid, because they were exchanged by the state authorities for sugar, instead of for state or Confederate currency, as required by the act authorizing their issuance, and that, therefore, the holder was not entitled to exchange them for consolidated state bonds, under the funding act of 1874, involved no federal question, and is not reviewable in the United States supreme court.—*Sage v. Board of Liquidation of Louisiana*, 144 U. S. 647, 12 S. Ct. 755, 36 L. Ed. 577.

On mandamus to compel a county to issue bonds to a railroad company in payment of a stock subscription, the decision of the state supreme court that, under the state laws and constitution, no subscription has ever been authorized by the requisite number of voters, and that, even if it were authorized, there was sufficient evidence to warrant the trial court in denying the relief asked, on the ground that the company had never complied with the conditions of the subscription, involves no federal question, and is not reviewable by the United States supreme court.—*State of Missouri v. Harris*, 144 U. S. 210, 12 S. Ct. 838, 36 L. Ed. 407.

When the applicability of a statute (of which the validity is alleged to have been drawn in question) to the matter under consideration in the state court depended upon the construction of another state statute, and the court, following a prior decision, adopted a construction excluding such application, it presents no federal question.—*Powell v. Brunswick County*

Sup'rs, 150 U. S. 433, 14 S. Ct. 166, 37 L. Ed. 1134.

The fact that there are no resident mortgagees in a particular case does not make the question of discrimination between nonresident and resident mortgagees by a statute a merely abstract or moot question, so as to preclude a decision against the validity of the statute, if it makes a discrimination against nonresident mortgagees with respect to sharing in the distribution of the assets of an insolvent foreign corporation.—*Sully v. American Nat. Bank*, 20 S. Ct. 935, 178 U. S. 289, 44 L. Ed. 1072.

No federal question is presented by a claim in a state court that a state statute is inconsistent with the power of congress to regulate commerce among the several states, where the judgment of the state court sustaining the validity of such enactment proceeds on the theory that the statute is intended to and does apply only to domestic transportation. Writ of error, *Purdy v. Erie R. Co.*, 56 N. E. 508, 162 N. Y. 42, 48 L. R. A. 689, dismissed.—*Erie R. Co. v. Purdy*, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847.

Defenses, in an action in ejectment brought by a municipality in a state court, of estoppel, license, payment of taxes, the unconstitutionality of a state statute because the title does not describe its subject, want of power in the state to convey its title to the municipality, and the statute of limitations, are of a local nature, and present no federal question for review in the supreme court of the United States. Judgment 30 So. 645, 128 Ala. 35, affirmed.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 266.

The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court. Writ of error, *City of Los Angeles v. Pomeroy*, 57 P. 585, 124 Cal. 597, dismissed.—*Hooker v. City of Los Angeles*, 23 S. Ct. 395, 188 U. S. 314, 47 L. Ed. 487, 63 L. R. A. 471.

Questions under the state Constitution and laws cannot be considered on a writ of error to a state court, as they might be on error to an inferior federal court.—*State of Missouri v. Dockery*, 24 S. Ct. 53, 191 U. S. 165, 48 L. Ed. 133, 63 L. R. A. 571.

Errors of the state court in construing a state Constitution, statutes and the common law on the subject of reading depositions of witnesses do not present any federal question which can be reviewed by the Supreme Court of the United States on a writ of error to the state court. Judgment, *State v. Kline*, 33 So. 618, 109 La. 622, affirmed.—*West v. State of Louisiana*, 24 S. Ct. 650, 194 U. S. 258, 48 L. Ed. 965.

Whether clauses of a state pilotage law granting discriminatory exemptions, in violation of Rev. St. U. S. § 4237 [U. S. Comp. St. 1901, p. 2903], can be eliminated without destroying the remaining provisions, is a question for the state court to decide, and cannot be reviewed by the federal Supreme Court, on writ of error to the state court. Judgment (Tex. Civ. App.) 68 S. W. 320, affirmed.—*Olsen v. Smith*, 25 S. Ct. 52, 195 U. S. 332, 49 L. Ed. 224.

The decision of a state court construing a state statute so as to remove any question of its repugnancy to the federal Constitution cannot be reviewed by the Supreme Court of the United States on writ of error to the state court. Judgment, 36 So. 174, 47 Fla. 338, affirmed.—*Tampa Waterworks Co. v. City of Tampa*, 26 S. Ct. 23, 199 U. S. 241, 50 L. Ed. 170.

A decision of a state court that the formalities required by the tax laws were fully observed does not present a federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law. Writ of error, *Woodward v. Taylor*, 73 P. 785, 33 Wash. 1, dismissed.—*French v. Taylor*, 26 S. Ct. 76, 199 U. S. 274, 50 L. Ed. 189.

Questions respecting the construction of state statutes on which the title to land depends are not federal, and cannot be considered by the Supreme Court of the United States on writ of error to a state court. Judgment, *State v. O'Connor*, 73 S. W. 1041, 96 Tex. 484, affirmed.—*O'Connor v. State of Texas*, 26 S. Ct. 726, 202 U. S. 501, 50 L. Ed. 1120.

A contest over a state office, dependent for its solution exclusively upon the application of the Constitution of the state or upon a mere construction of a provision of a state law, involves no possible federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. Writ of error, *People v. Elder* (Colo. 1905) 86 P. 250, dismissed.—*Elder v. People of State of Colorado*, 27 S. Ct. 223, 204 U. S. 85, 51 L. Ed. 381.

The question as to the validity of a state law under the federal Constitution is not necessarily involved so as to sustain a writ of error from the Supreme Court of the United States to a state court merely because the state law logically might have been assailed as invalid under the federal Constitution upon grounds more or less similar to those actually taken. Appeal, *Trustees of Garrick Academy v. Clark* (1904) 80 S. W. 64, 112 Tenn. 483, dismissed.—*Osborne v. Clark*, 27 S. Ct. 319, 204 U. S. 565, 51 L. Ed. 619.

The judgment of the highest court of a state, sustaining, as a legitimate exertion of the police power of the state, a statute the validity of which was challenged as repugnant to the federal Constitution, is reviewable in the Supreme Court of the United States by writ of error. Judgment, *Greenberg v. Western Turf Ass'n* (1905) 82 P. 684, 148 Cal. 126, affirmed.—*Western Turf Ass'n v. Greenberg*, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520.

Whether an order of the North Carolina Corporation Commission, regulating the train service of connecting carriers, was arbitrary and unreasonable, as being beyond the scope of the authority delegated to the commission by the state laws, is a local, and not a federal, question, and cannot be reviewed on writ of error to a state court. Judgment, *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* (1904) 49 S. E. 191, 137 N. C. 1, affirmed.—*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 27 S. Ct. 585, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398.

Whether a given corporation comes within the scope of the statutes of a state conferring the right of eminent domain, and is entitled to assert such right, presents only a question of state law, which cannot be reviewed by the federal Supreme Court on writ of error to a state court. Judgment, *Southern Illinois & M. Bridge Co. v. Stone* (1906) 92 S. W. 475, 194 Mo. 175, affirmed.—*Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

A judgment of a state court against a carrier for the value of a shipment of cotton which it delivered without the surrender of the bills of lading is not reviewable in the Supreme Court of the United States, although the state court refers to, and upholds, over an objection of repugnancy to the federal Constitution, a state statute forbidding delivery under

such circumstances, where the court treats the contract of shipment itself as requiring a delivery to shipper's order, and only upon the production of the bills of lading, properly indorsed.—*Arkansas Southern R. Co. v. German Nat. Bank*, 28 S. Ct. 78, 207 U. S. 270, 52 L. Ed. 201.

The decision of a state court that a void provision of a state statute is separable from its valid provisions does not present a federal question which will sustain a writ of error from the federal Supreme Court to a state court.—*King v. State of West Virginia*, 30 S. Ct. 225, 216 U. S. 92, 54 L. Ed. 396.

The misconstruction of a state statute by a state court cannot present a question which will sustain a writ of error from the federal Supreme Court to a state court.—*Id.*

The assertion that state statutes have undertaken to confer water rights upon a municipality, and were given such effect in violation of federal rights of riparian owners, cannot serve as the basis of a writ of error from the federal Supreme Court to a state court, where the latter court holds that the municipal rights were not determined by the effect of those statutes, but upon the right and title secured by Spanish and Mexican laws, and the subsequent confirmation thereof under a federal statute.—*Los Angeles Farming & Milling Co. v. City of Los Angeles*, 30 S. Ct. 452, 217 U. S. 217, 54 L. Ed. 736.

The construction by a state court of the statutes of that state and its rulings as to the admissibility of evidence furnish no basis for a writ of error from the federal Supreme Court.—*Id.*

The ruling of a state court that the power to penalize a railway company for failure to furnish cars on demand arose from a state statute instead of from a rule adopted by the railroad commission, which was challenged as repugnant to the federal Constitution, does not eliminate the federal questions from the case, so as to require the dismissal of a writ of error from the federal Supreme Court, where the constitutional defenses asserted by the pleadings and embraced in the instructions asked and refused were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the pleadings. Judgment (1907) 107 S. W. 1180, 85 Ark. 311, 122 Am. St. Rep. 33, reversed.—*St. Louis Southwestern Ry. Co. v. State of Arkansas*, 30 S. Ct. 476, 217 U. S. 136, 54 L. Ed. 698, 29 L. R. A. (N. S.) 802.

The construction given by the Maryland Court of Appeals to Code Pub. Gen. Laws Md. 1904, art. 43, § 99, making it a misdemeanor to attempt to practice medicine without registration, as not being subject to the limitations of section 80 of that article, relating to the sending of notice to unregistered physicians, is conclusive upon the federal Supreme Court on writ of error to the state court.—(1910) *Watson v. State of Maryland*, 30 S. Ct. 644, 218 U. S. 173, 54 L. Ed. 987, affirming judgment (1907) 66 A. 635, 105 Md. 650.

The ruling of the state court that osteopaths are persons practicing medicine, within Laws Tex. 1907, c. 123, providing for licensing medical practitioners, will be followed by federal Supreme Court in determining constitutionality of such act on writ of error to the state court.—(1912) *Collins v. State of Texas*, 32 S. Ct. 286, 223 U. S. 288, 56 L. Ed. 439, affirming judgment (1909) Ex parte Collins, 121 S. W. 501, 57 Tex. Cr. R. 2.

The meaning derived by the highest state court by construing together several state stat-

utes is as conclusive on the federal Supreme Court on writ of error to the state court as though such legislation were embodied in a single act.—*International Harvester Co. v. Commonwealth of Kentucky*, 34 S. Ct. 853, 234 U. S. 216, 58 L. Ed. 1284, reversing judgments 144 S. W. 1064, 147 Ky. 564, and 147 S. W. 1199, 148 Ky. 572, and 146 S. W. 12, 147 Ky. 795.

Decision of state court that order of state railroad commission prohibiting demand of prepayment of freight from particular connecting carrier, was authorized by statute, held binding on the federal Supreme Court.—*Wadley Southern Ry. Co. v. State of Georgia*, 35 S. Ct. 214, 235 U. S. 651, 59 L. Ed. 405, affirming judgment *Same v. State*, 73 S. E. 741, 137 Ga. 497.

The propriety of a statutory delegation of authority to an inferior state court is a question not open for review on writ of error to the highest state court.—*O'Neill v. Leamer*, 36 S. Ct. 54, 239 U. S. 244, 60 L. Ed. 249, affirming judgment 142 N. W. 112, 93 Neb. 786.

Application of Consol. Laws N. Y. c. 31, § 14, against employment of aliens on public works to contracts for construction of subways in New York City, are local questions not reviewable in the United States Supreme Court.—*Heim v. McCall*, 36 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 206, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

Proper construction of Constitution and laws of a state is not for the federal Supreme Court on a writ of error to a state court.—*Bi-Metallic Inv. Co. v. State Board of Equalization*, 36 S. Ct. 141, 239 U. S. 441, 60 L. Ed. 372, affirming decree *State Board of Equalization v. Bi-Metallic Inv. Co.*, 138 P. 1010, 56 Colo. 512.

Decision of the highest state court affirming judgment against terminal carrier in an action by shipper for damages for delay does not rest on a local ground independent of the question of the validity under the federal Constitution of the provisions of Civ. Code S. C. 1912, §§ 2754, 2755.—*Atlantic Coast Line R. Co. v. Glenn*, 36 S. Ct. 154, 239 U. S. 388, 60 L. Ed. 344, affirming judgment *Glenn v. Atlantic Coast Line R. Co.*, 80 S. E. 898, 96 S. C. 357.

The contention that a state law as administered violates the federal Constitution presents a federal question which will support a writ of error from the federal Supreme Court to the state court, though the state law as written is not attacked.—*Myles Salt Co. v. Board of Com'rs of the Iberia & St. Mary Drainage Dist.*, 36 S. Ct. 204, 239 U. S. 478, 60 L. Ed. 392, reversing judgment 64 So. 825, 134 La. 903.

Whether state, so far as it had the power, had by amendment vested part of the legislative power in the people by reserving a right to approve or disapprove laws enacted by the General Assembly, is a question of state law not determinable by federal Supreme Court on writ of error.—*State of Ohio ex rel. Davis v. Hildebrandt*, 36 S. Ct. 708, 241 U. S. 565, 60 L. Ed. 1172.

394 (4). — Violation of state Constitution.

The federal supreme court cannot pass upon the conformity of a municipal ordinance with the requirements of the constitution of the state in which it was enacted.—*Barbier v. Connolly*, 118 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The questions of the sufficiency of the evidence to justify the verdict, and of compliance with the state constitution on the trial, are not federal questions, reviewable in the United

States supreme court.—*Baldwin v. State of Kansas*, 129 U. S. 52, 9 S. Ct. 193, 32 L. Ed. 640.

The decision of the highest court of New York that the punishment of death by electricity, as prescribed by Laws N. Y. 1888, c. 489, is not a cruel punishment, within the meaning of Const. N. Y. art. 1, § 5, prohibiting "cruel and unusual punishments," is not re-examinable by the supreme court of the United States.—*In re Kemmler*, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519.

The supreme court of the United States has no jurisdiction to review a decision by a state court where the only question involved is the conformity of a state statute with the state constitution.—*Leeper v. Texas*, 139 U. S. 462, 11 S. Ct. 577, 85 L. Ed. 225.

The refusal of a motion to quash an indictment on the ground that the grand-jury law was a local or special law, and not constitutionally enacted, does not present a federal question.—*Murray v. State of Louisiana*, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

Whether the Iowa Constitution is violated by Code Iowa, § 5007, imposing a tax on cigarette selling, because the statute does not distinctly state the tax and the object to which it is applied, is a purely local question, which cannot be considered by the federal Supreme Court on writ of error to a state court. Judgment 96 N. W. 968, 121 Iowa, 482, 67 L. R. A. 624, 104 Am. St. Rep. 604, affirmed.—*Hodge v. Muscatine County*, 25 S. Ct. 237, 196 U. S. 276, 49 L. Ed. 477.

The conformity with the state Constitution of the proceedings of the state Legislature in the enactment of a law is not a federal question, which will sustain a writ of error from the Supreme Court of the United States to a state court, but is a question upon which the determination of the state court is final.—*Smith v. Jennings*, 27 S. Ct. 610, 206 U. S. 276, 51 L. Ed. 1061.

A decision sustaining the validity under the state Constitution of an alleged delegation of legislative power to a building commission does not present a federal question for determination by the federal Supreme Court on writ of error to a state court. Judgment (1907) 79 N. E. 745, 193 Mass. 364, 118 Am. St. Rep. 523.—*Welch v. Swasey*, 29 S. Ct. 567, 214 U. S. 91, 53 L. Ed. 923.

Question as to validity under state Constitution of Laws Or. 1907, c. 226, authorizing voters of municipality to resort to initiative to amend its charter, and as to regularity of proceedings leading up to adoption of amendment of charter, will not support a writ of error from the federal Supreme Court to the state court.—(1912) *Kiernan v. City of Portland*, 32 S. Ct. 231, 223 U. S. 151, 56 L. Ed. 386, dismissing writ of error (1910) 111 P. 379.

The contention that a person charged with crime by an information before the adoption of a state constitutional amendment requiring prosecutions to be by indictment could not thereafter be prosecuted under the information presents only a question of local law, not reviewable by a writ of error from the federal Supreme Court.—*Lem Woon v. State of Oregon*, 33 S. Ct. 783, 229 U. S. 586, 57 L. Ed. 1340, affirming judgments *State v. Lem Woon*, 107 P. 974, 57 Or. 482, and 112 P. 427, 57 Or. 482.

Decision of highest court of a state that an ordinance asserted to violate the federal Constitution is within the city's charter powers and not forbidden by the state Constitution is conclusive on the federal Supreme Court.—*Hadacheck v. Sebastian*, 36 S. Ct. 143, 239 U. S. 394, 60 L. Ed. 348, affirming judgment *Ex parte Hadacheck*, 132 P. 534, 165 Cal. 418.

☞394 (5). *Decisions involving construction or validity of municipal ordinances.*

Whether a municipal ordinance is or is not valid, and the extent to which it is so, having regard to the state constitution and laws, is wholly a state, and not a federal, question which can be reviewed by the supreme court of the United States on writ of error to a state court. Judgment, *Cummings v. West Chicago Park Com'rs*, 54 N. E. 941, 181 Ill. 136, affirmed.—*Lombard v. West Chicago Park Com'rs*, 21 S. Ct. 507, 181 U. S. 83, 45 L. Ed. 731.

Whether or not a municipal corporation has the power, under its charter, to adopt a certain ordinance, is not a question which can be considered on a writ of error from the federal Supreme Court to a state court.—*Fischer v. City of St. Louis*, 24 S. Ct. 673, 194 U. S. 361, 48 L. Ed. 1018, affirming judgment *City of St. Louis v. Fisher*, 67 S. W. 872, 167 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614; *Scheff v. Same*, 24 S. Ct. 676, 194 U. S. 373, 48 L. Ed. 1024, affirming judgment *City of St. Louis v. Scheff*, 67 S. W. 1100, 167 Mo. 666.

The question whether certain acts amount to a violation of a municipal ordinance is not a federal one, which can be reviewed on writ of error from the federal Supreme Court to a state court.—Id.

Whether or not a city council has determined that the board of public works has complied with the conditions of its jurisdiction to order a street improvement is not a Federal question, which can be reviewed by the Federal Supreme Court on writ of error to a state court. Judgment, *City of Denver v. Londoner* (1905) 80 P. 117, 33 Colo. 104, reversed.—*Londoner v. City and County of Denver*, 28 S. Ct. 708, 210 U. S. 373, 52 L. Ed. 1103.

Mere misconstruction of a municipal ordinance by the highest state court is not sufficient to present a question of due process of law which will sustain a writ of error from the federal Supreme Court.—*Seattle, R. & S. Ry. Co. v. State of Washington ex rel. Linhoff*, 34 S. Ct. 185, 231 U. S. 568, 58 L. Ed. 372, dismissing writ of error *State v. Seattle, R. & S. Ry. Co.*, 114 P. 431, 62 Wash. 544.

Any municipal enactment, to which a state gives the force of law, is a statute of the state, within Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), governing writs of error from the federal Supreme Court to state courts.—*Atlantic Coast Line R. Co. v. City of Goldsboro*, 34 S. Ct. 364, 232 U. S. 548, 58 L. Ed. 721, affirming decree 71 S. E. 514, 155 N. C. 356.

A judgment of a state court, refusing an injunction to restrain municipal ordinance forbidding owners whose property abutted on both sides of an alley to close the same along the lines of their respective property, does not rest on a nonfederal ground so as to defeat jurisdiction of federal Supreme Court, though the state court based its decision on the want of right of plaintiffs to prevent the closing of the alley which was a public wrong which plaintiffs had no right to redress, where plaintiffs claimed a right which could not be taken from them without depriving them of their federal rights.—*Bowe v. Scott*, 34 S. Ct. 769, 233 U. S. 658, 58 L. Ed. 1141, dismissing appeal 75 S. E. 123, 113 Va. 499.

An ordinance within the powers conferred by the state Legislature upon a city is a statute of the state, within Judicial Code, § 237.—*Reinman v. City of Little Rock*, 35 S. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment *City of Little Rock v. Reinman*, 155 S. W. 105, 107 Ark. 174.

☞394 (6). *Decision in favor of or against authority exercised under a state.*

A state court does not render a decision in favor of the authority exercised under any state, within the meaning of Rev. St. U. S. § 709, where it merely decides a question as to the jurisdiction of a federal court, and where the authority of the state court to decide this matter is not drawn in question. Judgment 56 P. 376, 20 Wash. 552, affirmed.—*Abbott v. National Bank of Commerce*, 20 S. Ct. 153, 175 U. S. 406, 44 L. Ed. 217.

☞394 (7). *Construction of United States statutes and denial of rights thereunder.*

Where the heirs of a deceased debtor file a bill to set aside a judicial sale of his land, for the reason that they were not parties, and that prior thereto his interest therein had been confiscated for treason, under Act Cong. July 17, 1862, and the state appellate court affirms the decree dismissing the bill on the ground that defendants were purchasers for value, without notice, and that the plaintiffs are bound by the recitals of the decrees confirming the sale showing their appearance, and are barred by laches, without referring to or construing said act of congress, the supreme court has no jurisdiction to review the decree of the state court.—*Marrow v. Brinkley*, 129 U. S. 178, 9 S. Ct. 267, 32 L. Ed. 654.

In an action by a material man, to whom a government contractor assigned the money coming to him from the government before any warrant therefor had issued, against another person, to whom the contractor also made an assignment, and to whom the money was actually paid, a defense by the latter that the assignment made to plaintiff was in violation of Rev. St. § 3477, is not the assertion of a right or title under the statute, so as to give the supreme court jurisdiction to review a judgment against the defendant by the highest court of the state.—*Conde v. York*, 18 S. Ct. 234, 168 U. S. 642, 42 L. Ed. 611.

Where, in a suit under the laws of Kansas against a railway company for damages for injuries to domestic cattle by bringing into the state cattle liable to impart Texas fever, the contention of the company is that legislation by congress and regulations prescribed by the secretary of agriculture thereunder furnish a complete defense, such contention raises a federal question, and the federal supreme court is authorized to review the judgment of the state supreme court. Judgment 44 P. 632, 56 Kan. 694, affirmed.—*Missouri, K. & T. Ry. Co. v. Haber*, 18 S. Ct. 488, 169 U. S. 613, 42 L. Ed. 878.

A question as to the construction to be placed on the act of congress of June 13, 1898, known as the "war revenue act," with respect to the right of an express company to shift the burden of the stamp tax upon shippers, constitutes a federal question for the purpose of a writ of error to a state court from the supreme court of the United States. Judgment, *Attorney General v. American Exp. Co.*, 77 N. W. 317, 118 Mich. 682, 5 Detroit Leg. N. 669, reversed.—*American Exp. Co. v. Maynard*, 20 S. Ct. 695, 177 U. S. 404, 44 L. Ed. 823.

The denial by a state court of a right of action expressly based on an act of congress presents a federal question which gives the supreme court of the United States jurisdiction to review a decision of such state court. Judgment 76 N. W. 726, 106 Iowa, 361, affirmed.—*Talbot v. First Nat. Bank of Sioux City*, 22 S. Ct. 612, 185 U. S. 172, 46 L. Ed. 857.

A decision by the highest court of the state of Nebraska that the Pawnee reservation lands in that state are public lands within the meaning of Enabling Act April 19, 1864, § 12 (13 Stat. 47, c. 59), does not bring into question the validity of that section, so as to give the supreme court of the United States the right, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], to review the judgment of the state court. Appeal, *State v. Kennard*, 76 N. W. 545, 58 Neb. 254, and 78 N. W. 282, 57 Neb. 711, dismissed.—*Kennard v. State of Nebraska*, 22 S. Ct. 879, 186 U. S. 304, 46 L. Ed. 1175.

The judgment of a state court sustaining the validity of Act Cong. Feb. 28, 1878, 20 Stat. 25, c. 20 [U. S. Comp. St. 1901, p. 2346], making the silver dollar of 412.5 grains troy of standard silver a full legal tender, cannot be reviewed in the supreme court of the United States, since that court has jurisdiction, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], to review the judgment of a state court upon the validity of a federal statute, only when against its validity. Writ of error, *Baldwin v. Baker*, 80 N. W. 36, 121 Mich. 259, 6 Detroit Leg. N. 431, dismissed.—*Baker v. Baldwin*, 23 S. Ct. 19, 187 U. S. 61, 47 L. Ed. 75.

Findings of fact or questions of local law upon which depends a party's right, under Rev. St. U. S. § 2339 [U. S. Comp. St. 1901, p. 1437], to the protection of vested water rights, are not reviewable in the supreme court of the United States on writ of error to a state court. Writ of error, *Rio Grande W. Ry. Co. v. Telluride Power Transmission Co.*, 63 P. 995, 23 Utah, 22, dismissed.—*Telluride Power Transmission Co. v. Rio Grande W. Ry. Co.*, 23 S. Ct. 178, 187 U. S. 569, 47 L. Ed. 307.

Whether the payment by a carrier of the duties exacted under the statutes of the United States on bonded goods at the port of entry confers upon the carrier the right to maintain possession until reimbursed is a question respecting a right and privilege under the federal statutes, which, when specially set up and claimed, and denied by a state court, confers jurisdiction upon the Supreme Court of the United States of a writ of error to the state court. Judgment, *Pearce v. Wabash R. Co.*, 89 Mo. App. 437, reversed.—*Wabash R. Co. v. Pearce*, 24 S. Ct. 231, 192 U. S. 179, 48 L. Ed. 397.

The defense in an action against the maker of a promissory note given in consideration of a promise to have the cigars called for by a certain contract manufactured in Key West, that it was contemplated that such cigars were to be removed from the factory without compliance with the regulations prescribed by Rev. St. U. S. §§ 3390, 3393, 3397 [U. S. Comp. St. 1901, pp. 2218, 2220, 2222], does not amount to the special assertion of a right, title, privilege, or immunity under a federal statute, within the meaning of section 709 [U. S. Comp. St. 1901, p. 575], authorizing writs of error from the Supreme Court of the United States to state courts, since defendant could derive no personal rights under those sections to enforce the repudiation of his note, even though, on grounds of public policy, it was illegal and void.—*Allen v. Arguimbau*, 25 S. Ct. 622, 193 U. S. 149, 49 L. Ed. 990.

A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], providing for writs of error from the Supreme Court of the United States to the state courts, to assert a right and immunity, under such statutes, although they may not give the party himself a personal or affirmative right that

could be enforced by direct suit against his adversary. Decree 36 So. 689, 84 Miss. 465, affirmed.—*Nutt v. Knut*, 26 S. Ct. 216, 200 U. S. 13, 50 L. Ed. 348.

A decision of a state court in a case in which rights under a statute of the United States were claimed by the defendant is reviewable in the Supreme Court of the United States, where that statute was referred to by the highest state court and was an element in its decision. Judgment, *Whittredge v. Sweetser* (1905) 75 N. E. 222, 189 Mass. 45, affirmed.—*Hammond v. Whittredge*, 27 S. Ct. 396, 204 U. S. 538, 51 L. Ed. 606.

A state court, by deciding that a railway employé who was killed while attempting to make a coupling with a car not equipped with an automatic coupler, as required by Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], was, as a matter of law, guilty of contributory negligence in lifting his head a little too high after he had been warned of the danger, cannot defeat the appellate jurisdiction of the federal Supreme Court, where section 8 of that statute was specially invoked as excluding the defense of assumption of risk. Judgment (1903) 56 A. 417, 207 Pa. 198, reversed.—*Schlemmer v. Buffalo, R. & P. Ry. Co.*, 27 S. Ct. 407, 205 U. S. 1, 51 L. Ed. 681.

Whether or not legislative power is constitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the Commission, is a federal question within the meaning of Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], governing writs of error from the Supreme Court of the United States to state courts.—*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 28 S. Ct. 616, 210 U. S. 281, 52 L. Ed. 1061.

The contention that the confirmation of a pueblo claim under Act March 3, 1851, c. 41, 9 Stat. 631, bars the municipal successor to the pueblo for setting up water rights not claimed in the petition for confirmation, is too clearly unfounded to support a writ of error from the federal Supreme Court to a state court.—*Los Angeles Farming & Milling Co. v. City of Los Angeles*, 30 S. Ct. 452, 217 U. S. 217, 54 L. Ed. 736.

A motion to quash an indictment against a negro for disqualification of the grand jurors, who must be electors, because of a change in the state Constitution respecting the qualifications of electors, alleged to violate Act Cong. June 25, 1868, c. 70, 15 Stat. 73, does not present any question of the denial of a federal right, where there is nothing in the record to show that the grand jury, as actually impaneled, contained any person who was not qualified as an elector under the earlier Constitution, or was so made up as to exclude negro citizens on account of their race.—(1910) *Franklin v. State of South Carolina*, 30 S. Ct. 640, 218 U. S. 161, 54 L. Ed. 980, affirming judgment *State v. Franklin* (1908) 60 S. E. 853, 80 S. C. 332.

Right or immunity under a statute of United States, held specially set up and claimed in the state court within Rev. St. § 709 [U. S. Comp. St. 1901, p. 575].—(1912) *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment (1908) 99 P. 819, 79 Kan. 59.

General findings against carrier in garnishment by creditor of shipper to recover charges in excess of special rate held to involve interpretation of Interstate Commerce Act Feb. 4,

1887, and Act March 2, 1889, so as to give the United States Supreme Court jurisdiction.—Id.

The contentions of defendant railroad, sued in state courts under state statute, that the injuries causing the death of an employé were received in interstate commerce, and that its liability was controlled by Employers' Liability Act April 22, 1908, present federal questions which, when decided by the state court, will support a writ of error from the United States Supreme Court.—*St. Louis, S. F. & T. R. Co. v. Seale*, 33 S. Ct. 651, 229 U. S. 156, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, reversing judgment (Tex. Civ. App.) 148 S. W. 1099.

A decision of the highest court of a state affirming a judgment for plaintiff based on Hours of Service Act March 4, 1907, and Employers' Liability Act of April 22, 1908, where defendant had requested an instruction in his favor, involves an adverse determination of a federal question, so that a writ of error will lie from the federal Supreme Court.—*St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 33 S. Ct. 858, 229 U. S. 265, 57 L. Ed. 1179, reversing judgment 140 S. W. 672, 145 Ky. 427.

A ruling by the highest state court in a suit based on Hours of Service Act March 4, 1907, and Employers' Liability Act April 22, 1908, that there was testimony showing negligence, is no ground for the contention that the judgment, which affirmed a judgment for plaintiff, was rested on that ground, so as to deprive the federal Supreme Court of jurisdiction of writ of error on the ground that the case was decided on an independent nonfederal ground.—Id.

A contention in an action based on a federal statute that there was no evidence showing liability thereunder presents a federal question, which, when denied, will support a writ of error from the federal Supreme Court to the highest state court.—Id.

Contention in state court that an agreement between publishers and booksellers to maintain prices on copyright books was in violation of Sherman Anti-Trust Act July 2, 1890, held to present a claim of a federal right so as to sustain appellate jurisdiction of the federal Supreme Court under Rev. St. § 790 (U. S. Comp. St. 1901, p. 595), governing writs of error to a state court.—*Straus v. American Publishers' Ass'n*, 34 S. Ct. 84, 231 U. S. 222, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, reversing judgment 93 N. E. 1133, 199 N. Y. 548.

A decision of a state court that the pleadings and evidence in an action for death against an interstate railway company show that deceased was in the employ of an express company rather than of the railway company, and defendant's liability was not controlled by the federal Employers' Liability Act, is not reviewable in the federal Supreme Court.—*Missouri, K. & T. R. Co. v. West*, 34 S. Ct. 471, 232 U. S. 682, 58 L. Ed. 795, dismissing appeal 134 P. 655.

A decree of the state court denying defendant the benefit of a federal statute set up in the answer and supported by testimony is an adverse ruling on a federal right, which, under Judicial Code, § 237 (Act March 3, 1911, c. 231, 36 Stat. 1156 [U. S. Comp. St. Supp. 1911, p. 227]), warrants bringing the case up to the federal Supreme Court by writ of error.—*Atchison, T. & S. F. Ry. Co. v. Robinson*, 34 S. Ct. 556, 233 U. S. 173, 58 L. Ed. 901, reversing judgment 129 P. 20, 36 Okl. 435; *Same v. Moore*, 34 S. Ct. 558, 233 U. S. 182, 58 L. Ed. 906, reversing judgment 129 P. 24, 36 Okl. 433.

A writ of error will lie from the federal Supreme Court to review a decision of the highest state court sustaining a trial court in overruling contentions by plaintiff in error as to a construction of the Federal Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, which, if acceded to, would have produced a verdict in favor of plaintiff in error.—*Seaboard Air Line Ry. v. Horton*, 34 S. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, reversing judgment *Horton v. Seaboard Air Line R. Co.*, 78 S. E. 494, 162 N. C. 424.

A judgment of a state court enforcing liability of connecting carriers for loss of an interstate shipment by an extraordinary flood which started a fire in cars containing quick lime held not reviewable in the federal Supreme Court, though the state court ruled adversely upon the carriers' contention that under Carmack Amendment June 29, 1906, § 7, pars. 11, 12, stipulations in bill of lading that they should not be liable unless plaintiff showed that one of the carriers negligently failed to take reasonable precautions to avoid loss where the court found that such carrier negligently permitted the cars to remain within the influence of the rising flood.—*New Orleans & N. E. R. Co. v. National Rice Mill. Co.*, 34 S. Ct. 726, 234 U. S. 80, 58 L. Ed. 1223, dismissing writ of error *National Rice Milling Co. v. New Orleans & N. E. R. Co.*, 61 So. 708, 132 La. 615.

Contention that an immunity under the federal Employers' Liability Act of April 22, 1908, was denied by ruling of a state court that a declaration stating a cause of action under that act was the basis of recovery under the state law after eliminating an unwarranted allegation that injury occurred in interstate commerce, is not the basis for a writ of error from the federal Supreme Court.—*Wabash R. Co. v. Hayes*, 34 S. Ct. 729, 234 U. S. 86, 58 L. Ed. 1226, dismissing writ of error *Hayes v. Wabash R. Co.*, 180 Ill. App. 511.

A decision of a state court adverse to plaintiff in error's contention that under the federal employers' liability and safety appliance acts it could rely on the common-law defense of assumption of risk is reviewable in the federal Supreme Court.—*Southern R. Co. v. Crockett*, 34 S. Ct. 897, 234 U. S. 725, 58 L. Ed. 1564.

The decision of a state court, enforcing liability of railroad for injuries to an interstate passenger traveling on a pass issued under Act June 29, 1906, § 1, as wife of an employé, on the ground that the pass was issued in consideration of the employé's services and that she was not bound by a stipulation exempting the carrier from liability, presents a question reviewable by the federal Supreme Court.—*Charleston & W. C. R. Co. v. Thompson*, 34 S. Ct. 964, 234 U. S. 576, 58 L. Ed. 1476, reversing judgment 79 S. E. 242, 13 Ga. App. 541.

No question under the provisions of the ordinance of July 13, 1787, for the government of Northwest Territory, or of subsequent congressional legislation, which merely defines rights dependent upon navigability remains to support the appellate jurisdiction of the federal Supreme Court over the state court which has decided against the fact of navigability.—*People of State of Illinois ex rel. Dunne v. Economy Light & Power Co.*, 34 S. Ct. 973, 234 U. S. 497, 58 L. Ed. 1429, dismissing writ of error 80 N. E. 760, 241 Ill. 290.

A party who relies unsuccessfully in the state courts on an act of Congress as a defense can bring the case to the federal Supreme Court by writ of error.—*Sage v. Hampe*, 35 S. Ct. 94, 235 U. S. 99, 59 L. Ed. 147, reversing

judgment *Hampe v. Sage*, 125 P. 53, 87 Kan. 538.

A controlling federal question is involved in a state judgment refusing to measure liability of interstate carrier in an action by an employé for personal injuries, by the Employers' Liability Act.—*Toledo, St. L. & W. R. Co. v. Slavin*, 35 S. Ct. 308, 236 U. S. 454, 59 L. Ed. 671, reversing judgment *Slavin v. Toledo, St. L. & W. R. Co.*, 106 N. E. 1077, 88 Ohio St. 538.

Contention in suit in state court under federal Employers' Liability Act April 22, 1908, that jury was misled by the instructions, may serve as basis of a writ of error from federal Supreme Court.—*Seaboard Air Line Ry. v. Padgett*, 35 S. Ct. 481, 236 U. S. 668, 59 L. Ed. 777, affirming judgment *Padgett v. Seaboard Air Line Ry.*, 83 S. E. 633, 99 S. C. 356.

Contention that error was committed in state court in not taking from jury a case under the federal Employers' Liability Act, and not directing verdict for defendant for want of evidence, is not so frivolous as not to serve as basis of writ of error from federal Supreme Court where state court and members of the federal Supreme Court were divided on the question.—*Id.*

Question whether right to recover for death of brakeman from noncompliance with Safety Appliance Acts of March 2, 1893, and March 2, 1903, was barred as a matter of law, *held* a question outside the federal statutes, which cannot be considered by the federal Supreme Court on writ of error sued out under Judicial Code, § 237.—*Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 35 S. Ct. 609, 237 U. S. 369, 59 L. Ed. 1000, affirming judgment *Popplar v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 141 N. W. 798, 121 Minn. 413, Ann. Cas. 1914D, 883.

Objection that decree of sister state was not approved, under Rev. St. § 905 (Comp. St. 1913, § 1519), because record contained only the decree, is so lacking in merit as to afford no basis for review by federal Supreme Court.—*Parker v. McLain*, 35 S. Ct. 632, 237 U. S. 469, 59 L. Ed. 1051, dismissing appeals *McLain v. Parker*, 129 P. 1140, 88 Kan. 717, and *Id.*, 131 P. 153, 88 Kan. 873.

Contention that error to prejudice of interstate railway company if the federal Safety Appliance Act applied to it, was committed by an instruction as to the degree of care required, is insufficient as basis of writ of error to a state court.—*Erie R. Co. v. Solomon*, 35 S. Ct. 648, 237 U. S. 427, 59 L. Ed. 1033, dismissing appeal 106 N. E. 1055, 89 Ohio St. 406.

Right of carrier under the federal Employers' Liability Act April 22, 1908, to prove contributory negligence in mitigation of damages, is not infringed by granting a partial new trial for assessment of damages, where the first trial found that the carrier was negligent and the employé was free from contributory negligence.—*Norfolk Southern R. Co. v. Ferebee*, 35 S. Ct. 781, 238 U. S. 269, 59 L. Ed. 1303, affirming judgments *Ferebee v. Norfolk Southern R. Co.*, 79 S. E. 685, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, and *Id.*, 83 S. E. 360, 167 N. C. 290.

Questions in suit under federal Employers' Liability Act relating to matters of pleading, to the admissibility of evidence, and various rulings involving no construction of the federal statute, will not be considered.—*Central Vermont R. Co. v. White*, 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment *White v. Central Vermont R. Co.*, 89 A. 618, 87 Vt. 330.

Questions of general law, raised in action under federal Employers' Liability Act, involving no construction of the statute, will not be reviewed.—*Id.*

Federal question giving jurisdiction to federal Supreme Court of writ of error to a state court in an action under the federal Employers' Liability Act *held* presented by contention that failure to instruct a verdict was error for want of sufficient evidence.—*Chicago, R. I. & Pac. Ry. Co. v. Devine*, 36 S. Ct. 27, 239 U. S. 52, 60 L. Ed. 140, affirming judgment *Devine v. Chicago, R. I. & P. Ry. Co.*, 107 N. E. 595, 266 Ill. 248.

Want of merit in contention that a state statute limiting amount of recovery is controlled in a suit under Employers' Liability Act, is so well established that such question will not prevent federal Supreme Court from granting motion to affirm on writ of error to state court.—*Id.*

Contention that agreement by employé that acceptance of benefits from a railroad's relief department shall release company from liability, though invalid under Employers' Liability Act, § 5, discharges another railway company as a joint tort-feasor from its common-law liability, presents no question on writ of error to a state court which held the release invalid as to the employing company, and not available as a defense to the other company.—*Chicago & A. R. Co. v. Wagner*, 36 S. Ct. 135, 239 U. S. 452, 60 L. Ed. 379, affirming judgment *Wagner v. Chicago & A. R. Co.*, 106 N. E. 809, 265 Ill. 245.

Contention that due effect was not given, in action for damages for delay in transportation of cattle, to provisions of Act June 29, 1906, limiting the time cattle may be confined in cars without being unloaded, *held* devoid of merit.—*St. Louis & S. F. R. Co. v. Shepherd*, 36 S. Ct. 274, 240 U. S. 240, 60 L. Ed. 622, dismissing appeal *Same v. Shepard*, 139 P. 833, 40 Okl. 589.

Federal question sustaining writ of error from federal Supreme Court to a state court *held* involved by decision of latter court that an embargo, by which railroad at request of paper company refused to furnish cars to shippers to such paper company which it was bound to receive, violates Hepburn Act.—*Menasha Paper Co. v. Chicago & N. W. Ry. Co.*, 36 S. Ct. 501, 241 U. S. 55, 60 L. Ed. 885, affirming judgment *Chicago & N. W. Ry. Co. v. Menasha Paper Co.*, 149 N. W. 751, 159 Wis. 508.

Federal Supreme Court has jurisdiction of writ of error to a state court in a suit turning on construction of an act of Congress incorporating defendant and under which it justifies.—*Supreme Lodge, K. of P. v. Mims*, 36 S. Ct. 702, 241 U. S. 574, 60 L. Ed. 1179, reversing judgment (Tex.Civ.App.) 167 S. W. 835.

—394 (8). *Decisions in favor of or against authority, exercised under United States or officers thereof, in general.*

The supreme court has no jurisdiction to review a decision of a state court that defendant was not liable in damages for the reason that he was acting within the scope of his judicial authority conferred by an Act of congress.—*Manning v. French*, 133 U. S. 186, 10 S. Ct. 258, 33 L. Ed. 582.

Whether a receiver appointed by a federal court can be sued for the act of his predecessor in office without leave of court, by virtue of Act Cong. March 3, 1887, § 3 (24 Stat. 552), which provides that a receiver may be sued in respect of any act "of his" in carrying on the business without previous leave of the court appointing him, is a question of general law; and the decision of a state supreme court that such a suit may be maintained is not a denial of a right under a "statute" which will entitle the receiver to a review of the ruling by the United States supreme court, under Rev. St. § 709.—

McNulta v. Lochridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. Ed. 796.

A claim by a receiver appointed by a federal court that he is not subject to suit for the act of his predecessor in the office, without previous leave of such court, is the claim of an immunity under an "authority exercised under the United States," within the meaning of Rev. St. § 709, giving the right to a review by the United States supreme court when such authority is denied by a decision of a state supreme court.—Id.

A decision by the supreme court of Washington that certain settlements made by territorial county commissioners with the county treasurer, under authority of the territorial laws, were not conclusive upon the county, because not made so by those laws, does not deny the validity of those laws or the authority of the commissioners thereunder, and therefore there was no denial of an authority exercised under the United States by the commissioners, whose powers were derived from the United States through the territorial legislature, acting under authority delegated by congress.—*Ferry v. King County*, 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895; *Id.*, 141 U. S. 673, 12 S. Ct. 130, 35 L. Ed. 898.

Where an action is brought in a state court against officers of the United States army to recover lands held and controlled by them as the property of the United States, the effect is to draw in question the validity of an authority exercised under the United States; so that, if the judgment is against the defendants, and is affirmed by the appellate court of the state, it may be reviewed by the supreme court on writ of error.—*Stanley v. Schwalby*, 147 U. S. 508, 13 S. Ct. 418, 37 L. Ed. 259; *Id.*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 29 S. W. 90, 8 Tex. Civ. App. 679.

In an action in a state court against a railroad company in the hands of a receiver of a federal court, a decision overruling the defense that plaintiff was subject to an order of the federal court requiring the presentation of all claims to it, and could not recover a judgment in personam, collectible by ordinary process, and, moreover, that his claim was barred under the order, amounts to a decision against the validity of the order, or a claim, right, or immunity thereunder, which may be reviewed by the United States supreme court.—*Texas & P. Ry. Co. v. Johnson*, 151 U. S. 81, 14 S. Ct. 250, 38 L. Ed. 81.

In an action against owners of a warehouse on account of the wrongful detention and disinfection by them of a cargo of rags imported by plaintiffs, defendants alleged that they acted under the authority of the collector of the port. The state court of appeals, however, decided that a direction given by the collector that the rags should be sent to defendants' warehouse was pursuant to a requirement that they should be disinfected, and in aid of the health officer in the execution of his official power by the observance of the regulations made by him; that the collector gave no order for their disinfection; that the health officer gave no such order; and that the defendants assumed to disinfect them without authority; and that hence their charges therefor were illegal, and they were liable in damages for the detention of the rags because of nonpayment of such charges. *Held*, that the ruling was in favor of, and not against, the validity of the authority set up and claimed under the laws of the United States, and hence there was no ground for review by the supreme court at the instance of defendants.—*Bartlett v. Lockwood*, 160 U. S. 357, 16 S. Ct. 334, 40 L. Ed. 455.

A decision by the state supreme court that, as the state court had been in possession of the res for several years, the appointment by a federal court of a receiver was ineffectual to deplete the control of the state court, did not deny any federal right, so as to confer jurisdiction on the supreme court.—*Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 16 S. Ct. 389, 40 L. Ed. 536.

In an action to recover lands held by officers of the United States as the property of the United States, a decision by a state appellate court that the United States had notice of a prior, unrecorded deed, under which plaintiffs claimed title, and, therefore, that the United States had no title, and that judgment should be rendered against their officers both for title and possession, *held* to be a decision, in matter of law, against the validity of the authority set up under the United States, and, as such, reviewable by the supreme court on writ of error.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 29 S. W. 90, 8 Tex. Civ. App. 679.

A judgment by a state court against a receiver appointed by a federal court does not, merely because of such appointment, where the questions involved are those merely of general or local law, amount to a denial of an authority exercised under the United States, or of a right or immunity claimed under a statute of the United States, so as to make a judgment of affirmance by the state supreme court reviewable by the federal supreme court.—*Bausman v. Dixon*, 19 S. Ct. 316, 173 U. S. 113, 43 L. Ed. 633.

The decision of a state court in favor of the jurisdiction of a federal court in another action cannot be reviewed under Rev. St. U. S. § 709, as a decision on an authority exercised under the United States, since it is in favor of such authority. Judgment 56 P. 376, 20 Wash. 552, affirmed.—*Abbott v. National Bank of Commerce*, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217.

The question whether there can be any liability on an injunction bond given in the course of proceedings in a federal court, because of the alleged effect of certain stipulations dismissing a portion of the case, and of an appeal from the decree that was afterward rendered, involves a claim of an immunity from liability depending on an authority exercised under the United States, such as will constitute a federal question for review by the supreme court on writ of error to a state court. Judgment 60 P. 749, 61 Kan. 650, reversed.—*Tullock v. Mulvane*, 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

A claim of immunity from liability for attorney's fees as one of the elements of damages under an injunction bond given in a federal court presents a federal question for review on writ of error to the state court from the supreme court of the United States.—Id.

The claim of a right under an "authority exercised under the United States," within the meaning of Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], defining the appellate jurisdiction of the Supreme Court of the United States over state courts, is presented by a contention that a Montana statute was authorized by Enabling Act Feb. 22, 1889, c. 180, 25 Stat. 676, and was therefore valid, even if repugnant to the Constitution of that state. Judgment (Mont. 1906) 83 P. 874, affirmed.—*State of Montana v. Rice*, 27 S. Ct. 281, 204 U. S. 291, 51 L. Ed. 490.

The right of a fraternal order to use of its corporate name and use of distinctive words to designate the order and appropriate emblems, when invoked in virtue of the authority to

incorporate under the federal General Incorporation Act May 5, 1870, is claimed under an authority exercised under the United States, within Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), and the judicial Code (Act March 3, 1911, c. 231, § 237, 36 Stat. 1156 [U. S. Comp. St. Supp. 1911, p. 227]) governing writs of error from the federal Supreme Court to state courts.—(1912) *Creswill v. Grand Lodge, K. P. of Georgia*, 32 S. Ct. 822, 225 U. S. 246, 56 L. Ed. 1074, reversing judgment (1910) 67 S. E. 188, 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453.

394 (9). *Impairment of obligation of contract.*

A state constitution is not a contract within the meaning of that clause of the constitution of the United States (art. 1, § 10, cl. 1), which prohibits the states from passing laws impairing the obligation of contracts, and a state statute which violates a state constitution is not void on that ground, and may be construed and carried into effect by the courts of the state without review by the United States supreme court, except in cases where what is done comes or is supposed to come in conflict with some other provision of the constitution of the United States.—*Church v. Kelsey*, 121 U. S. 282, 7 S. Ct. 897, 30 L. Ed. 960.

A judgment of a state court cannot be reviewed by the United States supreme court, under the clause of the United States constitution protecting the obligation of contracts against impairment by state legislation, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment by the state which is claimed by the party to impair the obligation of the particular contract in question.—*Lehigh Water Co. v. Borough of Easton*, 121 U. S. 388, 7 S. Ct. 916, 30 L. Ed. 1059.

The legislature of Louisiana granted plaintiff company the exclusive privilege of supplying the inhabitants of a city with water, by a charter which provided that nothing therein should be "so construed as to prevent the city council from granting to any person, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own use." *Held*, that the power conferred on the city council was not legislative, but administrative, and an ordinance of the city permitting one to lay pipes for his own use is a license, whose validity in no way depends on the constitution or laws of the United States.—*New Orleans Water-Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 S. Ct. 741, 31 L. Ed. 607.

The supreme court of the United States has jurisdiction to review a decision of the supreme court of a state that a state statute directing the assessment of taxes against railroads not exempt from taxation is applicable to a particular railroad company, which claims to be exempt by its charter, granted by the state before passage of the statute, as, if this be true, the statute impairs the obligation of the contract.—*Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 174, 10 S. Ct. 68, 33 L. Ed. 302; *Same v. Board of Levee Com'rs*, 132 U. S. 190, 10 S. Ct. 74, 33 L. Ed. 308.

Where, in a state court, it is contended that, when the debt in question was contracted, a decision of the state supreme court so construed a statute as to give it priority, and that the application of a different construction by earlier and later decisions, or of a subsequent amendment of the statute, would impair the obligation of the contract, a ruling by the court that the decision relied on is erroneous, and that the later and earlier decisions correctly construe the statute, and, with the amendment, merely state the law as it has always been, raises no federal question.—*Hopkins v. Mc-*

Lure, 133 U. S. 380, 10 S. Ct. 407, 33 L. Ed. 660.

The supreme court of the United States will not entertain jurisdiction of an appeal from the decision of a state supreme court on the ground that it upheld a statute which, by changing the terms of a contract between a city and a waterworks company, impaired the obligation thereof, within the prohibition of the federal constitution, when it appears that the contract claimed to have been impaired was ultra vires and void, and had been so declared by the state supreme court. The contract being void, it had no legal existence, and could not be impaired; and hence no federal question was presented.—*City of New Orleans v. New Orleans Water-Works Co.*, 142 U. S. 70, 12 S. Ct. 142, 35 L. Ed. 943.

A city which has repudiated its contract with a waterworks company, and thereby rendered necessary further legislation to establish the relations of the parties, is estopped to claim that such legislation has impaired the obligation of the contract; and hence such a claim cannot be considered as raising a federal question.—*Id.*

In a proceeding against a railroad company to enforce the payment of delinquent taxes, the company set up the defense that the property taxed, consisting of certain public lands acquired from the state, was exempt from taxation under the company's charter. The supreme court of the state affirmed a judgment against the company, placing its decision on the ground that the exemption claimed did not extend to the particular lands in question. *Held*, that there was no impairment of the obligation of the state's contract of exemption in the charter, by any subsequent law of the state, which would give jurisdiction of the case to the supreme court of the United States.—*St. Paul, M. & M. Ry. Co. v. Todd County*, 142 U. S. 282, 12 S. Ct. 281, 35 L. Ed. 1014.

The decision did not impair the obligations of a contract by giving effect to the act of 1881, as the decision was rendered prior to the passage of such act, and defendant voluntarily assumed the liability imposed thereby, and therefore no federal question was presented in the case.—*Winona & St. P. R. Co. v. Town of Plainview*, 143 U. S. 371, 12 S. Ct. 530, 36 L. Ed. 191.

A judgment of the highest court of a state is not reviewable in the supreme court of the United States because it refuses to give effect to a valid contract, or, in effect, impairs the obligation of a contract.—*Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 13 S. Ct. 54, 36 L. Ed. 925.

By an act passed in 1834, the legislature of North Carolina exempted a certain railroad, thereby chartered, from taxation. Under an act of 1891, certain of its branch lines were taxed. In a suit to enjoin the collection of the tax the state supreme court acknowledged the obligation of the contract of exemption, but held that the branches in question were not included therein. *Held*, that the supreme court of the United States had jurisdiction to review this decision.—*Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 13 S. Ct. 72, 36 L. Ed. 972, affirming judgment 14 S. E. 652, 110 N. C. 137, and distinguishing *Henderson Bridge Co. v. City of Henderson*, 141 U. S. 679, 12 S. Ct. 114, 35 L. Ed. 900, and *St. Paul, M. & M. Ry. Co. v. Todd County*, 142 U. S. 282, 12 S. Ct. 281, 35 L. Ed. 1014.

A gas company, having, by contract, an exclusive right to light the streets of a city with gas, obtained an injunction preventing the city from making any contract with other persons for lighting with "gas or otherwise," which was affirmed by the state court of appeals. Afterwards the city procured an amendment of its

charter, giving power to contract for lighting with electricity, with a proviso that no existing contracts should be interfered with. An act was also passed incorporating an electric light company, with which the city contracted for lighting the streets. The gas company thereupon procured an adjudication that the city council were in contempt for violating the injunction, but on appeal this judgment was reversed, the court holding that, as the gas company had no contract right to light with electricity, the city could contract therefor with a third party, if it chose to pay for both gas and electricity, but that it could not dispense with the gas company's gas, and, if it did so, this would be a mere breach of contract, actionable at law. *Held*, that this decision involved no federal question warranting an appeal to the United States supreme court, although the court of appeals ruled adversely upon a claim that the acts amending the charter and incorporating the electric company impaired the obligation of the gas company's contract.—*Newport Light Co. v. City of Newport*, 151 U. S. 527, 14 S. Ct. 429, 38 L. Ed. 259.

The supreme court has jurisdiction to review the decision of the highest court of a state that a contract, the obligation of which is alleged to be impaired, has no existence.—*Mobile & O. R. Co. v. State of Tennessee*, 153 U. S. 486, 14 S. Ct. 968, 38 L. Ed. 793.

The appellate jurisdiction of the supreme court can be invoked upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, only when an act of the legislature alleged to be repugnant to a constitutional provision has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court.—*Central Land Co. of West Virginia v. Laidley*, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91.

Where a decision of the state supreme court, that the lessee of a railroad is not liable to pay as rent the amount paid by it to the state as taxes upon the earnings of the road, is put upon the grounds that it was the duty of the lessor to pay such taxes, and, the lessee having been compelled by law to make the payments, the law implied a promise by the lessor to repay; that the lessee was under no duty to incur the expense and dangers of testing by litigation the constitutionality of the statute under which the taxes were imposed; and that the lessor, as between it and the lessee, was guilty of laches.—the fact that the decision was also based on the ground that the statute did not impair the obligation of any contract does not confer appellate jurisdiction upon the United States supreme court.—*Rutland R. Co. v. Central Vermont R. Co.*, 159 U. S. 630, 16 S. Ct. 113, 40 L. Ed. 284.

Rev. St. § 709, giving jurisdiction to review the final judgment of a state court when there "is drawn in question the validity of a statute of, or authority exercised under, any state," as being repugnant to the United States constitution, "and the decision of the state court is in favor of their validity," does not authorize a review of a decision of a state court against the validity of the acts of an assessing officer acting under the authority of the revenue laws, and in favor of an exemption from taxation claimed by a corporation under a charter contract.—*Bank of Commerce v. State of Tennessee*, 161 U. S. 134, 16 S. Ct. 456, 40 L. Ed. 645.

No jurisdiction exists to review a judgment of a state court, on writ of error, on the ground of an alleged impairment of contract by reason of the alteration by a state court of a construction previously given by it to such contract, or to a particular statute or series of statutes in existence when the contract was

made.—*Bacon v. State of Texas*, 163 U. S. 207, 16 S. Ct. 1023, 41 L. Ed. 132.

Jurisdiction to review a decision of the state court is not conferred by the fact that the state has passed an act which plaintiffs assert impairs the obligation of their contract, so long as the state court, in deciding the case, declared that they never had a contract, owing to failure to comply with a previous statute, and gave judgment wholly without reference to the later act.—*Id.*

There is no ground for review of a state decision, upon the ground of the impairment of a contract, if such decision gives no effect to the law of the state alleged to impair the contract, and the state court decides the case on grounds independent of that law.—*Id.*

In mandamus proceedings to compel a railroad company to repair a viaduct carrying a street over its tracks, where the company sets up prior statutes and ordinances, which, it alleges, constitute a contract, the obligation of which is impaired, contrary to the federal constitution, by the statutes under which the proceedings are had, and this defense is overruled by the state supreme court, the judgment thereof is reviewable by the federal supreme court.—*Chicago, B. & Q. R. Co. v. State of Nebraska*, 138 S. Ct. 513, 170 U. S. 57, 42 L. Ed. 948.

The question whether a party has, by laches and acquiescence, waived the right to insist that a state statute impaired the obligation of a contract, is not a federal question.—*Pierce v. Somerset Ry.*, 19 S. Ct. 64, 171 U. S. 641, 43 L. Ed. 316.

Several acts have been passed by the legislature of Virginia, the purpose of which was to defeat and render ineffective the coupon provision of the law of 1871, under which the refunding bonds of the state were issued, which made the coupons from such bonds receivable for all taxes and demands due the state. In a number of decisions, both of the highest court of the state and of the supreme court, the validity of the coupon provision has been upheld and subsequent acts have been declared unconstitutional and void as impairing the obligation of the contract thus made with the holder of the coupons. *Held*, that the supreme court has jurisdiction to review a judgment of the supreme court of appeals of Virginia reversing its former decisions, and holding such coupon provision invalid under the constitution of the state, although the court does not, in its opinion, discuss nor consider the question of the validity of the subsequent legislation, the effect of its judgment being to uphold and to give force and effect to such legislation, which impairs the obligation of the contract of the plaintiff in the suit if valid. Judgment 19 S. E. 114, 90 Va. 597, reversed.—*McCullough v. Commonwealth of Virginia*, 19 S. Ct. 134, 172 U. S. 102, 43 L. Ed. 382.

Where the supreme court of a state has done nothing more than construe its own constitution and statutes, in holding that county bonds issued in aid of a railroad were void under such laws, which were in force at the time the bonds were issued, there being no subsequent legislation on the subject, the United States supreme court has no jurisdiction to review the correctness of the decision, on a writ of error to the state court, under the allegation that a contract has been impaired thereby.—*Turner v. Board of Com'rs of Wilkes County*, 19 S. Ct. 464, 173 U. S. 461, 43 L. Ed. 768.

A decision by the state court that the act of congress of May 24, 1828, granting land to the state of Ohio for the construction of canals, did not constitute a contract for the perpetual maintenance of such canals, and that the contract thereby made was not impaired by Act Ohio May 18, 1894, abandoning a canal and

leasing it to a railroad company, raises a federal question, which will sustain a writ of error from the supreme court of the United States. Decree 50 N. E. 442, 58 Ohio St. 123, affirmed.—*Walsh v. Columbus, H. V. & A. R. Co.*, 20 S. Ct. 393, 176 U. S. 469, 44 L. Ed. 548.

The question whether the right of a railroad company to enter upon, take, and use "lands, streams, and materials of every kind for the complete operation of the road," is impaired by a statute and ordinance prohibiting any encroachment upon or obstruction in the harbor of a city without permission of the commissioner of public works, may constitute a federal question for review by the supreme court of the United States on writ of error to a state court. Decree 50 N. E. 1104, 173 Ill. 471, 53 L. R. A. 408, affirmed.—*Illinois Cent. R. Co. v. City of Chicago*, 20 S. Ct. 509, 176 U. S. 646, 44 L. Ed. 622.

A claim that the obligation of a contract is impaired by an ordinance the enforcement of which could not constitute such an impairment, although it denies liability on the contract, does not present a federal question for review by the supreme court of the United States on writ of error to a state court.—*St. Paul Gaslight Co. v. City of St. Paul*, 21 S. Ct. 575, 181 U. S. 142, 45 L. Ed. 788, dismissing writ of error 80 N. W. 877, 78 Minn. 39.

A bill averring that a railroad charter, and an exemption from taxation for a term of 20 years contained therein, constitute a contract with the state, which is violated by subsequent legislation repealing the exemption, raises a federal question, for which there is sufficient color to sustain the jurisdiction of the supreme court of the United States on writ of error to a state court which has decided against the exemption.—*Gulf & S. I. R. Co. v. Hewes*, 22 S. Ct. 28, 183 U. S. 66, 46 L. Ed. 86.

A claim that a forfeiture of the charter of a waterworks company for maintaining illegal rates by a decree of a state court after full hearing by all parties in a proceeding by quo warranto impaired the obligation of a contract, or deprived the company of its property without due process of law, or denied it the equal protection of the laws, because by its charter mandamus was prescribed as the remedy for illegal rates, is so clearly without color of foundation as to give the supreme court of the United States no jurisdiction to review such decree. Writ of error, *State v. New Orleans Waterworks Co.*, 31 So. 395, 107 La. 1, dismissed.—*New Orleans Waterworks Co. v. State of Louisiana*, 22 S. Ct. 691, 185 U. S. 336, 46 L. Ed. 936.

The supreme court of the United States cannot review the judgment of a state court solely because that judgment impairs or fails to give effect to a contract.—*Id.*

A change of view by the highest court of a state with respect to the limit of private ownership upon tide waters does not raise a case under the contract clause of the federal constitution, which can be reviewed in the supreme court of the United States. Judgment 30 So. 645, 128 Ala. 335, affirmed.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 266.

References to the Dartmouth College Case in the opinions of the state courts in discussing the question whether a certain educational institution is public or private, the decision of which question would determine the validity of state legislation under the state Constitution, do not show that the contract clause of the federal Constitution was relied upon to invalidate such legislation, so as to sustain a writ of error from the Supreme Court of the United States. Appeal, *Trustees of Garrick Academy v. Clark*, (1904) 80 S. W. 64, 112 Tenn. 483, dismissed.—*Osborne v. Clark*, 27 S. Ct. 319, 204 U. S. 585, 51 L. Ed. 619.

No federal question respecting the impairment of contract obligations, which will sustain a writ of error from the Supreme Court of the United States to a state court, is presented by the contention that the obligation of the contract made by bonds of the state is impaired by a joint resolution of the state Legislature directing the state treasurer to write off of the books in his office certain of such bonds and to carry no longer such bonds on the books as a debt of the state, since such law merely directed a change of entries in the books of the treasurer, and could in no respect impair or affect the rights of the holders. Writ of error (1903) 45 S. E. 821, 67 S. C. 324, dismissed.—*Smith v. Jennings*, 27 S. Ct. 610, 206 U. S. 276, 51 L. Ed. 1061.

Municipal legislation carried into effect by mandamus, which requires a railroad company to make repairs in a viaduct at its own expense, in accordance with plans adopted and approved by the municipal council, cannot be regarded as a mere repudiation by the municipality of its agreement to maintain the viaduct, so as to defeat the appellate jurisdiction of the Supreme Court of the United States over a state court, invoked on the ground that contract obligations were thereby impaired. Judgment, *State v. Northern Pac. Ry. Co.* (1906) 108 N. W. 269, 98 Minn. 429, affirmed.—*Northern Pac. Ry. Co. v. State of Minnesota*, 28 S. Ct. 341, 208 U. S. 583, 52 L. Ed. 630.

Only when a judgment of a state court gives effect to subsequent legislation can the federal Supreme Court review, as presenting a question of the impairment of contract obligations, its decision holding invalid, under the state Constitution, a state law which is alleged to constitute a contract. Judgment (1906) 41 So. 259, 89 Miss. 724, affirmed.—*Mobile, J. & K. C. R. Co. v. State of Mississippi*, 28 S. Ct. 650, 210 U. S. 187, 52 L. Ed. 1016.

The question whether a provision in a railway charter exempting the company from liability for the death of any person in its service, even if caused by its negligence, created a contract right protected against repeal by the contract clause of the federal Constitution, is sufficiently substantial to sustain a writ of error from the federal Supreme Court to a state court.—(1911) *Texas & N. O. R. Co. v. Miller*, 31 S. Ct. 534, 221 U. S. 408, 55 L. Ed. 789, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1165; (1911) *Same v. Gross*, 31 S. Ct. 536, 221 U. S. 417, 55 L. Ed. 796, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1173.

A decision of the highest court of a state, enforcing the payment by a street railway company to a municipality of the sum contracted to be paid when the road should be completed, is not reviewable in the federal Supreme Court, as giving effect to a resolution of the common council which the company asserts impaired its contract right to construct a certain turnout, where the court placed its decision distinctly upon the ground that, without regard to that resolution or to the question of the right of the company to construct the turnout, the money was payable because the road had been substantially completed.—*Missouri & K. I. Ry. Co. v. City of Olathe*, 32 S. Ct. 47, 222 U. S. 187, 56 L. Ed. 156, dismissing writ of error *City of Olathe v. Edson*, 114 P. 228, 84 Kan. 408.

A decision of a state court, that the common-law doctrine of implied covenant in a lease that the lessor shall pay the taxes is inapplicable to leases of tide lands, will not be disturbed by the federal Supreme Court in determining whether the contract obligations of the state to its lessees are impaired by a statute authorizing the assessment of such leaseholds for local improvements.—*Trimble v. City of Seattle*, 34 S. Ct. 218, 231 U. S. 683, 58 L. Ed. 435, affirming judgment 116 P. 647, 64 Wash. 102.

A decision of the highest state court that Act La. No. 74 of 1858, on which a canal company bases its contract right to compensation on reverting of its property to the state, gives the company no such right, presents a question as to violation of contract rights reviewable in the federal Supreme Court where, by Act La. No. 161 of 1906, a board of control of the canal was created by which the state was to exercise its right of control over the canal property.—*Carondelet Canal & Navigation Co. v. State of Louisiana*, 34 S. Ct. 627, 233 U. S. 362, 58 L. Ed. 1001, reversing judgment *State v. Carondelet Canal & Navigation Co.*, 56 So. 137, 129 L. Ed. 279.

The contention that contract rights under ordinance were impaired by subsequent ordinances is so frivolous as to afford no basis for a writ of error from the federal Supreme Court, where the state court, in deciding that original ordinance was void, merely applied the settled rule of state law existing when it was adopted.—*Ennis Waterworks v. City of Ennis*, 34 S. Ct. 767, 233 U. S. 652, 58 L. Ed. 1139, dismissing appeal 144 S. W. 930, 105 Tex. 63.

Averment by owners of property on a public alley that an ordinance permitting the closing of it unconstitutionally impairs the obligation of a contract with the dedicant does not present a substantial federal question; there being no allegation of any contract with the aggrieved parties or any privity between them and the person making the dedication.—*Bowe v. Scott*, 34 S. Ct. 769, 233 U. S. 658, 58 L. Ed. 1141, dismissing appeal 75 S. E. 123, 113 Va. 499.

A contention on an alleged change in the judicial construction of a statute presents no question of the impairment of the contract which will sustain a writ of error from the federal Supreme Court to a state court.—*Cleveland & P. R. Co. v. City of Cleveland*, 35 S. Ct. 21, 235 U. S. 50, 59 L. Ed. 127, dismissing writ of error 102 N. E. 1122, 87 Ohio St. 469.

A judgment of the highest state court, enjoining a railroad from constructing a belt line railway under an ordinance which the railroad claims gives it contract rights unconstitutionally impaired by a later ordinance, held reviewable in the federal Supreme Court.—*Louisiana R. & Nav. Co. v. Behrman*, 35 S. Ct. 62, 235 U. S. 164, 59 L. Ed. 175, affirming decree *Behrman v. Louisiana R. & Nav. Co.*, 54 So. 25, 127 La. 775.

A judgment of a state court giving effect to an ordinance which it is contended is an unconstitutional impairment of an existing contract with a city is reviewable by the federal Supreme Court on writ of error.—*New York Electric Lines Co. v. Empire City Subway Co.*, 35 S. Ct. 72, 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915A, 906, affirming judgments 125 N. Y. S. 1133, 140 App. Div. 934, and *In re New York Electric Lines Co.*, 94 N. E. 1056, 201 N. Y. 321.

No federal question is presented by contention that obligation of contract between taxpayers and New Orleans under special election, statute, and constitutional amendments of a proposition for the purchase of waterworks and construction of free sewerage system, was impaired by Acts La. 1908, No. 270, requiring all inhabited premises in the city to be connected with the public water system.—*New Orleans Taxpayers' Protective Ass'n v. Sewerage Water Board of New Orleans*, 35 S. Ct. 542, 237 U. S. 33, 59 L. Ed. 828, dismissing appeal 61 So. 843, 132 La. 839.

Whether a municipal ordinance may be upheld without impairing an admitted contract is a federal question which will support the ap-

pellate jurisdiction of the Supreme Court over a state court, though a construction of the contract is necessary.—*Southern Wisconsin Ry. Co. v. City of Madison*, 36 S. Ct. 400, 240 U. S. 457, 60 L. Ed. 739, affirming judgment *City of Madison v. Southern Wisconsin Ry. Co.*, 146 N. W. 492, 156 Wis. 352.

A decision of the state court upholding a paving assessment levied on a street railway company is reviewable in the federal Supreme Court on the ground that the ordinance fixing the obligation impaired contract rights, though the state court's opinion may be construed as asserting that the duty to pave was imposed by the railway company's franchise alone.—*Id.*

◀394(10). *Due process of law and equal protection of laws.*

The decision of a state court of last resort refusing to set aside an execution sale of lands at the instance of the debtor's heirs, on the ground that prior to the sale the land had been confiscated because of the debtor's treason, and, the attainder being for life only, the land went to his heirs and the purchaser took nothing, is not reviewable by the supreme court on the theory that, the decree of the state court being erroneous, the heirs were being deprived of property without due process of law.—*Marrow v. Brinkley*, 129 U. S. 178, 9 S. Ct. 267, 32 L. Ed. 654.

Defendant was convicted in a state court of murder in the first degree, and moved for a new trial on the ground that the court failed to charge the jury as to any degree of murder save the first. The motion was refused, and the court of appeals sustained the refusal because no exception to the charge was taken at the trial, as required by Code Cr. Proc. Tex. art. 685, and, further, because there was no evidence to support a charge of murder in any degree save the first. *Held*, that this involved no denial of due process of law, or of equal protection of the laws, and the supreme court of the United States has no jurisdiction of a writ of error.—*Davis v. State of Texas*, 139 U. S. 651, 11 S. Ct. 675, 35 L. Ed. 300.

Pending an appeal to the supreme court of California from a sentence of death, the provision of the Penal Code directing execution in not less than 30 nor more than 60 days after judgment was amended so as to require execution in not less than 60 nor more than 90 days. After hearing the appeal the supreme court held that although this act contained no exceptions, and was therefore apparently *ex post facto* in its operation, yet that a saving clause was to be read into it from section 329 of the Political Code, which declares that the repeal of a criminal law shall not constitute a bar to a prosecution and punishment thereunder for offenses committed before the repeal; and the court held that the prior law was therefore still in force, so as to justify execution thereunder, and accordingly affirmed the judgment. *Held*, that this decision involved no federal question, as the construction of the state laws was for the state courts alone, and a writ of error from the supreme court of the United States could not be sustained on the theory that the amendment repealed the prior law, but was itself unconstitutional, and that, therefore, there was no law in existence under which the execution could be had, whence it followed that the execution would be without due process of law, and in violation of the fourteenth amendment to the federal constitution.—*McNulty v. People of State of California*, 149 U. S. 645, 13 S. Ct. 959, 37 L. Ed. 882; *Vincent v. Same*, 149 U. S. 648, 13 S. Ct. 960, 37 L. Ed. 884.

The supreme court has no jurisdiction of an error to a state court in condemnation pro-

ceedings, on the ground that the condemnation statute is repugnant to the fourteenth amendment, in that it fails to provide for notice, when the highest state court has already decided that the statute does require notice.—*Baltimore Traction Co. v. Baltimore Belt R. Co.*, 161 U. S. 137, 14 S. Ct. 294, 38 L. Ed. 102.

The enactment of a statute authorizing a plank-road company previously chartered, and fully invested with all its franchises, to sell and convey its property and franchises, creates no contract between it and the state, and a decision by the state supreme court that a conveyance to a private individual operated, under the terms of the act, to transfer merely a life estate, and that no interest descended to his heirs, is not reviewable in the federal supreme court on the theory of a taking of property without due process of law.—*Snell v. City of Chicago*, 152 U. S. 191, 14 S. Ct. 489, 38 L. Ed. 408.

On application by holders of railroad bonds, the supreme court of Missouri granted a writ of prohibition commanding one of the common pleas courts, which had appointed a receiver of the railroad company, to cease action in the proceedings, and ordering such receiver to turn over the property in his hands to a receiver previously appointed by the circuit court in an action to foreclose a trust mortgage on the road. In a petition for rehearing the railroad company and other respondents alleged that the part of the order directed to the receiver appointed by the common pleas court was in violation of Const. Amend. U. S. art. 5, which provides that no one shall be deprived of property without due process of law, and of Const. Amend. 14, § 1, providing that no state shall deprive any person of property without due process of law. *Held* that, even if respondents relied on and properly pleaded rights under the federal constitution, no federal question was presented, since the order of the supreme court did not deprive the company of its property.—*St. Louis, C. G. & Ft. S. Ry. Co. v. State of Missouri*, 156 U. S. 478, 15 S. Ct. 443, 39 L. Ed. 502.

In an action by sureties to recover from their principal money which they had been compelled to pay for him by an action to which he was not a party, a decision by the state courts that the judgment in the action against the sureties was admissible evidence to charge the principal, and was *prima facie* sufficient to authorize a recovery unless fraud or collusion was shown, is not subject to review by the supreme court of the United States on the theory that it operated to deprive the principal of his property without due process of law, and to deny him the equal protection of the laws, because it operated to hold him conclusively bound by a judgment in an action to which he was not a party, and of which he had no notice, where there is nothing in the record to show that the defendant claimed in the state courts any right to protection under the constitution or laws of the United States.—*Sayward v. Denny*, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941.

An averment, in a complaint seeking to set aside a mortgage foreclosure, that plaintiff, who owned the property, was not a party thereto, does not show that a construction of the constitutional provision as to due process of law is necessarily involved, so as to confer jurisdiction on the supreme court under Act March 3, 1891, c. 517, § 5.—*Cornell v. Green*, 163 U. S. 75, 16 S. Ct. 969, 41 L. Ed. 76.

The directors of an irrigation district, having determined, in accordance with the statute, to issue bonds of the district to a certain amount, filed a petition asking that the proposed bonds be declared valid, to which petition a resi-

dent of the district filed an answer, claiming, in substance, that the proceedings under the statute operated to deprive him of property without due process of law. The decree of the court confirming these proceedings was modified and affirmed by the supreme court of the state. *Held*, that the proceeding by the directors was, in effect, only one to secure evidence of the regularity of the steps taken relative to the issue of the bonds, and it might well be doubted whether the judgment of the court was binding on any one; and, as no constitutional right had been invaded by the proceeding, the writ of error should be dismissed.—*Tregea v. Board of Directors of Modesto Irrigation Dist.*, 17 S. Ct. 52, 164 U. S. 179, 41 L. Ed. 395.

A decision, by the supreme court of a state, adverse to a claim by a party that proceedings by the board of supervisors in organizing an irrigation district in accordance with the statute operated to deprive him of his property without due process of law, involves a federal question.—*Id.*

A judgment of the supreme court of North Carolina in quo warranto proceedings, ousting the state railroad commissioner from his office, after he had been suspended by the governor, pursuant to the statute creating the office, *held* not to present sufficient color or ground for averring a want of due process of law to maintain a writ of error to the supreme court of the United States.—*Wilson v. State of North Carolina*, 18 S. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

A contention in a state court, that reputation is property of which the owner is deprived without due process of law by a decision against his right of action for libelous matter contained in a pleading, raises a federal question, under Rev. St. U. S. § 709, providing for writ of error from the supreme court in case of a decision against any constitutional right, privilege, or immunity. Judgment 56 P. 376, 20 Wash. 552, affirmed.—*Abbott v. National Bank of Commerce*, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217.

A decision by state tribunals against a claimant to the office of governor does not deprive him of any right to property within the meaning of Const. U. S. Amend. 14, so as to give jurisdiction to the supreme court of the United States on writ of error.—*Taylor v. Beckham*, 20 S. Ct. 890, 178 U. S. 548, 44 L. Ed. 1187, dismissing writ of error 56 S. W. 177, 21 Ky. Law Rep. 1735, 108 Ky. 278, 49 L. R. A. 258, 94 Am. St. Rep. 357.

A claim that property is taken without due process of law when condemned under a special statute for the abolition of grade crossings, because the act authorizes an increase in the number of tracks, and requires the city to pay part of the expense in violation of the state constitution, which prohibits donations by a city to a railroad corporation, raises a federal question for the purpose of a writ of error from the supreme court of the United States to a state court. Decree 39 A. 443, 70 Conn. 326, affirmed.—*Wheeler v. New York, N. H. & H. R. Co.*, 20 S. Ct. 949, 178 U. S. 321, 44 L. Ed. 1085.

A motion to dismiss a writ of error from a federal to a state court on the ground that no federal question is involved must be denied where the protection of the fourteenth amendment is invoked in the answer, and the defense is at least plausible upon its face. Judgment, *State v. American Sugar-Refining Co.*, 25 So. 447, 51 La. Ann. 562, affirmed.—*American Sugar-Refining Co. v. State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102.

The question whether a convict shall be executed, under statutory authority, by the warden of a penitentiary, or under statutes in force at

the time of his trial and conviction, by the sheriff, or whether he shall escape punishment altogether, does not involve any federal question as to due process of law under Const. U. S. Amend. 14.—*Davis v. Burke*, 21 S. Ct. 210, 179 U. S. 309, 45 L. Ed. 249.

A claim that a forfeiture of the charter of a waterworks company for maintaining illegal rates by a decree of a state court after full hearing by all parties in a proceeding by quo warranto deprived the company of its property without due process of law, or denied it the equal protection of the laws, because by its charter mandamus was prescribed as the remedy for illegal rates,—is so clearly without color of foundation as to give the Supreme Court of the United States no jurisdiction to review such decree.—*New Orleans Waterworks Co. v. State of Louisiana*, 22 S. Ct. 691, 185 U. S. 336, 46 L. Ed. 936, dismissing writ of error *State v. New Orleans Waterworks Co.* (1901) 31 So. 395, 107 La. 1.

A decision upon a federal question respecting the constitutional guaranty of the equal protection of the laws is involved in the ruling of a state court upon a motion to quash an indictment because of the exclusion of negroes from the grand jury lists, by which such motion, though but two printed octavo pages in length, was struck from the files under the color of local practice for prolixity, because it contained an allegation that certain provisions of the newly adopted state Constitution, claimed to have the effect of disfranchising negroes because of their race, worked as a reason and consideration in the minds of the jury commissioners for their action.—*Rogers v. State of Alabama*, 24 S. Ct. 257, 192 U. S. 226, 48 L. Ed. 417.

A decree of the state court requiring defendants to vacate certain lands, and enjoining them from further mining thereon, which was the relief prayed in a bill proceeding on the theory that the corporation holding a mining lease under which defendants justified their occupation as its agents was no longer in existence, is not reviewable in the federal Supreme Court as involving a denial of the claim that in proceeding to determine the case without making the corporation a party defendant it will be deprived of its property without due process of law, since, not being a party, the rights of the corporation are not affected by such decree. Writ of error, *Negaunee Iron Co. v. Iron Cliffs Co.* (Mich.) 96 N. W. 468, 134 Mich. 264, 10 Detroit Leg. N. 463, dismissed.—*Iron Cliffs Co. v. Negaunee Iron Co.*, 25 S. Ct. 474, 197 U. S. 463, 49 L. Ed. 836.

The enactment by a state of a new inheritance tax law after a decision of the highest court of the state sustaining the previous legislation on that subject as against the contention that it denied the equal protection of the laws guarantied by Const. U. S. Amend. 14, does not convert such federal question into a moot question, so as to preclude a review in the Supreme Court of the United States, unless it is obvious that such new legislation relieved the plaintiffs in error from their obligations under the earlier law. Decree, *In re Campbell's Estate*, 77 P. 674, 143 Cal. 623, affirmed.—*Campbell v. State of California*, 26 S. Ct. 182, 200 U. S. 87, 50 L. Ed. 382.

Whether or not a state court exceeded its functions under the state Constitution cannot give rise to a question respecting due process of law which will sustain the appellate jurisdiction of the Supreme Court of the United States. Writ of error (1905) 73 N. E. 495, 181 N. Y. 1, dismissed.—*Burt v. Smith*, 27 S. Ct. 37, 203 U. S. 129, 51 L. Ed. 121.

The power of the state, consistently with the due process of law clause of Const. U. S.

Amend. 14, to enact the provisions of Laws N. C. 1905, c. 538, enacted to prevent dealing in futures, which raise a presumption of guilt on proof of the doing of certain acts specified in that statute, cannot be considered by the Supreme Court of the United States on writ of error to review a conviction under that act, where, from the state of the record, it cannot be affirmed that the finding of the jury as to the keeping of a place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by the statute. Judgment, *State v. Gatewood* (1905) 51 S. E. 53, 138 N. C. 749, affirmed.—*Gatewood v. State of North Carolina*, 27 S. Ct. 167, 203 U. S. 531, 51 L. Ed. 305.

Any unconstitutional discrimination in Laws N. C. 1905, c. 538, enacted to prevent dealing in futures, which may be produced by provisions raising a prima facie presumption of guilt from the proof of certain acts when done by persons generally, and not when done by those engaged in manufacturing or wholesale merchandising, cannot be considered on writ of error from the Supreme Court of the United States to review a conviction under that act, where, from the state of the record, it cannot be affirmed that the finding of the jury as to the keeping of a place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by that act.—*Id.*

A decision of a state court upon a question of law cannot be reviewed in the federal Supreme Court as presenting a question of the violation of Const. U. S. Amend. 14, because such decision is asserted to be wrong, and contrary to previous decisions of the same court.—*Patterson v. People of State of Colorado*, 27 S. Ct. 556, 205 U. S. 454, 51 L. Ed. 879, 10 Ann. Cas. 689.

The admission of evidence in a criminal case which the highest state court decides did not violate the rights of the accused under the state Constitution and laws cannot involve a question of due process of law of sufficient merit to sustain a writ of error from the Supreme Court of the United States. Writ of error, *State v. Barrington* (1906) 95 S. W. 235, 198 Mo. 23, dismissed.—*Barrington v. State of Missouri*, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890.

Demurring to an indictment in a state court, on the ground that by reason of the inconsistency, multiplicity, and repugnancy of the different counts in such indictment the defendant is being proceeded against in violation of the state and federal guaranty of due process of law, and in violation of his constitutional right to be specifically informed of the nature and cause of the accusation against him, does not raise a federal question of sufficient merit to sustain a writ of error from the Supreme Court of the United States.—*Id.*

The contention that a second conviction of a public officer for failing, on demand, to pay over certain public moneys, deprives him of his liberty, without due process of law, in violation of Const. U. S. Amend. 14, by twice subjecting him to jeopardy for the same offense, presents no federal question which will sustain a writ of error from the federal Supreme Court to the highest court of a state, where the latter court decides that the accused was not put in jeopardy by his prior conviction, because such conviction was reversed on the ground that there had then been no legal demand.—*Shoener v. Commonwealth of Pennsylvania*, 28 S. Ct. 110, 207 U. S. 188, 52 L. Ed. 163.

The question of the validity, under the due process of law clause of Const. U. S. Amend. 14, of a tax sale made upon a notice published

only in a Sunday newspaper, is not open on a writ of error from the Supreme Court of the United States to the highest court of a state, whose decision upholding the tax title was based upon the grounds that a state statute made the tax deed, which, upon its face, was a valid instrument, prima facie evidence of the sufficiency of the notice, and that possession under such deed for the prescribed period met the requirements of the state statute of limitations. Judgment, *Wood v. McCombe* (1906) 86 P. 319, 37 Colo. 174, affirmed.—*Elder v. Wood*, 28 S. Ct. 263, 208 U. S. 226, 52 L. Ed. 464.

The contention that a state court, in appointing a receiver of a foreign corporation convicted of violating state anti-trust laws, deprives the corporation of rights under Const. U. S. Amend. 14, does not present a substantial federal question.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 227, 212 U. S. 112, 53 L. Ed. 431.

A specific contention on the trial of a criminal cause in a state court that the denial to the accused of the benefit of his plea of former jeopardy operates to deprive him of his liberty without due process of law, contrary to Const. U. S. Amend. 14, raises a federal question which will sustain a writ of error from the federal Supreme Court to review the judgment of the highest court of the state, affirming the conviction. Judgment (1906) 85 P. 862, 33 Mont. 501, affirmed.—*Keerl v. State of Montana*, 29 S. Ct. 469, 213 U. S. 135, 53 L. Ed. 734.

Federal questions of serious import, essential to support a writ of error from the federal Supreme Court, are not involved in contentions that riparian owners were denied due process of law or the equal protection of the laws by the decision of a state court awarding a municipality paramount rights in the waters of the stream under Spanish and Mexican laws, confirmed by the United States to the municipality as the successor of a Spanish pueblo.—*Los Angeles Farming & Milling Co. v. City of Los Angeles*, 30 S. Ct. 452, 217 U. S. 217, 54 L. Ed. 736.

The contention that the exemption of banks or trust companies and bona fide mortgages from the operation of Conn. Pub. Acts 1907, c. 238, prohibiting exacting more than 15 per cent. on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, denies the equal protection of the laws guaranteed by Const. U. S. Amend. 14, is not so clearly lacking in merit as not to serve as the basis of a writ of error from the federal Supreme Court to a state court.—*Griffith v. State of Connecticut*, 31 S. Ct. 132, 218 U. S. 563, 54 L. Ed. 1151; *Id.*, 31 S. Ct. 134, 218 U. S. 572, 54 L. Ed. 1155. Affirming judgment *State v. Griffith*, 74 A. 1068, 53 Conn. 1.

Whether, as a matter of law, the facts proved show the existence of public necessity of trackage connections between competing railroads, is a question for consideration in the federal Supreme Court on writ of error to a state court, where the order of the commission is attacked as denying due process of law.—(1912) *State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 32 S. Ct. 535, 224 U. S. 510, 56 L. Ed. 863, reversing judgment (1909) *State v. Railroad Commission of Washington*, 100 P. 179, 52 Wash. 17.

Judgment of the highest state court that claim of a policeman dropped from the pay rolls that he could not be summarily removed from office without denying him due process of law was not well founded presents no federal question.—*Preston v. City of Chicago*, 33 S. Ct. 177, 228 U. S. 447, 57 L. Ed. 293.

A judgment of a state court denying the petition for a writ of mandamus to compel the restoration to the pay rolls of the name of a

policeman who had been removed from office, which rests in part upon the ruling that the right to the relief prayed was in any event barred by long delay and laches, cannot be reviewed by a writ of error from the Federal Supreme Court, although it was contended that he was denied due process of law by his summary removal.—*Id.*

Contention that state constitutional amendment requiring criminal prosecutions be by indictment rendered it impossible to enforce a conviction theretofore rendered on an information, without depriving accused of his liberty without due process of law, contrary to Const. U. S. Amend. 14, presents no question or writ of error from the federal Supreme Court to a state court which ruled that the amendment did not affect pending cases.—*Ross v. State of Oregon*, 33 S. Ct. 220, 227 U. S. 150, 57 L. Ed. 458, Ann. Cas. 1914C, 224, dismissing appeal from *State v. Ross*, 106 P. 1022, 55 Or. 450.

Contention that highest court of a state denied due process of law guaranteed by Const. U. S. Amend. 14, where it rested its decision on the doctrine that when corporation having power of eminent domain enters on the property in question under deed of a mortgagor, and places improvements on the land, it may condemn the title of the mortgagor without regard to the improvements, is so lacking in merit as to justify refusal to take jurisdiction of a writ of error to the state court.—*Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 33 S. Ct. 605, 228 U. S. 596, 57 L. Ed. 982, denying rehearing 33 S. Ct. 510, 228 U. S. 326, 57 L. Ed. 857.

A conviction in a state court for peddling without a license does not rest on a nonfederal ground adequate to sustain it independently of the ruling adverse to rights asserted under the commerce clause of the Constitution, because defendant made some sales from a railway car not under previous orders, since, peddling being the only charge, the latter ground would amount to condemnation without hearing and constitute a denial of due process of law.—*Stewart v. People of State of Michigan*, 34 S. Ct. 476, 232 U. S. 665, 58 L. Ed. 786, reversing judgment *People v. Stewart*, 132 N. W. 1071, 167 Mich. 417.

Contention that the due process of law guaranteed by Const. U. S. Amend. 14, was denied by a court of equity, whose jurisdiction had been invoked by a railway company to enjoin its grantors from interfering with its enjoyment of its right of way after forfeiture for breach of condition, in assessing the damages and transferring the title to the railway company as in an eminent domain proceeding, *held*, so lacking in merit as to be insufficient as a basis of a writ of error from the federal Supreme Court to a state court.—*McDonald v. Oregon R. & Nav. Co.*, 34 S. Ct. 772, 233 U. S. 665, 58 L. Ed. 1145, dismissing appeal *Oregon R. & Nav. Co. v. McDonald*, 112 P. 413, 58 Or. 228, 32 L. R. A. (N. S.) 117.

A substantial question which will support a writ of error from the federal Supreme Court is not presented by contention in a state court that to give effect to a judgment of another state which had jurisdiction of the matter and the parties is to deny due process of law.—*Roller v. Murray*, 34 S. Ct. 902, 234 U. S. 738, 58 L. Ed. 1570, dismissing writ of error 76 S. E. 172, 71 W. Va. 161.

An objection under Const. U. S. Amend. 14, to the classification proposed by Laws Miss. 1908, c. 194, abrogating the fellow-servant rule as to certain employes, *held* too frivolous to serve as a basis of a writ of error from the federal Supreme Court.—*Easterling Lumber Co. v. Pierce*, 35 S. Ct. 133, 235 U. S. 380, 59 L. Ed. 279, dismissing appeal (Miss.) 64 So. 461.

The contention that due process of law is denied by the retroactive application of Laws

Miss. 1912, c. 215, enacted after an accident but before trial, making the accident prima facie presumption of negligence, *held* insufficient to sustain a writ of error from the federal Supreme Court.—*Id.*

No substantial federal question is presented by contention that the Safety Appliance Act, if applicable, is repugnant to due process of law clause of Const. U. S. Amend. 14, because construed by a state court to exact ordinary care as to the appliances.—*Erie R. Co. v. Solomon*, 35 S. Ct. 648, 237 U. S. 427, 59 L. Ed. 1033, dismissing appeal 106 N. E. 1055, 89 Ohio St. 406.

Question whether foreign corporation was doing business within the state when a privilege tax was imposed is open to review in the federal Supreme Court, where enforcement was resisted as contrary to due process of law clause of Const. Amend. 14.—*Provident Sav. Life Assur. Soc. v. Commonwealth of Kentucky*, 36 S. Ct. 34, 239 U. S. 103, 60 L. Ed. 167, L. R. A. 1916C, 572, reversing judgment 169 S. W. 551, 160 Ky. 16.

Contention that an appropriation of land for a drainage was for a private person contrary to Const. Amend. 14, as taking property without due process of law, supports a writ of error to a state court.—*O'Neill v. Leamer*, 36 S. Ct. 54, 239 U. S. 244, 60 L. Ed. 249, affirming judgment 142 N. W. 112, 93 Neb. 786.

Contention that property was taken without due process of law by award of nominal damages only in proceedings by which a landowner under Comp. Laws Utah 1907, § 1288x22, secured right to enlarge irrigation canals, *held* to present no question for writ of error from the federal Supreme Court to a state court.—*Provo Bench Canal & Irrigation Co. v. Tanner*, 36 S. Ct. 101, 239 U. S. 323, 60 L. Ed. 307, affirming judgment *Tanner v. Provo Bench Canal & Irrigation Co.*, 121 P. 584, 40 Utah, 105.

◀394 (11). *Taking private property for public use without just compensation.*

A decision by a state supreme court that, under the laws and constitution of the state, the building and operation of an elevated railroad along one side of a street, on the railroad company's own property, does not constitute a taking, an injury, or a destruction of property on the other side, is not reviewable by the supreme court of the United States on the theory of a taking of property without compensation.—*Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751.

No federal question which will confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court is involved in a contention in the highest state court that, by the judgment of the trial court, private property is taken for public use without just compensation, in violation of the fifth amendment to the federal Constitution, since this amendment operates solely as a restriction upon federal powers, and not upon those of the several states.—*Winous Point Shooting Club v. Caspersen*, 24 S. Ct. 431, 193 U. S. 189, 48 L. Ed. 675.

Claim that judgment of highest state court operated to take property of plaintiff in error without compensation *held* insufficient to give federal Supreme Court jurisdiction of writ of error to state court unless it is shown that the question is real and substantial and not concluded by previous decisions.—*Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 33 S. Ct. 606, 228 U. S. 596, 57 L. Ed. 982, denying rehearing 33 S. Ct. 510, 228 U. S. 326, 57 L. Ed. 857.

◀394 (12). *Giving full faith and credit to statute of another state.*

Where the highest court of a state, in determining the effect of a statute of another state, does not question its validity, but merely determines its construction, there is no ground for reviewing the cause in the supreme court of the United States, on the theory that the court failed to give such statute the full faith and credit which it was entitled to in the state where it was enacted, and thus denied to the defeated party a right claimed under the constitution or laws of the United States; especially when the construction adopted is not inconsistent with the construction placed upon the statute by the courts of the state in which it was enacted.—*Glenn v. Garth*, 147 U. S. 360, 13 S. Ct. 350, 37 L. Ed. 203.

A decision by a court of another state that the premium notice required by Laws N. Y. 1892, c. 690, § 92, in order to justify a forfeiture for nonpayment, is not required on the maturity of a note given for an installment of the premium, when this decision is based on the authority of a New York decision, does not deny full faith and credit to the statute so as to give jurisdiction to the supreme court of the United States on writ of error.—*Banholtzer v. New York Life Ins. Co.*, 20 S. Ct. 972, 178 U. S. 402, 44 L. Ed. 1124, dismissing writ of error 78 N. W. 244, 74 Minn. 387.

A decision of a state court, which merely construes a statute of another state as inapplicable to the case before it, and does not deny the validity of such statute, is not reviewable in the supreme court of the United States as a decision denying full faith and credit to such statute. Writ of error 78 N. W. 905, 109 Iowa, 708, 50 L. R. A. 99, dismissed.—*Johnson v. New York Life Ins. Co.*, 23 S. Ct. 194, 187 U. S. 491, 47 L. Ed. 273.

Whether or not a corporate contract entered into in contravention of the statutes regulating foreign corporations was, under the proper construction of such statutes, *ipso facto* void, and therefore unenforceable in the courts of another state, does not present a question under the full faith and credit clause of the federal Constitution which will sustain the exercise by the federal Supreme Court of its appellate jurisdiction over state courts.—*Allen v. Alleghany Co.*, 25 S. Ct. 311, 196 U. S. 458, 49 L. Ed. 551.

A decision of a state court sustaining the validity of a statute of another state, which is asserted to violate the Constitution of that state, does not necessarily involve a decision respecting the full faith and credit to be given such Constitution, so as to sustain a writ of error from the federal Supreme Court, where the state court did not question the validity of the state Constitution, but held that the statute was not repugnant to it. Judgment (1907) *St. John v. Andrews Institute for Girls*, 102 N. Y. S. 808, 117 App. Div. 698, affirmed.—*Smithsonian Institution v. St. John*, 29 S. Ct. 601, 214 U. S. 19, 53 L. Ed. 892.

The exercise by a state court of its independent judgment in interpreting the statute of another state upon which the cause of action is based can present no question under the full faith and credit clause of the federal Constitution for review in the federal Supreme Court by writ of error to a state court, where there is no local statute controlling the construction of statutes of other states, and no settled construction of the statute by the courts of the state enacting it is pleaded or proved.—(1910) *Louisville & N. R. Co. v. Melton*, 30 S. Ct. 676, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, affirming judgment (1907) 105 S. W. 366, 127 Ky. 276.

A decision of a state court in an action founded on a statute of another state creating an action for death, qualified by a one-year's limitation, that the failure to plead the statute in the complaint was cured by its inclusion in the answers, filed more than one year after the death, presents no question as to the full faith and credit to be given such statute, so as to sustain a writ of error from the federal Supreme Court, but involves nothing more than a question of local pleading and practice.—(1911) *Texas & N. O. R. Co. v. Miller*, 31 S. Ct. 534, 221 U. S. 408, 55 L. Ed. 789, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1165; (1911) *Same v. Gross*, 31 S. Ct. 536, 221 U. S. 417, 55 L. Ed. 796, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1173.

No question as to the full faith and credit clause of the federal Constitution which will support a writ of error from the federal Supreme Court is involved in a ruling of a state court that the validity of an assignment of life insurance policies must be tested by the law of the state the residence of the insured as to the necessity of an insurable interest, rather than by the law of the state of the assignee's residence, where both parties affirmed the illegality of the transaction, because of its alleged gambling nature; the only dispute being as to the resulting consequences.—*Manhattan Life Ins. Co. of New York v. Cohen*, 34 S. Ct. 874, 234 U. S. 123, 58 L. Ed. 1245, dismissing appeal (Civ. App.) 139 S. W. 51.

No question under the full faith and credit clause of Const. U. S. art. 4, § 1. open to review in the federal Supreme Court on writ of error to a state court, is presented, where the controversy turns on the construction of a statute in a sister state, the validity of which is not questioned.—*Western Life Indemnity Co. of Illinois v. Rupp*, 35 S. Ct. 37, 235 U. S. 261, 59 L. Ed. 220, affirming judgment 144 S. W. 743, 147 Ky. 489.

394 (13). *Giving full faith and credit to judgment of federal court.*

The supreme court of the District of Columbia is a court of the United States, and the decree of a state court enjoining the execution of a portion of a judgment thereof, for grounds that would be insufficient to set it aside in the District of Columbia, is such a refusal to give effect to the judgment of a court of the United States as authorizes a writ of error to the supreme court.—*Embry v. Palmer*, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346.

The question whether a state court, in an action for malicious prosecution, based upon certain litigation in the federal courts, has given due effect to the judgment of one of the federal courts in such litigation, is a federal question, so as to give the United States supreme court jurisdiction upon error from the judgment of the state court.—*Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U. S. 141, 7 S. Ct. 472, 30 L. Ed. 614.

Defendant in a suit in a state court pleaded a former adjudication by the United States supreme court. In the trial of the matter before the state supreme court this case was argued orally, in connection with another case between the same plaintiff, but another defendant, and the point was then presented as shown in the pleadings and assignment of errors; but the court refused to consider it, as not appearing in the printed brief. *Held*, that this was a decision against the federal right claimed, and jurisdiction for the review of that question by the United States supreme court, as well as the others, was complete.—*Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 S. Ct. 217, 31 L. Ed. 202.

Where the judgment of a state court is based on general rules of law and local statutes, and does not involve a federal question, the supreme court of the United States has no jurisdiction to review it, though the state court has disregarded a decision of the supreme court on the same question in another suit.—*Giles v. Little*, 134 U. S. 645, 10 S. Ct. 623, 33 L. Ed. 1062.

The supreme court of the United States has no jurisdiction to review a judgment of a state court, on the ground that it failed to give effect to judgments previously rendered by the federal courts, where such judgments were rendered in a suit by a third person, to which the plaintiff in error was not a party.—*Id.*

In an action in a Wisconsin court to quiet title to land, the complaint alleged that defendant claimed under a deed from a county, given as an inducement for the location of defendant's railroad. The state supreme court, affirming an order overruling a demurrer to the complaint, decided that a donation of land by a county to a railroad company was void, and could not be validated by the legislature, and therefore the deed to defendant was void. The cause being remanded, the trial court refused to receive in evidence the record of a suit in the United States circuit court, commenced subsequently to the one in the state court by defendant against plaintiff and others, in which the identical question was involved, and in which a decree was rendered, subsequent to the decision of the state supreme court, holding the title of the railroad company good. The state supreme court held this proper, on the ground that its decision on the demurrer as to the title was *res adjudicata*. *Held*, that a writ of error to the state supreme court would be dismissed, the judgment resting on a ground not involving a federal question, and not denying to the decree of the United States circuit court the effect which, under similar circumstances, would be given a judgment of the state court.—*Northern Pac. R. Co. v. Ellis*, 144 U. S. 458, 12 S. Ct. 724, 36 L. Ed. 504.

In an action by a stockholder of a corporation for an accounting in its behalf against another corporation indebted to it, and for the appointment of a receiver of the former corporation, it was set up as a defense that the latter corporation had been summoned as garnishee of the former in an action against it in a federal court. *Held*, that the state court, in declining to entertain this defense on the ground that the garnishment proceeding was abandoned, did not pass upon a federal question so as to furnish ground for review by the supreme court.—*Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 16 S. Ct. 389, 40 L. Ed. 536.

A claim, pleaded and relied on as a defense to a suit in a state court to enforce a lien on property, that such lien was wholly devastated and discharged by foreclosure proceedings against the property in a federal court, through which proceedings the defendant claims title, is such an assertion of a right or title under an authority exercised under the United States as gives the supreme court jurisdiction to re-examine a final judgment of the highest court of the state denying such right or title, on a writ of error.—*Pittsburgh, C. & St. L. Ry. Co. v. Long Island Loan & Trust Co.*, 19 S. Ct. 238, 172 U. S. 493, 43 L. Ed. 528.

The mere fact that the plaintiff in error was a purchaser at a marshal's sale of property sold under execution from a federal court does not entitle him to a writ of error from the supreme court of the United States to a state court to bring up questions under state law with respect to the validity and priority of a chattel mortgage covering the same property or a part thereof, where there is no question as to the validity of the judgment or the regularity of the proceedings in the federal court, and the question is as to the validity of a chattel mortgage

upon property sold under the execution, as affected by the sufficient identification of the property.—*Avery v. Popper*, 21 S. Ct. 94, 179 U. S. 305, 45 L. Ed. 203, dismissing writ of error 49 S. W. 219, 50 S. W. 122, 92 Tex. 337, 71 Am. St. Rep. 849.

A federal question is presented by a contention that due effect to a decree of a federal court was denied by the action of the court below in sustaining a plea of *res judicata* predicated on a decree of such federal court, where a determination whether the court correctly applied the plea necessitates deciding whether by sustaining such plea rights were denied which were vested under another decree of the federal court. Judgment 81 N. W. 125, 105 Wis. 48, affirmed.—*National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 22 S. Ct. 111, 183 U. S. 216, 46 L. Ed. 157.

Allegations in a complaint, which set up a right to recover as the result of a judicial sale under the decrees of courts of the United States and of a state, raise federal questions which confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court denying a recovery. Judgment 60 N. E. 642, 167 N. Y. 329, affirmed.—*Commercial Pub. Co. v. Beckwith*, 23 S. Ct. 382, 188 U. S. 567, 47 L. Ed. 598.

A decision of a state court that defendants in ejectment, who had successfully insisted in a prior suit in a federal court that only a portion of a tract of land was in issue, cannot invoke the rule that a judgment determining the ownership of a portion of a tract is conclusive between the same parties, claiming under the same titles, as to the ownership of the entire tract, is not reviewable in the Supreme Court of the United States, as denying any federal rights asserted under the federal court's judgment. Writ of error, *Vicksburg, S. & P. R. Co. v. Tibbs*, 36 So. 223, 112 La. 51, dismissed.—*Leonard v. Vicksburg, S. & P. R. Co.*, 25 S. Ct. 750, 198 U. S. 416, 49 L. Ed. 1108.

A decision of a state court that there was probable cause for beginning a trade-mark infringement suit in the federal courts in which a final decree was entered dismissing the bill on the merits after a temporary injunction had been dissolved is not reviewable in the Supreme Court of the United States, where the record does not show that any claim of right under the federal Constitution or laws was made in the state court, on the theory that such court, by its reasoning, implies that it finds probable cause, in its own opinion, that the decree of the federal court was wrong, whereas not to assume it to be correct is to fail to give it the full faith and credit which Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 677], requires. Writ of error (1905) 73 N. E. 495, 181 N. Y. 1, dismissed.—*Burt v. Smith*, 27 S. Ct. 37, 203 U. S. 129, 51 L. Ed. 121.

The contention that full faith and credit were not given to the judgment of a federal court dismissing an action by a foreign corporation because of its failure to register within the state before entering into the contract in suit, by a decision of a state court holding that such judgment was not a bar to a second action between the same parties upon the same contract, where the corporation had brought itself within the curative provisions of Act Pa. May 23, 1907 (P. L. 205), is not so far frivolous as not to serve as the basis of a writ of error from the federal Supreme Court to the state court.—(1911) *West Side Belt R. Co. v. Pittsburgh Const. Co.*, 31 S. Ct. 196, 219 U. S. 92, 55 L. Ed. 107, affirming judgment *Pittsburgh Const. Co. v. West Side Belt R. Co.* (1910) 75 A. 1029, 227 Pa. 90.

A plea of *res judicata*, based on a judgment of a federal court adjudicating a federal right, asserts a right which, if denied by state court,

makes a case reviewable in the federal Supreme Court, under Judicial Code, § 237.—*Cumberland Glass Mfg. Co. v. De Witt*, 35 S. Ct. 636, 237 U. S. 447, 59 L. Ed. 1042, affirming judgment 87 A. 927, 120 Md. 381, Ann. Cas. 1915A, 702.

—894 (14). *Giving full faith and credit to records, judgments, and proceedings of other states and territories.*

Plaintiff's testatrix was the devisee of property for life under a will executed in South Carolina, where the property was situate, which further gave her a power of appointment "by her last will and testament duly executed." This power was exercised in favor of plaintiff by a will executed according to the laws of North Carolina, of which state testatrix was a resident. The will was admitted to probate by the proper court, and an exemplification of the proceedings admitted to probate in South Carolina. The supreme court of the latter state held that the power of appointment could only be exercised by a will executed according to the laws of South Carolina. *Held*, that the federal question of the faith and credit to be given to the judgment of the probate court of North Carolina did not arise.—*Blount v. Walker*, 134 U. S. 607, 10 S. Ct. 606, 33 L. Ed. 1036.

Plaintiff recovered a judgment in a court of New York against defendant upon his personal liability as a director and stockholder, in a New York corporation, under the New York statute (Laws 1875, c. 611, §§ 21, 37); the grounds of liability being that defendant, as a director, made and filed a false certificate that the stock was fully paid in (in which case the statute makes him personally liable for all the debts contracted by the corporation while he was an officer thereof), and that the debt was incurred before the stock was fully paid (in which case defendant, as a stockholder, was liable to the amount of his stock). Plaintiff thereafter brought a bill in a state court of Maryland to set aside an alleged fraudulent transfer of property by defendant, and to charge the same with the payment of the New York judgment. This case was taken to the court of appeals of Maryland, which decided against the plaintiff's claim upon the ground that the New York judgment was for a penalty under the New York statute, and therefore could not be enforced in Maryland. Two of the judges dissented upon the ground that this decision failed to give the New York judgment full faith and credit, as required by the constitution of the United States (art. 4, § 1) and Rev. St. § 905. *Held*, that this decision involved the determination of a federal question, and was reviewable by the supreme court of the United States.—*Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123.

Where, in an action in a state court, the parties plead and claim rights under statutes of a foreign state, but the defeated party does not plead the construction given such statutes by the courts of such foreign state, or put in evidence the laws or the printed books of the adjudged cases of such state, or prove the common law of such state by the parol evidence of persons learned in that law, as required by the law of the state where the action is tried, such party cannot appeal from the highest court of the latter state to the supreme court of the United States on the ground that such court did not give the full faith and credit to the public acts, records, and judicial proceedings of such foreign state which the constitution and law of the United States require, and that, therefore, a federal question is presented.—*Lloyd v. Matthews*, 155 U. S. 222, 15 S. Ct. 70, 39 L. Ed. 128.

In an action brought in a state court to recover an assessment on the unpaid stock of a corporation, made by a decree of a court of

another state, a decision overruling a contention that the decree was entitled to full faith and credit as a judgment against the defendant, and permitting defendant to rely on the state statute of limitations, is reviewable in the supreme court of the United States.—*Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 16 S. Ct. 810, 40 L. Ed. 986, affirming judgment 50 N. W. 45, 83 Iowa, 430.

A contention that a state court denies to a judgment of another state the effect to which it is entitled by Rev. St. U. S. § 905, involves a federal question for the purpose of a writ of error from the supreme court of the United States. Judgment 40 A. 341, 20 R. I. 466, reversed.—*Hancock Nat. Bank v. Farnum*, 20 S. Ct. 506, 176 U. S. 640, 44 L. Ed. 619.

A decision of a state court in favor of the full faith and credit claimed for a decree by a court of another state cannot be reviewed on writ of error by the supreme court of the United States. Judgment 56 N. E. 979, 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, affirmed.—*Lynde v. Lynde*, 21 S. Ct. 555, 181 U. S. 183, 45 L. Ed. 810.

Provisions for bond, sequestration, receiver, and injunction made in a decree for alimony, being in the nature of execution and not of judgment, can have no extraterritorial operation, but the action of the courts of another state in these respects depends on the local statutes and practice of that state, and involves no federal question.—*Id.*

A federal question which will sustain a writ of error to a state court from the supreme court of the United States is presented by assignments of error to refusals of the courts below to give full faith and credit to the judicial records and proceedings of a court of another state. Judgment 56 N. E. 154, 183 Ill. 533, affirmed.—*Jacobs v. Marks*, 21 S. Ct. 865, 182 U. S. 583, 45 L. Ed. 1241.

A decision of a state court cannot be reviewed in the Supreme Court of the United States, on the ground that by its full faith and credit were denied to a Hawaiian judgment, in violation of Const. U. S. art. 4, § 1, as carried out by Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 677], where the judgment of the trial court was rendered prior to Act April 30, 1900 (31 Stat. 142, c. 339), providing a government for Hawaii, and such contention was not brought to the attention of the highest state court in any form. Writ of error, *McGrew v. Mutual Life Ins. Co.*, 64 P. 103, 132 Cal. 85, 84 Am. St. Rep. 20, dismissed.—*Mutual Life Ins. Co. v. McGrew*, 23 S. Ct. 375, 188 U. S. 291, 47 L. Ed. 480, 63 L. R. A. 33.

A decision of the Kentucky Court of Appeals denying any force or effect to an Indiana judgment, which is based on a denial of the jurisdiction of the Indiana court because of the place of service, presents a federal question for review in the Supreme Court of the United States, where such denial can be justified only on the ground that the Virginia Compact of 1789, and Act Cong. Feb. 4, 1791, c. 4 (1 Stat. 189), admitting Kentucky to the Union, did not confer the right of jurisdiction which the Indiana court attempted to exercise, and which the state of Indiana claims. Judgment *Meyler v. Wedding*, 53 S. W. 809, 107 Ky. 310, 21 Ky. Law Rep. 1006, 92 Am. St. Rep. 347, reversed.—*Wedding v. Meyler*, 24 S. Ct. 322, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 833.

The federal Supreme Court has jurisdiction of a writ of error sued out to review the decision of a state court adverse to the contention that no recovery against the plaintiff in error can be had if the judgment of a court of a sister state be given the full faith and credit to which it is entitled under the Constitution and laws of the United States.—*American Express Co. v. Mullins*, 29 S. Ct. 381, 212 U. S. 311, 53 L. Ed. 525, 15 Ann. Cas. 536.

No refusal by the courts of one state to give full faith and credit to the judgment of that of another is shown, so as to give the Supreme Court of the United States jurisdiction to review their final judgment dismissing, because such judgment determined the question of the legality of her marriage against her, a proceeding by a wife to set aside a judgment annulling her marriage, where it appears that such other court, being a court of competent jurisdiction, and having jurisdiction of the parties and the subject-matter, dismissed a suit by her for separate maintenance while she was living apart from her husband for alleged justifiable cause, in which the defense was that she never became the wife of defendant, because, at the time of her alleged marriage to him, she had a husband living, which allegation was supported by evidence at the hearing, although the dismissal might have been merely upon the ground that she was not justified in living apart from him, if she made no attempt to prove that it was in fact upon such ground.—*Everett v. Everett*, 30 S. Ct. 70, 215 U. S. 203, 54 L. Ed. 158.

The contention that proper faith and credit were not given to a judgment of the Canadian court by a decision of a state court does not involve a federal question.—*Ætna Life Ins. Co. v. Tremblay*, 32 S. Ct. 309, 223 U. S. 185, 56 L. Ed. 398.

—394 (15). *Decisions affecting commerce and navigable waters.*

Defendant, a liquor dealer of Whitehall, in the state of New York, received from persons in Rutland, in the state of Vermont, by telegraph, mail, and express, various orders for liquor, which he filled by selecting the liquor and delivering it to an express company at Whitehall for delivery to the consignees in Rutland on payment of the bill attached for the price and charges for the transportation of the goods and for the return of the money paid. He was tried and convicted in Vermont on such facts for selling intoxicating liquor without authority. The only points raised at the trial were that the facts did not constitute an offense against the Vermont statute under the complaint, and that he ought not to be found guilty under such facts. *Held*, that such points were too general to call the attention of the state court to the clause of the federal constitution in regard to the regulation of commerce, or to any right claimed under it, and, the only question considered by the supreme court of the state on appeal being whether the liquor was sold at Rutland or Whitehall so as to fall within or without the statute of Vermont, the conclusion being that the completed sale was in Vermont, no federal question was raised which would give the right to a review by the supreme court of the United States.—*O'Neil v. Vermont*, 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450.

The establishment of harbor lines by a state commission, even if made in violation of section 7, Act September 19, 1890 (26 Stat. 426, 454), would not be a violation of any right of a riparian owner arising under this statute, so that the refusal by a state court to prohibit the establishment of such harbor lines, at suit of the riparian owner, could be reviewed in the supreme court of the United States.—*Yealer v. Board of Harbor Line Com'rs*, 146 U. S. 646, 13 S. Ct. 190, 36 L. Ed. 1119.

A decision by a state court in an action at law for a collision on a navigable river, denying a right claimed to navigate such river in accordance with the statutory rules of navigation, may be reviewed by the supreme court.—*Belden v. Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218, reversing judgment *Chase v. Belden*, 117 N. Y. 637, 22 N. E. 963.

The contention that the congressional consent, in Act June 28, 1834, c. 126, 4 Stat. 708, to the agreement or compact between the states of New Jersey and New York respecting their territorial limits and jurisdiction, vested exclusive jurisdiction in the federal government over the sea adjoining the two states, does not raise a federal question which will sustain a writ of error from the federal Supreme Court to a state court, where there is nothing in the agreement and confirmatory state statutes abdicating rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two states.—*Hamburg American S. S. Co. v. Grube*, 25 S. Ct. 352, 196 U. S. 407, 49 L. Ed. 529.

A contention, on a motion for a directed verdict, that the cession to the United States, in Act N. J. March 12, 1846, of jurisdiction over a certain strip of land at Sandy Hook, vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line, presents a question respecting the exclusive legislative power of Congress under Const. U. S. art. 1, § 8, cl. 17, which will sustain a writ of error from the federal Supreme Court to a state court.—*Id.*

The question whether a state court, consistently with the act to regulate commerce, can grant relief to a shipper because of the exaction by a common carrier of an alleged unreasonable freight rate for an interstate shipment, when such rate has been filed with the interstate commerce commission and promulgated as provided by the act to regulate commerce, and has not been found to be unreasonable by the commission, will sustain a writ of error from the federal Supreme Court to a state court, where such question was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the highest state court, and is essentially involved in the case. Judgment, *Abilene Cotton Oil Co. v. Texas & P. Ry. Co.* (Tex. Civ. App. 1905) 85 S. W. 1052, reversed.—*Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553, 9 Ann. Cas. 1075.

A carrier's denial that "it was bound by law," as alleged by complainant, to receive, as a connecting and ultimate carrier, a certain interstate shipment, and forward and deliver it to its ultimate destination, does not amount to the assertion of a right under the act to regulate commerce, so as to sustain a writ of error from the Supreme Court of the United States to review a judgment of a state court adverse to such contention.—*Louisville & N. R. Co. v. Smith, Huggins & Co.*, 27 S. Ct. 401, 204 U. S. 551, 51 L. Ed. 612.

A decision of a state court dismissing, on the ground that the suit was one against the state, and therefore not within its jurisdiction, a bill which seeks to enjoin a state oil inspector from enforcing a state inspection law, on the theory that such law, if applied to the oils, in controversy, violates the commerce clause of the federal Constitution, gives effect to such law, and is reviewable by the Supreme Court of the United States. Judgment (1906) 95 S. W. 824, 117 Tenn. 82, affirmed.—*General Oil Co. v. Crain*, 28 S. Ct. 475, 209 U. S. 211, 52 L. Ed. 754.

Whether construction of a boom in a navigable stream lying entirely within the state is authorized by state statutes is not a federal question which will sustain a writ of error from the Supreme Court of the United States to a state court.—*North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 29 S. Ct. 355, 212 U. S. 406, 53 L. Ed. 574.

The decision of a state court sustaining its jurisdiction of a suit against a foreign railway corporation, commenced by attaching a box car belonging to that company, does not involve a ruling upon the company's contention that the levy upon such car was invalid, as burdening interstate commerce, where the court did not pass upon the question whether the levy of the attachment was regular, or whether the property seized was subject to levy, but held, construing the state statutes relating to attachments and the decisions of the highest court of that state, that it was unnecessary to decide those questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering without protestation.—*Cincinnati, N. O. & T. P. Ry. Co. v. Slade*, 30 S. Ct. 230, 216 U. S. 78, 54 L. Ed. 390.

The contention that a marine railway which projected beyond the harbor line established by the Secretary of War conformably to Act March 3, 1899, c. 425, § 10, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3541), is illegal and a public nuisance, which the owner of a vessel might wantonly injure or destroy, although such railway was constructed and had been in operation many years before the establishment of such harbor line, is so clearly unfounded as not to serve as the basis of a writ of error from the Federal Supreme Court to review the judgment of a state court adverse to such contention.—*Gring v. Ives*, 32 S. Ct. 167, 222 U. S. 365, 56 L. Ed. 235.

A judgment of a state court that a steamboat company must answer for damage to boring plants in the Hudson river from collisions with its boats, because of federal authority for the maintenance of such plants, and because the collisions were from the negligence of the steamboat company, is not excluded from appellate jurisdiction of the federal Supreme Court on theory that such judgment rests on a non-federal ground adequate to sustain it, because the issue of negligence involved question of interference with right of interstate commerce by the obstruction in the river from the buildings of the boring plant.—*Cornell Steamboat Co. v. Phoenix Const. Co.*, 34 S. Ct. 701, 233 U. S. 593, 58 L. Ed. 1107, affirming judgment *Phoenix Const. Co. v. Cornell Steamboat Co.*, 103 N. E. 891, 210 N. Y. 113.

A judgment of the Illinois Supreme Court affirming dismissal of the state's suit to restrain a corporation from constructing a dam across a river is not reviewable in the federal Supreme Court as involving a federal question presented by assertion by the state of a public right from the navigability alleged to have been created by concurrent state and federal action, where the state court merely held that there had been no concurrence by the state in the project to make the river navigable, that it was not navigable in fact, and did not become so by addition of water of the Chicago Sanitary District, and that the state could not make it navigable and destroy vested rights of riparian owners.—*People of State of Illinois ex rel. Dunne v. Economy Light & Power Co.*, 34 S. Ct. 973, 234 U. S. 497, 53 L. Ed. 1429, dismissing writ of error 89 N. E. 760, 241 Ill. 290.

Congress has not so taken jurisdiction of the Des Plaines river by making appropriations for survey and estimates as to its improvement that the state of Illinois may assert a right thereunder to restrain a dam across the river, which, if denied, will support the appellate jurisdiction of the federal Supreme Court over a state court.—*Id.*

Whether the liability of an interstate carrier under Act Feb. 4, 1887, as amended by Act

June 29, 1906, was changed to that of a warehouseman under a local law, casting the burden of proof upon a warehouseman in case of loss by fire, *held* a federal question supporting the appellate jurisdiction of the federal Supreme Court over a state court.—*Southern Ry. Co. v. Prescott*, 36 S. Ct. 469, 240 U. S. 632, 60 L. Ed. 836, reversing judgment *Prescott v. Southern Ry. Co.*, 83 S. E. 781, 99 S. C. 422.

Construction of bill of lading for an interstate shipment under Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, is a federal question.—*Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 36 S. Ct. 541, 241 U. S. 190, 60 L. Ed. 948, affirming judgment 82 S. E. 784, 15 Ga. App. 142.

A holding, that facts controlling in a suit for delay in delivery of interstate shipment in which carrier relied on interstate bill of lading as a defense must not be considered because bill of lading gives innocent purchaser greater rights than those enjoyed by the shipper, is a decision of a federal question.—*Atchison, T. & S. F. Ry. Co. v. Harold*, 36 S. Ct. 665, 241 U. S. 371, 60 L. Ed. 1050, reversing judgment *Harold v. Atchison, T. & S. F. Ry. Co.*, 144 P. 823, 93 Kan. 456.

—394 (16). *Decisions affecting public lands, entries thereon, and titles derived from a state or United States.*

In a contract between a county claiming land as included in the grant of swamp land to the state by Act Cong. Sept. 28, 1850, and subsequently granted to it by Acts Iowa Jan. 13, 1853, and March 2, 1858, for the purpose of reclamation, and for the building of roads and bridges and buildings for purposes of education, and a railroad company claiming the same land as part of a railroad grant, in aid of its construction, under Act Cong. May 15, 1856, c. 28, a compromise was entered into by which the county conceded the railroad company's superior title, and several conveyances were made in pursuance thereof. Subsequently a bill was brought by the county to have the compromise agreement and the conveyances thereunder decreed to be void as unauthorized and obtained by fraud and involving the diversion of a trust fund. The state courts decided against the county, sustaining the compromise. *Held*, on writ of error to the supreme court, that the only federal question involved was whether the compromise and the state grants to the county are repugnant to the trust created by the act of congress granting the swamp lands to the state.—*Mills County v. Burlington & M. R. R. Co.*, 107 U. S. 557, 2 S. Ct. 654, 27 L. Ed. 578.

The question of estoppel, as urged against a county which has failed since 1861 to show acts of ownership of land in dispute, although the original title to the land was derived by the county through grant by congress, is not a federal question.—*Adams County v. Burlington & M. R. R. Co.*, 112 U. S. 123, 5 S. Ct. 77, 28 L. Ed. 678.

In a suit for the recovery of lands, where both parties claim under a common grantor, whose title from the United States is admitted, the supreme court has no jurisdiction for the review of the decisions of a state court upon questions relating only to the title acquired by the several parties under their respective grants from the common grantor, and which are not in themselves of a federal character.—*People of the State of California v. Jackson*, 112 U. S. 233, 5 S. Ct. 113, 28 L. Ed. 712.

Under his application, in 1874, to the state surveyor general of California, plaintiff claimed real estate listed March 21, 1876, by the secretary of the interior to the state of California, as part of its selection under Act Cong. Sept. 24, 1841, § 8 (chapter 16), for the purpose of

internal improvements. Defendant claimed the property under a location under state law, and purchase with school warrants in 1857. Plaintiff sued out a writ of error in the United States supreme court to the supreme court of California. *Held*, that as the right of the state, under Act 1841, was admitted, and as, under that act, the title of the state inures to the purchaser, and both parties claim under the state, the determination of the question involved no federal right in the parties denied by the state court.—*Mace v. Merrill*, 119 U. S. 581, 7 S. Ct. 330, 30 L. Ed. 503.

Act Cong. March 3, 1845, provided for admitting Iowa into the Union. Section 7 provided that government lands shall not be taxed by that state while the property of the United States. Laws Iowa 1861 provided that government lands "entered or located" should not be taxed for the year in which the entry or location was made. Act Cong. March 2, 1861, relinquished the interest of the United States in certain lands to the state of Iowa, for the benefit of certain bona fide purchasers. *Held*, that the question as to whether the lands so relinquished could be taxed after relinquishment for the year 1861 was one on which the judgment of the state court was final, and not reviewable.—*Stryker v. Crane*, 123 U. S. 527, 8 S. Ct. 203, 31 L. Ed. 194.

The decision of a state court in an action for partition, on the question whether a valid partition of real estate had been made by the Mexican government prior to the treaty of July 4, 1848, being opposed neither to the laws, nor any authority exercised under the laws, of the United States, does not involve a federal question.—*Phillips v. Mound City Land & Water Ass'n*, 124 U. S. 605, 8 S. Ct. 657, 31 L. Ed. 588.

In a suit in a state court for specific performance of a contract to convey land, the defense that the contract was against public policy, and void under the homestead laws of the United States, because it was to convey land which at the time belonged to the general government, and which defendant contemplated and did afterwards take as a homestead, sets up and claims a right under the laws of the United States, and an appeal lies to the supreme court of the United States from a decision of the state court declaring such defense insufficient.—*Anderson v. Carkins*, 135 U. S. 483, 10 S. Ct. 905, 34 L. Ed. 272, reversing *Carkins v. Anderson*, 21 Neb. 364, 32 N. W. 155.

The admission in evidence in ejectment of a certificate of the register and receiver of the United States land office does not raise a federal question, where the entry thereunder is not claimed to be void, but the certificate is objected to merely because marked, "Canceled."—*Cook County v. Calumet & C. Canal & Dock Co.*, 138 U. S. 635, 11 S. Ct. 435, 34 L. Ed. 1110, affirming judgment 131 Ill. 505, 23 N. E. 629.

By Act Cong. Sept. 28, 1850, the United States granted to the state of Illinois all the swamp and overflowed lands within its borders which then remained unsold. Act Ill. June 22, 1852 (Sess. Laws Ill. 1852, p. 178), granted all such land to the counties in which the same might be situated, but provided that, if any of the lands had been sold by the United States since the act of 1850, the counties should convey such lands to the purchasers. In ejectment by a county to recover such land, the state court held that as the land in question had been sold by the United States before Act Ill. June 22, 1852, the county acquired no beneficial interest therein. *Held*, that there was no federal question on which the decision of the state court can be reviewed.—*Id.*

In ejectment for a lot of land in the city of Denver, Colo., brought in the state court, both parties claimed under the acts of congress of May 23, 1844, and May 28, 1864, authorizing the entry of the town site of Denver by the probate judge of the county in trust for the occupants of the lands, and the only question arose upon the construction of the act of Colorado territory of March 11, 1864, prescribing rules and regulations for the execution of such trust, under which act deeds for the land had been issued by different probate judges to each of the parties. *Held*, that a judgment for defendant did not involve a denial of any title, right, or privilege specially set up and claimed by plaintiff under the acts of congress, and that a writ of error from the supreme court of the United States to review such judgment could not be sustained.—*Chever v. Horner*, 142 U. S. 122, 12 S. Ct. 184, 35 L. Ed. 959, affirming judgment, 11 Colo. 68, 17 P. 495.

Certain lands originally granted to the Northern Pacific Railroad, having passed into the hands of private persons, were sold for taxes, although the company had never paid the expenses of the government survey, as required by Act Cong. 1870. The purchaser at the tax sale sued to recover the purchase money on the ground that the lands were not subject to taxation, because the fee was still in the United States. The state supreme court sustained this view, but held that the rule of caveat emptor applied, and that the money was therefore not recoverable. *Held*, that the cause was not reviewable in the United States supreme court, since the ruling that the lands were not taxable was in favor of the federal statute, and the question as to the right to recover money paid at a void tax sale was purely one of local law.—*Tyler v. Cass County*, 142 U. S. 288, 12 S. Ct. 225, 35 L. Ed. 1016.

By the treaty of Prairie du Chien, July 29, 1829, land was granted to certain Indians, with the proviso that it should never be conveyed or leased without the consent of the president of the United States. *Held*, that a decision by a state supreme court that an indorsement of the president's consent upon a deed several years after its execution was ineffectual was a denial of an "authority exercised under the United States" (Rev. St. § 709), and, as such, is reviewable by the federal supreme court.—*Pickering v. Lomax*, 145 U. S. 310, 12 S. Ct. 860, 36 L. Ed. 716, reversing judgment 120 Ill. 289, 11 N. E. 175.

In a proceeding to restrain the establishment of harbor lines on the shores of Elliott bay, at the city of Seattle, Wash., the petitioner averred that he was, and had been for 30 years last past, the owner of the property commonly known as "Yesler's Wharf and Dock," and the upland abutting on the shore of Elliott bay upon which said wharf and dock were constructed. At the hearing, it was stated that petitioner was the original patentee of the United States under the donation act of September 27, 1850 (9 Stat. 496), but this fact was not averred in the petition. *Held* that, whatever might be inferred from the foregoing allegation as to the character and source of petitioner's title, the allegation did not sufficiently claim any title, right, privilege, or immunity under the constitution or a statute of or authority exercised under the United States, the denial whereof by a state supreme court would be reviewable by the supreme court of the United States.—*Yesler v. Board of Harbor Line Com'rs*, 146 U. S. 646, 13 S. Ct. 190, 36 L. Ed. 1119.

Where a state receiving railway-aid lands from congress under certain restrictions as to time and mode of sale grants them to a railroad company with power to sell "in accordance with

the acts of congress granting the same," and thereafter takes back a mortgage embodying the same provision as security for a loan of state bonds, a question whether a subsequent sale of lands by the company is null under the mortgage and state statute, as being in violation of the restrictions imposed by congress, is not a federal question, and a decision thereof by the state supreme court is not reviewable in the United States supreme court.—*Miller v. Anderson*, 150 U. S. 132, 14 S. Ct. 52, 37 L. Ed. 1028.

A judgment of a state supreme court, holding that a grant from the United States, under the Oregon donation act (9 Stat. 496), of lands bounded by the Columbia river, passed no title or right as against subsequent deeds from the state, is an adjudication denying the validity of a right or privilege claimed under a law of the United States, and presents a federal question reviewable in the supreme court thereof.—*Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, affirming judgment *Bowlby v. Shively*, 22 Or. 410, 30 P. 154.

A decision of the supreme court of a state that the state is estopped by its acts and conduct to assert title in itself to certain lands under the swamp land act of September 28, 1850, as against claimants thereof under a subsequent grant by congress, involves no federal question.—*State of Michigan v. Flint & P. M. R. Co.*, 152 U. S. 363, 14 S. Ct. 586, 38 L. Ed. 478.

A bill in a state court by a railroad company, to which land had been granted by congress, to restrain a sale for taxes of lands within the grant, asserting that they had not been identified as passing by the grant, so as to extinguish all interest of the United States, was dismissed on the ground that a statutory remedy by application to a board of correction and equalization had not been exhausted. *Held*, that as it was for the state court to determine the effect of the statute, and the company in no sense represented the United States, no federal question was presented.—*Northern Pac. R. Co. v. Patterson*, 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934.

An issue in a state court between a railroad company and a construction company, which contracted to build a road for it, as to whether the former company, which had agreed to procure the right of way, properly secured it over public land in the mode provided by the act of congress, does not involve the validity of the act, nor a right claimed under it, so as to authorize a review of the decision by the supreme court.—*Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 16 S. Ct. 389, 40 L. Ed. 536.

Congress having, by Act July 10, 1886, authorized the states to tax railroad-grant lands for which no patent has issued, and upon which the costs of surveying have not been paid, the question whether, under the laws of a particular state, the railroad company has any taxable interest in such lands, involves no federal question reviewable by the supreme court of the United States.—*Central Pac. R. Co. v. State of Nevada*, 162 U. S. 512, 16 S. Ct. 885, 40 L. Ed. 1057, affirming decree *State v. Central Pac. R. Co.*, 30 P. 686, 21 Nev. 247.

A decision by the supreme court of a state adverse to a claim of title by a railroad company under a congressional land grant involves a federal question.—*Northern Pac. R. Co. v. Colburn*, 17 S. Ct. 98, 164 U. S. 383, 41 L. Ed. 479.

A decision of the supreme court of a state denying the validity of an equitable title apparently conveyed by proceedings in the United

States land office, and of tax titles based thereon, involves a federal question.—*Hussman v. Durham*, 17 S. Ct. 253, 185 U. S. 144, 41 L. Ed. 664.

In ejectment, the overruling by the state courts of a defense that the patents under which plaintiff claims are invalid because, at the time they were issued, the Indian title was not yet extinguished, and that by reason of certain treaties with the Indian tribes the lands were not subject to entry, involves no federal question, and is not reviewable by the federal supreme court.—*Budzisz v. Illinois Steel Co.*, 18 S. Ct. 503, 170 U. S. 41, 42 L. Ed. 941.

Where, in an action to cancel land certificates given for lands granted to a railroad company by the state of Texas, the defendant set up that it was entitled to other lands of which it had been deprived by the state, and the court, without passing on the question whether it had in fact been deprived of any vested right in such other lands, decided that it was not a proper defense in that suit, *held*, that such decision did not deny any title, right, privilege, or immunity secured by the constitution or laws of the United States.—*Galveston, H. & S. A. Ry. Co. v. State of Texas*, 18 S. Ct. 603, 170 U. S. 226, 42 L. Ed. 1017.

In an action to recover money due under a contract whereby plaintiff railroad company sold to defendant certain tracts of land as part of a grant of land to it by congress, patent for which had not been issued, where the supreme court of the state held that the contract showed that the parties dealt with reference to the existing state of the title to the lands, the vendor selling his hope of obtaining title, and the vendee buying such expectation, there is no federal question authorizing an appeal from the supreme court of the state to the supreme court of the United States, though the title to the land in question was dependent on proceedings pending in the United States land department for the issue of a patent to plaintiff.—*Allen v. Southern Pac. R. Co.*, 19 S. Ct. 518, 173 U. S. 479, 43 L. Ed. 775, dismissing appeal 44 P. 798, 112 Cal. 455.

In an action between two claimants to swamp lands, under apparently conflicting patents from a state, a decision by the supreme court of the state based entirely on a construction of the two patents involves no federal question which can give the supreme court jurisdiction to review it; and a writ of error for its review will be dismissed.—*White v. Leovy*, 19 S. Ct. 604, 174 U. S. 91, 43 L. Ed. 907.

A decision by a state court holding that the rights of parties who make conflicting claims under United States patents are determined by a contract which they have made, and also that plaintiff's claim is defeated by estoppel, does not involve a federal question for review by the supreme court of the United States on writ of error.—*Pittsburg & L. A. Iron Co. v. Cleveland Iron-Min. Co.*, 20 S. Ct. 931, 178 U. S. 270, 44 L. Ed. 1065, dismissing writ of error *Same v. Lake Superior Iron Co.*, 76 N. W. 395, 118 Mich. 109, 5 Detroit Leg. N. 457.

A federal question is presented by a contention in the state courts and in the supreme court of the United States, in an action to recover possession of a tract of land patented to the state of Oregon under the swamp land grant, that a proper construction of the survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents.—*French-Glenn Live Stock Co. v. Springer*, 22 S. Ct. 563, 185 U. S. 47, 46 L. Ed. 800, affirming judgment 58 P. 102, 85 Or. 312; *Same*

v. Colwell, 22 S. Ct. 566, 185 U. S. 54, 46 L. Ed. 804, affirming judgment 58 P. 1119, 36 Or. 600.

A decision of a state court that the courses alleged and distances set forth in a patent from the United States do not, as a matter of fact, bring the eastern boundary of the land to the waters of the Mississippi river, raises no federal question which gives to the supreme court of the United States, under Rev. St. § 709, cla. 1, 3 [U. S. Comp. St. 1901, p. 575], the right to review the judgment of the state court on writ of error, where the validity of the grant is not in any way controverted or drawn in question, and no question is made as to the authority of the government to convey the land to the water's edge if it chose to do so. Writ of error 52 S. W. 346, 151 Mo. 348, dismissed.—*Sweringen v. City of St. Louis*, 22 S. Ct. 569, 185 U. S. 38, 46 L. Ed. 795.

A decision of a state court adverse to the claim of title to land set up by a state by virtue of its right of sovereignty over the beds of lakes meandered by the United States government presents no federal question which will sustain a writ of error from the supreme court of the United States, as such sovereignty rests upon no federal statute or provision of the federal constitution, but upon general principles of the common law, which long antedated the constitution. Appeal, *Rood v. Wallace*, 79 N. W. 449, 109 Iowa, 5, dismissed.—*State of Iowa v. Rood*, 23 S. Ct. 49, 187 U. S. 87, 47 L. Ed. 86.

The action of surveyors for the federal government in segregating and setting apart a lake by meander lines from the public land, and the approval of such survey by the commissioner of the general land office, is not such an adjudication by the federal government, by its authorized officers and agents, that such lake is the property of the state, and not a part of the public domain, that a denial by a state court of the state's claim of title to the bed of such lake can be reviewed in the supreme court of the United States.—*Id.*

A writ of error to review a judgment of a state court adverse to a title claimed under a Spanish grant alleged to have been perfected under the treaty with Spain of February 22, 1819 (8 Stat. 252), and a patent from the United States in alleged confirmation of such claim, will not be dismissed where the federal questions so raised cannot be considered as frivolous and undeserving of notice. Judgment 30 So. 645, 128 Ala. 335, affirmed.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 268.

A decision of a state court adverse to the claim that, under Mexican and Spanish grants confirmed and patented under Act Cong. March 3, 1851 (9 Stat. 631, c. 41), the owners of the land were entitled to riparian rights and subterranean waters, involves no federal question reviewable in the Supreme Court of the United States, where the validity of such act was not drawn in question. Writ of error, *City of Los Angeles v. Pomeroy*, 57 P. 585, 124 Cal. 597, dismissed.—*Hooker v. City of Los Angeles*, 23 S. Ct. 395, 188 U. S. 314, 47 L. Ed. 487, 63 L. R. A. 471.

The judgment of a state court denying the right of possession of real property under a title founded on an act of Congress, which rests upon the ground that the title of the adverse party under a tax deed was made good by prescription under the state Constitution, involves no federal question which will sustain a writ of error from the Supreme Court of the United States. Writ of error, 35 So. 747, 111 La. 563, dismissed.—*Corkran Oil & Development Co. v. Arnaudet*, 28 S. Ct. 41, 199 U. S. 182, 50 L. Ed. 143.

The defense to an action by a state to recover possession of a tract of land, so far as based upon a Spanish grant, involves no ques-

tion of a federal nature which can be considered in the Supreme Court of the United States on writ of error to a state court, where neither the validity nor construction of any treaty of the United States nor the validity of the grant were challenged. Judgment, *State v. O'Connor* 73 S. W. 1041, 96 Tex. 484, affirmed.—*O'Connor v. State of Texas*, 26 S. Ct. 726, 202 U. S. 501, 50 L. Ed. 1120.

A decision of a state court, in a suit to quiet title, that the grantee from the United States, through the state of Arkansas and other grantors, took no title by virtue of riparian rights to lands lying between the government meander line and the main channel of a river, which lands the court finds to be swampy, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, is not reviewable in the Supreme Court of the United States.—*Chapman & Dewey Land Co. v. Bigelow*, 27 S. Ct. 679, 206 U. S. 41, 51 L. Ed. 953.

The federal question presented by a claim of right and title under a patent from the United States to land within the place limits of the grant made by Act July 1, 1862, c. 120, 12 Stat. 489, and the amendatory act of July 2, 1864 (13 Stat. 356, c. 216), in aid of branch railroads, which rests upon the theory that such grant was not one in present, and that therefore the title did not pass upon completion of the railroads and compliance with the terms and conditions of the grant, but the land remained in the jurisdiction of the Land Department, which, up to a short time before the execution of the patent, had assumed and exercised jurisdiction over controversies respecting the land, is not so frivolous as to require the dismissal of a writ of error from the federal Supreme Court to review a decision of a state court against the right or title claimed.—*Missouri Valley Land Co. v. Wiese*, 28 S. Ct. 294, 208 U. S. 234, 52 L. Ed. 466, affirming judgment *Wiese v. Union Pac. Ry. Co.* (Neb. 1906) 108 N. W. 175; *Missouri Valley Land Co. v. Wrich*, 28 S. Ct. 299, 208 U. S. 250, 52 L. Ed. 473, affirming judgment *Wrich v. Union Pac. Ry. Co.* (Neb. 1906) 108 N. W. 178.

A decision of the Washington Supreme Court adverse to a claim of title founded upon the invalidity, under the Oregon donation act of September 27, 1850 (9 Stat. 496, c. 76), of their ancestors' deed to the territory of Washington, and upon the incapacity of the territory to accept the deed under Act March 2, 1853 (10 Stat. 172, c. 90), by which such territory was organized, is reviewable on a writ of error from the federal Supreme Court. Judgment (1907) 91 P. 15, 46 Wash. 585, affirmed.—*Sylvester v. State of Washington*, 30 S. Ct. 25, 215 U. S. 80, 54 L. Ed. 101.

The effect of a valid conveyance to the territory of Washington by a claimant, under the Oregon donation act of September 27, 1850 (9 Stat. 496, c. 76), after occupation for more than four years, but before he had made final proof under that act, upon the title subsequently given him by a patent from the United States, is a question of local law, not open for review upon a writ of error from the federal Supreme Court to a state court.—*Id.*

A judgment of a state court, dismissing a suit founded upon the making and approval of a plat of a town site, although resting in some respects upon the proposition that, under Act Idaho, Jan. 8, 1873 (Laws 1873, p. 16), enacted pursuant to Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457), to provide for the disposal of the land, there was no power given to make a survey or plat which did not conform to the lines of occupation, is reviewable in the federal Supreme Court, where the basis of the suit is that the federal laws authorize an official ascertainment of boundaries; that equitable rights under those laws vest upon

condition that the owners, within a reasonable time, have their rights confirmed by the trustee upon an official survey; and that those laws require each town-site occupant to see that the official ascertainment is true before accepting confirmation. Decree (1907) 90 P. 573, 13 Idaho, 417, affirmed.—*Scully v. Squier*, 30 S. Ct. 51, 215 U. S. 144, 54 L. Ed. 131.

The contention that the disposition of the public lands by the United States is interfered with by a judgment awarding a municipality rights in the waters of a stream paramount to those of riparian owners, which rests upon the effect of the Spanish and Mexican laws governing the rights of a pueblo of which the municipality is the successor, and the subsequent confirmation thereof under the federal laws, is too clearly unfounded to serve as the basis of a writ of error from the federal Supreme Court to the state court rendering such judgment.—*Los Angeles Farming & Milling Co. v. City of Los Angeles*, 30 S. Ct. 452, 217 U. S. 217, 54 L. Ed. 736.

Contentions in a suit between two railway companies, each claiming the same right of way through an Indian reservation, that the congressional grant to one company was abandoned by the grantee, and that the circumstances show an estoppel to claim under it, do not present federal questions which may be reviewed on a writ of error from the federal Supreme Court to a state court.—(1911) *Spokane & B. O. Ry. Co. v. Washington & G. N. Ry. Co.*, 31 S. Ct. 182, 219 U. S. 166, 55 L. Ed. 159, affirming decree (1908) 95 P. 64, 49 Wash. 280.

Federal question held presented in ejectment for land derived from the United States under two different surveys, where the state court passes on competency of evidence as bearing on effect of requirements of Rev. St. § 2396 (U. S. Comp. St. 1901, p. 1473), as to mode of surveying lands.—(1912) *Graham v. Gill*, 32 S. Ct. 396, 223 U. S. 643, 56 L. Ed. 586, affirming judgment (1909) 47 So. 917, 56 Fla. 316.

The federal Supreme Court has jurisdiction of a writ of error to a state court to review a decision in which both plaintiff and defendant assert rights under a homestead entry, and the federal question was passed on by the state court.—*Wadkins v. Producer Oil Co.*, 33 S. Ct. 380, 227 U. S. 368, 57 L. Ed. 551, affirming judgment *Same v. Producers' Oil Co.*, 57 So. 937, 130 La. 308.

A decision of a state court adverse to the parties asserting a title to lands under state grants, which they claim cannot be defeated without denial of federal constitutional immunities, is not reviewable by writ of error, where the state court rendered its decision on the effect of a decree in another suit as res judicata and on the statute of limitations and laches.—*Wood v. Chesborough*, 33 S. Ct. 706, 228 U. S. 672, 57 L. Ed. 1018, dismissing appeal *Woods v. Same*, 48 So. 613, 95 Miss. 63.

A ruling of the highest state court as to a stipulation to avoid production of evidence that certain townships including a lake were listed by the Secretary of the Interior as swamp lands and patented under Act Sept. 28, 1850, is not open to review in the United States Supreme Court on writ of error to state court.—*Little v. Williams*, 34 S. Ct. 68, 231 U. S. 335, 58 L. Ed. 256, affirming decree 11 S. W. 340, 88 Ark. 37.

A decree of the highest state court adverse to the asserted rights under the federal homestead law is reviewable under Judicial Code, § 237, by the federal Supreme Court.—*Gauthier v. Morrison*, 34 S. Ct. 384, 232 U. S. 452, 58 L. Ed. 680, reversing judgment 114 P. 501, 62 Wash. 572.

A judgment of the highest state court, denying plaintiff in error's claim as a purchaser in

good faith within Railway Land Grant Adjustment Act March 3, 1887, § 4, under which a confirmatory patent had been issued to him, and holding that he was not within the provisions of the statute, is reviewable under Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156 (U. S. Comp. St. Supp. 1911, p. 227), in the federal Supreme Court.—*Logan v. Davis*, 34 S. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121, reversing decree 124 N. W. 808, 147 Iowa, 441.

394 (17). *Decisions affecting mines and minerals.*

Errors assigned in the court's holdings that a record sufficiently identified a mining claim, and that the annual labor should not be measured by its actual value, but by a speculative value in advance, show no question of federal law involved.—*Quimby v. Boyd*, 128 U. S. 488, 9 S. Ct. 147, 32 L. Ed. 502.

A suit in a state court to try the right of possession of a mining claim and the right to a patent therefor, turning largely upon the construction of Mills' Ann. St. Colo. § 3149, limiting mining claims to 150 feet on each side of the center, where the question submitted to the jury is in which direction the lode in controversy properly ran, and whether it crossed the side lines at a distance greater than 150 feet from the center of a conflicting claim, does not involve the construction of any federal statute, nor render it necessary to determine the rights of the parties under the federal mining laws.—*Bushnell v. Crooke Mining & Smelting Co.*, 148 U. S. 682, 13 S. Ct. 771, 37 L. Ed. 610.

A suit in a state court to try the right of possession of a mining claim and the right to a patent therefor, although it is brought in accordance with Rev. St. § 2326, does not necessarily involve a federal question, so as to give a right of appeal to the United States supreme court.—*Id.*

A decision by a state supreme court that the holder of a mining claim had no right to appropriate gold at the intersection of two veins is not reviewable by the United States supreme court as presenting a federal question involving the application of Rev. St. §§ 2322, 2336, when the state court based its decision on the ground that such holder was estopped, by a deed previously made by him, to claim the gold at such point of intersection.—*Gillis v. Stinchfield*, 159 U. S. 658, 16 S. Ct. 131, 40 L. Ed. 295.

The mere fact that defendant in a suit to quiet title to a mining claim claims title under a location made under the general mining laws of the United States is not in itself sufficient to raise a federal question which will sustain a writ of error from the supreme court of the United States to a state court, where the gravamen of defendant's argument was not the denial of any right under the mining laws, but the invalidity of the proceedings in a state court under which the plaintiffs claimed to have acquired title by virtue of a prior location.—*De Lamar's Nevada Gold-Min. Co. v. Nesbitt*, 20 S. Ct. 715, 177 U. S. 523, 44 L. Ed. 872.

A decision by a state court sustaining the defense of laches against the assertion of a right to a mining claim after it had been abandoned for 14 years, during which an apparent title had been obtained under a patent to a probate judge for the property as part of a town site, is based on a ground independent of any federal question.—*Moran v. Horsky*, 20 S. Ct. 856, 178 U. S. 205, 44 L. Ed. 1038, dismissing writ of error *Horsky v. Moran*, 53 P. 1064, 21 Mont. 345.

The question of the estoppel of a party to deny the validity of a mining location does not constitute a federal question for review by the supreme court of the United States on writ of error to a state court. Writ of error, *McCarthy v. Speed*, 80 N. W. 135, 12 S. D. 7,

50 L. R. A. 190, dismissed.—*Speed v. McCarthy*, 21 S. Ct. 613, 181 U. S. 269, 45 L. Ed. 855.

A decision by a state court that a cotenant who relocates a mining claim held in common is to be deemed a trustee for all the cotenants does not determine a federal question which can be reviewed by the supreme court of the United States on writ of error to a state court.—*Id.*

The mere fact that an action is brought in a state court, under Rev. St. U. S. §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430], in support of an adverse mining claim, does not of itself entitle the defeated party to a writ of error from the Supreme Court of the United States. Writ of error 62 P. 948, 27 Colo. 473, 83 Am. St. Rep. 92, dismissed.—*Beals v. Cone*, 23 S. Ct. 275, 188 U. S. 184, 47 L. Ed. 435.

Whether statements made on a hearing, before the land department, of a protest against a mineral entry, work an estoppel in pais which amounts to a defense to a claim of title under a subsequent entry, involves no federal question which will give the supreme court of the United States jurisdiction to review the judgment of a state court.—*Id.*

A ruling of a state court adverse to plaintiff's claim that the decision by the land department of a question of fact on the hearing of a protest filed by him and others against defendants' original mineral entry was res judicata in an adverse suit in which defendants rely on a subsequent entry is not the decision of a federal question which will give the supreme court of the United States jurisdiction to review the judgment of the state court.—*Id.*

A federal question, reviewable in the Supreme Court of the United States, is involved in a decision of a state court in favor of plaintiff in a controversy over the ownership of ore, in which defendant claimed that under Act May 10, 1872, §§ 2, 3, 17 Stat. 91, c. 152 [U. S. Comp. St. 1901, p. 1425], title thereto passed to it through its patent, instead of to plaintiff, because the end lines of the latter's patent were not parallel; plaintiff contending that its title was acquired under Act July 26, 1866 (14 Stat. 251, c. 262), which did not require parallelism of end lines. Judgment, *Argonaut Min. Co. v. Kennedy Min. & Mill. Co.*, 63 P. 148, 131 Cal. 15, 82 Am. St. Rep. 317, affirmed.—*Kennedy Min. & Mill. Co. v. Argonaut Min. Co.*, 23 S. Ct. 501, 189 U. S. 1, 47 L. Ed. 685.

The mere fact that the suit was brought under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], to try adverse rights to a mining claim, does not necessarily involve a federal question so as to authorize a writ of error from the Supreme Court of the United States to a state court. Writ of error 74 P. 461, 32 Colo. 38, 105 Am. St. Rep. 64, dismissed.—*McMillen v. Ferrum Min. Co.*, 25 S. Ct. 533, 197 U. S. 343, 49 L. Ed. 784.

A decision of a state court that the statute of limitations making adverse possession of real property for seven years a bar to its recovery operates to defeat an action brought under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], to try title to conflicting mining claims, in which the defeated party relied on the relocation, under section 2324 [U. S. Comp. St. 1901, p. 1426], of a forfeited claim, necessarily involves a denial of rights asserted by him under the latter section, so as to make a case for a writ of error from the Supreme Court of the United States, where the state court treated as irrelevant and immaterial evidence tending to show that the premises in dispute were embraced in the forfeited location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the conflicting locations almost up to the relocation. Judgment, 71 P. 1046, 26 Utah, 1, 99 Am. St. Rep. 808, affirmed.—*Lavag-*

nino v. Uhlig, 25 S. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

The decision of the highest court of a state that the determination of the trial court, based on conflicting testimony, that the original locators of a mining claim had resumed their assessment work within the meaning of Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], before an attempted adverse relocation, was conclusive on appeal, does not amount to a denial of the right of relocation claimed under that section, so as to permit a review in the Supreme Court of the United States on writ of error. Judgment, *Emerson v. Yosemite Gold Min. & Mill. Co.* (1906) 85 P. 122, 149 Cal. 50, affirmed. —*Yosemite Gold Min. & Mill. Co. v. Emerson*, 28 S. Ct. 196, 208 U. S. 25, 52 L. Ed. 374.

The decision of a state court rejecting the contention of an owner of a mining claim that a certain vein or lode has part of its apex in his claim is not reviewable in the federal Supreme Court, where the case turned upon a question of fact.—*Mammoth Min. Co. v. Grand Central Min. Co.*, 29 S. Ct. 413, 213 U. S. 72, 53 L. Ed. 702.

Decision of highest state court adverse to contentions of owner of lode mining claim founded on the apex and extralateral-rights provisions of Rev. St. § 2322 (Comp. St. 1913, § 4618), held not to rest on a nonfederal ground so as to defeat appellate jurisdiction of federal Supreme Court.—*Stewart Mining Co. v. Ontario Mining Co.*, 35 S. Ct. 610, 237 U. S. 350, 59 L. Ed. 989, affirming judgment 132 P. 787, 23 Idaho, 724.

394 (18). *Decisions relating to taxation and assessments.*

Plaintiff's assignor sued to recover taxes paid to a county on certain lands, the title to which was in dispute, and, on appeal to the United States supreme court, judgment was rendered for defendant. Plaintiff sued defendant for the same cause of action, and the county appeared and claimed that the taxes had never been paid. Defendants pleaded payment by plaintiff's assignor, to the claim of the county, and a prior adjudication to plaintiff's claim. Plaintiff replied, claiming a new cause of action, as defendant in his answer to the claim of the county had claimed the benefit of the payment to the county as he had not done in the prior suit. Held, that the questions whether the court erred in allowing the county to come into the suit, and in giving judgment in the new cause of action, are not federal questions, and cannot be reviewed.—*Chapman v. Crane*, 123 U. S. 540, 8 S. Ct. 211, 31 L. Ed. 235.

A decision by a state court that a particular formality in the assessment or levy of taxes or the sale of property for nonpayment of taxes is not essential under the state statute presents no federal question warranting a review by the supreme court of the United States, if the statute, as thus construed, does not deprive one of his property without due process of law. This requirement being fulfilled, the state court's interpretation of the state laws is decisive.—*Del Castillo v. McConico*, 18 S. Ct. 229, 168 U. S. 674, 42 L. Ed. 622.

The action of the comptroller of a state in determining the amount of capital employed in the state by a corporation of another state for purposes of taxation involves no federal question, and the decision of the state court affirming such action cannot be reviewed by the supreme court. Judgment (1895) 36 N. Y. S. 368, 91 Hun, 158, and 44 N. E. 1127, 149 N. Y. 608, affirmed.—*People of State of New York ex rel. Parke, Davis & Co. v. Roberts*, 19 S. Ct. 58, 70, 171 U. S. 658, 43 L. Ed. 323.

The effect of a decision as to liability to taxes for a certain year as an estoppel in a case respecting taxes of a different year is not a federal question which can be reviewed by the supreme court of the United States on writ of error to a state court. Judgment, 28 So. 959, 77 Miss. 780, affirmed.—*Yazoo & M. V. R. Co. v. Adams*, 21 S. Ct. 282, 180 U. S. 26, 45 L. Ed. 408.

The decision of the supreme court of a state that it is competent on a new assessment to determine questions of benefit from the proof, even though in so doing a different result is reached from that which had been arrived at when a former assessment, which has been set aside, was made, decides a local, and not a federal, question. Judgment, *Cummings v. West Chicago Park Com'rs*, 54 N. E. 941, 181 Ill. 136, affirmed.—*Lombard v. West Chicago Park Com'rs*, 21 S. Ct. 507, 181 U. S. 33, 45 L. Ed. 731.

The question whether or not a repealable exemption from taxation, given by state law, has been in fact repealed by a subsequent statute, is one which turns upon the construction of a state law, and is not reviewable on writ of error from the supreme court of the United States to a state court, although it would be otherwise if the exemption were irrepealable, and thus constituted a contract.—*Gulf & S. I. R. Co. v. Hewes*, 22 S. Ct. 26, 183 U. S. 66, 46 L. Ed. 86.

A determination by a state court that under the tax law of the state it is the execution of a power of appointment which subjects the grantees under it to the transfer tax is not reviewable in the supreme court of the United States.—*Orr v. Gilman*, 22 S. Ct. 213, 183 U. S. 278, 46 L. Ed. 196.

The mere determination as to who are merchants within a state tax law involves no federal question which can be reviewed on writ of error to a state court, where the levy of the merchants' tax violates no federal right. Judgment, 75 S. W. 1037, 110 Tenn. 524, 100 Am. St. Rep. 814, affirmed.—*American Steel & Wire Co. v. Speed*, 24 S. Ct. 365, 192 U. S. 500, 48 L. Ed. 538.

A federal question respecting the validity of a paving assessment against a street railway company is not open on writ of error from the Supreme Court of the United States to a state court, where the latter court based its ruling that the question had no standing in the case upon its view as to the scope of the application of the railway company for relief from the assessment, and of the pleadings, and it is not contended that such view is erroneous. Judgment (1903) 53 A. 960, 75 Conn. 442, affirmed.—*Fair Haven & W. R. Co. v. City of New Haven*, 27 S. Ct. 74, 203 U. S. 379, 51 L. Ed. 237.

A decision of a state court that the general rule making the landlord responsible for the taxes has no application to the case of a perpetual leaseholder where the tenant is, in effect, the virtual owner of the property and entitled to its use forever, presents no federal question which can be reviewed by the federal Supreme Court on writ of error.—(1911) J. W. Perry Co. v. City of Norfolk, 31 S. Ct. 465, 220 U. S. 472, 55 L. Ed. 548, affirming judgments (1908) *City of Norfolk v. J. W. Perry Co.*, 61 S. E. 867, 108 Va. 28, and (1908) *Same v. White*, 61 S. E. 870, 108 Va. 35.

Whether or not municipal taxation under a subsequent statute is a public tax within the meaning of a covenant by the lessee of a municipality to pay the public taxes which shall become due on the land is a question which the federal Supreme Court will determine for itself on writ of error to a state court in a case involving the question of the impairment of

contract obligations by the enforcement of the tax.—*Id.*

No federal question is presented by state law, which, as construed by a state court, compels county to reimburse city for amount by which taxes collected for the city are reduced on prompt payment, and requiring county to pay over to city penalties for delay in payment of taxes of cities of the first class, while in cities of other classes rebates are charged to the county and penalties credited to it.—*Stewart v. Kansas City*, 36 S. Ct. 15, 239 U. S. 14, 60 L. Ed. 120, dismissing writ of error, *Kansas City v. Stewart*, 136 P. 241, 90 Kan. 846.

Decision of highest court of a state affirming a decree dismissing a suit to cancel tax assessment and to enjoin collection of the tax held not to rest on a ground independent of the federal questions raised as to the validity of the tax.—*Rogers v. Hennepin County*, 36 S. Ct. 265, 240 U. S. 184, 60 L. Ed. 594, affirming judgment 145 N. W. 112, 124 Minn. 539.

The question whether memberships in a chamber of commerce are taxable under a state statute is a matter of local law.—*Id.*

Extent of authority of a city under its charter, the validity of its ordinances, and the rights of parties under assessment proceedings, are all state questions as to which decision of state court is controlling on federal Supreme Court.—*St. Louis & Kansas City Land Co. v. Kansas City*, 36 S. Ct. 647, 241 U. S. 419, 60 L. Ed. 1072, affirming judgment *Kansas City v. St. Louis & Kansas City Land Co.*, 169 S. W. 62, 260 Mo. 395.

Ruling of state court as to effect, as to curative proceedings to assess benefits, of a decree in a state court holding assessment void, does not present a federal question.—*Id.*

Whether assessment of benefits in street widening proceedings on portion of one's property is an adjudication that the other portions were not benefited is a question of state law not reviewable on writ of error to a state court.—*Id.*

894 (19). *Decisions relating to national banks.*

To give the supreme court jurisdiction to review the decision of a state supreme court under the banking act, the plaintiff in error must be by the judgment below denied some right, title, or immunity specially claimed under said act, and such claim must be for himself, and not for a third person, in whose title he has no interest.—*Miller v. National Bank of Lancaster*, 106 U. S. 542, 1 S. Ct. 536, 27 L. Ed. 289.

Plaintiffs in error, in possession of real estate under a decree providing that on a certain day they must surrender it to a trustee, and that upon their failure to do so he may have a writ of habere facias possessionem, sought to enjoin the execution of the writ issued in behalf of a national bank, to which the property had meanwhile passed by conveyance, on the ground that it had no power under its charter to take and hold the property, and that the deed to it was inoperative and void. Held that, as the conveyance to the bank did not affect the title of plaintiffs in error, a judgment of the state court awarding it possession of the land did not have the effect to deny them any "title, right, privilege, or immunity" under the national banking act (Rev. St. tit. 62), and a writ of error would not lie to the supreme court.—*Id.*

In order that the United States supreme court may acquire jurisdiction of an appeal from a state supreme court under the national bank act, the question is whether the appellant has, by the judgment below, been denied a right thereunder which he claimed for himself, and not for a third person in whose title he had no

interest.—*Miller v. Lancaster Nat. Bank*, 106 U. S. 542, 1 S. Ct. 536, 27 L. Ed. 289.

In an action in a state court for the breach of a contract by which a national bank purchased municipal bonds and agreed to return them to the seller at the purchase price, or less, the bank interposed the defense that it was forbidden by the national banking act to make the contract in question, and that, consequently, it was exempted from all liability thereon. Held, that a judgment of the state court holding that no such exemption existed was subject to review by the federal supreme court, though the state court rested its judgment on general principles of law, and did not expressly determine whether or not the act of congress forbade a national bank from making such a contract.—*Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 11 S. Ct. 496, 35 L. Ed. 107, affirming judgment 3 S. W. 122.

In an action in a state court against a national bank to recover usurious interest paid, the right given to such banks by Rev. St. § 5197, to charge the same rate of interest as state banks of issue, is not "specially set up or claimed" so as to render an adverse decision by the state supreme court reviewable in the United States supreme court, under section 709, when the only objection made to the complaint is that it fails to state facts sufficient to constitute a cause of action, and this question is argued and determined according to the technical rules of pleading, without any suggestion that defendant may be deprived of some right or privilege given by a statute of the United States.—*Schuyler Nat. Bank v. Bollong*, 150 U. S. 85, 14 S. Ct. 24, 37 L. Ed. 1008; *Id.*, 150 U. S. 90, 14 S. Ct. 26, 37 L. Ed. 1010.

In an action on a note against a national bank, wherein the only defense raised is that the giving of the note was part of a transaction in which the bank illegally purchased its own stock, a decision of the state court which is based on the fact that the purchase of stock and giving of the note were separate transactions is not reviewable in the supreme court, as being adverse to a liability claimed under United States laws.—*Chemical Nat. Bank of Chicago v. City Bank of Portage*, 160 U. S. 646, 16 S. Ct. 417, 40 L. Ed. 568.

The fact that a state court decides in a suit by a national bank against a corporation that neither a national bank nor any other person can in such a suit recover more than the legal rate of interest, while it has previously expressed the opinion that, against a corporation under the state law, an individual may recover more than the statutory rate, does not involve a discrimination against national banks, so as to authorize the review of the later decision by the supreme court.—*Union Nat. Bank of Chicago v. Louisville, N. A. & C. Ry. Co.*, 163 U. S. 325, 16 S. Ct. 1039, 41 L. Ed. 177.

The fact that Rev. St. § 5197, authorizes a national bank to receive only the interest allowed by the state laws, does not make the construction of the state usury law, in the case of a loan by a national bank, a federal question.—*Id.*

After the filing of articles of association and a certificate of organization of a national bank with the comptroller of the currency, but before he had authorized the bank to begin business, a lease was made in its name of a banking building. The bank was never authorized to do business, and, in fact, transacted none, and, in an action subsequently brought in a state court against it for rent, it set up that the lease was void under the prohibition in the last clause of Rev. St. § 5136, against doing "any business, except such as is incidental and necessarily preliminary to its organization," until authorized thereto by the comptroller. The plaintiff claimed (1) that the business of obtaining the lease was "incidental," etc., in the meaning of

the exception; and (2) that, construing the whole section together, the bank, after filing its articles and certificate, could make contracts appropriate to the banking business which would be valid as between the parties, but might afford ground for forfeiting its charter. *Held*, that each of these claims was a claim of a right under a federal statute, so that a decision denying the same, by the highest state court, was reviewable by the supreme court.—*McCormick v. Market Nat. Bank of Chicago*, 17 S. Ct. 433, 165 U. S. 538, 41 L. Ed. 817.

A decision by a state supreme court that by a *donatio causa mortis* the equitable title in certain national bank shares passed to the donee, under general principles of law, involves no federal question, and is not reviewable by the supreme court, though Rev. St. § 5139, makes such shares transferable on the books of the bank in such manner as may be prescribed by the by-laws, and the by-laws of the particular bank made the shares transferable only on its books.—*Leyson v. Davis*, 18 S. Ct. 500, 170 U. S. 36, 42 L. Ed. 936.

Where, in a suit in a state court against a national bank and its receiver to recover money in the latter's hands claimed to have been held by the bank as a trust fund, no right to appropriate trust funds was claimed by defendants under any law of the United States, and no claim was made by them that any judgment which might be rendered for plaintiff would contravene any provision of the banking act, and the court merely adjudged that the money constituted a trust fund, to which plaintiff was entitled, no federal question is involved, so as to authorize a review of the judgment by the United States supreme court under Rev. St. U. S. § 709. Judgment 69 N. W. 1151, 49 Neb. 795, affirmed.—*Capital Nat. Bank of Lincoln, Neb. v. First Nat. Bank of Cadiz, Ohio*, 19 S. Ct. 202, 172 U. S. 425, 43 L. Ed. 502.

The decision of a state court holding that by reason of their false assumption of corporate authority the officers, directors, and shareholders of what purported to be a national bank, but which never obtained legal authority to do business, became liable as partners, on the principle of agency, for contracts entered into in the name of the corporation, does not involve any federal question which will sustain a writ of error from the supreme court of the United States, but only a question of general law.—*Seeburger v. McCormick*, 20 S. Ct. 128, 175 U. S. 274, 44 L. Ed. 161, dismissing appeal *McCormick v. Market Nat. Bank*, 44 N. E. 381, 162 Ill. 100.

A decision by the highest court of a state adverse to the right claimed under Rev. St. U. S. §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493], to recover back usurious interest from a national bank, presents a federal question, which gives to the supreme court of the United States the right to review the judgment of such state court. Judgment 82 N. W. 963, 111 Iowa, 583, affirmed.—*Talbot v. Sioux City Nat. Bank*, 22 S. Ct. 621, 185 U. S. 182, 46 L. Ed. 862.

A decision of a state court that the statute of limitations applicable to the right to enforce the individual liability of stockholders in national banks is put in motion by a delay of the Comptroller of the Currency in making an assessment involves a federal question which will sustain a writ of error from the Supreme Court of the United States. Judgment 77 P. 531, 69 Kan. 629, reversed.—*Rankin v. Barton*, 26 S. Ct. 29, 199 U. S. 228, 50 L. Ed. 163.

The express denial of an immunity claimed in both the trial and appellate courts, under Rev. St. U. S. § 5239 [U. S. Comp. St. 1901, p. 3515], by officers and directors of a national

bank in respect to the rule of liability applied for making false official reports as to the bank's financial condition, is sufficient to sustain the exercise by the Supreme Court of the United States of its appellate jurisdiction over state courts. Judgment, *Outcalt v. Jones Nat. Bank* (Neb. 1905) 105 N. W. 287; *Mosher v. Same, Id.*; *Yates v. Bailey, Id.*; *Outcalt v. Same, Id.*; *Mosher v. Same, Id.*; *Yates v. Bank of Staplehurst, Id.*; *Outcalt v. Same, Id.*; *Mosher v. Same, Id.*; *Yates v. Utica Bank, Id.*; *Outcalt v. Same, Id.*; *Mosher v. Same, Id.*; modified.—*Yates v. Jones Nat. Bank*, 27 S. Ct. 638, 206 U. S. 158, 51 L. Ed. 1002.

A decision of the highest state court that certain conveyances absolute on their face are mortgages on the ground that redemption shall be granted only on condition that the grantor should be charged with the debt and interest is not reviewable in the federal Supreme Court, though the bill avers usury exacted by a national bank and prays that the entire interest shall be adjudged forfeited under Rev. St. U. S. §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493].—*Holden Land & Live Stock Co. v. Interstate Trading Co.*, 34 S. Ct. 661, 233 U. S. 536, 58 L. Ed. 1083, dismissing appeal 123 P. 733, 87 Kan. 221.

Plaintiffs suing directors of a national bank to recover deposits on the ground of false representations as to bank's financial condition *held* entitled to appeal to the federal Supreme Court from a judgment of the highest state court reversing the judgment in their favor in the trial court, though they did not base their action on Rev. St. § 5239 [Comp. St. 1913, § 9831], and the application of such statute was suggested by defendants' answer.—*Jones Nat. Bank v. Yates*, 36 S. Ct. 429, 240 U. S. 541, 60 L. Ed. 788, reversing judgment 139 N. W. 844, 1135, 93 Neb. 121.

◀ 394 (20). Decisions involving bankruptcy acts.

Where the only controversy in a case in a state court is as to the effect to be given to an order of a district court of the United States in bankruptcy, to sell mortgaged property free from incumbrance, a writ of error lies from the United States supreme court to review a decision denying the right claimed by one of the parties.—*Factors' & Traders' Ins. Co. v. Murphy*, 111 U. S. 738, 4 S. Ct. 679, 28 L. Ed. 582.

The United States supreme court has jurisdiction to review on writ of error the judgment of the supreme court of Louisiana in a suit between citizens of that state for the foreclosure of a mortgage, in which the only controversy relates to the effect to be given a sale of property under an order of the United States district court in bankruptcy, directing the mortgaged property of the bankrupt to be sold free of incumbrances.—*New Orleans, S. Ft. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 S. Ct. 1009, 29 L. Ed. 244, following *Factors' & Traders' Ins. Co. v. Murphy*, 111 U. S. 738, 4 S. Ct. 679, 28 L. Ed. 582.

A decision of a state court of final resort that the presentation of a bank check for payment operates as an equitable assignment to the holder of the check of so much of the drawer's deposit as will pay the check, so as to prevent the bank on which the check is drawn from afterwards setting it off in bankruptcy proceedings against a debt held by the bank against the maker, pursuant to the provision of the Revised Statutes authorizing the set-off of mutual credits in bankruptcy proceedings, is not a decision denying a right given by an act of congress, since the dispute is not as to the right of the bank to offset the deposit, but merely as to the amount

of the set-off; and hence such judgment is not reviewable by the supreme court of the United States as being a judgment denying a right secured by the constitution or laws of the United States.—*Boatmen's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265, 5 S. Ct. 878, 29 L. Ed. 174.

Where the issue is as to the validity of a transfer by a trustee in bankruptcy, and whether the suit is barred by the limitation of the bankrupt act (Rev. St. § 5057), the supreme court of the United States has jurisdiction on writ of error from a state court.—*Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 L. Ed. 467, affirming *Clews v. Traer*, 10 N. W. 838.

An order of the court of appeals of New York, on motion and affidavits, perpetually enjoining the collection of a judgment on the ground that the debtor had been discharged in bankruptcy, raises a federal question, when the counter affidavits set up the fact that the debt evidenced by the judgment was exempt from the operation of the discharge, under Rev. St. § 5117, because of its fraudulent and fiduciary character, and an appeal will lie to the supreme court of the United States.—*Palmer v. Hussey*, 119 U. S. 96, 7 S. Ct. 158, 30 L. Ed. 362.

Rev. St. § 709, providing for the review by the supreme court of a judgment or decree of a state court (1) when a statute of or an authority exercised under the United States is drawn in question, and held invalid; (2) when a statute of or an authority exercised under any state is drawn in question on the ground of its repugnancy to the constitution of the United States, and held valid; and (3) when any title or right is claimed under the constitution, laws, or authority of the United States, and the decision is against the validity of such title or right,—does not authorize the review of a decree of a state court setting aside conveyances made by a bankrupt before his petition in bankruptcy was filed, in a suit brought by his assignee, when no other question is raised or determined than the intent of the grantor to defraud his creditors.—*McKenna v. Simpson*, 129 U. S. 506, 9 S. Ct. 365, 32 L. Ed. 771.

Where a state court decides against the claim of an assignee in bankruptcy to certain of the bankrupt's property under Rev. St. § 5044, the decision is against a "right" or "title" claimed under a statute of the United States within the meaning of Rev. St. § 709, and its judgment is subject to review by the supreme court of the United States.—*Williams v. Heard*, 140 U. S. 529, 11 S. Ct. 885, 35 L. Ed. 550, reversing judgment *Heard v. Sturgis*, 146 Mass. 545, 16 N. E. 437.

Upon a petition for a judgment of revival, under Civ. Code La. art. 3547, for the purpose of preventing a judgment, admitted to be valid, from being prescribed within 10 years from the time of its rendition, the question whether the assignee in bankruptcy of the deceased judgment debtor is such a "representative" of the debtor that the citation may issue to him, as well as the proper manner of reviewing the decision of that question, if erroneous, is a matter of state law and practice, in no way depending upon the United States constitution or any act of congress, and is not subject to review by the supreme court.—*Ludeling v. Chaffe*, 143 U. S. 301, 12 S. Ct. 439, 36 L. Ed. 313.

In a suit in a state court to set aside a deed from plaintiff to defendant, and to have plaintiff declared the owner of the equity of redemption in the lands, it appeared that defendant, while holding the legal title, was declared a bankrupt, and conveyed the lands to his assignee, and that he again purchased the same at the assignee's sale. In his pleadings and proofs defendant claimed that by this purchase he acquired the lands free from any rights plaintiff might have had therein before such sale. The court held

that defendant was a trustee for plaintiff, and entered a decree accordingly, which was affirmed by the state supreme court. Held that, although it did not appear from the opinions rendered that either court formally passed on any federal question, yet that the necessary effect of the decree was to deny a right claimed under the authority of the United States, and the question as to the effect of the bankruptcy sale was therefore reviewable by the United States supreme court.—*Roby v. Colehour*, 146 U. S. 153, 13 S. Ct. 47, 36 L. Ed. 922.

A decision of a state court sustaining a homestead exemption claimed under the state statutes, which rests on the effect, as res judicata, of an order of a court of bankruptcy sustaining such exemption in proceedings begun prior to a sale of the property to satisfy the lien of a general judgment, cannot be reviewed in the federal Supreme Court, where the only federal right specially claimed, if any, was one of immunity from the discharge in bankruptcy. Writ of error 70 P. 786, 30 Wash. 307, dismissed.—*Smalley v. Laugenour*, 25 S. Ct. 216, 196 U. S. 93, 49 L. Ed. 400.

The decision of a state court as to whether a conveyance by a bankrupt was made with intent to defraud creditors does not present a federal question which can be considered by the federal Supreme Court on writ of error to a state court. Judgment 56 A. 11, 75 Vt. 361, 104 Am. St. Rep. 899, affirmed.—*Thompson v. Fairbanks*, 25 S. Ct. 306, 196 U. S. 516, 49 L. Ed. 577.

A judgment of the highest state court in favor of a trustee in bankruptcy in an action brought by him to recover the value of an alleged voidable preference may be reviewed by the federal Supreme Court as a decision against a federal right or immunity, specially set up or claimed, where the state court answered some of the defendant's contentions by the construction which it gave to the bankrupt act. Judgment. *Jackman v. Eau Claire Nat. Bank* (1905) 104 N. W. 98, 125 Wis. 465, affirmed.—*Eau Claire Nat. Bank v. Jackman*, 27 S. Ct. 391, 204 U. S. 522, 51 L. Ed. 596.

A judgment of a state court adverse to the plaintiff in an action in which he specially set up a title acquired by a purchase of property from a trustee in bankruptcy, under the sanction of the bankruptcy court, does not involve a decision of the federal question so set up which will sustain a writ of error from the Supreme Court of the United States, where the state court rests its judgment solely upon the ground that, being a purchaser pendente lite from the trustee, he was bound by a decree rendered against the trustee in a suit brought by him in equity to set aside certain bills of sale executed by the bankrupt, covering the same property.—*Corbett v. Craven*, 30 S. Ct. 64, 215 U. S. 125, 54 L. Ed. 122.

Right of immunity was claimed under federal bankrupt act within Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), governing writs of error from the federal Supreme Court to state courts, where defendant relied on his discharge in bankruptcy to defeat an action on a debt.—*Zavelo v. Reeves*, 33 S. Ct. 365, 227 U. S. 625, 57 L. Ed. 676, Ann. Cas. 1914D, 664, affirming judgment *Same v. J. S. Reeves & Co.*, 54 So. 654, 171 Ala. 401.

A decision of a state court adverse to defense in suit over the title to realty, of the two years' limitation from accrual of cause of action against an assignee in bankruptcy prescribed by Rev. St. U. S. § 5057, for suits between the assignee and person claiming property vested in assignee, rests on a nonfederal ground so as to exclude appellate jurisdiction of the federal Supreme Court, where decision was based on the ground that adverse claimants were not in possession when assignee was appointed.—*Yazoo & M. V. R. Co. v. Brewer*, 34 S. Ct. 90, 231 U. S. 245, 58 L. Ed. 204, dismissing appeal

Brewer v. Yazoo & M. V. R. Co., 54 So. 987, 128 La. 544.

A contention that a decision of a bankruptcy court that a claim was not provable, left the claim unaffected by a discharge raises a federal question supporting a writ of error from the federal Supreme Court to the state court.—*Lesser v. Gray*, 35 S. Ct. 227, 236 U. S. 70, 59 L. Ed. 471, affirming judgment 70 S. E. 104, 8 Ga. App. 605.

◀394 (21). *Medium of payment.*

A contention by defendant that a coin tendered to it by plaintiff was not legal tender under the laws of the United States is not a claim to a right under such laws, but a denial of such a claim; and hence a decision on that issue by the highest state court adverse to defendant is not against such a right so as to authorize a review by the supreme court, under Rev. St. § 709.—*Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 16 S. Ct. 276, 40 L. Ed. 430.

A board of levee commissioners, acting under a state statute authorizing them to borrow "money" and issue negotiable bonds therefor, issued bonds acknowledging themselves "indebted" in specified sums "in gold coin of the United States," "which sum" they bound themselves to pay to bearer. A bill to enforce the trust and lien securing these bonds alleged that the obligation of the bonds and the security were impaired by certain subsequent acts of the Legislature. A demurrer to the bill on the ground that the levee board had made the bonds payable in gold coin, and in so doing had exceeded their powers under the statute, was sustained; and the decision was affirmed by the state supreme court on that ground alone. *Held*, that the power to borrow "money" and issue negotiable bonds therefor meant the power to borrow, and to pay in whatever was money under the constitution and laws of the United States; that this was presumed by the law; and that the decision of the state court, by proceeding on the contrary implication, which limited the power to another kind of money than gold coin, involved the denial of a right claimed under the constitution and laws of the United States, and was therefore reviewable by the supreme court of the United States.—*Woodruff v. State of Mississippi*, 162 U. S. 291, 16 S. Ct. 820, 40 L. Ed. 973.

The contention in a state court that a contract for the payment of gold coin is invalid will not be ground for writ of error from the supreme court of the United States, when the decree of the state court is for payment of a certain amount in dollars and cents, without specifying any particular kind of money, and this is affirmed by the supreme court of the state on the ground that the defendants have not been prejudiced by merely requiring them to respond in lawful money.—*Rae v. Homestead Loan & Guaranty Co.*, 20 S. Ct. 341, 176 U. S. 121, 44 L. Ed. 398, dismissing writ of error 53 N. E. 220, 178 Ill. 369.

◀394 (22). *Denial of right to remove cause to federal court.*

The denial by a state court of an application to remove a cause to the federal court raises a federal question giving jurisdiction to the federal court.—*Oakley v. Goodnow*, 118 U. S. 43, 6 S. Ct. 944, 30 L. Ed. 61.

Where a circuit court remands a cause, and the state court thereupon proceeds to a judgment therein, which is affirmed by the court of last resort of the state, such court cannot be said to have decided against any federal right by reason of the proceedings for removal which will render its judgment subject to review by the supreme court, nor is the action of the circuit court in remanding the cause subject to review on a writ of error to the state court.—

Nelson v. Moloney, 19 S. Ct. 622, 174 U. S. 164, 43 L. Ed. 934, dismissing appeal 53 N. E. 31, 158 N. Y. 351.

No real federal question which will support a writ of error from the federal Supreme Court to a state court is raised by the contention that the state court denied a federal right in overruling an application to remove the cause to a federal Circuit Court, where the granting of such application would have necessitated the aligning on the side of the plaintiff, in a suit founded on an express trust, a trustee who was charged with a repudiation of his obligations as trustee by a refusal to apply the trust funds as required by the trust agreement, and as to whom not only was an accounting asked and an injunction prayed to prevent him from disposing of the trust property, but his removal as trustee was also sought.—*Fitzgerald v. Thompson*, 32 S. Ct. 185, 222 U. S. 555, 56 L. Ed. 314.

The asserted right to remove to a federal court for a fraudulent joinder of parties defendant an action for breach of contract in which a resident citizen was made joint defendant with two nonresident corporations, on the assumption that on the evidence to be introduced the individual defendant could not be held liable, is too frivolous to serve as the basis of a writ of error from the federal Supreme Court to a state court.—*Deming v. Carlisle Packing Co.*, 33 S. Ct. 80, 226 U. S. 102, 57 L. Ed. 140, dismissing writ of error *Carlisle Packing Co. v. Deming*, 114 P. 172, 62 Wash. 455.

Joint liability of defendants under pleadings is a matter of state law on which the decision of the highest court of the state will not be reviewed by the federal Supreme Court on writ of error to determine whether the joinder was fraudulently made to prevent removal.—*Chicago, R. I. & P. Ry. Co. v. Schwyhart*, 33 S. Ct. 250, 227 U. S. 184, 57 L. Ed. 473, affirming judgment *Schwychart v. Barrett*, 130 S. W. 388, 145 Mo. App. 332.

Whether declarations stated a cause of action against a resident joined as codefendant with a nonresident is a matter of local law, and will not be reviewed by the federal Supreme Court as presenting question whether joinder was fraudulent to prevent removal.—*Id.*

The federal Supreme Court, on writ of error, presenting question whether joinder of resident with nonresident defendants was fraudulently made to prevent removal, can only consider whether there was a real intent to secure a joint judgment.—*Id.*

The denial by a state court of a second petition to remove a cause to a federal court does not deny any federal right within Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), governing the appellate jurisdiction of the federal Supreme Court over state courts, where the first removal proceedings were remanded to the state court.—*McLaughlin Bros. v. Hallowell*, 33 S. Ct. 465, 228 U. S. 278, 57 L. Ed. 835, dismissing writs of error 111 N. W. 428, 136 Iowa, 279, and 121 N. W. 1030.

Judgment of a state court denying a second petition to remove a suit against a partnership to a federal court for diversity of citizenship after refusing to substitute the partners in place of the firm is not reviewable in the federal Supreme Court, where the case had been remanded to the state court on the ground that there was no diversity of citizenship.—*Id.*

◀394 (23). *Contempt proceedings.*

A decision by the highest court of a state construing its own prior judgment, and holding that a party thereto has not been guilty of a contempt, is not an appealable final judgment, nor does it involve a federal question warranting a review in the United States supreme court.

—Newport Light Co. v. City of Newport, 151 U. S. 527, 14 S. Ct. 429, 38 L. Ed. 259.

The doctrine that a judgment committing a person for contempt is not reviewable by the federal supreme court applies only to judgments in independent proceedings for contempt in the federal circuit courts, and not to judgments by the highest court of a state depriving the prisoner of rights claimed under the constitution, laws, or treaties of the United States.—Tinsley v. Anderson, 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91.

The objection that certain published articles did not constitute a contempt of court does not present a question which will sustain a writ of error from the federal Supreme Court to a state court; at least, where there is no showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. Writ of error, *People v. News-Times Pub. Co.* (Colo. 1906) 84 P. 912, dismissed.—*Patterson v. People of State of Colorado*, 27 S. Ct. 556, 205 U. S. 454, 51 L. Ed. 879, 10 Ann. Cas. 680.

The objections that the information in contempt was not supported by an affidavit until after it was filed, and that the suits referred to in the published articles complained of as constituting the contempt were not then pending, present questions of local law, which will not sustain a writ of error from the federal Supreme Court to a state court.—*Id.*

The claim of a right under the federal Constitution to prove the truth of certain published articles held to constitute a contempt of court is too clearly unfounded to serve as the basis of a writ of error from the federal Supreme Court to a state court.—*Id.*

394 (24). *Questions of fact.*

In proceedings for mandamus to a state comptroller to compel him to draw a warrant for plaintiff, the finding of the state court that there was no fund in the treasury on which the comptroller could lawfully draw his warrant, because there had been no appropriation by the legislature for payment of plaintiff's claim, is decisive of the case, and involves no federal question.—*Wailes v. Smith*, 157 U. S. 271, 15 S. Ct. 624, 39 L. Ed. 698.

A decision by a state supreme court, affirming a sentence for murder, is not subject to review by the United States supreme court, on writ of error, on the ground that the verdict was not the verdict of such a jury as is contemplated by the constitution of the United States, when it appears that the only objection to the jury consisted in the alleged mental and physical incapacity of one of the jurors, induced by illness at the trial, and that the question as to his condition was purely one of fact.—*In re Buchanan*, 158 U. S. 31, 15 S. Ct. 723, 39 L. Ed. 884.

The supreme court will not review, on writ of error, a decision of a state court involving no federal question, or other question of law, but a mere inference of fact from the evidence.—*Turner v. People of State of New York*, 18 S. Ct. 38, 168 U. S. 90, 42 L. Ed. 392, affirming judgment *People v. Turner*, 145 N. Y. 451, 40 N. E. 400.

A finding by the court that warrants issued under and by virtue of certain acts of the legislature were issued with intention to have them circulate as money is not a finding of fact, but is in the nature of a legal conclusion, which may be reviewable by the supreme court of the United States. Judgment, 41 S. W. 157, reversed.—*Houston & T. C. R. Co. v. State of Texas*, 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

What facts constitute a common-law marriage is purely a local, and not a federal, question, and will not sustain a writ of error from the Supreme Court of the United States to a

state court. Writ of error, 83 S. W. 526, 184 Mo. 358, dismissed.—*Keen v. Keen*, 26 S. Ct. 494, 201 U. S. 319, 50 L. Ed. 772.

A decision by a state court that certain tracts of land were not within the boundaries of a land grant rests upon a question of fact, which cannot serve as the basis of a writ of error from the federal Supreme Court to a state court.—*King v. State of West Virginia*, 30 S. Ct. 225, 218 U. S. 92, 54 L. Ed. 396.

Contention, on writ of error to state court in case under Employers' Liability Act, that court should have instructed verdict for defendant for insufficiency of evidence, *held* too lacking in substance to prevent grant of motion to affirm.—*Chicago, R. I. & Pac. Ry. Co. v. Devine*, 36 S. Ct. 27, 239 U. S. 52, 60 L. Ed. 140, affirming judgment *Devine v. Chicago, R. I. & P. Ry. Co.*, 107 N. E. 595, 266 Ill. 248.

394 (25). *Decisions as to matters of pleading and practice.*

The decision by a state supreme court dismissing an appeal because it was directed to the order of the inferior court, refusing to set aside its judgment dismissing plaintiff's case, rather than to the judgment itself, rests upon grounds of state procedure, and presents no federal question reviewable in the United States supreme court.—*Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 12 S. Ct. 655, 38 L. Ed. 371.

In a suit in the chancery court of Alabama to enjoin a city from selling certain lots for taxes, a motion was made to compel the city to produce in court certain depositions, one of which contained complainant's testimony, or, in case this could not be legally done, that complainant be given reasonable opportunity to establish said testimony. The record failed to show that this motion was called to the court's attention, but at a subsequent term the cause was submitted. When the argument had been nearly completed, an application was made to set aside the submission, in order that the motion might be considered. The chancellor ruled that the deposition of complainant had been taken improperly, and that, in view of the fact that there had been ample time during the years the cause was pending to procure the depositions of the witnesses, and the further fact that the submission was made without any application for a continuance to get their depositions, the motion to set aside the submission should be denied. On an appeal to the supreme court of the state it was held that the refusal of the chancellor to set aside the submission was a matter within his discretion, and could not be reviewed. *Held*, that these decisions called in question no rights of plaintiff under either the fifth or fourteenth amendment to the constitution of the United States, and that no federal question was passed upon or necessarily involved, so as to give the supreme court jurisdiction of a writ of error.—*Thorington v. City Council of Montgomery*, 147 U. S. 490, 13 S. Ct. 394, 37 L. Ed. 252.

Code Pub. Gen. Laws Md. art. 5, § 34, provides that, where no exception is filed to the evidence below, the court of appeals shall render judgment without regard to any variance between pleading and proof. *Held*, that the statute related to a matter of state practice, and was not in conflict with the constitution of the United States, or any law of congress, and its construction rested with the state courts alone, and no federal question was involved.—*Loeber v. Schroeder*, 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856.

The question of the sufficiency of an indictment for murder in the common form, and not charging robbery, to admit of evidence of robbery, and thus raise the offense to murder in the first degree, under Code Va. § 3662, by which every homicide is presumed to be murder in the

second degree, punishable by imprisonment, and murder in the commission of robbery is murder in the first degree, punishable by death, is not a federal question.—*In re Robertson*, 156 U. S. 183, 15 S. Ct. 324, 39 L. Ed. 389.

Permission to amend pleadings being, in general, a matter within the discretion of the court, the refusal of a state court to permit defendant to amend his petition for removal after the cause has remanded by the federal court is not the denial of any right secured by the constitution of the United States.—*Carr v. Nichols*, 157 U. S. 370, 15 S. Ct. 640, 39 L. Ed. 736, affirming judgment *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

A ruling of a state court as to whether certain issues are presented by the pleadings involves no federal question.—*Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 15 S. Ct. 991, 40 L. Ed. 85.

The question whether the highest state court erred in holding that it could rightfully determine, from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff, is not reviewable on appeal to the supreme court.—*Iowa Cent. Ry. Co. v. State of Iowa*, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467.

The overruling by a state court of a motion for a new trial in a criminal case is a matter within the court's discretion, and is not reviewable on error by the supreme court of the United States.—*Smith v. State of Mississippi*, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082.

Alleged errors in the method of summoning jurors by a state court for the trial of one accused of crime are not reviewable by the supreme court of the United States, unless the trial is had under some statute repugnant to the constitution of the United States, or is so conducted as to deprive the accused of some right or immunity secured to him thereby.—*Gibson v. State of Mississippi*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

The refusal of a state supreme court in mandamus proceedings to permit the respondent to amend his answer so as, for the first time, to set up that a state statute in question is void under the federal constitution, is a matter of discretion, and does not involve a decision against the right so claimed, so as to make the judgment reviewable by the federal supreme court.—*Kipley v. People of Illinois*, 18 S. Ct. 550, 170 U. S. 182, 42 L. Ed. 998.

That a state court entertained a bill of review contrary to the established practice of the state, or gave it a broader scope than authorized by such practice, are not matters which can be assigned for error in the supreme court.—*Central Nat. Bank v. Stevens*, 18 S. Ct. 403, 169 U. S. 432, 42 L. Ed. 807; *Id.*, 18 S. Ct. 837, 171 U. S. 108, 43 L. Ed. 97.

A decision of the highest state court that a plea, when construed most strongly against the pleader, does not disclose the defense that the note in suit was given to a foreign corporation in pursuance of business carried on in another state without compliance with the statutory conditions upon which its right to do business there depended, involves purely a local question, which will not sustain a writ of error from the federal Supreme Court.—*Allen v. Alleghany Co.*, 25 S. Ct. 311, 196 U. S. 458, 49 L. Ed. 551.

The refusal of a state court to grant, for local prejudice, the change of venue asked for in a criminal case, cannot involve a federal question of sufficient merit to sustain a writ of error from the federal Supreme Court, where

the highest state court, after reviewing the testimony, decided that such refusal was not an abuse of the discretion vested in the trial court. Writ of error, *State v. Barrington* (1906) 95 S. W. 235, 198 Mo. 23, dismissed.—*Barrington v. State of Missouri*, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890.

The decision of a state court that the federal questions alleged to be involved in mandamus proceedings were entirely put out of the case by the facts set forth in the return to the alternative writ, presenting a question obviously not of a federal character, will not be reviewed by the federal Supreme Court, where there is nothing in the case to justify a suspicion that the federal questions were sought to be avoided, or were avoided by giving an unreasonable construction to the pleadings.—*Vandalia R. Co. v. State of Indiana*, 28 S. Ct. 130, 207 U. S. 359, 52 L. Ed. 246.

The time or manner in which a state court sees fit to approve the bond of a receiver of the property of a corporation convicted of violating the state anti-trust laws presents no substantial federal question under Const. U. S. Amend. 14.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 227, 212 U. S. 112, 53 L. Ed. 431.

The refusal of a state court to permit the filing of a plea setting up a federal question does not necessarily involve a decision of such question so as to sustain the appellate jurisdiction of the Supreme Court of the United States, where the state court may have refused such permission either because the plea was not filed until more than nine months after the declaration, and not until the case was called for trial, or because such plea, which went in terms to the whole declaration, and prayed judgment, was clearly bad as to the second count in the declaration.—*Western Union Telegraph Co. v. Wilson*, 29 S. Ct. 403, 213 U. S. 52, 53 L. Ed. 693.

The construction and effect of a prior decree of a state court, and how far it bound the state, and whether or not it bound parties subsequently coming in, are matters of state procedure, the rulings upon which cannot present any question which will sustain a writ of error from the federal Supreme Court to a state court.—*King v. State of West Virginia*, 30 S. Ct. 225, 216 U. S. 92, 54 L. Ed. 396.

The dismissal of the petition of the owner, brought under Act Ky. March 15, 1906, c. 22, art. 3, for the assessment and taxation of his lands to escape the forfeiture provided by that statute, because such petition did not contain a description of the land sufficient to identify it, involves no federal question which can be reviewed by the federal Supreme Court on writ of error to a state court, unless the ruling was so arbitrary and baseless as to amount to a deprivation of due process of law.—(1911) *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 108 S. W. 260, 127 Ky. 667, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law Rep. 857.

Refusal to allow amendment to a petition in an action on the original safety appliance act of March 2, 1893, after cause had been twice tried, and period of limitation had expired, to allege that the cars had been used in interstate commerce, is not reviewable in the federal Supreme Court on writ of error to a state court.—(1912) *Brinkmeier v. Missouri Pac. R. Co.*, 32 S. Ct. 412, 224 U. S. 268, 56 L. Ed. 758, affirming judgment (1906) 105 P. 221, 81 Kan. 101.

The power of the United States Supreme Court on writ of error to a state court to review its ruling on a plea in abatement is not

affected by Rev. St. § 1011 (U. S. Comp. St. 1901, p. 715), providing that there shall be no reversal in the Supreme Court for error in plea in abatement other than a plea to the jurisdiction of the court.—*Buck Stove & Range Co. v. Vickers*, 33 S. Ct. 41, 226 U. S. 205, 57 L. Ed. 189, reversing judgment 101 P. 668, 80 Kan. 29.

Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), providing that suits in equity shall not be sustained in United States courts where there is an adequate remedy at law, is so inapplicable to the practice in United States court for the Indian Territory, which, under Act March 1, 1889, § 6, is to conform to the Arkansas practice, that the assertion of a right in a case brought in that court and transferred to the Oklahoma court to have it determined in equity, does not raise a substantial federal question which will sustain a writ of error from the Supreme Court under Rev. St. § 709 (U. S. Comp. St. 1901, p. 575).—*Dill v. Ebey*, 33 S. Ct. 620, 229 U. S. 199, 57 L. Ed. 1143, dismissing appeal 112 P. 973, 27 Okl. 584, 46 L. R. A. (N. S.) 440.

No federal question is raised by the act of the United States court for the Indian Territory in overruling a demurrer by which defendant sought to assert a right to trial by jury where under the local practice such an objection was not ground for demurrer.—*Id.*

A judgment of the Oklahoma Supreme Court dismissing for defect of parties a writ of error in a case transferred to the state trial court from a federal court for the Indian Territory under the enabling act of June 16, 1906, and the state Constitution, involved a question of local law, and was not reviewable in the federal Supreme Court.—*John v. Paullin*, 34 S. Ct. 178, 231 U. S. 583, 58 L. Ed. 381, dismissing writ of error 104 P. 365, 24 Okl. 636, and 106 P. 838, 24 Okl. 642.

Ruling of a state court involving only decision of a question of local pleading and practice is not reviewable in the federal Supreme Court.—*Washington v. Miller*, 35 S. Ct. 119, 235 U. S. 422, 59 L. Ed. 295, affirming decree 129 P. 58, 34 Okl. 259.

Whether, by consenting to a revivor of action in name of plaintiff's executrix, defendant was estopped from challenging her capacity to sue, was a state question, not reviewable by the federal Supreme Court.—*Parker v. McLain*, 35 S. Ct. 632, 237 U. S. 469, 59 L. Ed. 1051, dismissing appeals *McLain v. Parker*, 129 P. 1140, 88 Kan. 717 and *Id.* 131 P. 153, 88 Kan. 873.

The ruling of the highest court of a state that the failure of declaration in suit under the federal Employers' Liability Act to show that employé was engaged in interstate commerce when injured, was cured by a charge in the plea and admission in the replication, is binding on federal Supreme Court.—*Central Vermont R. Co. v. White*, 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment *White v. Central Vermont R. Co.*, 89 A. 618, 87 Vt. 330.

Matters of local practice are not open for review in federal Supreme Court on writ of error to state court.—*Perryman v. Woodward*, 35 S. Ct. 830, 238 U. S. 148, 59 L. Ed. 1242, affirming decree 133 P. 244, 37 Okl. 792.

The federal Supreme Court on writ of error to a state court to review dismissal of suit may not determine whether the state court could have thrown out the suit on the grounds of adequate remedy at law where it treated the merits as before it.—*Bi-Metallic Inv. Co. v. State Board of Equalization*, 36 S. Ct. 141, 239 U. S. 441, 60 L. Ed. 372, affirming decree *State Board of Equalization v. Bi-Metallic Inv. Co.*, 138 P. 1010, 56 Colo. 512.

Whether petition states a cause of action against a resident joined as codefendant is a matter of local law, not open on writ of error from the federal Supreme Court.—*Chicago, R. I. & P. Ry. Co. v. Whiteaker*, 36 S. Ct. 152, 239 U. S. 421, 60 L. Ed. 360, affirming judgment *Whiteaker v. Chicago, R. I. & P. R. Co.*, 160 S. W. 1009, 252 Mo. 438.

Allowance of amendment to declaration bringing the action within Employers' Liability Act infringes no federal right where the only difference is the additional allegation that plaintiff was injured on interstate trip.—*Kansas City Western Ry. Co. v. McAdow*, 36 S. Ct. 252, 240 U. S. 51, 60 L. Ed. 520, affirming judgment *McAdow v. Kansas City Western Ry. Co.*, 164 S. W. 188.

Whether two years' limitation prescribed by Employers' Liability Act was disregarded by permitting amendment to the complaint is a federal question subject to re-examination by writ of error.—*Seaboard Air Line Ry. v. Renn*, 36 S. Ct. 567, 241 U. S. 290, 60 L. Ed. 1006, affirming judgment (*N. C.*) *Renn v. Seaboard Air Line Ry.*, 86 S. E. 964.

—395. — Right of review, and parties.

See 13 Cent. Dig. Courts, §§ 1073, 1079.

Persons entitled to review, see Appeal and Error, —141.

Under Rev. St. § 709, allowing decisions of state supreme courts to be reviewed by the supreme court of the United States in cases where a title, right, privilege, or immunity is claimed under a statute of the United States, and the decision of the state court is against that right, title, privilege, or immunity, plaintiff cannot bring a writ of error to review a decision of a state court in favor of defendant, who claims a right under a statute of the United States.—*State of Missouri v. Andriano*, 138 U. S. 496, 11 S. Ct. 385, 34 L. Ed. 1012, affirming judgment 92 Mo. 70, 4 S. W. 263.

Where a suit brought against a federal railroad receiver and the railroad company results in a judgment against the company and in favor of the receiver, a writ of error by the company to the United States supreme court cannot be maintained on the ground that an immunity claimed under the authority of the receiver was denied; for the immunity must be one of the plaintiff in error, and not of a third person.—*Texas & P. Ry. Co. v. Johnson*, 151 U. S. 81, 14 S. Ct. 250, 38 L. Ed. 81.

To give the supreme court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only; and the statute or authority must be directly, and not collaterally, in issue.—*Conde v. York*, 18 S. Ct. 234, 168 U. S. 642, 42 L. Ed. 611.

A stranger to a contract cannot raise the question of its impairment for the purpose of creating a federal question to give jurisdiction on writ of error from the supreme court of the United States to a state court.—*Phinney v. Trustees of Sheppard & Enoch Pratt Hospital*, 20 S. Ct. 573, 177 U. S. 170, 44 L. Ed. 720.

A decision of a state court in favor of a right or privilege claimed by a party under an act of congress will not be reviewed in the supreme court of the United States at the instance of the adverse party, who made no claim under that statute.—*De Lamar's Nevada Gold-Min. Co. v. Nesbitt*, 20 S. Ct. 715, 177 U. S. 523, 44 L. Ed. 872.

In order to be heard in the supreme court of the United States on writ of error to a state

court on a question as to a right to share in the distribution of a fund, the party who seeks to raise the question must have raised it in the state court, and cannot avail himself of the fact that some one else has raised it there, if he failed to do so.—*Sully v. American Nat. Bank*, 20 S. Ct. 935, 178 U. S. 289, 44 L. Ed. 1072.

The jurisdiction of the supreme court of the United States to review a decision of a circuit court under Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], on the ground that the constitution or law of the state is claimed to be in contravention of the constitution of the United States, is not limited to a case in which the constitutional question is raised by the plaintiff, but extends to every case in which either party claims that the state law is in contravention of the federal constitution, and that claim is either sustained or rejected, if the unsuccessful party seeks to have the decision reviewed by the supreme court. Judgment (C. C.) 91 F. 37, reversed.—*Loeb v. Trustees of Columbia Tp.*, 21 S. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

The objection that persons may be deprived of their rights without due process of law under the Massachusetts Torrens act for land registration, because it provides for adjudicating the rights of certain classes of persons who are notified only by posting notices, registered letters, or publication, and for the registration of dealings with the land after the original registration, cannot be raised, so as to give jurisdiction on writ of error to the supreme court of the United States, by a person who is not affected by these provisions of the act because he has the requisite notice.—*Tyler v. Judges of Court of Registration*, 21 S. Ct. 206, 179 U. S. 405, 45 L. Ed. 252, dismissing writ of error 55 N. E. 812, 175 Mass. 71, 51 L. R. A. 433.

A case involving a constitutional question as to the impairment of the obligation of a contract, on writ of error to a state court, will not be dismissed by the supreme court of the United States on the ground that the constitutional question was raised only by certain public boards which had not the capacity to raise the question, when the state court has held that such boards have a fiduciary capacity to present the constitutional question, since this is a matter of local law on which the state decision will be accepted. Judgment, *State ex rel. Wilder v. Board of Liquidation of City Debt*, 26 So. 679, 51 La. Ann. 1849, affirmed.—*Board of Liquidation of City Debt v. State of Louisiana*, 21 S. Ct. 263, 179 U. S. 622, 45 L. Ed. 347.

A taxpayer who admits that his own tax is correct cannot, on the ground that he will be deprived of his property without due process of law, and denied the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States, have a writ of error from the United States Supreme Court to review a construction by the Supreme Court of the state of the statutes thereof, as exempting in whole or in part certain corporations from the payment of taxes.—*State of Missouri v. Dockery*, 24 S. Ct. 53, 191 U. S. 165, 48 L. Ed. 133, 63 L. R. A. 571.

A decree of the Wisconsin Supreme Court, dismissing a petition in the name of the state by a private citizen asking that court, in the exercise of its original jurisdiction under Const. Wis. art. 7, § 3, to enjoin certain state officers from enforcing the state income tax law, cannot without consent of the state be brought to the federal Supreme Court by writ of error.—*State of Wisconsin ex rel. Bolens v. Frear*, 34 S. Ct. 272, 231 U. S. 616, 58 L. Ed. 400, dismissing writ of error, 134 N. W. 673, 143 Wis. 456.

—396. — Time and manner of raising federal question in state court.

See 12 Cent. Dig. Courts, § 1080.

The assertion of a federal question after judgment of the highest court of the state on an application to it for a rehearing comes too late to justify the interposition of the United States supreme court.—*Susquehanna Boom Co. v. West Branch Boom Co.*, 110 U. S. 57, 3 S. Ct. 438, 28 L. Ed. 69; *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 137 U. S. 48, 11 S. Ct. 10, 34 L. Ed. 614, affirming judgment 6 So. 888, 41 La. Ann. 970, 17 Am. St. Rep. 445; *Bushnell v. Crooke Mining & Smelting Co.*, 148 U. S. 682, 13 S. Ct. 771, 37 L. Ed. 610; *Loeber v. Schroeder*, 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856; *Sayward v. Denny*, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941; *Pim v. City of St. Louis*, 17 S. Ct. 322, 165 U. S. 273, 41 L. Ed. 714; *Capital Nat. Bank of Lincoln, Neb. v. First Nat. Bank of Cadiz, Ohio*, 19 S. Ct. 202, 172 U. S. 425, 43 L. Ed. 502, affirming judgment 69 N. W. 1151, 49 Neb. 795; *Miller v. Cornwall R. Co.*, 18 S. Ct. 34, 168 U. S. 131, 42 L. Ed. 409; *Turner v. Richardson*, 21 S. Ct. 295, 180 U. S. 87, 45 L. Ed. 438, affirming judgment *Richardson v. Turner*, 28 So. 158, 52 La. Ann. 1613; *Weber v. Rogan*, 23 S. Ct. 263, 188 U. S. 10, 47 L. Ed. 363; *Barrington v. State of Missouri*, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890, dismissing writ of error *State v. Barrington*, 95 S. W. 235, 198 Mo. 23.

Where it does not appear in any part of the record that any federal question was actually presented for consideration, or in any way relied on, in the state court, before the final judgment from which the writ of error has been taken, the fact that, after the final judgment and in the petition for a writ of error, a federal question was presented, will not give the supreme court jurisdiction, and the writ will be dismissed.—*Board of Sup'rs of Santa Cruz County v. Santa Cruz R. Co.*, 111 U. S. 361, 4 S. Ct. 474, 28 L. Ed. 456; *Simmerman v. State of Nebraska*, 116 U. S. 54, 6 S. Ct. 333, 29 L. Ed. 535; *Calhoun v. Lanoux*, 127 U. S. 634, 8 S. Ct. 1345, 32 L. Ed. 297.

That a federal question was involved does not appear from the record, in an action against a mutual benefit association for forfeiture of its charter, showing that a motion for a new trial, which was overruled, was made on the ground that the statute under which the action was brought was unconstitutional, it not appearing whether the constitution of the United States or of the state was intended.—*Endowment & Benevolent Ass'n v. Kansas*, 120 U. S. 103, 7 S. Ct. 499, 30 L. Ed. 593.

A judgment of a state court cannot be reviewed on writ of error as a decision against a right under the constitution of the United States, unless the record shows that such right was set up in the trial court.—*Chappell v. Bradshaw*, 128 U. S. 132, 9 S. Ct. 40, 32 L. Ed. 369; *Miller v. State of Texas*, 153 U. S. 535, 14 S. Ct. 874, 38 L. Ed. 812; *Morrison v. Watson*, 154 U. S. 111, 14 S. Ct. 995, 38 L. Ed. 927; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 540, 16 S. Ct. 88, 40 L. Ed. 252; *Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 16 S. Ct. 417, 40 L. Ed. 568.

An objection to the form of the oath of the jury not having been taken at the trial, nor on motion for new trial, nor on motion in arrest, and the supreme court of the state, before which it was first raised, having for that reason refused to consider it, the objection cannot be considered by the United States supreme court on writ of error; *Rev. St. § 709*, providing for review of a decision against any right, etc., "specially set up or claimed" under the United

States constitution.—*Baldwin v. State of Kansas*, 129 U. S. 52, 9 S. Ct. 193, 32 L. Ed. 640.

The supreme court of the United States will not retain a case for the purpose of deciding whether or not *Seas. Laws Colo.* 1889, p. 444, appointing a supreme court commission, empowered to hear and decide causes, subject to the approval of the state supreme court, is in violation of Const. Amend. 14, providing that no person shall be deprived of life, liberty, or property without due process of law, where plaintiffs in error acquiesced in the hearing of the cause by the commission, participated in the argument before that body, petitioned the supreme court for a rehearing, and did not moot the unconstitutionality of the act until after the final judgment of the supreme court had been announced, and the petition for rehearing overruled.—*Butler v. Gage*, 138 U. S. 52, 11 S. Ct. 235, 34 L. Ed. 869.

Where, on proceedings in error to review the judgment of a state court upholding the validity of a statute alleged to impair the obligation of a contract, it appears that neither the pleadings in the trial court, the assignment of errors, nor the opinion of the supreme court contain any reference to the federal question, there is color for a motion to dismiss, though two days after the entry of the decree affirming the trial court it was so modified as to show that appellants presented such federal question, and that the decision was adverse to their contention.—*East Tennessee, V. & G. Ry. Co. v. Frazier*, 139 U. S. 288, 11 S. Ct. 517, 35 L. Ed. 196, affirming *Frazier v. East Tennessee, V. & G. Ry. Co.*, 88 Tenn. 138, 12 S. W. 537.

When from the pleadings and record it is apparent that a state supreme court could not have reached the decision announced except by disposing of a federal question, the supreme court of the United States will review such question, although it was not put in issue by the pleadings nor directly passed upon in the opinion.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

Under a complaint charging that defendant did "at divers times" sell intoxicating liquor, he was arrested, tried, and convicted of 307 separate offenses, under the Vermont liquor law (*R. L.* 1880, c. 169, §§ 3800, 3802). *Held*, that defendant, by failing to object at the trial that there was a defect or want of fullness in the complaint, waived such point, and that it was not available on error to the supreme court as involving a federal question, being a matter of state practice only.—*O'Neil v. Vermont*, 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450.

The court of appeals of Maryland affirmed a judgment which was rendered in favor of plaintiff on a different contract from that set up in his pleadings, holding that, as no exceptions were filed below to the evidence proving the contract, the court was bound, under the statute (*Code Pub. Gen. Laws Md.* art. 5, § 34), to consider such evidence, and render judgment without regard to the variance. The court accordingly ordered the issuance of execution. In the court below, defendant moved to quash this writ on the ground—then for the first time urged—that it would deprive him of his property without due process of law, contrary to the provisions of the constitution of the United States. The motion was overruled, and this action was affirmed by the court of appeals, from which a writ of error was taken to the United States supreme court. *Held*, that the attempt to raise a federal question came too late, as it should have been raised in the court of appeals before the rendition of judgment.—*Loeber v. Schroeder*, 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856.

After the amendment of 1890 to the constitution of Missouri, providing for the separa-

tion of the supreme court of the state into two divisions for the transaction of business, and for the transfer of any cause involving a federal question to the full court for decision, a conviction for a murder, committed before such amendment, was affirmed by one division of the court, and an application to it for a rehearing was denied, no reference to any federal question being made. Thereafter defendant moved for a transfer to the full court, on the ground that the amendment, as applied to an offense committed before its adoption, violated the constitution of the United States. *Held*, that the constitutional right was not specially set up or claimed at such time, and in such way as to give jurisdiction to the supreme court of the United States to review a denial of the motion.—*Duncan v. State of Missouri*, 152 U. S. 377, 14 S. Ct. 570, 38 L. Ed. 485.

Error will not lie to a state court, unless a federal question was actually raised and decided, or necessarily involved in its judgment. It is not enough that a federal question might have been raised.—*Hagar v. People of State of California*, 154 U. S. 639, 14 S. Ct. 1186, 24 L. Ed. 1044.

Upon an application for a writ of error to review the judgment of a state supreme court affirming a sentence for murder, it appeared that the prisoner, in his motion for a new trial, alleged that: "The verdict of the jury is not such a verdict as is contemplated by the constitution of the United States or the constitution of the state of New York. The only verdict recognized thereunder is that of a jury of twelve men of sound mind and memory, which this verdict is not." *Held*, that this fell far short of that specific assertion of a right, privilege, or immunity under the constitution, at the proper time, and in the proper way, upon the denial of which the supreme court is entitled to review the judgment of a state supreme court.—*In re Buchanan*, 158 U. S. 31, 15 S. Ct. 723, 39 L. Ed. 884.

The United States supreme court has no jurisdiction on error to a state supreme court, unless the question falling within the federal jurisdiction is raised before final judgment by the state court of last resort.—*Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 540, 16 S. Ct. 88, 40 L. Ed. 252.

Alleged errors of a state court in refusing to postpone the trial of a criminal case, or to quash the venire and panel of jurors, or to sustain exceptions to the qualifications of jurors, are not reviewable by the supreme court of the United States, where such motions are not so presented by the record as to raise any question of the denial of rights claimed under the constitution and laws of the United States.—*Smith v. State of Mississippi*, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082.

The assignment of errors in the Supreme Court cannot raise a federal question, but such review is confined to the assignments of error made and passed on in the judgment brought up for review.—*Cornell v. Green*, 163 U. S. 75, 16 S. Ct. 969, 41 L. Ed. 76; *Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 227, 212 U. S. 112, 53 L. Ed. 431; *Mallors v. Commercial Loan & Trust Co.*, 30 S. Ct. 438, 216 U. S. 613, 54 L. Ed. 638; *Cleveland & P. R. Co. v. City of Cleveland*, 35 S. Ct. 21, 235 U. S. 50, 59 L. Ed. 127, dismissing writ of error 102 N. E. 1122, 87 Ohio St. 469.

Where a party to an action in a state court specially claims a right under the constitution or laws of the United States, the decision of the state court as to the sufficiency of the allegations to present such claim is not conclusive upon the federal supreme court.—*Covington & L. Turnpike Road Co. v. Sandford*, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

A general statement that the judgment violates the federal constitution, or the rights of

the party thereunder, or that it is without due process of law, will not raise a federal question, even though the judgment be a final one, reviewable by the federal supreme court on writ of error, under Rev. St. U. S. § 709, especially where such statement appears only in the specifications of error.—*Clarke v. McDade*, 17 S. Ct. 284, 165 U. S. 168, 41 L. Ed. 673.

In condemnation proceedings, where no answer is required, a federal right is sufficiently claimed if set up in a written motion for new trial; and the overruling of such motion is a denial of the right, so as to render a judgment of the state supreme court affirming the judgment below reviewable on error in the federal supreme court.—*Chicago, B. & Q. R. Co. v. City of Chicago*, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

The general claim that a decree sought to be declared void was passed against some persons who were at the time dead, and against others who, though necessary parties, had no notice of the proceedings, does not, within the meaning of Rev. St. § 709, fixing the revisory power of the supreme court as to judgments of state courts, "specially set up" a right or immunity under the fourteenth amendment, forbidding a state to deprive one of property without due process of law; it not appearing that the supreme court of the state regarded these general allegations as asserting such federal right.—*F. G. Oxley Stave Co. v. Butler County*, 17 S. Ct. 709, 166 U. S. 648, 41 L. Ed. 1149.

Where an "agreed case" in a state trial court presented no issue as to the validity of a state statute, but simply the question of its construction, and only the question of construction was considered by the highest court of the state on appeal, the supreme court cannot take jurisdiction upon the ground that the statute, as construed by that court, impairs the obligation of a contract, and denies the equal protection of the laws. The mere fact that there was a motion to set aside the judgment of an intermediate appellate court, on the ground that it had no jurisdiction, because the validity of the statute under the constitution of the United States was involved, which motion was denied, was not a sufficiently definite tender of the constitutional question.—*Louisville & N. R. Co. v. City of Louisville*, 17 S. Ct. 725, 166 U. S. 709, 41 L. Ed. 1173.

A decision of a state supreme court, refusing a writ of prohibition to prevent the enforcement of a state statute, is not reviewable on error in the federal supreme court, where the only grounds upon which the writ was sought in the state court were that the statute in question violated certain provisions of the state constitution, and no claim was then made that it violated the federal constitution, or that its enforcement affected any right secured to the petitioner thereby.—*Levy v. Superior Court of City and County of San Francisco*, 17 S. Ct. 769, 167 U. S. 175, 42 L. Ed. 128.

Objections taken in a state court of Pennsylvania to the validity of a state statute, on the grounds that it is "unconstitutional and void," that it operated to deprive the party of "inherent, indefeasible rights guaranteed to all citizens by the constitution," and that the remedy provided by the statute was not a remedy "by the due course of law," are presumptively directed to the provisions in the state constitution upon these subjects, and, in the absence of anything more, are not sufficient to show that a right was claimed under the constitution of the United States.—*Miller v. Cornwall R. Co.*, 18 S. Ct. 34, 168 U. S. 131, 42 L. Ed. 409.

Where no federal question was raised or considered on an appeal to the supreme court of a state, and a decision was rendered which determined the rights of the parties, the case being remanded for an accounting, the fact that

on a second appeal a party insisted that a federal question was involved, which claim the court refused to consider on the ground that it had been waived by a failure to present it on the former hearing, does not give the United States supreme court jurisdiction to review such decision.—*Union Mut. Life Ins. Co. v. Kirchoff*, 18 S. Ct. 260, 169 U. S. 103, 42 L. Ed. 677.

The mere fact that a defendant in a state court pleads a purchase of realty at foreclosure sale, under a decree of a federal court, as his source of title, does not constitute a special setting up or claiming of a right or title under authority exercised by the United States, such as will give the supreme court jurisdiction to review the decision of the state court, under Rev. St. § 709.—*Id.*

The mere averment, in an action in a state court, that a statute of Illinois was unconstitutional and void, must be taken as referring to the constitution of that state, and not as setting up a claim of conflict with the constitution of the United States, so as to invoke the jurisdiction of the supreme court.—*Kipley v. People of Illinois*, 18 S. Ct. 550, 170 U. S. 182, 42 L. Ed. 998.

A cross complaint by a canal company, in a suit in a state court, setting up and claiming a right to a water power on the ground that it was created by a dam, canal, and other improvements owned and operated by the United States, and that the canal company's right and title to the water power so created arose under and by virtue of certain alleged and recited acts of congress, and especially by virtue of an alleged contract between the United States and the canal company whereby the use of the surplus water, not needed for purposes of navigation, was granted and reserved to the canal company, "specially set up and claimed" federal rights, within Rev. St. § 709; and a final judgment of the state courts denying such rights is reviewable by the supreme court.—*Green Bay & M. Canal Co. v. Patten Paper Co.*, 19 S. Ct. 97, 172 U. S. 58, 43 L. Ed. 364.

It is not essential to the jurisdiction of the supreme court to review a decision of a state court, on the ground that it involves a right claimed under the constitution or laws of the United States, that such claim should have been set up in the original pleadings, where it was subsequently made and expressly passed on by the trial court on a motion to set aside a former ruling, and was again made by a petition in error to the supreme court of the state, and was passed on by that court.—*Meyer v. City of Richmond*, 19 S. Ct. 106, 172 U. S. 82, 43 L. Ed. 374.

An allegation by a party in his petition that he is a resident of a certain state, in which his business is conducted, will be held a sufficient allegation that he is a citizen of such state, on writ of error in the supreme court of the United States to review a decision of a state court, as denying to the party privileges and immunities secured to citizens of each state, where the question was not raised in the state court.—*Blake v. McClung*, 19 S. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

Where the record discloses no federal right asserted in terms, and no such right in issue and necessarily determined, in the state court, the ground assigned on a motion for a new trial that the judgment is "contrary to law" cannot be construed as having a single meaning, and distinctly referring to the denial of such a right, so as to authorize a review of the judgment by the United States supreme court on writ of error as provided by Rev. St. U. S. § 709. Judgment 69 N. W. 1151, 49 Neb. 795, affirmed.—*Capital Nat. Bank of Lincoln, Neb., v. First Nat. Bank of Cadiz, Ohio*, 19 S. Ct. 202, 172 U. S. 425, 43 L. Ed. 502.

An answer in a suit in a state court to foreclose a lien created by a reassessment, alleging that the notice of reassessment was insufficient, and that by reason thereof defendant's property was sought to be taken without due process of law, and in conflict with the terms of the fourteenth amendment, raises a federal question, so as to give the supreme court jurisdiction. Judgment, City of New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 137, 47 P. 237, affirmed.—Bellingham Bay & B. C. R. Co. v. City of New Whatcom, 19 S. Ct. 205, 172 U. S. 314, 43 L. Ed. 460.

Rev. St. § 709, does not require a federal right to be "specially set up and claimed," to authorize the supreme court to review a state decision in a case in which there was drawn in question the validity of a state statute, on the ground that it impaired the obligation of a contract, and the decision was in favor of its validity. Decree 20 S. E. 1002, 43 S. C. 154, affirmed.—Columbia Water-Power Co. v. Columbia Electric Street-Railway, Light & Power Co., 19 S. Ct. 247, 172 U. S. 475, 43 L. Ed. 521.

While no particular form of words is necessary to raise a federal question, which may be reviewed by the supreme court, yet there must be something in the record before the state court which at least would call its attention to the federal question as one relied on by the party, and then if the decision of the state court, while not noticing the question, was such that the judgment, in its necessary effect, was a denial of the right claimed or referred to, this is sufficient. Judgment 70 N. W. 605, 101 Iowa, 416, reversed.—Dewey v. City of Des Moines, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

Federal questions not raised in the court below cannot be reviewed in the federal Supreme Court on writ of error to a state court.—Citizens' Sav. Bank v. City of Owensboro, 19 S. Ct. 530, 173 U. S. 636, 43 L. Ed. 840; Cincinnati, N. O. & T. P. Ry. Co. v. Slade, 30 S. Ct. 230, 216 U. S. 78, 54 L. Ed. 390; Selover, Bates & Co. v. Walsh, 33 S. Ct. 69, 226 U. S. 112, 57 L. Ed. 146, affirming judgment Walsh v. Selover, Bates & Co., 123 N. W. 291, 109 Minn. 136.

Failure to raise a federal question until after a case has been finally decided in the highest court of a state will preclude a writ of error to review that decision from the supreme court of the United States.—Scudder v. Coler, 20 S. Ct. 26, 175 U. S. 32, 44 L. Ed. 62.

A federal question not specially set up or claimed in a state court cannot be considered on writ of error from the supreme court of the United States to the state court merely because another federal question, not connected with it, was raised in the state court. Judgment 52 N. E. 117, 176 Ill. 267, affirmed.—Keokuk & H. Bridge Co. v. People of State of Illinois, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299.

A question raised in the supreme court of a state, and there decided, not on the ground that it was not raised in the lower court, but on its merits, is not raised too late for the purpose of review on writ of error from the supreme court of the United States.—Sully v. American Nat. Bank, 20 S. Ct. 935, 178 U. S. 289, 44 L. Ed. 1072.

The citizenship of a party who claims that his constitutional rights as a citizen have been infringed by the decision of a state court sufficiently appears, for the purpose of a review by the supreme court of the United States, when he is described in the pleadings as a "resident" of a certain state and city, and no question as to his citizenship seems to have been made throughout the litigation.—Id.

A constitutional question, which will give jurisdiction to the supreme court of the United States on writ of error to a state court, is not

raised by a contention in the state court that the state law in question violates the fifth and seventh amendments of the federal constitution, and a contention, made in the assignment of errors in the supreme court of the United States, that the law violates the fourteenth amendment, since the constitutional question must be raised in the state court, and the reference to the fifth and seventh amendments is insufficient for that purpose, because those amendments have no application to the powers of the state.—Chapin v. Fye, 21 S. Ct. 71, 179 U. S. 127, 45 L. Ed. 119.

A decision by a state court sustaining a defense in an action for breach of contract, to the effect that the contract was in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], does not entitle the plaintiff to a writ of error from the supreme court of the United States, under Rev. St. § 709 [U. S. Comp. St. 1901, p. 574], unless he set up some claim under the federal statute which was denied by the state court.—Kizer v. Texarkana & Ft. S. Ry. Co., 21 S. Ct. 100, 179 U. S. 199, 45 L. Ed. 152, dismissing writ of error 50 S. W. 871, 66 Ark. 348.

A federal question as to the impairment of the obligation of a contract was sufficiently raised in a state court for the purpose of a writ of error from the supreme court of the United States, although the contract clause of the federal constitution was not discussed, where the case turned upon the existence of such a contract, and no question seems to have been made that, if there had been a contract, it was impaired by the state legislation. Judgment 28 So. 956, 77 Miss. 194, affirmed.—Yazoo & M. V. R. Co. v. Adams, 21 S. Ct. 240, 180 U. S. 1, 45 L. Ed. 395, rehearing denied 21 S. Ct. 729, 181 U. S. 580, 45 L. Ed. 1011.

A federal question is not set up in a state court soon enough to sustain a writ of error, from the supreme court of the United States to the state court, when it is not presented until after the case has been decided by the supreme court of the state and remanded to the lower court for new trial, especially when it is raised by new pleas filed without the leave of court, which the state practice requires.—Id.

The contentions that the decision of a state court denies full faith and credit to public acts of another state, and that the obligation of a contract is impaired, and that a party is deprived of his property without due process of law, will not be considered by the supreme court of the United States on writ of error to a state court, where such contentions were not made in the state court until after the case had been remitted to the trial court and application was made for rehearing; and the court will not look into the record to determine whether the existence of such constitutional questions was necessarily involved.—Eastern Building & Loan Ass'n v. Welling, 21 S. C. 531, 181 U. S. 47, 45 L. Ed. 739, dismissing writ of error Welling v. Eastern Building & Loan Ass'n, 34 S. E. 409, 56 S. C. 280.

A statement in a pleading that the other party intended to set up certain rights under certain mining claims, and that these claims were abandoned and forfeited before certain other claims were located, is not sufficient to constitute a definite claim of a right or title under a statute of the United States which will present a federal question on writ of error from the supreme court of the United States to a state court. Writ of error, McCarthy v. Speed, 80 N. W. 135, 12 S. D. 7, 50 L. R. A. 190, dismissed.—Speed v. McCarthy, 21 S. Ct. 613, 181 U. S. 269, 45 L. Ed. 855.

Federal questions raised by petition for rehearing after a state court has filed its opinion, but before that has been certified down,

and when that court entertains the petition and proceeds to discuss and decide those questions, are not raised too late for the purpose of a writ of error from the supreme court of the United States. Judgment, *State v. Mallett*, 34 S. E. 651, 125 N. C. 718, affirmed.—*Mallett v. State of North Carolina*, 21 S. Ct. 730, 181 U. S. 589, 45 L. Ed. 1015.

A general statement in the answer to quo warranto proceedings in a state court to forfeit the franchise of a corporation for its violation of a state statute, that the proper remedy is by a criminal prosecution, and that "this proceeding is in violation of the constitution of the United States," is not sufficient to raise a federal question, where no specification is made as to the particular clause of the constitution relied upon, and there is nothing in the record to show that the attention of the state court was directed to that question. Judgment, *State v. Capital City Dairy Co.*, 57 N. E. 62, 62 Ohio St. 350, 57 L. R. A. 181, affirmed.—*Capital City Dairy Co. v. State of Ohio*, 22 S. Ct. 120, 183 U. S. 238, 46 L. Ed. 171.

A federal question is sufficiently raised in a state court for the purpose of review by the supreme court of the United States, although it was not raised in the court to which the writ of error was directed, and which entered the judgment after the case had been passed upon by the supreme court of the state, if the federal question was raised in the supreme court. Judgment 57 N. E. 337, 176 Mass. 48, affirmed.—*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573.

The federal Supreme Court has jurisdiction of a writ of error to the highest state court in a case in which federal questions were first raised by a petition for rehearing, where the court entertained the petition and decided the questions so presented.—*Missouri, K. & T. Ry. Co. v. Elliott*, 22 S. Ct. 446, 184 U. S. 530, 46 L. Ed. 673, reversing judgment *Elliott v. Missouri, K. & T. Ry. Co.* (1899) 77 Mo. App. 652; *Leigh v. Green*, 24 S. Ct. 390, 193 U. S. 79, 48 L. Ed. 623, affirming judgment 90 N. W. 255, 64 Neb. 533, 101 Am. St. Rep. 592; *Sullivan v. State of Texas*, 28 S. Ct. 215, 207 U. S. 416, 52 L. Ed. 274, affirming judgment 95 S. W. 645; *Illinois Cent. R. Co. v. Commonwealth of Kentucky*, 31 S. Ct. 95, 218 U. S. 551, 54 L. Ed. 1147, affirming judgment 108 S. W. 245, 128 Ky. 268; *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 106 S. W. 260, 127 Ky. 667, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law Rep. 857.

The jurisdiction of the supreme court of the United States to re-examine the final judgment of a state court under Rev. St. § 709, cl. 3 [U. S. Comp. St. 1901, p. 575], cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the cause up from such court intended to assert a federal right. Writ of error, *Michigan Sugar Co. v. Auditor General*, 83 N. W. 625, 124 Mich. 674, 56 L. R. A. 320, 83 Am. St. Rep. 354, dismissed.—*Michigan Sugar Co. v. Dix*, 22 S. Ct. 581, 185 U. S. 112, 46 L. Ed. 829.

The final judgment of the highest court of a state is not reviewable in the supreme court of the United States as a decision in favor of the validity of a state statute challenged as repugnant to the federal constitution or as a denial of a right or immunity under such constitution, where such question is not raised or specially set up in the trial court, and the appellate court does nothing more than decline to pass upon the federal question, because it is not raised in the trial court, as required by the

state practice. Writ of error, *Purdy v. Erie R. Co.*, 56 N. E. 508, 162 N. Y. 42, 48 L. R. A. 669, dismissed.—*Erie R. Co. v. Purdy*, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847.

The denial of a motion made in arrest of a judgment of a state court enforcing a state statute, by which motion the invalidity of such statute was specially set up on the ground of its repugnancy to Const. U. S. Amend. art. 14, presents a federal question which gives the supreme court jurisdiction to review the judgment of the highest court of the state affirming such judgment, although such court did not in terms pass upon the federal constitutionality of the law. Judgment 57 N. E. 880, 186 Ill. 134, 56 L. R. A. 266, affirmed.—*Consolidated Coal Co. of St. Louis v. People of State of Illinois*, 22 S. Ct. 616, 185 U. S. 203, 46 L. Ed. 872.

Assuming that the mere raising of a federal question in the brief submitted to a state appellate court is sufficient to invest the supreme court of the United States with jurisdiction of a writ of error to such court, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], it must appear that some provision of the federal, as distinguished from the state, constitution was relied upon; and such provision must be set forth. Writ of error, *In re New York Cent. & H. R. R. Co.*, 63 N. Y. S. 52, 49 App. Div. 281, dismissed.—*New York Cent. & H. R. R. Co. v. City of New York*, 22 S. Ct. 916, 186 U. S. 269, 46 L. Ed. 1158.

A claim that the admission in evidence of the previous testimony of an absent witness was in violation of the fourteenth amendment to the federal constitution was not specially set up at the proper time and in the proper way to confer jurisdiction on the supreme court of the United States to review the judgment of the highest court of a state, by an assignment of error in that court, which was not considered by it presumably because no such question had been raised in the trial court. Appeal, 32 So. 158, 133 Ala. 1, dismissed.—*Jacobi v. State of Alabama*, 23 S. Ct. 48, 187 U. S. 133, 47 L. Ed. 106.

A judgment of a state court cannot be reviewed in the supreme court of the United States on the ground that it denied a right, title, privilege, or immunity secured by the federal constitution, where it does not appear on the face of the record that such right, title, privilege, or immunity was specially set up or claimed in the state court. Writ of error, *In re Home for Incurables*, 59 N. E. 1123, 166 N. Y. 602, dismissed.—*Home for Incurables v. City of New York*, 23 S. Ct. 84, 187 U. S. 155, 47 L. Ed. 117, 63 L. R. A. 329.

An objection raised in the state court, that a state statute is unconstitutional and void, relates only to the power of the state legislature under the state constitution, and raises no federal question which will give the supreme court of the United States jurisdiction to review a judgment of the state court sustaining the validity of the statute. Appeal, *State v. Layton*, 61 S. W. 171, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, dismissed.—*Layton v. State of Missouri*, 23 S. Ct. 137, 187 U. S. 356, 47 L. Ed. 214.

A judgment of a state court upholding a state statute which is claimed to violate the federal constitution is not reviewable in the supreme court of the United States, where the state court declined to pass on the federal question because it was not raised in the trial court as required by the state practice.—Id.

A federal question is raised too late to confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court when asserted for the first time in the petition for the allowance of a writ of error

from the former court.—(*Iowa*) *Johnson v. New York Life Ins. Co.*, 23 S. Ct. 194, 187 U. S. 491, 47 L. Ed. 273, dismissing writ of error 78 N. W. 905, 109 *Iowa*, 708, 50 L. R. A. 99; (*Mo.*) *Wabash R. Co. v. Flannigan*, 24 S. Ct. 224, 192 U. S. 29, 48 L. Ed. 328, dismissing writ of error (*App.*) 75 S. W. 691, 95 *Mo. App.* 477; (*Utah*) *Telluride Power Transmission Co. v. Rio Grande W. Ry. Co.*, 23 S. Ct. 178, 187 U. S. 569, 47 L. Ed. 307, dismissing writ of error *Rio Grande W. Ry. Co. v. Telluride Power Transmission Co.*, 63 P. 995, 23 *Utah*, 22.

The repugnancy of a state statute to the federal constitution cannot be successfully invoked in support of a motion to set aside a judgment as void, where the invalidity of such statute would have been available to defeat the recovery of a valid judgment, if it had been pleaded or otherwise presented in the state court as a defense in the proceedings in the original action. Judgment 64 P. 28, 62 *Kan.* 553, affirmed.—*Manley v. Park*, 23 S. Ct. 208, 187 U. S. 547, 47 L. Ed. 296.

A decision of a state court adverse to a claim under the federal constitution, specially made in a motion to set aside the judgment, raises a federal question, for the purpose of a review in the supreme court of the United States.—*Id.*

An averment in an answer in a suit by a divorced wife on a policy of insurance on her former husband's life, that, by virtue of the Hawaiian laws and the decree of divorce thereunder, all her rights in such policy had passed to and become the property of her husband, is not the special assertion of a right or claim under the treaty with Hawaii, which is essential, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], to confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court adverse to such right or claim. Writ of error, *McGrew v. Mutual Life Ins. Co.*, 64 P. 103, 132 *Cal.* 85, 84 *Am. St. Rep.* 20, dismissed.—*Mutual Life Ins. Co. v. McGrew*, 23 S. Ct. 375, 188 U. S. 291, 47 L. Ed. 480, 63 L. R. A. 33.

A federal question, first raised in a petition for rehearing in the highest state court, is raised too late to confer jurisdiction upon the Supreme Court of the United States, where such petition was denied without opinion.—(*Cal.*) *Mutual Life Ins. Co. v. McGrew*, 23 S. Ct. 375, 188 U. S. 291, 47 L. Ed. 480, 63 L. R. A. 33, dismissing writ of error *McGrew v. Mutual Life Ins. Co.*, 64 P. 103, 132 *Cal.* 85, 84 *Am. St. Rep.* 20; (*La.*) *Corkran Oil & Development Co. v. Arnaudet*, 26 S. Ct. 41, 199 U. S. 182, 50 L. Ed. 143, dismissing writ of error 35 *So.* 747, 111 *La.* 563.

A federal right is "specially set up or claimed in a state court," within the meaning of Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], so as to confer jurisdiction on the Supreme Court of the United States of a writ of error to such court, where a claim of such right sufficiently appears in a motion for new trial and in the assignments of error in the state supreme court, and was fully considered in the opinion of that court, whose decision was adverse to such claim. Decree 62 P. 269, 129 *Cal.* 673, affirmed.—*San Jose Land & Water Co. v. San Jose Ranch Co.*, 23 S. Ct. 487, 189 U. S. 177, 47 L. Ed. 765.

A federal question was not set up too late to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court, where it was raised by the assignments of error in the state supreme court, and was considered and decided by a commission appointed to aid that court in the discharge of its duties, and the judgment of such commission was, for the reasons stated in its report, affirmed by the state supreme court. Judgment, *Farmers' & Merchants' Ins. Co. v. Dabney*, 86

N. W. 1070, 62 *Neb.* 213, 97 *Am. St. Rep.* 624, affirmed.—*Farmers' & Merchants' Ins. Co. v. Dobney*, 23 S. Ct. 565, 189 U. S. 301, 47 L. Ed. 821.

A writ of error from the Supreme Court of the United States to a state court will be dismissed for want of jurisdiction, where no claim of federal right was specially set up or called to the attention of the state court in any way. Writ of error 62 N. E. 1098, 169 N. Y. 584, dismissed.—*Onondaga Nation v. Thacher*, 23 S. Ct. 636, 189 U. S. 306, 47 L. Ed. 826.

The decision in the opinion of the highest state court, in reviewing a conviction of crime, of questions respecting due process of law, the equal protection of the laws, and cruel and unusual punishment, will not confer jurisdiction on the Supreme Court of the United States of a writ of error to the state court, in the absence of any claim to protection under the federal Constitution made therein. Writ of error, *State v. Howard*, 40 S. E. 71, 129 N. C. 584, dismissed.—*Howard v. Fleming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. Ed. 121.

A federal question is presented in time and in the proper form by requested instructions in a state trial court, asserting rights under the federal Constitution, which, if they actually exist, entitle the party asserting them to an instruction directing a verdict in its favor. Judgment 81 *So.* 840, 80 *Miss.* 407, 57 L. R. A. 793, affirmed.—*National Mut. Building & Loan Ass'n v. Braham*, 24 S. Ct. 532, 193 U. S. 635, 48 L. Ed. 823.

A question which the federal Supreme Court can review on writ of error to a state court does not arise under Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], requiring interstate carriers to equip their cars with automatic couplings, where no right under such act, or dependent upon its construction, was specially set up or claimed, and denied by the state court. Judgment, *Carson v. Southern Ry. Co.* (S. C.) 46 S. E. 525, affirmed.—*Southern Ry. Co. v. Carson*, 24 S. Ct. 609, 194 U. S. 136, 48 L. Ed. 907.

The assertion, on a motion for new trial, that a state statute is contrary to the federal Constitution, without pointing out the provision of that instrument which it is claimed to violate, does not present a federal question which will confer jurisdiction on the federal Supreme Court of a writ of error to a state court. Writ of error 66 N. E. 962, 202 *Ill.* 122, dismissed.—*Harding v. People of State of Illinois*, 25 S. Ct. 176, 196 U. S. 78, 49 L. Ed. 394.

The suggestion of a violation of a federal right, first made in a petition for the review, in the highest state court, of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States, where it does not affirmatively appear that the state court passed upon the federal question, and the denial of the petition may well have been upon the ground that the question, not having been suggested in the court below, could not be made available on appeal. Writ of error 65 N. E. 932, 31 *Ind. App.* 110, 99 *Am. St. Rep.* 249, dismissed.—*Chicago, I. & L. Ry. Co. v. McGuire*, 25 S. Ct. 200, 196 U. S. 128, 49 L. Ed. 413.

The highest court of a state may decline to reopen, on a second appeal, a question of the validity of the service of summons, which it had upheld on the first appeal, without thereby making a case for a writ of error from the Supreme Court of the United States, where the claim that such service was invalid under the federal Constitution was first set up on the second hearing in the trial court. Writ of error, *Abbeville Electric Light & Power Co. v. Western Electrical Supply Co.*, 44 S. E. 952, 66 S. E. 328, dismissed.—*Western Electrical Supply Co. v.*

Abbeville Electric Light & Power Co., 25 S. Ct. 481, 197 U. S. 299, 49 L. Ed. 765.

Assertion in a state court, in a petition for rehearing, of a federal right, is no ground for invoking the appellate jurisdiction of the federal Supreme Court, unless the state court passes on the federal ground relied on.—*McMillen v. Ferrum Min. Co.*, 25 S. Ct. 533, 197 U. S. 343, 49 L. Ed. 784, dismissing writ of error 74 P. 461, 32 Colo. 38, 105 Am. St. Rep. 64; *Bowe v. Scott*, 34 S. Ct. 769, 233 U. S. 658, 58 L. Ed. 1141, dismissing appeal 75 S. E. 123, 113 Va. 499.

A certificate of the highest court of a state to the effect that it necessarily considered the federal question relied upon to sustain a writ of error from the Supreme Court of the United States, which the record shows was raised, removes any objection that such question was raised too late under the local procedure.—*Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 26 S. Ct. 208, 200 U. S. 179, 50 L. Ed. 428.

A showing at every stage of the litigation in the state courts of the intention of a national bank to rely upon the United States banking laws for immunity against liabilities arising out of its ownership of shares in a partnership is sufficient to sustain the appellate jurisdiction of the Supreme Court of the United States, although the bank did not, in the first instance, anticipate the specific and qualified form in which the immunity finally was denied, especially where the highest state court, by a certificate, made part of its record and judgment, stated that the federal question was involved.—*Merchants' Nat. Bank v. Wehrmann*, 26 S. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036.

The mere claim of a right under the Constitution of the United States in the objections filed to the confirmation of an assessment for a public improvement, which was never afterwards brought to the attention of the trial court or the Supreme Court of the state, is not sufficient to sustain a writ of error from the Supreme Court of the United States to the state court. Writ of error 72 N. E. 1097, 213 Ill. 452, dismissed.—*Hulbert v. City of Chicago*, 26 S. Ct. 617, 202 U. S. 275, 50 L. Ed. 1026.

Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned, or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis for a writ of error from the Supreme Court of the United States.—Id.

Statements in the writ of error and the petition for citation are insufficient to show that a federal question was raised and decided by a state court which will sustain a writ of error from the Supreme Court of the United States.—Id.

A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court. Judgment (Tex. Civ. App.) 85 S. W. 34, 37 Tex. Civ. App. 607, affirmed.—*Cox v. State of Texas*, 26 S. Ct. 671, 202 U. S. 446, 50 L. Ed. 1099.

The necessity of invoking the protection of the commerce clause of the federal Constitution, if the repugnancy to that clause of certain state legislation is to be considered by the Supreme Court of the United States on writ of error to a state court, is not obviated by reference to Const. U. S. Amend. 14, as invalidating such legislation.—Id.

The judgment of the Ohio Supreme Court, upholding the validity of the provisions of the

free banking act of March 21, 1851, § 30, as amended April 24, 1879, under which an indictment had been found against the cashier of a bank incorporated under that act, in the face of the objection that such section, by subjecting officers of institutions so incorporated to criminal liability, when officers of other banking institutions guilty of similar acts are not so subjected, denies the equal protection of the laws, cannot be reviewed by the federal Supreme Court, where the failure of the state court to file an opinion leaves it doubtful whether that court may not have held that the words "any banking company," as used in the section in question, embrace all banking institutions in the state, whether incorporated under the free banking act or not.—*Bachtel v. Wilson*, 27 S. Ct. 243, 204 U. S. 36, 51 L. Ed. 357; Id., 27 S. Ct. 246, 204 U. S. 42, 51 L. Ed. 360; *Miller v. Wilson*, Id.; *Davis v. Same*, Id.; *Van Horn v. Same*, Id.

Raising the federal question for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors, is not sufficient to enable the Supreme Court of the United States to consider that question, even though another federal question has been properly raised and brought up by the same writ of error. Judgment (Mont. 1906) 83 P. 874, affirmed.—*State of Montana v. Rice*, 27 S. Ct. 281, 204 U. S. 291, 51 L. Ed. 490.

A right claimed under an authority exercised under the United States will be regarded as "specially set up or claimed," within the meaning of Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], defining the appellate jurisdiction of the Supreme Court of the United States over state courts, where it clearly and unmistakably appears from the opinion of the state court that the federal question was assumed to be in issue, that the decision was against the federal claim, and that the decision of the question was essential to the judgment rendered.—Id.

A claim of immunity from suit in the state court under the laws of the United States is in time to sustain a writ of error from the federal Supreme Court, though first claimed in a petition for rehearing in the state court, if necessarily involved, expressly considered, and decided adversely by such court. Judgment, *Kalyton v. Kalyton* (1903) 74 P. 491, 45 Or. 116, reversed.—*McKay v. Kalyton*, 27 S. Ct. 346, 204 U. S. 458, 51 L. Ed. 566.

A decision of the Michigan Supreme Court, that a foreign mutual insurance company which had not been authorized to do business in the state as provided by the state statutes could not maintain a suit to collect assessments due on a policy issued by one of its agents in another state on request of an insurance broker in Michigan who was unable to place the whole line in his own authorized companies, cannot be reviewed in the Supreme Court of the United States, where the only showing of a federal question raised before judgment is made by a request for a finding as matter of law that the state statutes do not, and could not, under the federal Constitution, prohibit the insured from going or sending outside the state and there procuring insurance on its property located in the state from an insurance company not authorized to do business therein, which is entirely inadequate for the purpose. Writ of error (1906) 103 N. W. 816, 140 Mich. 344, dismissed.—*Swing v. Weston Lumber Co.*, 27 S. Ct. 497, 205 U. S. 275, 51 L. Ed. 799.

The objection that no federal right was "specially set up and claimed" within the meaning of Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], governing the appellate jurisdiction of the federal Supreme Court over state

courts, cannot successfully be maintained, where judicial proceedings in New Jersey were clearly relied upon in New York by executors in an "appeal to the surrogate" as a defense to the assessment of the New York transfer tax, although such right was not in terms stated to be one claimed under the federal Constitution—especially where the constitutional right was specifically claimed in writing while the surrogate still had the "appeal" under consideration, and its denial was made the subject of exceptions. *Order, In re Tilt's Estate* (1905) 75 N. E. 1184, 182 N. Y. 557, reversed.—*Tilt v. Kelsey*, 28 S. Ct. 1, 207 U. S. 43, 52 L. Ed. 95.

The objection that the federal question was not properly and seasonably raised in the state courts is not available to defeat the jurisdiction of the Supreme Court of the United States of a writ of error to the highest court of a state, where it clearly and unmistakably appears from the opinion of that court that the federal question was assumed to be in issue, was decided against the claim of federal right, and that the decision of the question was essential to the judgment rendered. *Judgment, Baltimore & O. R. Co. v. Chambers* (1905) 76 N. E. 91, 73 Ohio St. 16, affirmed.—*Chambers v. Baltimore & O. R. Co.*, 28 S. Ct. 34, 207 U. S. 142, 52 L. Ed. 148.

A federal question entirely outside the record, and having no connection with any federal question which is raised in the record, cannot be considered by the Supreme Court of the United States on writ of error to a state court. *Judgment, In re City of Pittsburgh*, 66 A. 348, 217 Pa. 227; *Appeal of Hunter, Id.*, affirmed.—*Hunter v. City of Pittsburgh*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151.

A contention that certain instructions to the jury in a criminal case in effect deprived the accused of his liberty without due process of law does not, of itself, raise a federal question, under Const. U. S. Amend. 14, with sufficient distinctness to sustain a writ of error from the federal Supreme Court to a state court.—*Thomas v. State of Iowa*, 28 S. Ct. 487, 209 U. S. 258, 52 L. Ed. 782.

Assignments of error which simply allege in various forms that the state court erred in its decision of the cause present no federal question for consideration by the Supreme Court of the United States on a writ of error to the state court.—*Stickney v. Kelsey*, 28 S. Ct. 508, 209 U. S. 419, 52 L. Ed. 863.

A party who insists, by way of objection to or requests for instructions, upon a construction of a federal statute which will lead to a judgment in his favor, sets up a claim of a right or immunity under such statute within the meaning of Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), governing writs of error from the Supreme Court of the United States to state courts. *Judgment, St. Louis, I. M. & S. Ry. Co. v. Neal* (1906) 98 S. W. 958, 83 Ark. 591, reversed.—*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 28 S. Ct. 616, 210 U. S. 281, 52 L. Ed. 1061.

An order of the highest court of a state, on a motion for rehearing, reciting that the cause came on to be heard on such motion, and, "the same being considered by the court, said motion is overruled," does not show that the court passed on the federal question first raised by such petition.—*McCorquodale v. State of Texas*, 29 S. Ct. 146, 211 U. S. 432, 53 L. Ed. 269.

An attempt to assign new errors in a petition for rehearing in a state court which is overruled without an opinion passing on federal questions cannot avail to import such questions into the record.—*Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 227, 212 U. S. 112, 53 L. Ed. 431.

The federal Supreme Court has no jurisdiction of a writ of error to a state court in a case in which the only suggestion that a federal question was involved was put forward after the highest state court had affirmed, on a second appeal, a judgment rendered by the court below in strict obedience to its mandate, compliance with such mandate being, in fact, the only question open to and determined by the highest court.—*Bonner v. Gorman*, 29 S. Ct. 483, 213 U. S. 86, 53 L. Ed. 709.

The refusal by an inferior state court of an application to remove a cause to a federal Circuit Court presents no federal question which will sustain a writ of error under Rev. St. U. S. § 709 (U. S. Comp. St. 1901, p. 575), from the Supreme Court of the United States, to review a judgment of the highest state court, affirming the judgment below, where there is nothing in the record to indicate that the question of the right of removal was brought to the attention of the highest state court, and that court could not have considered the question even if presented, because, at the time the appeal from the final judgment was taken, it was too late to review the order refusing the removal.—*Chesapeake & Ohio Ry. Co. v. McDonald*, 29 S. Ct. 546, 214 U. S. 191, 53 L. Ed. 963.

An assignment of error in a state court which has refused to give effect to a judgment of a circuit court of the United States in deciding a controversy before it, which states the refusal of the trial court to give proper and full credit to the judgment of the circuit court, thereby denying to the complaining party "a right arising under the authority of the United States," does not lack certainty of specification, so as to prevent the Supreme Court of the United States from taking jurisdiction of the cause. *Judgment, Kirven v. Virginia-Carolina Chemical Co.* (1907) 58 S. E. 424, 77 S. C. 493, affirmed.—*Virginia-Carolina Chemical Co. v. Kirven*, 30 S. Ct. 78, 215 U. S. 252, 54 L. Ed. 179.

Objections to the valuation of national bank stock for taxation, as being in excess of the actual value, exorbitant and unjust, and not in proportion to other like personal property, but grossly in excess thereof, and constituting unfair and unequal taxation, do not raise any federal question which will sustain a writ of error from the federal Supreme Court to a state court, where no mention of the national bank act was made, nor of any right or privilege claimed under it, and the provisions of the United States Revised Statutes were not invoked, by name or otherwise, and there was no assertion that the local statutes under which the assessment was made were repugnant to the terms of Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502), or to the federal Constitution.—*First Nat. Bank v. City Council of Estherville*, 30 S. Ct. 152, 215 U. S. 341, 54 L. Ed. 223.

An order of the highest state court, made in passing upon a petition for rehearing, which recites that, "on mature consideration," the prayer of said petition is denied, does not show that the court passed upon the federal questions first raised by such petition, so as to sustain a writ of error from the Supreme Court of the United States.—*Forbes v. State Council of Virginia, Junior Order United American Mechanics of the State of Virginia*, 30 S. Ct. 295, 216 U. S. 396, 54 L. Ed. 534.

The full faith and credit clause of the federal Constitution must be pleaded, or the attention of the court below directed to the fact that, in connection with the proper construction of a statute of another state, reliance was placed upon that clause, in order to present a federal question for review in the federal Supreme Court by writ of error to a state court.—(1910) *Louisville & N. R. Co. v. Melton*, 30 S. Ct. 676, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.)

84, affirming judgment 105 S. W. 366, 127 Ky. 276.

A decree of a state court adverse to the contention that, if the state Constitution confers on one railway company an exemption from a special tax granted in aid of another railway company, it impairs contract obligations, is reviewable in the federal Supreme Court, although the state court rested its decision in part upon the ground that the latter railway company had not acquired all of its contract rights before the adoption of the Constitution.—(1910) *Arkansas Southern Ry. Co. v. Louisiana & A. Ry. Co.*, 31 S. Ct. 56, 218 U. S. 431, 54 L. Ed. 1097, affirming decree *Louisiana & A. Ry. Co. v. Shaw* (1908) 46 So. 994, 121 La. 997.

The contention that an attempt in the state Constitution to limit taxation impairs the obligation of contracts with a municipal school board does not present a case for a writ of error from the federal Supreme Court to review a decree of a state court which refused mandamus to compel the levy of a tax to pay claims and judgments based upon such contracts, which rests mainly on the grounds that the relators were guilty of laches, and that the statute relied upon as authorizing such contracts did not empower the school board to make contracts in such wise as to bind the municipality to levy the tax, neither the Constitution nor any subsequent legislation having been invoked or enforced by the court.—*Fisher v. City of New Orleans*, 31 S. Ct. 57, 218 U. S. 438, 54 L. Ed. 1090.

Whether or not a statute of a sister state alleged to create contract obligations protected against impairment by the contract clause of the federal Constitution has been repealed by subsequent legislation presents no federal question for review on writ of error from the federal Supreme Court to a state court, where there was neither allegation nor proof that the court of last resort in the state where the legislation was enacted had considered the question or made any ruling upon it.—(1911) *Texas & N. O. R. Co. v. Miller*, 31 S. Ct. 534, 221 U. S. 408, 55 L. Ed. 789, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1165; (1911) *Same v. Gross*, 31 S. Ct. 536, 221 U. S. 417, 55 L. Ed. 796, affirming judgment (Tex. Civ. App. 1910) 128 S. W. 1173.

Federal Supreme Court will review by writ of error the decision of state court, refusing habeas corpus to a person charged with practicing medicine without complying with Laws Tex. 1907, c. 123, where the validity of that statute under the federal Constitution appears as plainly as it ever will.—(1912) *Collins v. State of Texas*, 32 S. Ct. 286, 223 U. S. 288, 56 L. Ed. 439, affirming judgment (1909) *Ex parte Collins*, 121 S. W. 501, 57 Tex. Cr. R. 2.

A point not raised in the court below or covered by assignments of error cannot be considered on a writ of error to the state court.—*Rosenthal v. People of the State of New York*, 33 S. Ct. 27, 226 U. S. 260, 57 L. Ed. 212, Ann. Cas. 1914B, 71, affirming judgment *People v. Rosenthal*, 90 N. E. 991, 197 N. Y. 394.

A federal right, privilege, or immunity was not specially set up or claimed within Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), governing writs of error from the federal Supreme Court to a state court, where it was not suggested that defendant in insisting on certain propositions was relying on any right, privilege, or immunity derived from the federal Constitution or laws, and the state courts did not pass upon any such question.—*El Paso & S. W. Ry. Co. v. Eichel & Weikel*, 33 S. Ct. 179, 226 U. S. 590, 57 L. Ed. 369.

The assertion of federal rights in an unsuccessful application to the highest court of a state for writ of error to an intermediate ap-

pellate court raises no question which will sustain a writ of error from the federal Supreme Court to the intermediate state court.—*Id.*

The words "maturely considered," in the judgment entry of the denial without opinion by the highest state court of a petition for rehearing, do not import a decision of the federal question first raised by such petition.—*Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 33 S. Ct. 510, 228 U. S. 326, 57 L. Ed. 857, dismissing writ of error *Norfolk & O. V. R. Co. v. Consolidated Turnpike Co.*, 68 S. E. 346, 111 Va. 131, Ann. Cas. 1912A, 239, rehearing denied 33 S. Ct. 605, 228 U. S. 596, 57 L. Ed. 982.

The question whether the Illinois Supreme Court gave full faith and credit to the construction of an Indiana statute by the Indiana courts is not open for review by writ of error from the federal Supreme Court to the former court, where no settled construction by the Indiana courts was pleaded or proven, and no claim under the full faith and credit clause was set up except by petition for writ of error.—*Chicago, I. & L. R. Co. v. Hackett*, 33 S. Ct. 581, 228 U. S. 559, 57 L. Ed. 966, affirming judgment *Hackett v. Chicago, I. & L. R. Co.*, 170 Ill. App. 140.

An alleged right under the federal statute, not specially set up, cannot be considered by the federal Supreme Court on writ of error to the state court.—*Id.*

Judgment of the Supreme Court of Oklahoma in a case begun in the United States court for the Indian territory is not reviewable in the United States Supreme Court under Rev. St. § 709, on the ground of a deprivation of the right to trial by jury, where the question was not properly raised in the court below.—*Dill v. Ebey*, 33 S. Ct. 620, 229 U. S. 199, 57 L. Ed. 1148, dismissing appeal 112 P. 973, 27 Okl. 584, 46 L. R. A. (N. S.) 440.

An objection by an interstate railway carrier sued for the death of an employé that, if liable at all, it was, under Federal Employers' Liability Act April 22, 1908, liable only to personal representatives of the deceased, was interposed in time, so that it was error to overrule it, where the petition stated a case under the state statute and the carrier suggested that the state statute might not be applicable and made a specific objection under the federal statute after the evidence disclosed that it was controlled by such statute.—*St. Louis, S. F. & T. R. Co. v. Seale*, 33 S. Ct. 651, 229 U. S. 156, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, reversing judgment (Tex. Civ. App.) 148 S. W. 1099.

A federal question will be deemed to have been presented with sufficient clearness to sustain a writ of error to a state court where the latter court has held that the question was raised and decided.—*St. Louis, I. M. & S. R. Co. v. Hesterly*, 33 S. Ct. 703, 228 U. S. 702, 57 L. Ed. 1031, reversing judgment 135 S. W. 874, 98 Ark. 240.

The objection that a carrier sued for the death of an employé was estopped to rely on Federal Employers' Liability Act April 22, 1908, by having pleaded contributory negligence, will not defeat a writ of error to a state court where the latter court held that the federal question was sufficiently raised, and decided it.—*Id.*

Denial by the highest state court of relief by habeas corpus, sought by a convict whose parole has been annulled without notice, cannot be reviewed by the federal Supreme Court, where it can only be conjectured whether the state court entertained views adverse to those of the petitioner on the federal questions presented.—*Adams v. Russell*, 33 S. Ct. 846, 229 U.

S. 353, 57 L. Ed. 1224, dismissing writ of error 135 N. W. 658, 169 Mich. 606.

The state laws and practice applicable to the state appellate courts are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law.—*John v. Paullin*, 34 S. Ct. 178, 231 U. S. 583, 58 L. Ed. 881, dismissing writ of error 104 P. 365, 24 Okl. 636 and 106 P. 838, 24 Okl. 642.

Immunity from liability under the Employers' Liability Act, was sufficiently asserted for the purpose of a writ of error from the federal Supreme Court, whether the question was properly raised in the trial or not, where the immunity was expressly claimed and the highest court of the state decided against the party asserting such right.—*North Carolina R. Co. v. Zachary*, 34 S. Ct. 305, 232 U. S. 248, 58 L. Ed. 591, Ann. Cas. 1914C, 159, reversing judgment *Zachary v. North Carolina R. Co.*, 72 S. E. 858, 156 N. C. 496.

A federal question which a state court proceeds to determine will be regarded by the federal Supreme Court, on a writ of error to the state court, as duly presented.—*Miedreich v. Lauenstein*, 34 S. Ct. 309, 232 U. S. 236, 58 L. Ed. 584, affirming judgments 86 N. E. 963, 172 Ind. 140, and 87 N. E. 1029, 172 Ind. 140.

A decree of the highest state court affirming a decree adjudging a person in contempt is reviewable in the federal Supreme Court, where the state court recognized a federal contention, and by its decision necessarily overruled it.—*Carlson v. State of Washington*, 34 S. Ct. 717, 234 U. S. 103, 58 L. Ed. 1237, affirming judgment 120 P. 104, 66 Wash. 639.

A federal question will not sustain a writ of error to the highest court of the state, where the latter court declined to pass upon it because not appropriately raised below.—*Louisville & N. R. Co. v. Woodford*, 34 S. Ct. 739, 234 U. S. 46, 58 L. Ed. 1202, dismissing appeal 153 S. W. 722, 152 Ky. 398 and 154 S. W. 1063, 153 Ky. 185.

Allegation that a municipal ordinance is void as taking property without due process of law does not raise a federal question, where no reference to the Constitution of the United States is made, and no express rights thereunder are asserted, as the contention will be regarded as referring to the state Constitution containing the due process of law clause.—*Bowe v. Scott*, 34 S. Ct. 769, 233 U. S. 658, 58 L. Ed. 1141, dismissing appeal 75 S. E. 123, 113 Va. 490.

A federal right is raised so as to support a writ of error from the federal Supreme Court to the highest state court, though first asserted in the latter court, where the right was first denied by the decision of the highest state court, and on petition for rehearing it overruled the contention that the petitioner's federal rights were infringed.—*Grannis v. Ordean*, 34 S. Ct. 779, 234 U. S. 385, 58 L. Ed. 1363, affirming judgment *Ordean v. Grannis*, 136 N. W. 575, 1026, 118 Minn. 117.

Federal questions first raised by exceptions to the report of a special commissioner to whom an original proceeding in the highest state court had been referred will support a writ of error from the federal Supreme Court, though the highest state court did not refer to such questions, and though such court has decided that such questions must be raised at the first opportunity.—*International Harvester Co. v. State of Missouri ex inf. Attorney General*, 34 S. Ct. 859, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, affirming judgment *State ex inf. Mayor v. International Harvester Co. of America*, 141 S. W. 672, 237 Mo. 360.

Federal questions first raised by amended answers after the case had been remanded by the highest state court to the trial court will support the appellate jurisdiction of the federal Supreme Court of a writ of error to review a judgment which affirmed the refusal of the trial court to permit the filing of such answers where the state court ruled concerning the federal aspect of the answers.—*Louisville & N. R. Co. v. Higdon*, 34 S. Ct. 948, 234 U. S. 592, 58 L. Ed. 1484, affirming judgment 148 S. W. 28, 149 Ky. 321.

The objection that an assessment for the widening of a street was imposed by judicial fiat and without warrant of law, not being taken at the trial, was not open in the highest state court, is not a basis for writ of error to that court from the federal Supreme Court.—*Willoughby v. City of Chicago*, 35 S. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error *City of Chicago v. Willoughby*, 94 N. E. 513, 249 Ill. 249.

Failure to raise in state courts federal questions on rulings that certain state statutes of limitations barred the relief sought defeats appellate jurisdiction of the federal Supreme Court, where limitations were in express terms stated in the demurrer to bill, sustained by the trial court.—*Olympia Min. & Mill. Co. v. Kerna*, 35 S. Ct. 415, 236 U. S. 211, 59 L. Ed. 542, dismissing appeal 135 P. 255, 24 Idaho, 481.

Federal question calling for intervention by Interstate Commerce Commission held not raised in a suit by a shipper in a state court to recover from an interstate carrier damages from failure to furnish cars.—*Eastern Ry. Co. of New Mexico v. Littlefield*, 35 S. Ct. 489, 237 U. S. 140, 59 L. Ed. 878, dismissing appeal (Tex.) 154 S. W. 543.

Question sustaining appellate jurisdiction of federal Supreme Court over state court held not involved in rulings in suit by an elevator company to recover reasonable compensation from a carrier for services in handling grain, excluding evidence offered by the carrier on the ground that further payment would be contrary to the Interstate Commerce Act.—*Pennsylvania R. Co. v. Keystone Elevator & Warehouse Co.*, 35 S. Ct. 644, 237 U. S. 432, 59 L. Ed. 1035, dismissing appeal *Keystone Elevator & Warehouse Co. v. Pennsylvania R. Co.*, 92 A. 340, 246 Pa. 336.

Federal question held raised in state court within Judicial Code, § 237, where from opinion of state Supreme Court it appears that question of equal protection of the laws, under Const. U. S. Amend. 14, was treated as raised and ruled on.—*Mallinckrodt Chemical Works v. State of Missouri ex rel. Jones*, 35 S. Ct. 671, 238 U. S. 41, 59 L. Ed. 1192, affirming judgment *State ex rel. Jones v. Mallinckrodt Chemical Works*, 156 S. W. 967, 249 Mo. 702.

A question, under the full faith and credit clause of the federal Constitution, as to the law of another state, held sufficiently raised to support a writ of error to review a judgment of a New York court holding that the law of New York governs the rights of a Massachusetts benefit society where a Massachusetts judgment construing the charter was expressly pleaded.—*Supreme Council of the Royal Arcanum v. Green*, 35 S. Ct. 724, 237 U. S. 531, 59 L. Ed. 1089, L. R. A. 1916A, 771, reversing decrees *Green v. Supreme Council of Royal Arcanum*, 129 N. Y. S. 791, 144 App. Div. 761, and *Id.*, 100 N. E. 411, 206 N. Y. 591.

A federal question not raised in the trial court nor on appeal will not be considered on writ of error to the highest state court.—*Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 35 S. Ct. 760, 238 U. S. 275, 59 L. Ed. 1306, affirming judgment *Mulberry Hill Coal Co. v. Illinois Cent. R. Co.*, 100 N. E. 151, 257 Ill. 80.

No question under the laws of the United States reviewable by writ of error to a state court may be based on fact that applicability of Employers' Liability Act first appeared by an amendment to declaration which failed to allege originally that plaintiff was injured on an interstate trip.—*Kansas City Western Ry. Co. v. McA Dow*, 36 S. Ct. 252, 240 U. S. 51, 60 L. Ed. 520, affirming judgment *McA Dow v. Kansas City Western Ry. Co.*, 164 S. W. 188.

A federal question first set up in petition for rehearing, after judgment of the trial court had been affirmed by the state court, will not support jurisdiction of federal Supreme Court on writ of error, where petition was dismissed.—*St. Louis & S. F. R. Co. v. Shepherd*, 36 S. Ct. 274, 240 U. S. 240, 60 L. Ed. 622, dismissing appeal *Same v. Shepard*, 139 P. 833, 40 Okl. 589.

The question whether proper effect was given to Interstate Commerce Act, and its amendments, in interpreting bill of lading for interstate shipment, requiring notice of claims to be given to carrier's officers as excluding officers of connecting carriers, *held* fairly presented so as to sustain writ of error from federal Supreme Court.—*Northern Pac. Ry. Co. v. Wall*, 36 S. Ct. 493, 241 U. S. 87, 60 L. Ed. 905, reversing judgment *Wall v. Northern Pac. Ry. Co.*, 145 P. 291, 50 Mont. 122.

◀—397. — Writ of error and proceedings thereon.

See 13 Cent. Dig. Courts, §§ 1081-1084.

On motion to dismiss a writ of error to a state court, on the ground that no federal question is involved, made before the record is printed, the supreme court can look only to the briefs of counsel; and if the assignment of errors, as there printed, presents a federal question, the motion will be denied.—*Crane Iron Co. v. Hoagland*, 108 U. S. 5, 1 S. Ct. 17, 27 L. Ed. 630.

The practice, under Sup. Ct. Rule 6, § 5, making it permissible to unite with a motion to dismiss a writ of error a motion to affirm the judgment, is to grant the motion to affirm, although the record may show that the court has jurisdiction, if the question on which the jurisdiction depends is so manifestly rightly decided that the case ought not to be held for further argument. *Held* a proper practice to adopt upon motions in open court for the allowance of a writ of error.—*Spies*, *Ex parte*, 123 U. S. 131, 8 S. Ct. 21, 31 L. Ed. 80.

A writ of error from the United States supreme court ought not to be allowed if it appears upon the face of the record that the decision of the federal question complained of is so plainly right as not to require argument, especially if such decision is in accordance with the court's well-considered judgments in former cases.—*Id.*

A prisoner was convicted in a state court of murder in the first degree, and sentenced to death. The state supreme court, however, considering the evidence insufficient to show murder in the first degree, reversed the judgment and remanded the case, with directions to allow the verdict to stand, and enter a new judgment thereon for murder in the second degree, which was done. Thereupon the prisoner applied to a federal court for a writ of habeas corpus on the ground that his confinement was without due process of law, and contrary to the provisions of the fourteenth amendment to the constitution of the United States. *Held*, that the federal court had a discretion either to grant the writ or to require the prisoner to take a writ of error to the state supreme court, and, in case its judgment was against him, to have the same reviewed on writ of error from the supreme court of the United States, and that the court properly exercised its discretion in pursuing the latter

course.—*Ex parte Frederick*, 149 U. S. 70, 13 S. Ct. 793, 37 L. Ed. 653, affirming judgment (*C.*) 51 Fed. 747.

A writ of error to the highest court of a state removes the case to the United States supreme court, so that the latter alone is authorized to determine all questions as to its jurisdiction, and as to the form of the writ, the parties, citation, and service, or otherwise.—*Ex parte Chetwood*, 17 S. Ct. 385, 165 U. S. 443, 41 L. Ed. 782.

Under Rev. St. § 999, the allowance of a writ of error and signing of a citation by an associate judge of the court of appeals of New York, it not appearing that he was at that time acting as chief judge pro tem., does not give the federal supreme court jurisdiction to review a judgment of that court.—*Havnor v. People of New York*, 18 S. Ct. 631, 170 U. S. 408, 42 L. Ed. 1087.

Act March 3, 1891 (26 Stat. 826), limiting the time for writs of error or appeals in cases taken to the supreme court from the circuit court of appeals, created by the act, to one year, does not limit the time within which writs of error from the supreme court to state courts can be taken, as such writs are, under Rev. St. § 1003, subject to the limitation governing judgments or decrees of "a court of the United States," and the act of 1891 does not repeal the two-years limitation as to circuit and district courts, previously established by Rev. St. § 1008.—*Allen v. Southern Pac. R. Co.*, 19 S. Ct. 518, 173 U. S. 479, 43 L. Ed. 775, dismissing appeal 44 P. 796, 112 Cal. 455.

The question of the effect of an order remanding a cause from a circuit court of the United States to a state court, in which the contention was made that the cause was still pending in the federal court, gives color for a motion to dismiss a writ of error from the supreme court of the United States to the state court. Judgment, *Smithson v. Chicago G. W. Ry. Co.*, 73 N. W. 853, 71 Minn. 216, affirmed.—*Whitcomb v. Smithson*, 20 S. Ct. 248, 175 U. S. 635, 44 L. Ed. 303.

The superior court of Massachusetts is the court to which a writ of error from the United States supreme court should issue for the review of a federal question, after a rescript affirming its judgment has been sent to that court by the supreme court of the state. Judgment, 57 N. E. 337, 176 Mass. 48, affirmed.—*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573.

Leave to prosecute a writ of error to a state court without giving security as required by Rev. St. U. S. § 1000 [*U. S. Comp. St.* 1901, p. 712], cannot be granted under Act July 20, 1892, c. 209, 27 Stat. 252 [*U. S. Comp. St.* 1901, p. 706], as that act has no application to proceedings in the supreme court of the United States.—*Galloway v. State Nat. Bank of Ft. Worth, Tex.*, 22 S. Ct. 811, 186 U. S. 177, 46 L. Ed. 1111.

A writ of error issued from the federal Supreme Court for the purpose of reviewing the decision of a state court is properly directed to the inferior state court where the judgment of the highest state court was ordered to be entered, and where the record remained. Judgment, *Meyler v. Wedding*, 53 S. W. 809, 107 Ky. 310, 21 Ky. Law Rep. 1006, 92 Am. St. Rep. 347, reversed.—*Wedding v. Meyler*, 24 S. Ct. 822, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 833.

A writ of error to a state court, which incorrectly states the date of the judgment in the court below, may be dismissed without prejudice to proceedings under a second writ of error, which correctly describes the judgment.—*North-*

ern Pac. Ry. Co. v. Ely, 25 S. Ct. 302, 197 U. S. 1, 49 L. Ed. 639, reversing judgment 65 P. 555, 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766; Same v. Hasse, 25 S. Ct. 305, 197 U. S. 9, 49 L. Ed. 642, reversing judgment 68 P. 882, 28 Wash. 353, 92 Am. St. Rep. 840.

A writ of error from the federal Supreme Court to the Supreme Court of the state of Nebraska sufficiently conforms to the requirement of Rev. St. U. S. § 909 [U. S. Comp. St. 1901, p. 712], respecting allowance by the Chief Justice of the state court, where it is signed "John B. Barnes, Presiding Judge of Supreme Court of Nebraska, in absence of Sedgwick, C. J., from this state," and the truth of this recital is not challenged.—Missouri Valley Land Co. v. Wiese, 28 S. Ct. 294, 208 U. S. 234, 52 L. Ed. 466, affirming judgment Wiese v. Union Pac. Ry. Co. (Neb. 1906) 108 N. W. 175; Missouri Valley Land Co. v. Wrich, 28 S. Ct. 299, 208 U. S. 250, 52 L. Ed. 473, affirming judgment Wrich v. Union Pac. Ry. Co. (Neb. 1906) 108 N. W. 178.

Making the writ of error to a state court and the citation thereon returnable within 30 days from the date thereof, without inserting a day certain as the return day, held a substantial compliance with United States Supreme Court Rule 8, cl. 5, requiring such writs and citation to be returnable within 30 days from the date of the citation.—Seaboard Air Line Ry. v. Horton, 34 S. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, reversing judgment Horton v. Seaboard Air L. R. Co., 78 S. E. 494, 162 N. C. 424.

A writ of error to a state court from the federal Supreme Court will not be dismissed for want of jurisdiction because the federal rights passed upon were correctly decided.—Missouri Pac. R. Co. v. Larabee, 34 S. Ct. 979, 234 U. S. 459, 58 L. Ed. 1398, reversing judgment Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 116 P. 901, 85 Kan. 214.

398. — Record.

See 13 Cent. Dig. Courts, §§ 1065-1083.

Where the state statutes require that all decisions of the highest state court shall be in writing, stating the grounds of the decision, and shall be recorded, the supreme court may, in determining its jurisdiction, examine such written and recorded opinions, to ascertain the grounds of the judgment of the state court.—Gross v. United States Mortg. Co., 108 U. S. 477, 2 S. Ct. 940, 27 L. Ed. 795; Kreiger v. Shelby R. Co., 125 U. S. 39, 8 S. Ct. 752, 31 L. Ed. 675; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 16 S. Ct. 939, 41 L. Ed. 72.

To give the supreme court of the United States jurisdiction of a writ of error for the review of the judgment of a state court, it must appear affirmatively, not only that a federal question was raised and presented for decision to the highest court of the state having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered.—Adams County v. Burlington & M. R. R. Co., 112 U. S. 123, 5 S. Ct. 77, 28 L. Ed. 678.

In order to bring a case from a state court to this court for review, it is necessary that the record should show that the point giving jurisdiction to this court was raised and decided in the court below.—Detroit City Ry. Co. v. Guthard, 114 U. S. 133, 5 S. Ct. 811, 29 L. Ed. 118; Kansas Endowment Ass'n v. State of Kansas, 120 U. S. 103, 7 S. Ct. 499, 30 L. Ed. 593.

On writ of error to a state supreme court, if the record does not disclose a federal question, the court will not seek it in the opinion of the court below annexed to the record.—Otis v. Oregon S. S. Co., 116 U. S. 548, 6 S. Ct. 523, 29 L. Ed. 719.

Where a case is decided by a state court upon an agreed statement of facts the supreme court of the United States may, where the record on appeal does not show that a federal question was involved in the decision of the state court, examine the opinion of such court, transmitted, under the rules of court, along with the record, for the purpose of ascertaining whether such question was raised and decided.—Fire Ass'n of Philadelphia v. People, 119 U. S. 110, 7 S. Ct. 108, 30 L. Ed. 342.

To give the supreme court jurisdiction of a writ of error to a state court, it must appear by the record that a federal question was raised.—Brooks v. State of Missouri, 124 U. S. 394, 8 S. Ct. 443, 31 L. Ed. 454; Powell v. Supervisors of Brunswick County, 150 U. S. 433, 14 S. Ct. 166, 37 L. Ed. 1134; Ansbro v. United States, 159 U. S. 695, 16 S. Ct. 187, 40 L. Ed. 310.

A certificate of the chief justice of the highest court of a state, under Rev. St. § 909, allowing a writ of error to such court from the supreme court, certifying that a federal question arose and was determined adversely to plaintiff in error, cannot supply the want of all evidence of such question in the record.—Felix v. Scharnweber, 125 U. S. 54, 8 S. Ct. 759, 31 L. Ed. 687.

A writ of error to a state court from the supreme court of the United States cannot be sustained for the refusal of instructions involving a federal question, where the evidence upon which the instructions were based is not made part of the record.—Clark v. Commonwealth of Pennsylvania, 128 U. S. 395, 9 S. Ct. 113, 32 L. Ed. 487.

The certificate of the chief justice of a state court, showing that a right claimed under the federal constitution, laws, or authority was denied by the decision of that court, cannot of itself give jurisdiction to the supreme court of the United States on a writ of error, but it may be considered for the purpose of rendering more certain and specific a federal question which was raised on the record in general and indefinite terms.—Roby v. Colehour, 146 U. S. 153, 13 S. Ct. 47, 36 L. Ed. 922.

The certificate of the chief justice of the supreme court of a state, stating that a question as to a violation of the federal constitution was submitted to the court and decided cannot confer jurisdiction upon the supreme court of the United States on writ of error to the state court.—Powell v. Supervisors of Brunswick County, 150 U. S. 433, 14 S. Ct. 166, 37 L. Ed. 1134; Newport Light Co. v. City of Newport, 151 U. S. 527, 14 S. Ct. 429, 38 L. Ed. 259; Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941; Henkel v. City of Cincinnati, 20 S. Ct. 573, 177 U. S. 170, 44 L. Ed. 72.

The supreme court has no jurisdiction to review the judgment of a state court on writ of error, unless it affirmatively appears from the record that a question giving the supreme court jurisdiction was made by the pleadings and passed on by the court.—Gray v. Coan, 154 U. S. 589, 14 S. Ct. 1168, 38 L. Ed. 1088; Chouteau v. Gibson, 111 U. S. 200, 4 S. Ct. 340, 28 L. Ed. 400; Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941.

An appeal to the supreme court of the United States from the judgment of a state court will be dismissed where the record of the state court fails to show facts necessary to give jurisdiction to the United States courts.—Goode-nough Horse-Shoe Mfg. Co. v. Rhode Island Horse-Shoe Co., 154 U. S. 635, 14 S. Ct. 1180, 24 L. Ed. 368.

Neither the petition for a writ of error from a state supreme court nor the arguments of counsel in that court form any part of the record upon which action is taken in the su-

preme court of the United States.—*Sayward v. Penny*, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941.

Where it appears from the record that a question not federal was raised and decided, and, from the opinion, that the court based its judgment solely on that ground, it is not permissible to allow the certificate to overthrow that conclusion, by showing that a federal question was in fact decided.—*Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 16 S. Ct. 939, 41 L. Ed. 72.

The court has no jurisdiction on a writ of error to a state court, unless the record shows affirmatively that a federal question necessary to the determination of the cause was raised in the state court, and decided adversely to the party asserting a constitutional right, or that the judgment, as rendered, could not have been given without deciding it.—*Fowler v. Lamson*, 17 S. Ct. 112, 164 U. S. 252, 41 L. Ed. 424.

The court has no jurisdiction to determine whether the judgment is in derogation of a constitutional right unless the record shows that the party against whom the judgment was rendered specially set up or claimed such right in the state court.—*Chicago & N. W. Ry. Co. v. City of Chicago*, 17 S. Ct. 129, 164 U. S. 454, 41 L. Ed. 511.

The United States supreme court will not review on error the proceedings of a superior court, where the record contains no pleadings or judgment, but merely recites the bringing of an action in the superior court, and certain proceedings therein, resulting in adjudging the defendant an insolvent, and the allowance of the bill of exceptions and writ of error.—*Clarke v. McDade*, 17 S. Ct. 284, 165 U. S. 168, 41 L. Ed. 673.

The opinion of the supreme court of Louisiana forms a part of the record in cases brought from that court to the federal supreme court on error, and may be examined, with the rest of the record, to ascertain what questions were presented, and to explain the findings of fact.—*Egan v. Hart*, 17 S. Ct. 300, 165 U. S. 188, 41 L. Ed. 680.

To sustain the jurisdiction of the supreme court on error to a state court, on the ground that a right under the federal constitution was denied, it must appear from the record that the protection of the constitution was specially claimed, and it is not sufficient that such claim was made merely in the briefs and oral arguments.—*Zadig v. Baldwin*, 17 S. Ct. 639, 166 U. S. 485, 41 L. Ed. 1087.

The United States supreme court will not review the judgment of a state court on the ground of a denial by the latter court of a right under a statute of the United States, unless the record shows, either by words used or by clear and necessary intendment therefrom, that the right was specifically claimed, or a definite issue as to the possession of the right is distinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered. Judgment (1896) 69 N. W. 1151, 49 Neb. 795, affirmed.—*Capital Nat. Bank of Lincoln, Neb., v. First Nat. Bank of Cadiz, Ohio*, 19 S. Ct. 202, 172 U. S. 425, 43 L. Ed. 502.

A case involves a federal question, which sufficiently appears, where the pleadings show that plaintiff claims rights in property formerly owned by the state, under a conveyance authorized by an act of the legislature, and that defendant claims conflicting rights under a subsequent contract with the state, ratified by the legislature, and the record shows that the validity of the later contract and act was sustained by the state court. Decree 20 S. E. 1002, 43 S. C. 154, affirmed.—*Columbia Wa-*

ter-Power Co. v. Columbia Electric Street-Railway Light & Power Co., 19 S. Ct. 247, 172 U. S. 475, 43 L. Ed. 521.

A certificate by the chief justice of the supreme court of a state that, upon the argument of the case the validity of state legislation was drawn in question upon the ground of its repugnancy to the constitution of the United States is insufficient to give jurisdiction to the supreme court of the United States on writ of error, where the statutes complained of are not stated.—*Yazoo v. M. V. R. Co. v. Adams*, 21 S. Ct. 256, 180 U. S. 41, 45 L. Ed. 415, dismissing writ of error 25 So. 366, 76 Miss. 545.

A certificate of the chief justice of a state court, stating that the validity of state legislation subsequent to the charter of a corporation was drawn in question upon the ground that it impaired the obligation of a contract, and that the decision was in favor of the validity of such legislation, may be resorted to, in the absence of an opinion, to show that a federal question which was otherwise raised in the record was actually passed upon by the court.—*Gulf & S. I. R. Co. v. Hewes*, 22 S. Ct. 26, 183 U. S. 66, 46 L. Ed. 86.

A claim of title under an act of congress is not sufficiently asserted so as to present a question which will give the supreme court of the United States a right to review the judgment of a state court on writ of error, where the record does not show that any such claim was made in the trial court, or, upon appeal, in the supreme court of the state. Writ of error 52 S. W. 346, 151 Mo. 348, dismissed.—*Sweringen v. City of St. Louis*, 22 S. Ct. 569, 185 U. S. 38, 46 L. Ed. 795.

A certificate of the chief judge of the highest state court that a federal question was involved is not properly a part of the record, and is insufficient in itself to confer jurisdiction on the supreme court of the United States to review a judgment of the state court or to determine federal questions which do not appear from the record to have been brought to the attention of that court. Writ of error, *In re Home for Incurables*, 59 N. E. 1123, 166 N. Y. 602, dismissed.—*Home for Incurables v. City of New York*, 23 S. Ct. 84, 187 U. S. 155, 47 L. Ed. 117, 63 L. R. A. 329.

A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument. Writ of error, *City of Los Angeles v. Pomeroy*, 57 P. 585, 124 Cal. 597, dismissed.—*Hooker v. City of Los Angeles*, 23 S. Ct. 395, 188 U. S. 314, 47 L. Ed. 487, 63 L. R. A. 471.

Neither the petition for a rehearing, nor the petition for the writ of error, nor the assignments of error in the federal Supreme Court, nor the certification of briefs by the clerk of the state court, can cure the failure of the record to show that a federal question was raised and decided which would confer jurisdiction on the federal Supreme Court of a writ of error to the state court. Writ of error, 66 N. E. 962, 202 Ill. 122, dismissed.—*Harding v. People of State of Illinois*, 25 S. Ct. 176, 196 U. S. 78, 49 L. Ed. 394.

A federal question, even if presented by the claim, on a motion for a new trial in a state court, that a state statute takes property without due process of law, which the highest state court expressly refrained from passing upon because it regarded the objection waived by

failure to cite authorities or advance argument in support thereof, cannot be deemed necessarily to have been decided by that court, where the record does not show that the question was there raised.—Id.

A certificate of the presiding judge of a state court that a federal question which was first raised by a petition for rehearing was duly considered and decided cannot confer jurisdiction on the federal Supreme Court of a writ of error to the state court, where, from the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or may have declined to pass upon the federal question in terms because it was suggested too late. Writ of error (Cr. App.) 75 S. W. 534, dismissed.—Fullerton v. State of Texas, 25 S. Ct. 221, 196 U. S. 192, 49 L. Ed. 443.

The certificate of the Chief Justice of the highest state court that the judgment of that court denied a title, right, privilege, or immunity specially set up and claimed under a federal statute is not in itself sufficient to confer jurisdiction on the Supreme Court of the United States of a writ of error to that court.—Allen v. Arguimbau, 25 S. Ct. 622, 198 U. S. 149, 49 L. Ed. 990.

An adequate presentation of a federal question to a state court to make a case for a writ of error from the Supreme Court of the United States sufficiently appears where the record clearly shows that the trial court considered that the unsuccessful party was specially claiming rights under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], authorizing an adverse of an application for a patent to mineral lands, and the highest state court necessarily acted upon that assumption in delivering its opinion. Judgment, 71 P. 1046, 26 Utah, 1, 99 Am. St. Rep. 808, affirmed.—Lavagnino v. Uhlig, 25 S. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

The petition for writ of error from the Supreme Court of the United States to a state court, and the assignment of errors therein, form no part of the record on which to determine whether a federal question was decided by the state court. Writ of error, 35 So. 747, 111 La. 563, dismissed.—Corkran Oil & Development Co. v. Arnaudet, 26 S. Ct. 41, 199 U. S. 182, 50 L. Ed. 143.

The fact that the chief justice of the highest state court allowed a writ of error from the Supreme Court of the United States does not help out the failure of the record to show that a federal question was raised and decided. Writ of error, 72 N. E. 1097, 213 Ill. 452, dismissed.—Hulbert v. City of Chicago, 26 S. Ct. 617, 202 U. S. 275, 50 L. Ed. 1026.

The certificate of a state court of last resort may serve to remove any doubt whether rights under the federal bankrupt law were so relied upon and passed upon in affirming, without opinion, a judgment dismissing a suit brought by a trustee in bankruptcy to recover an alleged asset of the bankrupt estate, as to sustain a writ of error, under Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575], from the federal Supreme Court.—Rector v. City Deposit Bank Co., 26 S. Ct. 289, 200 U. S. 405, 50 L. Ed. 527.

The certificate of a state court that the defendant railway company, in a suit to recover damages for the infection of cattle because of a violation of the quarantine regulations promulgated by the Secretary of Agriculture under cover of Act Feb. 2, 1903, c. 349, 32 Stat. 791 [U. S. Comp. St. Supp. 1905, p. 613], insisted that such statute was unconstitutional, and that, even if constitutional, did not authorize such regulations or give a remedy in damages, removes any doubt as to whether a federal question was raised within the meaning and intent of Rev. St. U. S. § 709 [U. S. Comp. St. 1901,

p. 575], governing writs of error to state courts, where, after a demurrer to the answer of the railway company setting forth the unconstitutionality of the law, and the action of the secretary thereunder, had been sustained, verdict and judgment were rendered against the defendant.—Illinois Cent. R. Co. v. McKendree, 27 S. Ct. 153, 203 U. S. 514, 51 L. Ed. 298; Same v. Edwards, 27 S. Ct. 159, 203 U. S. 531, 51 L. Ed. 305.

The certificate of the chief justice of the highest court of a state cannot help out the total failure of the record to show that a federal question was raised which would sustain a writ of error from the Supreme Court of the United States.—Louisville & N. R. Co. v. Smith, Huggins & Co., 27 S. Ct. 401, 204 U. S. 551, 51 L. Ed. 612.

Questions as to the validity, under Const. U. S. Amends. 13, 14, of the provision of Gen. Acts Ala. 1907, p. 638, creating a presumption of criminal intent from the refusal of an employé to perform service without refunding money obtained from his employer, are not open on a writ of error from the federal Supreme Court to review a judgment of the highest court of the state, affirming the refusal of an inferior court to discharge the accused on habeas corpus, where all that appears from the record is that the accused is held to await trial on a charge of having obtained money from his employer under a written contract, with intent to defraud.—Bailey v. State of Alabama, 29 S. Ct. 141, 211 U. S. 452, 53 L. Ed. 278, affirming judgment 48 So. 498.

An affidavit in support of a petition for rehearing in the highest state court stating that, in the brief as well as upon oral argument, a specified federal question had been presented and discussed, will not support a writ of error from the federal Supreme Court, where the state court denied the petition, with the statement that no federal question had been raised in that court, which may be construed as denying that any such matter was brought to its attention, as stated in the affidavit, or as holding that it presented no federal question. Judgment (1907) St. John v. Andrews Institute for Girls, 102 N. Y. S. 808, 117 App. Div. 698, affirmed.—Smithsonian Institution v. St. John, 29 S. Ct. 601, 214 U. S. 19, 53 L. Ed. 892.

Formal defects in the certificate as to jurisdiction filed by a federal Circuit Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827, (U. S. Comp. St. 1901, p. 549), for the purpose of sustaining a writ of error from the federal Supreme Court, are not material, where the record clearly shows that the only matter tried and decided in the circuit was one of jurisdiction.—Davis v. Cleveland, C. & St. L. Ry. Co., 30 S. Ct. 463, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

The assignments of error in the federal Supreme Court cannot cure the failure of the record in the state court to show that a question was there raised and decided of the character described in Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), governing writs of error from the federal Supreme Court to a state court.—(1911) Appleby v. City of Buffalo, 31 S. Ct. 699, 221 U. S. 524, 55 L. Ed. 838, affirming judgment (1907) In re City of Buffalo, 81 N. E. 954, 189 N. Y. 163, and which reverses (1906) 101 N. Y. S. 966.

The certificate of the chief justice of the highest court of a state cannot cure entire failure of the record to show that a federal question was decided so as to sustain a writ of error from the Supreme Court of the United States.—(1912) Seaboard Air Line Ry. v. Duvall, 32 S. Ct. 790, 225 U. S. 477, 56 L. Ed. 1171, dismissing appeal (1910) Duvall v. Seaboard Air Line Ry., 67 S. E. 1008, 152 N. C. 524.

To sustain writ of error from federal Supreme Court to judgment of highest court of state, on the ground that a right under a fed-

eral statute was denied, the record must show that there was a definite issue presented as to the construction of the act so that the state court could not have given the judgment rendered without deciding against the contention of plaintiff in error.—Id.

Writ of error to review an alleged judgment of a court of last resort in the state, declining to allow writ of error or appeal from a lower state court, will be dismissed unless it plainly appears on the face of the record of the judgment sought to be reviewed that refusal to allow an appeal was exercised by the court of jurisdiction to review the case on the merits.—*Norfolk & S. Turnpike Co. v. Commonwealth of Virginia*, 32 S. Ct. 828, 225 U. S. 264, 56 L. Ed. 1082.

A certificate of the chief justice of the highest state court, not made a part of the record, that that court in denying a rehearing decided the question then raised for the first time, does not confer jurisdiction of a writ of error from the federal Supreme Court.—*Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 33 S. Ct. 510, 228 U. S. 328, 57 L. Ed. 857, dismissing writ of error *Norfolk & O. V. R. Co. v. Consolidated Turnpike Co.*, 68 S. E. 346, 111 Va. 131, Ann. Cas. 1912A, 239. Rehearing denied 33 S. Ct. 605, 228 U. S. 596, 57 L. Ed. 982.

Recital of certificate of highest state court, that it was made by order of the court itself to afford record evidence that a federal question raised by a petition for rehearing was adversely determined, justifies treating such certificate as bringing into the record necessary proof of a federal question, authorizing review by federal Supreme Court.—*Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 33 S. Ct. 605, 228 U. S. 596, 57 L. Ed. 982, denying rehearing 33 S. Ct. 510, 228 U. S. 328, 57 L. Ed. 857.

The rule that a writ of error from the federal Supreme Court will not run to the highest court of the state which has refused to permit a case to be transferred to that court from a lower state court, unless it appears on the record by an affirmation of the judgment or decree sought to be reviewed that the refusal was the exercise of jurisdiction to review the cause on the merits, will not be applied to a writ of error taken before the opening of the October term, 1912, of the Supreme Court.—*Mulcrevy v. City and County of San Francisco*, 34 S. Ct. 260, 231 U. S. 669, 58 L. Ed. 425, affirming judgment *City and County of San Francisco v. Mulcrevy*, 113 P. 339, 15 Cal. App. 11.

A certificate of the highest state court in its journal entry of judgment cannot import into the record a federal question sustaining a writ of error from the federal Supreme Court, where the record does not otherwise show it to exist.—*Cleveland & P. R. Co. v. City of Cleveland*, 35 S. Ct. 21, 235 U. S. 50, 59 L. Ed. 127, dismissing writ of error 102 N. E. 1122, 87 Ohio St. 469.

Findings of state court showing that fare paid by interstate passenger was less than amount due under published rates, are conclusive on the federal Supreme Court, where the tariffs are not included in the record.—*Louisville & N. R. Co. v. Maxwell*, 35 S. Ct. 494, 237 U. S. 94, 59 L. Ed. 853, L. R. A. 1915E, 665.

Judgment of state court awarding shipper damages for payment of rebates to other shippers for a like service should not be reversed on the theory that some of the shipments were destined for points outside the state, where the record does not contain all the evidence, but shows that some of the shipments were listed as "Coal—Intrastate."—*Pennsylvania R. Co. v. Mitchell Coal & Coke Co.*, 35 S. Ct. 787, 238 U. S. 251, 59 L. Ed. 1293, affirming judgment *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 88 A. 743, 241 Pa. 536.

◀ 399. — Scope and extent of review.

See 13 Cent. Dig. Courts, §§ 1089, 1090; 1 Cent. Dig. App. & E. §§ 3384-3394, 3396, 3398, 3399.

Review of decisions of intermediate courts, see Appeal and Error, ▶ 1094.

An amendment of an affidavit for attachment, adding a new ground of attachment, under Code Miss. 1871, § 1483, authorizing the amendment of defective affidavits, may be allowed by the circuit court of the United States.—*Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 S. Ct. 369, 27 L. Ed. 211.

Where a proceeding resulting in a verdict sustaining an attachment and a verdict and judgment on the merits of the cause of action are separate, under the provisions of the state statute (Code Miss. 1880, § 2434), they may be separately considered on error by the supreme court, under Rev. St. §§ 914, 915.—Id.

In cases coming from the supreme court of Louisiana, the opinion and judgment of the supreme court only, without reference to the rulings of the lower court, will be examined to see if any rights guaranteed by the constitution or laws of the United States have been denied the appellant.—*Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U. S. 141, 7 S. Ct. 472, 30 L. Ed. 614.

In a case where an appeal to the supreme court can be taken only on the question of the jurisdiction of the circuit court, inquiry cannot be made in the supreme court as to whether there was a statute providing for the survival of the action in favor of plaintiff to the action.—*St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659.

An adjudication of the highest court of a state that a law enacted in the exercise of the police power of the state is not within the constitutional inhibitions upon impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, will not be reversed by the supreme court of the United States upon general ideas of the requirements of natural justice, apart from the provisions of the constitution involved.—*New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269, affirming judgment 62 Conn. 527, 26 Atl. 122.

The rule that the supreme court has no authority to review questions of fact upon a writ of error extends to a case in which a state supreme court finds against the existence of a fact relied upon by the plaintiff in error as raising a federal question; as, where he contended that the granting of a town-site patent on lands known to be valuable for mining purposes did not prevent the subsequent location of a mining claim thereon, and the court found that the lands were not known to be valuable for mining at the time the patent took effect.—*Dower v. Richards*, 151 U. S. 658, 14 S. Ct. 452, 38 L. Ed. 305, affirming judgment *Richards v. Dower*, 81 Cal. 44, 22 P. 304.

On the subject of assessments imposed on private property by a city for improvements, the jurisdiction of the supreme court of the United States, on error to a state court, ends with the determination that sufficient provision was made by law for contesting the assessment, and error of the state court in respect to the details of it cannot be corrected.—*Corry v. Campbell*, 154 U. S. 629, 14 S. Ct. 1183, 24 L. Ed. 926.

There must be clear error to warrant the supreme court of the United States in setting aside a finding of fact affirmed in the highest court of a state.—*Lammers v. Nissen*, 154 U. S. 650, 14 S. Ct. 1189, 25 L. Ed. 562.

On error to a state court, it is only when the federal question involved has been decided erroneously that other questions may be considered, and then only to see if the judgment can stand notwithstanding the error in deciding the federal question.—*McLaughlin v. Fowler*, 154 U. S. 663, 14 S. Ct. 1192, 26 L. Ed. 176.

So far as a judgment of a state court against the validity of an authority claimed by defendants under the United States necessarily involves the decision of questions of law, as distinguished from questions of fact, it must be reviewed by the supreme court of the United States on writ of error, whether that question depends upon the constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 29 S. W. 90, 8 Tex. Civ. App. 679.

Where the federal supreme court has acquired jurisdiction on the ground that the constitutionality of a state law is involved, it may dispose of all questions in the case.—*Scott v. Donald*, 17 S. Ct. 265, 165 U. S. 58, 41 L. Ed. 632.

On a writ of error by a property owner to review a judgment of a state supreme court, affirming a judgment against him in condemnation proceedings, rendered under a statute giving a right to jury trial, the federal supreme court cannot inquire whether the jury erred in finding that no property right of substantial value had been taken, but only whether the court prescribed any rules for the jury which disregarded the right to compensation, the federal supreme court having no power, under Const. Amend. 7, to re-examine any facts tried by a jury otherwise than according to the rules of the common law.—*Chicago, B. & Q. R. Co. v. City of Chicago*, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

The provision in the seventh amendment to the federal constitution, that no fact tried by a jury in a common-law suit shall be re-examined in any court of the United States otherwise than by the rules of common law, extends to common-law cases coming to the supreme court on writ of error to the highest court of a state.—Id.

When reviewing a judgment of a state court upholding a state statute alleged to be in violation of the clause of the federal constitution protecting the obligation of contracts, the supreme court has paramount authority to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state statute, and is not bound by state decisions upon these points.—*Douglas v. Commonwealth of Kentucky*, 18 S. Ct. 199, 168 U. S. 488, 42 L. Ed. 553; *Chicago, B. & Q. R. Co. v. State of Nebraska*, 18 S. Ct. 513, 170 U. S. 57, 42 L. Ed. 948.

The supreme court may review proceedings in a state court for the appropriation of private property for public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right under the federal constitution to just compensation. Judgment 61 N. W. 787, 103 Mich. 556, affirmed.—*Backus v. Fort St. Union Depot Co.*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.

On error from the federal supreme court to a state supreme court, the facts must be taken as found by the jury, and the court can only consider whether a statute involved, as interpreted to the jury, was in violation of the federal constitution. Judgment 44 P. 632, 56 Kan. 694, affirmed.—*Missouri, K. & T. Ry. Co. v. Haber*, 18 S. Ct. 488, 169 U. S. 613, 42 L. Ed. 878.

The action of a circuit court in remanding a cause to a state court after its removal is

not open to revision on writ of error from the supreme court of the United States to the state court. Judgment *Smithson v. Chicago G. W. Ry. Co.*, 73 N. W. 853, 71 Minn. 216, affirmed.—*Whitcomb v. Smithson*, 20 S. Ct. 248, 175 U. S. 635, 44 L. Ed. 303.

Whatever was a question of fact in the state court is a question of fact on writ of error from the supreme court of the United States to that court. Judgment, *Ebaugh v. Eastern Building & Loan Ass'n* (1900) 36 S. E. 535, 58 S. C. 83, affirmed.—*Eastern Building & Loan Ass'n v. Ebaugh*, 22 S. Ct. 566, 185 U. S. 114, 46 L. Ed. 830.

A finding of fact by a state trial court as to the law of another state and its application under the decisions of the courts of that state is binding upon the supreme court of the United States on error to the supreme court of the former state, which decided that such finding of the trial court was conclusive upon it.—Id.

Whether a bankrupt was insolvent at the time of giving an alleged preference, and whether the creditor had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, as to which the Supreme Court of the United States is concluded by the verdict of the jury in a suit by the trustee to recover the amount of such preference. Judgment, *Tredway v. Kaufman*, 21 Pa. Super. Ct. 256, reversed.—*Kaufman v. Tredway*, 25 S. Ct. 33, 195 U. S. 271, 49 L. Ed. 190.

A finding of a state court that, when a commutation entry under the homestead laws was allowed, neither the entryman nor the land officers had actual knowledge of the amendment of Rev. St. U. S. § 2301, by Act March 3, 1891, c. 561, 26 Stat. 1098 [U. S. Comp. St. 1901, p. 1406], which made such commutation premature, is a finding of fact, and therefore conclusive on the federal Supreme Court, on a writ of error to the state court. Decree, *McCord v. Hill*, 94 N. W. 65, 117 Wis. 306, affirmed.—*Hill v. McCord*, 25 S. Ct. 96, 195 U. S. 395, 49 L. Ed. 251.

Questions of fact once settled in the courts of the state are not subject to review in the supreme court of the United States on writ of error to a state court.—*Noble v. Mitchell*, 17 S. Ct. 110, 164 U. S. 367, 41 L. Ed. 472; *Egan v. Hart*, 17 S. Ct. 300, 165 U. S. 188, 41 L. Ed. 680; *Keokuk & H. Bridge Co. v. People of State of Illinois*, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299, affirming judgment 52 N. E. 117, 176 Ill. 267; *Atchison, T. & S. F. R. Co. v. Mathews*, 19 S. Ct. 609, 174 U. S. 96, 43 L. Ed. 909; *Chrisman v. Miller*, 25 S. Ct. 468, 197 U. S. 313, 49 L. Ed. 770, affirming judgments *Miller v. Chrisman*, 73 P. 1083, 140 Cal. 440, 98 Am. St. Rep. 63, and 74 P. 444, 140 Cal. 440, 98 Am. St. Rep. 63; *Clipper Min. Co. v. Eli Mining & Land Co.*, 24 S. Ct. 632, 194 U. S. 220, 48 L. Ed. 944, affirming judgment 68 P. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89; *Smiley v. State of Kansas*, 25 S. Ct. 289, 196 U. S. 447, 49 L. Ed. 546, affirming judgment *State v. Smiley*, 69 P. 199, 65 Kan. 240, 67 L. R. A. 903; *Western Union Tel. Co. v. Call Pub. Co.*, 21 S. Ct. 561, 181 U. S. 92, 45 L. Ed. 765, affirming judgment 78 N. W. 519, 58 Neb. 192; *Jenkins v. Neff*, 22 S. Ct. 905, 186 U. S. 230, 48 L. Ed. 1140, affirming judgment 57 N. E. 408, 163 N. Y. 320; *Thayer v. Spratt*, 23 S. Ct. 576, 189 U. S. 346, 47 L. Ed. 845, affirming judgment *Whitney v. Spratt*, 64 P. 919, 25 Wash. 62, 87 Am. St. Rep. 738; *Chapman & Dewey Land Co. v. Bigelow*, 27 S. Ct. 679, 206 U. S. 41, 51 L. Ed. 953, dismissing writ of error 92 S. W. 534, 77 Ark. 338; *Waters-Pierce Oil Co. v. State of Texas*, 29 S. Ct. 220, 212 U. S. 88, 53 L. Ed. 417, affirming judgment 106 S. W. 918; *Earling v. Emigh*, 30 S. Ct. 672, 218 U. S. 27, 54 L. Ed. 915, affirming judgment *Emigh v. Earling*, 115 N. W. 128, 134 Wis. 565.

A judgment of the highest court of a state, which, reversing the trial court, upholds as against a pre-emptor a patent from the United States under the Dalles military wagon road grant made by Act Feb. 25, 1867, c. 77, 14 Stat. 409, resting its conclusion upon the general proposition that there was no competent proof to impeach the records of the Land Department, or to overthrow the presumption of validity which attends a patent from the United States, will not be reversed upon any presumption as to what might have been the testimony upon which the trial court made its finding that the land was situated entirely outside the limits of the grant, where such testimony, though taken and reported by a referee, is not preserved in the record. Judgment Eastern Oregon Land Co. v. Andrews, 77 P. 117, 45 Or. 203, affirmed.—Andrews v. Eastern Oregon Land Co., 27 S. Ct. 42, 203 U. S. 127, 51 L. Ed. 119.

The question whether a schedule of interstate freight rates filed with the interstate commerce commission was posted as required by the act to regulate commerce is not open in the Supreme Court of the United States on writ of error to a state court, where the latter court in effect declared that such schedule was conceded to have been filed and published in conformity with the statute, and it does not appear that if the court, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule, and affirmatively found facts compelling the conclusion that the statute had been complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Judgment, Abilene Cotton Oil Co. v. Texas & P. Ry. Co. (Tex. Civ. App. 1905) 85 S. W. 1052, reversed.—Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553, 9 Ann. Cas. 1075.

If it was necessary for a trustee in bankruptcy to represent judgment as well as simple contract creditors when attacking the validity of a chattel mortgage given by the bankrupt, it will be presumed, on a writ of error from the federal Supreme Court to review a judgment of a state court setting aside the mortgage as in fraud of creditors, that the trial court, in passing upon all the evidence, found that he did represent both classes of creditors, where the record shows that the entire record of the proceedings in the bankruptcy court, though not returned to the federal Supreme Court, was in evidence before the trial court. Judgment, Vollkommer v. Frank (1905) 95 N. Y. S. 324, 107 App. Div. 594, affirmed.—Frank v. Vollkommer, 27 S. Ct. 596, 205 U. S. 521, 51 L. Ed. 911.

Findings of fact upon which depends the answer to the question whether or not certain transactions were invalid under the bankrupt act as operating to give a creditor an unlawful preference are conclusive upon the Supreme Court of the United States, in reviewing, by writ of error, the judgment of a state court. Judgment, Jackman v. Eau Claire Nat. Bank (1905) 104 N. W. 98, 125 Wis. 465, affirmed.—Eau Claire Nat. Bank v. Jackman, 27 S. Ct. 391, 204 U. S. 522, 51 L. Ed. 596.

The federal Supreme Court must accept the conclusions of the court below on a question of fact, unless clearly and manifestly wrong. Judgment, United States Min. Co. v. Lawson (1904) 134 F. 769, 67 C. C. A. 587, affirmed.—Lawson v. United States Min. Co., 28 S. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

The adequacy of the local facilities existing at a station at which a through interstate railroad train is required to stop by an order made under state authority, though not inherently a federal question, may be considered by

the federal Supreme Court on writ of error to a state court in so far as the existence of such adequate local facilities is involved in the determination of the federal question as to whether the order does or does not directly regulate interstate commerce. Judgment, Railroad Com'rs v. Atlantic Coast Line R. Co. (1906) 54 S. E. 224, 74 S. C. 80, reversed.—Atlantic Coast Line R. Co. v. Wharton, 28 S. Ct. 121, 207 U. S. 328, 52 L. Ed. 230.

Whether or not the amount due to the holders of certain railroad equipment bonds on the issue of an execution against the railway company can be determined in a proceeding to enforce the lien of such bonds by a sale of the railroad property is not open on a writ of error from the Supreme Court of the United States to a state court. Rehearing, 28 S. Ct. 182, 208 U. S. 38, 52 L. Ed. 379, denied.—Wabash R. Co. v. Adelbert College of Western Reserve University, 28 S. Ct. 425, 208 U. S. 609, 52 L. Ed. 642.

The general rule respecting the conclusiveness of a master's findings of fact when confirmed by the court will not be applied by the federal Supreme Court on an appeal from a decree enjoining the enforcement of a municipal ordinance fixing maximum water rates, on the ground that the ordinance is invalid under Const. U. S. Amend. 14, as confiscatory.—City of Knoxville v. Knoxville Water Co., 29 S. Ct. 148, 212 U. S. 1, 53 L. Ed. 371.

The federal Supreme Court, on a writ of error to a state court, is limited to a consideration of the specific instances of denials of federal rights.—Waters-Pierce Oil Co. v. State of Texas, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

Whether discrimination against negroes because of race or color was practiced by jury commissioners in selection of grand and petit jurors is a question of fact, decision of which by the state court is conclusive on the federal Supreme Court, on writ of error, unless so grossly wrong as to amount to infraction of the federal Constitution. Judgment (1906) 95 S. W. 1069, 49 Tex. Cr. R. 633, affirmed.—Thomas v. State of Texas, 29 S. Ct. 393, 212 U. S. 278, 53 L. Ed. 512.

The facts and the conclusions to be drawn from them are for the jury, and cannot be reviewed by the federal Supreme Court upon writ of error.—(1910) Standard Oil Co. v. Brown, 30 S. Ct. 669, 218 U. S. 78, 54 L. Ed. 939, affirming judgment (1908) 31 App. D. C. 371.

The decision of a state court that a trust deed was accepted by a national bank is a finding of fact not reviewable by the federal Supreme Court on writ of error to the state court.—(1910) Kerfoot v. Farmers' & Merchants' Bank, 31 S. Ct. 14, 218 U. S. 281, 54 L. Ed. 1042, affirming decree (1898) Hall v. Same, 46 S. W. 1000, 145 Mo. 418.

Whether or not the rights of a surviving wife in the community property as they existed when the marriage was celebrated were correctly subjected to a state inheritance tax law subsequently enacted cannot be reviewed by the federal Supreme Court when determining, on writ of error to a state court, the validity of such statute under the contract clause of the federal Constitution.—(1910) Moffitt v. Kelly, 31 S. Ct. 79, 218 U. S. 400, 54 L. Ed. 1086, 30 L. R. A. (N. S.) 1179, affirming judgments (1908) In re Moffitt's Estate, 95 P. 653, 1025, 153 Cal. 359, 20 L. R. A. (N. S.) 207.

The nature and character of the rights of the surviving wife in the community property are peculiarly local questions, not open to review by the federal Supreme Court when determining, on a writ of error to a state court, whether the imposition of an inheritance tax

under the state laws denies to the wife the equal protection of the laws.—Id.

Whether the provisions of Act Pa. May 23, 1907 (P. L. 206), validating contracts of foreign corporations, extended to a contract which had previously been adjudged invalid by a federal court because of the corporation's failure to register within the state before entering into such contract, will be determined by the federal Supreme Court for itself on a writ of error to a state court, presenting the question whether full faith and credit were given to such judgment by the decision of the state court that it was not a bar to a second action between the same parties on the same contract, after the corporation had brought itself within the terms of such statute.—(1911) *West Side Belt R. Co. v. Pittsburgh Const. Co.*, 31 S. Ct. 196, 219 U. S. 92, 55 L. Ed. 107, affirming judgment *Pittsburg Const. Co. v. West Side Belt R. Co.* (1910) 75 A. 1029, 227 Pa. 90.

The right to have a review in the federal Supreme Court of a judgment of a state court in which the defeated party set up the pendency of bankruptcy proceedings as a bar to the action, and further relied upon an injunction issued out of the bankruptcy court, undertaking to stay the proceedings in the state court, and also contended that the proper construction of the bankruptcy act precluded the state court from taking jurisdiction, cannot be defeated by the finding of the state court as a matter of fact that the bankruptcy proceedings had been concluded by denial of the adjudication in bankruptcy and an abandonment of the proceedings.—(1911) *Acme Harvester Co. v. Beekman Lumber Co.*, 32 S. Ct. 96, 222 U. S. 300, 56 L. Ed. 208, affirming judgment (1908) *Beekman Lumber Co. v. Acme Harvester Co.*, 114 S. W. 1087, 215 Mo. 221.

United States Supreme Court may examine the entire record including the evidence to determine whether general finding of facts involves decision of question of law bearing on a federal right claimed in a state court.—(1912) *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment (1908) 99 P. 819, 79 Kan. 59.

Evidence in an equity suit will be examined by the Supreme Court of the United States on error to a state court, sufficiently to answer questions properly saved within its appellate jurisdiction.—(1912) *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 32 S. Ct. 389, 223 U. S. 655, 56 L. Ed. 594, affirming decree (1909) 120 N. W. 966, 144 Iowa, 426, 138 Am. St. Rep. 299.

Collateral questions as to whether quo warranto abated as against a foreign corporation when it gave notice of withdrawal from the state, and whether an amendment to the statute relieved the corporation from the penalties of combinations in restraint of trade, are not reviewable on writ of error in the federal Supreme Court to a state court where judgment of ouster and fine was within jurisdiction of the state court.—(1912) *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 32 S. Ct. 406, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913D, 936, affirming judgment *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1.

A finding of the highest court of the state that the evidence sustained the finding that a bankrupt had actual knowledge of the residence and address of certain judgment debtors who did not know of the bankruptcy proceedings until after discharge is binding on writ of error to the federal Supreme Court.—*Miller v. Guanti*, 33 S. Ct. 49, 226 U. S. 170, 57 L. Ed. 173, affirming judgment *Guanti v. Miller*, 96 N. E. 416, 203 N. Y. 259.

The rule excluding the right to review questions in a cause in a state court until final judg-

ment by such court requires the Supreme Court, when a final judgment is rendered, to pass on all federal questions in the cause irrespective of how far by the state law such questions were concluded during the litigation.—*Louisiana Nav. Co. v. Oyster Commission of Louisiana*, 33 S. Ct. 78, 226 U. S. 99, 57 L. Ed. 138, dismissing writ of error 51 So. 706, 125 La. 740.

A decision of the highest state court that the state Constitution made it impossible for a city by ordinance to make a contract fixing water rates beyond the power of the Legislature to change will not be disturbed by the federal Supreme Court where the Constitution declared the use of water a public use subject to control by the state.—*Murray v. City of Pocatello*, 33 S. Ct. 107, 226 U. S. 318, 57 L. Ed. 239, affirming judgment *City of Pocatello v. Murray*, 120 P. 812, 21 Idaho, 180.

The Federal Supreme Court, on writ of error to a state court, will not go behind findings of the court below that a so-called lake was an unnavigable body of water, proper to be meandered, where it was meandered in the original government survey, and the Secretary of the Interior has refused to have the land under water surveyed as swamp land.—*Marshall Dental Mfg. Co. v. State of Iowa*, 33 S. Ct. 168, 226 U. S. 460, 57 L. Ed. 300, affirming decree *State v. Jones*, 122 N. W. 241, 143 Iowa, 398.

Evidence on writ of error to review judgment of state court in action against a carrier for the death of a railway mail clerk not at the time on duty, where the carrier claimed benefit of Hepburn Act June 29, 1906, against free transportation, will be examined by the Supreme Court to determine whether there was evidence to support finding that decedent was accepted by carrier as a gratuitous passenger entitled to protection of the state law, irrespective of any federal question.—*Southern Pac. Co. v. Schuyler*, 33 S. Ct. 277, 227 U. S. 601, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901, affirming judgment *Schuyler v. Southern Pac. Co.*, 109 P. 458, 37 Utah, 581, and 109 P. 1025, 37 Utah, 612.

Whether the repeal of a municipal ordinance granting trackage rights to a railway, as relates to double tracks, was a reasonable exercise of the police power or an impairment of contract ordinance, must be determined by the federal Supreme Court, independent of the decisions of the state court.—*Grand Trunk Western R. Co. v. City of South Bend*, 33 S. Ct. 303, 227 U. S. 544, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405, reversing judgment *Grand Trunk & Western Ry. Co. v. Same*, 89 N. E. 885, 174 Ind. 203, 36 L. R. A. (N. S.) 850.

Even if the decision of a nonfederal question by an Oklahoma court having jurisdiction of a cause transferred from the federal court on admission of Oklahoma was subject to review in the Supreme Court on writ of error to the Oklahoma Supreme Court, a ruling on an amendment to the pleadings would not be interfered with except for manifest error.—*First Nat. Bank of Claremore v. Keys*, 33 S. Ct. 642, 229 U. S. 179, 57 L. Ed. 1140, affirming judgment *C. M. Keys & Co. v. First Nat. Bank of Claremore*, 104 P. 346, 22 Okl. 174, 18 Ann. Cas. 152.

The ruling of the highest court of the state that a tax imposed under P. S. Vt. §§ 804-820 on interest-bearing deposits in national bank which the bank may pay and charge to the depositor, is laid on the depositor, is conclusive on the federal Supreme Court when testing the validity of that statute under the federal Constitution.—*Clement Nat. Bank v. State of Vermont*, 34 S. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment *State v. Clement Nat. Bank*, 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

Evidence will be reviewed by the federal Supreme Court on writ of error, to the state court, only to the extent necessary to give plaintiff the benefit of an asserted federal right.—*North*

Carolina R. Co. v. Zachary, 84 S. Ct. 305, 232 U. S. 243, 58 L. Ed. 591, Ann. Cas. 1914C, 159, reversing judgment Zachary v. North Carolina R. Co., 72 S. E. 858, 156 N. C. 496.

The federal Supreme Court will not revise findings of the highest state court on the issue whether service of process was fraudulently procured, where there is evidence supporting the state court's conclusion.—*Miedreich v. Lauenstein*, 34 S. Ct. 309, 232 U. S. 236, 58 L. Ed. 584, affirming judgments 86 N. E. 963, 172 Ind. 140, and 87 N. E. 1029, 172 Ind. 140.

The federal Supreme Court, when reviewing the judgment of a state court, must examine the evidence, if the findings are inadequate, to determine what facts are to be found therefrom, and which would furnish a basis for an asserted federal right.—*Carlson v. State of Washington*, 34 S. Ct. 717, 234 U. S. 103, 58 L. Ed. 1237, affirming judgment 120 P. 104, 66 Wash. 639.

Whether the state court could follow procedure followed below is the only question open for consideration by the federal Supreme Court on a writ of error to a state court attacking under the federal Constitution the validity of an assessment for widening a street.—*Willoughby v. City of Chicago*, 35 S. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error City of Chicago v. Willoughby, 94 N. E. 513, 249 Ill. 249.

On writ of error to a state court presenting questions of impairment of a contract, the federal Supreme Court will determine whether a contract existed and whether it has been impaired.—*New York Electric Lines Co. v. Empire City Subway Co.*, 35 S. Ct. 72, 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915A, 906, affirming judgments 125 N. Y. S. 1133, 140 App. Div. 934, and *In re New York Electric Lines Co.*, 94 N. E. 1056, 201 N. Y. 321.

Federal Supreme Court, on writ of error to state court will review findings of fact, where a federal right has been denied on a finding without evidence to support it.—*Northern Pac. Ry. Co. v. State of North Dakota ex rel. McCue*, 35 S. Ct. 429, 236 U. S. 585, 59 L. Ed. 735, Ann. Cas. 1916A, 1, reversing judgment *State v. Northern Pac. R. Co.*, 145 N. W. 135, 26 N. D. 488.

Federal Supreme Court, on writ of error to a state court, may review the facts to determine whether a finding of fact is interwoven with a federal question, so as to be a decision of such question.—*Norfolk & W. Ry. Co. v. Conley*, 35 S. Ct. 437, 236 U. S. 605, 59 L. Ed. 745.

The federal Supreme Court, reviewing judgment of the state court based on the federal Employers' Liability Act, April 22, 1908, cannot consider questions not involving the existence of the right of plaintiff to recover under such statute.—*Seaboard Air Line Ry. v. Padgett*, 35 S. Ct. 481, 236 U. S. 638, 59 L. Ed. 777, affirming judgment *Padgett v. Seaboard Air Line Ry.*, 83 S. E. 633, 99 S. C. 356.

Finding of state court that no part of the apex of a vein lies within the surface lines of a lode mining claim requires affirmance of a judgment of the highest state court adverse to owner of claim based on apex and extralateral-rights provision of Rev. St. § 2322 (Comp. St. 1913, § 4618).—*Stewart Mining Co. v. Ontario Mining Co.*, 35 S. Ct. 610, 237 U. S. 350, 59 L. Ed. 989, affirming judgment 132 P. 787, 23 Idaho, 724.

Excessiveness of award for suffering of deceased railway employé in action under Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, is a question of fact not reviewable on writ of error to state court.—*St. Louis, I. M. & S. Ry. Co. v. Craft*, 35 S. Ct. 704, 237 U. S. 648, 59 L. Ed. 1160, affirming judgment (Ark.) 171 S. W. 1185.

Findings of fact on error to a state court from the federal Supreme Court in cases other than those arising under the contract clause of the federal Constitution are conclusive unless it is claimed that a federal right has been denied by a finding without support in the evidence.—*Interstate Amusement Co. v. Albert*, 36 S. Ct. 168, 239 U. S. 560, 60 L. Ed. 439, affirming judgment 161 S. W. 488, 128 Tenn. 417.

Evidence held to support finding of the state court that a corporation was doing business within the state other than interstate commerce, so that such finding is conclusive on writ of error to the federal Supreme Court.—*Id.*

Whether state or congressional legislation governs a personal injury action by a railroad employé need not be determined on writ of error to a state court, where state and federal statutes are so similar that the railroad's liability is not affected by such question.—*Kansas City Western Ry. Co. v. McAdow*, 36 S. Ct. 252, 240 U. S. 51, 60 L. Ed. 520, affirming judgment *McAdow v. Kansas City Western Ry. Co.*, 164 S. W. 188.

The federal Supreme Court, reviewing a refusal of a state court to discharge on habeas corpus a person whose extradition is sought by another state, held entitled to assume that the accused was a fugitive from the justice of the demanding state.—*Innes v. Tobin*, 36 S. Ct. 290, 240 U. S. 127, 60 L. Ed. 562, affirming judgment *Ex parte Innes*, 173 S. W. 291.

A judgment of a state court in an action brought under the Employers' Liability Act will not be disturbed on writ of error by the federal Supreme Court, where nothing but questions of fact are involved and the statute is not construed, or any legal principles in its application declared.—*Great Northern Ry. Co. v. Knapp*, 36 S. Ct. 399, 240 U. S. 464, 60 L. Ed. 745, affirming judgment *Knapp v. Great Northern Ry. Co.*, 163 N. W. 848, 130 Minn. 405.

In absence of clear error, the federal Supreme Court will not reverse a finding of the state trial and appellate courts that the "next of kin," entitled to sue under Act April 22, 1908, as amended by Act April 5, 1910, were so dependent on deceased as to justify recovery under the federal statute.—*Seaboard Air Line Ry. v. Kenney*, 36 S. Ct. 458, 240 U. S. 489, 60 L. Ed. 762, affirming judgment *Kenney v. Seaboard Air Line R. Co.*, 82 S. E. 988, 167 N. C. 14.

Refusal of state court, sustained by a court of last resort, to take from the jury an action under the Employers' Liability Act by directing verdict for defendant, will not be disturbed on writ of error by federal Supreme Court unless clearly erroneous.—*Louisville & N. R. Co. v. Stewart*, 36 S. Ct. 588, 241 U. S. 261, 60 L. Ed. 989, affirming judgment *Same v. Stewart's Adm'r*, 174 S. W. 744, 163 Ky. 823.

400. — Determination and disposition of cause.

See 13 Cent. Dig. Courts, §§ 1091, 1092.

Affirmance on motion, see Appeal and Error, 400-1126.

The repeal by Act Feb. 18, 1875, of the provision contained in Rev. St. § 709, authorizing the supreme court, in its discretion, to proceed to final decision, and itself award execution, in cases coming up from state courts, did not affect the general power conferred by section 709, by which the judgment of the state court may be "re-examined and reversed or affirmed."—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 29 S. W. 90, 8 Tex. Civ. App. 679.

Under the statutes and practice of Texas, the appellate courts of that state, upon review-

ing a judgment on a statement of the case certified by the judge below, are authorized to render such a judgment as should have been rendered by the court below; and, when a case so reviewed by an appellate court of Texas is brought to the supreme court of the United States on writ of error, that court, on reversing the decision, may enter a judgment finally disposing of the case, instead of merely remanding it for further proceedings not inconsistent with the opinion.—Id.

The supreme court, like all others, is limited in its jurisdiction to cases involving actual controversies, and in which its judgment will be effective; and although a case is one brought to review the decision of a state court, and involving a federal question, the decision of which may affect the rights of the parties in other proceedings, if, by reason of events occurring subsequent to the rendition of the judgment sought to be reversed, the particular relief sought in that action by the plaintiff in error cannot be afforded, the writ of error will be dismissed.—*Kimball v. Kimball*, 19 S. Ct. 639, 174 U. S. 158, 43 L. Ed. 932.

The decision of a state court that a charter exemption from taxation of the property, of whatever kind and description, belonging or appertaining to a theological seminary, does not include property owned, rented, or held by it as an investment, but not used in immediate connection with the seminary, although the income thereof is used only for the purposes of the school, is not so obviously erroneous as to require reversal by the Supreme Court of the United States, because the charter provides that the act "shall be construed liberally in all courts for the purposes therein expressed." Judgment 59 N. E. 977, 189 Ill. 439, and 61 N. E. 1022, 193 Ill. 619, affirmed.—*Board of Directors of Chicago Theological Seminary v. People of State of Illinois*, 23 S. Ct. 386, 188 U. S. 662, 47 L. Ed. 641.

The federal Supreme Court cannot, independently of the federal questions involved, reverse a judgment of the highest court of a state on the ground that a state statute, enacted after the judgment under review was rendered, had the effect of depriving the state of the power to enforce such judgment. Decree, *In re Campbell's Estate*, 77 P. 674, 143 Cal. 623, affirmed.—*Campbell v. State of California*, 26 S. Ct. 182, 200 U. S. 87, 50 L. Ed. 382.

The question whether the California Legislature could enact Act April 2, 1866, ratifying conveyances made by the corporate authorities of the city of Monterey of pueblo lands confirmed to that city by the United States, and afterwards patented to it, its successors and assigns, is not so far unsubstantial as to justify dismissal of a writ of error to a state court. Judgment (1903) 73 P. 436, 139 Cal. 542, affirmed.—*City of Monterey v. Jacks*, 27 S. Ct. 67, 203 U. S. 360, 51 L. Ed. 220.

The decree of a state court enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state, over the objection that the maximum rates so fixed are inadequate and confiscatory, will be affirmed by the federal Supreme Court, where the evidence leaves the question of reasonableness in doubt, but without prejudice to the right of the carrier to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly the confiscatory character of the rates. Decree, *State v. Northern Pac. Ry. Co.* (1909) 120 N. W. 869, affirmed.—*Northern Pac. Ry. Co. v. State of North Dakota ex rel. McCue*, 30 S. Ct. 423, 216 U. S. 579, 54 L. Ed. 624.

The action of the highest court of a state in remanding a cause to be retried on the settled principles of law as theretofore declared in its

decisions, instead of requiring the further proceedings to conform to the opinion of the federal Supreme Court, as the mandate of that court, which had reversed a judgment of the state court, required, is not cause for reversing the judgment rendered on the second trial and affirmed by the highest state court, where the change in the form of the mandate has not worked prejudice.—(1911) *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 31 S. Ct. 561, 220 U. S. 590, 55 L. Ed. 596, affirming judgment (1909) 71 A. 1053, 222 Pa. 470.

Judgment of state court, dismissing appeal to restrain enforcement of ordinance fixing gas rates without prejudice to a later suit, after ordinance which had not been enforced had been given a fair test, held not to be disturbed on review by the Supreme Court of the United States.—(1912) *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 32 S. Ct. 389, 223 U. S. 655, 56 L. Ed. 594, affirming decree (1909) 120 N. W. 966, 144 Iowa, 426, 138 Am. St. Rep. 299.

A judgment of ouster and fine against a foreign corporation in quo warranto in the highest court of the state, which cannot be reversed on the federal question involved, cannot be modified or amended.—(1912) *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 32 S. Ct. 406, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913D, 936, affirming judgment *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1.

No state statute can empower a state court, when assessing damages to a successful plaintiff in mandamus, to allow attorneys' fees for services in the federal Supreme Court on writ of error unsuccessfully prosecuted by defendant, where such award was in conflict with the settled rule in the federal Supreme Court.—*Missouri Pac. R. Co. v. Larabee*, 34 S. Ct. 979, 234 U. S. 459, 58 L. Ed. 1398, reversing judgment *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 116 P. 901, 85 Kan. 214.

The allowance of a writ of error with superseas from the federal Supreme Court to review a judgment of a state court awarding mandamus does not preclude the state court, after its judgment has been affirmed by such Supreme Court, from assessing, under Gen. Stat. Kan. 1909, § 6319 (Code Civ. Proc. § 723), as part of the damages, plaintiff's business losses suffered during the proceedings in the federal Supreme Court from defendant's refusal to obey the mandamus.—Id.

A verdict on first trial of action for death under Employers' Liability Act cannot be reinstated by federal Supreme Court on cross writ of error to a state court which, having set aside verdict for plaintiff on first trial, affirmed, on second appeal, judgment for plaintiff in a lesser amount, on second trial.—*Louisville & N. R. Co. v. Stewart*, 36 S. Ct. 586, 241 U. S. 261, 60 L. Ed. 989, affirming judgment *Same v. Stewart's Adm'r*, 174 S. W. 744, 163 Ky. 823.

Federal Supreme Court, reversing judgment of state court which erroneously held possession after Act April 28, 1904, confirming conveyances heretofore made by the Northern Pacific Railroad of its right of way outside the 200-foot limit, could be considered in determining whether possession had ripened into title, will leave open question of adverse possession as completed prior to that act which the state court did not determine.—*Northern Pac. Ry. Co. v. Concannon*, 36 S. Ct. 156, 239 U. S. 382, 60 L. Ed. 342, reversing judgment 135 P. 652, 75 Wash. 591.

(H) CIRCUIT COURTS OF APPEALS

Review of bankruptcy proceedings, see Bankruptcy, 441, 448, 451.

401. Creation and constitution.

See 13 Cent. Dig. Courts, § 1094.

Act March 3, 1891, creating circuit courts of appeals, took effect immediately, so as to permit appeals to the new courts to be taken at once.—*In re Claassen*, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409.

404. Issuance of remedial writs.

Authority to issue a writ of certiorari as an original and independent proceeding to review a conviction in an inferior federal court is not found in the grant to the Circuit Court of Appeals by Act March 3, 1891, c. 517, § 12, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488] of the powers specified in Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], which authorizes certain federal courts to "issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," where the only question in the case was whether the punishment of the offense charged was within the jurisdiction of the federal courts, and the case was put in proper condition for review on writ of error. *Order, Ex parte Dick*, 141 F. 5, 72 C. C. A. 667, reversed.—*Whitney v. Dick*, 26 S. Ct. 584, 202 U. S. 132, 50 L. Ed. 963.

Mandamus to require a federal Circuit Court to proceed with and determine a pending suit which it has stayed to await the commencement and prosecution to final judgment of a suit in a state court may be issued by a Circuit Court of Appeals as in aid of its appellate jurisdiction under Act March 3, 1891, c. 517, § 12, 26 Stat. 829 [U. S. Comp. St. 1901, p. 553], giving the Circuit Courts of Appeals the powers specified in Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], to issue all writs not specifically provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.—*McClellan v. Carland*, 30 S. Ct. 501, 217 U. S. 268, 54 L. Ed. 762.

405. Appellate jurisdiction and procedure in general.

See 13 Cent. Dig. Courts, §§ 1097-1099, 1101, 1103; 3 Cent. Dig. App. & E. § 156; 3 Cent. Dig. App. & E. §§ 3302, 3336.

No appeal lies from the supreme court of a territory to the circuit court of appeals in a suit between citizens of the territory, and which is not an admiralty case or a case arising under the patent, criminal, or revenue laws. *Judiciary Act March 3, 1891, §§ 5, 6*.—*Aztec Min. Co. v. Ripley*, 151 U. S. 79, 14 S. Ct. 236, 38 L. Ed. 80, affirming judgment 53 Fed. 7, 3 C. C. A. 388, 10 U. S. App. 383.

Where the jurisdiction of the circuit court is in issue, and the jurisdiction is sustained, and there is a judgment for plaintiff on the merits, defendant may elect either to have the question of jurisdiction certified directly to the supreme court or to carry the whole case to the circuit court of appeals, which may certify such question.—*United States v. Jahn*, 155 U. S. 100, 15 S. Ct. 39, 39 L. Ed. 87.

Where, in such case, plaintiff also has grounds of complaint in respect to the judgment in his favor, he may carry the case to the circuit court of appeals on the merits by cross appeal or writ of error, if defendant has taken the case there, or independently, if defendant has taken the case to the supreme court on the question of jurisdiction only, in which instance the circuit court of appeals will suspend a decision on the merits until the question of jurisdiction is determined.—*Id.*

The same rules apply where plaintiff objects to the jurisdiction of the circuit court, and is, or both parties are, dissatisfied with the judgment on the merits.—*Id.*

Under the fifth and sixth sections of the judiciary act of March 3, 1891 (26 Stat. 828), the circuit courts of appeals have appellate jurisdiction in all cases in which original jurisdiction is conferred on the circuit courts by reason of the United States being plaintiffs or petitioners, including the case of a bill by the United States to cancel a patent for an invention.—*United States v. American Bell Tel. Co.*, 159 U. S. 548, 16 S. Ct. 69, 40 L. Ed. 255.

Since, by Act March 3, 1891 (26 Stat. 827, c. 517), a circuit court of appeals has jurisdiction to review a judgment or decree of the supreme court of a territory only in cases in which the decisions of the former court are final, it has no such jurisdiction in cases of infamous crimes.—*Folsom v. United States*, 160 U. S. 121, 16 S. Ct. 222, 40 L. Ed. 363.

The district court of Alaska is, in effect, the supreme court of such territory, so as to authorize the review of its judgments or decrees, under Act March 3, 1891, § 15, authorizing the circuit court of appeals to review the judgments of the supreme court of any territory assigned to such circuit by the supreme court of said territory; this territory having, in accordance with such section, been assigned by the supreme court to the Ninth circuit.—*The Coquitlam v. United States*, 163 U. S. 346, 16 S. Ct. 1117, 41 L. Ed. 184.

In jurisdictions where it is the practice in the circuit and district courts to enter judgment at once on the return of a verdict, and permit a motion to set aside the judgment and for a new trial to be thereafter made and determined, where such motion is seasonably made, at the term when the judgment was entered, the judgment remains subject to the control of the court until the motion is disposed of, and until that time does not become final for purposes of review on appeal or writ of error by the circuit court of appeals.—*Kingman & Co. v. Western Mfg. Co.*, 18 S. Ct. 786, 170 U. S. 675, 42 L. Ed. 1192.

In an action at law brought in a circuit or district court under Act March 3, 1887, c. 359 (24 Stat. 505), authorizing the bringing of suits against the United States, the judgment is reviewable by the circuit court of appeals on writ of error.—*United States v. Harsha*, 19 S. Ct. 294, 172 U. S. 567, 43 L. Ed. 556, certifying case 56 F. 953, 6 C. C. A. 178.

No pecuniary limit on the appellate jurisdiction of the circuit court of appeals from a district or circuit court of the United States is imposed by Act Cong. March 3, 1891.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320.

A conviction for murder punishable with death is a conviction for a capital crime, of which the supreme court, and not the circuit court of appeals, has jurisdiction on writ of error, although the jury have qualified the judgment by rendering a verdict "without capital punishment."—*Good Shot v. United States*, 21 S. Ct. 33, 179 U. S. 87, 45 L. Ed. 101.

A writ of supersedeas issued by the clerk of a circuit court of appeals is not void because its issue was directed by a judge of the court, and not by the court as a court.—*In re McKenzie*, 21 S. Ct. 468, 180 U. S. 536, 45 L. Ed. 657.

The mere fact that a constitutional question may have so arisen that a direct resort to the supreme court of the United States may be had, where the jurisdiction of the circuit court depends on diverse citizenship, does not deprive the court of appeals of jurisdiction of an appeal or justify it in declining to exercise that jurisdiction. *Judgment 104 F. 2, 43 C.*

C. A. 393, reversed.—American Sugar-Refining Co. v. City of New Orleans, 21 S. Ct. 646, 181 U. S. 277, 45 L. Ed. 859.

No order of the supreme court of the United States assigning the territory of Hawaii to a judicial circuit under the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], can give a right of appeal inconsistent with the provision of act of April 30, 1900, § 86, restricting appeals from the court of the territory of Hawaii to cases in which appeals are allowable to the courts of the United States from the courts of the several states.—In re Wilder's S. S. Co., 22 S. Ct. 225, 183 U. S. 545, 46 L. Ed. 821.

No right of appeal to the United States circuit court of appeals from a decree of the supreme court of the territory of Hawaii, in a case of admiralty pending in the courts of Hawaii when the act of April 30, 1900, providing a government of the territory of Hawaii, took effect, was given by section 86 of that act, establishing in the territory a district court of the United States with the powers of a circuit court, and allowing appeals therefrom to the circuit court of appeals, but restricting appeals from the territorial courts of Hawaii to cases in which appeals are allowable to the courts of the United States from the courts of the several states.—Id.

No pecuniary limit on the appellate jurisdiction of the circuit court of appeals from a district or circuit court of the United States is imposed by Act Cong. March 3, 1891.—Kirby v. American Soda Fountain Co., 24 S. Ct. 619, 194 U. S. 141, 48 L. Ed. 911.

The judgment or order of a federal Circuit Court, finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing a fine therefor, is reviewable in the appropriate Circuit Court of Appeals, under Act March 3, 1891, c. 517, § 6, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], giving that court appellate jurisdiction of final decisions in all cases other than those specified in section 5, which provides for a direct review in the Supreme Court, and limits such review in criminal proceedings to convictions of capital and otherwise infamous crimes.—Bessette v. W. B. Conkey Co., 24 S. Ct. 665, 194 U. S. 324, 48 L. Ed. 997.

A writ of error lies from the appropriate Circuit Court of Appeals to review an order of a Circuit Court, adjudging the defendant in a suit for the infringement of a patent guilty of contempt in disobeying a preliminary injunction, and ordering him to pay a fine of \$1,000, one half to the United States and the other half to the complainant.—In re Christensen Engineering Co., 24 S. Ct. 729, 194 U. S. 458, 48 L. Ed. 1072.

An appeal lies to the appropriate Circuit Court of Appeals in a case where the jurisdiction of the Circuit Court attached both on the ground of diverse citizenship and on a separate and independent constitutional ground. Judgment, Illinois Cent. R. Co. v. Mississippi Railroad Commission (1905) 138 F. 327, 70 C. C. A. 617, affirmed.—Mississippi Railroad Commission v. Illinois Cent. R. Co., 27 S. Ct. 90, 203 U. S. 335, 51 L. Ed. 209.

The Circuit Court of Appeals cannot, in advance of the final decree in the suit, review an order of a federal Circuit Court which adjudges the defendants in such suit guilty of contempt in disobeying an order for the production of certain books and papers for inspection for the benefit of the plaintiff, and imposes a fine or imprisonment in the event of failure to produce such books or papers by a specified date, since this is not a final order rendered in a proceeding criminal in its nature, and, as such, within the appellate jurisdiction of the Circuit

Court of Appeals, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], but was intended to secure the rights of the party to the suit for whose benefit the original order was made.—Doyle v. London Guarantee & Accident Co., 27 S. Ct. 313, 204 U. S. 599, 51 L. Ed. 641.

A Circuit Court of Appeals to which is addressed the mandate of the Supreme Court directing the remanding of the cause to the District Court for further proceedings in conformity with the opinion upon which the mandate was based has no jurisdiction to compel the District Court, by mandamus, to modify the decree entered in supposed compliance with such mandate, to conform to the view of the Supreme Court's opinion entertained by the Circuit Court of Appeals. Judgment, *Ex parte Chicago Title & Trust Co.* (1906) 146 F. 742, 77 C. C. A. 406, reversed.—*Ex parte First Nat. Bank of Chicago*, 28 S. Ct. 23, 207 U. S. 61, 52 L. Ed. 103; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, Id.

A writ of error to the Circuit Court of Appeals to review a judgment of that court issuing a peremptory mandamus requiring a District Court to modify its judgment entered in supposed compliance with the mandate of the Supreme Court will not be dismissed because the district judge obeyed the order and did not sue out the writ, where it appears on the record that the judge declined to join, that he has no personal interest in the judgment, and that the plaintiffs in error have such an interest, and were made parties for the purpose of protecting their rights.—Id.

An order entered in an action to recover damages from a carrier for violations of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], requiring certain specified officers and employees who are not parties to produce relevant books and papers, is not, as to those persons, a final decree within the meaning of the provision of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], governing writs of error from Circuit Courts of Appeals to the Circuit Courts, and hence will not sustain a writ of error sued out by them. Judgment, *Cassatt v. Webster Coal & Coke Co.*, 150 F. 48, 81 C. C. A. 97, reversed.—*Webster Coal & Coke Co. v. Cassatt*, 28 S. Ct. 108, 207 U. S. 181, 52 L. Ed. 160; *Pennsylvania Coal & Coke Co. v. Same*, 28 S. Ct. 110, 207 U. S. 187, 52 L. Ed. 163, reversing judgment, *Cassatt v. Pennsylvania Coal & Coke Co.*, 150 F. 48, 81 C. C. A. 97.

A circuit court of appeals is not without jurisdiction of an appeal from a decree of a federal circuit court in a suit founded upon a decree of that court because the petition for the removal of the suit from the state court in which it was brought alleges that the construction of the Federal Constitution is involved.—*Kansas City Northwestern R. Co. v. Zimmerman*, 28 S. Ct. 730, 210 U. S. 336, 52 L. Ed. 1084, dismissing appeal (1906) *Zimmerman v. Kansas City N. W. R. Co.*, 144 F. 622, 75 C. C. A. 424.

The Circuit Court of Appeals is justified in allowing an amendment to correct a writ of error, which, owing to the illness of counsel, does not set forth accurately the parties plaintiff, and in denying a motion to dismiss the writ, founded upon such mistake. Judgment (C. C. A. 1908) *Thomas v. Green County*, 159 F. 339, 89 C. C. A. 405, affirmed.—*Green County, Ky. v. Thomas' Ex'r*, 29 S. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

Full appellate jurisdiction over the final decisions of the Court of Appeals in the Indian Territory was conferred upon the Circuit Court of Appeals for the Eighth Circuit by the provisions of Act March 1, 1895, c. 145, § 11, 28

Stat. 698, that "writs of errors and appeals from the final decision of said appellate court shall be allowed and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts," and such jurisdiction is not in any way measured or limited by the jurisdiction on appeal from or error to the District or Circuit Courts.—*Laurel Oil & Gas Co. v. Morrison*, 29 S. Ct. 894, 212 U. S. 291, 53 L. Ed. 517.

A writ of error for the review in a Circuit Court of Appeals of a judgment of a federal District Court cannot be allowed by the court after the expiration of the six months given by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), for suing out such writs. Judgment (1907) 152 F. 925, 82 C. O. A. 73, affirmed.—*Old Nick Williams Co. v. United States*, 30 S. Ct. 221, 215 U. S. 541, 54 L. Ed. 318.

Delay in settling the bill of exceptions, due to judicial engagements of the trial judge, is no excuse for the failure to sue out a writ of error from a circuit court of appeals to a federal District Court within the six months allowed by Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), although an assignment of errors should accompany the petition for the writ of error, since such assignment may be formulated without the previous settlement of the bill of exceptions, and, besides, is not a jurisdictional requirement.—*Id.*

The Circuit Court of Appeals, on an appeal from an interlocutory order, may direct the bill to be dismissed, if complainant is not entitled to sue.—*Metropolitan Water Co. v. Kaw Valley Drainage Dist. of Wyandotte County, Kan.*, 32 S. Ct. 246, 223 U. S. 519, 56 L. Ed. 533.

The Circuit Court of Appeals has jurisdiction to review the decree of the Circuit Court dismissing a bill to restrain the city from removing old wires of telephone and telegraph companies from the city streets, on the ground that the company's rights under Act July 24, 1866, were infringed, and that the city had given rise to a contract protected against impairment.—(1912) *City of Pomona v. Sunset Telephone & Telegraph Co.*, 32 S. Ct. 477, 224 U. S. 330, 56 L. Ed. 788, reversing decree (1909) *Sunset Telephone & Telegraph Co. v. City of Pomona*, 172 F. 829, 97 C. C. A. 251.

An appeal lies to the appropriate court of appeals from the final decree in a suit where jurisdiction was invoked because the suit was ancillary to receivership suit depending on diverse citizenship, and on grounds which involved alleged infractions of the federal Constitution.—(1912) *Railroad Commission of Ohio v. Worthington*, 32 S. Ct. 653, 225 U. S. 101, 56 L. Ed. 1004, affirming decree (1911) 187 F. 965, 110 C. C. A. 85.

A decree of a federal District Court dismissing after trial a libel to condemn food products seized on land under the pure food law of June 30, 1906, is reviewable in the Circuit Court of Appeals by writ of error, and not by appeal, notwithstanding the provisions of section 10.—*Four Hundred and Forty-Three Cans of Frozen Egg Product v. United States*, 33 S. Ct. 50, 226 U. S. 172, 57 L. Ed. 174, reversing judgment *United States v. Four Hundred and Forty-Three Cans of Frozen Egg Product*, 193 F. 589, 118 C. O. A. 457.

Writ of error being the proper procedure to review in the Circuit Court of Appeals a decree of the District Court dismissing a libel seeking to condemn food products under the pure food law of June 30, 1906, neither the action of the court nor the consent of parties would confer jurisdiction on appeal.—*Id.*

A decree of a federal District Court enjoining a municipality, because of a judgment, from issuing bonds or constructing a waterworks plant, is final for purposes of appeal to the Circuit Court of Appeals, where the record shows that the court and the parties treated the bill as an attack on the right to build a waterworks system, before expiration of existing private franchise, to be operated thereafter.—*City of Vicksburg v. Henson*, 34 S. Ct. 95, 231 U. S. 259, 58 L. Ed. 209, reversing judgment 203 F. 1023, 121 C. C. A. 664.

Application to a Circuit Court of Appeals for writ of prohibition forbidding a district judge to vacate a conviction in a criminal case pending in the former court on writ of error is within Judicial Code, § 239, authorizing certification of questions of law by a Circuit Court of Appeals in a case within its appellate jurisdiction.—*United States v. Mayer*, 35 S. Ct. 16, 235 U. S. 55, 59 L. Ed. 129.

Importance of the question certified by the Circuit Court of Appeals under Judicial Code, § 239, for decision filed by the federal Supreme Court, is no reason for its disallowance if the question is suitably specific.—*Id.*

A federal Circuit Court of Appeals has no appellate jurisdiction where the jurisdiction of the District Court was invoked upon the sole ground that the application of the federal Constitution was involved.—*Carolina Glass Co. v. State of South Carolina*, 38 S. Ct. 293, 240 U. S. 305, 60 L. Ed. 658, affirming judgments 69 S. E. 891, 87 S. C. 270, and *Same v. Murray* (D. C.), 197 F. 392, reversing judgment 206 F. 635, 124 C. C. A. 423.

Circuit Court of Appeals may not require plaintiff in error to elect under penalty of dismissal which of two writs of error to review conviction, one sued out from the Supreme Court and the other out of the Circuit Court of Appeals, he would pursue.—*Lamar v. United States*, 36 S. Ct. 535, 241 U. S. 103, 60 L. Ed. 912, affirming judgment 227 F. 1019, 141 C. C. A. 668.

406. Review of final decisions.

See 13 Cent. Dig. Courts, § 1103; 3 Cent. Dig. App. & E. §§ 3385, 3387-3391, 3393.

The question as to jurisdiction below, when in issue, is reviewable in the Circuit Court of Appeals on a writ of error to a Circuit Court bringing up the whole case, although the Circuit Court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), might have certified the sole question of jurisdiction directly to the Supreme Court. Judgment (1906) 149 F. 42, 79 C. C. A. 64, 9 Ann. Cas. 884, affirmed.—*Boston & M. R. R. v. Gokey*, 28 S. Ct. 657, 210 U. S. 155, 52 L. Ed. 1002.

The Circuit Court of Appeals cannot consider the sufficiency of facts found by the District Court in an action at law tried without a jury contrary to Rev. St. U. S. § 566 (U. S. Comp. St. 1901, p. 461), and the court's determination was not a judicial one, the provisions of sections 649 and 700 providing for such a trial being limited to cases in the Circuit Courts.—(1912) *Campbell v. United States*, 32 S. Ct. 398, 224 U. S. 99, 56 L. Ed. 684, reversing judgment (1909) *United States v. Campbell*, 170 F. 318, 95 C. C. A. 114.

407. Appeals from orders relating to provisional remedies.

See 13 Cent. Dig. Courts, § 1100.

The question whether the circuit court of appeals has authority to entertain an appeal from a decree setting aside an order appointing a receiver is not of such importance, even though the court has exercised such authority, as to require the interposition of the supreme

court, either by mandamus or certiorari; for, even if the interlocutory order could not be the subject of a separate appeal, it might be brought before the circuit court of appeals on appeal from the final decree in the cause.—*American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 13 S. Ct. 753, 37 L. Ed. 486.

Where the circuit court of appeals, under the authority given it by section 7 of the judiciary act of March 3, 1891, to entertain an appeal from an interlocutory order "granting or continuing an injunction," entertains an appeal from an order appointing a receiver for a railroad company and enjoining the disposition of its property, and not only modifies the injunction, but also directs the circuit court to discharge the receiver and restore the property to the company, its action in the latter respect, even if erroneous, is no ground for interference by the supreme court by writ of mandamus, for the appeal from the injunctive part of the decree was clearly authorized, and the case was within the jurisdiction of the circuit court of appeals.—*Id.*

An appeal, under Act March 3, 1891, c. 517, § 7, to the circuit court of appeals, from an interlocutory decree of the circuit court granting an injunction, may be taken from the whole decree. It need not be restricted to the part granting the injunction.—*Smith v. Vulcan Iron Works*, 17 S. Ct. 407, 165 U. S. 518, 41 L. Ed. 810.

The circuit court of appeals, on an appeal from an interlocutory decree of the circuit court granting an injunction, may consider and decide the case on its merits.—*Id.*

In a suit in which an appeal would lie to the circuit court of appeals from a final decree, an appeal may be taken from an order granting a temporary injunction and appointing a receiver, even though the jurisdiction of the circuit court is also involved; and such an appeal carries up the entire order, and the case may, on occasion, be considered and decided on the merits.—*In re Tampa Suburban R. Co.*, 18 S. Ct. 177, 168 U. S. 583, 42 L. Ed. 589.

Under Act March 3, 1891, § 7, as amended February 18, 1895 (28 Stat. 666), an appeal will not lie from an order appointing a receiver merely because it contains the usual mandatory direction, in the nature of an injunction, requiring the defendant, its officers, agents, and employés, to deliver to the receiver the property in their hands.—*Highland Ave. & B. R. Co. v. Columbian Equipment Co.*, 18 S. Ct. 240, 168 U. S. 627, 42 L. Ed. 605.

Appeals from interlocutory orders appointing receivers are authorized to be taken from the district court of Alaska under Act Cong. June 6, 1900 (31 Stat. 321, c. 786), regulating appeals from that court, when read in connection with Judiciary Act March 3, 1891, c. 517, § 7, 26 Stat. 828, as amended June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], by providing for appeals from orders appointing receivers.—*In re McKenzie*, 21 S. Ct. 468, 180 U. S. 536, 45 L. Ed. 657.

The inherent power of the appellate court to stay or supersede proceedings on appeal from an order appointing a receiver is not interfered with by the provision of Code Alaska, § 507, to the effect that on appeal to the circuit court of appeals from interlocutory orders granting or refusing an injunction, or an order to dissolve an injunction, "the proceedings in other respects in the district court" "shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."—*Id.*

The exception to the rule that only final decrees are appealable, which Act March 3, 1891, c. 517, § 7, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c.

803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], makes in favor of appeals to the Circuit Courts of Appeals from interlocutory orders or decrees of District or Circuit Courts granting an injunction, does not authorize a cross-appeal by complainants from a decree in a patent infringement suit, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed.—*Ex parte National Enameling & Stamping Co.*, 26 S. Ct. 404, 201 U. S. 156, 50 L. Ed. 707; *Ex parte Automatic Switch Co.*, 26 S. Ct. 407, 201 U. S. 166, 50 L. Ed. 710.

(I) CIRCUIT COURTS.

Jurisdiction of bankruptcy proceedings, see Bankruptcy, 294.

Jurisdiction to grant new trial, see Criminal Law, 950.

Jurisdiction to issue mandamus, see Mandamus, 141.

Mandamus to, see Mandamus, 426.

Review in bankruptcy proceedings, see Bankruptcy, 448, 453-459.

408. Creation and constitution.

See 13 Cent. Dig. Courts, §§ 1104, 1105.

410. — Circuit Courts for particular districts.

See 13 Cent. Dig. Courts, § 1104.

The state of South Carolina comprises but one federal judicial district, divided into two geographical divisions, called in the statutes "the Eastern and Western districts of the district of South Carolina" (Rev. St. § 546); so that on an indictment in the circuit court the grand and petit jurors may be drawn from both the Eastern and Western districts, irrespective of where the crime is laid.—*Barrett v. United States*, 18 S. Ct. 327, 169 U. S. 218, 42 L. Ed. 723.

413. Rules and conduct of business in general.

See 13 Cent. Dig. Courts, § 1107.

A rule of a federal Circuit Court which treats as a general appearance a special appearance by a party sued in the wrong federal district, made solely for the purpose of objecting to the jurisdiction, without stating that, if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case, is invalid, as substantially impairing his right under Act March 3, 1891, c. 517, 26 Stat. 827, § 5 (U. S. Comp. St. 1901, p. 549), to appear specially and object to the jurisdiction of the court, and bring an adverse decision directly to the Supreme Court for review.—*Davidson Bros. Marble Co. v. United States ex rel. Gibson*, 29 S. Ct. 324, 213 U. S. 10, 53 L. Ed. 675.

414. Original civil jurisdiction and procedure in exercise thereof.

See 13 Cent. Dig. Courts, §§ 1108-1110, 1112, 1153.

A suit brought by a state in one of its own courts against a corporation amenable to its process, to try the right of a corporation to exercise corporate powers within the territorial limits of the state, if presenting a case arising under the laws of the United States, may be removed to a United States circuit court, under Act March 3, 1875, c. 137, as the statute makes no exception of suits to which a state is a party; notwithstanding the constitutional grant to the supreme court of original jurisdiction in cases in which a state shall be a party.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

The provision of Act Cong. March 3, 1875, § 1 (18 Stat. 470), excepting from the original

jurisdiction of the federal courts suits by assignees which could not have been brought there by the assignors, does not apply to suits brought in state courts, and removed thence to the circuit court of the United States.—*Board of Com'rs of Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674.

Act Tex. April 3, 1891, § 6, allowing suits against the railroad commissioners to be brought in a court of competent jurisdiction in a certain county, authorizes such suit to be brought by a citizen of another state in the United States circuit court, as that court is a court of competent jurisdiction within the county named.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014.

Jurisdiction of a claim to recover mesne profits accruing between a pre-emption entry and the issuance of a patent cannot be taken by a circuit court of the United States which does not have jurisdiction to determine the question of title to the land in dispute or of the right of possession thereof. Judgment 87 F. 369, 31 C. C. A. 9, reversed.—*Florida Cent. & P. R. Co. v. Bell*, 20 S. Ct. 399, 176 U. S. 321, 44 L. Ed. 486.

An action to recover back duties illegally exacted and paid under protest upon imports into Porto Rico from New York is within the jurisdiction of the circuit court as a court of claims, whether the exactions were tortious or not, since the importer can waive the tort and sue upon an implied contract of the United States to refund the money, and the case is founded upon an act of congress within the meaning of the Tucker act (24 Stat. 505, c. 359), namely a revenue law.—*Dooley v. United States*, 21 S. Ct. 762, 182 U. S. 222, 45 L. Ed. 1074; *Armstrong v. Same*, 21 S. Ct. 827, 182 U. S. 243, 45 L. Ed. 1086.

Jurisdiction of an action to recover back duties exacted under the Foraker act of April 12, 1900, and paid under protest, upon goods brought from Porto Rico, is given to a circuit court of the United States by Rev. St. U. S. § 629, subd. 4, vesting it with jurisdiction "of all suits at law or equity arising under any act providing for a revenue from imports or tonnage," when construed with section 643, providing for the removal from state courts of suits against a revenue officer "on account of any act done under color of his office, or of any such revenue law, or on account of any right, title, or authority claimed by such officer or other person under any such law."—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

A federal circuit court has jurisdiction of a suit in equity brought by citizens of the state in which it sits, against citizens of other states, to set aside, as fraudulently obtained, judgments of a probate court against an intestate's estate, which are a lien on his real property situated within the district and inherited by complainants, since, under Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], a circuit court is empowered by final decree to remove any incumbrance or lien or cloud upon the title to real or personal property within the district as against persons not inhabitants thereof, and not found therein, who did not voluntarily appear in the suit. Decree (C. C.) 123 F. 338, reversed.—*McDaniel v. Traylor*, 25 S. Ct. 369, 196 U. S. 415, 49 L. Ed. 533.

A federal circuit court has no jurisdiction under Act March 3, 1887, c. 373, 24 Stat. 552, of original proceedings seeking relief by mandamus.—*United States ex rel. Knapp v. Lake Shore & M. S. Ry. Co.*, 25 S. Ct. 538, 197 U. S. 536, 49 L. Ed. 870.

A suit against the Governor and officers of the National Guard because of imprisonment

for 2½ months under the order of the Governor, made in good faith in the exercise of his power to suppress an insurrection, is not within the original jurisdiction of a federal Circuit Court under Rev. St. U. S. § 629 (U. S. Comp. St. 1901, p. 506), as a suit brought to redress the deprivation of any right secured by the Constitution of the United States. Judgment (C. C. 1906) 148 F. 870, affirmed.—*Moyer v. Peabody*, 29 S. Ct. 235, 212 U. S. 78, 53 L. Ed. 410.

—415. Claims against United States.

See 13 Cent. Dig. Courts, § 1111.

Act Cong. March 12, 1863 (12 Stat. 820, c. 120), provided that any loyal person claiming to have been the owner of property seized and sold as captured or abandoned property, under Act March 12, 1863, c. 120 (12 Stat. 820), should have a remedy in the court of claims. By Act July 27, 1868 (Rev. St. § 1059, 15 Stat. 243, c. 276), that remedy is declared to be exclusive, precluding the owner from any suit at common law, or any other mode of redress, before any tribunal other than the court of claims. In an action of trover in the United States circuit court against an ex-secretary of the treasury for the value of certain cotton, it appeared that, so far as defendant was concerned, the cotton was seized in good faith as captured or abandoned property. Held that, irrespective of whether or not it was captured or abandoned property, the action is barred by said section 1059.—*Lamar v. McCulloch*, 115 U. S. 163, 6 S. Ct. 1, 29 L. Ed. 360.

Where the United States, through its officers, acquires and maintains possession of land under a claim of ownership adverse to that of an individual, the latter cannot sue in assumpsit for the use and occupation, so as to give the circuit court jurisdiction, under 24 Stat. 506, c. 359, giving such court concurrent jurisdiction with the court of claims of all cases not sounding in tort.—*Hill v. United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. Ed. 862, reversing judgment (C. C.) 39 F. 172.

A Circuit Court of the United States has jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its officers and agents in improving navigation, where the government does not deny plaintiff's title, and admits that the work done was authorized by Congress, but denies that such work produced the alleged injury and destruction.—*United States v. Lynah*, 23 S. Ct. 349, 188 U. S. 445, 47 L. Ed. 539; *Same v. Williams*, 23 S. Ct. 363, 188 U. S. 485, 47 L. Ed. 554.

—416. Transfer of causes to other courts.

See 13 Cent. Dig. Courts, § 1117.

The state of South Carolina comprises but one federal judicial district, divided into two geographical divisions called "the Eastern and Western districts of the district of South Carolina" (Rev. St. § 546); and, hence an indictment found in the circuit court sitting in the Eastern district is properly remitted under Rev. St. § 1037, to the district court for the Western district, where the crime is laid.—*Barrett v. United States*, 18 S. Ct. 332, 169 U. S. 231, 42 L. Ed. 727.

—417. Appellate jurisdiction and procedure in exercise thereof.

See 13 Cent. Dig. Courts, §§ 1113-1116, 1118; 2 Cent. Dig. App. & E. § 332.

By Act Cong. March 3, 1887, the district court is given concurrent jurisdiction with the court of claims "where the amount of the claim does not exceed \$1,000," and the same right to

appeal and take writs of error is given to the plaintiff or the United States as "now reserved in the statutes of the United States in that behalf made." *Held*, that the statutes referred to as reserving the right to appeal and take writs of error were those relating to appeals and writs of error from judgments of the court of claims to the supreme court, and that in such cases the circuit courts have no jurisdiction of appeals from, and writs of error to, the district courts.—*United States v. Davis*, 131 U. S. 30, 9 S. Ct. 657, 33 L. Ed. 93.

(J) DISTRICT COURTS.

Decisions reviewable, see—

Appeal and Error, ¶25-131.

Criminal Law, ¶1021-1023.

Criminal jurisdiction, see Criminal Law, ¶89, 101.

Jurisdiction in bankruptcy proceedings, see Bankruptcy, ¶292, 293.

¶418. Creation and constitution.

See 12 Cent. Dig. Courts, §§ 1120, 1121.

Act Cong. Sept. 24, 1789, § 2 (1 Stat. 73, c. 20), dividing the United States into judicial districts, provided that one should "consist of the state of New Jersey" and "be called the New Jersey district." *Held*, that the boundaries of the district and the territorial jurisdiction of the federal courts coincided with the boundaries of the state, and varied with them when they were subsequently changed by the compact between New York and New Jersey of September 16, 1833.—*In re Devoe Mfg. Co.*, 108 U. S. 401, 2 S. Ct. 894, 27 L. Ed. 764.

¶418½ [New, vol. 14 Key-No. Series]. — Statutory provisions.

Abolition of federal Circuit Court by Judicial Code March 3, 1911, c. 231, 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 128), does not repeal by implication the provision of Act Feb. 11, 1903, for organization of a Circuit Court of at least three circuit judges for expedition of certain specified cases, under the express provision of section 291 of such Code.—*Ex parte United States*, 33 S. Ct. 170, 226 U. S. 420, 57 L. Ed. 281.

Proceeding to enforce mandate of Supreme Court directing entry of decree under which combination of railroad terminal facilities found to violate Anti-Trust Act July 2, 1890, shall be reorganized, *held* within the provisions of Act Feb. 11, 1903, for expedition of the hearing of cases brought under the Anti-Trust Act by the organization of the Circuit Court of at least three circuit judges.—*Id.*

¶420. — Divisions of districts.

See 12 Cent. Dig. Courts, § 1120.

Act Cong. July 20, 1892 (27 Stat. 252), creating the Southern division of the judicial district of Montana, provided that the act should "not affect the jurisdiction" of the court as to pending actions, which should proceed as though the act had not been passed, but that the court might, in its discretion, transfer to the new division such of them "as might properly be begun therein." *Held* not sufficient, as against Rev. St. §§ 563, 629, making the jurisdiction of district courts coextensive with the district, to show a distribution of territorial jurisdiction between the two divisions.—*Rosecrans v. United States*, 17 S. Ct. 302, 165 U. S. 257, 41 L. Ed. 708.

¶421. — Judges.

See 12 Cent. Dig. Courts, § 1121.

Under Comp. Laws N. M. § 2005, which provides that "for the purpose of hearing application for and issuing writs of mandamus the district court shall be regarded as open at all times wherever the judge of such court may be within the territory," a peremptory writ may

be issued by a judge in vacation.—*Delgado v. Chavez*, 140 U. S. 586, 11 S. Ct. 874, 35 L. Ed. 578, affirming judgment 5 N. M. 646, 25 P. 948.

¶424. Civil jurisdiction and procedure.

See 12 Cent. Dig. Courts, §§ 1119, 1125-1129.

The provision in the contract labor law of 1885 (23 Stat. 332, § 3) that the penalty of \$1,000 "may be sued for * * * as debts of like amount are now recovered in the circuit courts of the United States" refers to the form of action, and not the forum, and the district court has jurisdiction, as in suits for other penalties.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.

¶426. Claims against United States.

See 12 Cent. Dig. Courts, § 1131.

A federal District Court has jurisdiction under the provisions of Tucker Act, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, pp. 752, 753), defining the concurrent jurisdiction of the District Court and the Court of Claims, of a petition which is, in effect, a libel in personam for the salvage of duties collected and paid over to the federal government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers, since the claim may properly be said to be one for unliquidated damages in a case "not sounding in tort," in respect of which the party would be entitled to redress in a court of admiralty if the United States were suable. *Decrees United States v. Cornell Steamboat Co.*, 137 F. 455, 69 C. C. A. 603, and (D. C.) *Cornell Steamboat Co. v. 1,883 Bags of Sugar*, 108 F. 277, affirmed.—*United States v. Cornell Steamboat Co.*, 26 S. Ct. 648, 202 U. S. 184, 50 L. Ed. 987.

A suit to recover from the United States for the salvage of duties collected and paid over to the government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in possession and control of the customs officers, does not arise under the revenue laws, so as to be excluded from the jurisdiction of the District Court under the Tucker act, because the liability of the United States, as having a direct pecuniary interest in the property saved, is founded on the assumption that the Secretary of the Treasury, acting under the authority of Rev. St. U. S. §§ 2364, 3689 (U. S. Comp. St. 1901, pp. 1956, 2460), would have refunded the duties if the property had been destroyed by the fire.—*Id.*

Claims under Act July 27, 1912, for refunding of stamp taxes under War Revenue Act June 13, 1898, were "founded on a law of Congress," within Judicial Code, § 24, par. 20, conferring jurisdiction on District Courts.—*United States v. Hvoslef*, 35 S. Ct. 459, 237 U. S. 1, 59 L. Ed. 813, Ann. Cas. 1916A, 286, affirming judgment (D. C.) *Hvoslef v. United States*, 217 F. 680.

(K) TERRITORIAL AND PROVISIONAL COURTS.

See Bankruptcy, ¶18½.

Criminal jurisdiction, see Criminal Law, ¶84, 100.

Jurisdiction of offenses on Indian Reservation before admission of territory as state, see Indians, ¶38.

Transfer of criminal prosecutions on admission of territory, see Criminal Law, ¶89.

¶428. Establishment and organization in general.

See 12 Cent. Dig. Courts, §§ 1133, 1134.

Rev. St. § 1908, provides: "The judicial power of Arizona shall be vested in a supreme

court and such inferior courts as the legislative council may by law prescribe." *Held*, that a county court having civil and criminal jurisdiction, whose judgments and decrees the supreme court has a right to review on appeal, is an inferior court, as recognized in the above act.—*Ex parte Lothrop*, 118 U. S. 113, 6 S. Ct. 984, 30 L. Ed. 108.

—429. **Original civil jurisdiction and procedure in exercise thereof.**

See 13 Cent. Dig. Courts, §§ 1135-1141.

Rev. St. U. S. § 1866, provides that the jurisdiction of the courts of Idaho "shall be limited by law." Rev. St. Idaho, § 3816, confers original jurisdiction upon the supreme court of that territory in the issuance of writs of mandate, review, etc. *Held*, that this was not forbidden by Rev. St. U. S. § 1910, which provided that the district courts of certain territories, including Idaho, "shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States," although cases mentioned in section 3816 might depend on questions arising under the constitution and laws of the United States.—*Clough v. Curtis*, 134 U. S. 361, 10 S. Ct. 573, 33 L. Ed. 945, affirming 2 Idaho (Habb.) 523, 22 P. 8.

Under Rev. St. §§ 563, 734, defining the admiralty jurisdiction of the district courts, and Act May 17, 1884, establishing the district of Alaska, the district court of Alaska has jurisdiction to declare a forfeiture of vessels guilty of taking fur seal in violation of Rev. St. § 1956, in any of the navigable waters acquired from Russia by the treaty of March 30, 1867, over which the United States may lawfully exercise dominion.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

Under Act Cong. May 17, 1884, § 3, providing a civil government for Alaska, the district court of the district of Alaska, as therein defined, was invested with all the admiralty jurisdiction belonging to the district courts of the United States.—*Id.*

The jurisdiction of the territorial judicial district courts, which, under Organic Act N. M. § 10, was to be "as limited by law," was not withdrawn as to cases arising under the federal Constitution and laws which that section made justiciable in those courts by Comp. Laws N. M. 1897, §§ 900, 901, giving county district courts jurisdiction, enacted in pursuance both of the organic act and of Rev. St. § 1874.—*Santa Fé Cent. R. Co. v. Friday*, 34 S. Ct. 468, 232 U. S. 694, 58 L. Ed. 802, affirming judgment *Friday v. Santa Fé Cent. Ry. Co.*, 120 P. 316, 16 N. M. 434.

—430. **Appellate jurisdiction and procedure in exercise thereof.**

See 13 Cent. Dig. Courts, § 1142.

Territorial Supreme Court does not discharge its duty under Act April 7, 1874, to render a special verdict, where it hypothetically assumes the findings of the trial court to be correct and on them bases a judgment reversing decree for complainant and remands, with direction to enter a final decree against him.—(1912) *Nielsen v. Steinfeld*, 32 S. Ct. 609, 224 U. S. 534, 56 L. Ed. 872, reversing decree (1909) *Steinfeld v. Nielsen*, 100 P. 1094, 12 Ariz. 381.

—431. **Transfer of causes on admission of territory as state.**

See 13 Cent. Dig. Courts, §§ 1143-1149.

The question whether causes, which were of a nature to be cognizable either in the federal or state courts, were "pending" in the territorial

courts of Dakota at the time North Dakota was admitted, so as to be transferable on request to the federal circuit court, under the provisions of section 23 of the enabling act (25 Stat. 676), is to be determined independently of Comp. Laws Dak. T. § 5343, which declares that actions shall be deemed to be pending until the expiration of the two years allowed for an appeal; and such causes were not transferable after judgment, unless some further proceedings were being had therein.—*Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 12 S. Ct. 593, 36 L. Ed. 409.

On a question whether a motion for a new trial was pending, within the meaning of the act, it appeared that the motion was not made, or the notice of intention to move served, or the bill of exceptions settled and filed, until after the expiration of the statutory time and of several extensions granted by the court; that the motion and notice were not filed until after the admission of the state, but that the court had indorsed on the motion a continuance of the hearing until a day which was more than a month prior to the admission; and that no action whatever was had on that date or subsequently. *Held*, that no motion was pending at the time of admission, and the cause was improperly transferred.—*Id.*

Any right which a party may have to remove to a federal court a cause which was pending in the supreme court of a territory at the time of its admission as a state is not waived if he files his petition for transfer in the state supreme court before that court has taken any action in the case.—*Carr v. Fife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508; *Koenigsberger v. Richmond Silver-Min. Co.*, 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889.

As the newly-created federal courts were made successors of both the supreme and district courts of the territory, there is no inconsistency in allowing the transfer to the circuit court of causes which were pending in the supreme court of the territory on appeal; for after the transfer that court might do all things that were left undone in the territorial supreme court, and might proceed as that court would have proceeded if it had retained the case, and therefore might affirm, modify, or reverse the judgment, and, if necessary, itself try the case again.—*Koenigsberger v. Richmond Silver-Min. Co.*, 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889.

Act Feb. 22, 1889, § 23, providing for the admission of certain territories as states, provides that all cases pending in such territories at the time of admission, and arising within their limits, whereof the federal courts established by that act might have had jurisdiction had they existed when the action was commenced, may, at the request of either party, be transferred to such courts. *Held*, that this applied to pending actions between a resident of the territory and a citizen of a state.—*Id.*

Ter. Code Wash. §§ 439, 440, provided that proceedings to vacate a judgment as procured by fraud should be by petition filed within one year after the rendition of the judgment, and that the party should be brought into court in the same way and on the same notice, and the pleadings governed by the same principles, as in an original action by ordinary proceedings. *Held*, that a proceeding, begun in a territorial court in conformity to these sections, to set aside a judgment rendered on a stipulation of counsel made in disregard of defendant's instructions to his attorney, when removed, on defendant's request, to a United States court after the admission of Washington as a state, still remained a special proceeding under the statute, though properly triable as an equity

scit; and it was error to dismiss it on the ground that equity will not decree the vacation of a judgment when the remedy by petition or motion is adequate.—*Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 16 S. Ct. 127, 40 L. Ed. 263.

Act July 3, 1890, § 18, providing for the admission of Idaho, and authorizing the transfer to the newly-created federal courts of all cases pending at the time of admission whereof such federal courts "might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases," applies to all cases of which those courts might have had jurisdiction had they, like other federal courts, existed at the time in question in a state whose inhabitants consequently were citizens of that state.—*Washington & I. R. Co. v. Cœur D'Alene Ry. & Nav. Co.*, 160 U. S. 77, 16 S. Ct. 231, 40 L. Ed. 355, affirming decree 60 F. 981, 9 C. C. A. 303.

A homicide cause, the venue of which had been changed conformably to Act June 23, 1898, c. 517, § 29, 30 Stat. 511, because of the Indian citizenship of the accused, from the United States court in the Indian territory to the Federal district court at Paris, Texas, was not pending in the United States court in the Indian territory, within the meaning of the provisions of the Oklahoma enabling act (Act June 16, 1906, c. 3335, § 20, 34 Stat. 277), as amended by Act March 4, 1907, c. 2911, § 3, 34 Stat. 1287, for the transfer to the Oklahoma courts of all cases pending in the United States courts of Oklahoma and Indian territories, not transferred to the United States Circuit or District Courts in the state of Oklahoma.—*Hendrix v. United States*, 31 S. Ct. 193, 219 U. S. 79, 55 L. Ed. 102.

Irregularity in transferring to the federal District Court a suit begun prior to statehood in a territorial court based on Act April 22, 1908, as amended by Act April 5, 1910, is waived by answer on the merits to the amended complaint.—*Arizona & N. M. R. Co. v. Clark*, 35 S. Ct. 210, 235 U. S. 669, 59 L. Ed. 415, L. R. A. 1915C, 834, affirming judgment 207 F. 817, 125 C. C. A. 305.

Criminal prosecution for adultery held an offense not cognizable in a United States court had it been committed within a state within Oklahoma Enabling Act, §§ 16, 20, as amended by Act March 4, 1907, and of the Oklahoma Constitution accepting them.—*Southern Surety Co. v. State of Oklahoma*, 36 S. Ct. 692, 241 U. S. 582, 60 L. Ed. 1187, affirming judgment *Same v. State*, 127 P. 409, 34 Okl. 781.

Prosecution was pending in a temporary United States court of the Indian Territory within Oklahoma Enabling Act, §§ 16, 20, as amended by Act March 4, 1907, and of the Oklahoma Constitution, where accused was not only held by a magistrate to await action of grand jury but had given bail.—*Id.*

State of Oklahoma became beneficiary of a bail bond for appearance at temporary United States Court of Indian Territory of a person held to await action of grand jury under Oklahoma Enabling Act, as amended by Act March 4, 1907, and by Oklahoma Constitution accepting them.—*Id.*

432. Courts of particular territories.
See 13 Cent. Dig. Courts, § 1139; 1 Cent. Dig. Adm. § 37.

434. — Hawaii.

The power of the Hawaiian judges at chambers in proceedings not incident or ancillary to some cause pending before a court, conferred by the Hawaiian laws in force at the passage of Organic Act April 30, 1900, c. 339, 31 Stat. 141, was preserved by the provision of section

81 of that act, continuing in force the previous laws of Hawaii concerning the civil courts and their jurisdiction and procedure.—*Carter v. Gear*, 25 S. Ct. 491, 197 U. S. 318, 49 L. Ed. 787.

435. — Indian Territory.

See 13 Cent. Dig. Courts, § 1139.

In that portion of the Indian appropriation act of June 10, 1896 (29 Stat. 321 et seq., c. 398 et seq.), which relates to proceedings to determine rights of citizenship in any of the Five Tribes, the provision that, "if the tribe or any person be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court," must be construed as meaning the United States court in the Indian Territory, and the word "district" be rejected, as there was at the time no district court having jurisdiction within the territory.—*Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174 U. S. 445, 43 L. Ed. 1041.

A new trial may be granted for newly-discovered evidence in an action at law, by the United States court in the Indian Territory after a final decision of the case in the supreme court of the United States, under the authority of the Arkansas statute (Mansf. Dig. c. 119, § 5155), which is made applicable to the United States court of the Indian Territory by the act of congress of May 2, 1890, since that section relates to new trials for grounds disclosed after the term, and requires the grounds to be set forth in the petition which shall issue against the adverse party, and makes a proceeding under that section in form a new and independent suit.—*Ex parte Fuller*, 21 S. Ct. 871, 182 U. S. 562, 45 L. Ed. 1230.

Union in single court in Indian Territory of functions of probate and circuit courts of Arkansas renders inapplicable Mansf. Dig. 1884, §§ 6509, 6521, relating to appeals from probate, so that such provisions were not in force in the territory by Act Cong. May 2, 1890, § 31.—*Gidney v. Chappel*, 36 S. Ct. 492, 241 U. S. 99, 60 L. Ed. 910, affirming judgment *Same v. Chappel*, 142 P. 755, 48 Okl. 287.

Extension into Indian Territory of certain general laws of Arkansas published in Mansf. Dig. 1884, by Act Cong. May 2, 1890, § 31, put in force provisions of section 6525 of such digest relating to suits to avoid the probate of a will.—*Id.*

438. — Porto Rico.

The jurisdiction of the District Court of the United States for the District of Porto Rico extends, under Act April 12, 1900, c. 191, § 34 (31 Stat. 84), to all actions which could be brought in a federal Circuit Court.—*Ribas y Hijo v. United States*, 24 S. Ct. 727, 194 U. S. 315, 48 L. Ed. 994.

Damages for a wrongful attachment may, in view of the provision of Act April 12, 1900, c. 191, § 8, 31 Stat. 77, continuing local laws in force in Porto Rico, be assessed in the special proceeding provided by Code Civ. Proc. Porto Rico, arts. 1409-1415, where attachments have wrongfully been issued and vacated for any cause.—*Fernandez y Perez v. Perez y Fernandez*, 28 S. Ct. 561, 202 U. S. 80, 50 L. Ed. 942.

The district court of Porto Rico, when exercising the jurisdiction of a circuit court, conferred by Act April 12, 1900, c. 191, § 34, 31 Stat. 77, must conform to the local practice for the issuing of attachments, and the recovery of damages when wrongfully issued.—*Id.*

The jurisdiction of the District Court of the United States for the District of Porto Rico which, under Act March 2, 1901, c. 812, § 3, 31 Stat. 953, embraces controversies where the parties or either of them are citizens of the

United States, or citizens or subjects of a foreign state, extends to a cause in which the parties on both sides are subjects of the King of Spain.—*Ortega v. Lara*, 26 S. Ct. 707, 202 U. S. 339, 50 L. Ed. 1055.

The Porto Rican courts, as an incident of their general and probate authority and their power over all personal and real actions concerning decedents' estates, have jurisdiction to determine whether a decedent's estate has been closed by a family settlement which is attacked as fraudulent, to determine whether the property transferred to the widow by such settlement still remains a part of the estate, and to liquidate and settle the community existing between the husband and wife.—*Garzot v. Rios De Rubio*, 28 S. Ct. 543, 209 U. S. 283, 52 L. Ed. 794.

The District Court of the United States for the District of Porto Rico has no jurisdiction of a bill which seeks to administer decedents' estates which are open in a local court and subject to the power and authority of such court, because such bill also seeks to liquidate a community existing between husband and wife, to annul for fraud a family settlement of the estates, and to set aside, as simulated and fraudulent, sales made in virtue of the title apparently vested by such settlement, where the relief sought in this regard is merely ancillary to the prayer for the liquidation and settlement of the estates.—*Id.*

A corporation created by a decree of the Spanish crown for charitable purposes, and limited in its field of operations to Porto Rico, does not continue, after the ratification of the treaty of peace between the United States and Spain, to be a citizen or subject of Spain, within the meaning of Act March 2, 1901, c. 812, § 3, 31 Stat. 953, extending the jurisdiction of the District Court of the United States for Porto Rico to controversies where the parties or either of them are citizens or subjects of a foreign state.—*Martinez v. La Asociacion de Señoras Damas Del Santo Asilo de Ponce*, 29 S. Ct. 327, 213 U. S. 20, 53 L. Ed. 679.

A charitable corporation created by decree of the Spanish crown to operate in Porto Rico is not a citizen of the United States within the meaning of Act March 2, 1901, c. 812, § 3, 31 Stat. 953, extending the jurisdiction of the district court for Porto Rico to controversies where the parties or either of them are citizens of the United States, but, since the enactment of Act April 12, 1900, c. 191, 31 Stat. 77, establishing a civil government for Porto Rico, is, if a citizen of any country, a citizen of Porto Rico.—*Id.*

A mere reference in a bill in equity to the provisions of an order of the military governor of Porto Rico does not present a controversy arising under the laws of the United States, of which the federal District Court for Porto Rico would have jurisdiction without regard to the citizenship of the parties, even if such order be treated as a law of the United States, where the bill does not call the attention of the court to a controversy arising under such order in such a way as to invoke the court's action thereon.—*Fraenkl v. Cerecedo*, 30 S. Ct. 322, 216 U. S. 295, 54 L. Ed. 486.

Jurisdiction of the District Court of the United States for Porto Rico, under Act March 2, 1901, c. 812, § 3, 31 Stat. 953, does not embrace a suit to foreclose a mortgage in which one defendant is a citizen of the United States, while the other two and the claimant are citizens of Porto Rico.—*Cuebas y Arredondo v. Cuebas y Arredondo*, 32 S. Ct. 277, 223 U. S. 376, 56 L. Ed. 476.

Jurisdiction of federal District Court for Porto Rico of ejectment by a citizen of Porto Rico against a subject of Great Britain was

not ousted because Porto Rico became, with its consent, the sole party defendant.—*People of Porto Rico v. Ramos*, 34 S. Ct. 461, 232 U. S. 627, 53 L. Ed. 763.

439. Provisional courts.

See 13 Cent. Dig. Courts, §§ 1150-1153.

442. — Under executive or military authority.

See 13 Cent. Dig. Courts, §§ 1151-1153.

The creation of the provisional court for Porto Rico between April 11, 1899, when ratifications of the treaty by which it was ceded were exchanged, and May 1, 1900, when Act April 12, 1900, 31 Stat. 77, c. 191, establishing a civil government, took effect, was within scope of the military power, acting by authority of the President as Commander in Chief, though peace then prevailed, and courts established under Spain were open.—*Santiago v. Noguera*, 29 S. Ct. 608, 214 U. S. 260, 53 L. Ed. 989.

A controversy between a Porto Rican and a Spaniard furnishes diversity of citizenship which the order establishing the provisional court for Porto Rico made jurisdictional.—*Id.*

Service of process of the provisional court for Porto Rico by delivering the summons at usual place of defendant's abode, into hands of his wife is sufficient; such service being in strict accordance with procedure established by that court.—*Id.*

(L) COURTS OF DISTRICT OF COLUMBIA.

Criminal jurisdiction, see Criminal Law, 489.

443. Establishment and organization.

See 13 Cent. Dig. Courts, §§ 1154, 1155.

The fact that the special term of the supreme court of the District of Columbia ordered a cause to be referred to the court at general term for hearing in the first instance did not disqualify the court at special term from directing a receiver appointed at general term in regard to the expenditure of moneys; the general term in its interlocutory decree having granted leave to said court, or said court in special term, to give such instructions and orders as might be proper.—*Grant v. Phoenix Life Ins. Co.*, 121 U. S. 118, 7 S. Ct. 849, 30 L. Ed. 909.

For the purpose of determining the relation of the special to the general term of the supreme court of the District of Columbia, the act of congress of March 3, 1863, adopted the provisions of the legislation of the state of New York relative to the similar branches of its own supreme court, as that legislation is understood by the courts of New York.—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022.

The supreme court of the District of Columbia sitting at special term and such court sitting in the general term, though the judges may differ, is the same tribunal, so that the appeal from the special to the general term thereof is not an appeal from one court to another, but simply a step in the progress of the cause during its pendency in the same court.—*Id.*

Rule 2 of the supreme court of the District of Columbia provides that the May term of the circuit court shall not extend beyond the second Saturday in July. Rule 62 provides that the bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it. *Held* that, for this purpose, the May term could be extended indefinitely up to and beyond the beginning of the succeeding term.—*Hume v. Bowie*, 148 U. S. 245, 13 S. Ct. 582, 37 L. Ed. 438.

444. Original civil jurisdiction and procedure in exercise thereof.

See 13 Cent. Dig. Courts, §§ 1156-1180.

The supreme court of the District of Columbia has no jurisdiction of the petition of a widow for mandamus to the commissioner of the general land office to issue and deliver to her certificates of new location, as such demand is substantially a prayer that the United States be decreed to specifically perform their contract.—*United States v. Stockslager*, 129 U. S. 470, 9 S. Ct. 382, 32 L. Ed. 785.

The supreme court of the District of Columbia has no power to admit a will to probate, as a devise of real estate, either under the statutes of Maryland in force in the District, or under Act Cong. July 9, 1888, which declares that the record of any will or codicil admitted to probate by such court, or by the late orphans' court, etc., "shall be prima facie evidence of the contents and due execution" thereof.—*Campbell v. Porter*, 162 U. S. 478, 16 S. Ct. 871, 40 L. Ed. 1044.

Jurisdiction over an alleged residue of personality in the hands of an executrix, undisposed of by the will, can be exercised by the supreme court of the District of Columbia sitting as an orphans' court, in a controversy between the next of kin and the executrix, under Testamentary Act Md. Jan. 20, 1799, c. 101, subc. 15, § 12 (2 Kilty [Nov. Sess.] 1798), giving the court power to decree upon accounts, claims, and demands existing between legatees or persons entitled to any distributable part of an intestate's estate, and executors and administrators, with power to enforce obedience to such decrees in the same ample manner as the court of chancery may. Decree, *Sinnott v. Kenaday*, 14 App. D. C. 1, reversed.—*Kenaday v. Sinnott*, 21 S. Ct. 233, 179 U. S. 608, 45 L. Ed. 339.

The October term, 1900, of the circuit court branch of the Supreme Court of the District of Columbia ended on December 31st, 1900, although the first Tuesday in the following January, on which, by rule 3 of that court, the January term began, fell on a holiday; since the effect was, not to postpone the commencement of the January term, but to deprive the court of the power to do any business other than to discharge those who had been required to attend, until the succeeding day, when its general powers and duties could be legally exercised.—*Gordon v. Randle*, 23 S. Ct. 635, 189 U. S. 417, 47 L. Ed. 875.

445. Appellate jurisdiction and procedure in general.

See 13 Cent. Dig. Courts, § 1161.

The supreme court of the District of Columbia, has no appellate jurisdiction over a naval court-martial, nor over the offenses which such court has power to try.—*Wales v. Whitney*, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277.

An appeal from the special to the general term of the Supreme Court of the District of Columbia is not an appeal from one court to another, but is simply a step in the progress of a cause during its pendency in the same court.—*Metropolitan R. Co. v. Moore*, 7 S. Ct. 1334, 121 U. S. 558, 30 L. Ed. 1022.

For the purpose of determining the relation of the special to the general term of the Supreme Court of the District of Columbia, the act of Congress of March 3, 1863, adopted the provisions of the legislation of the state of New York relative to the similar branches of its own Supreme Court, as that legislation is understood by the courts of New York.—*Id.*

An interlocutory decree which involves the merits may be reviewed by the general term of the supreme court of the District of Columbia upon the appeal of a dissatisfied party, without awaiting a final determination of the cause.—

Spalding v. Mason, 161 U. S. 375, 16 S. Ct. 592, 40 L. Ed. 738.

An appeal which is not to operate as a supersedeas, as well as one which is to so operate, is within the provisions of the rule of the court of appeals of the District of Columbia limiting the time for filing a transcript in case of an appeal which shall operate as a supersedeas, and thereafter providing that "in any and all cases" after the time limited for filing the transcript the appeal may be docketed and dismissed for default of such filing.—*Queen v. Alvey*, 21 S. Ct. 876, 182 U. S. 456, 45 L. Ed. 1180.

An exception is unnecessary to bring up for review in the Court of Appeals of the District of Columbia a ruling sustaining a demurrer to a count in the declaration there being nothing in the Code of the District of Columbia of March 3, 1901, or the rules of practice, requiring an exception to an error apparent of record, contrary to the settled practice in Maryland under St. 13 Edw. I, c. 31, § 1, recognized by the Code and the compilation of the laws of the District under Act March 2, 1889, as being in force therein.—*Nalle v. Oyster*, 33 S. Ct. 1043, 230 U. S. 165, 57 L. Ed. 1439, modifying judgment 36 App. D. C. 36.

446. Appeals from Commissioner of Patents.

While the commissioner of patents is, generally speaking, an executive officer, yet, in deciding whether or not a patent shall issue, or on questions of interference between contesting claimants, he exercises judicial functions, and it is within the constitutional power of congress to provide for the revision of his decisions in such matters by a judicial tribunal; hence the provision of the act of February 9, 1893, creating the court of appeals for the District of Columbia (27 Stat. 434, c. 74, § 9), giving such court jurisdiction of appeals from decisions of the commissioner rejecting applications, and in interference cases, is constitutional and valid. *United States v. Seymour*, 10 App. D. C. 294, affirmed.—*United States ex rel. Bernardin v. Duell*, 19 S. Ct. 286, 172 U. S. 576, 43 L. Ed. 559.

(M) COURT OF CLAIMS.

Jurisdiction of suit on claim, see *United States*, 131.

Partial invalidity of statute, see *Statutes*, 64.

447. Jurisdiction.

See 13 Cent. Dig. Courts, §§ 1162-1184.

448. — Nature and scope in general.

See 13 Cent. Dig. Courts, § 1162.

Where a judgment of the court of claims was absolutely reversed for an error as to interest, and the cause remanded for further proceedings, and after the filing of mandate and motion for judgment for the principal without interest, but before the entry of judgment, the statute on which the proceeding was based, which conferred a mere gratuity, was repealed, the court of claims had no jurisdiction to enter judgment.—*In re Hall*, 17 S. Ct. 723, 167 U. S. 38, 42 L. Ed. 69.

Inquiry into the validity of the method by which certain amendments to the Constitution of the Cherokee Nation were adopted, or revision of the political or administrative action of that nation, was not authorized by the provision of Act June 28, 1898, c. 517, § 25 (30 Stat. 495), empowering the Delaware Indians residing in the Cherokee Nation to bring suit in the court of claims for the purpose of determining the contractual rights of the Delawares in the Cherokee national lands and funds. Decree 38 Ct. Cl. 234, modified.—*Delaware Indians v.*

Cherokee Nation, 24 S. Ct. 342, 193 U. S. 127, 48 L. Ed. 646.

Jurisdiction to decide the respective rights as between attorneys entitled to share in fees allowed for services in prosecuting an Indian claim *held* not conferred on the Court of Claims by Act June 21, 1906.—*Robertson v. Gordon*, 33 S. Ct. 105, 226 U. S. 311, 57 L. Ed. 236, reversing decree 34 App. D. C. 539.

Claims against individual Indians as citizens of the United States, from individual contracts not connected with the tribal membership or the dependency resulting from status as an Indian as distinguished from citizenship, were not made justiciable in the Court of Claims by Act May 29, 1908, § 2, conferring jurisdiction on claims of certain specified Indian traders against the Menominee tribe of Indians in Wisconsin and certain members of the tribe.—*Green v. Menominee Tribe of Indians in Wisconsin*, 34 S. Ct. 706, 233 U. S. 558, 58 L. Ed. 1093, affirming judgment 47 Ct. Cl. 281.

449. — Claims against United States in general.

See 13 Cent. Dig. Courts, §§ 1163-1169, 1172, 1173, 1175, 1180, 1181.

Claimants having imported linseed and manufactured it into oil and cake, and exported a large quantity of the cake, applied for a drawback thereon, under Act Cong. Aug. 5, 1861, providing that "there shall be allowed on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such material, and no more, as prescribed by the secretary of the treasury." The drawback was refused by the collector, acting under the instructions of the secretary of the treasury. *Held* a valid claim, of which the court of claims has jurisdiction, as founded on an act of congress, and arising out of the implied contract of the United States to refund the duty.—*Campbell v. United States*, 107 U. S. 407, 2 S. Ct. 769, 27 L. Ed. 592.

Where property to which the United States asserts no title is taken by their officers or agents, pursuant to an act of congress, as private property, for the public use, the government is under an implied obligation to make just compensation to the owner, within the statute which gives the court of claims jurisdiction of actions founded "upon any contract, express or implied, with the government of the United States."—*United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 S. Ct. 306, 28 L. Ed. 846.

Under Act Cong. March 3, 1881 (21 Stat. 504), for the ascertainment of the amount due the Choctaw Indians, giving to the court of claims authority "to take jurisdiction of, and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon," and empowering that court "to review the entire question of differences de novo," the court should not give to the various acts of congress, passed professedly in execution of treaty obligations on the part of the United States, the force of law, as those statutes themselves were in part the very subject of the complaints made by the Choctaws, to settle which the act of 1881 was passed; but, under that act, the whole matter is opened from the beginning, with the view of determining what the original treaty rights of the Choctaw Nation were, and how far they have been performed by the United States in its various transactions with them, including the acts done under the authority of those statutes.—*Choctaw Nation v. United States*, 119 U. S. 1, 7 S. Ct. 75, 30 L. Ed. 308.

The court of claims has jurisdiction of an action by a state against the United States for a demand arising upon an act of congress.—

United States v. Louisiana, 123 U. S. 32, 8 S. Ct. 17, 31 L. Ed. 69; *Same v. Alabama*, 123 U. S. 39, 8 S. Ct. 21, 31 L. Ed. 73.

The patentee of improved infantry equipments exhibited the same to a board appointed by the war department to inquire into the matter. The board recommended the improvements for use in the army, and they were adopted accordingly. The ordinance department manufactured a number of the improved equipments. *Held*, that an action by the patentee for a reasonable royalty on his patent was founded on an implied contract, and not on a tort, and within the jurisdiction of the court of claims.—*United States v. Palmer*, 128 U. S. 262, 9 S. Ct. 104, 32 L. Ed. 442.

An action on a contract for the use of a patented article, and not for an infringement, may be brought in the court of claims.—*Id.*

Under Act Cong. March 3, 1887, conferring jurisdiction on the court of claims where the amount in controversy exceeds \$1,000, and providing that the petition must set forth "the money or other thing claimed, or the damages sought to be recovered," and further providing that the jurisdiction shall be governed by the laws previously in force, so far as applicable, the court of claims has no jurisdiction over a suit to establish a claim to land or to obtain specific performance, but over money demands alone.—*United States v. Jones*, 131 U. S. 1, 9 S. Ct. 669, 33 L. Ed. 90.

By an appropriation act passed Oct. 2, 1888 (25 Stat. 523), the control of the congressional library building was given to the chief of engineers of the army, and all prior contracts relating thereto were rescinded, but it was provided that all loss or damages under such contracts, together with the value of the architect's plan, "may be adjusted and determined by the secretary of the interior, to be paid out of the sums heretofore or hereby appropriated." *Held*, that this did not exclude the court of claims from the jurisdiction over the architect's claim which it had before the passage of the act, but merely gave the architect an additional method of adjusting the claim without suit, if he so desired.—*Smithmeyer v. United States*, 147 U. S. 342, 13 S. Ct. 321, 37 L. Ed. 196, affirming judgment 25 Ct. Cl. 481.

The court of claims has no jurisdiction, in the absence of contract, of an action against the government for the infringement of a patent.—*United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 S. Ct. 420, 39 L. Ed. 530.

Act March 3, 1887 (24 Stat. 505), declares that the court of claims shall have jurisdiction to hear and determine all claims founded on any law of congress, and Act June 16, 1880 (21 Stat. 287) § 2, authorizes the secretary of the interior to cause to be repaid to any person who shall have made an erroneous public land entry, which cannot be confirmed, the amount of the purchase money, etc., and also provides that, "where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of \$1.25 per acre shall be repaid." *Held*, that such act did not provide an exclusive remedy in such cases by application to the secretary of the interior, but that the court of claims had jurisdiction of such claims after repayment had been denied by the secretary.—*Medbury v. United States*, 19 S. Ct. 503, 173 U. S. 492, 43 L. Ed. 779.

No authority to determine the relative rights of the parties to an Indian treaty to the land therein conveyed, upon the ground of mere justice or fairness, was conferred upon the court of claims by the jurisdictional act of March 2, 1895 (28 Stat. 876, 898, c. 188), authorizing suit to be brought to determine the rights of the parties thereto, provided that nothing con-

tained therein shall be deemed an admission by the United States that the Indian tribes have any claim to or interest in the lands or any part thereof. Decree 34 Ct. Cl. 17, reversed.—United States v. Choctaw Nation, 21 S. Ct. 149, 179 U. S. 494, 45 L. Ed. 291.

An implied contract to pay a patentee for an infringement of his patent by the United States, on which a claim can be brought within the jurisdiction of the court of claims, does not arise from the fact that he presented his claim of infringement by a gun adopted by the war department, not only to the chief of ordnance who replied that the ordnance department could not determine the matter, and denied him a hearing on the subject, but also to the commissioner of patents, who replied that the courts only could determine questions of infringement, and that the government took a bond of indemnity from the owner of the infringing gun.—*Russell v. United States*, 21 S. Ct. 899, 182 U. S. 518, 45 L. Ed. 1210.

Jurisdiction of a petition which raises the question as to the due and proper execution of a prior judgment of the court of claims making an award to the Pottawatomie Indians, but leaving to the Indian department the identification of the claimants entitled to share in its distribution, was given such court by the act of March 19, 1890 (26 Stat. 24, c. 39), conferring upon it jurisdiction to try all questions arising out of treaty stipulations between such Indians and the United States, and to render judgment thereon. Judgment 36 Ct. Cl. 427, affirmed.—*Pam-to-pee v. United States*, 23 S. Ct. 142, 187 U. S. 371, 47 L. Ed. 221.

Jurisdiction over the claims of individual members of the Shawnee tribe of Indians was not included in the grant of jurisdiction to the court of claims by Act Oct. 1, 1890, c. 1249 (26 Stat. 636), to hear and determine the rights of the Shawnee Indians to moneys, lands, and rights which may be due to "the said Shawnees" under the treaty of July 19, 1866 (14 Stat. 115), between the United States and the Cherokee Nation, and under articles of agreement between such nation and the Shawnees, Delawares, and Cherokee freedmen, and to moneys due from the United States "to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom"; nor was such jurisdiction conferred by Act July 6, 1892, c. 151 (27 Stat. 86), enlarging the scope of the earlier act so as to include all claims of "the Shawnee tribe or band . . . arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties." Judgment 37 Ct. Cl. 233, affirmed.—*Blackfeather v. United States*, 23 S. Ct. 772, 190 U. S. 368, 47 L. Ed. 1099.

The use by the United States of a device patented by a government employé with the understanding on his part, not shared by the government officials, that compensation would be made, does not give a contract right to such compensation on which a claim can be founded within the jurisdiction of the court of claims, especially where demand was first made by the petition in that court after a delay of 14 years. Judgment 39 Ct. Cl. 105, affirmed.—*Harley v. United States*, 25 S. Ct. 634, 198 U. S. 229, 49 L. Ed. 1029.

A petition for the reformation of a contract with the federal government, and for damages for breach of such contract as reformed, is within the jurisdiction of the Court of Claims, under Act March 3, 1887, c. 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], which defines such jurisdiction as extending to all claims founded "upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims a party would be entitled to redress against the United States, either in a court of

law, equity, or admiralty if the United States were suable. Decree, *Milliken Imprinting Co. v. United States*, 40 Ct. Cl. 81, reversed.—*United States v. Milliken Imprinting Co.*, 26 S. Ct. 572, 202 U. S. 168, 50 L. Ed. 980.

Counsel fees payable out of the amount awarded to the Eastern Cherokees as individuals by the Court of Claims, pursuant to Act July 1, 1902, c. 1375, § 68, 32 Stat. 726, which, as construed by Act March 3, 1903, c. 994, 32 Stat. 996, confers jurisdiction on that court to adjudicate any claim arising under treaty stipulations that the Cherokee tribe or any band thereof may have against the United States, in a suit to which both the Cherokee Nation and the Eastern Cherokees shall be made parties, and authorizes that court to render judgment in favor of the rightful claimants, and to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, may be allowed to the Cherokee Nation, whose tribal existence and government is continued by the joint resolution of March 2, 1906, until all the tribal property shall be distributed among the individual members, although by Act June 7, 1897, c. 3, 30 Stat. 62, Act June 28, 1898, c. 517, 30 Stat. 495, and Act July 1, 1902, c. 1375, 32 Stat. 726, the Cherokee Nation was practically incapacitated from acting as trustee, and by section 63 of the latter act it was provided that the tribal government of the Cherokee Nation should not continue longer than March 4, 1906. Award, *Eastern Cherokees v. United States* (1905) 40 Ct. Cl. 252, affirmed.—*United States v. Cherokee Nation*, 26 S. Ct. 588, 202 U. S. 101, 50 L. Ed. 949.

The Eastern and Emigrant Cherokees are only entitled to share as individuals with the other Eastern Cherokees in the distribution, through the Secretary of the Interior, of the amount awarded the Indians as due under the treaties of May 23, 1836 (7 Stat. 488), and August 6, 1846 (9 Stat. 871), for the removal of the Eastern Cherokees to the Indian Territory, by the Court of Claims, pursuant to Act July 1, 1902, c. 1375, § 68, 32 Stat. 726, which, as construed by Act March 3, 1903, c. 994, 32 Stat. 996, confers jurisdiction on that court to adjudicate any claim "the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," in a suit to which both the Cherokee Nation and the Eastern Cherokee shall be made parties, and authorizes that court to render judgment in favor of the rightful claimants, and to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part.—*Id.*

A claim against the United States for compensation for unlawful and unnecessary destruction of property during the war under the order of the general commanding is one "sounding in tort" within the meaning of Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), excluding cases of that character from the jurisdiction of the Court of Claims. Judgment (1907) 42 Ct. Cl. 99, affirmed.—*Juragua Iron Co. v. United States*, 29 S. Ct. 385, 212 U. S. 297, 53 L. Ed. 620.

The jurisdiction of the Court of Claims, under Act Feb. 25, 1905, c. 800, 33 Stat. 815, of a claim for the value of real property in the possession of the United States, is not confined to a determination of the existence of title in the claimants' grantor when the United States took possession, but extends to the question whether such grantor ratified a prior deed from her husband's executor, under which the United States claims, where the statute confers jurisdiction to hear the claim, and, if the court finds from the evidence on file and to be "presented on either side" that the claimants "acquired a valid title to said real property, as claimed," to award them the market value at the time possession was taken, and, in addition, states

that any defense may be pleaded by the United States as defendants.—(1911) *Hussey v. United States*, 32 S. Ct. 33, 222 U. S. 88, 56 L. Ed. 106, affirming judgment (1909) *Crane v. Same*, 44 Ct. Cl. 324.

The United States is not suable in the Court of Claims upon a claim for the value of the use by the military authorities of a Spanish merchant vessel captured in the harbor of Santiago, since, even under the mistaken assumption that the vessel was immune from capture because of the prior capitulation of Santiago, and the President's proclamation of July 13, 1898, with respect to the rights of private property, the claim would be one "sounding in tort" within the meaning of Tucker Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), excluding cases of that character from the jurisdiction of the Court of Claims.—*Herrera v. United States*, 32 S. Ct. 179, 222 U. S. 558, 56 L. Ed. 316; *Diaz v. Same*, 32 S. Ct. 184, 222 U. S. 574, 56 L. Ed. 321.

An implied contract to pay for the use of a patent, justiciable in the Court of Claims, arises out of its use by the United States with the patentee's consent.—(1912) *United States v. Société Anonyme Des Anciens Etablissements Cail*, 32 S. Ct. 479, 224 U. S. 309, 56 L. Ed. 778, affirming judgment (1907) *Société Anonyme Des Anciens Etablissements Cail v. United States*, 43 Ct. Cl. 25.

Jurisdiction of the Court of Claims over a claim against the United States under a private relief act was not excluded because the statute directed the proper accounting officers to settle it.—*McLean v. United States*, 33 S. Ct. 122, 228 U. S. 374, 57 L. Ed. 260, reversing judgment 45 Ct. Cl. 95.

The broadening of the general jurisdiction of the Court of Claims under Act March 3, 1887, which repealed all inconsistent acts, did not destroy established exception under Rev. St. § 1066 (U. S. Comp. St. 1901, p. 739), by which claims dependent on treaty stipulations are excluded from jurisdiction of such court.—*Eastern Extension, Australasia & China Tel. Co. v. United States*, 34 S. Ct. 57, 231 U. S. 326, 58 L. Ed. 250, reversing judgment 48 Ct. Cl. 33.

A claim based on transfer of sovereignty of the Philippine Islands from Spain to the United States on the theory that by international law an obligation for claimant was imposed on the United States is excluded from jurisdiction of Court of Claims by Rev. St. § 1066 (U. S. Comp. St. 1901, p. 739).—*Id.*

A claim against the United States for the annual subsidy provided in Spanish concessions for operation of submarine cables in the Philippine Islands, under treaty of December 10, 1898, with Spain, and contract between United States and telegraph company, does not arise out of treaty stipulations so as to be excluded from jurisdiction of Court of Claims by Rev. St. § 1066 (U. S. Comp. St. 1901, p. 739), but on an implied contract with the government, within Act March 3, 1887, defining jurisdiction of such court.—*Id.*

Court of Claims has no jurisdiction, under Act March 3, 1887, of an action against United States based on the torts of its agents by which claimant alleges he was deprived of rights under the federal Constitution.—*Basso v. United States*, 36 S. Ct. 226, 239 U. S. 602, 60 L. Ed. 462, affirming judgment 49 Ct. Cl. 700.

An undertaking on the part of the United States to pay the patentee of an improvement for use of his invention can be implied so as to bring the claim within the cognizance of the court of claims where the government expressly disclaimed any use of the patented device.—

Farnham v. United States, 36 S. Ct. 427, 240 U. S. 537, 60 L. Ed. 786, modifying judgment 49 Ct. Cl. 19.

④450. — Set-offs and counterclaims in general.

See 13 Cent. Dig. Courts, § 1182.

A set-off in favor of the United States against the demand of a commissioner of a federal Circuit Court for five cents more per folio for drawing complaints in civil rights cases than the amount he had been paid as in full for such services may be allowed by the Court of Claims, under the broad provisions of Rev. St. U. S. § 1059 [U. S. Comp. St. 1901, p. 734], and Act March 3, 1887, c. 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], to the extent of fees improperly and unlawfully paid him in the settlement of his former account, which was approved by the Circuit Court "subject to revision by the accounting officers of the United States Treasury," even though some of such illegal payments were made later than the filing of the claim.—*Allen v. United States*, 27 S. Ct. 324, 204 U. S. 581, 51 L. Ed. 634.

④451. — Claims referred by Congress.

See 13 Cent. Dig. Courts, § 1170.

A special act of congress authorizing the court of claims to inquire into the merits of a claim, to determine what are the just rights in law of the claimant, "and if, on a full hearing, the court shall find the said claim is just," to render judgment against the United States for the sum due, commits to the court the determination of the legal rights of the claimant, and empowers it to pass upon all questions of law or fact affecting such rights. Judgment 30 Ct. Cl. 378, affirmed.—*Oakes v. United States*, 19 S. Ct. 864, 174 U. S. 778, 43 L. Ed. 1169.

④452. — Claims referred by executive departments.

See 13 Cent. Dig. Courts, § 1171.

Any claim made against an executive department "involving disputed facts or controverted questions of law, where the amount in controversy exceeds \$3,000, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the constitution," may be transmitted to the court of claims by the head of such department, under Rev. St. § 1063, for final adjudication, provided such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.—*United States v. State of New York*, 160 U. S. 598, 16 S. Ct. 402, 40 L. Ed. 551.

Any claim embraced by Rev. St. § 1063, may, in the discretion of the executive department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the court of claims under the Tucker act of March 3, 1887 (chapter 359), without regard to the amount involved, for a report, merely advisory in its character, of facts and conclusions of law.—*Id.*

Any claim embraced by Rev. St. § 1063, without regard to its amount, and whether the claimant consents or not, may be transmitted, under the Bowman act of March 3, 1883 (chapter 116), to the court of claims by the head of the executive department in which it is pending, for a report to such department of facts

and conclusions of law for "its guidance and action."—*Id.*

In every case involving a claim of money transmitted by the head of an executive department to the court of claims under the Bowman act, a final judgment or decree may be rendered when it appears to the satisfaction of the court that the case is one of which the court, at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.—*Id.*

453. — Claims against District of Columbia.

See 13 Cent. Dig. Courts, § 1184.

Where the board of audit passes on a claim for breach of contract with the board of public works of the District of Columbia, and marks it "disallowed," it is the same as "rejected," within Act June 16, 1880, § 8 (21 Stat. 284, 286), providing that "no claim shall be presented to or considered by the court of claims under the provisions of this act which was rejected by the board of audit"; and the fact that the amount of damages claimed before the court of claims is larger than that presented to the board of audit is of no importance, where the contract relied on is the same.—*Brown v. District of Columbia*, 127 U. S. 579, 8 S. Ct. 1314, 32 L. Ed. 262.

Equitable jurisdiction to reform a contract for street improvements in the District of Columbia, in order to determine the amount due under such contract to the claimant, was conferred on the Court of Claims by District of Columbia Claims Act June 16, 1880, 21 Stat. 284, c. 243, giving the Court of Claims original legal and equitable jurisdiction of claims arising out of contracts for public work in the District. Judgment, *Barnes v. District of Columbia*, 37 Ct. Cl. 342, affirmed.—*District of Columbia v. Barnes*, 25 S. Ct. 401, 197 U. S. 146, 49 L. Ed. 699.

Compensation for work done outside of the original contract may be awarded by the Court of Claims under District of Columbia Claims Act June 16, 1880, 21 Stat. 284, c. 243, giving it original equitable and legal jurisdiction of all claims for work done by the order and direction of the commissioners of the District, and accepted by them for the use, purposes, or benefit of the District.—*Id.*

455. — Civil war claims.

See 13 Cent. Dig. Courts, § 1176.

The railroad of claimant, while being operated for the Confederate government, was seized by the United States, and retained for military purposes till the end of the war, when the application for its return was granted. While the government had possession, it removed a quantity of rails, and stored them, and after the war these were sold by the government for its own benefit. Held, that the claim for the value of these rails was one "growing out of the destruction or appropriation of, or damage to, property" * * * in the suppression of the Rebellion," within Act Feb. 18, 1875, c. 80, and was also among the "claims growing out of the late Civil War," within Act March 3, 1887, c. 359, and hence was outside the jurisdiction of the court of claims.—*United States v. Winchester & P. R. Co.*, 163 U. S. 244, 16 S. Ct. 993, 41 L. Ed. 145.

456. — Indian depredation claims.

See 13 Cent. Dig. Courts, § 1178.

In order that the court of claims may take jurisdiction, under Act March 3, 1891, giving it power to adjudicate claims "for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States," the owner of the property must have been a citizen

at the time of the taking or destruction.—*Johnson v. United States*, 160 U. S. 546, 16 S. Ct. 377, 40 L. Ed. 529.

Act March 3, 1891, § 1, cl. 1 (26 Stat. 851), relating to claims of Indian depredations, gives the court of claims jurisdiction only of claims which have been examined and allowed by the interior department, and claims which have been filed and were pending in the department at the date of the passage of Act March 3, 1885.—*Marks v. United States*, 161 U. S. 297, 16 S. Ct. 476, 40 L. Ed. 706.

Corporations organized under state laws are citizens of the United States, within Act Cong. March 3, 1891, giving the court of claims jurisdiction over "claims for property of citizens of the United States" destroyed by Indians.—*United States v. Northwestern Express, Stage & Transportation Co.*, 17 S. Ct. 206, 164 U. S. 686, 41 L. Ed. 599.

Act March 3, 1891, confers jurisdiction on the court of claims of Indian depredation claims in cases specified by Act March 3, 1885, among others, which act relates to claims previously filed, and approved by the interior department, and claims pending therein, "but not examined, on behalf of citizens of the United States," etc. Held, that such court had no jurisdiction of such a claim filed by an alien, which had not been acted on by the interior department.—*Yerke v. United States*, 19 S. Ct. 441, 173 U. S. 439, 43 L. Ed. 760.

The court of claims has no jurisdiction of a claim for property destroyed by Indians under Act March 3, 1891, giving such court jurisdiction of all claims for property of United States citizens taken or destroyed by Indians in amity with the United States, where the claimant had not acquired citizenship at the time the depredations were committed.—*Id.*

Where a case involving a claim for Indian depredations, which has been passed on by the secretary of the interior, is reopened for trial before the court of claims by either party, as provided by the act of March 3, 1891, § 4 (26 Stat. c. 538), it is reopened for all purposes; and the question of liability, as well as of amount, is before the court for readjudication. Judgment 33 Ct. Cl. 106, affirmed.—*Price v. United States*, 19 S. Ct. 765, 174 U. S. 373, 43 L. Ed. 1011.

Neither the provision of section 1 of the act of March 3, 1891, creating the court of claims (26 Stat. c. 538), which gives the court jurisdiction over "all claims for property of citizens of the United States taken or destroyed by Indians," nor the further provision which extends such jurisdiction to cases which had been examined and allowed by the secretary of the interior under the provisions of the act of March 3, 1885 (23 Stat. 376, c. 341), which authorized him to "determine the kind and value of all property damaged or destroyed" by reason of Indian depredations, confers powers on the court to allow consequential damages resulting to a claimant by reason of the taking by Indians of his oxen while he was transporting goods across the plains,—leaving him without means of transportation, and lessening the value to him of the remaining property, which was neither taken, destroyed, nor intrinsically damaged,—although such damages may have been awarded by the secretary. The courts cannot by construction enlarge their powers to allow claims against the government beyond those expressly given by congress.—*Id.*

Indian depredations committed in Mexico on property of a citizen of the United States, although the property was taken by Indians in amity with the United States and brought by them into the United States, do not create any claim against the United States under the act of congress of March 3, 1891, giving jurisdiction to the court of claims for depredations by

Indians in amity with the United States. Judgment, *Corralitos Stock Co. v. United States*, 33 Ct. Cl. 342, affirmed.—*Corralitos Co. v. United States*, 20 S. Ct. 941, 178 U. S. 280, 44 L. Ed. 1069.

Citizenship of the claimant at the time of filing a petition to recover for Indian depredations is not sufficient to give jurisdiction to the court of claims, if he was not a citizen at the time of the depredations. Judgment, *Coutzen v. United States*, 33 Ct. Cl. 475, affirmed.—*Contzea v. United States*, 21 S. Ct. 98, 179 U. S. 191, 45 L. Ed. 148.

An affidavit of a claimant, accompanying a claim for compensation for Indian depredations, filed in the interior department before the passage of the Indian depredation act of March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], is not "evidence," within the meaning of section 2 of that act (26 Stat. 852 [U. S. Comp. St. 1901, p. 760]), preserving as pending cases those in which evidence had been presented, since the word "evidence" must be considered as referring to the prior act of 1872 (17 Stat. 190, c. 233), and the regulations authorized thereby, which required claims for such depredations to be accompanied by the depositions of two or more persons having personal cognizance of the facts.—*Nesbitt v. United States*, 22 S. Ct. 805, 186 U. S. 153, 46 L. Ed. 1100.

A claim for compensation for Indian depredations is not relieved from the conditions of Act March 3, 1891, c. 538, § 2, 26 Stat. 852 [U. S. Comp. St. 1901, p. 760], preserving as pending cases only those in which evidence had been presented, by the provision of section 4 of that act (26 Stat. 852 [U. S. Comp. St. 1901, p. 761]), that in considering the merits of claims presented to the court of claims any testimony, affidavits, or other papers on file in the department relating to such claim shall be considered as competent evidence, as this provision is only applicable to the claim after it is presented to the court of claims.—Id.

A claim was not pending before Congress prior to the Indian depredation act of March 3, 1891, so as to prevent application of the restrictive clause in section 2 of that act excluding from the jurisdiction of the Court of Claims all claims accruing before July 1, 1865, unless the claim is pending before passage of the act, where the claim for depredation was one for reimbursement for a depredation committed by Mormons and not by Indians.—*Thurston v. United States*, 34 S. Ct. 394, 232 U. S. 469, 58 L. Ed. 688.

◀457. — Claims against foreign governments.

See 13 Cent. Dig. Courts, § 1174.

Rev. St. § 1006, denies to the court of claims jurisdiction over claims depending on treaties with foreign governments, and hence that court cannot order the payment of losses out of the fund received by the United States from Great Britain as indemnity for the destruction of vessels by the Confederate steamer *Alabama*.—*Great Western Ins. Co. v. United States*, 112 U. S. 193, 5 S. Ct. 99, 28 L. Ed. 687; *Paulison v. Same*, 112 U. S. 193, 5 S. Ct. 103, 28 L. Ed. 687.

A claim against the United States for moneys awarded by the commission under the convention of July 4, 1868, with Mexico, is not within the cognizance of the court of claims, being excluded as a claim founded on and growing out of a treaty with a foreign nation, within Rev. St. § 1006, and authority to distribute these awards having been conferred, by act of June 18, 1878, on the secretary of state.—*Aling v. United States*, 114 U. S. 562, 5 S. Ct. 1080, 29 L. Ed. 272.

◀460. Procedure in general.

See 13 Cent. Dig. Courts, § 1185.

Act Feb. 25, 1889 (25 Stat. 694), conferred on the court of claims jurisdiction to try the claim of the "Old Settlers," or "Western Cherokees," set forth in the report of the secretary of the interior of February 3, 1883, "it being the intention of this act to allow the said court of claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be determined"; and provided for an appeal to the supreme court. *Held*, that the latitude conferred must be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree so comprehensive and flexible as to secure to each suitor his joint and individual rights, and that the court should not be hampered by rules of procedure or by distinctions between law and equity.—*United States v. Old Settlers*, 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509, modifying decree *Western Cherokee Indians v. Same*, 27 Ct. Cl. 1.

◀461. Limitations.

See 13 Cent. Dig. Courts, § 1186.

Under Act Cong. March 3, 1863, c. 92, amending Act Cong. Feb. 24, 1855, c. 122, declaring that "every claim" against the United States cognizable by the court of claims shall be barred, unless filed within six years after it first accrues, the limitation begins to run against a claimant whose demand arose in December, 1865, at that time, notwithstanding he was under disability to prosecute it, because of his connection with the Rebellion, until after the amnesty proclamation of December 25, 1868.—*Kendall v. United States*, 2 S. Ct. 277, 107 U. S. 123, 27 L. Ed. 437.

Rev. St. U. S. § 1069, providing that "every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition is filed . . . within six years after the claim first accrues," applies as well to causes of action thereafter created as to those then existing.—*Rice v. United States*, 7 S. Ct. 1377, 122 U. S. 611, 30 L. Ed. 793.

The act of Congress of February 5, 1877, authorizing the court of claims to take jurisdiction under the provisions of the Act of March 12, 1863, providing "for the collection of abandoned property," etc., of the claim of Robert Erwin "for property alleged to have been taken from him," contains no provision as to when suit shall be brought thereunder, and, in the absence of such special limitation, such a suit falls within Rev. St. U. S. § 1069, and is barred by six years.—Id.

Plaintiff's claim against the United States accrued in October, 1863, but was never presented to any executive department of the government until July, 1874, and was not forwarded to the court of claims by the secretary of the treasury until August, 1886. *Held*, that claimant's right to judgment was barred by Rev. St. U. S. § 1069, which provides "that every claim against the United States, cognizable by the court of claims, shall be forever barred unless the statement of the claim be filed in the court, or transmitted to it, under the provisions of this act [March 3, 1863], within six years after the claim first accrues."—*Finn v. United States*, 8 S. Ct. 82, 123 U. S. 227, 31 L. Ed. 128.

Rev. St. U. S. § 1069, providing that in all cases in the court of claims the petition must be filed within six years after the claim accrues, applies to a suit by the state of Louisiana to recover from the United States moneys due under Act Cong. Feb. 20, 1811, granting the state 5 per cent. of the net proceeds of lands sold, and moneys due under Acts Sept.

28, 1850, and March 2, 1855, granting to the states all swamp lands therein, and the price of some already sold.—*United States v. State of Louisiana*, 8 S. Ct. 1047, 127 U. S. 182, 32 L. Ed. 66.

Limitation is not pleadable in the court of claims against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after its accrual.—*United States v. State of New York*, 16 S. Ct. 402, 160 U. S. 598, 40 L. Ed. 551.

A claim to recover from the United States a sum of money covered into the treasury under Rev. St. §§ 306–308, on account of checks issued and not presented for payment within three years, which sum was credited to the payee of the checks, to be paid him at any time the checks should be presented, does not accrue, within the meaning of Rev. St. § 1069, until demand has been made for payment by the person entitled thereto, and refused, and the court of claims has jurisdiction to entertain a suit for its recovery at any time within six years after such refusal. Judgment, *Wardwell v. United States*, 32 Ct. Cl. 30, affirmed.—*United States v. Wardwell*, 19 S. Ct. 86, 172 U. S. 48, 43 L. Ed. 360.

464. Evidence and taking proofs.

See 13 Cent. Dig. Courts, § 1191.

Ex parte affidavits forming exhibits in departmental reports printed as congressional documents were not made evidence in a suit in the Court of Claims, brought under Act March 1, 1907, c. 2290, 34 Stat. 1055, by the provisions of that act that such reports shall be evidence, to be given such weight as the court may determine for them.—(1911) *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma*, 31 S. Ct. 473, 220 U. S. 481, 55 L. Ed. 552, affirming judgment (1910) 45 Ct. Cl. 287.

467. Rules of decision.

See 13 Cent. Dig. Courts, § 1194.

In the act of January 17, 1887, referring to the court of claims the claim of Kinkad and Sussman for rentals of a certain warehouse in Sitka, Alaska, the recital that the claimants purchased the building from the Russian-American Company, "the owner of said building," was not intended to require the court to accept such ownership as a fact, but that question was submitted by the act for determination under the terms of the treaty with Russia.—*Kinkad v. United States*, 150 U. S. 483, 14 S. Ct. 172, 37 L. Ed. 1152, distinguishing *United States v. Jordan*, 113 U. S. 418, 5 S. Ct. 585, 28 L. Ed. 1013.

468. Findings or report.

See 13 Cent. Dig. Courts, § 1195.

Recitals in a finding that the claim in suit was supported by the testimony of but two witnesses, and that "the court is not satisfied by this evidence," followed by the statement, in the opinion, that the court "has no reason, other than the lapse of time and the inaction of the claimant, to discredit the witnesses or suspect the claim," do not justify a reversal, on the ground that the court attempted to create a rule of evidence as to the number of witnesses necessary to prove such a claim.—*Stone v. United States*, 17 S. Ct. 71, 164 U. S. 380, 41 L. Ed. 477.

The finding of the court of claims in an action at law determines all matters of fact, precisely as the verdict of a jury.—Id.

The finding of the court of claims in an action at law determines all matters of fact, like the verdict of a jury; and where there

is any evidence of a fact which it finds, and no exception is taken, the finding is final.—*United States v. New York Indians*, 19 S. Ct. 487, 173 U. S. 464, 43 L. Ed. 769.

A finding of the court of claims that the property of the claimant was taken and carried away by Indians while he was traveling in an Indian reservation, over a certain trail, "the same being an established trail, en route from Texas to a market in Kansas," is equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States, and therefore shows that he was not a trespasser, but was lawfully on the reservation at the time when his property was taken.—*United States v. Andrews*, 21 S. Ct. 46, 179 U. S. 96, 45 L. Ed. 105.

The reply of the Court of Claims to a request from the Commissioner of Indian Affairs for an opinion on a question not passed upon in its original opinion, but of which it was given jurisdiction by Act Oct. 1, 1890, c. 1249, 26 Stat. 636, held a part of the decision of the case.—(1912) *United States ex rel. Lowe v. Fisher*, 32 S. Ct. 196, 223 U. S. 95, 56 L. Ed. 364, affirming judgment (1910) *Same v. Ballinger*, 35 App. D. C. 524.

Findings of Court of Claims on a claim for the price, arising from alleged use by the Post Office Department of claimant's patented device for pneumatic transportation, held not open to objection that they are a mere recital of the evidence instead of an ascertainment of the ultimate facts.—*Beach v. United States*, 33 S. Ct. 20, 226 U. S. 243, 57 L. Ed. 205, affirming judgment 41 Ct. Cl. 110.

469. New trial.

See 13 Cent. Dig. Courts, § 1196; 47 Cent. Dig. U. S. § 146.

The court of claims has power, under Rev. St. § 1088 [U. S. Comp. St. 1901, p. 745], to grant a new trial at any time within two years after the final disposition of the claim; and this power is not affected by the pendency of an appeal, or in any way restricted by a mandate from the supreme court.—*Belknap v. United States*, 150 U. S. 588, 14 S. Ct. 183, 37 L. Ed. 1191.

The court of claims may properly grant a new trial after an appeal by the government from its judgment has been dismissed for failure to enter the same in the supreme court at the proper time, when it appears that such failure was due to an understanding by the government's counsel that the appeal was to abide the decision of another appeal, involving the same question, and that such other appeal has resulted in a reversal.—Id.

A new trial cannot be granted by the court of claims on the ground that the decision is shown by a later decision of the supreme court to have been erroneous, under Rev. St. U. S. § 1088 [U. S. Comp. St. 1901, p. 745], providing for new trial in case "any fraud, wrong, or injustice in the premises has been done to the United States," since this refers to matters of fact whereby fraud, wrong, or injustice has been done.—In re District of Columbia, 21 S. Ct. 357, 180 U. S. 250, 45 L. Ed. 516.

Claims under Indian Depredation Act March 3, 1891, c. 538, 26 Stat. 851 (U. S. Comp. St. 1901, p. 758), are embraced by the provisions of Rev. St. U. S. § 1088 (U. S. Comp. St. 1901, p. 745), giving the Court of Claims power to grant new trials on motion on behalf of the United States.—*Sanderson v. United States*, 28 S. Ct. 661, 210 U. S. 168, 52 L. Ed. 1007.

A limitation applicable to the time for filing the motion, and not to the time for making the decision thereon, is made by the provision of Rev. St. U. S. § 1088 (U. S. Comp. St. 1901, p. 745), that the Court of Claims, "within two years next after the final disposi-

tion" of a claim, may, on motion on behalf of the United States, grant a new trial.—*Id.*

—470. Judgment.

See 13 Cent. Dig. Courts, §§ 1197, 1198.

Under Rev. St. § 707, providing that "an appeal to the supreme court shall be allowed on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount, in controversy exceeds three thousand dollars," the court being adverse to the claimant on the merits cannot render judgment against the United States pro forma, for the purpose of an appeal to the supreme court, on a question, because it would affect a class of cases.—*United States v. Gleeson*, 124 U. S. 255, 8 S. Ct. 502, 31 L. Ed. 421.

Act Cong. July 8, 1886, referred to the court of claims for adjudication appellees' claims "for property taken and impressed into the service of the United States." *Held* error for the court to render a judgment based on damages arising from mere detention and delay of the property.—*United States v. Irwin*, 127 U. S. 125, 8 S. Ct. 1033, 32 L. Ed. 99.

Under the Indian depredation act (26 Stat. c. 538) the court of claims may enter judgment against the United States alone for the value of the property of citizens taken or destroyed by Indians, where the tribe to which the depredators belong cannot be identified, and such inability is stated.—*United States v. Gorham*, 17 S. Ct. 382, 165 U. S. 316, 41 L. Ed. 729.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) COURTS OF SAME STATE, AND TRANSFER OF CAUSES.

See 13 Cent. Dig. Courts, §§ 1199-1323.

Change of venue, see Venue, —42-79.

Grounds for relief by injunction, see Injunction, —32.

Removal of action from state court to United States court, see Removal of Causes.

Transfer of criminal causes, see Criminal Law, —101.

(B) STATE COURTS AND UNITED STATES COURTS.

Authority of United States courts to discharge on habeas corpus persons in custody of state authorities, see Habeas Corpus, —45.

Conflict of jurisdiction between state and admiralty courts, see Admiralty, —3.

Courts of bankruptcy and state courts, see Bankruptcy, —20, 211, 296.

Exclusive admiralty jurisdiction, see Maritime Liens, —60, 74.

In suits for infringement of trade-mark, see Trade-Marks and Trade-Names, —90.

Prohibition against proceedings in state court, see Prohibition, —3.

—489. Exclusive or concurrent jurisdiction.

See 13 Cent. Dig. Courts, §§ 404, 1324-1330, 1333-1341, 1372-1374; 11 Cent. Dig. Copyr. §§ 49, 67; 33 Cent. Dig. Pat. § 1774; 46 Cent. Dig. Trade-Marks, § 100.

Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of habeas corpus in proceedings for the arrest of fugitives from justice, and their delivery to the authorities of the state in which they stand charged with crime.—*Robb v. Connolly*, 111 U. S. 624, 4 S. Ct. 544, 28 L. Ed. 542.

Act Cong. 1789, § 9 (Rev. St. §§ 563, 711), gave the United States district courts exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. The national banking act of June 3, 1864, as amended February 18, 1875 (Rev. St. §§ 5197, 5198), authorized national banks to sue and be sued in any court as fully as natural persons, and provided that suits against them might be brought in the United States Courts in the district, or "in any state, county, or municipal court in the county or city, in which said association is located, having jurisdiction in similar cases." *Held*, that the latter act modified the former in respect to jurisdiction of actions against national banks for penalties, and gave concurrent jurisdiction to the state courts.—*First Nat. Bank v. Morgan*, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282.

There is no jurisdiction in the federal courts to determine a question as to the right of a father to have the custody of his infant child, as against the grandfather, who detains it. Such questions belong exclusively to the polity of the several states.—*Ex parte Burrus*, 136 U. S. 586, 10 S. Ct. 850, 34 L. Ed. 500.

In an action for the price of a patented machine sold, a state court has jurisdiction to entertain the defense that the patent was invalid, and the machine an infringement upon other patents, and to receive evidence tending to show these facts, since such questions arise only collaterally. 40 N. E. 1032, 155 Ill. 531, affirmed.—*Pratt v. Paris Gaslight & Coke Co.*, 18 S. Ct. 62, 168 U. S. 255, 42 L. Ed. 458.

Rev. St. § 711, vesting exclusive jurisdiction in the federal courts of "cases" arising under the patent laws, does not deprive the state courts of power to determine questions arising under the patent laws; for there is a clear distinction between a case and a question arising under those laws. The former arises when the plaintiff, in his opening pleading, sets up a right under the patent laws as a ground of recovery, and then the state courts have no jurisdiction. The latter may appear in the plea, answer, or testimony, and the state courts are authorized to decide them.—*Id.*

The courts of a state have jurisdiction concurrent with those of the United States of a suit brought by the state against citizens of other states.—*Plaquemines Tropical Fruit Co. v. Henderson*, 18 S. Ct. 685, 170 U. S. 511, 42 L. Ed. 1128.

An attachment against a national bank as garnishee is not an attachment against the bank or its property or a suit against it, within the meaning of Rev. St. U. S. § 5242, prohibiting suit against such bank in a state court, with a view to acquiring a preference over other creditors, after insolvency or in contemplation thereof.—*Earle v. Commonwealth of Pennsylvania*, 20 S. Ct. 915, 178 U. S. 449, 44 L. Ed. 1148.

A suit by a riparian owner to prevent interference with his rights in a submerged water front by an officer of the United States in possession of a pier built by the government is not to be deemed a suit against the United States of which a state court cannot take jurisdiction without the consent of the United States, although in determining the question the court may have to consider whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. Judgment 71 N. W. 1091, 113 Mich. 565, 4 Detroit Leg. N. 409, 67 Am. St. Rep. 484, affirmed.—*Scranton v. Wheeler*, 21 S. Ct. 48, 179 U. S. 141, 45 L. Ed. 126.

State courts have concurrent jurisdiction with federal courts to determine the constitu-

tionality of a state statute which is attacked as in violation of the federal constitution.—*Blythe v. Hinckley*, 21 S. Ct. 390, 180 U. S. 333, 45 L. Ed. 557.

Any legal right which a stockholder of a national bank may have to obtain an inspection of its books may be enforced in the state courts by mandamus, in view of the provision of Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], that for actions against national banks at law or in equity they shall be deemed citizens of the state in which they are located, and that in such cases the federal Circuit and District Courts shall have jurisdiction only as in cases between individual citizens of the same state. Judgment, *Harkness v. Guthrie*, 75 P. 624, 27 Utah, 248, 107 Am. St. Rep. 664, affirmed.—*Guthrie v. Harkness*, 26 S. Ct. 4, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

The exclusive jurisdiction of a federal Circuit Court arising out of the possession of the res in a suit to foreclose a railroad mortgage may be so continued, after the delivery of the property to the purchaser under the foreclosure decree and the discharge of the receiver, by reserving in such decree jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise again the power of sale, as to prevent a state court from thereafter decreeing a sale of the property to satisfy the lien of certain equipment bonds in a suit begun before the property was taken into the possession of the federal court. Decree (Sup. 1906) 78 N. E. 1141, 74 Ohio St. 483, reversed.—*Wabash R. Co. v. Adelbert College of Western Reserve University*, 28 S. Ct. 182, 208 U. S. 38, 52 L. Ed. 379, rehearing denied 28 S. Ct. 425, 208 U. S. 609, 52 L. Ed. 642.

The federal Circuit Court for the District of Nevada and the California state courts have concurrent jurisdiction to determine the relative rights of parties claiming, the one in Nevada and the other in California, to be entitled to appropriate, as against each other, the waters of an interstate stream.—(1910) *Rickey Land & Cattle Co. v. Miller & Lux*, 31 S. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032, affirming decrees (1907) 152 F. 11, 22, 81 C. O. A. 207, 218.

A collision between a vessel and a supporting pier of a bridge over a navigable waterway of the United States, caused by the negligent management of the vessel, and resulting in the collapse of a span of the bridge, and its fall into the stream, is a nonmaritime tort, and a cause of action arising thereon is therefore not within the exclusive admiralty jurisdiction of the federal courts, but the owner of the bridge may pursue the remedy afforded by a state statute, even though that law gives a lien on the vessel.—(1911) *Martin v. West*, 32 S. Ct. 42, 222 U. S. 191, 56 L. Ed. 169, 36 L. R. A. (N. S.) 592, affirming judgment (1908) *West v. Martin*, 97 P. 1102, 51 Wash. 85, 21 L. R. A. (N. S.) 324.

The enforcement of rights under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), regulating the liability of interstate railway carriers for the death or injury of their employes while engaged in interstate commerce, cannot be regarded as impliedly restricted to the federal courts, in view of the concurrent jurisdiction provision of Judiciary Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), and of the amendment made by Act April 6, 1910, c. 143, 36 Stat. 291, to the original employers' liability act, which, instead of granting jurisdiction to the state courts, presupposes that they already possess it.—(1912) *Mondou v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, reversing judgment (1909) 73 A. 762, 82 Conn. 373.

Damage caused by failure of connecting carrier in interstate shipment to deliver goods to consignee, for which the initial carrier is liable under amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), to interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 8154]), is not traceable to violation of the statute, for which under section 9 of the original act redress can only be had in Interstate Commerce Commission or federal courts.—(1912) *Galveston, H. & S. A. Ry. Co. v. Wallace*, 32 S. Ct. 205, 223 U. S. 481, 56 L. Ed. 516, affirming judgment (Civ. App. 1909) 117 S. W. 169, and (Civ. App. 1909) *Same v. Crow*, Id. 170.

Jurisdiction of state courts extends to any civil and transitory cause of action created by a foreign state, if not of a character opposed to the public policy of the state in which it is brought.—Id.

State court may enforce liability of initial carrier of interstate shipment arising under Carmack amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]) to Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 8154).—Id.

A suit by the assignee of patent to compel the assignor and assignee of a later patent, appearing to be for an improvement, to assign patent for such improvement to complainant, is within jurisdiction of a state court.—(1912) *New Marshall Engine Co. v. Marshall Engine Co.*, 32 S. Ct. 238, 223 U. S. 473, 56 L. Ed. 513, affirming decree (1908) *Marshall Engine Co. v. New Marshall Engine Co.*, 85 N. E. 741, 199 Mass. 546.

The grant in Act Feb. 4, 1887, § 9, of choice between complaint to Interstate Commerce Commission by person damaged by common carrier, and suit in federal court for damages, was exclusive of any remedy in the state courts.—*Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 35 S. Ct. 484, 237 U. S. 121, 59 L. Ed. 867, affirming judgment *Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 85 A. 426, 237 Pa. 420, Ann. Cas. 1914B, 37.

Jurisdiction of state courts in any case not involving matters within the power and discretion of Interstate Commerce Commission, or as to which the jurisdiction of the federal courts had been made exclusive, was not superseded by Act Feb. 4, 1887, §§ 8, 9, 22.—Id.

State courts have jurisdiction concurrent with federal courts, under Act Feb. 4, 1887, § 22, of a suit by a shipper against an interstate carrier for damages arising in interstate commerce.—Id.

State and federal courts have concurrent jurisdiction without preliminary finding by Interstate Commerce Commission under Act Feb. 4, 1887, § 22, of a suit by a coal mining company against an interstate carrier for damages arising in interstate commerce.—Id.

State courts have jurisdiction concurrent with federal courts under Act Feb. 4, 1887, § 22, of a suit against an interstate carrier for damages in interstate commerce.—*Eastern Ry. Co. of New Mexico v. Littlefield*, 35 S. Ct. 489, 237 U. S. 140, 59 L. Ed. 873, dismissing appeal (Tex.) 154 S. W. 543.

Act March 8, 1871, § 1, gave no exceptional federal jurisdiction of suits against railroad corporation created under it.—*Bankers' Trust Co. v. Texas & P. Ry. Co.*, 36 S. Ct. 569, 241 U. S. 295, 60 L. Ed. 1010.

490. Comity in general.

See 13 Cent. Dig. Courts, §§ 1243, 1244.

A federal Circuit Court, if properly appealed to, cannot decline, on the ground of discretion or comity, to take jurisdiction of a suit to enjoin the enforcement of state statutes fix-

ing gas rates which are asserted to violate the federal Constitution. Decree (C. C. 1907) Consolidated Gas Co. v. City of New York, 157 F. 849, reversed.—Willcox v. Consolidated Gas Co. of New York, 29 S. Ct. 192, 212 U. S. 19, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

—492. Priority of jurisdiction.

See 13 Cent. Dig. Courts, § 1345.

The filing of a bill for foreclosure of a mortgage in a federal court, and the issuing of a subpoena in the suit, give jurisdiction as against an action subsequently commenced in a state court by a summons which was served before service of the writ of subpoena issued by the federal court. Judgment 51 N. E. 55, 173 Ill. 449, reversed.—Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 20 S. Ct. 564, 177 U. S. 51, 44 L. Ed. 667.

Jurisdiction of a state court of the property of a foreign corporation attaches so as to prevent interference on the part of a federal court when a receiver has been appointed and qualified, although he has not taken actual possession of the property. Judgment (C. C. A. 1907) State of Texas v. Palmer, 158 F. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316, modified.—Palmer v. State of Texas, 29 S. Ct. 230, 212 U. S. 118, 53 L. Ed. 435.

The federal Circuit Court for the District of Nevada, and the California state courts, having concurrent jurisdiction to determine the relative rights of parties claiming, the one in Nevada and the other in California, to be entitled to appropriate as against each other the waters of an interstate stream, whichever court first acquires jurisdiction is entitled to proceed to final determination without interference from the other.—(1910) Rickey Land & Cattle Co. v. Miller & Lux, 31 S. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032, affirming decrees (1907) 152 F. 11, 81 C. C. A. 207, and Same v. Wood, 152 F. 22, 81 C. C. A. 218.

—493. Pendency and scope of prior proceeding.

See 13 Cent. Dig. Courts, §§ 1346-1352.

The United States courts and the courts of the several states, while they exercise jurisdiction in the same territory, do not exercise it upon the same plane. A specific thing, once taken into the jurisdiction of the one, is immediately removed from the judicial power of the other.—Ovrell v. Heyman, 4 S. Ct. 355, 111 U. S. 176, 28 L. Ed. 390, reversing Heyman v. Covel, 6 N. W. 846, 44 Mich. 332, 38 Am. Rep. 272.

In Ohio, a bill in equity alleged that defendant corporation made an assignment of its property for the benefit of its creditors, and that in contemplation of the assignment, and as part of the same transaction, it executed mortgages of all its property to the other defendants, with a fraudulent intent to prefer them as creditors of the company, and in fraud of complainant and other creditors. Held that, where the parties are citizens of different states an objection to the jurisdiction of the circuit court of the United States cannot be sustained on the ground that the probate court of the county of the assignee's residence had exclusive jurisdiction, under Rev. St. Ohio 1880, § 6335, providing that the assignee shall give bond and file the assignment in the probate court of the county in which he resides, where nothing appears to have been done in that court except to file the assignment and bond.—George T. Smith Middlings Purifier Co. v. McGroarty, 136 U. S. 237, 10 S. Ct. 1017, 34 L. Ed. 346.

The state court can entertain and adjudicate a suit against a patentee for specific per-

formance of a contract alleged to have been made between defendant and complainant, by which the latter was to have the right to make and use the patented article, though an appeal is pending in the supreme court of the United States from a judgment of the circuit court dismissing a suit brought against complainant by the patentee for infringement of the patent.

—Marsh v. Nichols, Shepard & Co., 140 U. S. 344, 11 S. Ct. 796, 35 L. Ed. 413, affirming 61 Mich. 509, 28 N. W. 699.

When a receiver appointed by a federal court takes possession of the property of a business corporation, and thereafter the court renders a decree ascertaining the sums due each creditor who has appeared and proved his claim, and directing a sale of the property, the fact that, pending an appeal from this decree, a court of the state which created the corporation, in a suit commenced after the bill was filed in the federal court, declares the corporation dissolved, and appoints a receiver to wind up its affairs, does not divest the federal court of jurisdiction to proceed with the execution of its decree, and effect a complete settlement of the corporation's affairs.—Leadville Coal Co. v. McCreery, 141 U. S. 475, 12 S. Ct. 28, 35 L. Ed. 824, affirming decree (C. C.) Lake Superior Iron Co. v. Brown, Bonnell & Co., 44 F. 539.

The fact that the mortgagees of a leased line belonging to a system which is in the hands of a receiver appointed by a federal court have sued to foreclose in a state court, and the receivers have filed a general denial thereto, does not prevent the mortgagees from intervening in the federal court, at any time, for the purpose of regaining possession of the mortgaged property.—United States Trust Co. v. Wabash W. Ry. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085; Seney v. Wabash W. Ry. Co., 150 U. S. 310, 14 S. Ct. 94, 37 L. Ed. 1092, affirming decree (C. C.) Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 38 F. 63.

The question whether, as between courts of concurrent jurisdiction, when proceedings have been commenced in one with a view to the appointment of a receiver, and are proceeding in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the first court from asserting its right to possession, is a question which can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by him is necessary for the full accomplishment of the purposes set forth in the bill.—Shields v. Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. Ed. 660.

The dismissal by a circuit court of the United States, for want of jurisdiction, of a suit to set aside a deed as a cloud on title, cannot be justified by the fact that the matter was res judicata or was under control of the state court, since these matters affect the merits of the case, rather than the jurisdiction.—Huntington v. Laidley, 20 S. Ct. 526, 176 U. S. 668, 44 L. Ed. 630.

A replevin suit in a state court, affecting only certain articles of personal property, and arising out of a controversy between a railway company and its vice president, cannot draw into the jurisdiction and control of that court the railroad and franchises of the railway company, so as to preclude creditors of the company from instituting proceedings in a federal court.—Put-in-Bay Waterworks, Light & Ry. Co. v. Ryan, 21 S. Ct. 709, 181 U. S. 409, 45 L. Ed. 927.

The jurisdiction of a circuit court of the United States over a cause properly before it

cannot be defeated by the institution, by one of the parties in a state court, of subsequent proceedings, whether civil or criminal, involving the same legal questions. Decree, *Starr v. Chicago, R. I. & P. Ry. Co.* (C. C.) 110 F. 3, affirmed.—*Prout v. Starr*, 23 S. Ct. 398, 188 U. S. 537, 47 L. Ed. 584.

Diverse citizenship does not give jurisdiction to a federal circuit court of a bill which seeks a declaration of the nonexistence of a will, and the consequent nullity of its probate in a state court, where the proceeding to contest a will afforded by the laws of that state is but supplementary, or ancillary, to the original probate proceedings, and is not an independent controversy inter partes.—*O'Callaghan v. O'Brien*, 25 S. Ct. 727, 199 U. S. 89, 50 L. Ed. 101, affirming judgment *Carrau v. O'Callaghan*, 125 F. 657, 60 C. C. A. 347, which reversed (C. C.) *O'Callaghan v. O'Brien*, 116 F. 934.

The jurisdiction of a federal Circuit Court of a controversy between citizens of different states, presented by a bill which seeks to declare and foreclose an attorney's lien upon certain interests in the distributive shares of the property of a decedent within the district, is not defeated because the settlement of the estate is pending in a state probate court, where no interference with that court is sought or decreed, and rights between the parties arising from their transactions and contracts are adjudged and are decreed to be redressed only when the probate court shall have finished its functions. Decree, *Coram v. Ingersoll* (1906) 148 Fed. 169, 78 C. C. A. 303, reversed.—*Ingersoll v. Coram*, 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208.

A federal court of chancery has jurisdiction, where the proper diversity of citizenship exists, to determine the interest of an heir in an alleged lapsed legacy and the consequent increase in the residuary estate, although the bill also asks other relief which cannot be granted because it would interfere with the ordinary settlement of the estate in the state probate court.—*Waterman v. Canal-Louisiana Bank & Trust Co.*, 30 S. Ct. 10, 215 U. S. 33, 54 L. Ed. 80.

A suit within the original jurisdiction of a federal Circuit Court, to have the complainants adjudicated to be the heirs at law and next of kin of a decedent, cannot be stayed by that court to await the commencement and prosecution to final determination of a suit to be brought in a state court, on behalf of the state, to determine an escheat of the estate.—*McClellan v. Carland*, 30 S. Ct. 501, 217 U. S. 268, 54 L. Ed. 762.

The pendency in a state court of a suit in the nature of quo warranto, seeking a determination as to the persons who were the true and lawful members of the Board of Publication of the Cumberland Church after the alleged union with the Presbyterian Church, is not a bar to a suit in the federal courts to enforce the alleged rights of the members of the united Church to control the said board, and to have the benefit of the board's property in its denominational work, regardless of the personnel of the board.—*Helm v. Zarecor*, 32 S. Ct. 10, 222 U. S. 32, 56 L. Ed. 77.

Jurisdiction of a federal court by filing of bills assailing state railway rate legislation was not ousted by filing of a bill in a state court in the name of the state seeking enforcement of later legislation before supplemental bills attacking the same were filed in the federal court, where action for leave to file the supplemental bills was pending.—*Knott v. Chicago, B. & Q. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, modifying decree (C. C.) *St. Louis & S. F. R. Co. v. Hadley*, 168 F. 317.

Proceedings before State Water Board, authorized by 3 Lord's Or. Laws, tit. 43, c. 6 (Laws 1913, cc. 82, 86, 97), to determine rights of claimants to waters of a stream, differs so from private suits between a few of the claimants in the federal court restraining encroachments on rights in stream as to render rule inapplicable that a court of competent jurisdiction first obtaining jurisdiction of the same matter will retain it.—*Pacific Live Stock Co. v. Lewis*, 36 S. Ct. 637, 241 U. S. 440, 60 L. Ed. 1084, affirming decree (D. C.) 217 F. 95.

494. Assumption and exercise of conflicting jurisdiction in general.

See 13 Cent. Dig. Courts, §§ 1355-1371.

A federal court, in which is first raised the question of the validity, under the federal Constitution, of a state statute, has a right to decide that question to the exclusion of the state courts, and may enjoin criminal proceedings subsequently commenced under it in the state court until its duty is performed.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

Jurisdiction of an action to enforce the rights arising under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), regulating the liability of interstate railway carriers for the death or injury of their employés while engaged in interstate commerce, may not be declined by the courts of a state whose ordinary jurisdiction as prescribed by local laws is adequate to the occasion, on the theory that such statute is not in harmony with the policy of the state, or that the exercise of such jurisdiction will be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state.—(1912) *Mondou v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, reversing judgment (1909) 73 A. 762, 82 Conn. 373.

495. Prisoners under arrest, commitment, or sentence.

See 13 Cent. Dig. Courts, §§ 1376-1385.

The question of how far the forcible seizure, without regard to extradition treaties, of a person in a foreign country, charged with an offense against state laws, would avail the prisoner thus forcibly brought within the state's jurisdiction in resisting trial, is one wholly subject to the decision of the state courts, and in which the federal courts have no right to interfere.—*Ker v. People of State of Illinois*, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421.

The doctrine that, where the jurisdiction of a federal court first attaches to a matter of which it has concurrent jurisdiction with the courts of a state, it will hold such matter to the exclusion of the state courts, does not give a circuit court of the United States, which has in a suit in equity taken charge of the affairs and assets of a corporation, jurisdiction to grant an injunction restraining the prosecution in a state court of an officer of the corporation for embezzlement committed in connection with the affairs of such corporation, upon an indictment regularly found under a valid law of the state.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

496. Property in custody of the law.

See 13 Cent. Dig. Courts, §§ 1336, 1337, 1338-1410.

497. — In general.

See 13 Cent. Dig. Courts, §§ 1336, 1397, 1398, 1404-1406.

To adjudge that certain railroad equipment bonds are a lien upon the railroad property is beyond the power of a state court, where that

court, by reason of the possession of the res by a federal court, is without power to decree a sale of the property to satisfy the lien, and the declaration of the lien is sought only as an essential part of the order of sale. Rehearing 28 S. Ct. 182, 208 U. S. 38, 52 L. Ed. 379, denied.—*Wabash R. Co. v. Adelbert College of Western Reserve University*, 28 S. Ct. 425, 208 U. S. 609, 52 L. Ed. 642.

§498. — Actual or constructive possession.

See 13 Cent. Dig. Courts, §§ 1387-1396.

In attachment in a state court the sheriff attempted to levy, but could not take actual possession by reason of the wrongful acts of the United States marshal, who held possession under an illegal writ, issued from the United States circuit court. Plaintiff served the marshal with notice of his claim, and intervened in the federal court, making the marshal and the creditors in that action defendants. *Held*, that the marshal was liable as garnishee.—*Gumbel v. Pitkin*, 124 U. S. 131, 8 S. Ct. 379, 31 L. Ed. 374.

Where property has been levied on to satisfy a judgment in a federal court, it is thereby brought within the custody of the court, and, by the death of the debtor before its sale, a state court does not acquire probate jurisdiction to administer on it as part of the debtor's estate.—*Rio Grande R. Co. v. Vinet*, 132 U. S. 478, 10 S. Ct. 155, 33 L. Ed. 400.

§500. — Possession of receiver.

See 13 Cent. Dig. Courts, §§ 1407, 1408.

The fact that the United States circuit court has appointed receivers of a consolidated association does not deprive the state court of jurisdiction of a proceeding by mandamus, at the instance of a subscriber to stock to compel the recorder of mortgages, on the ground that the stock subscribed for has been fully paid, to cancel the record of a mortgage given to secure the subscription, which mortgage has been pledged by the association to the state as security for a loan.—*Calhoun v. Lanau*, 127 U. S. 634, 8 S. Ct. 1345, 32 L. Ed. 297.

Where a state court of competent jurisdiction appoints a receiver for an insolvent corporation, and refuses either to permit him to sue the officers for alleged fraudulent misappropriations of its property, or to be made a party defendant in an action by stockholders for the same cause of action, the federal courts have no jurisdiction to entertain the suit.—*Porter v. Sabin*, 149 U. S. 473, 13 S. Ct. 1008, 37 L. Ed. 815, affirming decree (C. C.) 36 F. 475.

A federal court has jurisdiction to entertain proceedings for contempt against a constable who, without a warrant, searches railroad premises in possession of the court's receiver, and seizes liquors deposited therein, and to determine in such proceeding whether the receiver was violating the state statute, and whether the seizure was authorized thereby.—*In re Swan*, 150 U. S. 637, 14 S. Ct. 225, 37 L. Ed. 1207.

Where a receiver appointed by a state court, and subsequently dispossessed by a federal receiver, comes, by order of his own court, into the federal court, and prays for the restoration of the property to him, the fact that the parties originally asking relief in the state court have since come into the federal court, and had their claims allowed, will not of itself warrant the federal court in denying such receiver's application. If it be true that all the plaintiffs in the state court have abandoned their suit there, the proper remedy is to call the attention of that court to the fact, and have an order entered setting aside the appointment of the receiver, or directing the discontinuance of his application in the federal court.—*Shields*

v. Coleman, 15 S. Ct. 570, 157 U. S. 168, 39 L. Ed. 660.

A state court has no authority to order execution against a national bank in the hands of a receiver, for the enforcement of a lien obtained before the receiver's appointment by an attachment against the bank as garnishee, although the rights thus acquired must be recognized by the comptroller of the currency.—*Earle v. Commonwealth of Pennsylvania*, 20 S. Ct. 915, 178 U. S. 449, 44 L. Ed. 1146.

An attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it cannot create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the treasurer of the United States, subject to the order of the comptroller of the currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. Judgment, *Conway v. Chestnut St. Nat. Bank*, 42 A. 303, 189 Pa. 610, affirmed.—*Earle v. Conway*, 20 S. Ct. 918, 178 U. S. 456, 44 L. Ed. 1149.

The jurisdiction of a state court over the res, acquired by the appointment and qualification of a receiver of a foreign corporation, is not lost, so as to permit interference by a federal court, because of an appeal with supersedeas from the order appointing the receiver, where the state courts hold that the effect of the appeal and supersedeas bond is merely to suspend the order appointing the receiver pending the determination of the appeal. Nor will the possible danger of prosecutions and interference pending such an appeal justify a federal court in interfering with the state court's custody of the res. Judgment (C. C. A. 1907) *State of Texas v. Palmer*, 158 F. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316, modified.—*Palmer v. State of Texas*, 29 S. Ct. 230, 212 U. S. 118, 53 L. Ed. 435.

§501. — Actions against receivers.

See 13 Cent. Dig. Courts, § 1409.

A receiver appointed by a federal court, who commences an action in a state court to collect money alleged to be due him as such receiver, cannot object to the jurisdiction of the state court to adjudicate upon a set-off pleaded by the defendant.—*Grant v. Buckner*, 19 S. Ct. 163, 172 U. S. 232, 43 L. Ed. 430.

A receiver is liable to suit in a court other than that by which he was appointed, even in a state court, for disregard of official duty which causes injury to the parties suing. Judgment 56 P. 133, 60 Kan. 251, affirmed.—*Erb v. Morasch*, 20 S. Ct. 819, 177 U. S. 584, 44 L. Ed. 897.

§502. — Proceedings in admiralty.

See 13 Cent. Dig. Courts, §§ 1392, 1393; 1 Cent. Dig. Adm. §§ 29-36.

In proceedings in a state court to wind up a corporation, such court has no power to restrain proceedings in a federal court on libels to enforce maritime liens against vessels of the corporation, where the receiver of the corporation never took possession of such vessels, and they were seized by the marshal under the libels before the receiver qualified, though he was appointed before the libels were filed, for the doctrine of relation has no application in such a case.—*Moran v. Sturges*, 154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981, reversing judgment *In re Schuyler's Steam Towboat Co.*, 136 N. Y. 169, 32 N. E. 623.

An admiralty court may have jurisdiction of a libel in rem for seamen's wages which accrued while the vessel was in custody of a receiver appointed by a state court, the vessel having been subsequently sold so as to pass out of the receiver's hands. The rendition of the

services imports *prima facie* the existence of a lien, and whether any lien in fact arose or continued in existence after the sale is a matter to be determined at the hearing on the merits. 69 F. 742 (D. C.) affirmed.—*The Resolute*, 18 S. Ct. 112, 168 U. S. 437, 42 L. Ed. 533.

—503. — *Seizures and proceedings for forfeiture.*

See 12 Cent. Dig. Courts, §§ 1286, 1294.

After proceedings in rem had been commenced in a federal court to enforce a forfeiture of property for a violation of the revenue laws, another proceeding (also in rem) was commenced in a state court to enforce a mechanic's lien. Held, that the federal court, having taken possession of the property, acquired exclusive jurisdiction over it, and though such proceedings might have been had in the state court as were necessary to preserve the existence of the mechanic's lien, yet it could not proceed to a judgment and sale of the property so as to confer title as against one who had purchased under a decree of the federal court.—*Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 5 S. Ct. 135, 28 L. Ed. 729.

—505. — *Administration of decedents' estates.*

See 12 Cent. Dig. Courts, § 1410.

An estate which is in course of administration in a state probate court is in *gremio legis*, and a federal court has no jurisdiction, on the filing of a bill by a citizen of another state against the administrator to recover a share in the property, to take the administration of the estate out of the state court, and itself make a decree of distribution, determining the rights of citizens of the same state as between themselves. Its jurisdiction in such case is limited to determining and awarding the shares of citizens of other states.—*Byers v. McAuley*, 149 U. S. 608, 13 S. Ct. 903, 37 L. Ed. 867.

—507. *Injunction by state court against proceedings in United States court.*

See 12 Cent. Dig. Courts, §§ 1411-1417; 37 Cent. Dig. Inj. § 73.

An injunction against proceeding to foreclose a mortgage in a federal court which has first acquired jurisdiction over the property cannot be granted by a state court in which suit is brought for removal of the trustee. Judgment 51 N. E. 55, 173 Ill. 449, reversed.—*Farmers' Loan & Trust Co. v. Lake St. El. R. Co.*, 20 S. Ct. 564, 177 U. S. 51, 44 L. Ed. 667.

—508. *Injunction by United States court against proceedings in state court.*

See 12 Cent. Dig. Courts, §§ 1418-1423, 1425-1430; 37 Cent. Dig. Inj. § 72; 42 Cent. Dig. Rem. of C. § 209.

Plaintiff sued the owners of a yacht in the state court for negligently causing intestate's death by the sinking of the yacht. Defendants instituted proceedings in the federal court, under the limited liability act (Rev. St. §§ 4283-4286), but the proceedings were dismissed, and an appeal was taken. Held, that an injunction would not be issued by the supreme court of the United States pending the appeal to stay proceedings in the state court, simply because of the expense consequent upon trials pending the appeal.—*Parcher v. Cuddy*, 110 U. S. 742, 4 S. Ct. 194, 28 L. Ed. 312.

A federal court has no jurisdiction to grant an injunction to restrain a prosecuting attorney of a state from prosecuting an indictment regularly found under a state statute conceded to be valid. In such case the injunction is virtually against the state itself.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

A federal court of equity has no power to enjoin the institution or prosecution of indict-

ments or other criminal proceedings in a state court.—*Fitts v. McGhee*, 19 S. Ct. 269, 172 U. S. 516, 43 L. Ed. 635.

The fact that a proceeding by mandamus is pending in a state court to compel a city and its board of valuation and assessment to certify the apportioned valuation of a bank for purposes of taxation does not render a suit subsequently instituted by the bank, to restrain the city and the board of valuation from taking this action, a suit to enjoin the proceedings in a state court. Decree (C. C.) Bank of Kentucky v. Stone, 88 F. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 S. Ct. 881, 174 U. S. 799, 43 L. Ed. 1187.

An injunction against enforcing claims against Indians in a state court cannot be granted by a federal court under Rev. St. U. S. § 720, which prohibits an injunction from a federal court to stay proceedings in any court of a state except in matters of bankruptcy.—*United States v. Parkhurst-Davis Mercantile Co.*, 20 S. Ct. 423, 176 U. S. 317, 44 L. Ed. 485.

A federal court is without jurisdiction to enjoin proceedings in a state court sought to be removed to the federal court, where such proceedings are not removable because regarded by the state court merely as supplementary in character and as a mere continuation of an action already passed into judgment, and in aid of the execution of such judgment. Decree, *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 F. 453, 50 C. C. A. 339, 61 L. R. A. 717, affirmed.—*Mutual Reserve Fund Life Ass'n v. Phelps*, 23 S. Ct. 707, 190 U. S. 147, 47 L. Ed. 987.

The prohibition against enjoining proceedings in the state courts made by Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], does not preclude a federal court which has decreed a sale in foreclosure proceedings from entertaining a supplemental bill filed in the original suit by the purchaser under the decree of sale to enjoin a sale of the property conveyed by such decree for the satisfaction of judgments rendered by the state courts in suits against the mortgagor to which the purchaser was not a party, on causes of action arising subsequent to the confirmation of sale, where the decrees of sale and confirmation evince the purpose of the federal court to retain jurisdiction so far as necessary to determine all liens and demands to be paid by the purchaser, as a condition of security in the title decreed to be conveyed. Judgment 115 F. 956, 53 C. C. A. 438, affirmed.—*Julian v. Central Trust Co.*, 24 S. Ct. 399, 193 U. S. 93, 48 L. Ed. 629.

Where the highest court of a state, in an appropriate action, has decided that taxes were properly assessed, and are legal and valid under the constitution and laws of the state, a federal court will not entertain a suit to enjoin their collection. Decree (C. C.) 110 F. 812, affirmed.—*Douglas Co. v. Stone*, 24 S. Ct. 843, 191 U. S. 557, 48 L. Ed. 301.

One of two corporations bearing the same name, but incorporated in different states, will be restrained by an ancillary suit from assailing the title of a purchaser under a decree of a federal court, foreclosing a trust deed executed under the common corporate name and describing the property as lying in both states, by a suit in a state court, which proceeds on the theory that the real grantor was the corporation which was a citizen of the same state with the plaintiff, and therefore was not and could not have been made a party defendant without ousting the federal court of jurisdiction, where the purpose of the double incorporation was the development of a single plant, and all the proceedings were had on the supposition that there was but a single entity, which was indebted, and gave the trust deed as security for such indebtedness. Judgment, *Alabama & G. Mfg.*

Co. v. Riverdale Cotton Mills, 127 F. 497, 62 C. C. A. 295, reversed.—*Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 25 S. Ct. 629, 198 U. S. 188, 49 L. Ed. 1008.

A federal court, which has decreed a foreclosure in a suit in which diverse citizenship was alleged and admitted, and the property was described as lying partly in the state, may, by an ancillary suit restrain any attack on the title of the purchaser under the decree by a suit in a state court, brought by a party to the original suit, which proceeds on the theory that, by reason of his own untruthful admission of citizenship, the federal court assumed a jurisdiction which in fact it did not have.—*Id.*

Ancillary relief in a federal Circuit Court by way of an injunction in aid of a decree in a suit over the validity of state taxation, in which jurisdiction as to the state and its officers had been acquired as the result of the voluntary action of the state in submitting its rights to judicial determination, is not forbidden by Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], forbidding the granting of the writ by any court of the United States to stay proceedings in any state court, except in bankruptcy proceedings.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

The Mississippi railroad commission is not a court within the meaning of Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], forbidding the federal courts to enjoin proceedings in a state court. Judgment, *Illinois Cent. R. Co. v. Mississippi Railroad Commission* (1905) 138 F. 327, 70 C. C. A. 617, affirmed.—*Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 27 S. Ct. 90, 203 U. S. 335, 51 L. Ed. 209.

A proceeding before the Mississippi railroad commission does not become a proceeding in a state court, within the meaning of Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], so as to prevent a federal court from enjoining the enforcement of an order of such commission which is claimed to violate the federal Constitution, because the commission would have to resort to a state court to aid it in the enforcement of its order.—*Id.*

Enjoining, at the suit of the New York Cotton Exchange, the receipt and use by the defendant of quotations of sales on such exchange, is not forbidden to a federal circuit court by Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], as enjoining proceedings in a state court, because an injunction has been granted by a state court in a pending suit between defendant and a telegraph company, restraining the latter from refusing to furnish him with such quotations. Decree, *New York Cotton Exch. v. Hunt* (C. C.) 144 F. 511, affirmed.—*Hunt v. New York Cotton Exch.*, 27 S. Ct. 529, 205 U. S. 322, 51 L. Ed. 821.

A federal Circuit Court on principles of comity, should not entertain a suit by which injunctive relief is sought against railway passenger rates as fixed by the Virginia State Corporation Commission, in advance of the appeal to the highest state court from the order fixing the rates, which is given by the state Constitution, as of right to any aggrieved party.—*Prentiss v. Atlantic Coast Line Co.*, 29 S. Ct. 67, 211 U. S. 210, 53 L. Ed. 150.

Injunctive relief against railway passenger rates as fixed by the Virginia State Corporation Commission may be granted by a federal court if such rates are confiscatory, although, for some purposes, the commission is a court, since proceedings to establish rates are legislative, and therefore are not comprehended by the provision of Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], forbidding federal courts from enjoining proceedings in state courts, which provision looks to the character of the proceedings, not the character of the body.—*Id.*

A federal District Court has jurisdiction of a suit by a railway company to restrain the Vermont public service commission from enforcing an order concerning a passenger station as violative of the federal Constitution, though the company has not taken an appeal from the order to the Supreme Court of the state provided for by P. S. V. 4599, 4600, as those sections only provide a more expeditious way of doing what might be done by a bill in equity.—*Bacon v. Rutland R. Co.*, 34 S. Ct. 283, 232 U. S. 134, 58 L. Ed. 538.

The prohibition of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), against injunctions to stay proceedings in state courts, prevents owners of certain property in Florida from maintaining in a federal court in Massachusetts a suit to restrain trustees in bankruptcy, appointed in that court, from claiming any interest in the property, where there is pending in Florida a suit, with the parties reversed, to establish an equitable claim in the property in the trustees in bankruptcy against complainants.—*Hull v. Burr*, 34 S. Ct. 892, 234 U. S. 712, 58 L. Ed. 1557, affirming decree 207 F. 543, 125 C. C. A. 221, which denies rehearing 206 F. 1, 124 C. C. A. 135.

A suit by alleged owners of certain property to restrain trustees in bankruptcy from suing them in the state court to establish an interest therein is not in aid of a prior judgment in ejectment in the federal court, and therefore excluded from the prohibition of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), against injunctions to stay proceedings in state courts, where ejectment was brought after adjudication of bankruptcy, and the bill declares that any title the bankrupt had at the time of the adjudication remains in him.—*Id.*

The federal Circuit Court having jurisdiction on diversity of citizenship of a bill could enjoin enforcement of a judgment of a state court obtained by fraud and without notice to the judgment debtor.—*Simon v. Southern R. Co.*, 35 S. Ct. 255, 238 U. S. 115, 59 L. Ed. 492, affirming decree 195 F. 56, 115 C. C. A. 58.

A suit in a federal Circuit Court to enjoin enforcement of a judgment of a state court obtained by fraud and without notice to the debtor is not forbidden by Rev. St. § 720.—*Id.*

◀509. Vacating or annulling decisions.

See 13 Cent. Dig. Courts, §§ 1364-1371.

Federal courts have jurisdiction over an action by a citizen of one state against a citizen of another to set aside a judgment of a state probate court when it has been obtained by fraud.—*Johnson v. Waters*, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

A circuit court of the United States cannot revise or set aside a final decree of foreclosure of a mortgage rendered by a state court which had complete jurisdiction of the parties and the subject-matter, upon the ground that the decree was obtained by fraud, when the injured party has had an opportunity to apply to the state court to revise the decree, and has not done so.—*Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 S. Ct. 1009, 30 L. Ed. 196.

Where the controversy is between citizens of different states, and the value of the property within the jurisdictional amount, the circuit court has jurisdiction over an action to set aside a guardian's sale, on the ground of fraud, though it involves the interference with judicial proceedings in a state court.—*Arrow-smith v. Gleason*, 129 U. S. 86, 9 S. Ct. 237, 32 L. Ed. 630.

It is not an interference with the jurisdiction of the state court for a federal court to grant relief against a decree entered in the former court on the consent of an attorney

who fraudulently appeared therein for that purpose.—*Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52.

A state court has no power to impeach and nullify a decree of the circuit court of the United States, rendered in a case in which it had jurisdiction, by enjoining its enforcement, though the injunction is directed in personam against the parties entitled to the benefit of such decree, over whom it has jurisdiction.—*Central Nat. Bank v. Stevens*, 18 S. Ct. 403, 169 U. S. 432, 42 L. Ed. 807; *Id.*, 18 S. Ct. 837, 171 U. S. 108, 43 L. Ed. 97.

The courts of a state have concurrent jurisdiction with the United States circuit courts to decide federal questions involved in probate proceedings determining the capacity of an alien to inherit land, and their judgments, though erroneous, cannot be corrected by an original bill in such circuit court to quiet the title in other claimants.—*Blythe v. Hinckley*, 19 S. Ct. 497, 173 U. S. 501, 43 L. Ed. 783, dismissing appeal (C. C.) 84 F. 246.

Where an action of trespass to try title to land was brought in a state court against a nonresident, who was alleged to be a resident of the state and county where the suit was brought, a judgment against him therein may be collaterally attacked and annulled in a United States circuit court sitting in the same district as the state court, in a suit between such nonresident and a subsequent grantee of the land, by evidence, aliunde the record of the state court, that such defendant was a resident citizen of another state when the suit was brought, was neither served with process nor appeared, and had no knowledge of the suit, and that a pretended appearance by an attorney was unauthorized and without his knowledge or consent.—*Cooper v. Newell*, 19 S. Ct. 506, 173 U. S. 555, 43 L. Ed. 808.

A federal court may take jurisdiction of a suit to set aside a judgment of a state court in the same state, when it is attacked for fraud and want of jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit.—*Howard v. De Cordova*, 20 S. Ct. 817, 177 U. S. 609, 44 L. Ed. 908.

(C) COURTS OF DIFFERENT STATES OR COUNTRIES.

511. Comity between courts of different states.

See 13 Cent. Dig. Courts, § 1432.

The courts of New York are not required by the full faith and credit clause of the federal Constitution to give effect to a Michigan statute legitimatizing children born prior to the marriage of their parents, so as to control the devolution of title to lands in New York under a will—especially where to give effect to such statute would disturb interests already vested when the statute was enacted. Judgment (1908) 83 N. E. 569, 190 N. Y. 458, 123 Am. St. Rep. 585, affirmed.—*Olmsted v. Olmsted*, 30 S. Ct. 292, 216 U. S. 386, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292.

(D) DIFFERENT UNITED STATES COURTS.

Courts of bankruptcy and other United States Courts, see Bankruptcy, 18½.
Pendency of other action ground for abatement, see Abatement and Revival, 10.

518. Exclusive or concurrent jurisdiction.

See 13 Cent. Dig. Courts, §§ 1109, 1444-1446.

There is no conflict between Act Cong. March 3, 1875, § 1, c. 137 (18 Stat. 470), and Act Sept. 24, 1789, § 9, c. 20 (1 Stat. 76), which conferred exclusive jurisdiction upon the district courts of suits for penalties and forfeitures incurred under the laws of the United States, and the latter, except as modified by statutes conferring jurisdiction upon the circuit courts in special cases, still remains in force.—*United States v. Mooney*, 116 U. S. 104, 6 S. Ct. 304, 29 L. Ed. 550.

Although, in practice, suits in rem for forfeitures for violations of the internal revenue laws are more frequently brought in the district courts, yet the circuit court, under Rev. St. § 629, subd. 4, has also original jurisdiction.—*Coffey v. United States*, 116 U. S. 427, 6 S. Ct. 432, 29 L. Ed. 681.

The general grant of jurisdiction to the district courts over suits to recover penalties and forfeitures should not, in any case, be transferred exclusively to the circuit courts by words of doubtful import in a statute.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.

An action at law to recover damages for infringement of copyright under Rev. St. U. S. § 4966, is not one to recover either a penalty or a forfeiture, so as to make the jurisdiction of a district court of the United States exclusive, but is within the provision of Rev. St. U. S. § 629, subd. 9, giving to the circuit courts jurisdiction of suits at law or in equity arising under the patent or copyright laws. Judgment 83 F. 1007, 28 C. C. A. 253, affirmed.—*Brady v. Daly*, 20 S. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

The "further sum," equal to 2 per cent. of the appraised value of imported merchandise for each 1 per cent. that such appraised value exceeds the value declared in the entry, which, under Customs Administrative Act June 10, 1890, § 7, 26 Stat. 131, c. 407 [U. S. Comp. St. 1901, p. 1892], may be collected from an importer for undervaluation "in addition to the duties imposed by law," is a penalty, and exclusive jurisdiction of a suit to recover such sum is therefore, by Rev. St. U. S. § 563 [U. S. Comp. St. 1901, p. 455], vested in the District Courts of the United States.—*Helwig v. United States*, 23 S. Ct. 427, 188 U. S. 605, 47 L. Ed. 614.

COURTS-MARTIAL

See—

Army and Navy, 16, 42-49.

Habeas Corpus, 19, 95.

Acquittal by court-martial as bar to criminal prosecution, see Criminal Law, 166.

Former jeopardy, see Criminal Law, 200.

COUSINS.

Right of inheritance, see Descent and Distribution, 38.

COVENANT, ACTION OF.

See 14 Cent. Dig. Cov., Action of.

Covenants on which the action may be maintained, see Covenants.

COVENANTS.

Scope-Note.

[INCLUDES promises under seal in general, and more particularly such promises relating to the title, possession, or use of real property; their nature, requisites, validity, incidents, construction, operation, and effect; what constitutes a breach of covenant, and actions therefor.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity.

(A) EXPRESS COVENANTS.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Covenants, §§ 1-6.]

(B) IMPLIED COVENANTS.

- ⌚9. Statutory provisions.
- 10. — In general.
- 12. Words of conveyance.
- 14. — Particular words.

II. Construction and Operation.

(A) COVENANTS IN GENERAL.

- ⌚32. Limitations and exceptions in covenants.
- 35. Limitation by other covenants.

(B) COVENANTS OF TITLE.

- ⌚39. Knowledge of parties as to defects in title or incumbrances.

(C) COVENANTS AS TO USE OF REAL PROPERTY.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Covenants, §§ 49-51.]

(D) COVENANTS RUNNING WITH THE LAND.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Covenants, §§ 52-92.]

III. Performance or Breach.

- ⌚87. Notice to maintain or defend title.
- 88. — Necessity.
- 96. Covenant against incumbrances.
- 99. Covenant of warranty.
- 100. — Breach in general.

IV. Actions for Breach.

- ⌚108. Defenses.

Cross-References.

Conditions and provisos in contracts, see Contracts, ⌚221, 222; in deeds, see Deeds, ⌚159-162.

Conveyance with covenants as estoppel to assert after-acquired title, see Estoppel, ⌚38.

In insurance policies, see Insurance, ⌚306-366.

In lease, see Landlord and Tenant, ⌚102-108. Railroad land grants, see Public Lands, ⌚86. Restraining breach, see Injunction, ⌚58, 59.

I. REQUISITES AND VALIDITY.

(A) EXPRESS COVENANTS.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Covenants, §§ 1-6.]

(B) IMPLIED COVENANTS.

⌚9. Statutory provisions.

See 14 Cent. Dig. Covenants, §§ 8, 9.

⌚10. — In general.

See 14 Cent. Dig. Covenants, § 2.

In construing a covenant in a deed, the words are to be taken most strongly against the covenantor; but covenants created by the statute (Comp. Laws N. M. 1884, p. 1306, § 2750) from the use of certain words in the deed, being in derogation of the common law, should be construed strictly.—*Douglass v. Lewis*, 131 U. S.

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75, 9 S. Ct. 634, 33 L. Ed. 53, affirming 3 N. M. (Gild.) 596, 9 P. 377.

—12. Words of conveyance.

See 14 Cent. Dig. Covenants, §§ 10, 11.

—14. — Particular words.

See 14 Cent. Dig. Covenants, § 11.

Under Comp. Laws N. M. 1884, p. 1306, § 2750, the words "bargained and sold," or words to the same effect, unless restricted in express terms, amount to a covenant of seisin, and against incumbrances made or suffered by the grantor, or person claiming under him.—*Douglas v. Lewis*, 131 U. S. 75, 9 S. Ct. 634, 33 L. Ed. 53, affirming 3 N. M. (Gild.) 596, 9 Pac. 377.

II. CONSTRUCTION AND OPERATION.

Estoppel by covenants, see Estoppel, —23.

(A) COVENANTS IN GENERAL.

—32. Limitations and exceptions in covenants.

See 14 Cent. Dig. Covenants, § 32.

Where a deed conveys lots "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part," mortgages thereon, as well as unpaid taxes, are excluded from a covenant of special warranty against all persons claiming under the grantor.—*Keller v. Ashford*, 133 U. S. 610, 10 S. Ct. 494, 33 L. Ed. 667.

—35. Limitation by other covenants.

See 14 Cent. Dig. Covenants, § 35.

Comp. Laws N. M. 1884, § 2750, p. 1306, provides that "the words 'bargained and sold,' or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms, * * * shall be limited to the following effect: First, that the grantor * * * is possessed of an irrevocable possession in fee simple; * * * second, that the said real estate * * * is free from all incumbrance." Held that, where a deed contains an express covenant of general warranty, the statutory covenants are not implied, and a grantee whose possession has never been disturbed cannot recover the purchase money paid by him on the ground that his grantors had no title at the time of the conveyance.—*Douglas v. Lewis*, 131 U. S. 75, 9 S. Ct. 634, 33 L. Ed. 53, affirming 3 N. M. (Gild.) 596, 9 P. 377.

(B) COVENANTS OF TITLE.

—39. Knowledge of parties as to defects in title or incumbrances.

See 14 Cent. Dig. Covenants, §§ 39, 40.

Civ. Code La. art. 2452 (French Code, art. 1599), declaring that the sale of a thing belonging to another person may give rise to damages when the buyer knew not that the thing belonged to another person, has no reference to a case where the act of sale contains an express warranty, as in such case knowledge of the buyer is no defense to the seller.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (C. C.) *Whitney v. City of New Orleans*, 43 F. 215.

(C) COVENANTS AS TO USE OF REAL PROPERTY.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Covenants, §§ 49-51.]

(D) COVENANTS RUNNING WITH THE LAND.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Covenants, §§ 52-92.]

III. PERFORMANCE OR BREACH.

In leases, see Landlord and Tenant, —102-108.

—87. Notice to maintain or defend title.

See 14 Cent. Dig. Covenants, §§ 97-100.

—88. — Necessity.

See 14 Cent. Dig. Covenants, §§ 97, 98.

Notice of suit and opportunity to defend must be given warrantor of title to render judgment against title of his grantee available against him.—*Kapiolani Estate v. Atcherley*, 35 S. Ct. 832, 238 U. S. 119, 59 L. Ed. 1229.

—96. Covenant against incumbrances.

See 14 Cent. Dig. Covenants, §§ 111-129.

Possession of the premises by an intruder without right is no breach of the covenant of quiet enjoyment.—*Andrus v. St. Louis Smelting & Refining Co.*, 130 U. S. 643, 9 S. Ct. 645, 32 L. Ed. 1054.

—99. Covenant of warranty.

See 14 Cent. Dig. Covenants, §§ 123-128.

—100. — Breach in general.

See 14 Cent. Dig. Covenants, §§ 129-155.

Where defendant held in good faith under a patent, all representations before sale as to the validity of its title and its right of possession were merged in the deed afterwards given, covenanting for title and for quiet possession against all persons lawfully claiming the premises, and the covenant was not broken by the wrongful occupation of another.—*Andrus v. St. Louis Smelting & Refining Co.*, 130 U. S. 643, 9 S. Ct. 645, 32 L. Ed. 1054.

IV. ACTIONS FOR BREACH.

Restraining breach, see Injunction, —58.

—108. Defenses.

See 14 Cent. Dig. Covenants, §§ 175, 179-185.

A grantor, who has conveyed with warranty land to which he had no title, cannot, when sued on his warranty, set up in defense that the sale was a nullity, under Civ. Code La. art. 2452, which declares that the sale of a thing belonging to another person is null, since said article does not affect the covenant of warranty.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (C. C.) *Whitney v. City of New Orleans*, 43 F. 215.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Witnesses, —320-404.

CREDIT.

Accounting between partners, see Partnership, —333.
Letters of credit, see Banks and Banking, —191.

CREDITORS.

See cross-references under Debtor and Creditor.

CREDITORS' SUIT.

Scope-Note.

[INCLUDES actions to enforce judgments and other general liens against property of debtors liable for payment of their debts, but not subject to levy and sale under execution; nature and scope of the remedy in general; grounds of such actions, and defenses thereto; by and against whom, and on what judgments or other liens, and as to what property, they may be maintained; jurisdiction of such actions, and proceedings therein; incidental relief; judgments or decrees, and enforcement thereof; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 8. Property or rights which may be subjected.
- 9. Conditions precedent.
- 11. — Recovery of judgment.
- 14. — Effect of insolvency of debtor.
- 19. Creditors entitled to relief.
- 52. Claims of creditors under judgment or decree.
- 53. — Intervention in general.

Cross-References.

Ancillary jurisdiction, see Courts, 284.
Jurisdiction of federal courts, see Courts, 262.
Remedies in cases of assignments, see Assignments for Benefit of Creditors, 297-341.

Remedies in cases of fraudulent transfers, see Fraudulent Conveyances, 228-310.
Review of findings, see Appeal and Error, 1008.

8. Property or rights which may be subjected.

See 14 Cent. Dig. Cred. Suit, §§ 12-41; 11 Cent. Dig. Copyr. § 48; 21 Cent. Dig. Execution, § 1131.

Ch. Prac. Act Ill. c. 22, § 49 (Hurd's Rev. St. 1895), making subject to creditors' bills of discovery to reach equitable estates property held in trust, except when such trust has in good faith been created by, or the trust fund has proceeded from, some person other than the defendant, applies not merely to cases where a technical discovery is sought, but to all cases where the creditor is obliged, by the nature of the interest sought to be applied, to resort to a court of equity.—*Spindle v. Shreve*, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512.

Under a statute of Connecticut, providing that any policy of life insurance expressed to be for the benefit of a married woman or her children shall inure to her separate use, insurance for the life of a husband, taken out by the wife for the benefit of herself and her children, or by a husband for the benefit of his wife and children, cannot be reached by a creditors' bill filed by the husband's creditors.—*Central Nat. Bank v. Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370.

9. Conditions precedent.

See 14 Cent. Dig. Cred. Suit, §§ 42-87.

11. — Recovery of judgment.

See 14 Cent. Dig. Cred. Suit, §§ 46-66.

A creditors' bill may be maintained in a federal court upon a judgment procured in a different state from that in which the court sits.—*Handley v. Stutz*, 139 U. S. 417, 11 S. Ct. 530, 35 L. Ed. 227, reversing decree (C. C.) *Stutz v. Handley*, 41 F. 531.

A creditors' bill founded on a judgment recovered in Connecticut against a corporation of that state cannot be maintained in a United States circuit court in New York against a citizen of that state to enforce his liability on an unpaid subscription to the stock of the corporation, when no judgment has been obtained or execution issued against the corporation within the latter state, and no allegations are made showing that it is impossible to obtain such judgment.—*National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 S. Ct. 165, 36 L. Ed. 1070, affirming decree (C. C.) 42 F. 749.

No judgment at law on a note given by a national bank is prerequisite to a suit by the holder, one object of which is to subject to the satisfaction of the debt certain property conveyed to the trustee as security therefor. Decree, *George v. Wallace*, 135 F. 286, 68 C. C. A. 40, affirmed.—*Wyman v. Wallace*, 26 S. Ct. 495, 201 U. S. 230, 50 L. Ed. 738; *Frenzer v. Same*, 26 S. Ct. 498, 201 U. S. 244, 50 L. Ed. 742; *Poppleton v. Same*, 26 S. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

14. — Effect of insolvency of debtor.

See 14 Cent. Dig. Cred. Suit, §§ 49, 70, 77.

While the general rule is that a creditor must exhaust his legal remedies before a court of equity will interpose for his relief, and that the proper evidence of that fact is a judgment, execution, and return of nulla bona, yet, when it appears that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, such issue may be dispensed with.—*Sage v. Memphis & L. R. Co.*, 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694.

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19. Creditors entitled to relief.

See 14 Cent. Dig. Cred. Suit, §§ 88, 89.

Equity has jurisdiction of a suit in the nature of a judgment creditors' bill by persons claiming, by successive assignments from the original creditors, a lien on certain land, which the debtor had conveyed in fraud of the original creditors; and with this may be joined the additional reasons for relief that plaintiffs have long been in possession of the land, that the records of the case, through which the original purchaser at the execution sale claimed to have acquired legal title to the lands, have been lost, and that plaintiff's title, though good in equity, may be technically insufficient at law.—Wehrman v. Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 187.

52. Claims of creditors under judgment or decree.

See 14 Cent. Dig. Cred. Suit, §§ 210-212.

53. — Intervention in general.

See 14 Cent. Dig. Cred. Suit, § 219.

On a creditors' bill, filed on behalf of all creditors who may come in, to secure the due administration and application of a trust fund, a decree granting relief should give other creditors having valid claims against the fund opportunity to come in on a reference to a master, and have the benefit of the decree.—Johnson v. Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

CRIMINAL LAW.

Scope-Note.

[INCLUDES acts and omissions in violation of law punishable as offenses against the public; the nature and elements of crime in general; capacity to commit crime, and nature and extent of responsibility therefor in general, and responsibility of principals, accessories, etc.; jurisdiction over and place of prosecution of crimes; limitation of time for prosecution; preliminary complaints, warrant, examination, and commitment; arraignment and pleas; evidence in criminal proceedings; trial of indictments, etc., and acquittal or conviction; motions in arrest of judgment and for new trial; judgment or sentence and final commitment; review on appeal, writ of error, or certiorari; prosecution and punishment of successive offenses or of habitual criminals; and modes of punishment and prevention of crime in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Elements of Crime and Defenses in General.

2. Power to define and punish crime.

5. — States.
8. Application and operation of common law.
9. — Adoption and abrogation.
12. Statutory provisions.
13. — Creation and definition of offenses.
15. — Repeal.
16. — Offenses against United States and state or territory.
27. Felonies and misdemeanors.
37. Entrapment.
42. Immunity to one furnishing information or evidence.
43. Pendency of or recovery in civil action.

II. Capacity to Commit and Responsibility for Crime.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Crim. Law, §§ 53-70.]

III. Parties to Offenses.

IV. Jurisdiction.

84. Constitutional and statutory provisions.

85. Courts invested with criminal jurisdiction.
89. — United States courts.
91. Jurisdiction of offense.
94. — Extent of penalty.
95. — Offenses against United States and state or territory.

IV. Jurisdiction—Continued.

- 97. — Locality of offense.
- 98. Jurisdiction of the person.
- 99. Mode of acquiring jurisdiction.
- 100. Exercise of jurisdiction in general.
- 101. Transfer of causes.
- 102. Loss or divestiture of jurisdiction.

V. Venue. .**(A) PLACE OF BRINGING PROSECUTION.**

- 106. Nature and necessity of venue in prosecution.
- 107. Constitutional and statutory provisions.
- 113. Offenses against United States.

(B) CHANGE OF VENUE.**VI. Limitation of Prosecutions.**

- 146. Constitutional and statutory provisions.
- 147. Limitations applicable.
- 148. Commencement of period of limitation.
- 150. — Continuing offenses.
- 151. Exceptions and suspension.
- 153. — Fugitives from justice.

VII. Former Jeopardy.

- 162. Constitutional and statutory provisions.
- 163. Offenses or proceedings as to which former jeopardy is a defense.
- 164. Elements of former jeopardy.
- 166. — Character and constitution of court.
- 173. Time or stage of prosecution at which jeopardy attaches.
- 181. Discharge of jury without verdict.
- 182. — In general.
- 185. — Failure of jurors to agree.
- 186. Acquittal.
- 188. Verdict set aside or judgment arrested.
- 190. — New trial.
- 191. Judgment reversed.
- 192. — In general.
- 193½. Conviction of lower as acquittal of higher grade or degree of offense charged.
- 194. Identity of offenses.
- 195. — In general.
- 200. — Different offenses in same act or transaction.
- 201. — Offenses against different sovereignties in same act or transaction.
- 202. — Particular classes of offenses.
- 204. Waiver of objections.

VIII. Preliminary Complaint, Affidavit, Warrant, Examination, Commitment, and Summary Trial.

- 206. Constitutional and statutory provisions.
- 208. Preliminary complaint or affidavit.
- 211. — Requisites and sufficiency.
- 215. Preliminary warrant or other process.
- 217. — Issuance.
- 218. — Requisites and sufficiency.
- 229. Conduct of preliminary examination.
- 232. — Representation by attorneys.
- 242. Removal of accused to other county or district for trial.

IX. Arraignment and Pleas, and Nolle Prosequi or Discontinuance.

- ⇐ 261. Necessity of arraignment and plea.
- 267. Pleas in general.
- 270. — Several pleas.
- 276. Plea to jurisdiction.
- 277. Pleas in abatement.
- 279. — Time and order of pleading.
- 280. — Requisites and sufficiency.
- 288. Plea of limitation.
- 289. Plea of former jeopardy or former acquittal or conviction.
- 295. — Evidence.
- 296. — Trial and determination.
- 302. Nolle prosequi.

X. Evidence.**(A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.**

- ⇐ 304. Judicial notice.
- 305. Presumptions.
- 308. — Innocence.
- 311. — Sanity.
- 323. — Particular facts.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ.

- ⇐ 338. Relevancy in general.
- 342. Motive or absence of motive.
- 351. Subsequent condition or conduct of accused.
- 358. Alibi.
- 359. Incriminating others.
- 362. Res gestæ.
- 365. — Other offenses part of same transaction.
- 368. — Acts and statements of third persons.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

- ⇐ 369. Other offenses as evidence of offense charged in general.
- 371. Acts showing intent or malice or motive.
- 372. Acts part of series showing system or habit.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

- ⇐ 390. Testimony as to intent or motive.
- 393. Compelling accused to criminate himself.
- 394. Evidence wrongfully obtained in general.
- 396. Evidence admissible by reason of admission of similar evidence of adverse party.

(E) BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE.

- ⇐ 399. Record or other writing as best evidence.
- 400. — In general.
- 404. Demonstrative evidence.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

- ⇐ 405. Admissions by accused.
- 406. — In general.
- 411. Declarations by accused.
- 413. — Self-serving declarations.
- 415. Declarations by person injured.
- 416. Declarations by third persons.
- 417. — In general.
- 419, 420. Hearsay in general.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

- ⇐ 422. Grounds of admissibility in general.
- 423. Furtherance or execution of common purpose.

X. Evidence—Continued.

**(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS
—Continued.**

- ⌘424. After accomplishment of object.
- 427. Preliminary evidence as to conspiracy or common purpose.

**(H) DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE
THEREBY.**

- ⌘429. Public or official acts, proceedings, records, and certificates.
- 431. Private writings and publications.
- 434. — Books and entries therein.
- 438. — Photographs.
- 444. Authentication of documents.

(I) OPINION EVIDENCE.

- ⌘449. Witnesses in general.
- 452. — Special knowledge as to subject-matter.
- 456. — Mental condition or capacity.
- 468. Subjects of expert testimony.
- 475. — Nature, condition, and relation of objects.
- 482. Examination of experts.
- 483. — In general.
- 489. — Cross-examination.

(J) TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

- ⌘507. Accomplices within rules of evidence.
- 508. Admissibility and effect of testimony.

(K) CONFESSIONS.

- ⌘517. Admissibility in general.
- 519. Voluntary character in general.
- 521. Judicial compulsion.

**(L) EVIDENCE AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.
[No paragraphs or references in this Digest. But see 14 Cent. Dig.
Crim. Law, §§ 1230-1247.]**

(M) WEIGHT AND SUFFICIENCY.

- ⌘564. Place of commission of offense and venue.
- 570. Insanity or other incapacity.

XI. Time of Trial and Continuance.

- ⌘573. Right to speedy trial in general.
- 586. Discretion of court.
- 588. Grounds for continuance.
- 589. — In general.
- 595. — Competency or materiality of expected evidence.
- 598. — Diligence.
- 602. Application and affidavits for continuance.
- 603. — In general.

XII. Trial.

(A) PRELIMINARY PROCEEDINGS.

- ⌘619. Consolidation of indictments.
- 622. Separate trial of codefendants.
- 627. Service of copy of indictment, information, or minutes of evidence.
- 628. Indorsement of witnesses on indictment or information.
- 629. Service of notice or list of witnesses.
- 631. Service of list of jurors.

XII. Trial—Continued.**(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.**

- ⇐ 636. Presence of accused.
- 650. Experiments and tests.
- 654. Remarks and conduct of judge.
- 656. — Comments on evidence or witnesses.

(C) RECEPTION OF EVIDENCE.

- ⇐ 662. Right of accused to confront witnesses.
- 671. Presence of jury during inquiry as to admissibility.
- 673. Effect of admission.
- 680. Order of proof in general.
- 684. Admission in rebuttal of evidence proper in chief.

(D) OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

- ⇐ 695. Sufficiency and scope of objection.
- 696. Motion to strike out.
- 698. Effect of failure to object or except.

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I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

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 Power to make criminal, acts committed within territorial limits of another state, see States, ¶12.

¶2. Power to define and punish crime.

See 14 Cent. Dig. Crim. Law, §§ 3-7.

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The protection of the national flag against illegitimate uses is not so exclusively intrusted to the federal government as to prevent the state of Nebraska from making it a misdemeanor by Act April 8, 1903, p. 644, c. 139, to use representations of such flag upon articles of merchandise for advertising purposes. Judgment (Neb. 1905) 105 N. W. 298, affirmed.—Halter v. State of Nebraska, 27 S. Ct. 419, 205 U. S. 34, 51 L. Ed. 690, 10 Ann. Cas. 525.

¶8. Application and operation of common law.

See 14 Cent. Dig. Crim. Law, §§ 8-12.

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There are no common-law offenses against the United States.—United States v. Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. Ed. 591.

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See 14 Cent. Dig. Crim. Law, §§ 3-5, 7, 12-20; 44 Cent. Dig. Statut. § 270.

¶13. — Creation and definition of offenses.

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Laws Wash. 1913, c. 134, making use of trading stamps, etc., entitling holders to obtain goods below retail market price, a crime, held not invalid for indefiniteness and uncertainty.—Tanner v. Little, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree (D. C.) Little v. Tanner, 208 F. 605; Pitney v. State of Washington, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed.

703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

—15. — Repeal.

See 14 Cent. Dig. Crim. Law, §§ 1, 16-20; 44 Cent. Dig. Statut. §§ 370, 373.

The repeal by Act Feb. 8, 1894, of all the sections of Rev. St. tit. 70, relating to offenses against the elective franchise, did not withdraw all offenses by election officers from operation of section 5508 (Comp. St. 1913, § 10183), making it criminal to conspire to injure rights of citizen secured by the Constitution or laws.—*United States v. Mosley*, 35 S. Ct. 904, 238 U. S. 383, 59 L. Ed. 1355.

Repeal by Act Feb. 8, 1894, of all sections of Rev. St. U. S. tit. 70, c. 7, relating to offenses against elective franchise, did not withdraw offenses of election officers from operation of section 5508 (Comp. St. 1913, § 10183).—*Guinn v. United States*, 35 S. Ct. 926, 238 U. S. 347, 59 L. Ed. 1340, L. R. A. 1916A, 1124.

—16. — Offenses against United States and state or territory.

See 14 Cent. Dig. Crim. Law, §§ 3-5.

Congress was not empowered by Const. U. S. Amend. 13, to make it an offense against the United States, cognizable in the federal courts, for private individuals to compel negro citizens, by intimidation and force, to desist from performing their contracts of employment, but the remedy must be sought through state action and in state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error in proper cases.—*Hodges v. United States*, 27 S. Ct. 6, 203 U. S. 1, 51 L. Ed. 65.

—27. Felonies and misdemeanors.

See 14 Cent. Dig. Crim. Law, §§ 29-31.

The infamous nature of the punishment affixed to an offense does not necessarily raise the offense to the grade of felony. In the absence of a statute defining "felony," the word is used to designate such serious offenses as were formerly punished by death, or by forfeiture of the lands or goods of the offender.—*Bannon v. United States*, 156 U. S. 464, 15 S. Ct. 467, 39 L. Ed. 494.

—37. Entrapment.

See 14 Cent. Dig. Crim. Law, § 42; 3 Cent. Dig. Burg. § 23; 29 Cent. Dig. Int. Liq. § 159; 40 Cent. Dig. P. O. § 52.

It is no valid objection to a conviction of mailing obscene matter that the government inspector who instigated the prosecution, on being informed that the law was being violated, wrote decoy letters, in answer to which defendant mailed the objectionable matter.—*Price v. United States*, 17 S. Ct. 366, 165 U. S. 311, 41 L. Ed. 727.

—42. Immunity to one furnishing information or evidence.

See 14 Cent. Dig. Crim. Law, §§ 45-48.

Exemption from prosecution for an offense growing out of a transaction concerning which a bankrupt testified before the referee in bankruptcy is not given by the provision of Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." Judgment, *State v. Burrell*, 70 P. 982, 27 Mont. 282, affirmed.—*Burrell v. State of Montana*, 24 S. Ct. 787, 194 U. S. 572, 48 L. Ed. 1122.

A shield against successful prosecution, available to the accused as a defense, and not immunity from the prosecution itself, is what was secured by Act Cong. Feb. 25, 1903, c. 755, 32 Stat. 904 (U. S. Comp. St. Supp. 1909,

p. 1142), as amended by Act Cong. June 30, 1906, c. 3920, 34 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1168), providing that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under the Sherman anti-trust and interstate commerce acts.—*Heike v. United States*, 30 S. Ct. 539, 217 U. S. 423, 54 L. Ed. 821, dismissing writ of error (C. C.) *United States v. Heike*, 175 F. 852.

Officer of sugar refining company testifying before grand jury investigating violations of the Anti-Trust Act July 2, 1890, whose testimony consisted chiefly of documentary evidence, cannot defeat a prosecution for conspiracy to commit an offense by entries of raw sugar at less than true weights by claim of immunity, under Act Feb. 25, 1903, where the evidence in the former proceeding does not substantially concern the present one and has no tendency to incriminate him.—*Heike v. United States*, 33 S. Ct. 226, 227 U. S. 131, 57 L. Ed. 450, Ann. Cas. 1914C, 128, affirming judgment 192 F. 83, 112 C. C. A. 615.

—43. Pendency of or recovery in civil action.

See 14 Cent. Dig. Crim. Law, § 49.

A decree in a suit by the United States by procurement of the Secretary of War after enactment of River and Harbor Act March 3, 1899, refusing to enjoin replacement of a bridge over the Ohio river, conformably to Act July 14, 1862, held a conclusive determination as against the Secretary of War, when attempting under supposed authority of section 18 of such act to compel alterations in the bridge, that in the absence of changed conditions the structure was not subject to that act.—*United States v. Baltimore & O. R. Co.*, 33 S. Ct. 850, 229 U. S. 244, 57 L. Ed. 1169.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Crim. Law, §§ 53-70.]

III. PARTIES TO OFFENSES.

See 14 Cent. Dig. Crim. Law, §§ 71-111.

Particular offenses.

See—
Banks and Banking, —256, 257.
Libel and Slander, —150.
United States, —49.

IV. JURISDICTION.

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—6.

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False swearing in naturalization proceedings, see Aliens, —67.

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Removal of prosecution from state court to federal court, see Removal of Causes, —22, 70.

Transfer of cause on admission of territory as state, see Courts, —431.

Treaty provisions relating to jurisdiction, see Treaties, —8.

Want of jurisdiction as ground for writ of habeas corpus, see Habeas Corpus, —27.

—84. Constitutional and statutory provisions.

See 14 Cent. Dig. Crim. Law, §§ 115-124; 37 Cent. Dig. Nuis. § 204; 44 Cent. Dig. Statut. § 353.

The public land strip commonly known as "No Man's Land," lying west of the 100th me-

ridian, bounded on the south by Texas, on the west by New Mexico, and on the north by Colorado and Kansas, was, by Act Cong. March 1, 1889 (25 Stat. 783, c. 333), annexed to the Eastern district of Texas for judicial purposes. *Held*, that the fact that the act gives the court jurisdiction of crimes committed on the strip before its passage does not render it unconstitutional, as in violation of Const. U. S. art. 3, § 2, providing that the trial of crimes shall be at such place or places as congress "may by law have directed."—*Cook v. United States*, 138 U. S. 157, 11 S. Ct. 268, 34 L. Ed. 908.

85. Courts invested with criminal jurisdiction.

See 14 Cent. Dig. Crim. Law, §§ 126-128; 37 Cent. Dig. Nuis. § 204.

89. — United States courts.

See 14 Cent. Dig. Crim. Law, § 128.

A prosecution for murder, pending at the time of the passage of the act of March 3, 1899, establishing a Criminal Code and Code of Criminal Procedure for Alaska, must, in view of the provision therein for the preservation of pending causes, be regarded as within the "general jurisdiction" in criminal cases conferred upon the district court for the district of Alaska by Act June 6, 1900 (31 Stat. 321, c. 786), whether that court be one newly created by that act, which contains no provision for a transfer of pending causes, or be an existing tribunal continued thereby.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

The jurisdiction of the Supreme Court of the District of Columbia over a criminal conspiracy charged to have been entered into in the city of Washington is not defeated because such offense was also triable in the states of California and Oregon, on the theory that it was therefore "lawfully triable in any other court," within the meaning of Comp. St. D. C. c. 35, § 23, excluding offenses so triable from the jurisdiction of that court over crimes and misdemeanors committed in the District, and which are, by law, to be prosecuted by indictment or information.—*Hyde v. Shine*, 25 S. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, affirming judgment (D. C.) *United States v. Hyde*, 132 F. 545; *Dimond v. Shine*, 25 S. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

Crimes and offenses committed before and after the admission of Oklahoma into the Union, and not those committed before and after the passage of Enabling Act June 16, 1906, c. 3335, 34 Stat. 267, must be deemed meant by the provision of section 14 of that act (34 Stat. 275 [U. S. Comp. St. Supp. 1909, p. 155]) for the transfer of jurisdiction in respect of all crimes against the United States to the federal courts therein provided, since otherwise there would be an indefinite period between the date of the enabling act and the admission of the state, during which such crimes might go unpunished.—*Pickett v. United States*, 30 S. Ct. 265, 216 U. S. 456, 54 L. Ed. 566.

Federal District Court which has jurisdiction under Judicial Code, § 24, of all crimes cognizable under authority of the United States, acts within its jurisdiction whether it finds a man guilty or not, and whether its decision is right or wrong.—*Lamar v. United States*, 36 S. Ct. 255, 240 U. S. 60, 60 L. Ed. 526.

Jurisdiction of Federal District Court over a prosecution under Cr. Code, § 32, for falsely pretending, with intent to defraud, to be a federal officer, is not defeated because the indictment may not charge a crime.—*Id.*

91. Jurisdiction of offense.

See 14 Cent. Dig. Crim. Law, §§ 129, 137-139, 191; 1 Cent. Dig. Ack. § 264; 6 Cent. Dig. Banks, §§ 968, 969; 40 Cent. Dig. P. O. § 81.

94. — Extent of penalty.

See 14 Cent. Dig. Crim. Law, §§ 127-128.

Act Cong. March 1, 1889, establishing a United States court in the Indian Territory, and giving it exclusive jurisdiction of offenses "not punishable by death or by imprisonment at hard labor," does not give it jurisdiction of the offense of retailing liquors without a license, made punishable, under Rev. St. §§ 2139, 3242, by imprisonment for "not less than six months nor more than two years," since, under Rev. St. § 5541, a punishment which a statute prescribes shall be by imprisonment merely may, if it be for more than one year, be executed in a state prison, the rules of which prescribe hard labor.—*In re Mills*, 135 U. S. 263, 10 S. Ct. 762, 34 L. Ed. 107.

95. — Offenses against United States and state or territory.

See 14 Cent. Dig. Crim. Law, §§ 167-175; 6 Cent. Dig. Banks, §§ 968, 969; 13 Cent. Dig. Counterfeit § 22; 40 Cent. Dig. P. O. § 81.

It is no objection to the jurisdiction of the state courts that the same act constitutes forgery under the state law, as well as a violation of the national banking law, and that the offender is subject to punishment for both crimes.—*Cross v. State of North Carolina*, 132 U. S. 131, 10 S. Ct. 47, 33 L. Ed. 287, affirming *State v. White*, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

Though an act constituting forgery under Code N. C. 1883, § 1029, was committed solely for the purpose of deceiving the examiner appointed under the United States national banking laws, and therefore violates Rev. St. § 5209, the jurisdiction of the state courts to try the indictment for the forgery is not ousted by the fact that by section 711 the federal courts are given exclusive jurisdiction of offenses against the United States.—*Id.*

Under Rev. St. § 711, cl. 1, providing that the federal courts shall have exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States; and section 5392, providing that any one who shall testify falsely, after having taken an oath to testify truly, in a case where any law of the United States authorizes an oath to be administered, shall be guilty of perjury,—the federal courts have exclusive jurisdiction of that offense, when committed in giving a deposition before a notary public to be used in the case of a contested election of a member of congress, as provided by Rev. St. § 110.—*Thomas v. Loney*, 134 U. S. 372, 10 S. Ct. 584, 33 L. Ed. 949.

Electors for president and vice president are state officers, who, by Const. art. 2, § 1, are to be appointed by the state in such manner as its legislature may direct, and it is within the exclusive jurisdiction of the state to punish all fraudulent voting for such electors.—*Fitzgerald v. Green*, 134 U. S. 377, 10 S. Ct. 586, 33 L. Ed. 951.

Murder committed by derailing a mail train is punishable as such in the state courts, though the act is also an offense against the laws of the United States.—*Crossley v. State of California*, 18 S. Ct. 242, 168 U. S. 640, 42 L. Ed. 610.

The offense of extorting money under a threat to accuse a person of a criminal violation of a federal internal revenue law, though made a crime by Rev. St. U. S. § 5484 [U. S. Comp. St. 1901, p. 3702], is excepted from the exclusive jurisdiction conferred on the federal courts by sections 629, 711 [pages 507, 577], of "all crimes and offenses cognizable under the authority of the United States," by the provision of section 5328 [page 3622], that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Judgment, *People v. Sexton*, 64 P. 107, 132 Cal. 27, affirmed.

—Sexton v. People of State of California, 23 S. Ct. 543, 189 U. S. 319, 47 L. Ed. 833.

◀97. — **Locality of offense.**

See 14 Cent. Dig. Crim. Law, §§ 177-189, 191; 1 Cent. Dig. Ack. § 264; 40 Cent. Dig. P. O. § 81; 46 Cent. Dig. Sunday, § 68.

The criminal jurisdiction of the courts of the United States extends to the island of Navassa, and an indictment for murder committed there may be tried in the district into which the offender is first brought, as provided by Rev. St. § 730, in cases of offenses committed on the high seas, or elsewhere, out of the jurisdiction of any particular state or district.—Jones v. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Smith v. Same, 137 U. S. 224, 11 S. Ct. 88, 34 L. Ed. 700.

Guano Islands Act Aug. 18, 1856, § 6, providing that all crimes committed on such islands shall be deemed to have been committed on the high seas on board a merchant ship belonging to the United States, and shall be punished according to the laws relating to offenses committed in such places, which laws are extended to such islands for that purpose, does not extend the admiralty jurisdiction over land, but simply extends the operation of the statutes relating to crimes and punishments to the islands which may have been determined by the president to appertain to the United States.—Id.

The public land strip, commonly known as "No Man's Land," lying west of the 100th meridian, bounded on the south by Texas, on the west by New Mexico, and on the north by Colorado and Kansas, was by Act Cong. March 1, 1889 (25 Stat. 783, c. 333), annexed to the Eastern district of Texas, for such judicial purposes, among others, jurisdiction of crimes punishable by death or imprisonment with hard labor committed therein, as by the act appertain to the court held at Paris in that district.—Cook v. United States, 138 U. S. 157, 11 S. Ct. 268, 34 L. Ed. 906.

The courts of the United States have jurisdiction, under Rev. St. § 5346, of an assault with a dangerous weapon committed on a vessel belonging to a citizen of the United States, in the Detroit river, out of the jurisdiction of any particular state, and within the territorial limits of the dominion of Canada.—United States v. Rodgers, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071, disapproving People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703.

The open waters of the Great Lakes are "high seas" within the meaning of Rev. St. § 5346.—United States v. Rodgers, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071, overruling In re Miller, Fed. Cas. No. 9,558 [Brown, Adm. 156], and Ex parte Byers, 32 Fed. 404.

The fact that, by treaty between the United States and Great Britain, the boundary line between the United States and Canada is run through the center of the Lakes, does not change their character as seas, or impair in any respect the jurisdiction of the United States over vessels of its own citizens navigating those waters, and persons on board.—United States v. Rodgers, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071.

The limitation to the jurisdiction, by the qualification in Rev. St. § 5346, that the offenses punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay, "without the jurisdiction of any particular state," does not apply to vessels on the "high seas" of the Lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States.—Id.

Land now embraced within the limits of Comanche county, Oklahoma, had become part

of that territory on August 4, 1901, so as to make a murder committed therein on that date an offense against the territorial rather than the federal statutes, although the land had not then been opened for settlement.—In re Moran, 27 S. Ct. 25, 203 U. S. 96, 51 L. Ed. 105.

A murder committed upon land bought by the United States in the city of Macon, Ga., on which it is building a post office and courthouse, and over which the state has ceded jurisdiction, is made an offense against the United States, justiciable in the federal courts, by Rev. St. U. S. § 5339 (U. S. Comp. St. 1901, p. 3627), making it a capital offense to commit murder within any fort, arsenal, dockyard, or in any other place or district of country under the exclusive jurisdiction of the United States. Judgment, United States v. Battle (O. C. 1907) 154 F. 540, affirmed.—Battle v. United States, 28 S. Ct. 422, 209 U. S. 38, 52 L. Ed. 670.

A murder committed on board a ship lying in the harbor of Honolulu is cognizable in the district court of the United States for the territory of Hawaii, under Rev. Stat. § 5339 (U. S. Comp. St. 1901, p. 3627), as committed in a haven or arm of the sea within the admiralty and maritime jurisdiction of the United States, and "out of the jurisdiction of any particular state."—Wynne v. United States, 30 S. Ct. 447, 217 U. S. 234, 54 L. Ed. 748.

There is nothing in the Hawaiian organic act (Act April 30, 1900, c. 339, 31 Stat. 141) which expressly or impliedly deprives the federal courts of their jurisdiction under Rev. St. § 5339 (U. S. Comp. St. 1901, p. 3627), to punish a murder committed on board a ship lying in the harbor of Honolulu.—Id.

Punishment in the federal courts as an offense against the United States, but only in the way and to the extent that such offense would have been punishable if the territory embraced by the government reservation where the crime was committed had remained subject to the jurisdiction of the state, is what was intended by Act July 7, 1898, c. 576, § 2, 30 Stat. 717 (U. S. Comp. St. 1901, p. 3652), adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated now provide for a like offense, the punishment therefor not being otherwise provided for by any law of the United States.—United States v. Press Pub. Co., 31 S. Ct. 212, 219 U. S. 1, 55 L. Ed. 65, 21 Ann. Cas. 942.

The circulation in the government reservation at West Point and in the post-office building in New York City of copies of a newspaper containing a criminal libel printed and primarily published in such city cannot be punished in the federal courts under Act July 7, 1898, c. 576, § 2, 30 Stat. 717 (U. S. Comp. St. 1901, p. 3652), providing that offenses committed in places under the exclusive jurisdiction and control of the United States, when not expressly made criminal by any law of the United States, shall be punished in accordance with the laws of the state in which such places are situated, since the state laws afford adequate punishment for the offense, without resorting to the federal courts, and the plain purpose is that there shall be but a single prosecution and conviction for a criminal libel.—Id.

Offense denounced by Cr. Code, § 240, of shipping intoxicating liquors from one state to another or from a foreign country into any state, without name of consignee and nature of contents, is cognizable in the federal district in which place of destination is situated, as well as in district in which packages were shipped under

Judicial Code, § 42.—United States v. Freeman, 36 S. Ct. 32, 239 U. S. 117, 60 L. Ed. 172.

Constitutional rights of person accused of falsely pretending, with intent to defraud, contrary to Cr. Code, § 32, to be an officer of the United States, are not infringed by trial in District Court of Southern District of New York, where personation was by telephone to a person in that district.—Lamar v. United States, 36 S. Ct. 255, 240 U. S. 60, 60 L. Ed. 526.

98. Jurisdiction of the person.

See 14 Cent. Dig. Crim. Law, §§ 192-195.

When a governor of one state has voluntarily surrendered a fugitive from justice to the governor of another, the details of the demand made by one governor, and compliance by the other, are not proper subjects of inquiry upon trial of the case; and hence the objection that the prisoner for whom the requisition was made was not, as therein alleged at the time, in California, but was being illegally carried there, in accordance with an illegal scheme of which the requisition was a part, cannot, even if valid, be urged on the trial of the prisoner for the crime charged, or on appeal from a judgment of conviction.—Ker v. People of State of Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421.

99. Mode of acquiring jurisdiction.

See 14 Cent. Dig. Crim. Law, §§ 196, 197; 4 Cent. Dig. Arrest, § 143.

The fact that the accused was illegally arrested does not deprive the court of jurisdiction to try him.—Ex parte Johnson, 17 S. Ct. 735, 167 U. S. 120, 42 L. Ed. 103.

100. Exercise of jurisdiction in general.

See 14 Cent. Dig. Crim. Law, §§ 112, 114, 196.

Under the act of March 1, 1895, giving the United States courts in the Indian Territory, after September 1, 1896, jurisdiction of all offenses against the laws of the United States committed in said territory, except such cases as certain other courts "shall have acquired jurisdiction of before that time," one of the courts named did not acquire jurisdiction by the mere commission of an offense within its jurisdiction, or by the issuing of a warrant not served, before September 1, 1896.—Ex parte Johnson, 17 S. Ct. 735, 167 U. S. 120, 42 L. Ed. 103.

101. Transfer of causes.

See 14 Cent. Dig. Crim. Law, §§ 199-206; 42 Cent. Dig. Rem. of C. § 127.

Act Jan. 6, 1883 (22 Stat. 400), by which a certain part of Indian Territory was annexed to the judicial district of Kansas, and which vested in the United States district courts at Wichita and Ft. Scott in the district of Kansas "exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said district of Kansas against any of the laws of the United States," qualified or repealed pro tanto Rev. St. § 1039, which required indictments in capital cases presented to the district court to be remitted to the circuit court of the same district.—Mattox v. United States, 15 S. Ct. 337, 156 U. S. 237, 39 L. Ed. 409.

The federal District Court at Paris, Tex., cannot be said to have been without jurisdiction to try a member of the Choctaw and Chickasaw Nation charged with homicide, because the order of the United States court in the Indian territory, changing the venue, pursuant to Act June 28, 1898, c. 517, § 29, 30 Stat. 511, did not state whether the cause was transferred to the federal District or Circuit Court, but only to the "United States Court" at that place, where the District Court was the only court to which the case could have been removed under

the statute, and the record was transferred to and filed in that court, and the case was tried there.—Hendrix v. United States, 31 S. Ct. 193, 219 U. S. 79, 55 L. Ed. 102.

102. Loss or divestiture of jurisdiction.

See 14 Cent. Dig. Crim. Law, §§ 206-212.

A person convicted of murder in a state court will not be released on habeas corpus by the federal courts on the theory that jurisdiction over the subject-matter and the person of the accused was lost by the failure of the trial court to have the testimony in the case read or repeated to the accused, who was unable, because of his almost total deafness, to hear the evidence.—Felts v. Murphy, 26 S. Ct. 366, 201 U. S. 123, 50 L. Ed. 689.

V. VENUE.

(A) PLACE OF BRINGING PROSECUTION.

106. Nature and necessity of venue in prosecution.

The trial in Comanche county, Oklahoma, of an offense committed within territory which, at the time of trial, had been organized as such county, with a term of court fixed for it by order of the territorial Supreme Court, satisfies the requirements of Organic Act May 2, 1890, c. 182, § 10, that crimes shall be tried in the county to which territory not embraced in any organized county "shall be attached," although at the date of the commission of the offense Comanche county had not been organized, but was attached for judicial purposes to Canadian county.—In re Moran, 27 S. Ct. 25, 203 U. S. 96, 51 L. Ed. 106.

107. Constitutional and statutory provisions.

See 14 Cent. Dig. Crim. Law, § 219.

The provision of Const. U. S. art. 3, that trials of all crimes shall be in the state where committed, applies only to trials in the federal courts.—Nashville, C. & St. L. Ry. Co. v. Alabama, 128 U. S. 96, 9 S. Ct. 28, 32 L. Ed. 352.

Act July 12, 1894, requiring the prosecution of offenses "arising in the district of Minnesota" to be had in the division of the district "in which such offenses were committed," applies to all prosecutions instituted after the date of its passage, without regard to when the offense was committed.—Post v. United States, 161 U. S. 583, 16 S. Ct. 611, 40 L. Ed. 816.

Assignment of judge of one federal district and circuit to duty in another, under Judicial Code, § 18, as amended by Act Oct. 3, 1913, does not destroy the latter district and thus violate the rights under Const. U. S. Amend. 6, by subjecting one tried before him to trial in a district not established when the offense was committed.—Lamar v. United States, 36 S. Ct. 535, 241 U. S. 103, 60 L. Ed. 912, affirming judgment (C. C. A.) 227 F. 1019.

113. Offenses against United States.

See 14 Cent. Dig. Crim. Law, §§ 190, 223; 40 Cent. Dig. P. O. § 82.

Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], provides that every person who promises or offers any money or other thing of value, or tenders any contract for the payment of money, to any officer of the United States, with intent to influence him to do or omit to do anything in violation of his lawful duty, shall be punished, etc. Act Cong. June 17, 1878 [U. S. Comp. St. 1901, p. 2734], prohibits postmasters from selling or disposing of postage stamps except for cash. The constitution declares that in all criminal prosecutions defendant shall have the

right to be tried in the state and district where the crime was committed. Rev. St. § 731 [U. S. Comp. St. 1901, p. 585], provides that, when any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with in either. *Held*, that one who, to induce a sale of stamps on credit mailed the letter containing his offer in a state and district other than the state and district where the letter was received, was triable in the latter district.—*Palliser v. United States*, 136 U. S. 257, 10 S. Ct. 1034, 34 L. Ed. 514.

Under the statute, the offense of delivering lottery matter through the mails is distinct from that of depositing it in the mails, and is committed at the place of the delivery. Hence, under an indictment found in the Southern district of Illinois charging, in four counts, that defendant deposited a lottery circular in the mails at New York, and in a fifth count that he caused it to be delivered through the mails to a person in the Southern district of Illinois, the district judge for the Southern district of New York properly issued a warrant for the removal of the defendant, who had been arrested there, to Illinois for trial.—*Horne v. United States*, 143 U. S. 207, 12 S. Ct. 407, 36 L. Ed. 126, affirming order (D. C.) *United States v. Horner*, 44 F. 677.

The federal circuit courts may be required to sit at different places in their judicial districts, and prosecutions for offenses committed in certain counties may be required to be tried, and writs and recognizances to be returned, at each place; but this does not affect the power of the grand jury sitting at either place to present indictments for offenses committed anywhere within the district; and as to where trials shall be had in any district depends entirely on the legislation on the subject.—*Barrett v. United States*, 18 S. Ct. 327, 169 U. S. 218, 42 L. Ed. 723.

The crime of bribing a public officer, in violation of Rev. St. U. S. § 5451 [U. S. Comp. St. 1901, p. 3680], when begun by mailing a letter containing the money in one federal district, and completed by the receipt of the letter in another district, is triable in the latter district. Order (C. C.) *In re Benson*, 130 F. 486, affirmed.—*Benson v. Henkel*, 25 S. Ct. 569, 198 U. S. 1, 49 L. Ed. 919.

The physical absence of the accused from the state of Missouri when the acceptance by a St. Louis corporation of his offer to render services in consideration of the compensation forbidden by Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], was dispatched by mail or telegram, does not deprive the Circuit Court of the United States for the Eastern District of Missouri of jurisdiction of the offense, on the theory that the crime was not committed in that district, within the meaning of Const. U. S. art. 3, § 2, and Const. U. S. Amend. 6, requiring the trial of all crimes against the United States to be held in the state and district where such crimes shall have been committed.—*Burton v. United States*, 26 S. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

The offense of obtaining transportation of property in interstate or foreign commerce at less than the carrier's published rates, created by Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], is made triable in any federal district through which such transportation is had by the provision of that act that violations shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted.—*Armour Packing Co. v. United States*,

28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681, affirming judgment (1907) 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; *Chicago, B. & Q. Ry. Co. v. Same*, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment (1907) 157 F. 830, 85 C. C. A. 194.

The requirement that the prosecution of crimes against the United States be had in the state or district where the offense was committed, which is made by Const. U. S. Amend. 6, is not violated by the provision of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], under which the offense of obtaining transportation of goods from Kansas City to New York City at less than the carrier's published rates may be tried in any federal district through which such transportation was conducted.—*Id.*

There is no principle of constitutional law which entitles one to be tried for a criminal offense in the district where he resides. Order (C. C. 1909) 166 F. 621, affirmed.—*Haas v. Henkel*, 30 S. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

An offense against the United States committed in more than one district is, under Rev. St. § 731 [U. S. Comp. St. 1901, p. 585], cognizable in either district.—*Id.*

The requirement of Const. U. S. Amend. 6, that the criminal prosecution shall be had in the state and district where the crime is committed is satisfied by laying the venue of the trial of an indictment for conspiracy to defraud the United States, contrary to Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], at the place where an overt act was performed.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment (1910) 35 App. D. C. 451.

The doing of the overt act prescribed by Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], as necessary to the conspiracy to defraud the United States, renders applicable, where the place of the act and of the entry into the unlawful combination were in different federal districts, provisions of section 731 [U. S. Comp. St. 1901, p. 585] creating a double jurisdiction where the offense is begun in one district and completed in another.—*Id.*

Laying the venue of the trial of a conspiracy to commit an offense against the United States, under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], by using the mails to defraud, in the state and federal judicial district where the overt act is performed, satisfies Const. U. S. Amend. 6, that all crimes be tried in the state and district where committed.—*Brown v. Elliott*, 32 S. Ct. 812, 225 U. S. 392, 56 L. Ed. 1136.

The offense of misrepresenting the weight of interstate shipments of lumber to obtain a lower rate condemned by Act Feb. 4, 1887, § 10, as amended by Act June 13, 1910, when committed by the consignee, may be prosecuted in the federal district at the place of destination as having been "fully or in part committed."—*United States v. Union Mfg. Co.*, 36 S. Ct. 420, 240 U. S. 605, 60 L. Ed. 822.

Violations of Act June 25, 1910, making it a crime for harbinger of alien prostitute to fail to file with Commissioner General of Immigration statement concerning such alien, held committed in the District of Columbia where that official has his office, and not justifiable elsewhere on theory that failure to deposit statement in the mail is the beginning of the offense which, under Judicial Code, § 42, may be prosecuted in district where begun or completed.—*United States v. Lombardo*, 36 S. Ct. 508, 241 U. S. 73, 60 L. Ed. 897, affirming order (D. C.) 228 F. 980.

(B) CHANGE OF VENUE.

See 14 Cent. Dig. Crim. Law, § 235-269.

Review of orders sustaining demurrer, see Courts, 385(1½).

VI. LIMITATION OF PROSECUTIONS.

Contempt proceedings, see Contempt, 46.
Violation of injunction, see Injunction, 230.

146. Constitutional and statutory provisions.

See 14 Cent. Dig. Crim. Law, § 270.

The further prosecution of a criminal offense is not barred by the failure of the grand jury to act within nine months from the date when the accused was held to bail to await such action, although it is provided by Code D. C. § 939, 31 Stat. 1189, 1342, that under such circumstances, unless the court enlarges the time, the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free, or his bail discharged, as the case may be, but this section must be deemed to operate merely as ending the pending prosecution, and not as repealing pro tanto the general statute of limitations contained in Rev. St. U. S. § 1044 [U. S. Comp. St. 1901, p. 725], prescribing three years as the limitation for all offenses not capital.—*United States v. Cadarr*, 25 S. Ct. 487, 197 U. S. 475, 49 L. Ed. 842, 8 Ann. Cas. 1057.

147. Limitations applicable.

See 14 Cent. Dig. Crim. Law, §§ 271, 272; 18 Cent. Dig. Elections, § 354; 29 Cent. Dig. Int. Liq. § 217; 33 Cent. Dig. Libel, § 418; 40 Cent. Dig. P. O. § 31.

Conspiracy to commit against the United States, contrary to Cr. Code, § 37, an act criminal under Bankr. Act July 1, 1898, is not an offense arising under that act within section 29d, limiting prosecutions, but is governed by Rev. St. § 1044 (Comp. St. 1913, § 1708), limiting prosecutions for offenses not capital.—*United States v. Rabinowich*, 35 S. Ct. 682, 238 U. S. 78, 59 L. Ed. 1211.

148. Commencement of period of limitation.

See 14 Cent. Dig. Crim. Law, § 273-275.

150. — Continuing offenses.

See 14 Cent. Dig. Crim. Law, §§ 274, 275.

A conspiracy to restrain or monopolize trade, in violation of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy.—(1910) *United States v. Kissel*, 31 S. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168, reversing judgment (C. C. 1909) 173 F. 823.

A conspiracy to acquire fraudulently school lands from the states of California and Oregon, and to corrupt the officers of the General Land Office to facilitate their selection, under Act June 4, 1897, in exchange for other public lands, continues, so far as limitations are concerned, so long as any overt acts are done in furtherance of the conspiracy.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment (1910) 35 App. D. C. 451.

Some affirmative action to defeat the purpose of a continuing conspiracy to defraud the United States, contrary to Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), must be taken by a conspirator to prevent the overt act of an as-

sociate from continuing him in the conspiracy.—*Id.*

Disclosure by a government employé of continuing conspiracy to which he was a party, to defraud the United States out of its public lands, contrary to Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), does not prevent subsequent overt acts of any of his associates from continuing him in the conspiracy so far as the statute of limitations is concerned, if, after the first disclosure, he acquiesced in the later acts.—*Id.*

Conspiracy to use the mails to defraud, within Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), which the indictment alleges was designed to be and was in fact continuous, continues, so far as the limitations are concerned, so long as the overt acts are done by any of the conspirators.—*Brown v. Elliott*, 32 S. Ct. 812, 225 U. S. 392, 56 L. Ed. 1136.

151. Exceptions and suspension.

See 14 Cent. Dig. Crim. Law, §§ 276-280.

153. — Fugitives from justice.

See 14 Cent. Dig. Crim. Law, § 278.

To constitute "fleeing from justice," within the meaning of Rev. St. § 1045, providing that the three-years limitation, fixed by the previous sections, for a prosecution for a criminal offense, shall not apply to one so fleeing, an intent to avoid the justice of the United States is not necessary, an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act being sufficient.—*Streep v. United States*, 160 U. S. 128, 16 S. Ct. 244, 40 L. Ed. 365.

VII. FORMER JEOPARDY.

Application of constitutional provision to territories, see Territories, 8.

162. Constitutional and statutory provisions.

See 14 Cent. Dig. Crim. Law, § 285.

Since indictable statutory offenses may be punished as such while the offenders may still be subjected to punishment for the same acts as contempts, Rev. St. 102, making it a misdemeanor punishable by indictment to refuse to give testimony before either house of congress, is not invalid, as putting the witness twice in jeopardy for the same offense, though the refusal may still be punished as a contempt.—*In re Chapman*, 17 S. Ct. 677, 166 U. S. 661, 41 L. Ed. 1154.

Imposing a heavier punishment on a person convicted of a felony, as prescribed by St. Mass. 1887, c. 435, § 1, if he has twice before been convicted of a crime, for which he has been sentenced to imprisonment for not less than three years, does not impose any additional punishment for the former crimes, and does not put such person twice in jeopardy.—*McDonald v. Commonwealth of Massachusetts*, 21 S. Ct. 389, 180 U. S. 311, 45 L. Ed. 542.

163. Offenses or proceedings as to which former jeopardy is a defense.

See 14 Cent. Dig. Crim. Law, § 283; 1 Cent. Dig. Action, § 35.

Persons sued for double damages imposed by a statute for making a casual and involuntary trespass by cutting or assisting to cut timber upon state lands cannot complain that because of the further penal features of the law applicable to those offending against its provisions they are subject to be put twice in jeopardy for the same offense.—(1910) *Shevlin-Carpenter Co. v. State of Minnesota*, 30 S. Ct. 663, 218 U. S. 57, 54 L. Ed. 930, affirming judgment *State v. Shevlin-Carpenter Co.* (1907) 113 N. W. 634, 102 Minn. 470.

A former convict is not placed twice in jeopardy by bringing him after conviction before the court of another county under Code W. Va. 1906, c. 165, §§ 1-5, by information charging prior convictions, and on verdict that he was a former convict, sentencing him to additional punishment prescribed by chapter 152, §§ 23, 24.—(1912) *Graham v. State of West Virginia*, 32 S. Ct. 583, 224 U. S. 616, 56 L. Ed. 917, affirming judgment (1911) *State v. Graham*, 69 S. E. 1010, 68 W. Va. 248.

©164. Elements of former jeopardy.

See 14 Cent. Dig. Crim. Law, §§ 290-324.

©166. — Character and constitution of court.

See 14 Cent. Dig. Crim. Law, § 309.

One acquitted by a military court of competent jurisdiction of the crime of homicide, as defined by Pen. Code F. I. art. 404, cannot be tried a second time in a civil court of those islands for the same offense.—*Grafton v. United States*, 27 S. Ct. 749, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

©173. Time or stage of prosecution at which jeopardy attaches.

See 14 Cent. Dig. Crim. Law, § 289.

The submission of an indictment by the government attorney to the grand jury, and the examination of witnesses before them, do not amount to the institution of a prosecution.—*Post v. United States*, 161 U. S. 583, 16 S. Ct. 611, 40 L. Ed. 816.

©181. Discharge of jury without verdict.

See 14 Cent. Dig. Crim. Law, §§ 330-344.

©182. — In general.

See 14 Cent. Dig. Crim. Law, §§ 330-332.

Defendant is not twice put in jeopardy by reason of the court's discharging the jury after trial has begun, and ordering trial by another jury.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

©185. — Failure of jurors to agree.

See 14 Cent. Dig. Crim. Law, § 344.

A plea of former jeopardy cannot be based upon the discharge of the jury for their inability to agree on a verdict after considering the cause from 4 o'clock in the afternoon until half past 9 in the morning of the succeeding day. Judgment 58 N. E. 620, 188 Ill. 40, 58 L. R. A. 869; Id., 59 N. E. 424, 188 Ill. 40, 58 L. R. A. 869, affirmed.—*Dreyer v. People of State of Illinois*, 23 S. Ct. 28, 187 U. S. 71, 47 L. Ed. 79.

A plea of former jeopardy cannot be based upon a discharge of the jury on a prior trial after they had been out at least 24 hours, and the trial court had found that there was a reasonable probability that the jury could not agree. Judgment (1906) 85 P. 862, 33 Mont. 501, affirmed.—*Keerl v. State of Montana*, 29 S. Ct. 469, 213 U. S. 135, 53 L. Ed. 734.

©186. Acquittal.

See 14 Cent. Dig. Crim. Law, §§ 312, 320, 345-361.

A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.—*Ball v. United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 800.

A verdict of acquittal is not deprived of its effect as barring a subsequent prosecution by the fact that the verdict was received on Sunday, and the order discharging the defendant was made on the same day.—Id.

©188. Verdict set aside or judgment arrested.

See 14 Cent. Dig. Crim. Law, §§ 301, 321, 373-376.

©190. — New trial.

See 14 Cent. Dig. Crim. Law, § 375.

A defendant who procures a judgment against him upon an indictment to be set aside may be tried anew on the same or another indictment for the same offense.—*Ball v. United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 800.

©191. Judgment reversed.

See 14 Cent. Dig. Crim. Law, §§ 376-379.

©192. — In general.

See 14 Cent. Dig. Crim. Law, §§ 376, 377, 379.

The effect of a verdict of acquittal of a joint defendant, as barring his subsequent trial for the same offense, cannot be altered by the subsequent reversal of a judgment of guilty against the other defendant.—*Ball v. United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 800.

A sentence of conviction imposed under authority of Acts Mass. 1851, c. 87, and Pub. St. c. 187, § 13, after the reversal of a former judgment, on the application of the convict, because it was imposed under a statute that was passed after the offense was committed, and was therefore unconstitutional so far as it related to that offense, does not violate the constitutional provision against double jeopardy, although he had partly served the invalid sentence before it was reversed, including one day's solitary confinement, to which each of the sentences condemned him. Judgment, Commonwealth of Massachusetts v. Murphy, 54 N. E. 860, 174 Mass. 369, 48 L. R. A. 393, 75 Am. St. Rep. 353, affirmed.—*Murphy v. Commonwealth of Massachusetts*, 20 S. Ct. 639, 177 U. S. 155, 44 L. Ed. 711.

An accused is not placed twice in jeopardy for the same offense within the meaning of Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, because the Supreme Court of the Philippine Islands, upon reversing judgment below in a criminal case, on an appeal taken by the accused, convicted him on the same facts, of a different offense, carrying an increased sentence.—*Flemister v. United States*, 28 S. Ct. 129, 207 U. S. 372, 52 L. Ed. 252.

©193½. Conviction of lower as acquittal of higher grade or degree of offense charged.

See 14 Cent. Dig. Crim. Law, §§ 366, 387, 389, 394.

A person is not placed twice in jeopardy within the meaning of Act July 1, 1902, c. 1369, 32 Stat. 691, for the government of the Philippine Islands, by a conviction of homicide in the Supreme Court of those islands, on an appeal taken by the accused from a judgment of the trial court, which, after acquitting of murder, convicted the accused of assault, which is included in the crime of murder charged in the complaint.—*Trono v. United States*, 26 S. Ct. 121, 199 U. S. 521, 50 L. Ed. 292, 4 Ann. Cas. 773.

A person convicted of a lesser grade of homicide than that charged in the indictment, who obtains a reversal of the judgment upon appeal, is not placed twice in jeopardy by a second trial for murder under the same indictment. Judgment (1909) 65 S. E. 426, affirmed.—*Brantley v. State of Georgia*, 30 S. Ct. 514, 217 U. S. 284, 54 L. Ed. 768.

©194. Identity of offenses.

See 14 Cent. Dig. Crim. Law, §§ 347, 366, 382-409.

195. — In general.

See 14 Cent. Dig. Crim. Law, §§ 382, 383.

An acquittal upon the charge of having received the compensation forbidden by Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], from a specified person, described in the indictment as an officer and employé of a corporation, will not sustain a plea in bar of a prosecution upon the charge of having received such compensation from the corporation, where the accused declined to plead further after his demurrer to the answer, alleging that the two offenses are not, in legal effect, identical, was overruled.—*Burton v. United States*, 26 S. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

An acquittal of homicide, as defined in Pen. Code P. I. art. 404, is a bar to a subsequent conviction of the same offense arising out of the same facts, under an information charging the higher crime of assassination, as defined by article 403, since, if not guilty of the lesser crime, the accused could not, for the same acts, be guilty of the offense of higher grade.—*Grafton v. United States*, 27 S. Ct. 749, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

Treating as two different offenses assaults on two different individuals does not place the accused twice in jeopardy for the same offense, within the meaning of Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, even if these assaults occurred very near each other, in one continuing attempt to defy the law.—*Flemister v. United States*, 28 S. Ct. 129, 207 U. S. 372, 52 L. Ed. 252.

200. — Different offenses in same act or transaction.

See 14 Cent. Dig. Crim. Law, §§ 347, 386-409.

Punishment of dismissal from the army imposed by sentence of an army court-martial for conduct unbecoming an officer and a gentleman, under the sixty-first article of war, is not illegal on the theory that, as by such sentence fine and imprisonment are also imposed for conspiring to defraud the United States and causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war, a third punishment is inflicted where but two offenses were committed, in violation of the provision of Const. U. S. Amend. art. 5, against putting a person twice in jeopardy for the same offense, since the offense of conduct unbecoming an officer and a gentleman is not the same offense as conspiracy to defraud, or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former. Order (C. C.) 105 F. 614, affirmed.—*Carter v. McClaughry*, 22 S. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

A person is not twice put in jeopardy, within the meaning of Const. U. S. Amend. art. 5, by a sentence of an army court-martial imposing, both fine and imprisonment upon an army officer convicted of two charges of violating the sixtieth article of war, one of which charges a conspiracy to defraud the United States and the other the causing of false and fraudulent claims to be made against the United States, even if the punishment prescribed by such article for violations of its provisions is confined to fine, or imprisonment in the alternative, as such charges are separate and distinct offenses, although they related to and grew out of one transaction.—*Id.*

The offenses of behaving in an indecent manner in a public place, open to public view, punishable under municipal ordinance, and of insulting a public officer by deed or word in his presence, contrary to Pen. Code P. I. art. 257, are not identical, so that a conviction of the first will not bar a prosecution for the other, although the acts and words of the accused set forth in both charges are the same.—*Gavieres*

v. United States, 31 S. Ct. 421, 220 U. S. 338, 55 L. Ed. 489.

Prosecution for homicide, of a person previously convicted of assault from which the death ensued, does not place accused twice in jeopardy, contrary to Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, enacting a Bill of Rights for the Philippine Islands.—*Diaz v. United States*, 32 S. Ct. 250, 223 U. S. 442, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

Conviction of two distinct offenses of persons stealing stamps and postal funds, having first burglariously entered the post office, does not put them twice in jeopardy within Const. U. S. Amend. 5, where the offenses are made separate and distinct by Pen. Code, §§ 190, 192.—*Morgan v. Devine*, 35 S. Ct. 712, 237 U. S. 632, 59 L. Ed. 1153.

201. — Offenses against different sovereignties in same act or transaction.

See 14 Cent. Dig. Crim. Law, §§ 404-406.

An acquittal of murder after a regular trial in a state court having full jurisdiction in the premises is a bar to so much of an indictment for conspiring criminally in violation of Rev. St. §§ 5508, 5509 (U. S. Comp. St. 1901, p. 3712), as seeks by charging defendants with the commission of such murder, to enforce the provision of section 5509, that if, in carrying out such conspiracy, an offense against the state has been committed, the punishment provided for by the state for such offense shall be imposed.—*United States v. Mason*, 29 S. Ct. 490, 213 U. S. 115, 53 L. Ed. 725.

202. — Particular classes of offenses.

See 14 Cent. Dig. Crim. Law, §§ 386-403, 408, 409.

A conviction under Act March 22, 1882, § 3, making it unlawful for a man to cohabit with more than one woman in any territory of the United States, bars a prosecution under Act March 3, 1887, prescribing the punishment for adultery, when the latter offense is in fact a part of a continuous cohabitation with the woman named in the first indictment, though the time of its commission is laid after the period during which the cohabitation was alleged to have continued.—*Ex parte Nielsen*, 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118.

A plea of former jeopardy to an indictment for murder cannot be based upon the fact that, upon the trial of two consolidated indictments for two other murders committed by defendant on the same day as the one charged in the indictment in question, he was found not guilty on the issue of insanity, which is the defense set up to such indictment.—*Hotema v. United States*, 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

204. Waiver of objections.

See 14 Cent. Dig. Crim. Law, §§ 286, 319.

A state statute providing that a person who has been before convicted of crime shall suffer a severer punishment for a subsequent offense than for a first offense is not invalid as subjecting him to be put twice in jeopardy for the same offense.—*Moore v. State of Missouri*, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301, affirming judgment *State of Missouri v. Moore*, 121 Mo. 514, 26 S. W. 345.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

Conformity of federal courts to state practice, see Courts, 340.

Due process of law, see Constitutional Law, 263.

Equal protection of laws, see Constitutional Law, 250.

206. Constitutional and statutory provisions.

See 14 Cent. Dig. Crim. Law, §§ 411-413, 460; 37 Cent. Dig. Pardon, § 2.

The accused cannot contend that because there was no preliminary examination he was deprived of his constitutional guaranty to be confronted by the witnesses.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

Act Or. Feb. 17, 1899 (Laws 1899, p. 99), authorizing criminal prosecutions to be instituted by information without preliminary examination, held valid.—*Lem Woon v. State of Oregon*, 33 S. Ct. 783, 229 U. S. 586, 57 L. Ed. 1340, affirming judgments *State v. Lem Woon*, 107 P. 974, 57 Or. 482, and 112 P. 427, 57 Or. 482.

208. Preliminary complaint or affidavit.

See 14 Cent. Dig. Crim. Law, §§ 415-434, 441-443.

211. — Requisites and sufficiency.

See 14 Cent. Dig. Crim. Law, §§ 420-431.

The invalidity of one count in a complaint, because the charges are made solely upon information and belief, without setting forth the sources of information or the grounds of belief, will not invalidate other counts in which the natural intentment is that the affiant swore to facts within his personal knowledge.—*Rice v. Ames*, 21 S. Ct. 406, 180 U. S. 371, 45 L. Ed. 577.

215. Preliminary warrant or other process.

See 14 Cent. Dig. Crim. Law, §§ 435-439, 444-457.

217. — Issuance.

See 14 Cent. Dig. Crim. Law, § 439.

Preliminary inquiry into the facts by prosecuting attorney of Manila, under Philippine Commission Act No. 612, § 2, on which he files an information, held a sufficient compliance with Philippine Bill of Rights Act July 1, 1902, § 5, providing that no warrant shall issue but upon probable cause supported by oath in view of section 9, authorizing modifications of procedure.—*Ocampo v. United States*, 34 S. Ct. 712, 234 U. S. 91, 58 L. Ed. 1231.

218. — Requisites and sufficiency.

See 14 Cent. Dig. Crim. Law, §§ 444-450, 457.

A warrant without a seal, issued by a United States commissioner having no seal of office, and not required by any act of congress or statute of the state to be under seal, is not void for the omission.—*Starr v. United States*, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841.

229. Conduct of preliminary examination.

See 14 Cent. Dig. Crim. Law, §§ 412, 461, 478-492.

232. — Representation by attorneys.

See 14 Cent. Dig. Crim. Law, §§ 480, 482, 483.

A petition for a writ of habeas corpus was filed by a prisoner under sentence of death for murder, alleging that prior to his preliminary examination the petitioner had employed a certain attorney as his counsel, but that such counsel was refused permission to see and consult with him, and he was not represented by counsel at his examination. The record showed that the prisoner waived examination, and that on his trial, at his request, other counsel was assigned him, who represented him through the trial and in proceedings in error in the Supreme Court. It did not appear, nor was it alleged, that the court was requested at any time, either by the petitioner or his alleged counsel, to permit the latter to represent the petitioner, or appear in his behalf. Held, that the petitioner

was not entitled to the writ on the ground that he had been deprived of his constitutional right to be represented by counsel, which rendered the judgment void.—*Andersen v. Treat*, 19 S. Ct. 67, 172 U. S. 24, 43 L. Ed. 351.

242. Removal of accused to other county or district for trial.

See 14 Cent. Dig. Crim. Law, §§ 509, 510.

The fact that a warrant for the removal of a prisoner, issued by a federal district judge, directed the marshal to remove the prisoner to the district where the crime was committed, "to be tried in said district upon such counts in the indictment" as he "can be legally tried upon," did not render the warrant objectionable, as allowing him to be tried there upon the whole indictment, or render it void for indefiniteness.—*Horner v. United States*, 143 U. S. 207, 12 S. Ct. 407, 36 L. Ed. 126, affirming order (D. C.) *United States v. Horner*, 44 F. 677.

A transfer of the place of trial from one division of a judicial district to another, by a court having jurisdiction over the whole district, when not expressly prohibited, is not ground of error, especially when not objected to at the time.—*Rosecrans v. United States*, 17 S. Ct. 302, 165 U. S. 257, 41 L. Ed. 708.

Persons are not held to answer for an infamous crime without presentment by a grand jury, by an order removing them, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], on a sworn complaint and upon evidence under oath which has been adjudged to amount to probable cause, to a court in which they have been indicted for an offense against the United States, and where all the defenses of the parties may be presented and judgment obtained thereon, on the theory that, by reason of illegality in drawing and organizing the grand jury, such indictment is void.—*Greene v. Henkel*, 22 S. Ct. 218, 183 U. S. 249, 46 L. Ed. 177.

The existence of an indictment is not a condition precedent to proceedings, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to remove to another district for trial persons there charged with an offense against the United States.—Id.

The existence of technical defects in an indictment with respect to the averments of time, place, or circumstances will not prevent the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another district for trial, of persons there charged with an offense against the United States, if evidence be given upon the hearing which supplies such defects and shows probable cause to believe the defendants guilty of the commission of the offense defectively stated in the indictment.—Id.

Whether defendants, sought to be removed, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another district, for trial for an offense against the United States, for which they have there been indicted, have waived, or can waive, the right to question the validity and regularity of the grand jury which found the indictment, can only be raised before, and decided in the first instance by, the court in which they are to be tried.—Id.

A magistrate acting pursuant to Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], providing for the removal to another district for trial of persons there charged with an offense against the United States, is justified in treating a properly certified copy of an indictment valid on its face, and purporting to have been found by a grand jury acting in fact as such at a regular term of the district court of the United States, presided over by one of its judges and hearing testimony in the ordinary way, as an indictment found by a competent grand jury, irrespective of any irregularities in drawing and

organizing the grand jury which found the indictment.—Id.

The finding of an indictment does not preclude the government, on proceedings taken under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to remove to another district for trial persons there charged with an offense against the United States, from giving evidence of a certain and definite character concerning the commission of the offense by the defendants in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail.—Id.

A decision granting a removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another district for trial, of persons there charged with an offense against the United States, where an indictment has been found, is not an adjudication of the sufficiency of the indictment in law as against any objection which may subsequently be made by the defendants.—Id.

A statement in the opinion of a district judge, rendered on granting an application for the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another district for trial of persons there charged with an offense against the United States, that upon the evidence before him it is a proper case to be submitted to the jury for trial, is equivalent to a finding that probable cause exists for believing defendants guilty of the crime charged, although he also states that he expresses no opinion upon the merits.—Id.

An indictment is *prima facie* evidence of the existence of probable cause in proceedings for the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another federal district for trial, of a person there charged with an offense against the United States.—*Beavers v. Henkel*, 24 S. Ct. 605, 194 U. S. 73, 48 L. Ed. 882.

So far as respects technical objections, the sufficiency of an indictment is not a matter of inquiry in proceedings for the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another federal district for trial, of a person there charged with an offense against the United States, but is to be determined by the court in which the indictment was found.—Id.

The sufficiency of the indictment as evidence of probable cause in proceedings for the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another federal district for trial, of a person there charged with an offense against the United States, cannot be impeached (if impeachable at all) by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action.—Id.

Sources of information on which are based a complaint made on information and belief, in proceedings for the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another federal district for trial, of a government official there charged with having received money for procuring a contract with the federal government, are sufficiently disclosed by the statements in the supporting affidavit that such sources are the official documents with reference to the making of the contract, the transactions on file in the government records, letters and communications from the contractor, the indictment and bench warrant, and personal conversations with the parties having the various transactions with the defendant, and that deponent's information as to the whereabouts of defendant is derived from a recent conversation with him, and from the certificate of the United States marshal, indorsed on the warrant.—Id.

The Supreme Court of the District of Columbia must be deemed a "court of the United States" within the meaning of Rev. St. U. S.

§ 1014 [U. S. Comp. St. 1901, p. 716], authorizing the removal of a person charged with an offense against the United States cognizable by a court of the United States to the federal district where the trial is to be had, in view of Act June 22, 1874, c. 396, 18 Stat. 193, making applicable to the courts of the District the sections of the original judiciary act from which section 1014 was taken, and of the powers given to that court as a court of the United States by Code D. C. § 61 (31 Stat. 1199, c. 854), and of the provision of section 1 of that Code (31 Stat. 1189, c. 854), making applicable to the District all general acts of Congress "not locally inapplicable." Judgment (C. C.) in *re Benson*, 130 F. 486, affirmed.—*Benson v. Henkel*, 25 S. Ct. 569, 198 U. S. 1, 49 L. Ed. 919.

The District of Columbia is a district of the United States within the meaning of Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], authorizing the removal for trial of a person charged with an offense against the United States to the federal district where the trial is to be had, although this section was taken from the judiciary act of 1789, when the District of Columbia was not in existence.—Id.

Objections to an indictment charging a violation of Rev. St. U. S. § 5451 [U. S. Comp. St. 1901, p. 3680], in bribing two federal officers to reveal the contents of certain reports pertaining to an investigation then pending in the Land Department with respect to certain frauds used in obtaining public lands, are not available in proceedings before a United States Commissioner for the removal of the accused to another federal district for trial, where such objections raise the questions whether the statute applied to reports which had not yet been filed and might never be filed, or whether the words of the statute, "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of the investigation or to the pendency of an obligation not to reveal the contents of a paper then in the officer's possession, or whether the revealing of the contents of such reports was forbidden by any lawful authority, there being no statute imposing such obligation; but such questions should be determined by the court in which the indictment was found.—Id.

The prosecution of proceedings to remove to another federal district for trial a person there charged with an offense against the United States is not an unlawful interference with the jurisdiction of the federal Circuit Court in whose custody the accused was then held to await the trial of indictments pending against him in that court, where such proceedings were had with the consent of that court.—*Beavers v. Haubert*, 25 S. Ct. 578, 198 U. S. 77, 49 L. Ed. 950.

Evidence of probable cause, in proceedings to remove a person to another federal district for trial, afforded by an indictment charging him with an offense against the United States, is not rebutted, even if subject to rebuttal, where the rebuttal testimony is negative and for the most part confined to general statements, and the accused claims his privilege, under the state practice, of exemption from cross-examination.—Id.

A person indicted in the Supreme Court of the District of Columbia for an offense against the United States may be removed to that district for trial, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], authorizing the removal for trial of a person charged with such a crime to the federal district where the trial is to be had.—*Hyde v. Shine*, 25 S. Ct. 700, 199 U. S. 62, 50 L. Ed. 90, affirming judgment (D. C.) *United States v. Hyde*, 132 F. 545; *Diamond v. Same*, 25 S. Ct. 706, 199 U. S. 88, 50 L. Ed. 99.

Indictments for conspiracy to defraud the United States under Rev. St. § 6440 [U. S.

Comp. St. 1901, p. 3676], considered, and held sufficient for the purposes of a proceeding for the removal of the defendant from another district for trial and to establish probable cause in such proceeding. *Order, United States v. Green (D. C.)* 136 F. 618, affirmed.—*Green v. MacDougall*, 28 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

Under the law, as determined by the Supreme Court, that an indictment is prima facie evidence of probable cause in a proceeding for the removal of a defendant to another federal district for trial thereon, the effect of the indictment, if introduced in evidence in such proceeding, is not weakened by the fact that the government introduces additional evidence, which is in itself insufficient to establish probable cause, provided such evidence does not contradict the facts alleged in the indictment.—*Id.*

Where it is sought to remove a defendant from one federal district to another for trial on an indictment, the question of the validity of such indictment in matters of substance may properly be raised and determined in the district of the arrest in habeas corpus proceedings.—*Id.*

Evidence tending to show that no offense, triable in the federal District Court to which the accused is sought to be removed pursuant to Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], has been committed by him in that district cannot be excluded in the removal proceedings, on the theory that a certified copy of the indictment and proof of the identity of the party accused furnish conclusive evidence of probable cause.—*Tinsley v. Treat*, 27 S. Ct. 430, 205 U. S. 20, 51 L. Ed. 689; *Kessler v. Same*, 27 S. Ct. 434, 205 U. S. 33, 51 L. Ed. 695; *Morgan v. Same, Id.*; *Carpenter v. Same, Id.*; *Whittle v. Same, Id.*; *Wilcox v. Same, Id.*; *Braden v. Same, Id.*; *Royster v. Same, Id.*; *Smith v. Same, Id.*; *Burroughs v. Same, Id.*; *McDowell v. Same, Id.*

A person indicted for the same offense in two federal districts, one of which is the district where he resides, may—at least, with the consent of the court of the latter district—be removed, under Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), to the other district for the trial of the offense committed there.—*Price v. Henkel*, 30 S. Ct. 257, 216 U. S. 488, 54 L. Ed. 581.

Allegations charging a conspiracy by which an employé in the Bureau of Statistics in the Department of Agriculture was to give his co-conspirators advance information of the official cotton crop reports, and a conspiracy to bribe such employé for the same purpose, sufficiently show, for the purposes of a removal, under Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), to the District of Columbia for trial, the commission within the District of offenses against the United States.—*Id.*

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

Review of judgment sustaining plea of limitation, see Courts, ◀ 385(1½).

◀ 261. Necessity of arraignment and plea.

See 14 Cent. Dig. Crim. Law, §§ 612, 613.

A plea is indispensable to a valid verdict and judgment of conviction.—*Crain v. United States*, 162 U. S. 625, 16 S. Ct. 952, 40 L. Ed. 1097.

◀ 267. Pleas in general.

See 14 Cent. Dig. Crim. Law, §§ 621-630.

◀ 270. — Several pleas.

See 14 Cent. Dig. Crim. Law, §§ 624-628.

Pleas of former jeopardy and not guilty are not inconsistent, and may stand together.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

◀ 276. Plea to jurisdiction.

See 14 Cent. Dig. Crim. Law, §§ 636, 637.

It is not error to refuse to sustain a plea to the jurisdiction where the correctness of such refusal depends on the alleged existence of certain facts which are not admitted.—*Wright v. United States*, 158 U. S. 232, 15 S. Ct. 819, 30 L. Ed. 963.

◀ 277. Pleas in abatement.

See 14 Cent. Dig. Crim. Law, §§ 633-656; 24 Cent. Dig. Gaming, § 284.

◀ 279. — Time and order of pleading.

See 14 Cent. Dig. Crim. Law, §§ 643, 644.

A right to plead in abatement is waived by a plea in bar.—*United States v. Gale*, 109 U. S. 65, 3 S. Ct. 1, 27 L. Ed. 857.

A plea in abatement for alleged irregularity in the drawing of grand jurors is properly overruled where it was not filed until 14 days after the term began, and 5 days after return of the indictment; and no want of knowledge by defendant of the threatened prosecution, nor any reason why objection was not made earlier, nor any facts showing how he was prejudiced by the irregularity, are alleged.—*Agnew v. United States*, 17 S. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

An objection to the personal qualifications of grand jurors may be taken by plea in abatement, filed after the return of the indictment, but prior to arraignment, and as soon as the facts on which the objection was based were ascertained.—*Crowley v. United States*, 24 S. Ct. 731, 194 U. S. 461, 48 L. Ed. 1075.

Objections to the want of proper arrest and preliminary examination of the accused before a magistrate, and to the lack of verification of the information by oath or affidavit, must be taken before pleading the general issue by some proper motion or plea in order to be available to the accused.—*Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

Pleas in abatement, alleging irregularity in drawing grand jury, were filed too late where four years had elapsed since the indictment and nearly two years since a mandate of a federal Circuit Court of Appeals sustaining overruling of a demurrer to the indictment and a bill of particulars furnished.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment (1910) 35 App. D. C. 451.

◀ 280. — Requisites and sufficiency.

See 14 Cent. Dig. Crim. Law, §§ 645-651; 24 Cent. Dig. Gaming, § 284.

The right of trial by jury upon the question of waiver of preliminary examination is not claimed as a federal right in a state court by a plea in abatement alleging that the prosecution is in contravention of the fourteenth amendment, where this evidently referred to prior paragraphs which dealt only with the necessity of an indictment to constitute due process of law. Judgment 71 N. W. 444, 51 Neb. 581, affirmed.—*Bolln v. State of Nebraska*, 20 S. Ct. 287, 176 U. S. 83, 44 L. Ed. 382.

288. **Plea of limitation.**

See 14 Cent. Dig. Crim. Law, §§ 660, 661.

A special plea of the statute of limitations is not good as against an indictment charging a conspiracy to restrain or monopolize trade, in violation of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), by improperly excluding a competitor from business, although the conspiracy is alleged to have been formed on a specified date, which was more than three years before the finding of the indictment, where such indictment, consistently with the other facts, alleges that the conspiracy continued to the date of its presentment.—(1910) *United States v. Kissel*, 31 S. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168, reversing judgment (C. C. 1909) 173 F. 823.

The averment of an indictment charging a continuing conspiracy to defraud the United States, that such conspiracy continued to the date of the filing of the indictment, must be denied under the general issue, and not by a special plea of the statute of limitations.—*United States v. Barber*, 31 S. Ct. 209, 219 U. S. 72, 55 L. Ed. 99.

289. **Plea of former jeopardy or former acquittal or conviction.**

See 14 Cent. Dig. Crim. Law, §§ 666-683; 24 Cent. Dig. Gaming, § 284.

295. — **Evidence.**

See 14 Cent. Dig. Crim. Law, §§ 674-678.

Parol evidence is always admissible to establish the defense of prior conviction or acquittal.—*Durland v. United States*, 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709.

296. — **Trial and determination.**

See 14 Cent. Dig. Crim. Law, §§ 679-681.

When a former conviction or acquittal and not guilty are pleaded, the former plea must be disposed of before the latter goes to the jury.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

302. **Nolle prosequi.**

See 14 Cent. Dig. Crim. Law, §§ 688-697.

The dismissal of a criminal prosecution in the Philippine Islands for embezzlement, without prejudice to the right to institute a civil action, is not demanded because the restoration of the money found to be embezzled, or, in lieu thereof, the suffering of a subsidiary imprisonment for a term not exceeding one-third of the principal penalty will not bar the creditor from a civil action to recover any sum which he may prove to be due in excess of the sum wrongfully converted.—*Freeman v. United States*, 30 S. Ct. 592, 217 U. S. 539, 54 L. Ed. 874, 19 Ann. Cas. 755.

X. EVIDENCE.

Change of rules of evidence as denial of due process of law, see Constitutional Law, 266; as ex post facto law, see Constitutional Law, 202.

Competency of witnesses, see Witnesses, 41-219.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, 320-404.

Cross-examination of witnesses, see Witnesses, 268-287.

Examination of witnesses, see Witnesses, 226-308.

Privilege of accused as witness, see Witnesses, 299-301.

In particular criminal prosecutions.

See—

Banks and Banking, 257.

Burglary, 40-42.

Conspiracy, 44, 45.

See—

Homicide, 153-242.

Intoxicating Liquors, 236.

Perjury, 30-32.

Post Office, 49.

(A) **JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.**

In extradition proceedings, see Extradition, 14.

304. **Judicial notice.**

See 14 Cent. Dig. Crim. Law, §§ 700-717; 15 Cent. Dig. Crim. Law, § 2961½; 10 Cent. Dig. Contempt, § 182.

Gen. Laws Minn. 1889, p. 51, c. 8, prohibits the sale of dressed meat within any municipal division of the state unless the animal was inspected there within 24 hours before slaughter. *Held*, that the theory upon which such statute is based—that the inspection of an animal on the hoof, within a short time before it is slaughtered, is necessary to ascertain whether it is diseased—is not a fact of which the court can take judicial notice.—*State of Minnesota v. Barber*, 136 U. S. 313, 10 S. Ct. 862, 34 L. Ed. 455, affirming (C. C.) 39 F. 641.

The court cannot take judicial notice of the fact that tobacco in the form of cigarettes is more noxious than in any other form. Judgment 48 S. W. 305, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, affirmed.—*Austin v. State of Tennessee*, 21 S. Ct. 132, 179 U. S. 343, 45 L. Ed. 224.

Judicial notice will be taken that vaccination is commonly believed to be a safe and valuable means of preventing the spread of small-pox, and that this belief is supported by high medical authority. Judgment, *Commonwealth v. Pear*, 68 N. E. 719, 183 Mass. 242, 67 L. R. A. 935, affirmed.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765.

305. **Presumptions.**

See 14 Cent. Dig. Crim. Law, §§ 26-28, 712, 713, 724, 726.

308. — **Innocence.**

See 14 Cent. Dig. Crim. Law, § 731.

Where proof that certain obscene publications came through the mails rests in part upon the inference that certain messengers in the post office performed their customary duty of taking from the mails matter directed to post-office inspectors at that place, and placed it on their tables, or in their private boxes, where it was found by them, defendant is not entitled to an instruction that the presumption of his innocence is stronger than the presumption that such messengers obtained the objectionable publications from the mails.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

It is not broadly true that the presumption of innocence is stronger than any other presumption except the presumption of sanity and of knowledge of the law.—*Id.*

311. — **Sanity.**

See 14 Cent. Dig. Crim. Law, §§ 742-744.

The presumption of law that every one is sane merely authorizes the jury to assume at the outset that the accused is criminally responsible for his acts.—*Davis v. United States*, 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499.

323. — **Particular facts.**

See 14 Cent. Dig. Crim. Law, §§ 724, 726, 730-751.

In cases of homicide, the fact of absconding may be proved as evidence against the defendant, but it scarcely comes up to the standard of evidence tending to establish guilt.

Held, therefore, that it was error to charge that the jury may infer from the fact of absconding the fact of guilt, and that flight "is a silent admission by the defendant that he is unwilling or unable to face the case against him"; that "it is in some sense, feeble or strong, as the case may be, a confession; and it comes in with the other incidents, the corpus delicti being proved, from which guilt may be cumulatively inferred."—*Alberty v. United States*, 162 U. S. 499, 16 S. Ct. 864, 40 L. Ed. 1051.

Possession of articles apparently taken from the deceased at the time of his death authorizes a prima facie presumption of guilt, which the jury may act upon unless it is rebutted by the evidence or explanations offered by the accused.—*Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ

◀ 338. Relevancy in general.

See 14 Cent. Dig. Crim. Law, §§ 752, 753, 755, 756, 787, 788, 801, 855.

Where defendant killed the captain of a vessel while alone with him in his cabin, and afterwards went on deck, where he killed the mate, on his trial for the killing of the mate evidence of the reputation of the captain was not admissible.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

Evidence that letters in the possession of the government, on trial for criminal conspiracy, addressed to one of the defendants under an alias, could only have been obtained by robbing the mails, is not relevant.—*Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

◀ 342. Motive or absence of motive.

See 14 Cent. Dig. Crim. Law, §§ 773, 774.

Evidence of the motive of the entryman under Timber and Stone Act June 3, 1878, c. 151, § 3, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], at the time of final hearing, which, under that act, cannot defeat his right to a patent, is inadmissible, on a trial for conspiring to suborn perjury in the proceedings to acquire the land, to show motive in making the original application.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

◀ 351. Subsequent condition or conduct of accused.

See 14 Cent. Dig. Crim. Law, §§ 776, 778-785, 830-832.

In a criminal case, evidence of flight and of the facts connected therewith is admissible.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

◀ 358. Alibi.

See 14 Cent. Dig. Crim. Law, § 763.

To make out an alibi, there was evidence that defendant was at a certain time many miles away, and that he could not have reached that place by the road, and that he could not have reached it by a direct route because the country was covered with wire fences. *Held*, that it could be shown in rebuttal that defendant had a wire cutter.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

◀ 359. Incriminating others.

See 14 Cent. Dig. Crim. Law, §§ 789, 790.

Where the evidence is purely circumstantial, it is proper for the prosecution to show, as a circumstance in the case, the fact that another person, who was in the vicinity at the time of the killing, could not have committed the crime. The fact that such testimony might

operate indirectly to fortify the credit of such person as a witness could not affect its admissibility.—*Bram v. United States*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

◀ 362. Res gestæ.

See 14 Cent. Dig. Crim. Law, §§ 804-821; 4 Cent. Dig. Assault, § 129.

◀ 365. — Other offenses part of same transaction.

See 14 Cent. Dig. Crim. Law, § 807.

On trial of defendant, who was one of the crew of a vessel, for the killing of the mate, evidence of ill treatment of defendant by the captain, who was first killed by defendant, prior to the day of the homicide, is not admissible; there being no evidence to so connect it with the killing of the mate as to render it a part of the res gestæ.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

◀ 368. — Acts and statements of third persons.

See 14 Cent. Dig. Crim. Law, §§ 806, 812, 814, 815, 821.

Defendant's testimony showed that on the day deceased disappeared, under circumstances implicating defendant in the crime, a party of armed men, not including defendant, were hunting for deceased and the wife of one of the party, under the belief that they had eloped together. *Held*, that threats made by members of the party to kill deceased were also admissible, in favor of defendant, as part of the res gestæ, and as illustrative of their acts.—*Alexander v. United States*, 138 U. S. 353, 11 S. Ct. 350, 34 L. Ed. 954.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

Character of accused as ground of impeachment as witness, see Witnesses, ▶ 337.

◀ 369. Other offenses as evidence of offense charged in general.

See 14 Cent. Dig. Crim. Law, §§ 822-824; 32 Cent. Dig. Larc. § 131.

On a trial for murder, committed in a shooting affray participated in by defendants on one side, and several persons, including deceased, on the other, evidence was admitted that defendants had committed five separate robberies during the 20 days preceding the shooting, on the theory that the party of the murdered man was attempting to arrest defendants, but it did not appear that any of that party knew of more than one of the previous robberies. *Held*, that it was error to admit testimony as to the other robberies.—*Boyd v. United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, reversing judgment (C. C.) *United States v. Boyd*, 45 F. 851.

Evidence which tends directly to prove the defendant's guilt of the offense charged is admissible, although it may also tend to prove a distinct felony.—*Moore v. United States*, 150 U. S. 57, 14 S. Ct. 26, 37 L. Ed. 996.

◀ 371. Acts showing intent or malice or motive.

See 14 Cent. Dig. Crim. Law, §§ 830-832; 29 Cent. Dig. Int. Liq. § 286; 32 Cent. Dig. Larc. § 131.

Evidence of an attempt to acquire, and of the acquisition, by like unlawful methods, of state school lands, is admissible, on a trial for conspiring to suborn perjury in proceedings for the purchase of public land under the timber and stone act, as tending to establish guilty intent, purpose, design, or knowledge on the part of the alleged conspirators.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

372. Acts part of series showing system or habit.

See 14 Cent. Dig. Crim. Law, §§ 833, 834; 24 Cent. Dig. Gaming, § 286; 27 Cent. Dig. Incest, § 11; 29 Cent. Dig. Int. Liq. § 288.

Testimony that same course of conduct was going on for a long time before an indictment, alleging that defendants conspired to commit an offense against the United States by false weights of raw sugar imported, is admissible.—*Heike v. United States*, 33 S. Ct. 226, 227 U. S. 131, 57 L. Ed. 450, Ann. Cas. 1914C, 128, affirming judgment 192 F. 83, 112 C. C. A. 615.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

See Searches and Seizures, 37.

Compelling criminalization in bankruptcy proceedings, see Bankruptcy, 242.

390. Testimony as to intent or motive.

See 14 Cent. Dig. Crim. Law, § 858.

Accused should be allowed to testify as to his intent in abstracting certain correspondence from the files of a corporation, where the prosecution claims that he did so for the purpose of suppressing or destroying evidence against him. Judgment (1907) 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 392.

393. Compelling accused to criminate himself.

See 14 Cent. Dig. Crim. Law, §§ 871-874.

The self-incrimination of an accused is not effected by the introduction in evidence against him of certain private papers found in the execution of a search warrant where he did not take the witness stand in his own behalf, as was his privilege, and was not compelled to testify concerning the papers, or make any admission about them. Judgment *People v. Adams*, 68 N. E. 636, 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, affirmed.—*Adams v. People of State of New York*, 24 S. Ct. 372, 192 U. S. 585, 48 L. Ed. 575.

The protection against self-incrimination afforded by Const. U. S. Amend. 5, extends to the use against the accused of communications extorted from him by physical or moral compulsion, but not to evidence obtained from the exhibition of his person, such as testimony as to the fit of a blouse which he was forced to put on.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

Admission at the trial of the testimony of accused, voluntarily given at preliminary hearing, held not to violate his privilege against self-incrimination accorded by Const. Amend. 5.—*Powers v. United States*, 32 S. Ct. 281, 223 U. S. 303, 56 L. Ed. 448.

Testimony of accused, voluntarily given at preliminary hearing, is not rendered inadmissible at trial by Rev. St. § 860 (U. S. Comp. St. 1901, p. 661).—*Id.*

394. Evidence wrongfully obtained in general.

See 14 Cent. Dig. Crim. Law, §§ 875, 876.

The admissibility of documentary evidence tending to establish the guilt of an accused of the offense charged is not affected because it was secured in violation of the constitutional prohibition against unreasonable searches and seizures. Judgment, *People v. Adams*, 68 N. E. 636, 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, affirmed.—*Adams v. People of*

State of New York, 24 S. Ct. 372, 192 U. S. 585, 48 L. Ed. 575.

Testimony that the accused put on a blouse, and that it fitted him, is not made inadmissible on the question whether or not it belonged to him, because the prisoner did this under duress, since, even assuming that such evidence was improperly obtained, it is still competent.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

396. Evidence admissible by reason of admission of similar evidence of adverse party.

See 14 Cent. Dig. Crim. Law, §§ 861, 862.

Refusal to allow the defendant to prove what was said by him in a conversation with the deceased, which has already been put in evidence by the prosecution, is error.—*Carver v. United States*, 17 S. Ct. 228, 164 U. S. 694, 41 L. Ed. 602.

Witnesses are properly examined by the prosecution in rebuttal with respect to the effect of light from a flash of a revolver and its sufficiency for the identification of the person firing it, where the defense has put in a calendar, apparently for the purpose of showing the time when the moon rose that night, as having some bearing on this question.—*Fitzpatrick v. United States*, 20 S. Ct. 944, 178 U. S. 304, 44 L. Ed. 1078.

A letter written by counsel for the accused, with the latter's consent, and by his direction, in reply to a letter charging him with having abstracted certain correspondence from the files of a corporation, should be admitted in evidence to explain the letter of accusation, already admitted without objection to show a suppression or spoliation of evidence. Judgment (1907) 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 392.

(E) BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE.

399. Record or other writing as best evidence.

See 14 Cent. Dig. Crim. Law, §§ 879-884, 1202-1212.

400. — In general.

See 14 Cent. Dig. Crim. Law, §§ 879-884, 1202-1212; 18 Cent. Dig. Embez. § 61.

On a trial for smuggling and facilitating the transportation of smuggled opium, witness, who handled the money realized from the sale of the opium, may testify that, in obedience to instructions, he deposited part of it to defendant's credit in a bank, and used part of it to pay a paper, which he first called a note, and afterwards said was a draft drawn by defendant on B., and which he took up from the bank that held it for collection, and forwarded to B., notwithstanding objection that the paper was the best evidence as to the party by whom it was drawn, as the substantial matter was the disposition of the money, and calling the paper a draft drawn by defendant on B. was a mere general description, which was not improper, since the receipt and transmission to B. were only incidental to the disposition of the money.—*Dunbar v. United States*, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (D. C.) *United States v. Dunbar*, 60 F. 75.

404. Demonstrative evidence.

See 14 Cent. Dig. Crim. Law, §§ 873, 891-892, 1467; 8 Cent. Dig. Breach of F. § 6; 33 Cent. Dig. Forg. § 112; 26 Cent. Dig. Homic. § 557.

On the trial of one for having committed a murder while engaged in a robbery, it appeared that a watch charm was taken by defendant at the time of the robbery; and this charm was

produced by a witness who testified that a participant in the robbery gave it to him in defendant's presence, defendant saying at that time that he had committed a robbery and had shot a person. *Held*, that the watch charm was admissible in evidence.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

Dying declarations, see Homicide, ◄210-220.

◄405. Admissions by accused.

See 14 Cent. Dig. Crim. Law, §§ 785, 894-917, 920-927, 949, 968, 970-973; 1 Cent. Dig. Adultery, § 21; 4 Cent. Dig. Assault, § 129; 6 Cent. Dig. Big. § 43; 24 Cent. Dig. Gaming, § 287; 32 Cent. Dig. Larc. § 141.

◄406. — In general.

See 14 Cent. Dig. Crim. Law, §§ 785, 894-917, 920-927; 1 Cent. Dig. Adultery, § 21; 4 Cent. Dig. Assault, § 129; 6 Cent. Dig. Big. § 43; 24 Cent. Dig. Gaming, § 287; 32 Cent. Dig. Larc. § 141.

Voluntary statements made by a defendant before and after his preliminary examination are not inadmissible in evidence against him, because the provisions of 30 Stat. 1319, c. 429, §§ 307-311, with respect to statements pending an examination, were not complied with, although made to the magistrate who in fact conducted the preliminary examination.—*Hardy v. United States*, 22 S. Ct. 889, 186 U. S. 224, 46 L. Ed. 1137.

◄411. Declarations by accused.

See 14 Cent. Dig. Crim. Law, §§ 894-935; 1 Cent. Dig. Adultery, § 21; 4 Cent. Dig. Assault, § 129; 32 Cent. Dig. Larc. § 141; 42 Cent. Dig. Rape, § 53.

◄413. — Self-serving declarations.

See 14 Cent. Dig. Crim. Law, §§ 923-935; 4 Cent. Dig. Assault, § 129; 32 Cent. Dig. Larc. § 141.

False statements made by the accused, or in his behalf, at his instigation, may be considered by the jury in determining whether or not his conduct has been satisfactorily explained upon the theory of his innocence; and false statements made or procured to be made by defendant, in explanation or defense, may be regarded as themselves tending to show guilt.—*Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

◄415. Declarations by person injured.

See 14 Cent. Dig. Crim. Law, §§ 937-949; 4 Cent. Dig. Assault, § 129.

In order to sustain an averment, on a prosecution for murder, that deceased was a negro, and not a member of an Indian tribe, a declaration by deceased that he did not belong to the Indian country, but had come from another state, is not admissible.—*Lucas v. United States*, 163 U. S. 612, 16 S. Ct. 1168, 48 L. Ed. 282.

◄416. Declarations by third persons.

See 14 Cent. Dig. Crim. Law, §§ 950-972.

◄417. — In general.

See 14 Cent. Dig. Crim. Law, §§ 950-967.

On the prosecution of a postmaster's assistant, who had sole management and possession of the money-order business and funds, a transcript from the account books of the post-office department of the account of the postmaster himself is admissible.—*Faust v. United States*, 163 U. S. 452, 16 S. Ct. 1112, 41 L. Ed. 224.

◄419, 420. Hearsay in general.

See 14 Cent. Dig. Crim. Law, §§ 973-983.

Extrajudicial confession of a third person, since deceased, that he had committed the mur-

der with which accused is charged, is inadmissible in evidence in behalf of accused.—*Donnelly v. United States*, 83 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

On trial for murder, defendants' attorney, who, when the crime was committed, was attorney general for Kansas, and had then made a report of it to the governor containing statements purporting to have been made by defendants and connecting them with the crime; was put on the stand by the prosecution in rebuttal, and parts of this report were read to the jury, though the witness stated that the report was based on hearsay evidence only. The court instructed that, if the jury believed that the statements contained in the report had been made to the attorney general, they should consider them as evidence. *Held* error, as submitting to the jury hearsay evidence.—*Cook v. United States*, 158 U. S. 157, 11 S. Ct. 268, 34 L. Ed. 906.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

◄422. Grounds of admissibility in general.

See 14 Cent. Dig. Crim. Law, §§ 994-998.

On trial separately of one indicted jointly with others for murder, although they are not charged as conspirators, the acts, appearances, and declarations of either, if part of the res gestæ, are admissible for the purpose of presenting the situation at the time of the alleged murder.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

The extent to which a declaration by one conspirator is admissible against all is much in the discretion of the court.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment (D. C.) *United States v. Wiborg*, 73 F. 159.

◄423. Furtherance or execution of common purpose.

See 14 Cent. Dig. Crim. Law, §§ 989-1001; 4 Cent. Dig. Assault, § 129.

Where a conspiracy or privity of design has been established, the acts and declarations of any of the conspirators, done or made during the pendency of the conspiracy and in furtherance thereof, are admissible against the others.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment (D. C.) *United States v. Wiborg*, 73 F. 159.

Evidence of any fact having a tendency to connect with a murder either one of several persons, some of whom are not on trial, is admissible in a murder trial, where there is some evidence tending to show a joint action on their part in committing the crime, although a statement by either of them after the commission of the crime would not be admissible against others who were not present when it was made.—*Fitzpatrick v. United States*, 20 S. Ct. 944, 178 U. S. 304, 44 L. Ed. 1078.

◄424. After accomplishment of object.

See 14 Cent. Dig. Crim. Law, §§ 1002-1010.

In conspiracy, only those actions and declarations of one conspirator are admissible against the others which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, either by success or failure, the admissions of one, by way of narrative of past facts are not admissible against the others, and, in case of a conspiracy to injure prisoners while in charge of a marshal, the admissions of one or

the conspirators, after the conspiracy had ended by the attack on the prisoners, the killing of two of them, and the dispersion of the conspirators are not admissible against his coconspirators.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

Evidence of the acts, declarations, or confessions of one conspirator or codefendant, after the object of the conspiracy has been accomplished, is not admissible against his coconspirators or codefendants.—*Brown v. United States*, 150 U. S. 93, 14 S. Ct. 37, 37 L. Ed. 1010.

427. Preliminary evidence as to conspiracy or common purpose.

See 14 Cent. Dig. Crim. Law, §§ 1012-1017.

A combination or conspiracy must be established before the acts, declarations, or confessions of one alleged conspirator can be given in evidence against another.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment (D. C.) *United States v. Wiborg*, 73 F. 159.

(H) DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE THEREBY.

In extradition proceedings, see Extradition, 14.

Privilege of witness as to production, see Witnesses, 298.

Use of writings to refresh memory of witness, see Witnesses, 252-255.

429. Public or official acts, proceedings, records, and certificates.

See 14 Cent. Dig. Crim. Law, §§ 1018, 1020.

The deeds and condemnation proceedings under which the United States claims title to a military reservation, the scene of a crime, and the official maps in the engineer's department, made from original surveys under the authority of the War Department, and a book showing titles to the reservation, compiled under the same authority, are admissible in evidence to show that the premises in question were within the exclusive jurisdiction of the United States.—*Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C.) 168 F. 141.

431. Private writings and publications.

See 14 Cent. Dig. Crim. Law, §§ 893, 1021-1025; 32 Cent. Dig. Larc. § 137.

434. — Books and entries therein.

See 14 Cent. Dig. Crim. Law, § 1023.

Where, upon a trial, it becomes necessary to show that a certain person was in a jail at a certain time, a book kept by a county jailer in the discharge of his duty, containing the dates of receiving and discharging prisoners, is admissible in evidence, even though no statute provides for the keeping of such a book.—*White v. United States*, 17 S. Ct. 38, 164 U. S. 100, 41 L. Ed. 365.

The possibility of forgery goes to the weight, but not to the competency, of a private account book kept by one accused of conspiring to defraud the United States, which contains entries relating to financial transactions between him and his alleged accomplice in connection with a contract between a corporation and the United States, where he offers such book in evidence to corroborate his testimony on the issue whether he received money back from such alleged accomplice for which he did not account to the corporation, but concealed from it, and testifies that such book is in the same condition as when he received it back

from the president of the corporation, with the latter's check marks, indicating approval of the items. Judgment 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 392.

Books showing weights of importations of sugar entered by city weighers are admissible in evidence without calling such weighers on prosecution of officers of sugar refining company for entering raw sugars at less than their true weights.—*Heike v. United States*, 33 S. Ct. 226, 227 U. S. 131, 57 L. Ed. 450, Ann. Cas. 1914C, 128, affirming judgment 192 F. 83, 112 C. C. A. 615.

438. — Photographs.

See 14 Cent. Dig. Crim. Law, § 893.

A picture of the deceased, whose body was found in a state of decomposition, held admissible on the question of identity, in connection with other evidence.—*Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

444. Authentication of documents.

See 14 Cent. Dig. Crim. Law, § 1023.

The genuineness of the authentication of a copy of a certificate of enrollment offered in evidence to establish the national character of a vessel on a prosecution for a crime committed on shipboard will be assumed, as will also the official character of the purported signer and the signing by him, or one authorized to sign for him, where there is no evidence casting suspicion upon the genuineness of the copy or of the seal, or the signature, and none which challenges in any way the American character of the ship.—*Wynne v. United States*, 30 S. Ct. 447, 217 U. S. 234, 54 L. Ed. 748.

(I) OPINION EVIDENCE.

449. Witnesses in general.

See 14 Cent. Dig. Crim. Law, §§ 1034-1037, 1040-1067; 4 Cent. Dig. Assault, § 130; 23 Cent. Dig. Forg. § 111.

452. — Special knowledge as to subject-matter.

See 14 Cent. Dig. Crim. Law, §§ 1063-1065; 23 Cent. Dig. Forg. § 111.

On a trial for murder committed on a vessel, it is proper to admit the testimony of a man, who had built the vessel, and sailed in it for a number of years, as to its construction and arrangement, and as to the freedom of view from one part of it to another under certain conditions, and when loaded in a certain manner, though he was not on the vessel at the time of the acts charged.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

456. — Mental condition or capacity.

See 14 Cent. Dig. Crim. Law, § 1045.

A nonexpert witness cannot give his opinion formed since the commission of a crime, as to the accused's mental condition at the time the offense was committed, where his only knowledge in respect thereto was derived from his familiarity with the accused as a patron of the latter's barber shop. Judgment 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, affirmed.—*Queenan v. Territory of Oklahoma*, 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175.

468. Subjects of expert testimony.

See 14 Cent. Dig. Crim. Law, §§ 1069-1063; 4 Cent. Dig. Assault, § 130.

475. — Nature, condition, and relation of objects.

See 14 Cent. Dig. Crim. Law, § 1063.

A physician, who has made a post mortem examination of one killed by a blow on the head, may state from which direction, in his

opinion, the blow was struck.—*Hopt v. People of Territory of Utah*, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, affirming judgment *People v. Hopt*, 4 Utah, 247, 9 P. 407.

◄482. Examination of experts.

See 14 Cent. Dig. Crim. Law, §§ 1071-1073.

◄483. — In general.

See 14 Cent. Dig. Crim. Law, §§ 1071, 1075.

A question asked of a medical expert as to whether, in his opinion, a man standing at the hip of a recumbent person, and striking blows on his head and forehead with an axe, would necessarily be spattered or covered with blood, *held* to have been properly admitted; the assumed state of facts being warranted by the proofs.—*Bram v. United States*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

◄489. — Cross-examination.

See 14 Cent. Dig. Crim. Law, § 1073.

On a question of sanity, it is within the limits of proper cross-examination to permit a medical expert to be asked, "You think, from your experience, from your conversation with him, that he killed the man because he threatened his life?" and to receive the answer, "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his life."—*Davis v. United States*, 17 S. Ct. 360, 165 U. S. 373, 41 L. Ed. 750.

(J) TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

◄507. Accomplices within rules of evidence.

See 14 Cent. Dig. Crim. Law, §§ 1082-1086; 1 Cent. Dig. Adultery, §§ 22, 23; 24 Cent. Dig. Gaming, § 288; 27 Cent. Dig. Incest, § 13; 44 Cent. Dig. Sod. § 7.

A person does not become an accomplice by not disclosing the fact that a homicide has been committed until some time afterward.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

◄508. Admissibility and effect of testimony.

See 14 Cent. Dig. Crim. Law, §§ 1099-1123; 50 Cent. Dig. Witn. §§ 244-248.

Under a joint indictment in a federal court, when a severance and separate trials have been ordered, one defendant, even though his case has not been disposed of, may testify on behalf of the government on the trial of his co-defendant.—*Benson v. United States*, 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991.

(K) CONFESSIONS.

◄517. Admissibility in general.

See 14 Cent. Dig. Crim. Law, §§ 1146-1156.

To render a statement offered as a confession admissible, the rule is not that the proof must establish that the particular communications contained in the statement were voluntarily made, but it must establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, he was not involuntarily impelled to make a statement when, but for the improper influence, he would have remained silent.—*Bram v. United States*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

Whenever a question arises in the federal courts as to whether a confession is incompetent because not voluntary, the issue is controlled by the declaration in the fifth amendment, to the constitution that no person "shall be

compelled in any criminal case to be a witness against himself"; this being the constitutional embodiment of the doctrine of the inadmissibility of involuntary confessions.—*Id.*

◄519. Voluntary character in general.

See 14 Cent. Dig. Crim. Law, §§ 1163-1174.

Defendant was arrested by a detective, who put him in charge of a policeman. In two or three minutes the detective joined the policeman and defendant, and the latter immediately commenced to make a confession. The detective testified that he did not know of any conversation having taken place between the policeman and defendant; that he himself offered no inducement to defendant to confess, and did not know of any inducement being held out to him. *Held*, that the confession was properly admitted in evidence, though the policeman was not examined as to whether any conversation had taken place between him and defendant before the detective joined them.—*Hopt v. People of Territory of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262.

The fact that accused was under arrest at the time of confessing is not of itself sufficient to exclude the confession.—*Sparf v. United States*, 156 U. S. 51, 715, 15 S. Ct. 273, 39 L. Ed. 343; *Pierce v. Same*, 160 U. S. 355, 16 S. Ct. 321, 40 L. Ed. 454; *Bram v. Same*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

Statements offered as a confession of murder *held* inadmissible where it appeared that they were made to a police officer, in the latter's office, no other persons being present, after the prisoner had been stripped of his clothing, and after the officer had said to him that his co-suspect had made a statement that he saw him commit the deed; that the officer was satisfied that the prisoner had killed the deceased; that, it was thought that he could not have done it alone, and, if he had an accomplice, he should say so, "and not have the blame of this horrible crime on your own shoulders."—*Bram v. United States*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

The deputy marshal may testify as to conversations between himself and the defendant in a criminal case which were not induced by duress, intimidation, or other improper influences, but were perfectly voluntary.—*Perovich v. United States*, 27 S. Ct. 456, 205 U. S. 86, 51 L. Ed. 722.

◄521. Judicial compulsion.

See 14 Cent. Dig. Crim. Law, §§ 1185-1188.

Where self-incriminating statements are made on preliminary examination, not under oath, but in answer to questions by the examining officer, they are not rendered inadmissible by the fact that accused did not have the benefit of counsel, and was not warned of his right to be represented by counsel.—*Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

(L) EVIDENCE AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Crim. Law, §§ 1230-1247.]

(M) WEIGHT AND SUFFICIENCY.

Credibility, impeachment, corroboration, and contradiction of witnesses, see Witnesses, ◄320-404.

In particular criminal prosecutions.

See—

Burglary, ◄40-42.

Homicide, ◄229-242.

Intoxicating Liquors, ◄236.

564. Place of commission of offense and venue.

See 14 Cent. Dig. Crim. Law, §§ 726, 1277-1284.

The evidence is sufficient to sustain the finding of the jury that the scene of a homicide was within the exclusive federal jurisdiction, where the deeds and condemnation proceedings assented to by state legislation and authorized by Congress, under which the United States claimed title to the premises as a military reservation, were put in evidence, together with official maps in the engineer's department, made from original surveys under the authority of the War Department, and a book showing titles to such reservation, compiled under the same authority, even if evidence of the de facto exercise of exclusive jurisdiction was not enough.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

570. Insanity or other incapacity.

See 14 Cent. Dig. Crim. Law, §§ 1235-1238.

On a prosecution for murder, where the defense is insanity, and the fact of the killing with a deadly weapon is clearly established, defendant is entitled to an acquittal of the specific crime charged if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime.—*Davis v. United States*, 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499.

XI. TIME OF TRIAL AND CONTINUANCE.

Appellate jurisdiction of Supreme Court to review denial of speedy trial, see Courts, 885(5).

Due process of law, see Constitutional Law, 268.

Equal protection of laws, see Constitutional Law, 250.

573. Right to speedy trial in general.

See 14 Cent. Dig. Crim. Law, § 1292.

Constitutional rights of the accused to a speedy trial of the indictments pending against him in a federal Circuit Court are not violated by the prosecution, with the consent of that court, of proceedings to remove the accused to another federal district for the trial of an indictment there found against him.—*Beavers v. Haubert*, 25 S. Ct. 573, 198 U. S. 77, 49 L. Ed. 950.

586. Discretion of court.

See 14 Cent. Dig. Crim. Law, § 1311.

Whether or not the trial should be delayed for several days in order to grant defendant's application, made just before he called his last witness, for process for additional witnesses, to be served at the expense of the government, is in the discretion of the trial court; and its refusal to grant the application is no ground for a new trial, especially where the additional evidence does not seem to be important.—*Crumpton v. United States*, 138 U. S. 361, 11 S. Ct. 355, 34 L. Ed. 958.

Granting or refusing an application for a continuance is a matter within the discretion of the trial court.—*Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229.

It was within the court's discretion to refuse a continuance on the ground that, prior to the finding of the indictment, defendant was in jail and sick, and unable to prepare his defense, and that he was informed that, if further time was given him, there were witnesses, whose names were not disclosed in the application, who could be produced to show his innocence.—

Goldsby v. United States, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 843.

588. Grounds for continuance.

See 14 Cent. Dig. Crim. Law, §§ 1315-1341.

589. — In general.

See 14 Cent. Dig. Crim. Law, §§ 1315, 1319.

The fact that on a trial for murder the shorthand notes of the testimony taken on the preliminary examination have not been transcribed, as provided by Comp. Laws Utah, § 4883, is not ground for postponing the trial.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

595. — Competency or materiality of expected evidence.

See 14 Cent. Dig. Crim. Law, §§ 1311, 1322-1327.

It was not an abuse of discretion for the district court for the district of Alaska to refuse a continuance to a defendant charged with a capital crime, on a showing by his affidavit of the absence of witnesses who would testify that he was not at the scene of the crime at the time named in the indictment as the date of its commission, and would also explain the possession of money found on his person, when nothing had been disclosed to indicate that the possession of such money by the defendant had any significance in connection with the charge, and the falsity of some of the statements in defendant's affidavit clearly appeared from the affidavits offered by the government in opposition to the motion.—*Hardy v. United States*, 22 S. Ct. 889, 186 U. S. 224, 46 L. Ed. 1137.

598. — Diligence.

See 14 Cent. Dig. Crim. Law, §§ 1335-1341.

Upon an application for a continuance in a murder case on the ground of the absence of a material witness, it appeared that 49 days before the case was called for trial an application was made and granted to have such witness summoned at the expense of the government. It was not shown why the subpoena was not served, or that any diligence was used to procure her attendance, or any attachment asked for, although the trial continued for several days. *Held*, that there was no abuse of discretion in refusing the continuance.—*Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229.

602. Application and affidavits for continuance.

See 14 Cent. Dig. Crim. Law, §§ 1342-1370; 6 Cent. Dig. Big. § 55.

603. — In general.

See 14 Cent. Dig. Crim. Law, §§ 1342-1361; 6 Cent. Dig. Big. § 55.

It was a proper exercise of discretion to refuse a continuance on the ground that certain witnesses were not in attendance; the affidavit not giving any reason for their nonattendance, though subpoenaed, for asking compulsory process.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 843.

XII. TRIAL.

Competency of and challenge to jurors, see Jury, 83-139.

Impaneling jury, see Jury, 148.

Law changing place of trial as ex post facto law, see Constitutional Law, 199.

Nature and constitution of juries, see Jury 4-6.

Right to trial by jury, see Jury, 29.

Summoning, attendance, discharge, and compensation of jurors, see Jury, 58-72.

In particular criminal prosecutions.

See—

Banks and Banking, ◀257.
 Conspiracy, ◀48.
 Homicide, ◀268-314.
 Intoxicating Liquors, ◀237-239.
 Post Office, ◀50.
 Rape, ◀59.

(A) PRELIMINARY PROCEEDINGS.

◀619. Consolidation of indictments.

See 14 Cent. Dig. Crim. Law, § 1376; 27 Cent. Dig. Ind. & Inf. § 402.

Defendant, by failing to object at the trial to the consolidation of indictments against others for an unlawful conspiracy with indictments against him for the same crime, waives such objection.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

Rev. St. § 1024, allowing the court to consolidate indictments found upon several charges against any person for the same act or acts, or two or more acts of the same class of offenses, which may be properly joined, does not authorize the consolidation of indictments in such a way that some defendants may be tried at the same time with other defendants charged with an additional crime different from that for which all are tried.—*McElroy v. United States*, 17 S. Ct. 31, 164 U. S. 76, 41 L. Ed. 355.

Two indictments against the same person, charging him with extorting money on different occasions from two different persons, under color of his office, may be consolidated, under Rev. St. § 1024.—*Williams v. United States*, 18 S. Ct. 92, 168 U. S. 382, 42 L. Ed. 509.

◀622. Separate trial of codefendants.

See 14 Cent. Dig. Crim. Law, §§ 1389-1388, 1385, 1386, 1389-1390.

It is a matter of discretion for the court, and not of right in the parties, to grant separate trials to defendants jointly indicted.—*Ball v. United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

◀627. Service of copy of indictment, information, or minutes of evidence.

See 14 Cent. Dig. Crim. Law, §§ 1399-1408, 1412, 1434.

The provision of Rev. St. § 1033, that, when any person is indicted for any capital offense, a copy of the indictment shall be delivered to him a certain time before the trial, is mandatory, and the failure to comply therewith is error.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

Rev. St. § 1033, providing that the defendant in a capital case shall be entitled to a copy of the indictment two days before trial, does not control the procedure of the courts of a territory.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

◀628. Indorsement of witnesses on indictment or information.

See 14 Cent. Dig. Crim. Law, §§ 1409-1411, 1413-1419.

In the absence of some statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment, or has not been furnished to defendant before trial.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Ter-*

ritory of Utah v. Thiede, 11 Utah, 241, 39 P. 837.

◀629. Service of notice or list of witnesses.

See 14 Cent. Dig. Crim. Law, §§ 1420-1423, 1432-1436.

The provision of Rev. St. § 1033, that, when any person is indicted of any capital offense, a list of the witnesses shall be delivered to him a certain time before the trial, is mandatory, and the failure to comply therewith is error.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

The right to object to a witness in a capital case on the ground that his name was not furnished to defendant two days before the trial, as required by Rev. St. § 1033, is waived by failure to make the objection until after his examination in chief is closed, even if the omission was not before discovered; for inquiry in that regard should be made earlier.—*Hickory v. United States*, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

Rev. St. § 1033, providing that the defendant in a capital case shall be entitled to a list of the witnesses two days before trial, does not control the procedure of the courts of a territory.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

Rev. St. § 1033, requiring a copy of the indictment and a list of the jury and "witnesses to be produced on the trial for proving the indictment" to be delivered to the accused two days before trial, does not apply to witnesses introduced purely for rebuttal purposes.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

A woman who has been married and divorced is not incompetent as a witness in a capital cause because she is designated, on the list of witnesses furnished to the defendant in compliance with Rev. St. U. S. § 1033 [U. S. Comp. St. 1901, p. 722], by her maiden name, under which she has gone since her divorce some 10 or 12 years ago.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

Neither the sixth amendment to the federal Constitution, nor Rev. St. § 829 (U. S. Comp. St. 1901, p. 636), accords the right to the accused to be apprised of the names of the witnesses who appeared before the grand jury.—*Wilson v. United States*, 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

◀631. Service of list of jurors.

See 14 Cent. Dig. Crim. Law, §§ 1379, 1437-1446.

The provision of Rev. St. § 1033, that, when any person is indicted of any capital offense, a list of the jurors and witnesses shall be delivered to him a certain time before the trial, is mandatory, and the failure to comply therewith is error.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

Due process of law, see Constitutional Law, ◀268.

◀636. Presence of accused.

See 14 Cent. Dig. Crim. Law, §§ 1465-1482, 2120.

Code Cr. Proc. § 218, provides that on an indictment for felony "defendant must be personally present at the trial." Section 246 pro-

vides that, where a juror is challenged for cause, the challenge must be tried by three triers. Section 249 provides that the juror may be examined as a witness in such investigation; and section 250, that "other witnesses may be examined on either side," subject to "the rules of evidence applicable to the trial of other issues." Section 252 directs the court "when the evidence is concluded," to "instruct the triers." *Held*, that to be present before the triers was a right of the accused, which could not be waived.—*Hopt v. People of Territory of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262.

Voluntary absence of accused when his presence was not made indispensable by Philippine Comp. St. §§ 3271, 3280, 3296, with consent that trial go on in the presence of his counsel, *held* a waiver of his right under section 3270, to be present.—*Diaz v. United States*, 32 S. Ct. 250, 223 U. S. 442, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

One accused of an offense not capital, not in custody, but who was present when the trial was begun, may waive his right under Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, enacting Bill of Rights of the Philippine Islands, to be personally present.—*Id.*

650. Experiments and tests.

See 14 Cent. Dig. Crim. Law, § 1457; 32 Cent. Dig. Larc. § 135.

The prosecution introduced evidence that deceased was killed with low-mold buckshot; that there were 12 wounds on his body, and gun wadding was found close by; that he was shot with a double-barreled, muzzle-loading gun belonging to one of defendants; and that this gun scattered low-mold buckshot badly. *Held*, that it was within the discretion of the court to refuse a request by defendants that the gun might be shot off in the presence of a deputy marshal, in order to test how it threw such shot.—*Ball v. United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

654. Remarks and conduct of judge.

See 14 Cent. Dig. Crim. Law, §§ 1520-1535.

656. — Comments on evidence or witnesses.

See 14 Cent. Dig. Crim. Law, §§ 1524-1533.

On a trial for embezzling the funds of a national bank, the jury asked to be discharged because of inability to agree. The court had stated in its general charge that the jury were the sole judges of the facts, but now denied their request, saying that he deemed the evidence so convincing that he could not understand their difficulty in reaching an agreement. *Held*, that this statement was proper, as the federal judges are entitled to express an opinion on the facts.—*Simmons v. United States*, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968.

(C) RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, 226-308.

662. Right of accused to confront witnesses.

See 14 Cent. Dig. Crim. Law, §§ 3, 1538-1548.

The 6th amendment to the United States constitution applies only to the federal government, and not to that of the states.—*Eilenbecker v. Plymouth County District Court*, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801.

Where a witness for the government in a murder case dies after the first trial, the reading in evidence on the second trial of a transcribed copy of the reporter's stenographic notes of his testimony is not inhibited by the constitutional provision that the accused shall "be confronted with the witnesses against him."—*Mattox v. United States*, 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409.

The constitutional provision that the accused "in a criminal prosecution" shall "be confronted with the witnesses against him" is not infringed by permitting a deposition of a living witness to be read against him in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law.—*United States v. Zucker*, 161 U. S. 475, 16 S. Ct. 641, 40 L. Ed. 777.

So much of Act March 3, 1875 (18 Stat. 479, c. 144, § 2), as provides that the judgment of conviction against the principal in the crime of embezzlement or larceny of property of the United States shall be evidence in the prosecution against a receiver thereof that the property was embezzled or stolen is in violation of Const. Amend. 6, declaring that an accused shall be confronted with the witnesses against him.—*Kirby v. United States*, 19 S. Ct. 574, 174 U. S. 47, 43 L. Ed. 890.

The right of an accused under Const. U. S. Amend. 6, to be confronted with witnesses against him, is violated by permitting a deposition or statement of an absent witness, taken at an examining trial, to be read at the final trial, when it does not appear that the witness was absent by the suggestion, connivance, or procurement of the accused, but it does appear that his absence was due to the negligence of the prosecution.—*Motes v. United States*, 20 S. Ct. 993, 178 U. S. 458, 44 L. Ed. 1150.

The right of the accused, under the Philippine Islands Bill of Rights of July 1, 1902 (Act July 1, 1902, c. 1369, § 10), 32 Stat. 695, to meet the witnesses face to face, was not infringed by the action of the Supreme Court of the Philippine Islands upon suggestion of diminution of the record, in ordering the judge and clerk of the court below to supply the failure of the record to show whether the accused pleaded to the complaint, and were present in court during the entire trial.—*Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

The right to meet witnesses face to face, secured to one accused of crime in the Philippine Islands by Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, *held* not infringed by resting a conviction for homicide in part on record of proceedings before a justice offered in evidence by accused without qualification.—*Diaz v. United States*, 32 S. Ct. 250, 223 U. S. 442, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

671. Presence of jury during inquiry as to admissibility.

See 14 Cent. Dig. Crim. Law, §§ 1591, 1592.

The refusal to exclude the jurors during counsel's argument over the admissibility of admissions alleged to have been made by the accused is not an abuse of the trial court's discretion, where the evidence to which they listened was simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and no evidence was admitted that the prisoner had made any confession, and his statements were excluded—especially since the judge stated that the jurors were to decide the case on the testimony as it came from the witnesses on the stand, and not on what counsel might say, and told them in the strongest terms that the preliminary evidence that he was hearing had no bearing on the question they had to decide.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

673. Effect of admission.

See 14 Cent. Dig. Crim. Law, §§ 1597, 1572-1576.

The record of prior proceedings before a justice of the peace, offered by accused on trial

for homicide without qualification, *held* equally available to the government and the accused.—*Diaz v. United States*, 32 S. Ct. 230, 223 U. S. 442, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

◀680. Order of proof in general.

See 14 Cent. Dig. Crim. Law, §§ 1609, 1610, 1612; 23 Cent. Dig. Forg. § 122.

The order of testimony is a matter within the discretion and control of the trial court.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837; *Putnam v. United States*, 162 U. S. 687, 16 S. Ct. 923, 40 L. Ed. 1118.

◀684. Admission in rebuttal of evidence proper in chief.

See 14 Cent. Dig. Crim. Law, §§ 1615, 1618.

It is within the discretion of the court to allow evidence in rebuttal which should have been offered in chief.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

(D) OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

◀695. Sufficiency and scope of objection.

See 14 Cent. Dig. Crim. Law, §§ 1633-1638.

A general objection made on the joint trial of two persons for murder, by counsel representing both, to the confession of one, made after the homicide, and not in the presence of the other, as incompetent, is sufficient to entitle the latter to have it excluded as to him.—*Sparf v. United States*, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343.

Where a general verdict of guilty is rendered, an objection taken to evidence admissible under one or a part of the counts is untenable.—*Goode v. United States*, 159 U. S. 663, 16 S. Ct. 136, 40 L. Ed. 297.

An objection to evidence on the ground that no foundation for its admission was laid covers an objection to it as not properly in rebuttal.—*Carver v. United States*, 160 U. S. 553, 16 S. Ct. 388, 40 L. Ed. 532.

◀696. Motion to strike out.

See 14 Cent. Dig. Crim. Law, §§ 1639-1644.

A letter from a witness, charging the accused with having abstracted certain correspondence from the files of a corporation, admitted without objection, for the purpose of showing a suppression or spoliation of evidence, should be struck out on motion upon the withdrawal by the prosecution of its offer in evidence of the accused's answer to such letter. Judgment (1907) 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 302.

◀698. Effect of failure to object or except.

See 14 Cent. Dig. Crim. Law, §§ 1651-1654; 50 Cent. Dig. Witr. § 984.

On a trial for murder, defendant's wife testified for the government that certain slips and two letters were in defendant's handwriting, and that the letters were received by her through the mail. Before this testimony was given, defendant's counsel requested the court to advise the witness that, as defendant's wife, she need not testify unless she so desired, which request was complied with. No other objection was made. Afterwards, defendant, as a witness in his own behalf, testified that he wrote the letters. Several other witnesses were then

examined, after which defendant moved to strike out the wife's testimony as incompetent. *Held*, that the motion was properly overruled, since the testimony had been admitted in accordance with defendant's suggestions, and without objection on his part.—*Benson v. United States*, 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991.

Hearsay evidence admitted without objection is to be given its natural probative effect.—*Diaz v. United States*, 32 S. Ct. 230, 223 U. S. 442, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

(E) ARGUMENTS AND CONDUCT OF COUNSEL.

◀708. Scope and effect of summing up.

See 14 Cent. Dig. Crim. Law, §§ 1663-1693.

◀709. — For prosecution.

See 14 Cent. Dig. Crim. Law, §§ 1663-1693.

An allusion, by counsel for the prosecution, to the case as having been many times brought before the tribunals, is not a ground for reversing a judgment, under the statute which declares that on a new trial the "former verdict cannot be used or referred to either in evidence or argument."—*Hopt v. People of Territory of Utah*, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, affirming judgment *People v. Hopt*, 4 Utah, 247, 9 P. 407.

◀712. Statements as to facts, comments, and arguments.

See 14 Cent. Dig. Crim. Law, §§ 1663-1687.

◀713. — In general.

See 14 Cent. Dig. Crim. Law, §§ 1663, 1678.

In a prosecution for mailing a paper containing alleged indecent advertisements of "massage" treatment the district attorney, addressing the jury, said, "It is not necessary to tell you what the massage treatment is; how a man is stripped naked, from the sole of his feet to the crown of his head, and is rubbed with the hands." *Held* that, as "massage" is defined to be "a rubbing or kneading of the body," the attorney's explanation was not radically wrong, and no ground for reversal.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

◀721. — Comments on failure of accused to testify.

See 14 Cent. Dig. Crim. Law, § 1672.

The district attorney, in a case in which defendant did not testify, in summing up the case to the jury, said, "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go on the stand, and hold up my hand before high heaven, and testify to my innocence of the crime." *Held*, that such language was improper under 20 Stat. 30, c. 37, providing that defendant's failure to make a request to testify in his own behalf shall not create any presumption against him.—*Wilson v. United States*, 149 U. S. 60, 13 S. Ct. 765, 37 L. Ed. 650.

◀721½. — Comments on failure to produce witnesses or evidence.

See 14 Cent. Dig. Crim. Law, § 1673.

The failure of a person on trial for murder to have his wife in court, in order to afford witnesses an additional means of identifying him,—she having been seen with him near the time and place of the murder,—is not proper subject for unfavorable comment in argument to the jury, the wife being incompetent as a witness for or against her husband.—*Graves v. United*

States, 150 U. S. 118, 14 S. Ct. 40, 37 L. Ed. 1021.

6722. — Comments on character or conduct of accused or prosecutor.

See 14 Cent. Dig. Crim. Law, § 1674.

On the trial of a Chinese inspector for extorting money from Chinese persons in consideration of allowing them to land, it was proposed by the defense to show that the defendant was assigned to the investigation of Chinese female cases, and that while he was acting in this capacity more females were sent back to China than ever were sent back before or after. The prosecuting attorney objected to this evidence, remarking, in the presence of the jury, that "no doubt every Chinese woman who did not pay the defendant was sent back." *Held*, that this language was highly improper, and the action of the court in overruling an objection taken to it was prejudicial error.—*Williams v. United States*, 18 S. Ct. 92, 168 U. S. 382, 42 L. Ed. 509.

6722½. — Comments on commission of other offenses by accused.

See 14 Cent. Dig. Crim. Law, § 1675.

Where, in a trial for murder in another state, it appeared that defendant had previously killed a negro in Mississippi, and had there been tried for murder and acquitted, it was error for the court to permit the prosecutor, without rebuke, notwithstanding defendant's protest, to say that we all know, from reading the newspapers and magazines, that the trial of a white man for killing a negro in Mississippi is a farce, that defendant came from Mississippi stained with the blood of a negro, and that the killing of the negro was murder.—*Hall v. United States*, 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003.

6726. Retaliatory statements and remarks.

See 14 Cent. Dig. Crim. Law, § 1681.

Where defendant's counsel, in his argument to the jury, tenders the issue that either his client or a witness for the government is guilty of the crime, there is no impropriety in the district attorney's accepting the challenge, and attempting to demonstrate that the government's witness is not guilty, and arguing that the jury, on the issue thus presented, has the right to infer that defendant is guilty.—*Crumpton v. United States*, 138 U. S. 361, 11 S. Ct. 355, 34 L. Ed. 958.

6728. Objections and exceptions.

See 14 Cent. Dig. Crim. Law, §§ 1689-1691.

Where counsel for the state makes improper comment, and the court fails to sufficiently condemn it, an exception by defendant to the court's action or want of action is a proper method of objection thereto.—*Wilson v. United States*, 149 U. S. 60, 13 S. Ct. 765, 37 L. Ed. 650.

6729. Withdrawal or correction of objectionable matter.

See 14 Cent. Dig. Crim. Law, § 1692.

The district attorney, in a case in which defendant did not testify, in summing up the case to the jury, said: "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go on the stand and hold up my hand before high heaven and testify to my innocence of the crime." The court, when its attention was called to this language by defendant's counsel, said: "I suppose the counsel should not comment upon the defendant not taking the stand." *Held*, that the court did not sufficiently condemn the district attorney's

language, in view of 20 Stat. 30, c. 37, in effect prohibiting any reference to accused's failure to testify.—*Wilson v. United States*, 149 U. S. 60, 13 S. Ct. 765, 37 L. Ed. 650.

The trial court does not err in characterizing as frivolous an exception to its action on objection to an improper argument by the district attorney in summing up before the jury, where the court held such argument to be improper, and the district attorney withdrew it, and apologized for it.—*Sawyer v. United States*, 26 S. Ct. 575, 202 U. S. 150, 50 L. Ed. 972, 6 Ann. Cas. 269.

An improper remark by the district attorney in summing up before the jury is not ground for reversing a conviction, where the court, on objection, held such remark to be improper, and the counsel withdrew it and apologized for it.—*Id.*

6730. Action of court.

See 14 Cent. Dig. Crim. Law, § 1693.

On a trial for improper use of the mails, the district attorney, addressing the jury, said he did not believe there were 12 men to be found in Illinois, unless "they were bought up and perjured in advance, whose verdict I would not be willing to take" on the question of the obscenity of the publication. Defendant excepted to this language, the court held it improper, and the attorney immediately withdrew it. *Held*, that the error, if any, was cured.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

The court properly interrupts counsel to ask him to make an argument that does not tend to degrade the administration of justice, where counsel is appealing to race prejudice, and is asking the jury to believe a white man not on his oath before a negro who is sworn, adding that the jury can "swallow those niggers" if it wishes, but counsel will not. Judgment, *United States v. Battle* (C. C. 1907) 154 F. 540, affirmed.—*Battle v. United States*, 28 S. Ct. 422, 209 U. S. 36, 52 L. Ed. 670.

The conduct of a federal district attorney on a trial for murder, in characterizing as confessions certain alleged statements of the prisoner which were excluded because they were not freely made, does not require a reversal of the conviction, where the court told the jurors that they were to decide the case on the testimony of the witnesses, and not on what counsel might say.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

(F) PROVINCE OF COURT AND JURY IN GENERAL.

See—

Banks and Banking, 6257.

Homicide, 6268-276.

6731. Functions as judges of law and facts in general.

See 14 Cent. Dig. Crim. Law, §§ 1694, 1695; 33 Cent. Dig. Larc. § 200; 42 Cent. Dig. Rob. § 40.

In criminal cases, the determination of the law is for the court, and not for the jury.—(U. S.) *Sparf v. United States*, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343.

6733. Questions of law or of fact.

See 14 Cent. Dig. Crim. Law, §§ 1138, 1219-1221, 1697-1723, 1727, 1728.

6736. — Preliminary or introductory questions of fact.

See 14 Cent. Dig. Crim. Law, §§ 1219-1221, 1701, 1702, 1705, 1716.

Where there is a conflict of testimony as to whether the confessions were voluntary, that

is a question of fact for the jury to determine.—*Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

☞741. — **Weight and sufficiency of evidence in general.**

See 14 Cent. Dig. Crim. Law, §§ 1133, 1221, 1706, 1713, 1716, 1717, 1727, 1728.

The sufficiency of the evidence is solely for the jury.—*Hoke v. United States*, 33 S. Ct. 281, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, affirming judgment (D. C.) *United States v. Hoke*, 187 F. 992.

☞754. **Instructions invading province of jury.**

See 14 Cent. Dig. Crim. Law, §§ 1731-1802, 1853, 1941; 13 Cent. Dig. Embes. § 75; 26 Cent. Dig. Homic. §§ 589, 603, 656; 32 Cent. Dig. Larc. §§ 184, 200, 201.

☞755½. — **Comments on facts or evidence in general.**

See 14 Cent. Dig. Crim. Law, §§ 1731-1765.

A statement made by the court, while recapitulating the evidence, that defendants were armed, having rifles and cannon, and were provided with ammunition and other supplies, which was based on uncontroverted testimony, is not ground for reversal.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment (D. C.) *United States v. Wiborg*, 73 F. 159.

☞757. — **Credibility of witnesses.**

See 14 Cent. Dig. Crim. Law, §§ 1772-1785; 26 Cent. Dig. Homic. §§ 680, 692; 32 Cent. Dig. Larc. § 184.

On an issue as to self-defense, five witnesses testified to the reputation of deceased as a man of quarrelsome and dangerous character. Of these, one testified on cross-examination that he had been arrested for murder, but was acquitted and had been discharged from arrest for gambling; another testified to his arrest for "fighting and gambling"; another testified that he had been arrested for selling whisky, but discharged, and had never been convicted of anything; a fourth had twice served a jail sentence for whisky; and the fifth had never been arrested. *Held*, that it was error to charge, in regard to the evidence of deceased's character, that reputation, to be entitled to consideration, must "come from a pure source," and be "the reflection of honest and conscientious men.—Of men who possess character themselves"; and that, "if a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is; he has none himself, and he is incompetent to determine when other men have one"; and to charge the jury "to see to it that it is the reflection, not by keepers of dives and gambling hells, and violators of law, and prison convicts," and, if it comes from that source, "to cast it aside as so much worthless matter, invoked wrongfully in cases of this character."—*Smith v. United States*, 161 U. S. 85, 16 S. Ct. 483, 40 L. Ed. 626.

☞758. — **Credibility of accused.**

See 14 Cent. Dig. Crim. Law, §§ 1786-1789.

A person accused of murder having testified in his own behalf, the court charged that there was or might be "a conflict as to the material facts between the statements of the accused and the statements of the other witnesses who are telling the truth," and that "then you would have a contradiction that would weigh against the statements of the defendants as coming from such witness." *Held*, that this was objectionable in its assumption that the witnesses

who contradicted defendant were telling the truth.—*Hicks v. United States*, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

While a judge cannot, perhaps, be considered as going outside his province in cautioning the jury about giving effect to the testimony of an accused person in his own behalf, yet, where the statute makes the accused, on his own request, a "competent" witness, its policy should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect to the law.—*Id.*

Where the defendant testifies in his own behalf, the court is not at liberty to charge the jury, directly or indirectly, that he is not to be believed, because he is the defendant; but, on the other hand, it may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger the temptation; and that the interest of the defendant, being of a character not possessed by other witnesses, is a matter which may seriously affect the credibility of his testimony.—*Reagan v. United States*, 157 U. S. 301, 15 S. Ct. 610, 39 L. Ed. 709.

Defendant having testified in his own behalf, the court, after giving general instructions for weighing testimony, and directing attention to the interest which might influence witnesses, further charged that, above all things, the jury were to see whether defendant's statement was corroborated by the proven facts; that, if so corroborated, it was strengthened to the extent of the corroboration, and, if not, it was to be judged by its own inherent truthfulness. *Held*, that in this there was no error.—*Johnson v. United States*, 157 U. S. 320, 15 S. Ct. 614, 39 L. Ed. 717.

The court, after reminding the jury that the defendant was the only living witness of the killing, and that the other witness could not speak, "except as he speaks by his body as it was found, having been denied even the right of decent burial, by the dead body of his horse, by the concealed weapons, and the concealed saddle, by the blood stains that were obliterated," told them that they were to see whether these circumstances "harmonize with this statement of the transaction as given by the defendant, bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed; that cannot be dragged into perjury. *Held*, erroneous.—*Hickory v. United States*, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474.

☞759. — **Inferences from evidence.**

See 14 Cent. Dig. Crim. Law, §§ 1737, 1738, 1790-1793; 32 Cent. Dig. Larc. § 200.

An instruction, given with reference to the count of an indictment charging defendant with facilitating the transportation of smuggled opium, that if, as was testified, defendant's drafts were paid out of the proceeds thereof, and the balance of the proceeds was deposited to defendant's credit, the circumstances would be inconsistent with defendant's innocence of the transportation, as ordinarily men do not deposit money to the credit of other people, or to pay the debts of others, unless the money belongs to those people, and there is some understanding that it is to be done, but that defendant denied that he had any knowledge of the transaction, and that it was for them to say whether his denial was overcome by the testimony of the government, leaves all the facts to the jury, and does not too strongly state the inference to be drawn from the facts if found against defendant.—*Dunbar v. United States*, 153 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (D. C.) *United States v. Dunbar*, 60 Fed. 75.

The court said: "The law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom, and apply it to this case." Held, that this was erroneous, as saying that the presumption of guilt from flight was so conclusive that it was the duty of the jury to act on it as an axiomatic proof.—*Hickory v. United States*, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474.

A charge that the flight of the accused is "a silent admission by the defendant that he is unwilling or unable to face the case against him," and that it is "in some sense, feeble or strong, as the case may be, a confession, and it comes in with other incidents, the corpus delicti being proved, from which guilt may be cumulatively inferred," is error.—*Starr v. United States*, 17 S. Ct. 223, 164 U. S. 627, 41 L. Ed. 577.

761. — Assumptions as to facts.

See 14 Cent. Dig. Crim. Law, §§ 1731, 1738, 1754-1764, 1771, 1853; 26 Cent. Dig. Homic. §§ 582, 599, 607, 621; 32 Cent. Dig. Larc. §§ 184, 201.

On trial of an indictment for murder of an officer while seeking to arrest defendant, involving the question of self-defense, the judge, in charging the jury, in strong terms, expressed indignation at the homicide, and urged argumentatively the necessity of vindicating and upholding the law. Held, that his remarks were not consistent with due regard to the right and duty of the jury to exercise an independent judgment.—*Starr v. United States*, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841.

The refusal to give a requested instruction upon the necessity of corroborating the testimony of an accomplice is not error, where the request assumes that the witness was an accomplice, a conclusion which was controverted, and against which the jury might have found, in the light of the testimony.—*Holmgren v. United States*, 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778, affirming judgment (1907) 156 F. 439, 84 C. C. A. 301.

762. — Opinion or belief as to facts.

See 14 Cent. Dig. Crim. Law, §§ 1731, 1750, 1754, 1758, 1759, 1769; 26 Cent. Dig. Homic. §§ 581, 656.

In the federal courts, an expression of opinion on the facts by the court is permissible.—*Allis v. United States*, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

763, 764. — Weight and sufficiency of evidence.

See 14 Cent. Dig. Crim. Law, §§ 1731-1748, 1752, 1768, 1770; 18 Cent. Dig. Embez. § 75; 26 Cent. Dig. Homic. §§ 579, 603, 631, 648; 32 Cent. Dig. Larc. § 184.

Defendant (who was a member of a vessel's crew), after a quarrel with the captain, shot and killed him in his cabin. By his own testimony, he then thought of the mate, and, taking three pistols, went on deck, and called the mate, or waited for him, to come down from aloft. When the mate reached the deck and came towards him defendant shot him three or four times. The only evidence tending to show present provocation was defendant's statement that the mate came towards him as if to attack him with a marline spike which hung around his neck; but defendant also testified that he stood three feet above the deck where the mate was, and that the mate asked him not to shoot. Held, that it was not error to instruct the jury that, if they found defendant guilty of felonious homicide, there was nothing in the evidence to reduce it below the grade of murder.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

Comments of trial court as to consideration to be given written evidence, are not ground

for reversal where they amount only to the declaration of an abstract principle and do not take from the jury their province of weighing the evidence.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment 35 App. D. C. 451.

An instruction that there was evidence to corroborate the testimony of an accomplice is not objectionable as instructing the jury that there was corroborating evidence.—*Bennett v. United States*, 33 S. Ct. 288, 227 U. S. 333, 57 L. Ed. 531, affirming judgment 194 F. 630, 114 C. C. A. 402.

768. — Instructions as to duties of jury.

See 14 Cent. Dig. Crim. Law, §§ 1798-1802, 1941, 1996; 26 Cent. Dig. Homic. § 583.

On a trial for a violation of the neutrality law, the court said that it seemed to it to be free from reasonable doubt that certain acts in which defendants participated constituted a military expedition, but that the question was for the jury, the court "reminding you that the responsibility of deciding it rests upon you alone." Held, not such a trespass on the province of the jury as to constitute error.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment (D. C.) *United States v. Wiborg*, 73 F. 159.

(G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

In particular criminal prosecutions.

See—

- Banks and Banking, 257.
- Conspiracy, 48.
- Homicide, 283-309.
- Intoxicating Liquors, 239.
- Rape, 59.

773. Insanity.

See 14 Cent. Dig. Crim. Law, §§ 1821-1822.

A requested instruction as to the insanity of the accused is properly refused where there is only the merest shadow of evidence that such accused was not of sound mind, and the judge has instructed the jury that the burden of proof is on the government to prove sanity beyond a reasonable doubt, and told the jury to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and stated the evidence relied upon by him. Judgment, *United States v. Battle* (C. C. 1907) 154 F. 540, affirmed.—*Battle v. United States*, 28 S. Ct. 422, 209 U. S. 36, 52 L. Ed. 670.

776. Character.

See 14 Cent. Dig. Crim. Law, §§ 1838-1846.

Evidence of the good character of the defendant may be considered, in connection with the other evidence, to create a reasonable doubt of his guilt, and a charge that it can be considered only when the other evidence raises such a doubt is therefore erroneous.—*Edgington v. United States*, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467.

777½. Statement and review of evidence.

See 14 Cent. Dig. Crim. Law, § 1807.

The court need not in its charge recapitulate all the items of evidence, nor even all the evidence bearing on a single question; especially where it tells the jury that there is other evidence than that mentioned, and that they should give it as full consideration as that mentioned.—*Allis v. United States*, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

◀778. Presumptions and burden of proof.

See 14 Cent. Dig. Crim. Law, §§ 1846-1852, 1854-1857, 1960, 1967; 26 Cent. Dig. Homic. § 632; 32 Cent. Dig. Larc. § 186.

A charge that the burden of proof had shifted, under the circumstances of the case, and that it was incumbent on the accused to show the lawfulness of their acts, is erroneous, especially where the court refuses to charge, as to the presumption of innocence.—*Coffin v. United States*, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481.

The court may charge the jury that false evidence, knowingly invoked by defendant, may be considered against him.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

An instruction that an attempt to escape, made after many months of confinement, and comparatively without danger, tended, though only slightly, to prove guilt, was as favorable to the accused as he could demand where the only testimony on that subject related to an escape made in October following an arrest in June, and was objected to solely on the ground that the escape was too remote from the commission of the offense and the arrest and imprisonment to be entitled to go to the jury.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

The jury is correctly instructed as to the presumption of innocence where the court states that a criminal prosecution begins with the presumption that the defendant, although accused, is innocent, and that to overcome this legal presumption the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

There is no error in instructing that, while the burden of proof is on accused that he was insane at the time of the killing, the jury cannot convict if there is a reasonable doubt as to his sanity.—*Matheson v. United States*, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

◀779. Acts and declarations of conspirators and codefendants.

See 14 Cent. Dig. Crim. Law, § 1858.

An instruction which assumes that an accomplice who is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it is not necessary for the accomplishment of the purpose, is equally guilty as if he had actually participated, is erroneous, when there is no evidence of any previous conspiracy to commit the murder.—*Hicks v. United States*, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

◀782. Determination of sufficiency of evidence in general.

See 14 Cent. Dig. Crim. Law, §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967.

There is no error in instructing the jury that there is nothing to prevent them from applying to the facts of the case "the same rules of good common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration, and that demanded your judgment."—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

An instruction that, in determining the issue of self-defense, the jury must, under the evidence, consider the situation of the parties and the surrounding circumstances, "together

with the testimony of witnesses for the prosecution as well as the evidence of the defendant," is not open to the objection that it authorized the consideration of the testimony of the witnesses for the prosecution even if untrue, and withdrew from the jury in passing on that issue all of the evidence for the defendant except his own testimony, when considered with other instructions giving the rule as to the credibility of witnesses, and enjoining the jury to consider the whole evidence and render a verdict in accordance with the facts proved, and to determine from the evidence the respective situations of the several parties.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

◀783½. Excluding evidence from consideration.

See 14 Cent. Dig. Crim. Law, §§ 1879, 1986.

The court may charge the jury to disregard all evidence they find to be false.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

◀784. Circumstantial evidence.

See 14 Cent. Dig. Crim. Law, §§ 1883-1888, 1922, 1960.

It is not reversible error for the court to say, in its charge, that persons who assert that it is cruel and criminal to convict upon circumstantial evidence are fools, or knaves, or sympathetic criminals.—*Hickory v. United States*, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

◀785. Credibility of witnesses.

See 14 Cent. Dig. Crim. Law, §§ 1774, 1776-1781, 1889-1894; 29 Cent. Dig. Int. Liq. § 333.

A charge declaring it to be a necessary condition of the admissibility of evidence of the general bad character for truth of a witness whom it is sought to impeach, that it "must be founded upon a state that is dispassionate; must grow out of the dispassionate judgment of men who are honest men and good men, and able and competent to make up a judgment of that kind"; and that "it is not the judgment of the bad people, the criminal element, the man of crime, that is to fasten upon a man and blacken his name,"—is error. Mr. Justice Brewer, Mr. Justice Brown, and Mr. Justice Peckham dissenting.—*Brown v. United States*, 17 S. Ct. 33, 164 U. S. 221, 41 L. Ed. 410.

◀786. Credibility of testimony or statement of accused.

See 14 Cent. Dig. Crim. Law, §§ 1787, 1895-1901, 1960, 1984.

The court, after reminding the jury that defendant was the only living witness of the killing, and that the other witness could not speak, "except as he speaks by his body as it was found," told them that they were to see whether these circumstances "harmonize with the statement of the transaction as given by the defendant, bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, * * * but they stand as bloody, naked facts before you, speaking for deceased and justice, in opposition to and confronting defendant, who stands before you as an interested party." *Held* erroneous, as improperly denouncing the testimony of accused.—*Hickory v. United States*, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474.

◀789. Reasonable doubt.

See 14 Cent. Dig. Crim. Law, §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; 26 Cent. Dig. Homic. § 478.

A charge to the jury, that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act

upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous.—*Hopt v. People of Territory of Utah*, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, affirming judgment *People v. Hopt*, 4 Utah, 247, 9 Pac. 407.

An instruction on reasonable doubt, that no attempt would be made to define it beyond saying it was not an unreasonable doubt; that by a reasonable doubt they were not to understand that all doubt was to be excluded; that it was impossible, in the determination of these questions, to be absolutely certain; that they were required to decide the questions submitted on the "strong probabilities" of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt,—cannot be complained of because failing to instruct what constituted a reasonable doubt, or because of the use of the term "strong probabilities."—*Dunbar v. United States*, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (D. C.) *United States v. Dunbar*, 60 F. 75.

An instruction defining reasonable doubt held sufficiently favorable to the accused.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

792. Principals and accessories.

See 14 Cent. Dig. Crim. Law, §§ 1818-1820.

Where ambiguous words and actions, heard and seen from a distance, are relied upon to connect defendant, as aider and abettor, with a murder committed by one of his two companions upon the other, it is error for the court, in charging as to the effect of defendant's use of encouraging words and actions, to omit a further statement that they must have been used with an intention to encourage and abet.—*Hicks v. United States*, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

793. Codefendants.

See 14 Cent. Dig. Crim. Law, §§ 1853, 1939.

Where separate indictments against different defendants are tried together, an instruction that the jury may find all of defendants guilty, or find some guilty and some not guilty, but they cannot find a verdict as to some and disagree as to others, is erroneous.—*Bucklin v. United States*, 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. Ed. 304, 305.

797. Power of recommendation to mercy.

See 14 Cent. Dig. Crim. Law, §§ 1935-1937.

Under Comp. Laws Utah 1876, p. 586, providing that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor for life, at the discretion of the court, the failure of the court, on a trial for murder, to instruct the jury as to their right to make such recommendation, is reversible error where a verdict of guilty of murder in the first degree is returned, as, in the absence of such recommendation, the court can only impose the death penalty.—*Calton v. Utah*, 130 U. S. 83, 9 S. Ct. 435, 32 L. Ed. 870.

807. Argumentative instructions.

See 14 Cent. Dig. Crim. Law, §§ 1805, 1969, 1960.

Where the gravamen of the offense charged is intent to injure or defraud, an illustration which is apt and fair, contained in the charge, and put in the form of a question without any affirmation as to the intent that must be presumed therefrom, is not open to the objection of "arguing the testimony," though it bears hard on defendant because the transaction with which he is charged was of like character to the one mentioned in the illustration, and indicative of the same intent.—*Allis v. United*

States, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

811. Undue prominence of particular matters.

See 14 Cent. Dig. Crim. Law, §§ 1787, 1969-1973; 26 Cent. Dig. Homic. § 602.

The accused cannot properly single out the absence of one of several possible motives for the commission of the offense, isolate it in an instruction from all the other facts, and demand that the court shall instruct the jury as to the weight to be given to this particular fact, independent of all the other evidence.—*Coffin v. United States*, 162 U. S. 604, 16 S. Ct. 943, 40 L. Ed. 1109.

The refusal of a requested instruction which singles out certain testimony as determinative of a reasonable doubt of guilt is not error, even if such instruction be a correct one, where the whole case is submitted to the jury.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

The trial court is not required to give a requested instruction in a criminal case which singles out and emphasizes an isolated fact.—*Perovich v. United States*, 27 S. Ct. 456, 205 U. S. 86, 51 L. Ed. 722.

814. Application of instructions to case.

See 14 Cent. Dig. Crim. Law, §§ 1821, 1823, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987.

Where the evidence, in a criminal trial, tends to show the commission of the crime charged, it is proper to instruct that there can be no conviction of an offense included in or less than the one charged.—*Sparf v. United States*, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 843.

Instructions not based on facts in proof are erroneous.—*Bird v. United States*, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100.

An instruction not within the issues not supported by the evidence is properly refused.—*Battle v. United States*, 28 S. Ct. 422, 209 U. S. 36, 52 L. Ed. 670, affirming judgment *United States v. Battle* (C. C. 1907) 154 F. 540.

815. Instructions excluding or ignoring issues, defenses, or evidence.

See 14 Cent. Dig. Crim. Law, §§ 1922, 1966.

Instructions which leave the jury to pass upon the vital question of the guilt of a person charged with homicide, without reference to his evidence, are erroneous, when he himself has testified to his own belief that his life was in danger, and to the facts that led him so to believe.—*Bird v. United States*, 21 S. Ct. 403, 180 U. S. 356, 45 L. Ed. 570.

822. Construction and effect of charge as a whole.

See 14 Cent. Dig. Crim. Law, §§ 1990, 1991, 1994, 1995; 15 Cent. Dig. Crim. Law, § 3158.

A portion of a charge, which insufficiently states the essentials of the crime, will not be held harmless because a full and correct statement of the law is given in other portions.—*Mills v. United States*, 17 S. Ct. 210, 164 U. S. 644, 41 L. Ed. 584.

A charge, on a trial for murder, that the recent use of whisky by the defendant is no defense, is not erroneous, where the court has already charged that there must be a willful and intentional killing in order to warrant a conviction of murder.—*Hotema v. United States*, 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

823. Error in instructions cured by withdrawal or giving other instructions.

See 14 Cent. Dig. Crim. Law, §§ 1992-1995; 15 Cent. Dig. Crim. Law, § 3158; 26 Cent. Dig. Homic. §§ 718, 719.

Under Code Cr. Proc. Utah, § 257, providing that the trial judge may "state the testimony and declare the law," but "must not charge the jury in respect to matters of fact," the judge may state to the jury, in a murder case, what the statute defines as murder in the first degree and murder in the second degree, but it is error for the court to remark that "an atrocious and dastardly murder had been committed by some one," and the error was not cured by a previous statement by the judge that the jury are "the sole judges of the credibility of the witnesses and of the weight of the evidence and of the facts."—*Hopt v. People of Territory of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262.

Instructing on trial of a carrier for giving rebates to take into consideration the absence of a certain witness and the nonproduction of books in which entries were made concerning the transactions in question is not prejudicial error, where the jurors are left to attach such weight to these circumstances as they see fit, and are further instructed that there is no evidence that the defendant or those who controlled its corporate action destroyed or failed to produce any paper for which the government asked. Judgment (C. C.) *United States v. New York Cent. & H. R. R. Co.*, 146 F. 298; *Same v. Guilford, Id.*, affirmed.—*New York Cent. & H. R. R. Co. v. United States*, 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613.

(H) REQUESTS FOR INSTRUCTIONS.

824. Necessity in general.

See 14 Cent. Dig. Crim. Law, §§ 1996-2004; 26 Cent. Dig. Homic. §§ 615, 651.

If the accused wishes specific charges as to the legal weight to be attached to testimony in support of an alibi, he must make a request therefor.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

A party cannot be heard to complain of the failure of the court to instruct upon a particular feature of the case, where he has not requested a proper instruction upon the subject.—*Humes v. United States*, 18 S. Ct. 602, 170 U. S. 210, 42 L. Ed. 1011.

829. Instructions already given.

See 14 Cent. Dig. Crim. Law, § 2011.

Instructions on the question of reasonable doubt, though correctly given, cannot be regarded as covering the subject of the presumption of innocence, and it is error to refuse to give a separate instruction on the latter subject.—*Coffin v. United States*, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481; *Cochran v. Same*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704.

Requested instructions, which are already substantially given and covered by the general charge, or special instructions, are properly refused.—*Coffin v. United States*, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109; *Humes v. United States*, 18 S. Ct. 602, 170 U. S. 210, 42 L. Ed. 1011; *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C.) 168 F. 141; *Bennett v. United States*, 33 S. Ct. 288, 227 U. S. 333, 57 L. Ed. 531, affirming judgment 194 F. 630, 114 C. C. A. 402.

Where, in a criminal trial, the court tells the jury that they may consider the admitted fact that the defendant was a man of good character, and give it such weight as they think

proper under all the evidence, and that defendant is entitled to a reasonable doubt, it is not error to refuse a request to charge that "the evidence of good character, when established by the evidence in a case, taken in connection with all the other evidence, may generate a reasonable doubt of the guilt of the defendants."—*White v. United States*, 17 S. Ct. 38, 164 U. S. 100, 41 L. Ed. 363.

The court, having charged that the presumption of innocence stays with defendant until driven out by evidence showing guilt beyond a reasonable doubt, may refuse to charge that, where there is a probability of innocence, there is a reasonable doubt of guilt.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

The refusal of the trial court to give requested instructions as to the presumption of innocence and as to reasonable doubt is not error, where the jury were otherwise fully and correctly instructed on these matters.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

834. Modification by court.

See 14 Cent. Dig. Crim. Law, §§ 2012, 2014.

Where the court, at defendant's request, instructs the jury that they have a right to consider the absence of any proof of a motive for the crime, it is not error to qualify the same by stating that proof of a motive is not necessary to conviction.—*Johnson v. United States*, 157 U. S. 320, 15 S. Ct. 614, 39 L. Ed. 717.

(I) OBJECTIONS TO INSTRUCTIONS OR REFUSAL THEREOF, AND EXCEPTIONS.

841. Time for objection or exception.

See 14 Cent. Dig. Crim. Law, § 2022.

When the verdict was returned on October 21st, exceptions to instructions not saved until November 2d were too late.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

844. Sufficiency and scope of objections or exceptions to instructions given.

See 14 Cent. Dig. Crim. Law, § 2025.

An exception, taken at the time of the delivery of the charge of the court, "to all the remarks of the court in reference to the impeachment of" a witness named, and "to that part of the charge in regard to the evidence of" such witness, is sufficient.—*Brown v. United States*, 17 S. Ct. 38, 164 U. S. 221, 41 L. Ed. 410.

An exception to "that part of the charge in stating the effect of good character," made to a paragraph which treats only of the proper effect of evidence of good character, is sufficient.—*Edgington v. United States*, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467.

An instruction as to reasonable doubt, which, after defining such doubt as an actual doubt which a juror is conscious of after reviewing in his mind the entire case, giving consideration to all the testimony, and one which he believes would cause a reasonable man in any matter of like importance to hesitate to act, denies the notion that any mere possibility is sufficient ground for such a doubt, and adds that, in the performance of jury service, jurors should decide controversies as they would any important question in their own affairs, is good as against a general exception.—(1910) *Holt v.*

United States, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment United States v. Holt (C. C. 1909) 168 F. 141.

845. Sufficiency and scope of exceptions to failure or refusal to instruct.

See 14 Cent. Dig. Crim. Law, § 2026.

An exception "to the refusal of the court to give the instructions requested by the defendant" will not be sustained if any one of such instructions is erroneous.—Thiede v. People of Territory of Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment People of Territory of Utah v. Thiede, 11 Utah, 241, 39 P. 837.

(J) CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

Due process of law, see Constitutional Law, 268.

863. Instructions after submission of cause.

See 14 Cent. Dig. Crim. Law, §§ 2065-2067.

A further charge to the jury upon their return into court, which, standing alone, might permit a conviction for violating the interstate commerce act under an indictment framed under Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), is not ground for reversal if the whole charge, taken together, submits to the jury as a basis of conviction only the acts which occurred after the passage of the Elkins act. Judgment (C. C. 1906) United States v. New York Cent. & H. R. R. Co., 146 F. 298; Same v. Guilford, Id., affirmed.—New York Cent. & H. R. R. Co. v. United States, 29 S. Ct. 309, 212 U. S. 500, 53 L. Ed. 624.

864. Communications between judge and jury.

See 14 Cent. Dig. Crim. Law, § 2068.

The trial court ought not to inquire of the jury in a criminal case, when brought into court because of their inability to agree, how the jury is divided, even though the scope of the question is confined to the proportions of the division, without reference to how the jury stands with respect to conviction or acquittal. Judgment (D. C.) United States v. Burton, 131 F. 552, reversed.—Burton v. United States, 25 S. Ct. 243, 196 U. S. 283, 49 L. Ed. 482.

865. Urging or coercing agreement.

See 14 Cent. Dig. Crim. Law, § 2069.

It is not error to recall the jury; after they have deliberated some time, for the purpose of ascertaining their difficulties, and making proper efforts to assist them in solving such difficulties; and the time of recalling them is in the sound discretion of the trial court.—Allis v. United States, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

It is not error to charge the jury, on their return for further instructions, that it is their duty to decide the case, if they can conscientiously do so; that they should listen to each other's arguments with a disposition to be convinced; that, if much the larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one; and that, if a majority is for acquittal, the minority should consider whether they may not reasonably doubt their judgment.—Allen v. United States, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

A verdict in prosecution for a criminal conspiracy was not coerced because, after a long trial during which the jury were not allowed to separate, and after deliberation for

three days and nights without result, they were instructed to consider the possibility of the guilt of some of the defendants, whereupon they brought in a verdict of guilty as to two and not guilty as to the others.—(1912) Hyde v. United States, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment 35 App. D. C. 451.

867. Discharge of jury before verdict.

See 14 Cent. Dig. Crim. Law, §§ 2071-2073.

On a trial for embezzlement, after evidence had been given for the prosecution, an affidavit was produced, alleging that a juror, on his voir dire, falsely swore that he had no acquaintance with the accused. Thereafter a letter commenting upon this affidavit was published in a newspaper, and was read by members of the jury. Held, that the court was warranted in dismissing the jury.—Simmons v. United States, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968.

A plea of former jeopardy which shows that the jury on a former trial was discharged, without defendant's consent, by the court on its own motion, after the jury, having been in retirement to consider their verdict for 40 hours, announced in open court that they were unable to agree, is bad on its face, as it shows good cause for the discharge.—Logan v. United States, 144 U. S. 203, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) United States v. Logan, 45 F. 872.

868. Objections and exceptions.

See 14 Cent. Dig. Crim. Law, § 2070.

Under rule 4 of the supreme court, which provides that "the party excepting shall be required to state distinctly the several matters of law in the charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court,"—where the court, in a criminal case, recalls the jury, after it has been out several hours, and re-reads to them a portion of the charge, and gives some additional instructions, an exception to "the action of the court in recalling the jury and in arguing the testimony on certain points without stating the entire testimony" is insufficient to present the question as to whether the court sought to coerce a verdict.—Allis v. United States, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

(K) VERDICT.

In prosecutions for homicide, see Homicide, 312-314.

Operation and effect as curing defects in pleading, see Indictment and Information, 200-203.

Polling jury as denying due process of law, see Constitutional Law, 268.

873. Sealed verdict.

See 14 Cent. Dig. Crim. Law, § 2084.

A sealed verdict returned in a criminal case in accordance with an agreement of counsel made in open court, in the presence of the defendant, may properly be received and recorded.—Pounds v. United States, 18 S. Ct. 729, 171 U. S. 35, 43 L. Ed. 62.

878. Several counts.

See 14 Cent. Dig. Crim. Law, §§ 2098-2101.

Where an indictment charges several distinct offenses in several counts, but in substantially the same language, a finding of acquittal on one count does not operate as an acquittal as to all.—Dealy v. United States, 152 U. S. 539, 14 S. Ct. 680, 38 L. Ed. 545.

A general verdict of guilty on an indictment with several counts is equivalent to a verdict of guilty as charged in each and every count.—

Ballew v. United States, 160 U. S. 187, 16 S. Ct. 263, 40 L. Ed. 388.

Where the indictment contains four counts, each charging a distinct crime, a verdict finding defendant guilty on three counts, but stating that the jury disagreed on the fourth, is valid.—**Selvester v. United States**, 18 S. Ct. 580, 170 U. S. 262, 42 L. Ed. 1029.

Where an indictment in a criminal case contains several counts, a verdict of the jury finding the defendant guilty on one or more of the counts operates an acquittal as to the other counts.—**Jolly v. United States**, 18 S. Ct. 624, 170 U. S. 402, 42 L. Ed. 1085.

(L) WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Crim. Law, §§ 2116-2127.]

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

See Estoppel, ¶68(1).

Certification of questions to Supreme Court, see Courts, ¶386.

Due process of law, see Constitutional Law, ¶269.

Law giving state right to appeal from order granting new trial as ex post facto law, see Constitutional Law, ¶199.

Prohibition against grant of new trial, see Prohibition, ¶5.

¶911. Discretion of court as to new trial.

See 15 Cent. Dig. Crim. Law, § 2124.

The granting or refusing a new trial is within the discretion of the trial judge.—**Mattox v. United States**, 146 U. S. 140, 13 S. Ct. 50, 38 L. Ed. 917.

¶913. Grounds for new trial in general.

See 15 Cent. Dig. Crim. Law, §§ 2137-2145; 26 Cent. Dig. Homic. §§ 684-686; 29 Cent. Dig. Int. Liq. § 355.

It is not an abuse of discretion for the district court to refuse a new trial in a misdemeanor case on account of defendant's former conviction of the same offense, when such conviction was first brought to its attention by motion for new trial. Judgment, **State v. Durein** (1905) 80 P. 987, 70 Kan. 1, affirmed.—**Durein v. State of Kansas**, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645; **Ross v. Same, Id.**; **Simmons v. Same, Id.**

¶919. Misconduct of counsel for prosecution.

See 15 Cent. Dig. Crim. Law, §§ 2197-2201.

In a criminal trial, the district attorney, in summing up the case to the jury, said: "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime." The court, its attention being called to this language by defendant's counsel, said: "I suppose the counsel should not comment on defendant not taking the stand." The district attorney replied: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." Counsel for defendant thereupon excepted. A verdict of guilty was rendered. **Held**, that the refusal or neglect of the court to prohibit any reference to the accused's failure to take the stand, and to emphatically instruct the jury not to attach any importance to such failure, was error tending to prejudice defendant,

and was sufficient ground for awarding a new trial.—**Wilson v. United States**, 149 U. S. 60, 13 S. Ct. 785, 37 L. Ed. 650.

¶924. Misconduct of or affecting jurors.

See 15 Cent. Dig. Crim. Law, §§ 2136, 2238-2282.

¶927. — Separation.

See 15 Cent. Dig. Crim. Law, §§ 2257-2262.

The trial court does not abuse its discretion in refusing to grant a motion for a new trial in a capital case because the jury, being allowed to separate, read the local daily newspapers with articles about the case, while the trial was in progress.—(1910) **Holt v. United States**, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment **United States v. Holt** (C. C. 1909) 168 F. 141.

¶929. — Misconduct of officer.

See 15 Cent. Dig. Crim. Law, §§ 2272-2279.

The court was not bound to set aside the verdict because no special oath was administered to the officer in charge of the jury; he having, as deputy marshal, taken an oath some months before that he would "in all things well and truly, and without malice or partiality, perform the duties of the office of marshal's deputy"; the jury having been duly cautioned by the court not to separate, nor allow any other person to talk to them about the case; there being no evidence that they were exposed to any influence that might interfere with the impartial performance of their duties, or in any way prejudice the defendants; and no objection to such officer's taking charge of the jury without a new oath having been made at any stage of the trial.—**Ball v. United States**, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

¶948. Application for new trial.

See 15 Cent. Dig. Crim. Law, §§ 2337-2403, 2406-2417; 26 Cent. Dig. Homic. § 683.

¶950. — Jurisdiction.

See 15 Cent. Dig. Crim. Law, §§ 2345-2348; 26 Cent. Dig. Homic. § 683.

A circuit court for the Southern district of New York, called for the transaction of criminal business, and held by the circuit judge of the Second judicial circuit, and the district judges for the Southern and Eastern districts of New York, is a legally constituted tribunal, under Rev. St. § 613, which provides that the terms of the circuit court for the Southern district of New York, appointed exclusively for criminal business, may be held by the named three judges, or any one of them; and they may hear and pass on a motion for a new trial and in arrest of a judgment of conviction of a crime at a former term of the same court held by one of the judges.—**In re Claassen**, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409.

¶951. — Time for making.

See 15 Cent. Dig. Crim. Law, §§ 2349-2358.

A breach of a court rule requiring motions for new trial to be made four days after entry of verdict is a mere error of procedure not affecting jurisdiction.—**Abbott v. Brown**, 36 S. Ct. 689, 241 U. S. 606, 60 L. Ed. 1199.

A term of federal District Court, Southern District of Florida, which under Judicial Code, §§ 9-11, and 76, must always be open as a court of admiralty and equity, was not brought to an end, so far as criminal business was concerned, so as to prevent granting of new trial, by adjournment in accordance with court rule requiring, pending temporary absence of the judge, the clerk be present for transaction of business under orders of the judge.—**Id.**

957. — Statements, affidavits, and testimony of jurors.

See 15 Cent. Dig. Crim. Law, §§ 2392-2395.

On a motion for a new trial, jurors may testify as to any fact showing the existence of an extraneous influence, but they cannot give evidence as to the effect which such influence had on their minds, or as to the motives and influences generally which affected their deliberations.—*Mattox v. United States*, 146 U. S. 140, 18 S. Ct. 50, 36 L. Ed. 917.

On a motion for a new trial, in a murder case, it was error to exclude the affidavits of jurors that a bailiff remarked, in the presence of the jury, that this was the third person defendant had killed; and that a newspaper printed after the jury retired was introduced into the jury room, and an article read therefrom to the jury stating that defendant had been tried for his life once before, that the evidence against him was claimed to be very strong, that the argument of the prosecution was such that defendant's friends gave up all hope, and that the jury's deliberations would probably not last over an hour.—*Id.*

Affidavits of jurors are not admissible to impeach the verdict, on motion for a new trial.—*Id.*

The trial court commits no error in denying a motion for a new trial in a criminal case, founded upon the affidavits of jurors to the effect that they did not understand the legal effect of their verdict.—*Hendrix v. United States*, 31 S. Ct. 193, 219 U. S. 79, 55 L. Ed. 102.

A verdict convicting two of the four defendants of criminal conspiracy and acquitting the others cannot be impeached by evidence of the jury that it was the result of a bargain, or induced by coercion.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 58 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment 35 App. D. C. 451.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

See Contempt, 964.

Court-martial, see Army and Navy, 948, 49. Due process of law, see Constitutional Law, 9270, 272.

In prosecutions for Homicide, see Homicide, 9354.

985. Formalities in pronouncing sentence.

See 15 Cent. Dig. Crim. Law, §§ 2510-2517, 2520.

986. — In general.

See 15 Cent. Dig. Crim. Law, §§ 2510-2517, 2520.

There is nothing in the Utah statutes which requires the court itself, in the exercise of an independent judgment on the facts, to find that defendant is guilty, before imposing the sentence.—*Davis v. People of Territory of Utah*, 151 U. S. 262, 14 S. Ct. 328, 38 L. Ed. 153, affirming judgment *People v. Davis*, 8 Utah, 412, 32 P. 670.

990. Requisites and sufficiency of sentence.

See 15 Cent. Dig. Crim. Law, §§ 2513, 2519, 2525, 2528.

991. — In general.

See 15 Cent. Dig. Crim. Law, §§ 2513, 2525, 2528.

The court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction, and when, in taking custody of the accused, and in its modes of procedure, and in rendering judgment, it keeps within the limitations prescribed by the law, customary or statutory. When it goes outside these limits, its action, to the extent of the excess, is void. Proceeding within these limits, its action may

be erroneous, but not void.—*In re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149.

993. Modification of sentence.

See 15 Cent. Dig. Crim. Law, §§ 2529, 2531.

Since the time and place of execution are not, strictly speaking, any part of the judgment prescribing the penalty of death, it is not necessary that the accused should be present when a change is made in them.—*Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

995. Requisites and sufficiency of record of judgment.

See 15 Cent. Dig. Crim. Law, §§ 2513, 2521, 2522-2526, 2528½, 2530, 2536-2543.

An objection that the sentence does not itself state the offense of which the defendant was found guilty, or that he was guilty of any named crime, is not well taken, when it contains a reference to the "verdict heretofore returned against him," and the record as a whole shows everything necessary to justify the punishment inflicted.—*Pointer v. United States*, 151 U. S. 398, 14 S. Ct. 410, 38 L. Ed. 208.

Where the record in a criminal case plainly shows what the offense is of which the defendant was convicted, and the language shows that the sentence was the judgment of the court and of the law, pronounced upon the defendant on account of his conviction upon the indictment, there is a sufficient judgment for all purposes.—*White v. United States*, 17 S. Ct. 38, 164 U. S. 100, 41 L. Ed. 365.

998. Setting aside judgment.

See 15 Cent. Dig. Crim. Law, § 2549.

A federal District Court has no jurisdiction, after the term at which a conviction has been entered, to set aside the judgment for misconduct of counsel or bias of jurors discovered after the expiration of such term.—*United States v. Mayer*, 35 S. Ct. 16, 235 U. S. 55, 59 L. Ed. 129.

The consent of the United States attorney could not confer jurisdiction on a federal District Court to entertain a motion after the term to set aside a conviction on facts discovered after the expiration of the term.—*Id.*

1000. Certificate of judgment.

See 15 Cent. Dig. Crim. Law, §§ 2550-2552, 2562.

A certified copy of the judgment properly entered in a criminal action is sufficient authority in the hands of the prison warden for defendant's detention.—*Ex parte Wilson*, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89.

1002. Effect of habeas corpus proceedings.

See 15 Cent. Dig. Crim. Law, § 2559½.

Under Rev. St. § 766, prohibiting any proceedings against one restrained of his liberty by a state court pending appeal from the final decision in a circuit court of the United States of an application for a writ of habeas corpus on the ground that he is restrained in violation of the constitution of the United States, the state court may sentence to death one convicted of a capital offense, as soon as a judgment of the circuit court of the United States denying a writ of habeas corpus is affirmed by the supreme court, without waiting for the mandate of the latter court to be issued and filed in the circuit court, since after the affirmance the appeal is no longer pending.—*Jugiro v. Brush*, 140 U. S. 291, 11 S. Ct. 770, 35 L. Ed. 510.

1003. Fixing date of execution of sentence after date originally fixed.

See 15 Cent. Dig. Crim. Law, § 2560.

When the federal supreme court affirms a judgment of the circuit court denying a writ

of habeas corpus in behalf of one convicted of a capital crime in a state court, the action of the state court in then immediately fixing a new date for the execution, without awaiting the issuance and filing in the circuit court of the supreme court's mandate, while not commendable, is not void.—*In re Durrant*, 18 S. Ct. 291, 169 U. S. 39, 42 L. Ed. 653.

XV. APPEAL AND ERROR, AND CERTIORARI.

Court-martial proceeding, see Army and Navy, 49.

Decision reviewable by Supreme Court, see Courts, 385(1½).

Due process of law, see Constitutional Law, 271.

Equal protection of laws, see Constitutional Law, 240, 250.

Original jurisdiction of court of appeals to issue certiorari, see Courts, 404.

Prosecution for homicide, see Homicide, 325-340.

Remedy by appeal or writ of error as affecting right to habeas corpus, see Habeas Corpus, 4.

Review of proceedings of courts-martial, see Army and Navy, 47.

Right to bail pending appeal, see Bail, 44.

Review of violation of banking laws, see Banks and Banking, 257.

(A) FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW.

Certification of questions to Supreme Court, see Courts, 386.

Circuit court of appeals, see Courts, 405.

Right of government to review, see Courts, 385(1½).

Review by prosecution, see Courts, 380, 382, 385(1½), (4), 387(1).

1006. Proper mode of review.

See 15 Cent. Dig. Crim. Law, § 2564-2569.

1007. — Appeal.

See 15 Cent. Dig. Crim. Law, § 2568.

Under Act Cong. March 3, 1891, § 5, providing that "appeals or writs of error may be taken from the district courts or from the existing circuit courts" directly to the supreme court, "in cases of conviction of a capital or otherwise infamous crime," no appeal lies to the supreme court from a judgment of conviction under an indictment for perjury; such judgment being reviewable only on writ of error.—*Bucklin v. United States*, 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. Ed. 304, 305.

1011. — Certiorari.

See 15 Cent. Dig. Crim. Law, § 2569.

On application by the president of a national bank, indicted for a violation, as such president, of Rev. St. § 5209, for a writ of certiorari to bring the indictment to the United States supreme court, on the ground that he was the political agent of a foreign government, it appeared that such government had requested his resignation prior to the finding of the indictment, although it was not given until subsequent thereto, and that the United States government had withdrawn from him the usual privilege of diplomatic representatives of free entry of goods imported for his use. *Held*, that the writ, being discretionary with the court, should not be allowed.—*Ex parte Hitz*, 111 U. S. 766, 4 S. Ct. 698, 28 L. Ed. 592.

1016. Appellate jurisdiction.

See 15 Cent. Dig. Crim. Law, §§ 2572-2580; 13 Cent. Dig. Courts, § 490.

1017. — Nature and grounds in general.

See 15 Cent. Dig. Crim. Law, §§ 2572-2576, 2589; 13 Cent. Dig. Courts, § 490.

Defendant was found guilty, and motions in arrest of judgment and for a new trial were denied, and sentence rendered. During the same term an order was entered suspending execution until the next term of court. *Held*, that the suspension of the execution, without any motion pending to rehear, reconsider, or modify, gave the court no jurisdiction at the succeeding term to set aside the judgment and the order overruling the motion to arrest, and a certificate of division of opinion upon a motion then made in arrest of the judgment will be dismissed for want of jurisdiction.—*United States v. Pile*, 130 U. S. 280, 9 S. Ct. 523, 32 L. Ed. 904.

The federal Supreme Court has no jurisdiction to review an order of a federal District Court, permitting the entry of a nolle prosequi to an indictment for violating Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), punishing the sending of letters through the mails with intent to defraud, where no new indictment has been returned within three years from the date of the commission of the alleged offense, or, if returned, is not still pending, since, under the circumstances, the case has become merely a moot one.—*Lewis v. United States*, 30 S. Ct. 438, 216 U. S. 611, 54 L. Ed. 637.

1018. — Courts invested with jurisdiction.

See 15 Cent. Dig. Crim. Law, § 2577.

Where, by decision of the highest state court, the defendant is entitled to a specification of particulars of the charge as a matter of right, the question of the sufficiency of the information, in the absence of any such specification, as constituting due process of law, cannot be considered.—*Hodgson v. State of Vermont*, 18 S. Ct. 80, 166 U. S. 262, 42 L. Ed. 461.

Authority to issue a writ of certiorari as an original and independent proceeding to review a conviction in an inferior federal court is not found in the grant to the Circuit Court of Appeals by Act March 3, 1891, c. 517, § 12, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488], of the powers specified in Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], which authorizes certain federal courts to "issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," where the only question in the case was whether the punishment of the offense charged was within the jurisdiction of the federal courts, and the case was put in proper condition for a review on writ of error. *Order* (1905) *Ex parte Dick*, 141 F. 5, 72 C. C. A. 667, reversed.—*Whitney v. Dick*, 26 S. Ct. 584, 292 U. S. 132, 50 L. Ed. 963.

A judgment convicting a chancery receiver of embezzling money which had come into his possession in his official capacity is not reviewable on writ of error from the federal Supreme Court to the Court of Appeals of the District of Columbia, on the theory that the forfeiture by defendant, under Code D. C. § 841, defining the offense, of all right or claim to any commissions, was determined by the judgment, and that therefore the jurisdictional amount prescribed by section 233 of such Code was involved, since the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys. *Certiorari* (1906) 27 App. D. C. 433, denied.—*Fields v. United States*, 27 S. Ct. 543, 205 U. S. 292, 51 L. Ed. 807.

Certiorari to review a judgment of the Circuit Court of Appeals reversing a conviction below cannot be granted by the federal Supreme Court under the authority given by Act March

3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 489) to require the Circuit Courts of Appeals, by certiorari or otherwise, to certify to the Supreme Court for review any case otherwise made final in those courts.—*United States v. Dickinson*, 29 S. Ct. 485, 213 U. S. 92, 53 L. Ed. 711.

Want of power in the federal Supreme Court under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), to review by certiorari a judgment of the Circuit Court of Appeals, reversing a conviction below, cannot be helped out by Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1907, p. 209), providing for writs of error on behalf of the government in certain instances in criminal cases, which, being an innovation in criminal jurisdiction in certain classes of prosecutions, cannot be extended beyond its terms.—*Id.*

Contention that indictment charging subornation of perjury before a federal grand jury did not sufficiently set forth the nature and cause of the accusation within Const. U. S. Amend. 6, held too frivolous to serve as a basis of a writ of error from the federal Supreme Court.—*Hendricks v. United States*, 32 S. Ct. 313, 223 U. S. 178, 56 L. Ed. 394.

1019. — Nature or grade of offense.

See 15 Cent. Dig. Crim. Law, §§ 2578-2580.

The act of March 1, 1895 (2 Supp. Rev. St. p. 392), which extended the jurisdiction of the United States courts in the Indian Territory to capital cases, having also created the court of appeals in that territory, with power to entertain appeals and writs of error, the jurisdiction of such court to review judgments in capital as well as other cases is exclusive, and the supreme court has no appellate jurisdiction of such cases.—*Brown v. United States*, 19 S. Ct. 56, 171 U. S. 631, 43 L. Ed. 312.

1020. — Extent of penalty.

See 15 Cent. Dig. Crim. Law, §§ 2578-2580.

Act Cong. March 3, 1885, § 1 (23 Stat. 443), which provides that no appeal or writ of error shall be allowed from any judgment or decree, in any suit at law or in equity, in the supreme court of any of the territories, unless the amount in controversy exceeds \$5,000, is restricted to cases where the matter in dispute is measured by a pecuniary value, and does not apply to a judgment imposing a fine, in a prosecution of a commercial traveler for a misdemeanor for offering, in violation of a territorial statute, merchandise for sale without having obtained a license, especially where the amount of the fine does not exceed \$5,000.—*Farnsworth v. Montana*, 129 U. S. 104, 9 S. Ct. 253, 32 L. Ed. 616.

The jurisdiction given by Act Feb. 9, 1893, § 8, to the supreme court of the United States to review, on appeal or writ of error, any final judgment or decree of the court of appeals of the District of Columbia, where the matter in dispute exceeds \$5,000, does not extend to criminal cases.—*Chapman v. United States*, 17 S. Ct. 76, 164 U. S. 436, 41 L. Ed. 504.

1021. Decisions reviewable.

See 15 Cent. Dig. Crim. Law, §§ 2581-2598.

1022. — Courts and other tribunals subject to review.

See 15 Cent. Dig. Crim. Law, §§ 2581, 2582.

A scire facias on a recognizance to answer a charge of crime is a case arising "under the criminal laws," within Act March 3, 1891, c. 517, § 6, making the decision of the circuit courts of appeals in such cases final. Dismissing writ of error 61 F. 795, 10 C. C. A. 74, and 63 F. 568, 11 C. C. A. 340.—*Hunt v. United States*, 17 S. Ct. 609, 166 U. S. 424, 41 L. Ed. 1063.

Lack of statutory authority precludes a review in the federal Supreme Court of judgments of the Supreme Court of the territory of Oklahoma in capital cases. Writ of error, *New v. Territory*, 70 P. 198, 12 Okl. 172, dismissed.—*New v. Territory of Oklahoma*, 25 S. Ct. 68, 195 U. S. 252, 49 L. Ed. 182.

1023. — Appellable judgments and orders.

See 15 Cent. Dig. Crim. Law, §§ 2533-2598.

Certiorari to review a judgment of the Court of Appeals of the District of Columbia in a criminal case will not be granted by the federal Supreme Court, where such case, however important it may be to the petitioner, does not involve a question of gravity and general importance; there being no conflict between the decisions of state and federal courts, or between those of federal courts of different circuits, and nothing affecting international relations. *Certiorari* (1906) 27 App. D. C. 433, denied.—*Fields v. United States*, 27 S. Ct. 543, 205 U. S. 292, 51 L. Ed. 807.

1024. Right of prosecution to review.

See 15 Cent. Dig. Crim. Law, §§ 2599-2614.

Neither under the common law nor under the judiciary act of March 3, 1891, c. 517, §§ 5, 6 (26 Stat. 827, 828), has the United States the right to sue out a writ of error in a criminal case upon a judgment in favor of defendant, whether rendered upon a verdict of acquittal or upon a determination by the court of an issue of law.—*United States v. Sanges*, 144 U. S. 310, 12 S. Ct. 609, 36 L. Ed. 445.

1025. Right of defendant to review.

See 15 Cent. Dig. Crim. Law, §§ 2615-2618.

1026. — In general.

See 15 Cent. Dig. Crim. Law, §§ 2615-2618.

A person indicted for a crime cannot sue out a writ of error to review the entry of a nolle prosequi.—*Lewis v. United States*, 30 S. Ct. 438, 216 U. S. 611, 54 L. Ed. 637.

(B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

1029. Necessity of objections.

See 15 Cent. Dig. Crim. Law, §§ 2619-2621, 2632, 2659.

1030. — In general.

See 15 Cent. Dig. Crim. Law, §§ 2619-2621, 2632, 2653.

Questions not raised below, respecting the denial of rights which find expression and sanction in the federal Constitution and the Philippine Bill of Rights, may be considered by the federal Supreme Court, on error to the Supreme Court of the Philippine Islands, in the exercise of its discretion, under Supreme Court rule 35, to notice a plain error not assigned.—*Weems v. United States*, 30 S. Ct. 544, 217 U. S. 349, 54 L. Ed. 793, 19 Ann. Cas. 705.

1031. — In preliminary proceedings.

See 15 Cent. Dig. Crim. Law, §§ 2622-2625, 2631.

Objection that there was no venire facias summoning the grand jury is not available on writ of error to review conviction, where there is no showing that the objection was taken during the trial.—*Powers v. United States*, 32 S. Ct. 281, 223 U. S. 303, 56 L. Ed. 448.

1032. — Indictment or information.

See 15 Cent. Dig. Crim. Law, §§ 2627, 2628, 2642.

Objections to the sufficiency of an indictment cannot first be raised upon writ of error.—

Pickett v. United States, 30 S. Ct. 265, 216 U. S. 456, 54 L. Ed. 566.

Objection that there was a variance in prosecution under White Slave Act June 25, 1910, in that names by which the women were called in the indictment differed from their real names, comes too late when first raised in the Supreme Court.—Harris v. United States, 33 S. Ct. 289, 227 U. S. 340, 57 L. Ed. 534, affirming judgment 194 F. 634, 114 C. C. A. 406.

1035. — Proceedings at trial in general.

See 15 Cent. Dig. Crim. Law, §§ 2633-2638, 2643, 2644.

On a murder trial the action of the court in compelling defendant to make his challenges of jurors in ignorance of the challenges made by the government whereby he challenged two jurors who had also been challenged by the district attorney, is no ground for reversal, where defendant failed to except at the time, and made no objection until after conviction, on motion for a new trial.—Alexander v. United States, 138 U. S. 353, 11 S. Ct. 350, 34 L. Ed. 954.

One who did not, at the time of the consolidation of an indictment against him with indictments against others growing out of the same transaction, except to the order of consolidation, cannot complain thereof on error.—Bucklin v. United States, 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. Ed. 304, 305.

The objection that the jury in a criminal case in the District of Columbia was not lawfully drawn should be taken at the trial, and not in the federal Supreme Court, in view of Code D. C. (Act March 3, 1901, c. 854, § 31 Stat. 1338) § 919.—Johnson v. United States, 32 S. Ct. 748, 225 U. S. 405, 56 L. Ed. 1142, affirming judgment 38 App. D. C. 347.

1036. — Evidence.

See 14 Cent. Dig. Crim. Law, §§ 1631-1640; 15 Cent. Dig. Crim. Law, §§ 2639-2641.

Objections and exceptions taken both when a witness is offered to prove a confession, and also after he has been examined as to the circumstances under which the confession was made, are sufficient to raise the question in the appellate court, though the objection is not renewed after the witness has testified to the confession.—Bram v. United States, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 508.

1038. — Instructions.

See 15 Cent. Dig. Crim. Law, § 2646.

The failure to request that the jury be instructed to find for the defendant will not prevent the federal Supreme Court, in reviewing a conviction of crime, from examining the record to see if there was any proof of a material element of the crime charged.—Clyatt v. United States, 25 S. Ct. 429, 197 U. S. 207, 49 L. Ed. 726.

1039. — Custody and conduct of jury.

See 15 Cent. Dig. Crim. Law, §§ 2647, 2648.

An objection first made on a motion for a new trial that the court erred in permitting the jury to take into the jury room the indictment, which contained an indorsement of a conviction of the accused on a count thereof at a former trial, will not be considered by the federal Supreme Court, in the exercise of its power under Supreme Court rule 35, to notice a plain error not properly reserved, where the record contains all the testimony, and it is ample to sustain the conviction without giving weight to the effect of the indorsement, and the indorsement itself shows that a new trial was granted upon the former conviction, which is quite as likely to have influenced the jury favorably to the ac-

cused as was the fact of the former conviction to work to his prejudice.—Holmgren v. United States, 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778, affirming judgment (1907) 156 F. 439, 84 C. C. A. 301.

1043. Scope and effect of objection.

See 15 Cent. Dig. Crim. Law, §§ 2654, 2655.

An objection to a juror as a "salaried officer of the government, which is one of the exemptions mentioned in Code of Laws D. C. 1901, § 217," reaches the question whether the relation of the juror to the government, as appears from his voir dire, disqualifies him as a juror on the trial of an indictment for a conspiracy to defraud the United States. Judgment (1907) 30 App. D. C. 1, reversed.—Crawford v. United States, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 392.

1047. Necessity of exceptions.

See 15 Cent. Dig. Crim. Law, §§ 2656-2670.

1048. — In general.

See 15 Cent. Dig. Crim. Law, §§ 2656, 2657, 2670.

Failure of the record to affirmatively show the issue of the venire for the grand and petit juries or that the defendant was arraigned, or that he was personally present when verdict and sentence were rendered, is not available, in the absence of exceptions based on these grounds, when it appears that in other respects the indictment, trial, verdict, and sentence were regularly had and rendered.—Barrett v. United States, 18 S. Ct. 327, 169 U. S. 218, 42 L. Ed. 723.

Rulings as to which no exception was taken at the time, or as to matters not set out in the assignment of error, will not be revised by the federal Supreme Court.—Matheson v. United States, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

1054. — Review of rulings on evidence.

See 15 Cent. Dig. Crim. Law, §§ 2662-2664.

Assignments of error in admitting or rejecting evidence cannot be considered on writ of error, where no bill of exceptions has been taken.—Pickett v. United States, 30 S. Ct. 265, 216 U. S. 456, 54 L. Ed. 566.

1066. Exceptions to decision on motion for new trial or in arrest.

See 15 Cent. Dig. Crim. Law, § 2686.

Failure to except to the overruling of a motion in arrest of judgment waives the objection that the grand jurors were selected by an unauthorized official, even assuming that such objection was raised in time by such a motion.—Rodriguez v. United States, 25 S. Ct. 617, 198 U. S. 156, 49 L. Ed. 994.

(C) PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

1069. Time of taking proceedings.

See 15 Cent. Dig. Crim. Law, §§ 2691-2699.

On November 3, 1899, after a verdict of guilty of murder, an order was entered adjudging defendants guilty as charged in the indictment, and directing that they be committed to await judgment and sentence. On November 15th an order was made, that they be executed by being hanged, according to the forms, delays, and processes provided by law. Neither order stated the offense of which defendants were adjudged guilty, nor did it appear that they were present when the order of sentence was entered, or were asked if they had aught to say why sentence should not be pronounced. On July 18,

1890, orders were entered reciting the verdict and sentence, and directing that they be executed on a day specified. *Held*, that the judgment against defendants did not become final until July 18th.—*Ball v. United States*, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377.

1072. Allowance or leave.

See 15 Cent. Dig. Crim. Law, § 2703-2706.

Although a motion to the federal supreme court for a writ of error to a state supreme court, under Rev. St. § 709, empowering the federal supreme court to grant writs of error, may be permitted to be made in open court, on account of the urgency and importance of the case, yet it is the duty of the court, upon such motion, not only to ascertain, from an examination of the record, whether any questions, cognizable in the federal supreme court upon appeal, were made and decided in the proper court of the state, but also whether the character of those questions is such as to make it proper to bring the judgment up for re-examination.—*Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. Ed. 80.

1083. Effect of transfer or proceedings therefor.

See 15 Cent. Dig. Crim. Law, § 2732.

A writ of error does not vacate a judgment sentencing accused to death.—*Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

1084. Supersedeas or stay of proceedings.

See 15 Cent. Dig. Crim. Law, §§ 2723, 2729, 2731, 2733-2735.

Under Rev. St. § 716, giving the supreme court power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law; or under section 1000, providing that any justice or judge signing a citation on any writ of error shall take security for the prosecution of the writ, where the writ is not to be a supersedeas, and for damages and costs where it is to be, and section 1007, providing the manner in which a supersedeas may be obtained on a writ of error,—a justice of the supreme court may issue a supersedeas, on allowing a writ of error, under Act Cong. March 3, 1891, to a circuit court, in case of conviction for an infamous crime.—*In re Claassen*, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409.

In a criminal case, the effect of a writ of error is to stay the execution of the judgment pending the determination of the writ by the supreme court.—*Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

(D) RECORD AND PROCEEDINGS NOT IN RECORD.

Prosecutions for homicide, see Homicide, 327.

1085. Matters to be shown by record.

See 15 Cent. Dig. Crim. Law, §§ 2736-2781, 2794.

1086. — Necessity in general.

See 15 Cent. Dig. Crim. Law, §§ 2736-2770, 2772, 2794.

Under Code Cr. Proc. Utah, § 257, cl. 7, requiring the charge of the court to the jury to be reduced to writing, and section 339, requiring a copy of all charges given to be included in the record, a judgment upon a verdict of guilty of murder, the record of which states that the court charged the jury, and does not contain the charge in writing, nor show that with the defendant's consent it was given orally, is erroneous, and must be reversed on appeal.—*Hopt v.*

People of Territory of Utah, 114 U. S. 488, 5 S. Ct. 972, 29 L. Ed. 183.

The state supreme court refused to consider an objection to the reception in evidence of a letter which it was claimed by defendant had been forcibly seized upon his premises without a search warrant or other legal process, in violation of Const. U. S. Amend. 5, and of Const. Ill. art. 2, § 10, on the ground that the defendant had not, at the trial, substantiated the fact of the illegal seizure by evidence, or placed it upon the record. On application in the United States supreme court for a writ of error, *held*, that as the record did not show, as required by Rev. St. § 709, that any title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, had been "specially set up or claimed" by the defendant at the proper time and in the proper manner, or that the decision of the state court was against the title, right, privilege, or immunity so set up or claimed, an application for a writ of error must be denied.—*Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. Ed. 80.

In the case of an indictment for murder in the first degree, the record must show that the prisoner was present in court when he was sentenced to be executed, and that he was asked whether he had anything to say why sentence of death should not be pronounced upon him.—*Ball v. United States*, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377.

"Due process of law," as used in the constitution, requires that the accused plead, or be ordered to plead, or in a proper case, that a plea of not guilty be entered for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous.—*Crain v. United States*, 162 U. S. 625, 16 S. Ct. 952, 40 L. Ed. 1097.

1088. Scope and contents of record.

See 15 Cent. Dig. Crim. Law, §§ 2676, 2746-2751, 2757, 2766, 2782-2802, 2899.

Recital in indictment that grand jury was selected, impaneled, sworn, and charged *held* enough, on proceedings in error, to show proper swearing of grand jury.—*Powers v. United States*, 32 S. Ct. 281, 223 U. S. 303, 56 L. Ed. 448.

Record in proceedings in error after conviction *held* to sufficiently show that the petit jury were duly sworn.—*Id.*

The record, stating that the defendant, being arraigned, pleads not guilty and puts himself upon the country, and the attorney of the United States does the like, sufficiently shows that the indictment was read to accused.—*Johnson v. United States*, 32 S. Ct. 748, 225 U. S. 405, 56 L. Ed. 1142, affirming judgment 38 App. D. C. 347.

1089. Bill of exceptions.

See 15 Cent. Dig. Crim. Law, §§ 2853, 2769, 2808-2861, 2919, 2920, 2927, 2928, 2931-2933, 2943, 2948, 3204.

1090. — Necessity.

See 15 Cent. Dig. Crim. Law, §§ 2853, 2769, 2803-2822, 2826-2827, 2927, 2928, 2948, 3204.

The granting by the supreme court of a writ of error to a circuit court, under Act Cong. March 3, 1891, does not entitle plaintiff in error to a bill of exceptions to which he was not entitled at the time of his conviction, though he was not sentenced until after passage of the act, which gave him such right.—*In re Claassen*, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409.

In the absence of some special statutory provision, a bill of exceptions is the only meth-

od of bringing on the record instructions given or refused.—*Clune v. United States*, 159 U. S. 590, 16 S. Ct. 125, 40 L. Ed. 269.

Ⓒ1091. — **Form and contents.**

See 15 Cent. Dig. Crim. Law, §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2825-2833, 2843, 2831-2833, 2843.

Separate bills of exception for each separate matter are not required, and all the alleged errors at a trial may be incorporated in one bill; but only so much of the testimony or proceedings should be set out as is necessary to present clearly each matter excepted to.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.

Ⓒ1110. **Amendment or correction.**

See 15 Cent. Dig. Crim. Law, §§ 2803-2817, 2819.

Certificates of the judge and the clerk of the court below, returned to the Supreme Court of the Philippine Islands in a proceeding to supply deficiencies in the record in a criminal cause, could be accepted by that court, so far as any questions under the federal Constitution and statutes are concerned, although they were not under oath, and although the court's seal was not attached to the clerk's certificate.—*Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

Ⓒ1111. **Conclusiveness and effect.**

See 15 Cent. Dig. Crim. Law, §§ 2894-2896.

Defendants objected that they were not present before the state supreme court at the time sentence was pronounced, but the record, as it stood, showed upon its face that they were present. *Held*, that the record must be corrected in the court below, before the United States supreme court, upon an application for a writ of error, would consider whether the objection raised any federal question or not.—*Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. Ed. 80.

A recital in an agreed statement, that defendant offered to introduce testimony of a discrimination against negroes in the selection of grand jurors, which was relied upon as the ground for his motion to quash the indictment, will not be taken as true on error to a state court, where such statement was signed "with relation to case as settled by judge," and he stated therein that he overruled the motion because the statement of facts set out in the grounds for quashing the indictment did not appear from the records or otherwise, and that in the absence of any showing to the contrary he was bound to assume that the jury commissioners had done their duty, and the record discloses no exception to the supposed refusal to hear the proffered evidence, and no contention in that regard on the appeal to the state Supreme Court. Judgment, *State v. Brownfield*, 39 S. E. 2, 60 S. C. 509, affirmed.—*Brownfield v. State of South Carolina*, 23 S. Ct. 513, 189 U. S. 426, 47 L. Ed. 882.

Ⓒ1112. **Impeaching or contradicting.**

See 15 Cent. Dig. Crim. Law, § 2896.

The record on appeal imports verity and cannot be contradicted by affidavit of counsel.—*Johnson v. United States*, 32 S. Ct. 748, 225 U. S. 405, 56 L. Ed. 1142, affirming judgment 38 App. D. C. 347.

Ⓒ1113. **Questions presented for review.**

See 15 Cent. Dig. Crim. Law, §§ 2918, 2921-2950.

Ⓒ1114. — **In general.**

See 15 Cent. Dig. Crim. Law, §§ 2918, 2921.

An exception to the refusal of a motion to require the district attorney to elect on which

of several conspiracies disclosed by the evidence he would ask for conviction, cannot be considered when the bill of exceptions does not contain the evidence, so that it does not appear on what ground the trial court proceeded.—*Barrett v. United States*, 18 S. Ct. 327, 169 U. S. 218, 42 L. Ed. 723.

Ⓒ1119. — **Conduct of trial in general.**

See 15 Cent. Dig. Crim. Law, §§ 2927-2930.

An exception to the court's granting permission to a juror to take notes will not be considered, where the record does not show that any juror took notes.—*Agnew v. United States*, 17 S. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

Ⓒ1120. — **Admissibility of evidence.**

See 15 Cent. Dig. Crim. Law, §§ 2931-2937.

An omission in a bill of exceptions of the names of witnesses whom the accused intended to call, and of any statement of their testimony on a certain subject, cannot deprive him of the benefit of his exception to the wrongful refusal of the court to hear any evidence whatever on that subject. Judgment 46 S. W. 236, 39 Tex. Cr. R. 345, and 48 S. W. 508, reversed.—*Carter v. State of Texas*, 20 S. Ct. 687, 177 U. S. 442, 44 L. Ed. 839.

Ⓒ1121. — **Sufficiency of evidence.**

See 15 Cent. Dig. Crim. Law, §§ 2938, 2939.

The lack of an affirmative statement in the bill of exceptions in a criminal case that it contains all the testimony is not fatal, where the recitals in such bill sufficiently show that fact.—*Clyatt v. United States*, 25 S. Ct. 429, 197 U. S. 207, 49 L. Ed. 726.

The rule that a conviction will be reversed where it plainly appears that there was no evidence whatever justifying such conviction, even though no request was made to instruct the jury on the whole evidence to return a verdict of not guilty, will not be applied where it is not certified that the bill of exceptions contains the entire evidence, and the appellate court is not otherwise satisfied that it does, and it is recited in the bill of exceptions that the plaintiff offered evidence during the trial sufficient to go to the jury, tending to prove each and every material allegation of the indictment.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

Ⓒ1122. — **Instructions, and failure or refusal to give instructions.**

See 15 Cent. Dig. Crim. Law, §§ 2940-2945.

Failure to give requested instructions will not be held erroneous when the record does not disclose the instructions actually given, for it will be presumed that such instructions covered the requests so far as they correctly stated the law.—*Andrews v. United States*, 162 U. S. 420, 16 S. Ct. 798, 40 L. Ed. 1023.

(E) **ASSIGNMENT OF ERRORS AND BRIEFS.**

Ⓒ1129. **Assignments of error.**

See 15 Cent. Dig. Crim. Law, §§ 2954-2964.

Under one complaint, defendant was tried and convicted of 307 separate offenses against the Vermont liquor laws, under which he was sentenced to pay a fine of \$6,638.72, or in default be imprisoned at hard labor for 19,914 days. *Held*, on error in the supreme court, that the question whether such punishment was "cruel and unusual," within the inhibition of the eighth amendment to the constitution, not being assigned as error, nor suggested in the

brief of plaintiff in error, though raised and decided below, would not be considered.—*O'Neil v. Vermont*, 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450.

Errors not assigned will not be considered by the federal Supreme Court on writ of error.—*Paraiso v. United States*, 28 S. Ct. 127, 207 U. S. 368, 52 L. Ed. 249.

Rulings not set out in the assignment of error will not be reviewed by the federal Supreme Court.—*Matheson v. United States*, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

(F) DISMISSAL, HEARING, AND RE-HEARING.

Dismissal as denying due process of law, see Constitutional Law, ¶271.

1131. Dismissal.

See 15 Cent. Dig. Crim. Law, §§ 2971-2973, 2985.

Where the accused escapes while a writ of error is pending, the case will be stricken from the docket unless he is brought within the jurisdiction of the court below during the term.—*Bonahan v. Nebraska*, 125 U. S. 692, 8 S. Ct. 1390, 31 L. Ed. 854.

(G) REVIEW.

Prosecutions for homicide, see Homicide, ¶332-340.

1134. Scope and extent in general.

See 15 Cent. Dig. Crim. Law, §§ 2537, 2553, 2986-2998, 3056, 3067-3071.

The issue raised upon a challenge for cause to a juror in a criminal case, on the ground that he had formed and expressed an opinion as to the issues to be tried, is one of mixed law and fact; and the finding of the trial court upon that issue ought not to be set aside by a reviewing court unless it manifestly appears that, upon the evidence, the trial court ought to have found that the juror had formed such an opinion that he could not in law be deemed impartial.—*Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. Ed. 80.

Refusal of a federal court to grant a new trial cannot be reviewed on error.—*Addington v. United States*, 17 S. Ct. 288, 165 U. S. 184, 41 L. Ed. 679.

An objection to the sufficiency of an indictment will not be considered by the federal Supreme Court on certiorari, although the grounds of the demurrer and the general language of the exceptions taken on the trial are broad enough to embrace such objection, where the conduct of counsel for the accused in the courts below is wholly inconsistent with any intention to rely upon such objection, and the point was not referred to in the petition for writ of certiorari, or in the brief submitted in support of that petition. Judgment (C. C. A. 1907) 155 F. 945, 84 C. C. A. 93, affirmed.—*Great Northern Ry. Co. v. United States*, 28 S. Ct. 313, 208 U. S. 452, 52 L. Ed. 567.

Assignments of error which challenge the sufficiency of the evidence to warrant a conviction cannot be considered by the federal Supreme Court on a writ of error to the Supreme Court of the Philippine Islands, to review a judgment affirming such conviction, where it is not contended that there was no evidence of guilt, since only errors of law can be considered upon a writ of error.—*Ling Su Fan v. United States*, 31 S. Ct. 21, 218 U. S. 302, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176.

Question for review on error from judgment sustaining demurrer to indictments under Interstate Commerce Act June 29, 1906, making it a misdemeanor to receive rebates, held to

be whether compliance with the act as to posting tariffs is essential to bring a tariff within such act.—(1912) *United States v. Miller*, 32 S. Ct. 323, 223 U. S. 599, 56 L. Ed. 568, reversing judgment (C. C. 1911) 187 F. 375.

1135. Parties entitled to allege error.

See 15 Cent. Dig. Crim. Law, §§ 3005-3010.

1137. — Estoppel.

See 15 Cent. Dig. Crim. Law, §§ 3007-3010.

The fact that a juror was sworn as interpreter, and interpreted a witness' testimony, is not ground for complaint by defendant, when the substitution of such juror in place of the former interpreter was made on the suggestion of defendant's counsel that the latter was not correctly translating the answers of the witness, and it was done with defendant's consent.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

Plaintiff in error cannot complain of a charge requested by him.—*Matheson v. United States*, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

1140. Presumptions.

See 14 Cent. Dig. Crim. Law, § 214; 15 Cent. Dig. Crim. Law, §§ 2736-2781, 2901, 3014-3037; 31 Cent. Dig. Jury, §§ 306, 330, 347, 390.

1142. — Matters shown by record.

See 15 Cent. Dig. Crim. Law, §§ 3014, 3016-3037.

On appeal in a criminal case the record in the trial court will not be interpreted to show error if it is susceptible of a reasonable interpretation to the contrary. Judgment, *State v. Durein* (1905) 80 P. 987, 70 Kan. 1, affirmed.—*Durein v. State of Kansas*, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645; *Ross v. Same, Id.*; *Simmons v. Same, Id.*

1144. — Facts or proceedings not shown by record.

See 15 Cent. Dig. Crim. Law, §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; 31 Cent. Dig. Jury, §§ 306, 330, 347, 390.

The fact that the record recites that defendants in open court excepted to the sentence pronounced upon them, and that the motion in arrest of judgment, signed by their attorneys, states that they came in their own proper person and by attorney, does not sufficiently show that they were present when sentence was pronounced.—*Ball v. United States*, 146 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377.

On appeal from a conviction of conspiracy, it will be assumed, in the silence of the record, that it was shown that persons whose acts and declarations were admitted were engaged in the conspiracy, and that such acts and declarations were in execution thereof.—*Clune v. United States*, 159 U. S. 590, 16 S. Ct. 125, 40 L. Ed. 269.

The fact of pleading to an indictment for an infamous crime cannot be inferred from a record reciting that defendant came "in his own person and by his attorney," that, on motion of the prosecuting attorney, it was "ordered by the court that a jury come to try the issue joined," and that a jury was selected, impaneled, and sworn "to try the issue joined."—*Crain v. United States*, 162 U. S. 625, 16 S. Ct. 952, 40 L. Ed. 1097.

The refusal of a continuance will not be disturbed by an appellate court when the absence of any bill of exceptions in the record prevents any showing of abuse.—*Pickett v. United States*, 30 S. Ct. 265, 216 U. S. 456, 54 L. Ed. 566.

The presumption will be indulged that the jurisdictional fact of the Indian citizenship of the accused in a homicide case was presented

to the United States court in the Indian territory, and constituted the ground of its order changing the venue, pursuant to Act June 28, 1898, c. 517, § 29, 30 Stat. 511, to the federal District Court at Paris, Tex., where such citizenship is admitted, and the affidavit upon which the order of removal was made is not in the record, and the order recited that the court granted the motion "being well advised in the premises," and it is stated in the affidavit of the attorney for the accused, filed in support of a motion to send the case back to Oklahoma, that the motion for removal was made "under the federal statute permitting said removal to be made."—*Hendrix v. United States*, 31 S. Ct. 193, 219 U. S. 79, 55 L. Ed. 102.

⚡1146. Discretion of lower court.

See 15 Cent. Dig. Crim. Law, §§ 3038-3073.

⚡1148. — Preliminary proceedings.

See 15 Cent. Dig. Crim. Law, §§ 3050-3052.

The summoning of witnesses at the expense of the government is by Rev. St. § 878, left to the discretion of the trial court, and its action is not reviewable.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

Refusal of separate trial to one of several persons jointly indicted will not be reviewed, in absence of abuse of discretion.—*Heike v. United States*, 33 S. Ct. 226, 227 U. S. 131, 57 L. Ed. 450, Ann. Cas. 1914C, 128, affirming judgment 192 F. 83, 112 C. C. A. 615.

⚡1149. — Amendments and rulings as to indictment or pleas.

See 15 Cent. Dig. Crim. Law, §§ 3039-3043, 3058.

A refusal of the trial court to quash an indictment or complaint cannot be urged on appeal as a ground for reversal of a conviction.—*United States v. Hamilton*, 109 U. S. 63, 3 S. Ct. 9, 27 L. Ed. 857.

⚡1153. — Reception of evidence.

See 15 Cent. Dig. Crim. Law, §§ 3061-3066.

In respect to the admission of evidence tending to show motive for a crime, the trial court has a certain discretion which a court of error will not interfere with, unless it manifestly appears that the testimony admitted has no legitimate bearing on the question in issue, and is calculated to prejudice the accused in the minds of the jury.—*Moore v. United States*, 150 U. S. 57, 14 S. Ct. 26, 37 L. Ed. 996.

The decision of the trial court upon an objection to a witness, on the ground of nonage or want of intelligence, is not reviewable except for abuse of discretion, or where the witness' testimony is admitted or rejected upon an erroneous view of some legal principle.—*Wheeler v. United States*, 159 U. S. 523, 16 S. Ct. 93, 40 L. Ed. 244.

The exclusion of matter sought to be elicited on cross-examination, because not within the scope of the direct examination, held not prejudicial error, where the excluded matter was not offered at any subsequent stage of the trial, for the order in which evidence shall be introduced is in the discretion of the court.—*Putnam v. United States*, 162 U. S. 637, 16 S. Ct. 923, 40 L. Ed. 1118.

Refusal to permit nonexperts to express the opinion that accused was insane is not reviewable unless the discretion of the court was abused.—*Matheson v. United States*, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

⚡1156. — New trial.

See 15 Cent. Dig. Crim. Law, §§ 3067-3071.

While the granting or refusing of a new trial is in the sound discretion of the federal

courts, and not subject to review, yet, on a motion for a new trial, the action of the court in rejecting the affidavits of jurors as to the existence of an extraneous influence is not within that discretion, and is reviewable on writ of error.—*Mattox v. United States*, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917.

The refusal of a new trial, being in the discretion of the trial court, cannot be reviewed.—*Moore v. United States*, 150 U. S. 57, 14 S. Ct. 26, 37 L. Ed. 996; *Holder v. Same*, 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010; *Wheeler v. Same*, 159 U. S. 523, 16 S. Ct. 93, 40 L. Ed. 244.

The granting or denying of a new trial is a matter not assignable as error.—*Pickett v. United States*, 30 S. Ct. 265, 216 U. S. 456, 54 L. Ed. 568.

The denial of a motion for a new trial, raising for the first time the objection that the jury was permitted to take into the jury room the indictment, which contained an indorsement showing the conviction of the accused on a count thereof at a former trial, is not reviewable in the federal Supreme Court.—*Holmgren v. United States*, 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778, affirming judgment (1907) 156 F. 439, 84 C. C. A. 301.

⚡1157. Questions of fact, verdicts, and findings.

See 15 Cent. Dig. Crim. Law, §§ 3061-3066, 3070, 3071, 3074-3084.

⚡1158. — In general.

See 15 Cent. Dig. Crim. Law, §§ 3061-3066, 3070, 3071, 3074.

The supreme court of the District of Columbia having jurisdiction to hear and determine a charge against a prisoner, its decision as to whether a plea of former jeopardy by defendant was sustained will not be reviewed by the United States supreme court.—*Ex parte Bigelow*, 113 U. S. 328, 5 S. Ct. 542, 28 L. Ed. 1005.

If there is sufficient evidence to go to the jury in a criminal case, the Supreme Court of the United States will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of evidence, but will limit its decision to questions of law.—*Burton v. United States*, 26 S. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057 6 Ann. Cas. 392.

The Supreme Court of the Philippine Islands, in reviewing the judgment of the court of first instance, in a criminal case, may determine for itself the guilt or innocence of the defendant, upon the proofs presented at the trial.—*Pendleton v. United States*, 30 S. Ct. 315, 216 U. S. 305, 54 L. Ed. 491.

⚡1159. — Conclusiveness of verdict.

See 15 Cent. Dig. Crim. Law, §§ 3074-3083.

A verdict supported by sufficient evidence or substantially supported by the evidence will not be disturbed on appeal.—*Humes v. United States*, 18 S. Ct. 602, 170 U. S. 210, 42 L. Ed. 1011.

⚡1161. Harmless error.

See 15 Cent. Dig. Crim. Law, §§ 3085-3157, 3159-3191; 42 Cent. Dig. Rape, § 104.

⚡1163. — Presumption as to effect of error.

See 15 Cent. Dig. Crim. Law, §§ 3090-3099.

The practice of alluding in the charge to the details of other cases given in the books is not to be commended, but an appellate court will nevertheless assume, unless the contrary appears, that the jurors understood these allusions to be merely by way of illustration, and that they were not misled thereby.—*Point-*

er v. United States, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208.

Where indictments are erroneously consolidated in such a way that some defendants are tried with others charged with an additional crime, different from that for which all are tried, prejudice is presumed.—*McElroy v. United States*, 17 S. Ct. 31, 164 U. S. 76, 41 L. Ed. 355.

1165. — Prejudice to defendant in general.

See 15 Cent. Dig. Crim. Law, §§ 3085, 3086, 3088, 3089.

The refusal to appoint an interpreter when the defendant in a criminal case is testifying is not prejudicially erroneous where it does not appear from the answers made by the witness that there was any abuse of the discretionary power lodged in the trial court.—*Pero-vich v. United States*, 27 S. Ct. 456, 205 U. S. 86, 51 L. Ed. 722.

1166. — Preliminary proceedings.

See 15 Cent. Dig. Crim. Law, §§ 3100-3102, 3107-3112.

The fact that on a trial for murder the shorthand notes of the testimony taken on the preliminary examination have not been transcribed as provided by Comp. Laws, § 4883, is not ground for reversal when it appears that the stenographer was in the court room during the trial, and that he could have been compelled to read any testimony taken on the preliminary examination.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

1166½. — Conduct of trial in general.

See 15 Cent. Dig. Crim. Law, §§ 3114-3123.

Overruling defendant's challenge of a juror for cause is no ground for a reversal, where he did not exhaust his peremptory challenges, and there was no cause for objection to the juror impaneled.—*Hopt v. People of Territory of Utah*, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, affirming judgment *People v. Hopt*, 4 Utah, 247, 9 P. 407; *Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. Ed. 80.

The error, if any, committed by the court of first instance, when determining the guilt or innocence of accused, in considering the latter's failure to testify in his own behalf, is not available on a writ of error from the federal Supreme Court to the Supreme Court of the Philippine Islands, where the latter court, in denying a motion for new trial after its decision reducing the sentence on the accused's appeal, stated that it did not, as the trial court did take the accused's failure to testify into consideration.—*Pendleton v. United States*, 30 S. Ct. 315, 216 U. S. 306, 54 L. Ed. 491.

1167. — Rulings as to indictment or pleas.

See 15 Cent. Dig. Crim. Law, §§ 3101, 3103-3106.

A want of particularity in describing the offense intended to be charged is not a ground for reversing a conviction, where the indictment states the elements of the offense with sufficient particularity fully to advise defendant of the crime charged, and to enable a conviction, if had, to be pleaded in bar of a subsequent prosecution for the same offense, in view of Rev. St. U. S. § 1025 (U. S. Comp. St. 1901, p. 720), providing that a conviction shall not be affected by any defect or imperfection in matter of form not tending to prejudice defendant. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. Co.*, 146 F. 298; *Same v. Guilford, Id.*, affirmed.—*New York Cent. & H. R. Co. v. United States*, 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613.

Only substantial defects in an indictment are available to reverse a conviction. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. Co.*, 146 F. 298; *Same v. Guilford, Id.*, affirmed.—*New York Cent. & H. R. Co. v. United States*, 29 S. Ct. 309, 212 U. S. 500, 53 L. Ed. 624.

1168. — Rulings as to evidence in general.

See 15 Cent. Dig. Crim. Law, §§ 3124, 3125, 3129-3136, 3144.

The refusal of the court to exclude a witness because he disregarded an order to withdraw while other witnesses were testifying is not, ordinarily, subject to revision by an appellate court; and such refusal is clearly proper where the objection is not made until after the witness has testified, other testimony has been given, and he is recalled in relation to another matter.—*Holder v. United States*, 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010.

1169. — Admission of evidence.

See 14 Cent. Dig. Crim. Law, § 754; 15 Cent. Dig. Crim. Law, §§ 3083, 3120, 3127-3143.

On a trial for murder, committed in a shooting affray, participated in by defendants on one side, and by several persons, including deceased, on the other, evidence was admitted that defendants had committed five separate robberies during the 20 days preceding the shooting, on the theory that the party of the murdered man was attempting to arrest defendants, but it did not appear that any of that party knew of more than one of the previous robberies. *Held*, that error in admitting evidence as to such other robberies was not cured by a charge merely stating that the evidence as to the robbery of which the party of deceased had knowledge should be considered only with reference to the right to arrest, and not mentioning the other robberies by name, or referring to them, except by a repetition of the words "these other crimes."—*Boyd v. United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, reversing judgment (C. C.) *United States v. Boyd*, 45 F. 851.

Illegal evidence will work a reversal except where it is clear that it cannot have harmed the exceptant.—*Bram v. United States*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

Any error in the admission of evidence as to a conceded fact *held* harmless.—*Motes v. United States*, 20 S. Ct. 993, 178 U. S. 458, 44 L. Ed. 1150.

A judgment of conviction in a criminal case will not be reversed because of the admission of evidence which was clearly not prejudicial to defendant, although it may have been irrelevant or immaterial.—*Sawyer v. United States*, 26 S. Ct. 575, 202 U. S. 150, 50 L. Ed. 972, 6 Ann. Cas. 269.

One accused of conspiring to suborn perjury in proceedings for the purchase of public lands under the timber and stone act is not prejudiced by admitting evidence of an attempt to acquire and of the acquisition, by like unlawful methods, of state school lands, because it tends to show the commission of crimes other than those charged in the indictment especially where the trial judge in his charge carefully limited the application of the testimony so as to prevent any improper use.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 53 L. Ed. 278.

1170. — Exclusion of evidence.

See 15 Cent. Dig. Crim. Law, §§ 3145-3153.

Erroneous rejection of competent evidence is not cured by a suggestion by the court that, if offered later in the trial, it may be admissible.—*Edgington v. United States*, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467.

Exclusion of material evidence on behalf of accused is reversible error, unless want of prejudice is shown. Judgment (1907) 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 302.

The refusal to permit one accused of conspiring to defraud the United States to testify as to his intent in abstracting correspondence from the files of a corporation, which the government claims was to suppress evidence against himself, is reversible error where the conviction rests largely upon the testimony of a felon and self-confessed accomplice, although there may have been other testimony from which inferences as to such intent might have been drawn.—*Id.*

Erroneous exclusion of evidence as to facts subsequently established is not prejudicial.—*Matheson v. United States*, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

⚡1172. — Instructions.

See 15 Cent. Dig. Crim. Law, §§ 3123, 3154-3157, 3159-3163, 3169; 42 Cent. Dig. Rape, § 104.

An instruction that the age of presumptive legal accountability for crime begins at 11, instead of 14, is prejudicial error, although the accused was concededly two months over 14 when he committed the act.—*Allen v. United States*, 150 U. S. 551, 14 S. Ct. 196, 37 L. Ed. 1179.

The giving of erroneous instructions on a criminal trial is no ground for reversal, where they could not in any manner have prejudiced the accused.—*Sawyer v. United States*, 26 S. Ct. 575, 202 U. S. 150, 50 L. Ed. 972, 6 Ann. Cas. 269.

Submitting to the jury on a prosecution against a shipper for accepting rebates in violation of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), the question whether or not there was a device to avoid the operation of the act and to obtain the transportation at less than the carrier's published rates did not prejudice the accused, where, under that act, no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense; any means by which transportation by a concession from the established rate was had being sufficient to work a conviction.—*Armour Packing Co. v. United States*, 28 S. Ct. 428, 209 U. S. 56, 52 L. Ed. 681, affirming judgment (1907) 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; *Chicago, B. & Q. Ry. Co. v. Same*, 28 S. Ct. 439, 209 U. S. 90, 52 L. Ed. 698, affirming judgment (C. C. A. 1907) 157 F. 830, 85 C. C. A. 184.

Defendants on trial for criminal conspiracy, are not prejudiced by an instruction that the jury might convict any one of the defendants alone, where two were in fact convicted.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment (1910) 35 App. D. C. 451.

⚡1173. — Failure or refusal to give instructions.

See 15 Cent. Dig. Crim. Law, §§ 3164-3168; 42 Cent. Dig. Rape, § 104.

The refusal to charge the jury in a criminal case, on their return into court for further instructions because of their inability to agree, that certain applicable requests to charge, given by the court at defendant's request, were material to the case then on trial, is reversible error where such requests, when originally made, were received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. Judgment, *United States v. Burton*, 131 F. 552, reversed.—*Burton v. United States*, 25 S. Ct. 243, 196 U. S. 283, 49 L. Ed. 482.

The refusal of requested instructions in a criminal case, concerning motive and intent, and the effect of advice of counsel, cannot prejudice the accused, where the trial judge in instructing the jury on the subject went as far in favor of the accused as it was possible for him to go consistently with right.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

⚡1177. — Sentence and judgment.

See 15 Cent. Dig. Crim. Law, §§ 3123-3129.

There is no prejudicial error in suspending sentence, already passed, as to one of two murders of which defendant has been convicted under separate counts in the same indictment, when this does not prevent an appellate court from reversing the judgment in its application to all the charges of the indictment.—*Pointer v. United States*, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208.

(H) DETERMINATION AND DISPOSITION OF CAUSE.

⚡1183. Reduction or mitigation of sentence.

See 15 Cent. Dig. Crim. Law, §§ 3195-3198.

When a prisoner sentenced to death carries his case to an appellate court, it does not affect his rights that the appellate court, in pronouncing its judgment, fixes a new date for the execution, as required by Rev. St. Ill. c. 38, §§ 459, 465, div. 15.—*Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

A prisoner was sentenced on the first and third counts of an indictment, imprisonment on the third count to commence on the expiration of that on the first count. *Held*, that judgment on both counts should not be reversed, on appeal, for insufficiency of the first count only, but that the judgment on the third count should stand, and imprisonment thereunder commence at the time fixed for imprisonment under the first count.—*Blitz v. United States*, 153 U. S. 308, 14 S. Ct. 924, 38 L. Ed. 725.

⚡1184. Modification or correction of judgment.

See 15 Cent. Dig. Crim. Law, §§ 3199, 3200.

The Supreme Court of Philippine Islands, established in place of the existing audiencia or Supreme Court by Philippine Commission Act No. 136, with original and appellate jurisdiction, can increase the punishment on an appeal from a conviction of criminal libel, notwithstanding General Orders No. 58, §§ 42-44, 50, and Philippine Commission Act No. 194, § 4, under which judgments of courts of first instance are final unless appealed from.—*Ocampo v. United States*, 34 S. Ct. 712, 234 U. S. 91, 58 L. Ed. 1231.

⚡1185. Reversal.

See 15 Cent. Dig. Crim. Law, §§ 3215-3220.

⚡1186. — In general.

See 15 Cent. Dig. Crim. Law, §§ 3215-3219, 3221, 3230.

The Supreme Court of the Philippine Islands, upon reversing a judgment of the court below in a criminal case on an appeal taken by the accused, has jurisdiction to convict him, on the same facts, of a different offense, carrying an increased sentence.—*Flemister v. United States*, 28 S. Ct. 129, 207 U. S. 372, 52 L. Ed. 252.

⚡1187. — Rendering final judgment.

See 15 Cent. Dig. Crim. Law, §§ 3220, 3231.

The Supreme Court of the Philippine Islands has jurisdiction, on an appeal taken by the accused from a conviction in the trial court,

to reverse the judgment, and convict the accused of a higher degree of the offense charged.—*Trono v. United States*, 26 S. Ct. 121, 199 U. S. 521, 50 L. Ed. 292, 4 Ann. Cas. 773.

1188. — Directing judgment in lower court.

See 15 Cent. Dig. Crim. Law, §§ 3222-3224.

The previous statutory provisions giving the supreme court power, upon reversing a conviction, to remand with directions to render proper judgment, apply to criminal cases in which jurisdiction is conferred by Act March 3, 1891.—*Ballew v. United States*, 160 U. S. 187, 16 S. Ct. 263, 40 L. Ed. 388.

1190. — Effect.

See 15 Cent. Dig. Crim. Law, §§ 3228, 3229.

On the reversal of a conviction under both counts in an indictment for error under one of the counts, the verdict may stand as to the other count, unaffected by the reversal.—*Ballew v. United States*, 160 U. S. 187, 16 S. Ct. 263, 40 L. Ed. 388.

1193. Jurisdiction and proceedings of appellate court after remand.

See 15 Cent. Dig. Crim. Law, §§ 3241, 3242.

Rev. St. D. C. § 845, provides that when judgment of death or confinement in the penitentiary is pronounced the court shall, on application of the condemned to enable him to apply for a writ of error, postpone the final execution to a reasonable time beyond the next term of the court, in no case exceeding 30 days. *Held*, that this is not a limitation of the time of execution, and when the judgment is affirmed on writ of error the court should set another day for execution, although the 30 days have passed.—*In re Cross*, 146 U. S. 271, 13 S. Ct. 109, 36 L. Ed. 969.

(I) LIABILITIES ON BONDS.

[No paragraphs or references in this Digest. But see 14 Cent. Dig. Crim. Law, §§ 3244-3252.]

XVI. SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS.

Due process of law, see Constitutional Law, 257, 271.

1201. Constitutional and statutory provisions.

See 15 Cent. Dig. Crim. Law, § 3254.

No rights under the federal Constitution are infringed by Penal Law N. Y. § 1941, under which a person committing a crime against the state law is punished as a second offender, because of a prior conviction of an offense against the United States, notwithstanding a pardon by the president after completion of term of imprisonment under such prior conviction.—*Carlesi v. People of the State of New York*, 34 S. Ct. 576, 233 U. S. 51, 58 L. Ed. 843, affirming judgment *People v. Carlesi*, 139 N. Y. S. 309, 154 App. Div. 481, in Court of Appeals 101 N. E. 1114, 208 N. Y. 547.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

See—

Convicts.
Forfeitures.
Pardon.

Due process of law, see Constitutional Law, 270.

Equal protection of laws, see Constitutional Law, 223, 250.

Ex post facto laws, see Constitutional Law, 203.

Naval officers, see Army and Navy, 46.

Privileges and immunities of citizens, see Constitutional Law, 204, 206.

Punishment of particular offenses.

See—

Adultery, 16.
Army and Navy, 48.
Bigamy, 17.
Contempt, 73-82.
Homicide, 354.

1208. Extent of punishment in general.

See 15 Cent. Dig. Crim. Law, §§ 3281-3287, 3298-3296.

Where an offense is made punishable by imprisonment (the statute not expressly authorizing hard labor), a sentence of imprisonment to hard labor is not invalid where hard labor is a part of the discipline of the prison where the sentence would be carried into execution.—*United States v. Pidgeon*, 153 U. S. 48, 14 S. Ct. 746, 38 L. Ed. 631.

1210. Cumulative sentences.

See 15 Cent. Dig. Crim. Law, §§ 3298-3301, 3315.

A single sentence on conviction under several indictments for several offenses committed within the same six months, on a prosecution under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3896], for fraudulent use of the mails, need not be limited to the sentence prescribed for one offense by that section, since the provisions which authorize the joinder of three offenses in one indictment, and the imposition of a single sentence therefor, do not have the effect of making all the offenses committed within six months amount to a single continuing offense.—*Ex parte De Bara*, 21 S. Ct. 110, 179 U. S. 316, 45 L. Ed. 207.

1213. Cruel or unusual punishment.

See 15 Cent. Dig. Crim. Law, §§ 3304-3309.

The 8th amendment to the United States Constitution apply only to the federal government, and not to that of the states.—*Eilenbecker v. Plymouth County District Court*, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801.

A state statute providing that a person who has been before convicted of crime shall suffer a severer punishment for a subsequent offense than for a first offense is not invalid as providing a cruel and unusual punishment.—*Moore v. State of Missouri*, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301, affirming judgment *State of Missouri v. Moore*, 121 Mo. 514, 26 S. W. 345.

Constitutional provisions against cruel and unusual punishments are not violated by St. Mass. 1857, c. 435, § 1, imposing a heavier penalty on a person convicted of felony if he has twice before been convicted of crimes for each of which he was sentenced to at least three years' imprisonment.—*McDonald v. Commonwealth of Massachusetts*, 21 S. Ct. 389, 180 U. S. 311, 45 L. Ed. 542.

A sentence of the state court of 10 years' imprisonment for the offense of a conspiracy to defraud is not so cruel or unusual as requires the interference by the Supreme Court of the United States on habeas corpus. Writ of error, *State v. Howard* (1901) 40 S. E. 71, 129 N. C. 584, dismissed.—*Howard v. Fleming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. Ed. 121.

Cruel and unusual punishment, forbidden by the Philippine Bill of Rights, is inflicted by the provisions of the Philippine Penal Code under which the falsification by a public official of a public and official document must be punished by fine and imprisonment at hard and painful labor for a period ranging from 12 years and a day to 20 years, the prisoner being subject, as accessories to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political rights, hold office, etc., and to

surveillance of the authorities during life.—*Weems v. United States*, 30 S. Ct. 544, 217 U. S. 349, 54 L. Ed. 793, 19 Ann. Cas. 705.

Cruel and unusual punishment is not inflicted on a former convict by bringing him after conviction before the court of another county under Code W. Va. 1906, c. 165, §§ 1-5, by information charging him with former convictions, and on verdict sentencing him to the additional punishment prescribed by chapter 152. §§ 23, 24.—(1912) *Graham v. State of West Virginia*, 32 S. Ct. 583, 224 U. S. 616, 56 L. Ed. 917, affirming judgment (1911) *State v. Graham*, 69 S. E. 1010, 68 W. Va. 248.

Prohibition of Const. U. S. Amend. 8, against cruel and unusual punishment, is a limitation on the federal government, and not on the states.—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

Cr. Code, § 215, held not unconstitutional as imposing cruel and unusual punishment and excessive fines because mailing of each letter in execution of scheme to defraud is made a separate offense.—*Badders v. United States*, 36 S. Ct. 367, 240 U. S. 391, 60 L. Ed. 706.

⚖1214. Excessive fines.

See 15 Cent. Dig. Crim. Law, §§ 3304-3309.

Cr. Code, § 215, held not unconstitutional as imposing cruel and unusual punishment and excessive fines because mailing of each letter in execution of scheme to defraud is made a separate offense.—*Badders v. United States*, 36 S. Ct. 367, 240 U. S. 391, 60 L. Ed. 706.

⚖1216. Term of imprisonment.

See 15 Cent. Dig. Crim. Law, §§ 3310-3319.

Detention in a county jail cannot be considered, on habeas corpus, as any part of the time of imprisonment at hard labor in the state prison to which the prisoner was sentenced, where it does not appear but that such detention was due to the prisoner's efforts to obtain a review and reversal of the judgment of conviction, and, in the meantime, a supersedeas thereon, so as to prevent his transportation to the state prison.—*Dimmick v. Tompkins*, 24 S. Ct. 780, 194 U. S. 540, 48 L. Ed. 1110.

Each successive cutting into different mail bags with intent to steal the mail therefrom by one who cuts successively a number of such bags, is a distinct offense, punishable under Cr. Code, § 189.—*Ebeling v. Morgan*, 35 S. Ct. 710, 237 U. S. 625, 59 L. Ed. 1151.

Persons stealing stamps and postal funds from a post office after breaking commit two distinct offenses which may be separately charged and punished, under Pen. Code, §§ 190, 192.—*Morgan v. Devine*, 35 S. Ct. 712, 237 U. S. 632, 59 L. Ed. 1153.

⚖1218. Place of imprisonment.

See 15 Cent. Dig. Crim. Law, §§ 3320-3328.

Rev. St. § 5541, providing that when a person convicted of an offense against the United States is sentenced to imprisonment "for a period longer than one year," the sentence may be executed in a state penitentiary, does not apply where a person is sentenced for one year only.—*In re Mills*, 135 U. S. 263, 10 S. Ct. 762, 34 L. Ed. 107.

The United States court in the Indian Territory has no power to order that a sentence of imprisonment for one year shall be executed in a state penitentiary as imprisonment in such an institution is limited by Rev. St. § 5541, to sentences for a period longer than one year.—*Id.*

A federal court has no jurisdiction to sentence a convict to imprisonment in a state penitentiary, except as expressly authorized by statute, namely, when the imprisonment is to be for more than a year (Rev. St. § 5541), or at hard labor (section 5542).—*In re Mills*, 135 U. S. 263, 10 S. Ct. 762, 34 L. Ed. 107; *In re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149.

Under Const. art. 5, § 13, authorizing the governor to "grant reprieves, commutations, and pardons, after conviction, for all offenses"; and Rev. St. c. 108, § 1, making the penitentiary at Joliet the general prison for all persons sentenced by any court of competent jurisdiction,—a person whose sentence of death has been commuted to imprisonment for life may be lawfully kept imprisoned there.—*Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

⚖1219. Execution of sentence of death.

See 15 Cent. Dig. Crim. Law, §§ 3329-3333.

Gen. St. Minn. 1878, c. 118, §§ 3, 4, which require the punishment of death to be inflicted by hanging after the issuance of a warrant by the governor to the sheriff commanding the execution, are consistent with, and not repealed by, Gen. Laws Minn. 1889, c. 20, which substantially re-enacts these two sections, adds other provisions as to the time and the mode of the execution, provides for the solitary confinement of the convict after the issuance of the warrant, and then repeals all prior inconsistent statutes; and therefore one sentenced to death after the passage of the act of 1889 for a murder committed before that time may be imprisoned and executed under the statute of 1878, without invoking the provision of the act of 1889 requiring solitary confinement.—*Holden v. State of Minnesota*, 137 U. S. 483, 11 S. Ct. 143, 34 L. Ed. 734, distinguishing *In re Medley*, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835.

⚖1221. Rights to property subject of or connected with crime.

See 15 Cent. Dig. Crim. Law, § 3334; 32 Cent. Dig. Larc. § 209.

One who has in good faith received currency in payment of an existing debt cannot be compelled to make repayment because it subsequently appears that such currency had been embezzled by the one who made the payment. *Judgment Gale v. Chase Nat. Bank*, 108 F. 987, 46 C. C. A. 683, reversed.—*Rankin v. Chase Nat. Bank*, 23 S. Ct. 372, 188 U. S. 557, 47 L. Ed. 594.

CRIMINATION.

Compelling accused to criminate himself, see Criminal Law, ⚖393.

Compelling witness to criminate himself, see Witnesses, ⚖297.

CROPS.

Scope-Note.

[INCLUDES the annual products of the soil while unsevered therefrom, growing spontaneously or by cultivation, immature or ripe, and nature and incidents of rights of property therein in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

See Chattel Mortgages, ¶117, 197.

§8. Offenses.

See 15 Cent. Dig. Crops, § 9.

A conviction of selling pooled tobacco without the consent of the agent of the pool, contrary to Ky. St. § 3941a, cannot be sustained because of the uncertainty of the test of the

legality of the pool prescribed by Ky. St. § 3915, and Const. Ky. § 198.—*Collins v. Commonwealth of Kentucky*, 84 S. Ct. 924, 234 U. S. 634, 58 L. Ed. 1510, reversing judgment 133 S. W. 233, 141 Ky. 564; *Malone v. Same*, 34 S. Ct. 926, 234 U. S. 639, 58 L. Ed. 1512, reversing judgment 133 S. W. 235, 141 Ky. 570.

CROSS-APPEAL

See Appeal and Error, ¶14, 878, 1090.

CROSS-BILL

See Equity, ¶148, 195-199, 286.

CROSS-DEMANDS.

See Set-Off and Counterclaim.

CROSS-EXAMINATION.

Expert witnesses, see—

Criminal Law, ¶489.

Evidence, ¶502.

Witnesses in general, see Witnesses, ¶268-287, 300, 348, 349, 387.

CROSSINGS.

Railroad crossings, see Railroads, ¶88-103, 301-353.

CROSS VEINS.

See Mines and Minerals, ¶32.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, ¶1213.

CRUELTY.

Ground for divorce, see Divorce, ¶130.

CUBA.

Duty on imported goods, see Customs Duties, ¶1, 10.

Length of occupation by United States as judicial question, see Constitutional Law, ¶68.

CUMULATIVE REMEDIES.

See Election of Remedies.

CUMULATIVE SENTENCE

See Criminal Law, ¶1210.

CURATIVE ACTS.

See—

Acknowledgment, ¶47.

Constitutional Law, ¶192-196.

Statutes, ¶268.

CURATORS.

See Guardian and Ward.

Ad litem in action by or against infant, see Infants, ¶76-80.

For insane persons, see Insane Persons, ¶30.

CURTESY.

Scope-Note.

[INCLUDES nature and incidents of the interest in the real property of a deceased wife to which her husband is entitled, for his life or absolutely, at common law or by statute; abolition of curtesy and its effect; rights, powers, and liabilities of husbands in respect of their curtesy; releasing, barring, or defeating rights of curtesy; and remedies relating thereto.

[For related matters under other topics, see cross-references following.]

Cross-References.

See Dower.

⌚12. Rights and remedies of tenant by curtesy.

See 15 Cent. Dig. Curt. §§ 43-64.

Rev. St. D. C. § 727, providing that the right of a married woman to her property "shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her hus-

band, nor be liable for his debts," exempts his estate by curtesy in her real estate from liability for his debts, contracted after the act took effect.—Hitz v. National Metropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28 L. Ed. 577; Mattoon v. McGrew, 112 U. S. 713, 5 S. Ct. 369, 28 L. Ed. 824.

CUSTODIA LEGIS.

See—

Bankruptcy, ⌚20.

Courts, ⌚264, 496-505.

Replevin, ⌚3, 4.

CUSTODY.

Debtor's property pending bankruptcy proceedings, see Bankruptcy, ⌚101-117.

Debtor's property pending insolvency proceedings, see Insolvency, ⌚38.

Goods in course of transportation, see Carriers, ⌚70-76.

Property by bailee, see Bailment, ⌚10-14.

CUSTOMS AND USAGES.

Scope-Note.

[INCLUDES established methods of dealing in particular occupations or trades, or in transactions of a particular kind, or in particular localities; their operation and effect as to contracts; and pleading such customs and usages, and evidence relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

⌚9. Application and operation.

10. — Scope and effect in general.

12. — Knowledge of parties.

14. — Exclusion by terms of contract.

15. — Explanation of contract.

17. — Varying terms of contract.

Cross-References.

Affecting transaction with bank, see Banks and Banking, ⌚89.

Customary law, see Common Law.

Customary use of appliances by master as af-

fecting negligence, see Master and Servant, ⌚105.

Judicial notice, see Evidence, ⌚21.

Locating mines, see Mines and Minerals, ⌚15.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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—9. **Application and operation.**

See 14 Cent. Dig. Crim. Law, §§ 11-39; 8 Cent. Dig. Brok. § 113; 43 Cent. Dig. Sales, § 745; 44 Cent. Dig. Ship. §§ 93, 147.

—10. — **Scope and effect in general.**

See 15 Cent. Dig. Cust. & U. §§ 11-21, 25-39; 8 Cent. Dig. Brok. § 113.

A local usage cannot affect parties to a contract made elsewhere.—*Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565, 11 S. Ct. 909, 35 L. Ed. 517.

—12. — **Knowledge of parties.**

See 15 Cent. Dig. Cust. & U. §§ 23, 24; 44 Cent. Dig. Ship. § 93.

A custom of the produce exchange by which brokers are personally liable on contracts for the sale of grain entered into on behalf of their principals, and are entitled to supply the grain themselves, and charge it to their principals who fail to meet their engagements, is not binding on a person employing such a broker in ignorance of the custom.—*Irwin v. Williar*, 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225.

One who has no knowledge of a local custom, confined to a particular business, is not bound thereby.—*Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510.

—14. — **Exclusion by terms of contract.**

See 15 Cent. Dig. Cust. & U. § 29.

Payment for removing the earth which may slide into the channel from the sides or slopes during excavation is so clearly excluded by a dredging contract as to prevent giving the words "measured in place" a trade meaning which demands a different construction, where the specifications provide for payment by the cubic

yard, measured in place, determined by surveys made before dredging is commenced and after completion, require that the work shall be plainly located by stakes and ranges, which shall be kept continually in place, and preclude extra allowance for excavating material different from that therein described, or payment for work outside the designated lines of excavation or below the specified depth, and state that any material deposited otherwise than specified and agreed upon must be removed by the contractor at his own expense, that no guaranty is given as to the nature of the bottom, and that no claim will be made for any excess or deficiency in the estimate of quantity. Judgment (1908) 41 Ct. Cl. 214, affirmed.—*Bowers Hydraulic Dredging Co. v. United States*, 29 S. Ct. 77, 211 U. S. 176, 53 L. Ed. 136.

—15. — **Explanation of contract.**

See 15 Cent. Dig. Cust. & U. §§ 30-33; 8 Cent. Dig. Brok. § 113; 20 Cent. Dig. Evid. §§ 1945-1952.

In an action by brokers for advances made by them on account of one who employed them to sell grain futures for him, evidence having been introduced that the agreement was that the transactions should be conducted under the rules of the board of trade at Chicago, and that such rules were explained to defendant, such rules are admissible, as well as testimony by plaintiff to explain the purport of the rules and the transactions thereunder.—*Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment (C. C.) *Boyd v. Hanson*, 41 F. 174.

—17. — **Varying terms of contract.**

See 15 Cent. Dig. Cust. & U. § 24; 20 Cent. Dig. Evid. §§ 1945-1952; 43 Cent. Dig. Sales, § 745.

A custom directly contradicting the terms of a contract is inadmissible.—*The Gazelle*, 128 U. S. 474, 9 S. Ct. 139, 32 L. Ed. 496.

CUSTOMS DUTIES.

Scope-Note.

[INCLUDES taxes on imports or exports; power to impose such duties; constitutional and statutory provisions relating thereto; property subject to duty, classification thereof under provisions of customs laws, and rate and amount of duty; entry, storage, and appraisal of goods, liens for collection and payment of duties, drawbacks, and rights and remedies of importers or owners of goods; and forfeitures, penalties, and other punishments for violations of customs laws.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Validity, Construction, and Operation of Customs Laws in General.

- 1. Power to impose duties on imports or exports.
2. Constitutionality of customs laws.
4. Changes in tariffs.
6. — Amendment or repeal of provisions.
7. — Time of taking effect.
8. — Effect as to goods in course of importation.
9. — Effect as to goods in bond.
10. Treaty provisions.
11. — Reciprocity.
12. General rules of construction.
13. Trade with island possessions and canal zone.
16. Construction as to classification of goods.
17. — In general.
18. — Commercial designation.
19. — Use of article.

I. Validity, Construction, and Operation of Customs Laws in General—
Continued.

- 20. — Articles imported in separate parts.
- 21. Discriminating duties.

II. Goods Subject to Duty, Rate and Amount.

- 23. Nature of goods subject to duty in general.
- 24. Chemicals, oils, and paints (Schedule A).
- 25. Earths, earthenware, and glassware (Schedule B).
- 26. Metals and manufactures thereof (Schedule C).
- 27. Wood and manufactures thereof (Schedule D).
- 28. Sugar (Schedule E).
- 29. Tobacco and manufactures thereof (Schedule F).
- 30. Agricultural products and provisions (Schedule G).
- 31. Spirits, wines, and other beverages (Schedule H).
- 32. Cotton manufactures (Schedule I).
- 33. Flax, hemp, and jute, and manufactures thereof (Schedule J).
- 34. Wool and manufactures of wool (Schedule K).
- 35. Silks and silk goods (Schedule L).
- 36. Pulp, papers, and books (Schedule M).
- 37. Sundries (Schedule N).
- 38. Free list.
- 39. Nonenumerated articles.
- 40. — In general.
- 41. — Raw or unmanufactured articles.
- 44. — Similitude to articles enumerated in general.
- 47. Packages and coverings.
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- 53. Authority of Secretary of Treasury in general.
- 55. Collectors.
- 59. Merchant appraisers.
- 60. Inspectors and other subordinate officers.

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- 65. Declarations and statements accompanying invoices.
- 68. Entry of articles as exempt from duty.
- 71. Appraisal.
- 72. — In general.
- 73. — Examination of goods.
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- 75. — Valuation of goods.
- 76. — Value of foreign money.
- 77. — Additions to entered value, and additional duties.
- 78. — Deductions and allowances.
- 79. — Conclusiveness and effect.
- 80. Reappraisal and revision.
- 81. Liquidation and reliquidation.
- 82. Protests.
- 83. Appeal to Secretary of Treasury.
- 84. Review by Board of General Appraisers.
- 85. Review by courts.
- 86. Bonds for duties.
- 91. Withdrawal from bond.
- 92. Fees and charges.

V. Payment and Collection, Refunding, and Drawback.

- 95. Payment under protest.
- 96. Actions for duties.
- 98. Lien of carrier and collection of carrier's charges.
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VI. Recovery of Duties Paid.

- 101. Right of action in general.
- 102. Statutory provisions.
- 103. Conditions precedent.
- 105. — Protest.
- 107. Defenses.
- 108. Persons entitled to sue.
- 111. Time to sue and limitations.
- 112. Pleading.
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VII. Violations of Customs Laws.

- 120. Nature and elements of offenses in general.
- 122. — Criminal intent.
- 123. — Criminal act or omission.
- 125. Offenses by owners or others in regard to importation of goods.
- 126. Searches and seizures.
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- 133. Proceedings for enforcement of forfeitures.
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- 135. Disposition of proceeds of penalties, forfeitures, and fines.

Cross-References.

Appellate jurisdiction to determine liability to customs duties, see Courts, 385(6).
Application of revenue laws to goods imported from territories, see Territories, 8.
Claims against United States arising under revenue laws, see United States, 98.
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I. VALIDITY, CONSTRUCTION, AND OPERATION OF CUSTOMS LAWS IN GENERAL.

Construction of statute with reference to prior act, see Statutes, 225.
Delegation of legislative powers, see Constitutional Law, 62.
Due process of law, see Constitutional Law, 283, 286, 303.
Equality and uniformity of tonnage taxes, see Taxation, 42.
Necessity of determination of constitutionality of laws, see Constitutional Law, 46.
Origin of law, see Statutes, 6.
Retroactive laws, see Constitutional Law, 190.

1. Power to impose duties on imports or exports.

See 15 Cent. Dig. Cust. Dut. § 1.

The Isle of Pines must be regarded as at least de facto under the jurisdiction of the Republic of Cuba, and hence, as a "foreign country" within the meaning of Dingley Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], since the United States has never taken possession of such island as included in the territory ceded by Spain to the United States in the treaty of peace, but, instead, through its legislative and executive departments, has recognized the Cuban government as rightfully exercising sovereignty over the Isle of Pines as a de facto government until the de jure status shall be determined.—Percy v. Stranahan, 27 S. Ct. 545, 205 U. S. 257, 51 L. Ed. 793.

Merchandise imported into Cuba from the United States by an American citizen during

the military occupation of the island, between March 31, 1900, and May 20, 1902, was not exempt from the payment of duties imposed and collected by the military government for necessary governmental purposes incident to the occupation of Cuba by the United States. Judgment (1905) 40 Ct. Cl. 495, affirmed.—Galban & Co. v. United States, 28 S. Ct. 254, 207 U. S. 579, 52 L. Ed. 349.

2. Constitutionality of customs laws.

See 15 Cent. Dig. Cust. Dut. § 2.

Act July 20, 1868 (15 Stat. 157), imposed an excise tax of 32 cents per pound on manufactured tobacco, to be paid by affixing a stamp before the package was removed from the factory; but tobacco intended for exportation was relieved from this tax by fixing to each package, of whatever size, before removal, a 25-cent stamp, engraved to indicate the intent to export the same. Held, that such exportation stamp is not a "tax or duty" on exports, within Const. art. 1, § 9, par. 5.—Turpin v. Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988.

Aside from any question of intervening rights, Congress could, by Act June 30, 1906, c. 3912, 34 Stat. 636, ratify the illegal collection of duties on imports to the Philippine Islands which were levied under the President's order of July 12, 1898, between the dates of the ratification of the treaty of peace with Spain and the passage of Act July 1, 1902, c. 1369, 32 Stat. 691, enacting a tariff of duties for those islands.—United States v. Heinssen, 27 S. Ct. 742, 206 U. S. 370, 51 L. Ed. 1098, 11 Ann. Cas. 688, reversing judgment Heinssen v. United States, 42 Ct. Cl. 58.

4. Changes in tariffs.

See 15 Cent. Dig. Cust. Dut. §§ 4-6.

¶6. — Amendment or repeal of provisions.

See 15 Cent. Dig. Cust. Dut. § 5.

The provision of section 7 of the act of February 8, 1875 (18 Stat. 307, 308), which permitted the return to the United States free of duty of foreign-made bags in which grain had been exported, was repealed by the tariff act of 1883, which was a complete revision of the subject, and from which such provision was omitted.—*United States v. Ranlett*, 19 S. Ct. 114, 172 U. S. 133, 43 L. Ed. 393.

The duties on filled glass bottles, prescribed by the tariff act of March 3, 1883, c. 121, Schedule B, 22 Stat. 495, were not repealed by the provision of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 131, 139 [U. S. Comp. St. 1901, p. 1924], that the duty on ad valorem goods shall be assessed upon their actual market value, including the value of "all cartons, cases, crates, boxes, sacks, and coverings of any kind."—*United States v. Austin Nicholls & Co.*, 22 S. Ct. 918, 186 U. S. 298, 46 L. Ed. 1173.

¶7. — Time of taking effect.

See 15 Cent. Dig. Cust. Dut. § 6.

The tariff act of Aug. 27, 1894 (28 Stat. 509), went into effect August 28, 1894. Section 1 provides that on and after August 1, 1894, there "shall" be levied the rates of duty prescribed, etc. Section 2 provides that on and after August 1, 1894, specified articles "shall" be exempt from duty. Section 72, in terms, repeals inconsistent acts and parts of acts, and keeps in force every right and liability of the government or of any person which had been incurred or had accrued prior to the passage of the act. *Held*, that on goods imported and withdrawn between August 1 and August 28, 1894, the rate of duty is that prescribed by the act of Oct. 1, 1890 (26 Stat. 567), which was in force until repealed, August 28, 1894.—*United States v. Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82.

¶8. — Effect as to goods in course of importation.

See 15 Cent. Dig. Cust. Dut. § 7.

Under Act Cong. March 3, 1865, c. 80, § 7, requiring that, in determining the value of imported goods in the country of export, for the purpose of fixing the rate of duty payable thereon, nothing less than the invoice or entered value shall be taken, the reduction of foreign coin, named in the invoice, to United States money, should be made according to a rule prescribed by a statute going into effect before the entry, although after the exportation.—*Heinemann v. Rollins*, 120 U. S. 82, 7 S. Ct. 446, 30 L. Ed. 605.

¶9. — Effect as to goods in bond.

See 15 Cent. Dig. Cust. Dut. § 8.

Under Act March 3, 1883 (22 Stat. 489, 525), which took effect July 1, 1883, and provided that all imported goods which may be in public stores or bonded warehouses on the day when this act should go into effect should be subjected to no other duty on entry for consumption than if imported after that day, goods on a vessel entered at port June 30, 1883, and remaining thereon in charge of a customs officer preliminary to their removal, are dutiable only under such act, though not entered in bond until July 7, 1883.—*Hartman v. Oliver*, 125 U. S. 525, 8 S. Ct. 958, 31 L. Ed. 813; *Sherman v. Robertson*, 136 U. S. 570, 10 S. Ct. 1063, 34 L. Ed. 540.

Merchandise on which the duties have been paid, and for the removal of which permits have been issued, which have been delivered to the

storekeeper, is withdrawn from bonded warehouses for consumption, within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 20, 26 Stat. 140, as amended by Act Dec. 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 420], subjecting merchandise so withdrawn to the duties prescribed by law at the time of the withdrawal.—*Franklin Sugar Refining Co. v. United States*, 28 S. Ct. 720, 202 U. S. 580, 50 L. Ed. 1153.

Imported merchandise is, by the express terms of Customs Administrative Act June 10, 1890, c. 407, § 20, 26 Stat. 140, as amended by Act Dec. 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 420], subjected to the rate of duty in force at the time of its withdrawal from a bonded warehouse for consumption, and not to the rate of duty in force at the time of the liquidation.—*Id.*

¶10. Treaty provisions.

See 15 Cent. Dig. Cust. Dut. § 9.

Imports from Cuba were not entitled, under the treaty of December 11, 1902, to the 20 per cent. reduction from the duties imposed by Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], until December 27, 1903—the date proclaimed by the President of the United States and the President of the Cuban Republic for the commencement of the operation of the treaty.—(N. Y.) *United States v. American Sugar Refining Co.*, 26 S. Ct. 717, 202 U. S. 568, 50 L. Ed. 1149, reversing order (C. C.) *American Sugar Refining Co. v. United States*, 136 F. 508; (Pa.) *Franklin Sugar Refining Co. v. United States*, 28 S. Ct. 720, 202 U. S. 580, 50 L. Ed. 1153.

The Philippine Islands are not "another country" within the meaning of the provision of the commercial convention with Cuba (Act Dec. 17, 1903, art. 8, 33 Stat. 2136), that the rates of duty granted to Cuba by that treaty, being a reduction of 20 per cent. from the rates prescribed by the tariff act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626), or any tariff laws subsequently enacted, shall continue preferential in respect to all like imports from other countries.—(1911) *Faber v. United States*, 31 S. Ct. 659, 221 U. S. 649, 55 L. Ed. 897, affirming judgment (C. C. 1907) 157 F. 140.

¶11. — Reciprocity.

See 15 Cent. Dig. Cust. Dut. § 9.

The treaty with the king of the Hawaiian Islands, by which the United States, in consideration of the king of Hawaii allowing the importation of certain articles into the Hawaiian Islands free of duty, "and as an equivalent therefor," agreed to allow the importation of certain products into the United States free of duty, does not bind the United States, under the provisions in the treaty with the king of Denmark of April 26, 1826, as renewed on January 12, 1858, "not to grant any particular favor to other nations in respect to commerce and navigation which shall not immediately become common to the other party," and that "no higher or other duties" shall be charged by the United States on the importation of a Danish product "than are or shall be payable on the like articles being the product or manufacture of any other foreign country," to extend to Denmark, without compensation, the privileges which have been conceded to the Hawaiian Islands in exchange for valuable concessions.—*Bartram v. Robertson*, 122 U. S. 116, 7 S. Ct. 1115, 30 L. Ed. 1118.

¶12. General rules of construction.

See 15 Cent. Dig. Cust. Dut. § 10.

In construing the tariff act of October 1, 1890 (26 Stat. 567), the court will, in a proper

case, as an aid to interpretation, consider the fact that the general idea of the statute is that of protection to American manufactures, and this idea suggests that an article which has been subjected to an additional process of manufacture is subject to a higher, rather than an equal or lower, rate of duty.—*Arnold, Constable & Co. v. United States*, 147 U. S. 494, 13 S. Ct. 406, 37 L. Ed. 253.

13. Trade with island possessions and canal zone.

Porto Rico, after its cession to the United States by the treaty with Spain, April 11, 1899, though it had not been formally embraced by congress within the customs union of the states, was no longer "foreign country" within the Dingley tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], providing for duties on articles "imported from foreign countries."—*De Lima v. Bidwell*, 21 S. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041.

The exaction of duties on importations into Porto Rico from the United States before the cession of the island by treaty was properly made, under the war power, by General Miles' order of July 26, 1898, which merely extends the existing regulations, and by the tariffs of August 19, 1898, and February 1, 1899, prescribed by the president as commander in chief.—*Dooley v. United States*, 21 S. Ct. 762, 182 U. S. 222, 45 L. Ed. 1074; *Armstrong v. Same*, 21 S. Ct. 827, 182 U. S. 243, 45 L. Ed. 1086.

The tax "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture," which under Act Cong. April 12, 1900, § 3, is collectible on Porto Rican manufactures coming into the United States, in addition to the duty of 15 per cent. of the duties levied upon like articles imported from foreign countries, is not a tariff duty within the provision of the section that, when the Legislature of Porto Rico creates a system of local taxation, all "tariff duties" on imports and exports between the United States and Porto Rico shall cease.—*Jordan v. Roche*, 33 S. Ct. 573, 228 U. S. 436, 57 L. Ed. 908.

Substance is the test of likeness between articles of domestic and Porto Rican manufacture for the purpose of fixing the tax on importations of Porto Rican manufactures, which under Act Cong. April 12, 1900, § 3, is to be equal to the internal revenue tax imposed in the United States on like articles of domestic manufacture.—*Id.*

Importations of bay rum from Porto Rico were subject to a tax equal to the internal revenue tax on distilled spirits by the provision of Act Cong. April 12, 1900, § 3.—*Id.*

The imposition of a specific tax on bay rum imported from Porto Rico under Act Cong. Feb. 4, 1900, was not a congressional declaration that bay rum so imported was not subject to a tax under prior statutes.—*Id.*

16. Construction as to classification of goods.

See 15 Cent. Dig. Cust. Dut. §§ 13-16, 22.

17. — In general.

See 15 Cent. Dig. Cust. Dut. § 13.

In an action for the recovery of duties alleged to have been illegally exacted by the collector of customs, and paid under protest, the fact that, at the date of the passage of the act (Rev. St. § 2504, Schedule A), goods of the kind in question had not been manufactured, will not withdraw them from the class to which they belong, as described in the statute, where the language used fairly and clearly includes them.—*Newman v. Arthur*, 109 U. S. 132, 3 S. Ct. 88, 27 L. Ed. 883.

In the tariff act of March 3, 1883 (22 Stat. 505), the titles prefixed to the several schedules

were intended merely as general suggestions as to the character of the articles included therein, and not as technically accurate definitions of them.—*Hollender v. Magone*, 149 U. S. 586, 13 S. Ct. 932, 37 L. Ed. 860, reversing judgment (C. C.) 38 F. 912.

18. — Commercial designation.

See 15 Cent. Dig. Cust. Dut. § 14.

The commercial designation is of first importance, and, if that fails to give the article its proper classification, resort must be had to the common designation.—*Robertson v. Salomon*, 130 U. S. 412, 9 S. Ct. 559, 32 L. Ed. 995.

In an action to recover duties paid on importations, on the ground that they were improperly classified as aniline dyes, it is proper to instruct that if the articles in question, according to the understanding of commercial men, dealers in and importers of them, would, when imported, be included in the class of articles known as "aniline dyes," by whatever name they had come to be known, they are subject to duty as aniline dyes, though such articles were unknown when the statute imposing duties on aniline dyes was enacted.—*Pickhardt v. Merritt*, 132 U. S. 252, 10 S. Ct. 80, 33 L. Ed. 353.

Where terms employed in the tariff laws have a special restricted meaning, according to the general usage of the trade to which the articles appertain, it is to be presumed that congress used them in such restricted sense; but the fact that they have such restricted meaning must be clearly established, otherwise they are to be interpreted according to their common, popular signification.—*Hedden v. Richard*, 149 U. S. 346, 13 S. Ct. 891, 37 L. Ed. 763.

In order that an alleged commercial use of a word or phrase employed in a tariff law, which differs from its ordinary signification, shall prevail over its ordinary meaning, it must appear that such commercial designation is the result of established usage in commerce and trade, and that, at the time of the passage of the act, such usage was definite, uniform, and general, and not partial, local, or personal.—*Sonn v. Magone*, 159 U. S. 417, 16 S. Ct. 67, 40 L. Ed. 203, following *Maddock v. Magone*, 152 U. S. 368, 14 S. Ct. 588, 38 L. Ed. 482.

In the interpretation of the revenue laws, words are to be taken in their popular sense, or according to their commercial designation, if that differs from their ordinary meaning.—*United States v. Buffalo Natural Gas Fuel Co.*, 19 S. Ct. 200, 172 U. S. 339, 43 L. Ed. 460, affirming judgment 78 F. 110, 24 C. C. A. 4, which affirms (C. C.) *In re Buffalo Natural Gas Fuel Co.*, 73 F. 191.

19. — Use of article.

See 15 Cent. Dig. Cust. Dut. §§ 15, 22.

A law imposing a duty on articles used for a particular purpose should not be construed to cover articles not so used at the date of the act, unless expressly so provided.—*Rossman v. Hedden*, 145 U. S. 561, 12 S. Ct. 925, 36 L. Ed. 817, affirming judgment (C. C.) 37 Fed. 90.

The use of tapioca flour by Chinese laundrymen on the Pacific coast as starch, and its use by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic and other gums, as well as for sizing cotton goods, and as an adulterant in the manufacture of candy and other articles, are insufficient to show that it is "fit for use as starch," within the meaning of the tariff act, as the article is commercially known in the markets of the United States as tapioca flour, and it does not compete with American starch for any of the purposes for which starch is commonly and ordinarily used in this country. Judgment. *Wise v. Chew Hing Lung*, 83 F. 162, 27 C. C. A. 494, reversed.—*Chew Hing Lung & Co. v.*

Wise, 20 S. Ct. 320, 176 U. S. 156, 44 L. Ed. 412.

20. — Articles imported in separate parts.

See 15 Cent. Dig. Cust. Dut. § 16.

Act Jan. 29, 1795, § 2 (1 Stat. 411), providing that, where any article is made subject to duty, the parts thereof, when imported separately, shall be subject to duty at the same rate, was limited to duties imposed by laws then existing, and does not apply to subsequent tariff acts.—*United States v. Schoverling*, 146 U. S. 76, 13 S. Ct. 24, 36 L. Ed. 893, affirming judgment (C. C.) in re *Schoverling*, 45 F. 349.

21. Discriminating duties.

See 15 Cent. Dig. Cust. Dut. § 17.

Customs Act July 14, 1870, c. 255, § 21 (16 Stat. 262), enacted that, in lieu of the duties then imposed by law, certain duties specified should thereafter be imposed on certain enumerated articles. *Held*, that this enactment did not have the effect to repeal, as to such articles, the provisions of Act March 3, 1865, c. 80, § 6 (13 Stat. 493), which declared that there should be paid on all goods produced in countries east of the Cape of Good Hope, when imported from countries west of the Cape, a duty of 10 per cent. ad valorem, in addition to the duties imposed thereon when imported directly from the place of production.—*Russell v. Williams*, 106 U. S. 623, 1 S. Ct. 409, 27 L. Ed. 220.

The Russian laws regulating the production and exportation of sugar, under which an exporter of sugar is remitted the excise tax imposed on sugar sold in Russia, and obtains a certificate because of such exportation, which has a substantial market value, allow a bounty upon the exportation of sugar which, under Act Cong. July 24, 1897, § 5, 30 Stat. 205, c. 11 [U. S. Comp. St. 1901, p. 1693], subjects such sugar upon its importation into the United States to an additional duty equal to the entire amount of such bounty as ascertained and determined by the secretary of the treasury. Decree, 113 F. 144, 51 C. C. A. 100, affirmed.—*Downs v. United States*, 23 S. Ct. 222, 187 U. S. 496, 47 L. Ed. 275.

II. GOODS SUBJECT TO DUTY, RATE AND AMOUNT.

Construction of statute with reference to prior act, see Statutes, 225.

23. Nature of goods subject to duty in general.

See 15 Cent. Dig. Cust. Dut. §§ 19, 20.

Ships or vessels are not dutiable, *eo nomine*, under the tariff laws, and are not dutiable "articles," in the meaning thereof. Therefore a large pleasure yacht purchased abroad and brought to this country by an American citizen cannot be subjected to duty.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D. C.) 49 F. 99.

24. Chemicals, oils, and paints (Schedule A).

See 15 Cent. Dig. Cust. Dut. §§ 31-42.

Boneblack is not included in the clause "bones crude, and not manufactured, burned, calcined, ground or steamed" in the free list of Rev. St. § 2504, but is liable to a duty of 25 per cent. ad valorem, under Schedule M of that section.—*Harrison v. Merritt*, 115 U. S. 577, 6 S. Ct. 191, 29 L. Ed. 494, reversing 23 F. 653.

An article known as "Henry's Calcined Magnesia," prepared by Thomas and William Henry, of Manchester, England, put up in bottles in which their name is blown, over the

top of each an English proprietary revenue stamp being pasted, with the names of the proprietors on it, the proprietors calling it "their calcined magnesia," announcing a property in its trade-mark, and having recommended it for certain specified superior qualities, being publicly intrusted to a firm in the United States as the sole wholesale agents by such makers, and bearing a United States proprietary revenue stamp on each bottle, is a proprietary medicine, within the meaning of Rev. St. § 2504, Schedule M, p. 480.—*Ferguson v. Arthur*, 117 U. S. 482, 6 S. Ct. 861, 29 L. Ed. 979.

Bichromate of soda is a "chemical compound or salt," for which a duty is provided by Rev. St. § 2502, Schedule A.—*Mason v. Robertson*, 139 U. S. 624, 11 S. Ct. 668, 35 L. Ed. 293, reversing judgment (C. C.) 29 Fed. 684. *CONTRA*, *Biddle v. Hartranft* (C. C.) 29 F. 90.

"Boonekamp Bitters," a preparation sold as a proprietary article under a registered trade-mark, and containing 47½ per cent. of alcohol, together with rhubarb, orange peel, tumeric, and an essential oil, supposed to be oil of anise, held (in accordance with the verdict of a jury) not to be similar to cordials, liquors, absinthe, and like beverages, which are provided for in Schedule H of Act March 3, 1883 (22 Stat. 481), but to be dutiable as a "proprietary preparation," under Schedule A.—*Erhardt v. Steinhardt*, 153 U. S. 177, 14 S. Ct. 775, 38 L. Ed. 678.

Muriate of cocaine, which is made and used solely as a medicine, was dutiable as a medicinal preparation, under paragraph 74 of the act of October 1, 1890, and not as a chemical salt, under paragraph 76, though it in fact belongs to this class of substances. The former description, being more narrow and specific, must prevail over the latter. *Lehn v. United States* (C. C.) 66 F. 748, affirmed.—*Fink v. United States*, 18 S. Ct. 770, 170 U. S. 584, 42 L. Ed. 1153.

25. Earthenware, and glassware (Schedule B).

See 15 Cent. Dig. Cust. Dut. §§ 29, 43-47.

White hard enamel, an article used for various purposes, including watch dials, scale columns of thermometers, and other articles where a smooth or enameled surface is desired, and which in the form or condition imported cannot be used for any practical purpose, but must be changed by grinding or otherwise, is dutiable at 20 per cent. ad valorem, under Rev. St. U. S. § 2513, as an article partly manufactured, and not provided for, and not under section 2502, reading "watches, watch-cases, watch movements, parts of watches, and watch materials, not specially enumerated or provided for in this act, twenty-five per centum ad valorem," though the particular importation is intended for use in the watch business.—*Worthington v. Robbins*, 11 S. Ct. 581, 139 U. S. 337, 35 L. Ed. 181.

Under Act Oct. 1, 1890 (26 Stat. 567), stained-glass windows containing representations of saints and other Biblical subjects, and imported in a fragmentary state for the use of a convent, are not exempt from duty, under paragraph 677, as "paintings," specially imported in good faith, for the use of any society or institution established for religious purposes, but are dutiable at 45 per cent. ad valorem, under paragraph 122, as "stained or painted window glass and stained or painted glass windows," "wholly or partly manufactured, and not specially provided for in this act."—*United States v. Perry* (1892) 146 U. S. 71, 13 S. Ct. 26, 36 L. Ed. 890.

Opera glasses, composed of metal tubes covered with polished mother of pearl, and held together by a metal framework, were dutiable at 45 per cent. ad valorem, as "manufactured ar-

ticles composed in part of metal," under Schedule C of the act of 1883, although the shell was of greater value than the other component materials; and they could not properly be classed as "shells, whole or parts of," under Schedule N, or as "articles composed of shell, metal, and glass in which shell is the component of chief value," under Rev. St. § 2499, as amended by the act of 1883.—*Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 L. Ed. 560, reversing judgment (C. C.) *Schlesinger v. Seeberger*, 40 F. 872, overruling *United States v. Manasse*, 56 F. 828, 6 C. C. A. 155.

The question whether pieces of glass are dutiable at 45 per cent. ad valorem as articles of glass, or at 30 per cent. as parts of clocks, is to be determined by whether their principal or chief use is as parts of clocks, and not by whether that is their exclusive use, or exclusive commercial use.—*Magone v. Wiederer*, 159 U. S. 555, 16 S. Ct. 122, 40 L. Ed. 258.

Glass beads strung together and colored in imitation of precious stones are dutiable under Act Cong. 1890, par. 108, as manufactures of glass not otherwise provided for, at 60 per cent. ad valorem, and not under paragraph 454, as imitations of precious stones not set, at 10 per cent. ad valorem, since the tariff laws have hitherto assessed strung beads at a rate higher than unstrung beads or imitations of precious stones, and the present statute, retaining the provision for unstrung beads at the same rate as imitations of precious stones, has failed to provide specifically for strung beads, without showing any purpose to change the former policy by which they were made to pay a higher rate than the unstrung beads; and it is a proper case for the application of the general rule by which articles to which two or more rates of duty are applicable shall pay the higher rate. Judgment, *Morrison v. United States* (C. C. A.) 84 F. 444, 28 C. C. A. 456, reversed.—*United States v. E. A. Morrison & Son*, 21 S. Ct. 195, 179 U. S. 456, 45 L. Ed. 275.

Glass bottles filled with merchandise liable to ad valorem duties cannot be regarded as "coverings" within the meaning of the provision of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 131, 139 [U. S. Comp. St. 1901, p. 1924], that the duty upon ad valorem goods shall be assessed upon the actual market value, including the value of "all cartons, cases, crates, boxes, sacks, and coverings of any kind," in view of the elaborate provision made by the tariff act of Aug. 27, 1894, c. 348, 28 Stat. 508, for a specific tax on glass bottles, filled or unfilled, whether their contents are subject to ad valorem or specific duties.—*United States v. Austin Nicholls & Co.*, 22 S. Ct. 918, 186 U. S. 298, 46 L. Ed. 1173.

Carbon sticks, which must undergo a slight process of manufacture to be fit for use in electric lamps, not being dutiable under Tariff Act 1897, par. 98 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), as "carbons for electric lighting," because unfinished, nor under paragraph 97, as articles composed of carbon, not specially provided for, decorated or undecorated, because not susceptible of decoration, are dutiable under the similitude clause of section 7 (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), at the rate levied by paragraph 98 on the finished product. Judgment, *United States v. Downing*, 129 F. 90, 63 C. C. A. 532, reversed.—*United States v. R. F. Downing & Co.*, 26 S. Ct. 476, 201 U. S. 354, 50 L. Ed. 786.

26. Metals and manufactures thereof (Schedule C).

See 15 Cent. Dig. Cust. Dut. §§ 43-59.

Cotton ties, each tie consisting of an iron strip and an iron buckle, imported in bundles, each bundle consisting of 30 strips and 30 buckles, each strip 11 feet long, the whole blackened, are subject to a duty of 35 per cent. ad

valorem, as "manufactures of iron not otherwise provided for," under Schedule E, Rev. St. § 2504, and not to a duty of one and a half cents per pound, under said schedule, as "band, hoop, and scroll iron."—*Badger v. Ranlett*, 106 U. S. 255, 1 S. Ct. 346, 350, 27 L. Ed. 194.

Under Rev. St. § 2504, importations of iron ore are subject to a duty of 20 per cent. ad valorem, as "a mineral * * * substance in its crude state not otherwise provided for."—*Marvel v. Merritt*, 116 U. S. 11, 6 S. Ct. 207, 29 L. Ed. 550.

Rev. St. § 2504, Schedule E, provides that "all manufactures of steel, or of which steel shall be a component part, not otherwise provided for," shall pay duty at "45 per cent. ad valorem. But all articles of steel partially manufactured, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured." "Locomotive tires, or parts thereof, three cents per pound." "Steel in any form, not otherwise provided for, 30 per cent. ad valorem." *Held*, that "steel tire blooms" which had been cast and hammered, and had had a hole swedged in the middle, and had been then hammered on the horn of an anvil, expanding the circumference, and on which the rudiments of a flange had been swedged on the outer periphery of the circle, and were all ready to be rolled or spun into the proper size and shape, and finished on a lathe for use as tires of locomotive and car wheels, were manufactures of steel, and subject to the duty of 45 per cent. ad valorem.—*Chicago Tire & Spring Works Co. v. Spalding*, 116 U. S. 541, 6 S. Ct. 498, 29 L. Ed. 720, affirming (C. C.) 19 F. 412.

Punchings and clippings of wrought-iron boiler plates and wrought sheet-iron, left after the process of the manufacture of the boiler plates into boilers is completed, and the ends of bridge rods and beams of wrought iron, cut off to bring the rods and beams to the required length, are iron that has been in "actual use," within the meaning of that term as used in Schedule E, Rev. St. § 2504, and dutiable as wrought scrap iron under that paragraph.—*Schlesinger v. Beard*, 120 U. S. 264, 7 S. Ct. 546, 30 L. Ed. 656, reversing judgment (C. C.) 14 F. 687.

Swedish iron nail rods should be classified as a description of "rolled and hammered iron not otherwise provided for," and not as "bar iron, rolled or hammered, comprising flats less than three-eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide."—*Worthington v. Abbott*, 124 U. S. 434, 8 S. Ct. 562, 31 L. Ed. 494, affirming (C. C.) 20 F. 495.

Crop ends of Bessemer steel rails are taxable at 45 per cent. ad valorem, under Rev. St. § 2502, Schedule C, as "steel not specially enumerated or provided for," and not under the amendment (Act March 3, 1883, c. 121, § 6) imposing a duty of 20 per cent. ad valorem on "mineral substances in a crude state, and metals unwrought, not specially enumerated or provided for."—*Robertson v. Perkins*, 129 U. S. 233, 9 S. Ct. 279, 32 L. Ed. 686, reversing (C. C.) *Perkins v. Robertson*, 29 F. 842.

Iron and steel wire hair pins, which are not specifically enumerated in Act March 3, 1883 (22 Stat. 501), are not dutiable as "pins, solid head or other," mentioned in Rev. St. § 2502, Schedule C, of that act, but as "manufactures, articles, or wares, not specially enumerated, * * * composed wholly or in part of iron, steel," etc., as previous tariff acts treated hair pins as distinct from "pins, solid head or other."—*Robertson v. Rosenthal*, 132 U. S. 460, 10 S. Ct. 120, 33 L. Ed. 392.

Iron show or advertising cards, printed in different colors, on plates of sheet iron, from lithographic stones on hand presses, containing

generally the name of a person and of the article advertised, with some ornament thereon, not being specifically enumerated in Act March 3, 1883 (22 Stat. 481), are dutiable under Rev. St. § 2502, Schedule C, as enacted by that act, as "manufactures * * * not specially enumerated, * * * composed wholly or in part of iron," etc., and not as "printed matter," under Schedule M, which is headed "Books, Papers, Etc.," and is confined to the subject-matter thus indicated, and which provides the duty for books, pamphlets, and "all printed matter not specially enumerated;" there being no evidence that such cards are known commercially as "printed matter."—*Forbes Lithograph Mfg. Co. v. Worthington*, 132 U. S. 655, 10 S. Ct. 180, 33 L. Ed. 453, reversing (C. C.) 25 F. 899.

Under Rev. St. § 2504, iron rails that have never been in use are not dutiable as scrap iron, though they are old and rusty, and are in fact intended by the importer to be remanufactured.—*Dwight v. Merritt*, 140 U. S. 213, 11 S. Ct. 768, 35 L. Ed. 450.

The declaration in Act Oct. 1, 1890, Schedule C, par. 133, that no deduction shall be made on iron ore on account of moisture "chemically or physically combined therewith," does not indicate that the term "iron ore," as used in the act of 1883, did not include the water, but was only intended to put an end to any doubt upon the subject.—*Earnshaw v. Cadwalader*, 145 U. S. 247, 12 S. Ct. 851, 36 L. Ed. 693.

Under Act Oct. 1, 1890 (26 Stat. 567), "finished gunstocks with locks and mountings," are dutiable at 45 per cent. ad valorem, under paragraph 215, as "manufactures, articles, or wares not specially enumerated," "composed wholly or in part of iron, steel," etc., and the fact that the finished gun barrels are imported separately by another firm, under an arrangement with the importer of the stocks with intent that they shall be brought together here, does not render the importation dutiable at the higher rate prescribed by paragraph 170 for all double-barreled, sporting, breech-loading shotguns, when it does not appear that the stocks had ever formed part of completed guns in Europe.—*United States v. Schoverling*, 146 U. S. 76, 13 S. Ct. 24, 36 L. Ed. 893, affirming judgment (C. C.) In re Schoverling, 45 F. 349, following *Robertson v. Gerdan*, 132 U. S. 454, 10 S. Ct. 119, 33 L. Ed. 403, and distinguishing *Falk v. Robertson*, 137 U. S. 225, 11 S. Ct. 41, 34 L. Ed. 645.

Scythes, grass hooks, and carpenters' pinchers, subjected before completion to grinding, tempering, or polishing, are dutiable as "manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, * * * or any other metal, and whether wholly or partly manufactured" (Act March 3, 1883; 22 Stat. 501), and not as "forgings of iron and steel, or forged iron" (page 498), though all but 3 or 4 per cent. of the labor expended on them consisted of forging.—*Saltonstall v. Wiebusch & Hilger*, 156 U. S. 601, 15 S. Ct. 476, 39 L. Ed. 549, reversing (C. C.) 45 F. 40.

Metal beads temporarily strung on cotton cords or strings for the purpose of facilitating transportation are not dutiable, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 403, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], at 35 per cent. ad valorem as loose beads, but are subject to the 45 per cent. ad valorem duty prescribed by paragraph 193 for articles or wares not specially provided for in the act, composed wholly or in part of metal, whether wholly or partly manufactured. Judgment 146 F. 63, 76 C. C. A. 514, affirmed.—*Henry E. Frankenberg Co. v. United States*, 27 S. Ct. 628, 206 U. S. 224, 51 L. Ed. 1034.

A bronze bust case by artisans from the artist's model is dutiable upon importation from France at 45 per cent. ad valorem, under Tariff Act July 24, 1897, par. 193, and is not statutory under the commercial reciprocal agreement with France, negotiated under authority conferred in section 3 of that act.—(1912) *B. Altman & Co. v. United States*, 32 S. Ct. 593, 224 U. S. 583, 56 L. Ed. 894, affirming judgment (C. C. 1909) *Altman & Co. v. Same*, 172 F. 161.

—27. Wood and manufactures thereof (Schedule D).

See 15 Cent. Dig. Cust. Dut. §§ 60-65.

That dressed lumber, after being tongued and grooved, is called "flooring," "ceiling," or "sheathing," does not indicate a new manufacture, making it dutiable as "a manufacture of wood." Judgment 79 F. 75, 24 C. C. A. 449, affirmed.—*United States v. Dudley*, 19 S. Ct. 801, 174 U. S. 670, 43 L. Ed. 1129.

—28. Sugar (Schedule E).

See 15 Cent. Dig. Cust. Dut. §§ 66-68.

"Saccharine," a patented article in the form of a dry, white powder, which is 300 times sweeter than sugar, but which is classed by scientists as an acid anhydrid, having an acid reaction, was not entitled, under Act March 3, 1883 (22 Stat. 494, 516), to free entry as an "acid used for medicinal, chemical, or manufacturing purposes"; for the popular meaning of a word must control when so diametrically opposed, as in this instance, to the scientific designation.—*Lutz v. Magone*, 153 U. S. 105, 14 S. Ct. 777, 38 L. Ed. 651, affirming judgment (C. C.) 41 F. 128.

—29. Tobacco and manufactures thereof (Schedule F).

See 15 Cent. Dig. Cust. Dut. §§ 69-71.

Under Act March 3, 1883 (Rev. St. § 2502), imposing a duty of 75 cents per pound upon "leaf tobacco, of which 85 per cent. is of the requisite size, and of the necessary fineness of texture to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, if not stemmed," the bale in which the tobacco is imported is not the unit upon which the 85 per cent. is to be calculated, but such unit is the separate quantity of such tobacco; and where the original bale has been broken, a portion taken out, and a sufficient quantity of inferior tobacco placed in the bale, but kept separate by sheets of paper from that remaining to reduce the percentage of tobacco of the described quality in the whole bale below 85 per cent., the part of the original tobacco remaining in the bale is still subject to a duty of 75 cents per pound.—*Falk v. Robertson*, 137 U. S. 225, 11 S. Ct. 41, 34 L. Ed. 645.

Tobacco composed of fragments clipped from the ends of cigars, or broken off in the course of manufacturing them, was dutiable as "tobacco unmanufactured, not specially enumerated," under Act March 3, 1883 (22 Stat. 481) Schedule F, and not as "tobacco, manufactured, of all descriptions, * * * not specially enumerated," under the same schedule.—*Seeberger v. Castro*, 153 U. S. 32, 14 S. Ct. 766, 38 L. Ed. 624; *Spalding v. Castro*, 153 U. S. 38, 14 S. Ct. 768, 38 L. Ed. 626, affirming judgment (C. C.) *Castro v. Seeberger*, 40 F. 531.

Unstemmed leaf tobacco suitable for cigar wrappers, when mixed or packed with filler tobacco, though constituting less than 15 per cent. of the whole, is separately dutiable at \$1.85 per pound as wrapper tobacco, under paragraph 213 of the tariff act of July 24, 1897, and not as filler tobacco at 35 cents per pound.—*Rothschild & Bro. v. United States*, 21 S. Ct. 197,

179 U. S. 463, 45 L. Ed. 277, answering certified questions 109 F. 1062, 47 C. C. A. 686.

Tobacco sweepings used in manufacture of stogies and cigarettes are dutiable at 55 cents a pound, under Tariff Act July 24, 1897, c. 11, § 1, par. 215, 30 Stat. 169 (U. S. Comp. St. 1901, p. 1648), as unmanufactured tobacco, and not at 10 per cent. ad valorem under paragraph 463, as waste not specially provided for.—*Latimer v. United States*, 32 S. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.

30. Agricultural products and provisions (Schedule G).

See 15 Cent. Dig. Cust. Dut. §§ 73-77.

Beet and cabbage seed are "garden seed," and subject to a 20 per cent. ad valorem duty, under Rev. St. § 2502, Schedule N (Act March 3, 1883, § 6, c. 121, 22 Stat. 489); and turnip and mangel-wurzel seed are field seed, and not garden seed, and are exempt from duty under the "free list" in Id. § 2503.—*Ferry v. Livingston*, 115 U. S. 542, 6 S. Ct. 175, 29 L. Ed. 489.

Tomatoes are "vegetables," rather than "fruits," in the common and popular acceptation of such words, and were not free of duty under the provision of the free list for "fruits, green, ripe, or dried," but were dutiable at 10 per cent. ad valorem, under the provision in Schedule G, Act March 3, 1883 (22 Stat. 481), for "vegetables in their natural state."—*Nix v. Hedden*, 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745, affirming judgment (C. C.) 39 F. 109.

Beans in a dry state, used for food, are dutiable as "vegetables" at 10 per cent. ad valorem, under Schedule G of the tariff act of March 3, 1883 (22 Stat. 488), and are not entitled to free entry as "seeds."—*Sonn v. Magone*, 159 U. S. 417, 16 S. Ct. 67, 40 L. Ed. 203.

31. Spirits, wines, and other beverages (Schedule H).

See 15 Cent. Dig. Cust. Dut. §§ 78-82.

Wines imported in cases of 24 bottles, each bottle containing more than one pint and less than one quart, are dutiable at \$1.60 per dozen bottles, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1654), providing that the duties shall be, "in bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or 24 bottles or jugs containing each not more than one pint, \$1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of 5 cents per pint or fractional part thereof."—*United States v. Cerecedo Hermanos y Compania*, 28 S. Ct. 532, 209 U. S. 337, 52 L. Ed. 821.

32. Cotton manufactures (Schedule I).

See 15 Cent. Dig. Cust. Dut. §§ 83-87.

By Schedule D to the act of July 30, 1846 (9 Stat. 46), a duty of 25 per cent. ad valorem was imposed on "cotton laces, cotton insertings," and "manufactures composed wholly of cotton, not otherwise provided for." By Act March 3, 1857, § 1 (11 Stat. 192), the duties on the articles enumerated in Schedules C and D, Act 1846, were fixed at 24 and 19 per cent., respectively, "with such exceptions as are hereinafter made." By Id. § 2, "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines," were transferred to Schedule C. *Held*, that laces and insertings composed wholly of cotton, and bleached or dyed, were dutiable at 24 per cent., under the act of 1857.—*Cochran v. Schell*, 107 U. S. 617, 2 S. Ct. 301, 27 L. Ed. 490.

Madras mull, consisting of woven cotton cloth in which the groundwork is uniform, and

the threads countable by the aid of a magnifying glass, was dutiable under the countable provisions of Act March 3, 1883, Schedule I, para. 319-321 (22 Stat. 481), and not as a "manufacture of cotton not specifically enumerated," under paragraph 324, notwithstanding that it had upon it figures or patterns woven into the groundwork contemporaneously with the weaving thereof, the whole being afterwards run through a clipping machine, which, in order to bring out the figure, cuts the weft threads, so that they do not extend continuously from selvege to selvege.—*Hedden v. Robertson*, 151 U. S. 520, 14 S. Ct. 434, 38 L. Ed. 257, applying *Newman v. Arthur*, 109 U. S. 132, 3 S. Ct. 88, 27 L. Ed. 883, and reversing judgment *Robertson v. Hedden* (C. C.) 40 F. 322.

Figured cotton cloth valued at over 11, 12, and 12½ cents per square yard is liable, in addition to the specific duty imposed by Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 175, 178 [U. S. Comp. St. 1901, pp. 1656-1659] par. 313, to the ad valorem tax imposed by paragraphs 306, 307, upon similar plain cotton cloth above those values, Decree (1905) 136 F. 583, 69 C. C. A. 357, reversed.—*United States v. George Riggs & Co.*, 27 S. Ct. 39, 203 U. S. 136, 51 L. Ed. 127.

Featherstitch braid prior to Act July 24, 1897, which shifted braids from the lower duty of the notion schedule (paragraph 320), to the highest duty of the trimming schedule (paragraph 339), *held* dutiable at 60 per cent. under the trimming schedule as cotton braids, and not at 45 per cent. under the notions schedule, as bindings or tapes.—(1912) *United States v. Baruch*, 32 S. Ct. 306, 223 U. S. 191, 56 L. Ed. 399, reversing decree (1909) *Baruch v. United States*, 172 F. 842, 97 C. C. A. 40.

33. Flax, hemp, and jute, and manufactures thereof (Schedule J).

See 15 Cent. Dig. Cust. Dut. §§ 88-96.

Handkerchiefs composed of linen cambric and embroidered with cotton, known as "embroidered handkerchiefs," and of which the embroidery is a substantial part, are dutiable at 35 per cent. ad valorem, under Rev. St. § 2502, par. 8, Schedule J (as enacted by congress March 3, 1883), which includes "brown and bleached linens, * * * handkerchiefs, lawns, or other manufactures of flax," and not at 30 per cent., under paragraph 11 of the same schedule, which includes "flax or linen laces, insertings, embroideries, or manufactures of linen, if embroidered, * * * and not specially enumerated or provided for in this act."—*Robertson v. Glendinning*, 132 U. S. 158, 10 S. Ct. 44, 33 L. Ed. 298.

Though an article imported for the manufacture of gill nets is linen thread, and the greater part of the whole importation of thread of like character is used for other purposes, the fact that for many years before the passage of the tariff act of March 3, 1883, this kind of thread was imported under the name of "gilling twine," to be used in making gill nets, being invoiced and entered at the custom house under that name, while no other imported article was so designated, will render it dutiable at 25 per cent. ad valorem, as gilling twine, under Schedule J of that act (22 Stat. 507), instead of being dutiable at 40 per cent. ad valorem, as linen thread, under a preceding paragraph of the same schedule.—*American Net & Twine Co. v. Worthington*, 141 U. S. 468, 12 S. Ct. 55, 35 L. Ed. 821, reversing judgment (C. C.) 33 F. 826.

Under Rev. St. § 2504, Schedule C, laces made by machinery out of linen thread, and known as "torchons," were dutiable at 40 per cent. ad valorem, as "manufactures of flax," and could not be classed under Schedule C, p. 463, as "thread lace," dutiable at 30 per cent.

ad valorem, which is always handmade.—*Meyerhelm v. Robertson*, 144 U. S. 601, 12 S. Ct. 754, 36 L. Ed. 599.

◀ 34. Wool and manufactures of wool (Schedule K).

See 15 Cent. Dig. Cust. Dut. §§ 97-108.

Under Act July 14, 1862, § 9 (12 Stat. 543), imposing a certain duty "on all delaines * * * and on all goods of similar description," goods which are similar to delaines in product, in adaptation to uses, and in uses, are dutiable as delaines, even though in commerce they may be classed as different articles.—*Schmieder v. Barney*, 113 U. S. 645, 5 S. Ct. 624, 28 L. Ed. 1130.

Under Rev. St. § 2504, webbing made of India rubber, wool, and cotton, and known as "wool elastic webbing," to distinguish it from "union elastic webbing," and "cotton elastic webbing," which is used in the manufacture of congress boots, and which would not be adapted to that use without the rubber, is dutiable as "webbing * * * composed wholly or in part of India rubber, not otherwise provided for," at 35 per cent. ad valorem (Schedule M), and not as "webbing * * * made of wool, * * * or of which wool * * * is a component material," at 50 cents per pound and 50 per cent. ad valorem (Schedule L).—*Beard v. Nichols*, 120 U. S. 260, 7 S. Ct. 548, 30 L. Ed. 652, affirming decree (C. C.) 7 F. 579.

Goods composed of 80 per cent. goat's hair and 20 per cent. cotton, such as brilliantines, lustrines, alpacas, and mohairs, which, prior to 1870, had not come to be specifically known in this country as women's dress goods, are assessable under Act July 14, 1870, § 21, as amended by Act 1871 (16 Stat. 592), providing for duties on haircloth known as "crinoline cloth," and "on all other manufactures of hair not otherwise herein provided for"; and not under Act March 2, 1867 (14 Stat. 561), relating to women's dress goods composed wholly or in part of wool, worsted, hair of the alpaca, goat, or other like animal.—*Arthur's Exrs v. Butterfield*, 125 U. S. 70, 8 S. Ct. 714, 31 L. Ed. 643.

Act March 2, 1867, c. 197 (14 Stat. 561), imposes (section 2) the following duties: "On woollen cloths, woollen shawls, and all manufactures of wool of every description made wholly or in part of wool, not herein otherwise provided for, 50 cents per pound, and, in addition thereto, 35 per cent. ad valorem. On flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool," different duties. *Held*, that knit stockings, composed in part of wool, were dutiable under the first clause of section 2.—*Miller v. Victor*, 127 U. S. 572, 8 S. Ct. 1225, 32 L. Ed. 201.

Diagonal cloths used mainly for the manufacture of men's wearing apparel, and known to the trade as "worsted," being composed mainly of worsted, mixed with about 10 per cent. of shoddy, made from wool and cotton, are subject to duty as "manufactures of worsted," under Act March 3, 1883, Schedule K, "Wool and Woolens," par. 363 (22 Stat. 508, 509), fixing the rate on all manufactures "composed wholly or in part of worsted," and are not subject to duty as "manufactures of wool," under paragraph 362.—*Seeberger v. Cahn*, 137 U. S. 95, 11 S. Ct. 28, 34 L. Ed. 599, affirming judgment (C. C.) 30 F. 425.

Women's and children's dress goods which contain no cotton except about 6 per cent.,

carded into the wool from which the warp is spun, come within the description of goods composed in part of wool, being of less value than 20 cents per square yard, and are dutiable under Rev. St. § 2502, Schedule K, at 5 cents per square yard, and 35 per cent. ad valorem, and they are not "goods with selvages, made wholly or in part of other materials, or with threads of other materials introduced for the purpose of changing the classification," on which that section imposes a higher duty.—*Seeberger v. Farwell*, 139 U. S. 608, 11 S. Ct. 650, 35 L. Ed. 297, affirming judgment (C. C.) 40 F. 529.

Women's dress goods, composed chiefly of wool, with from 1.99 to 4.47 per cent. of cotton introduced in the warp and selvages thereof, for the purpose of changing the classification, in the form of a fiber, the warp being a compound thread of cotton, are not "goods made with threads of other materials" for the purpose of changing the classification, within the meaning of Rev. St. § 2502, Schedule K, and are not subject to the higher duty imposed on such goods.—*Magone v. Luckemeyer*, 139 U. S. 612, 11 Sup. Ct. 651, 35 L. Ed. 298, affirming judgment (C. C.) 38 F. 30.

Under Act March 3, 1883, elastic goods used to insert in the upper part of shoes or gaiters could not be classified as "fabrics in part India rubber, not otherwise provided for," dutiable at 30 per cent., under Schedule N, p. 513; but, when composed of cotton, silk, and India rubber, were dutiable at 35 per cent., as "webbing, composed of cotton, flax, or other material," under Schedule N, p. 514; and, when composed of worsted and India rubber, were dutiable either under Schedule N, p. 514, or under Schedule K, p. 509, at 30 cents per pound, and 50 per cent. ad valorem in addition, as "webbing, gorings," etc., made of wool, worsted, etc.,—the classification depending upon the question whether the goods were known to the trade simply as "webbing," or as both "webbing" and "goring."—*Robertson v. Salomon*, 144 U. S. 603, 12 S. Ct. 752, 36 L. Ed. 560.

While the expressions "knit goods" and "knit fabrics" are frequently used interchangeably, it would seem that the former more appropriately describes manufactured articles, while the latter refers more especially to manufactured material as piece goods, and this distinction is recognized in the trade.—*Arnold, Constable & Co. v. United States*, 147 U. S. 494, 13 S. Ct. 406, 37 L. Ed. 253.

As used in tariff legislation, the words "clothing and articles of wearing apparel" are more specific than "cloths and knit fabrics," since out of cloths and knit fabrics clothing and wearing apparel are made; the latter being included in the former, while the former are not included in the latter.—*Id.*

Under Tariff Act Oct. 1, 1890, knit woollen undershirts, drawers, and hosiery are dutiable as "woollen wearing apparel," under section 1, par. 396, and not as "knit fabrics made on frames," under paragraph 392.—*Id.*

The fact that in Act March 3, 1883, a certain duty was imposed upon "clothing, ready made, wearing apparel of every description," etc., "except knit goods," and that in Act 1890, par. 396, this exception was stricken out, is very persuasive that congress intended that no articles of wearing apparel should be excepted from the duty prescribed in that section because they were knit goods.—*Id.*

Under Act March 3, 1883, Schedule K (22 Stat. 509, 510), rugs, made as rugs, and clearly distinguishable as such by reason of their process of manufacture, size, shape, pat-

tern, etc., were dutiable at 40 per cent. ad valorem; but rugs made from pieces of carpets or carpeting were subject to the same rate imposed upon the kind of carpets or carpeting from which they were made.—*Beuttell v. Magone*, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 454, reversing judgment (C. C.) 48 F. 157.

In Schedule K of the act of March 3, 1883 (22 Stat. 488), the words, in class 2 "combing wools," apply only to the first part of the clause, which enumerates wools, and not to the latter part, reading, "and also all hair of the alpaca, goat, and other like animals"; and such hairs, whether fit for combing or not, are dutiable at a uniform rate of 10 cents a pound. Common goat hair is therefore included in this specification, and is not comprehended in the clause (paragraph 717) relating to hair "not specially provided for in this act."—*Cooper v. Dobson*, 157 U. S. 148, 15 S. Ct. 568, 39 L. Ed. 652, reversing judgment (D. C.) *Dobson v. Cooper*, 46 F. 184, and approving *United States v. Hopewell*, 51 F. 798, 2 C. C. A. 510.

Scoured wool, made up in England into the form of "tops," which were afterwards purposely torn up in order to be imported as "waste," was not classifiable, under the act of 1883 (22 Stat. 508), as "waste," nor as manufactures of wool, but was dutiable at 60 cents per pound, under the provision imposing treble duties upon scoured wool as compared with unwashed wool, and the further provision imposing double duties in case of wools purposely changed in character or condition for the purpose of evading the duty properly chargeable upon them.—*Patton v. United States*, 159 U. S. 500, 16 S. Ct. 89, 40 L. Ed. 233, affirming judgment (D. C.) *United States v. Patton*, 46 F. 461.

The provision in Act 1883 (22 Stat. 508), imposing double and treble duties, respectively, upon wools imported washed and wools imported scoured, refers not to the commercial designation, but to the fact whether the wool has been actually washed or scoured or is imported unwashed.—*Id.*

Merchantable wool "tops," purposely torn into fragments for the purpose of being imported as "waste," were not commercially known as "waste" at the time of the passage of the tariff act of 1883, and therefore are not included in that designation, and the term will be presumed to have been used in the tariff act in its ordinary sense of refuse.—*Id.*

The word "waste," as used in respect to wools in the tariff act of 1883 (22 Stat. 508), means refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture.—*Id.*

Merchantable wool "tops," which have been torn into fragments for the purpose of changing their character from that of tops to that of "waste," in order to evade the duty to which the wool would be subject in the form of tops, is liable to pay the double duty expressly imposed in such cases by the act of 1883 (22 Stat. 508), irrespective of the question whether such torn-up tops were commercially known as "waste" or "top waste" or not.—*Patton v. United States*, 159 U. S. 500, 16 S. Ct. 89, 40 L. Ed. 233, affirming judgment (D. C.) *United States v. Patton*, 46 F. 461, distinguishing *Merritt v. Welsh*, 104 U. S. 694, 26 L. Ed. 896, and *Seeburger v. Farwell*, 139 U. S. 608, 11 S. Ct. 650, 35 L. Ed. 297.

By the tariff acts of 1890 and 1894 the distinction made in previous tariff laws between woolens and worsteds was no longer recognized; and, as worsteds are in fact made of wool, the provision in paragraph 297 of the act of 1894 declaring that the reduction of duties therein provided for on "manufactures of wool" should not take effect until January 1, 1895, included worsted goods. 72 F. 1008, 19

C. C. A. 343 and 68 F. 908 (C. C.) reversed.—*United States v. Klump*, 18 S. Ct. 311, 169 U. S. 209, 42 L. Ed. 720.

35. Silks and silk goods (Schedule L).
See 15 Cent. Dig. Cust. Dut. §§ 109-114.

Under Act June 30, 1864, c. 171, § 8 (13 Stat. 218), imposing a duty of 60 per cent. on "silk laces," and a duty of 50 per cent. on "all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," an article of silk and cotton, bought and sold as "spotted or dotted net," but which was a lace, in which silk was the component material of chief value, was a "silk lace," and subject to a duty of 60 per cent.—*Drew v. Grinnell*, 115 U. S. 477, 6 S. Ct. 117, 29 L. Ed. 453.

Schedule K (Act March 3, 1883) imposes a duty of 35 per cent. on "all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for" in the act. Schedule L imposes a duty of 50 per cent. on "all goods, wares, and merchandise made of silk, or of which silk is the component material of chief value." *Held*, that cloth, of which silk is the component material of chief value, is dutiable under Schedule L, though it is made partly of wool.—*Hartman v. Meyer*, 135 U. S. 237, 10 S. Ct. 751, 34 L. Ed. 110, affirming (C. C.) 28 F. 358.

36. Pulp, papers, and books (Schedule M).
See 15 Cent. Dig. Cust. Dut. §§ 115-120.

Tissue paper for making letter-press copies of written matter is within the clause imposing a duty of 35 per cent. ad valorem "on all other paper not otherwise provided for," and not within the clause provided for "paper, * * * printing, unsized, used for books and newspapers exclusively, 20 per cent. ad valorem." Rev. St. § 2504, Schedule M.—*Lawrence v. Merritt*, 127 U. S. 113, 8 S. Ct. 1099, 32 L. Ed. 91.

Under Rev. St. § 2499, as amended by Act March 3, 1883, providing that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component materials of chief value may be chargeable," photographic albums, composed of paper, leather, and metal clasps, the paper being the material of chief value, are dutiable at 15 per cent. ad valorem, under Schedule M of such act, as articles not specially enumerated, of which paper is a component material.—*Liebenroth v. Robertson*, 144 U. S. 35, 12 S. Ct. 607, 36 L. Ed. 336, reversing judgment (C. C.) 33 F. 457.

Paper coated, colored, and embossed to imitate leather, or coated with flock to imitate velvet, and known to the trade at the time of the passage of the act of March 3, 1883, as "fancy papers," is dutiable at 25 per cent., as paper not specially enumerated or provided for, and not at 15 per cent., as a manufacture of paper.—*Dejonge v. Magone*, 159 U. S. 562, 16 S. Ct. 119, 40 L. Ed. 260.

37. Sundries (Schedule N).

See 15 Cent. Dig. Cust. Dut. §§ 121-145.

Marble statues executed by professional sculptors in the studio and under the direction of another professional sculptor, whether from models just made by a professional sculptor, or from antique models whose author is unknown, are "professional productions of a statuary or of a sculptor," liable to a duty of only 10 per cent. ad valorem, under Rev. St. § 2504, Schedule M.—*Tutton v. Viti*, 108 U. S. 312, 2 S. Ct. 687, 27 L. Ed. 737.

"Rosaries" are not an enumerated article in the tariff act (Rev. St. tit. 33), and under

section 2499, which provides, as to nonenumerated articles, that "on all articles manufactured from two or more materials the duty shall be * * * the highest rate at which any of its component articles may be chargeable," they are liable to the duty of 50 per cent. ad valorem imposed by section 2504 on "beads and bead ornaments."—*Benziger v. Robertson*, 122 U. S. 211, 7 S. Ct. 1169, 30 L. Ed. 1149.

Shells were imported into the United States, which, before their importation, had their outer layers cleaned off by acid, and their second layers ground off by an emery wheel so as to expose the brilliant interior. They were sold for ornaments, and also used for buttons, handles to penknives, etc., without, however, any new or distinctive name or use after such treatment. *Held*, that such shells were not within the sense of section 2504 of the Revised Statutes (Schedule M, p. 481, 2d Ed.), which imposes a duty of 35 per cent. ad valorem upon manufactures of shells, but that they fell under section 2505 (page 488), which exempts from duty "shells of every description not manufactured."—*Hartranft v. Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012; *Hartranft v. Winters*, 121 U. S. 616, 7 S. Ct. 1244, 30 L. Ed. 1015.

Under the tariff act of March 3, 1883 (22 Stat. 488), ribbons made of silk, or of which silk is the component material of chief value, and which the jury found are commonly and principally used in trimming hats, were dutiable at 20 per cent. ad valorem, as "hat trimmings," under Schedule N, and not at 50 per cent., under Schedule L, as unenumerated silk merchandise.—*Hartranft v. Langfeld*, 125 U. S. 128, 8 S. Ct. 732, 31 L. Ed. 672; *Robertson v. Edelhoff*, 132 U. S. 614, 10 S. Ct. 186, 33 L. Ed. 477; *Cadwalader v. Wanamaker*, 149 U. S. 532, 13 S. Ct. 979, 37 L. Ed. 837; *Walker v. Seeberger*, 149 U. S. 541, 13 S. Ct. 981, 37 L. Ed. 839, reversing (D. C.) 38 F. 724; *Hartranft v. Meyer*, 149 U. S. 544, 13 S. Ct. 982, 37 L. Ed. 840.

Under Act March 3, 1883 (22 Stat. 488), relating to the duty on cotton and silk goods, and placing eider down on the free list, and levying a duty of 20 per cent. ad valorem on all manufactured articles not enumerated or provided for in the act, quilts composed of cotton and eider down, or silk and eider down, the eider down in each case being the component material of chief value, are dutiable, on importation into the United States, at 20 per cent. ad valorem, as manufactured articles not enumerated.—*Hartranft v. Sheppard*, 125 U. S. 337, 8 S. Ct. 920, 31 L. Ed. 763.

Rev. St. tit. 33, Schedule E, requires a duty of 45 per cent. for "copper in rolled plates, * * * and all manufactures of copper, or of which copper shall be a component of chief value, not otherwise provided for." Schedule M requires 10 per cent. for "paintings and statuary not otherwise provided for, * * * but the term 'statuary' * * * shall be understood to include professional productions of a statuary or of a sculptor only." Plaintiff imported bronze statues and statuettes, and, being compelled to pay 45 per cent., sued to recover back all but 10 per cent. It was shown that all of the statues, except two, were made by manufacturers or mechanics, by means of artists' models from which any number could be cast. Expert witnesses testified that the process was purely mechanical, but that it was necessary to use the model of a sculptor. There was testimony that two of the statues were modeled by an artist, and manufactured under his personal supervision. *Held*, that it was error to refuse to instruct in behalf of defendant that if the imported articles were made, not by professional sculptors or statuary, or by their as-

sistants under their direction, but by skilled workmen or mechanics in the employ of the manufacturer, the verdict should be for defendant.—*Merritt v. Tiffany*, 132 U. S. 167, 10 S. Ct. 52, 33 L. Ed. 299.

Pieces of ivory for keys of pianos and organs, and made into the proper shapes and sizes for certain octaves of those instruments, and sold for that purpose, are not dutiable as "musical instruments," but as manufactures of ivory, under Rev. St. § 2504, Schedule M, enacted June 22, 1874, and Rev. St. § 2502, Schedule N, enacted March 3, 1883 (22 Stat. 511), neither of which imposes the same rate on parts of musical instruments as on musical instruments.—*Robertson v. Gerdan*, 132 U. S. 454, 10 S. Ct. 119, 33 L. Ed. 403.

"Dental rubber," although composed of a mixture of rubber with sulphur and coloring matter, is dutiable, as an "article composed of India rubber," at 25 per cent. ad valorem, under Rev. St. § 2502.—*Junge v. Hedden*, 146 U. S. 233, 13 S. Ct. 88, 36 L. Ed. 953, affirming judgment (C. C.) 37 F. 197.

The word "article," in this section, includes things partly or not at all manufactured, as well as those completely manufactured.—*Id.*

Plaintiff imported packages of paper, specially prepared as cigarette wrappers, cut to the proper size, and separated into divisions of about 250 pieces, being the proper number for a cigarette book. By a separate importation, he brought in pasteboard covers of corresponding size, to be used with the paper in making cigarette books by brushing one edge of each subdivision of paper with adhesive material, and cementing the same into the covers. His intention was to unite the two importations into cigarette books, and that was the only form in which such paper had been sold at retail. A part of the paper, however, was sold directly to manufacturers of cigarettes. *Held*, that the importations were dutiable at 70 per cent. ad valorem, as "smokers' articles," within Schedule N of the tariff act of 1883 (22 Stat. 513, c. 121), and not at 15 per cent., as manufacturers of paper not specially enumerated, under Schedule M (22 Stat. 510).—*Isaacs v. Jonas*, 148 U. S. 648, 13 S. Ct. 677, 37 L. Ed. 596; *United States v. Isaacs*, 148 U. S. 654, 13 S. Ct. 679, 37 L. Ed. 598.

Old India rubber shoes, purchased and imported for the same purposes as crude rubber, the commercial value of which is due solely to the rubber which they contain, and not the preparation or manufacture which they have undergone, were exempt from duty, under the act of March 3, 1883 (22 Stat. 491, § 2499), as "similar in material and quality" to crude rubber.—*Cadwalader v. Jessup & Moore Paper Co.*, 149 U. S. 350, 13 S. Ct. 875, 37 L. Ed. 764, affirming judgment (C. C.) 43 F. 288.

Under the tariff act of March 3, 1883, goods composed, some entirely of silk, some chiefly of silk, and some chiefly of metal, and known by the general name of "trimmings," though they have specific names to distinguish one from the other, and some of which are used exclusively, and the others chiefly, for the making and ornamenting of hats, bonnets, and hoods, were dutiable at 20 per cent., under Schedule N, as trimmings for hats, etc., and not at 50 per cent. for the goods composed wholly or chiefly of silk, and 45 per cent. for those composed chiefly of metal, under Schedules L and C, respectively.—*Walker v. Seeberger*, 149 U. S. 541, 13 S. Ct. 981, 37 L. Ed. 839, reversing judgment (D. C.) 38 F. 724, and following *Cadwalader v. Wanamaker*, 149 U. S. 532, 13 S. Ct. 979, 37 L. Ed. 837.

Under the tariff act of March 3, 1883, piece goods composed of silk, or of which silk

is the component material of chief value, which are bought and sold under the commercial designation of "chinas" and "marcelines," and which the jury finds are "trimmings," chiefly used in making hats and bonnets, were dutiable at 20 per cent., as trimmings used in making or ornamenting hats, bonnets, and hoods, and not at 50 per cent., under Schedule L, as unenumerated silk merchandise. Mr. Justice Brewer and Mr. Justice Brown, dissenting, on the ground that these articles are not "trimmings."—Id.

By the use of the expression "manure and all substances expressly used for manure," found in the free list of the tariff act, of 1883, congress signified that any article coming within this description should be exempt from duty, although it might be a chemical product scientifically classifiable by name under "Schedule A—Chemical Products."—*Magone v. Heller*, 150 U. S. 70, 14 S. Ct. 18, 37 L. Ed. 1001, reversing judgment (C. C.) *Heeler v. Magone*, 38 F. 908.

The word "toys," in Schedule N of the tariff act of March 3, 1883, is to be taken in its commercial meaning at that date (there being nothing in the act to show a contrary intent), if shown to have any trade meaning different from the popular use.—*Cadwalader v. Zeh*, 151 U. S. 171, 14 S. Ct. 288, 38 L. Ed. 115, affirming judgment (C. C.) *Zeh v. Cadwalader*, 42 F. 525.

"Chinese goatskins," tanned with the hair on, and sewed together in pieces 18 inches wide and from 36 to 48 inches long, and used as rugs, sleigh and carriage robes, or cut up for lap robe and overcoat trimmings, were not dutiable as "rugs," under Schedule K of the act of March 3, 1883.—*Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 L. Ed. 560, reversing judgment *Schlesinger v. Seeberger*, 40 F. 872.

Paragraph 467 in the free list of the tariff act of 1894, which reads as follows: "Diamonds; miners,' glaziers,' and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks,"—does not exempt from duty diamonds except of the classes enumerated, precious stones of all kinds being made dutiable by paragraph 338. The word "diamonds," beginning the paragraph quoted, is designated merely as a heading, and should be read as though followed by a colon.—*Keck v. United States*, 19 S. Ct. 254, 172 U. S. 434, 43 L. Ed. 505.

Loose drilled pearls, unset and unstrung, held dutiable at 10 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, par. 436, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), as pearls in their natural state, not strung or set, and not under paragraph 434 at 60 per cent. ad valorem.—(1912) *United States v. Citroen*, 32 S. Ct. 259, 223 U. S. 407, 56 L. Ed. 486, affirming judgment (1909) *Citroen v. United States*, 166 F. 693, 92 C. C. A. 365.

38. Free list.

See 15 Cent. Dig. Cust. Dut. §§ 25-28, 30, 72.

A citizen of the United States arriving home from a visit to Europe with his family in the end of September, by a vessel, brought with him wearing apparel, bought there for his and their use, to be worn here during the season then approaching, "not excessive in quantity for persons of their means, habits, and station in life," and their ordinary outfit for the winter. A part of the articles had not been worn, and duties were exacted by the collector on all those articles. Held that, under Rev. St. § 2505, now section 2503, by virtue of section 6 of Act March 3, 1883, c. 121, § 6 (22 Stat. 521), exempting from duty "wearing apparel in actual use and other personal effects (not merchandise)

*** of persons arriving in the United States," the proper rule to be applied was to exempt from duty such of the articles as fulfilled the following conditions: (1) Wearing apparel owned by the passenger, and in a condition to be worn at once, without further manufacture; (2) brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; (3) suitable for the season of the year which was immediately approaching at the time of arrival; (4) not exceeding in quantity or quality or value what the passenger was in the habit of ordinarily providing for himself and his family at that time, and keeping on hand for his and their reasonable wants in view of their means and habits in life, even though such articles had not been actually worn.—*Astor v. Merritt*, 111 U. S. 202, 4 S. Ct. 413, 28 L. Ed. 401.

A carriage in use abroad for a year by its owner, who brings it to this country for his own use here, and not for another person, nor for sale, is "household effects" under Rev. St. § 2502, and free from duty.—*Arthur v. Morgan*, 112 U. S. 495, 5 S. Ct. 241, 28 L. Ed. 825.

Lumber planed on one side, and tongued and grooved, to be used as flooring and sheathing, is entitled to be admitted free of duty, as "sawed boards, plank, deals and other lumber, rough and dressed," under Act Aug. 28, 1894, par. 676 (28 Stat. 546), and is not dutiable as "house or cabinet furniture, of wood, wholly or partly finished, manufactures of wood," under paragraph 181 (Id. 521). Judgment 79 F. 75, 24 C. C. A. 449, affirmed.—*United States v. Dudley*, 19 S. Ct. 801, 174 U. S. 670, 43 L. Ed. 1129.

The general words, "preparations *** fit for use as starch," are insufficient to show that an article fit for such use, but which is specially named on the free list, is "otherwise specially provided for" so as to prevent its exemption from duty. Judgment *Wise v. Chew Hing Lung*, 83 F. 162, 27 C. C. A. 494, reversed.—*Chew Hing Lung & Co. v. Wise*, 20 S. Ct. 320, 176 U. S. 156, 320, 44 L. Ed. 412.

Tapioca flour, being one of the three forms of tapioca known to commerce, is entitled to free entry under the tariff act of 1890, par. 730, as tapioca, even if it should be deemed fit for use as starch, so that, if not named on the free list, it would have been dutiable under paragraph 323, as a preparation fit for use as starch.—Id.

The omission from Tariff Act July 24, 1897, c. 11, Free List, par. 638, 30 Stat. 200 [U. S. Comp. St. 1901, p. 1686], of the provisions of prior tariff acts for the free entry of casts, was not intended to prevent the free entry of such casts as also come within the designation of "casts of sculpture," which, under paragraph 649 (30 Stat. 201 [U. S. Comp. St. 1901, p. 1687]), are entitled to free entry where specially imported, in good faith, for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or literary purposes. Judgment 113 F. 1016, 51 C. C. A. 587, reversed.—*Benziger v. United States*, 24 S. Ct. 189, 192 U. S. 38, 48 L. Ed. 331.

Plaster casts of clay models, though painted and gilded and produced in unlimited quantities, are "casts of sculpture," which, under Tariff Act July 24, 1897, c. 11, Free List, par. 649, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1687], are entitled to free entry where specially imported, in good faith, for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or literary purposes.—Id.

A growth on skins of Mocha sheep imported from Arabia, which is commercially known,

designated, and dealt in as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 300, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1696], as wool on the skin, but is entitled to free entry under paragraph 664, placing on the free list "skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this act."—(1907) *Goat & Sheepskin Import Co. v. United States*, 27 S. Ct. 634, 206 U. S. 194, 51 L. Ed. 1022, reversing judgment (1906) 145 F. 1022, 74 C. C. A. 82.

◀39. Nonenumerated articles.

See 15 Cent. Dig. Cust. Dut. §§ 146-149.

◀40. — In general.

See 15 Cent. Dig. Cust. Dut. § 146.

Plain glazed and plain enameled tiles, used for hearths, bathrooms, walls, dados, wainscoting, and ornamental purposes, are sufficiently comprehended in the words, "Earthenware, * * * white, glazed, or edged, composed of earthy or mineral substances, not specially enumerated" (dutiable at 55 per cent.), as used in Act March 3, 1883, Schedule B, par. 4 (Rev. St. § 2502), to take them out of the operation of the similitude clause (Rev. St. § 2499), as being similar to either encaustic or paving tiles; and, the jury having found that they were not paving tiles, the goods are dutiable under this paragraph.—*Rossman v. Hedden*, 145 U. S. 561, 12 S. Ct. 925, 36 L. Ed. 817, affirming judgment (C. C.) 37 F. 99.

◀41. — Raw or unmanufactured articles.

Natural gas was exempt from duty under Act Oct. 1, 1890 (26 Stat. 604, 607) par. 496, as a "crude bitumen," or paragraph 651, as a "crude mineral, not advanced in value by manufacture," etc., and was not dutiable under section 4 as a raw or unmanufactured article not enumerated.—*United States v. Buffalo Natural Gas Fuel Co.*, 19 S. Ct. 200, 172 U. S. 339, 43 L. Ed. 469, affirming judgment 78 F. 110, 24 C. C. A. 4, which affirms *In re Buffalo Natural Gas Fuel Co.*, 73 F. 191.

◀44. — Similitude to articles enumerated in general.

See 15 Cent. Dig. Cust. Dut. § 148.

An article not enumerated in the tariff laws, but which bears a substantial similitude in material, quality, texture, or use to which it may be applied, to any article enumerated, may be charged accordingly. It is only when nothing can be found to which it bears the requisite similitude that it will be assessed at the highest rates chargeable on any of its component materials.—*Arthur v. Fox*, 108 U. S. 125, 2 S. Ct. 371, 27 L. Ed. 675.

The Japanese beverage "sake" is properly classified under the similitude clause of Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626), as similar to still wine, in view of the uniform customs administrative construction under which, on a protest by an importer in 1894 against classification by similitude to distilled liquor, sake was classified by similitude to still wine, which ruling has uniformly been followed, and has received at least a qualified approval by Congress in enacting such tariff act without modifying the provisions of the earlier act upon which such ruling was based.—*Komada & Co. v. United States*, 30 S. Ct. 136, 215 U. S. 392, 54 L. Ed. 249.

Imitation horsehair produced from cotton waste by a chemical process, being like cotton yarn as to material and use, is dutiable under the similitude clause of Tariff Act July 24,

1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), at the rate levied by section 1, schedule I, par. 302, on cotton yarn, and not under section 6, as a nonenumerated manufactured article.—(1911) *United States v. Eckstein*, 32 S. Ct. 65, 222 U. S. 130, 56 L. Ed. 125, affirming judgment (1909) *Eckstein v. United States*, 167 F. 802, 93 C. C. A. 192.

◀47. Packages and coverings.

See 15 Cent. Dig. Cust. Dut. § 20.

Rev. St. § 2504, Schedule D, imposes the following customs duties: "Ale, porter, and beer, in bottles, 35 cents per gallon; otherwise than in bottles, 20 cents per gallon." Schedule B of the same section imposes the following customs duties: "Glass bottles or jars, filled with articles not otherwise provided for, 30 per centum ad valorem." "All manufacturers of glass * * * not otherwise provided for, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for, 40 per centum ad valorem." Under these provisions, the bottles in which ale and beer are imported are subject to a duty of 30 per cent. ad valorem, in addition to the duty of 35 cents per gallon on the ale and beer imported in the bottles.—*Schmidt v. Badger*, 107 U. S. 85, 1 S. Ct. 530, 27 L. Ed. 328; *Merritt v. Park*, 108 U. S. 109, 2 S. Ct. 310, 27 L. Ed. 669.

Under Rev. St. § 2504, Schedule B, which imposes a duty of 30 per cent. ad valorem on glass bottles or jars filled with articles not otherwise provided for, such duty is chargeable on bottles filled with natural mineral water, although by section 2505, mineral water, not artificial, is declared to be exempt from duty.—*Merritt v. Stephani*, 108 U. S. 106, 2 S. Ct. 308, 27 L. Ed. 668.

The exaction of duty on the packing of goods, whether packing the goods in the cartons, or the cartons in the outer case, or lining the outer case, is not warranted by law. Though these were "charges" under former statutes, they are abolished by Act March 3, 1883 (22 Stat. 523).—*Oberteuffer v. Robertson*, 116 U. S. 499, 6 S. Ct. 462, 29 L. Ed. 706.

The fact that the small, thin, wood boxes in which safety and parlor matches are put up have a prepared surface, to be used in igniting the matches, does not bring them within the proviso of Act March 3, 1883, § 7 (22 Stat. 523), providing that, if the coverings of imported goods be designed for use otherwise than in the bona fide transportation of the goods to the United States, they shall be subject to an ad valorem duty of 100 per cent.—*Magone v. Rosenstein*, 142 U. S. 604, 12 S. Ct. 391, 35 L. Ed. 1130, affirming judgment (C. C.) *Rosenstein v. Magone*, 34 F. 120, and following *Oberteuffer v. Robertson*, 116 U. S. 499, 6 S. Ct. 462, 29 L. Ed. 706.

◀52. Evidence as to classification.

See 15 Cent. Dig. Cust. Dut. §§ 248-250.

Where it is claimed that certain goods have been improperly subjected to duty as delaines, under said act, it is proper to inquire of a witness whether the phrase, "of similar description," is a commercial term, and, if so, what is its meaning among merchants and importers; but it is not proper to show by experts whether the goods in question were known in commerce as goods of similar description to delaines.—*Schmieder v. Barney*, 113 U. S. 645, 5 S. Ct. 624, 28 L. Ed. 1130.

The question being whether white beans are "vegetables," within the meaning of the schedule of Act March 3, 1883, entitled "Provisions," or whether they are "seeds," under the head of "Free List—Sundries," evidence of the common designation of beans as an article of food should be admitted.—*Robertson v. Salo-*

mon, 130 U. S. 412, 9 S. Ct. 559, 32 L. Ed. 995.

In an action to recover duties paid on importations whose proper classification is disputed, evidence to show what the importations in question were called in trade at the time of the trial is admissible, though it be 5 years after the entry of such importations, and 10 years after the enactment of the statute under which they are held dutiable.—*Pickhardt v. Merritt*, 132 U. S. 252, 10 S. Ct. 80, 33 L. Ed. 353.

In an action to recover duties paid under protest the inquiry was whether the goods were dutiable, under Schedule K of the act of March 3, 1883, as "knit goods, made on knitting frames," as assessed by the collector, or, under Schedule N, as "bonnets, hats, and hoods for men, women, and children," etc., as claimed by the importers. *Held*, that it was proper to admit evidence that the commercial designation of the article in question at the date of the act was "Scotch caps," and not "bonnets for men," for, if no such term as "bonnets" was applicable to head coverings for men, congress could not have intended to apply the term to goods which were elsewhere specifically described as "goods made on knitting frames."—*Toplitz v. Hedden*, 146 U. S. 252, 13 S. Ct. 70, 36 L. Ed. 961, affirming judgment (C. C.) 33 F. 617.

Usage sufficient to establish a commercial designation which will control the meaning of words in a tariff act cannot be made out by the evidence of one dealer, whose testimony is practically limited to his own usage, especially when he admits that the articles are sometimes bought and sold under other names.—*Berbecker v. Robertson*, 152 U. S. 373, 14 S. Ct. 590, 38 L. Ed. 484.

III. COLLECTION DISTRICTS AND OFFICERS.

Immunity of United States from suit, as protection to customs officers, see United States, ¶125.

Injunction to control action of, see Injunction, ¶75.

¶53. Authority of Secretary of Treasury in general.

See 15 Cent. Dig. Cust. Dut. § 150.

Under Rev. St. § 2505, which provides that "all animals alive, specially imported for breeding purposes from beyond the seas, shall be admitted free upon proof thereof satisfactory to the secretary of the treasury, and under such regulations as he may prescribe," the secretary of the treasury cannot, by regulations, confine the operation of the statute to animals of "superior stock."—*Morrill v. Jones*, 106 U. S. 466, 1 S. Ct. 423, 27 L. Ed. 267.

Act May 9, 1890 (26 Stat. 105), declaring that "the secretary of the treasury be, and he hereby is, authorized and directed to classify as woolen cloths all imports of worsted cloths," etc., does not require that the secretary in person shall make the classification, but only that it shall be done in the usual manner by the customs department, of which the secretary is the responsible head.—*United States v. Ballin*, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321, reversing judgment (C. C.) in re Ballin, 45 F. 170.

The customs regulation which requires that, where a shipment of goods is without an invoice, all the packages shall be sent to the public store for examination and appraisement, is a valid exercise of the authority of the treasury department, under Rev. St. § 2989.—*Kennedy v. Magone*, 153 U. S. 212, 15 S. Ct. 814, 39 L. Ed. 954, affirming judgment (C. C.) 41 F. 768.

¶55. Collectors.

See 15 Cent. Dig. Cust. Dut. §§ 156-162.

There is no warrant, under Act March 2, 1799 (1 Stat. 706), for a charge by the collector of a fee for putting on an invoice a stamp or certificate as to the presentation of the invoice, which is a mere memorandum between officers in the custom house; nor a fee for an oath to an entry or for a jurat to such oath; nor a fee for an order from the collector to the storekeeper to deliver examined packages.—*Cochran v. Schell*, 107 U. S. 617, 2 S. Ct. 301, 27 L. Ed. 490.

Act June 10, 1880, § 10, requires a collector of customs, when notified of a carrier's lien, to give the carrier reasonable notice of the delivery to the consignee. *Held*, that the payment of freight to the collector's deputy without notice to the carrier, under a long-standing custom of the office, of which custom the collector was ignorant, and which payment the collector gave his deputy no express authority to receive, was not payment to the collector, so as to render him liable in an action to recover the charges paid, brought by the carrier, though the rule would be different if the action had been brought for damages for failure to give the statutory notice.—*Cleveland, C. C. & I. R. Co. v. McClung*, 119 U. S. 434, 7 S. Ct. 262, 30 L. Ed. 465, affirming judgment (C. C.) 15 F. 905.

Act June 10, 1880, § 10, requires a collector of customs, when notified of a carrier's lien, to give to the carrier reasonable notice of delivery. In an action against a collector, the carrier alleging a failure to give the statutory notice, and that the collector had received the charges for freight from the consignees, and failed to pay it over, *held*, that the case made out was an action for the charges collected, and not an action of damages for failure to give the statutory notice, and that, inasmuch as the carrier failed to aver that its charges were unpaid, and as it ratified their payment by suing the collector for receiving them, the collector was not liable for not giving the notice.—*Id.*

Plaintiff's trunk, on her arrival at the port of New York, was examined by the custom-house officials, and erroneously decided to contain dutiable articles, and was therefore detained on the dock, in accordance with the regulations of the custom house, until it could be sent to the public store for appraisement. Before it could be removed it was destroyed by fire. *Held*, that the collector, being a public officer, was not chargeable with the negligence or misconduct of his subordinates in the course of their employment, in the absence of evidence that such subordinates were incompetent or improperly selected.—*Robertson v. Sichel*, 127 U. S. 507, 8 S. Ct. 1286, 32 L. Ed. 203.

The collector of customs is not responsible in damages for negligent acts on the part of his subordinates, in the absence of proof that such subordinates were known by him to be careless or incompetent, or were selected by him without proper care.—*Id.*

Rev. St. § 970, providing for a certificate of probable cause of seizure when judgment is given for the claimant, is confined to cases in which the collector or other officer makes a seizure, followed by a suit or prosecution in the name of the United States for a penalty or forfeiture, and does not apply where a vessel is simply detained, under Rev. St. § 2064, for nonpayment of duties claimed. A certificate given in such a case does not protect the collector from a judgment for damages.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D. C.) 49 F. 98.

¶59. Merchant appraisers.

See 15 Cent. Dig. Cust. Dut. § 165.

A merchant appraiser is not an "officer" or "inferior officer" of the United States, who

is required, by Const. art. 2, § 2, to be appointed by the president, or a court of law, or the head of a department; nor is he a "clerk," "agent," or "person employed," in the customs department, who is required, by Act Cong. Jan. 16, 1883, c. 27, § 6, to undergo a competitive examination before appointment, and hence congress had power to authorize the collector to "select" him as prescribed in said section 2930.—*Auffmordt v. Hedden*, 137 U. S. 310, 11 S. Ct. 103, 34 L. Ed. 674, affirming judgment (C. C.) 30 F. 360.

60. Inspectors and other subordinate officers.

See 15 Cent. Dig. Cust. Dut. § 186.

Claimant was appointed occasional weigher of customs at a salary of \$2,000 per annum, "when employed." After a service of 10 years, for each month of which he was paid and received for his salary "for one month, Sundays excepted," he brought action for the time covered by the Sundays, on the ground that his contract was for \$2,000 a year, as an absolute salary. *Held*, that he was not entitled to recover.—*Pray v. United States*, 106 U. S. 594, 1 S. Ct. 483, 27 L. Ed. 265.

Rev. St. § 2733, providing that customs inspectors shall receive three dollars "for every day" they actually serve, refers to calendar days; and a night inspector who, after performing an all-night service, has not been excused from duty the following night, as provided in the treasury regulations, is precluded by Rev. St. §§ 1764, 1765, from claiming extra compensation therefor. *Decree*, 30 Ct. Cl. 208, reversed.—*United States v. Garlinger*, 18 S. Ct. 364, 169 U. S. 316, 42 L. Ed. 762.

A customs inspector who, though complaining of being required to work overtime, yet for several years accepts payment at the regular rate provided by statute, without claiming extra compensation, and who brings suit therefor two years after leaving the service, may well be considered as having accepted the payments as in full, so as to preclude him from further claims, in the absence of fraud or coercion.—*Id.*

IV. ENTRY AND APPRAISAL OF GOODS, BONDS, AND WAREHOUSES.

65. Declarations and statements accompanying invoices.

See 15 Cent. Dig. Cust. Dut. § 171.

Under section 3 of the customs administration act of June 10, 1890 (26 Stat. 131), providing that the invoice accompanying any imported merchandise shall have indorsed thereon a declaration showing, inter alia, that such invoice contains, if such merchandise was obtained by purchase, a true statement of the actual cost thereof, and, when obtained in any other manner than by purchase, the actual market value thereof in the country from whence it was exported; and section 7, as amended by section 32 of the tariff act of July 24, 1897, providing that the importer, at the time he makes his entry, may make such addition to the cost or value given in the invoice, where the merchandise has been actually purchased, as may, in his opinion, raise it to the actual market value, and that the collector shall cause the actual market value thereof, whether such merchandise has been actually purchased or procured otherwise than by purchase, to be appraised,—it was obligatory on the importer to furnish the appraiser and collector with a true valuation of such merchandise.—*Hoenigshaus v. United States*, 19 S. Ct. 305, 172 U. S. 622, 43 L. Ed. 576.

68. Entry of articles as exempt from duty.

See 15 Cent. Dig. Cust. Dut. § 173.

Under Rev. St. §§ 2853-2855, 2860, requiring all "invoices" of merchandise imported to be made in triplicate, and certified by the consul, and providing that "no merchandise" shall be admitted to entry unless the invoice conforms to the requirements, and the consular regulations of 1874 and 1881, providing that "all invoices of importations" must be authenticated by the consul, an invoice authenticated by the consul is necessary in the case of an importation of goods not subject to duty.—*Phelps v. Siegfried*, 142 U. S. 602, 12 S. Ct. 391, 35 L. Ed. 1128, reversing judgment (C. C.) 40 F. 660, and following *United States v. Mosby*, 133 U. S. 273, 10 S. Ct. 327, 33 L. Ed. 625.

Where a package of imported goods of the same kind invoiced as free of duty is found on examination to contain a large proportion of dutiable goods, indiscriminately mixed with free goods, the customs officer is justified in assessing duty upon the entire package at the rate to which the dutiable goods are subject, and it devolves upon the importer, if dissatisfied, to ask for a re-examination, and to separate the free from the dutiable goods, or furnish evidence of the proportion of each.—*United States v. Ranlett*, 19 S. Ct. 114, 172 U. S. 133, 43 L. Ed. 393.

71. Appraisal.

See 15 Cent. Dig. Cust. Dut. §§ 176-195.

72. — In general.

See 15 Cent. Dig. Cust. Dut. § 176.

Where the consignee, on pointing out the imperfection in the invoice and desiring to have it corrected, is told by the customs officers that he must enter the goods at the value expressed in the invoice, and in no other way, he is not bound to ask for the appraisal provided for by Rev. St. § 2926 in case of an incomplete entry of goods.—*Robertson v. Bradbury*, 132 U. S. 491, 10 S. Ct. 158, 33 L. Ed. 405.

73. — Examination of goods.

See 15 Cent. Dig. Cust. Dut. § 177.

Rev. St. § 2939, providing that the collector of the port of New York shall not direct to be sent for examination and appraisal less than one package of every invoice, and one package at least out of every ten packages of merchandise, provided that, when the secretary of the treasury is of the opinion that examination of a less number will protect the revenue, he may direct examination of a less number, is not mandatory, so that though, without any special direction, a less number than one out of ten packages of an invoice is examined, the examination is not void.—*Erhardt v. Schroeder*, 155 U. S. 124, 15 S. Ct. 45, 39 L. Ed. 94.

74. — Determination of quantity of goods.

See 15 Cent. Dig. Cust. Dut. § 178.

Under Act 1883, § 246, declaring the duty on leaf tobacco of which 85 per cent. is of the requisite size and fineness of texture to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, the percentage test is to be applied to the bale as a unit, if the leaves are of such uniform character as to be collectively of one class, otherwise to the amount of each class in the bale. The separate hands in the bale are not to be taken as the unit.—*Erhardt v. Schroeder*, 155 U. S. 124, 15 S. Ct. 45, 39 L. Ed. 94.

The test of size is to be applied, not to a leaf as a whole, but to each half as divided by the stem, and there must be 85 halves out of each 100 halves having a portion sufficiently

fine in texture, of the requisite size, to make at least one wrapper.—Id.

The test of whether "100 leaves are required to weigh a pound" is applied to the whole leaves.—Id.

75. — Valuation of goods.

See 15 Cent. Dig. Cust. Dut. §§ 179-189.

Rev. St. tit. 33, Schedule L, imposing duties on imported wool, makes the appraised value of wool in its unwashed state the standard for determining the amount of ad valorem duty to be collected upon washed wool.—Arthur v. Pastor, 109 U. S. 139, 3 S. Ct. 96, 27 L. Ed. 882.

Act March 3, 1865, § 7 (13 Stat. 491, 493), and Act July 28, 1866, § 9 (14 Stat. 328, 330), provide that duties shall not be assessed upon an amount less than the invoice or entered value. Act March 2, 1867, § 1 (14 Stat. 559), provides that the duty upon wool of a certain class, the value whereof at the last port whence exported to the United States is 12 cents or less per pound, shall be 3 cents per pound, and where the value is more than 12 cents the duty shall be 6 cents. Held, in a proceeding to recover duties paid under protest, that where it appeared that the invoice value was more than 12 cents per pound, though after the purchase and before the date of shipment the market had declined and the value of the wool was then less than 12 cents, the duty was properly assessed at 6 cents.—Saxonville Mills v. Russell, 116 U. S. 13, 6 S. Ct. 237, 29 L. Ed. 554.

Rev. St. § 2907, Act June 22, 1874, § 14 (18 Stat. 189), providing that, in determining dutiable value, there shall be added to the invoice price the cost of transportation from the place of production to the place of shipment, apply only where the places of production and shipment are in the same country, and not where the import comes from one country, and is transported into and shipped from another.—Robertson v. Downing, 127 U. S. 607, 8 S. Ct. 1328, 32 L. Ed. 269.

Under Act March 3, 1883, c. 121, § 7, excluding from the estimate of duties collectible on goods imported from other countries the value of "charges" specified in Rev. St. §§ 2907, 2908, including boxes, bags, etc., used in the bona fide transportation of such goods to the United States, the collector cannot increase the dutiable value of oranges invoiced at their true market value, by reducing the value of the boxes and packing, and adding the reduction to the value of the fruit.—Badger v. Cusimano, 130 U. S. 39, 9 S. Ct. 431, 32 L. Ed. 851.

In determining what is the component material of chief value in a manufactured article, under Rev. St. § 2499, as amended by the act of 1883 (22 Stat. 491), the value of the materials should be taken at the time they were put together in the completed article, and not in their raw state, as received by the manufacturer. The express provision to this effect in the act of 1890 was merely declaratory of the law.—Seeberger v. Hardy, 150 U. S. 420, 14 S. Ct. 170, 37 L. Ed. 1129.

The market value of imported goods for purpose of assessing customs duties is to be determined by the general market value of goods of the same description, without reference to the fact that the goods cost the particular importer a less amount because of special advantages which he had.—Muser v. Magone, 155 U. S. 240, 15 S. Ct. 77, 39 L. Ed. 135.

In ascertaining the market value and wholesale price in Germany of goods imported therefrom, it is proper to include the amount of the so-called "bonification of tax," which is, in effect, a drawback or remission of taxes by the German government on goods there manufactured in bond, and withdrawn for export, and on which the tax would have been payable if withdrawn for consumption or sale in Germany.—

United States v. Passavant, 18 S. Ct. 219, 169 U. S. 16, 42 L. Ed. 644.

Where imported merchandise of a certain character was subject to specific duties at a rate to be regulated by the value thereof, and in no case less than 50 per centum ad valorem, the fact that the importation in question paid such rate did not relieve the appraiser from inquiring into and determining the value of such goods.—Hoeninghaus v. United States, 19 S. Ct. 305, 172 U. S. 622, 43 L. Ed. 576.

Where it was the duty of the appraiser, in order to enable him to fix the duty on certain imported merchandise, to inquire into the value thereof, he was entitled to the aid afforded in such inquiry by the production of a true and correct invoice.—Id.

Sugar imported from Brazil, which has diminished in weight by a decrease of moisture, but improved in quality thereby, so that the quantity received here is worth as much as the original quantity shipped in Brazil, may be appraised for duties according to the grade of the sugar as it is received here, instead of its grade as it was shipped from Brazil under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1925], providing for duty upon imported merchandise assessed upon the market value in the markets of the country from whence imported and in the condition in which it was bought and sold for exportation, since the article upon which duty must be laid is that which is "imported." Judgment 99 F. 716, 40 C. C. A. 84, affirmed.—American Sugar-Refining Co. v. United States, 21 S. Ct. 830, 181 U. S. 610, 45 L. Ed. 1024.

76. — Value of foreign money.

See 15 Cent. Dig. Cust. Dut. § 190.

The valuation of foreign standard coins, which Act March 3, 1873, c. 268 (Rev. St. § 3564), requires the director of the mint to estimate annually, and the secretary of the treasury to proclaim on the 1st day of January, is as binding on collectors of customs and importers as if declared by statute, and evidence is not receivable to show that it is inaccurate.—Hadden v. Merritt, 115 U. S. 25, 5 S. Ct. 1169, 29 L. Ed. 333.

77. — Additions to entered value, and additional duties.

See 15 Cent. Dig. Cust. Dut. §§ 191-193.

When the valuation of imported merchandise, as fixed by the board of general appraisers, exceeds by more than 10 per cent. the value declared in the entry, it is the duty of the collector, under Act June 10, 1890, § 7 (26 Stat. 131), as matter of mere computation, to levy an additional sum equal to 2 per cent. of the total appraised value for each 1 per cent. by which the appraised exceeds the declared value.—Passavant v. United States, 148 U. S. 214, 13 S. Ct. 572, 37 L. Ed. 426.

Importers who have failed to accompany the entry of their importation with a true and correct invoice stating the cost or market value thereof must be required to pay the additional duty imposed by the provisions of section 32 of the tariff act of July 24, 1897, where the duty to be levied is to be regulated by the value of such goods.—Hoeninghaus v. United States, 19 S. Ct. 305, 172 U. S. 622, 43 L. Ed. 576.

Where it was obligatory on the appraiser and the collector to inquire into the value of certain imported merchandise in determining the duty properly assessable thereon, under paragraph 387 of the tariff act of July 24, 1897, providing that merchandise of such character was subject to specific duties at various specified rates, depending on the weight and certain other characteristics of such goods, and that none thereof should pay a less rate than 50 per cent—

um ad valorem, such duty was one "regulated" in some manner "by the value" of such merchandise, within the meaning of section 32 of such act, which provides that, "if the appraised value of any article of imported merchandise subject to * * * a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, an additional duty," etc.—*Id.*

—78. — Deductions and allowances.

See 15 Cent. Dig. Cust. Dut. § 194.

Under Rev. St. § 2927, providing for a reduction of duties on goods damaged in the course of the voyage, a claim therefor is properly allowed, though not made until after the goods are entered and the estimated duties paid. *Id.* § 2928, requiring damaged goods to be appraised, and the reduction of duties applied for before entry, relates alone to merchandise taken from a wreck.—*United States v. Phelps*, 107 U. S. 320, 2 Sup. Ct. 389, 27 L. Ed. 505.

Under Rev. St. § 2921, providing that, if a deficiency of any article shall be found on examination by the appraisers, an allowance therefor shall be made in estimating duties, an allowance should be made for deficiency arising from loss, where the value of the goods is measured by weight, but not from mere shrinkage.—*Robertson v. Bradbury*, 132 U. S. 491, 10 S. Ct. 158, 33 L. Ed. 405.

There is no trade custom establishing that a ton of iron ore is a ton with the water mechanically present expelled by drying at a temperature of 212° Fahrenheit; and the duty of 75 cents per ton, imposed by Tariff Act 1883, § 6, Schedule C, was payable on the weight reported by the government weigher, without any deduction for water, except sea water taken during the voyage, for which proper deduction may be had under the provisions of Rev. St. § 2927, in respect to damaged goods.—*Earnshaw v. Cadwalader*, 145 U. S. 247, 12 S. Ct. 851, 36 L. Ed. 693.

The word "liquors," as used in the proviso of Schedule H of the tariff act of March 3, 1883 (22 Stat. 505), prohibiting any allowance for breakage, leakage, or damage in respect to "wines, liquors, cordials, or distilled spirits," is simply a misspelling of the word "liqueurs," and does not include beer.—*Hollender v. Magone*, 149 U. S. 586, 13 S. Ct. 932, 37 L. Ed. 860, reversing judgment (C. C.) 38 F. 912.

The word "draught" (or "draft"), as used in Rev. St. § 2898, which provides that "in all cases the real tare shall be allowed, * * * but in no case shall there be any allowance for draught," means an arbitrary deduction or allowance to the merchant for loss of weight in handling, differences in scales, etc., so as to insure good weight to him; and it is not a misspelling for "draft," which means waste matter, sweepings, refuse, lees, or dregs.—*Seeberger v. Wright & Lawther Oil & Lead Mfg. Co.*, 157 U. S. 183, 15 S. Ct. 583, 39 L. Ed. 665, affirming judgment (C. C.) *Wright & Lawther Lead Co. v. Seeberger*, 44 F. 258.

Under Act March 3, 1883, which makes flaxseed dutiable at "twenty cents per bushel of fifty-six pounds," less the tare, a deduction should be made for an ascertained percentage of dirt and such like impurities contained in the seed.—*Id.*

That portion of a cargo of pineapples which on arrival within the limits of a port of entry of the United States was found to be so decayed as to be utterly worthless is not duti-

able, though the loss was less than 10 per cent. of the total invoice, as entirely worthless articles are not within the provision of Customs Administrative Act June 10, 1890, § 23 [U. S. Comp. St. 1901, p. 1830], that no allowance shall be made for damage to "goods, wares, and merchandise" imported into the United States, unless the importer shall abandon to the United States a portion of such articles amounting at least to 10 per cent. of the total invoice. Judgment, *Stone v. Lawder* 101 F. 710, 41 C. C. A. 621, reversed.—*Lawder v. Stone*, 23 S. Ct. 79, 187 U. S. 281, 47 L. Ed. 178.

Congress, by enacting the proviso to Act July 24, 1897, c. 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], which differs from the proviso to Act Oct. 1, 1890, c. 1244, § 50, 26 Stat. 624 [U. S. Comp. St. 1901, p. 1950], only in substituting the word "entry" for the word "withdrawal" as the date when the weight of merchandise withdrawn from bonded warehouses is to be taken as the basis of the duty, must be deemed to have adopted the construction given to the earlier proviso by the Attorney General and followed by the executive officers charged with the administration of the law, viz., that such proviso was general in its application, and not restricted to merchandise imported before the act took effect. Judgment, *American Cigar Co. v. United States* (C. C. A. 1906) 146 F. 484, 77 C. C. A. 40, and *G. Falk & Bro. v. Same, Id.*, reversed.—*United States v. G. Falk & Bro.*, 27 S. Ct. 191, 204 U. S. 143, 51 L. Ed. 411.

The duty on imports withdrawn from bonded warehouses must be assessed on the basis of weight at the time of original entry, as prescribed by the proviso to Act July 24, 1897, c. 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], notwithstanding the addition by Act Dec. 15, 1902, c. 1, § 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 419], of a proviso to section 20 of Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 140, that the same rate of duty shall be collected upon such merchandise as may be imposed by law upon like articles imported at the time of withdrawal, since this provision refers to the rate of duty, and not to the date at which the weight is to be taken as the basis of such duty.—*Id.*

The duty upon leaf tobacco which, when withdrawn from a bonded warehouse, has lost in weight through evaporation of moisture, must be assessed on the basis of weight at the time of the original entry, as prescribed by the proviso to Act July 24, 1897, c. 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], which is general in its application, and not restricted to merchandise imported before the act took effect.—*Id.*

—79. — Conclusiveness and effect.

See 15 Cent. Dig. Cust. Dut. § 195.

Rev. St. §§ 2902, 2906, 2922, prescribe the duties of appraisers in appraising merchandise subject to import duties, so as to ascertain "the actual market or wholesale price thereof * * * in the principal markets of the country from which the same has been imported." Section 2930 provides that, if the importer is dissatisfied with the appraisement, he shall give notice thereof to the collector, who shall select an experienced merchant to be associated with a general appraiser in appraising the goods, and that the appraisement thus made "shall be final, and deemed to be the true value, and the duties shall be levied thereon accordingly." *Held*, that the appraisal of imported merchandise by the customs officers is final and conclusive on the importer, unless impeached on the ground of fraud.—*Hilton v.*

Merritt, 110 U. S. 97, 3 S. Ct. 548, 28 L. Ed. 83.

Rev. St. § 2931, provides that the decision of the collector shall be final as to the rate and amount of duties to be paid on imported goods, unless notice be given of an appeal to the secretary of the treasury, and that the decision of the secretary shall be final, and the merchandise shall be liable to duty accordingly, unless suit shall be brought within 90 days after the decision of the secretary. Section 3011 provides that any person who shall have paid any duties under protest may maintain an action triable by jury to ascertain the validity of such demand and payment, and to recover back the excess so paid. *Held*, that only questions relating to the rate and amount of duties, and not the appraisement by the customs officers, are reviewable in such action.—*Id.*

Rev. St. § 2907, provided that there should be added to the actual market value "the cost of transportation, shipment, and transshipment, with all the expenses included," from the place of production to the vessel in which shipment is made to the United States, "and all other actual or usual charges" for packing, etc. *Held*, that the decision of the appraiser as to the amount to be added as cost of transportation, etc., was not conclusive.—*Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 S. Ct. 5, 33 L. Ed. 236.

Under Rev. St. § 2930, in an action against the collector to recover duties paid under protest after reappraisement, the importer has no right to the judgment of a jury upon the value of the goods, when the appraisers were selected in conformity with the statute, and acted within the powers conferred upon them.—*Auffmordt v. Hedden*, 137 U. S. 310, 11 S. Ct. 103, 34 L. Ed. 674, affirming judgment (C. C.) 30 F. 360.

Though in an action, under Rev. St. § 3011, to recover duties paid under protest, the value of the merchandise as fixed by the appraiser cannot be questioned, his classification of tobacco, which depends on the size, fineness of texture, and weight of the leaves, is open to review.—*Erhardt v. Schroeder*, 155 U. S. 124, 15 S. Ct. 45, 39 L. Ed. 94.

The evidence of the decision of appraisers is their official returns, and, if they acted without fraud and within their powers, their decision cannot be impeached by requiring them to disclose the reason for their conclusions, or by evidence of statements made by them.—*Muser v. Magone*, 155 U. S. 240, 15 S. Ct. 77, 39 L. Ed. 135.

Under Rev. St. § 2906, providing for the appraisement, which appraisement, under section 2930, shall be final; and Act March 3, 1883, § 9, providing that if, on the appraisal, it shall appear that the actual market value cannot be ascertained to the satisfaction of the appraiser, it shall be lawful to appraise the goods by ascertaining the cost of the material, and the expense of manufacturing and preparing and putting up the goods for shipment,—the determination of appraisers that the market value can be ascertained to their satisfaction, which will be assumed from their finding such value, is conclusive.—*Id.*

The provision of Rev. St. § 2901, requiring an examination of sample packages of imported goods for appraisement by the customs officers, is for the benefit of the government, and is not mandatory, and an importer cannot avoid the payment of duties assessed on the ground that the examination was insufficient, or not made in accordance with the statute, but, if dissatisfied, should apply for a re-examination, and may, on appeal, prove by evidence the facts he claims.—*United States v. Runlett*, 19 S. Ct. 114, 172 U. S. 133, 43 L. Ed. 393.

§ 80. Reappraisal and revision.

See 15 Cent. Dig. Cust. Dut. § 194.

An application for reappraisement, under Rev. St. § 2930, is not necessary where the only ground of dissatisfaction is the addition to the appraised value of the goods of items for cartons and packing, but protest and appeal is the proper way to raise the point.—*Obertseffer v. Robertson*, 116 U. S. 499, 6 S. Ct. 482, 29 L. Ed. 706.

The general regulations of the treasury department of 1884, and the instructions of the secretary of the treasury of June 9, 1885, prescribe, among other things, that a reappraisement shall not "assume the nature of a judicial inquiry," but that the appraisers shall arrive at their conclusions, from their own knowledge as experts, substantially in the same manner as in original appraisements; that no lawyers or custom-house brokers shall be present, and the importer shall be represented by "some one belonging to his house, familiar with the facts," who shall state the facts "concisely, and not argumentatively." *Held*, that these regulations are proper, and are consistent with Rev. St. § 2902, which provides that it shall be the duty of the appraisers, "and every person who shall act as such," by all reasonable means in their power, to ascertain and appraise the actual market value and wholesale price in the principal markets of the country from which the goods were imported.—*Auffmordt v. Hedden*, 137 U. S. 310, 11 S. Ct. 103, 34 L. Ed. 674, affirming judgment (C. C.) 30 F. 360.

An importer, having demanded a reappraisement, attended on the day set, but, the government not being ready, the hearing was adjourned indefinitely, with the understanding that the importer should be notified when a new day was fixed. About nine months later notice was mailed at New York to the importer in Philadelphia that the hearing would be held the next day at noon. The importer was then in Cuba, but the letter was received at his office by his clerk, who wrote, asking a postponement. The appraiser then telegraphed the clerk that the appraisement would take place on the fifth succeeding day, but no attention was paid thereto, and the appraisement was had soon after the day fixed, the importer being unrepresented. *Held* that, in view of the fact that the importer had left the country without making any provision for a hearing during his absence, the appraisers did not act unreasonably, and their decision must stand.—*Earnshaw v. United States*, 146 U. S. 60, 13 S. Ct. 14, 36 L. Ed. 887, affirming judgment (D. C.) *United States v. Earnshaw*, 30 F. 672.

The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court.—*Id.*

An importer is not entitled to be present during proceedings on appraisement, to hear or examine all the testimony, and to cross-examine the witnesses; and where he is invited by the appraisers to present his views in regard to the reappraisement, and to suggest questions to be put to the witnesses, he has no ground for complaint.—*Orizet v. Hedden*, 155 U. S. 228, 15 S. Ct. 92, 39 L. Ed. 130.

The mere fact that all the cases of an importation "were by the collector ordered to the public store, and that they were there at the time of the reappraisement," does not show a specific direction by the collector that all should be examined, and render void a reappraisement made without examining all the cases, though, under Rev. St. §§ 2901, 2930, such reappraisement would be void if the collector directed an examination of all the cases, and it was not made.—*Id.*

Where the merchant appraiser examines the goods in one case out of each importation sufficiently to satisfy him that they are the

same order of goods that his firm imports, the reappraisal is not open to the objection that his examination of the goods was not sufficient to qualify him to act.—*Id.*

81. Liquidation and reliquidation.

See 15 Cent. Dig. Cust. Dut. § 197.

A reliquidation of duties based, not on a reappraisal of the value of the merchandise by the local appraiser, but on a change in the rate, and by a disallowance of a discount, and made more than one year after settlement without protest, will not sustain a demand by the government for additional duties, such settlement being final, under Act June 22, 1874, § 21 (18 Stat. 190).—*Beard v. Porter*, 124 U. S. 437, 8 S. Ct. 556, 31 L. Ed. 492.

Under Rev. St. § 2931, providing that the decision of the collector of customs as to the duties to be paid shall be conclusive unless the importer files a written protest "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption," the "liquidation" of duties on goods entered in bond may be made as soon as practicable after the entry, and protest must be filed within 10 days thereafter. Such liquidation need not be deferred until the final withdrawal of the goods for consumption.—*Merritt v. Cameron*, 137 U. S. 542, 11 S. Ct. 174, 34 L. Ed. 772.

The reliquidation by the Secretary of the Treasury of the entry of imported gunnies at the exchange value of the invoice rupee, which is also its value as a fraction of a pound, where that value differs by more than 10 per cent. from the value of the pure metal therein, as proclaimed by him at the beginning of the quarter year, is authorized by the proviso to Act Aug. 27, 1894, c. 349, § 25, 28 Stat. 509, 552 [U. S. Comp. St. 1901, p. 2375], which empowers him to order the reliquidation of any entry at a different value from that so proclaimed by him, upon satisfactory evidence that the value in United States currency of the foreign money specified in the invoice was, at the date of consular certification of the invoice, at least 10 per cent. more or less than the value proclaimed during the quarter. *Decree Stone v. Whitridge*, White & Co., 129 F. 33, 64 C. C. A. 47, reversed.—*United States v. Whitridge*, 25 S. Ct. 406, 197 U. S. 135, 49 L. Ed. 696.

Importer held not concluded by a reliquidation for fraud a year after removal of goods, but under Act June 22, 1874, § 21, making the settlement of duties in the absence of fraud conclusive after one year, and Tariff Act August 5, 1906, § 28, subsec. 14, he may, when sued for amount due under reliquidation, set up his defense as in other cases.—*United States v. Sherman & Sons Co.*, 35 S. Ct. 520, 237 U. S. 146, 59 L. Ed. 883.

82. Protests.

See 15 Cent. Dig. Cust. Dut. § 198.

A protest specifically objecting to the rate of 50 per cent. assessed on sweetened chocolate, and claiming that the goods "are dutiable at two cents per pound," is sufficiently specific, without pointing out the particular paragraph under which the importer claims that the goods should be classified, where there are but two other paragraphs dealing with chocolate, under either of which the duty is two cents a pound, so that the collector could not have been perplexed by the omission to name a particular paragraph.—*United States v. Salambier*, 18 S. Ct. 771, 170 U. S. 621, 42 L. Ed. 1167.

83. Appeal to Secretary of Treasury.

See 15 Cent. Dig. Cust. Dut. § 199.

Rev. St. § 3011, as amended by Act Feb. 27, 1877, c. 69, provides that any person paying

duties under protest, in order to obtain possession of the merchandise, may maintain an action to recover any excess so paid, but that no recovery shall be allowed in such case unless a protest and appeal is taken as prescribed in section 2931. Section 2931 makes the decision of a collector, as to rate and amount of duties, conclusive, unless within a specified time an appeal be taken to the secretary of the treasury; and the decision of the secretary on such appeal is in turn made conclusive, unless suit is brought for duties within a specified time after that decision. *Held*, that the decision of the secretary of the treasury, on an appeal to him, would not be conclusive in a case where the goods had been delivered to the importer on payment of estimated duties, but on a reliquidation of the duties the amount was increased, and the claim was made by the government for the added sum, and where, after a protest and appeal by the importers, and a decision by the secretary favorable to the government, suit was brought by the government against the importer.—*United States v. Schlesinger*, 120 U. S. 109, 7 S. Ct. 442, 30 L. Ed. 607.

84. Review by Board of General Appraisers.

See 15 Cent. Dig. Cust. Dut. § 200.

It was within the power of congress to provide, by Customs Administrative Act June 10, 1890 (26 Stat. 131), that the decision of the board of general appraisers should be final as to the dutiable valuation of merchandise.—*Passavant v. United States*, 148 U. S. 214, 13 S. Ct. 572, 37 L. Ed. 426.

In order to have a review of the collector's liquidation by the board of general appraisers, under section 14 of the customs administrative act of June 10, 1890, it is not necessary, in addition to filing a protest within 10 days from such liquidation, that the amount of the duties found due shall also be paid within the 10 days.—*United States v. Goldenberg*, 18 S. Ct. 3, 168 U. S. 95, 42 L. Ed. 394.

Under the customs administrative act of June 10, 1890, alleged error of the appraiser or collector, in that he has proceeded on a wrong principle, as by including in the appraisal charges forming no part of dutiable value, may be attacked by protest, and reviewed by the board of general appraisers.—*United States v. Passavant*, 18 S. Ct. 219, 169 U. S. 16, 42 L. Ed. 644.

Jurisdiction of the board of general appraisers under the customs administrative act of June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], authorizing an appeal to the board from a decision of a collector "as to the rate and amount of the duties chargeable upon imported merchandise," if paid under protest, does not extend to an appeal from a decision as to duties on goods imported from Porto Rico and the Hawaiian Islands, when the sole question is whether those places were foreign countries within the meaning of the tariff laws. *Judgment (C. C.) 103 F. 72, reversed.*—*Goetze v. United States*, 21 S. Ct. 742, 182 U. S. 221, 45 L. Ed. 1065.

The remedy by an appeal to the board of general appraisers from a decision of the collector, which is given by Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], does not extend to a review of the question whether the article was imported or not, or whether it was or was not brought from a foreign country.—*De Lima v. Bidwell*, 21 S. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041.

—85. Review by courts.

See 15 Cent. Dig. Cust. Dut. §§ 201-206.

A question as to whether certain articles were subject to a different duty than that fixed by certain rates considered by the trial court cannot be first raised on appeal to the supreme court.—*Badger v. Ranlett*, 106 U. S. 255, 1 S. Ct. 346, 350, 27 L. Ed. 194.

The board of appraisers is entitled to the benefit of the general rule that some presumption is to be indulged in favor of the propriety and legality of the action of inferior tribunals, and that with respect to their methods of procedure they are vested with a certain discretion, which will be respected by the courts except in cases of manifest abuse thereof.—*Earnshaw v. United States*, 146 U. S. 60, 13 S. Ct. 14, 36 L. Ed. 887, affirming judgment (D. C.) *United States v. Earnshaw*, 30 F. 672.

Under Customs Act June 10, 1890 (26 Stat. 131), a federal circuit court has no jurisdiction to review a decision of the board of general appraisers upon the question involving merely the valuation, and not the classification or rate of duty on imported merchandise.—*Passavant v. United States*, 148 U. S. 214, 13 S. Ct. 572, 37 L. Ed. 426; *In re Passavant* (C. C.) 50 F. 788.

The proclamation of the secretary of the treasury, of July 1, 1892, fixing the values of foreign money for the ensuing quarter (Act Oct. 1, 1890, § 52), fixed the gold florin of Austria-Hungary at \$0.482, and the silver florin at \$0.32, adding the statement: "Silver, the nominal standard; paper, the actual standard, the depreciation of which is measured by the gold standard." The invoices of certain goods imported during the quarter were made out in paper florins, and there was no consular certificate giving the value of such florins. In reducing the currency of the invoice to money of the United States, the collector estimated the paper florin at \$0.482, the value of the gold florin. On appeal the board of general appraisers, after taking testimony, held that the florin should have been estimated at \$0.32, the value of the silver florin. *Held*, that the proclamation of the secretary, and consequently the action of the collector, were conclusive, for which reason the board of appraisers had no authority to review the decision of the latter, and that, as the board acted without authority, the circuit court had jurisdiction to review their decision, under Act June 10, 1890, § 15.—*United States v. Klingenberg*, 153 U. S. 93, 14 S. Ct. 790, 38 L. Ed. 647, reversing judgment (C. C.) 57 F. 195.

The board of general appraisers sustained the action of a collector in exacting, under Rev. St. § 3023, a charge of 10 cents per cask for gauging molasses withdrawn by importers from warehouse, and exported for the benefit of the drawback, to the payment of which the importers objected, on the ground that such charge was abolished by Act June 10, 1890 (26 Stat. 131, 140, c. 407), § 22. *Held*, that the circuit court of the United States, on appeal from such decision, had jurisdiction to hear and determine the questions of law and fact involved therein.—*United States v. Jahn*, 155 U. S. 109, 15 S. Ct. 39, 39 L. Ed. 87, following *Same v. Klingenberg*, 153 U. S. 93, 14 S. Ct. 790, 38 L. Ed. 647.

Alleged errors of the board of general appraisers detrimental to the government cannot be reviewed on an appeal taken by the importer, where he abandons his opposition to the decision, and the government itself took no steps to procure a review. Judgment (1896) 20 C. C. A. 651, 74 F. 546, affirmed.—*United States v. Lies*, 18 S. Ct. 780, 170 U. S. 628, 42 L. Ed. 1170.

—86. Bonds for duties.

See 15 Cent. Dig. Cust. Dut. §§ 208-214.

An importer entered sugars at the custom house, and gave bond with sureties for the

"payment of the proper duties," under Act Aug. 30, 1842, c. 270, § 12, as amended by Act Aug. 6, 1846, c. 84, § 1. He afterwards sold the sugars in bond, giving the purchaser, who agreed to pay the duties as part of the purchase price, a written authority on which the sugars were withdrawn; but the duties,—a less sum than that specified in the bond,—were not paid. *Held*, that the obligors on the bond did not become merely sureties, with the goods as primary security, and are not released because the officers of the government unlawfully parted with the goods without exacting payment of the duties.—*Minturn v. United States*, 106 U. S. 437, 1 S. Ct. 402, 27 L. Ed. 208.

The authority of the collector, under Rev. St. U. S. § 2899 [U. S. Comp. St. 1901, p. 1921], to require a bond from an importer for double the value of the merchandise imported, to be forfeited for the nonreturn unopened of any package of the invoice upon demand, includes the right to take a less stringent undertaking, such as a bond which provides for the return of any required package unopened or the payment of double its value as a condition of being discharged from the full penalty of the bond. Judgment *Dieckerhoff v. United States*, 136 F. 545, 69 C. C. A. 255, reversed.—*United States v. Dieckerhoff*, 28 S. Ct. 604, 202 U. S. 302, 50 L. Ed. 1041.

Double the value of the package of an invoice of imported merchandise ordered by the collector to be returned, and not merely the actual damages sustained by the United States by reason of its nonreturn, is the measure of recovery for the breach of the obligation incurred in a redelivery bond taken by the collector under the authority of Rev. St. U. S. § 2899 [U. S. Comp. St. 1901, p. 1921], to return any required package unopened, or to pay double its value as a condition of being discharged from the full penalty of the bond.—*Id.*

The enforcement of the penalty prescribed in a redelivery bond taken by a collector under the authority of Rev. St. U. S. § 2899 [U. S. Comp. St. 1901, p. 1921], for the nonreturn unopened of any required package of an invoice of imported merchandise, is not precluded by the provision of section 961 [U. S. Comp. St. 1901, p. 699], that in suits to recover the forfeiture annexed to a bond or other specialty, where the forfeiture, breach, or nonperformance appears by default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff for so much as is due according to equity.—*Id.*

—91. Withdrawal from bond.

See 15 Cent. Dig. Cust. Dut. § 219.

Section 2970 provides that merchandise in a "bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of 10 per cent. of such duties and charges." *Held*, that the first clause merely requires that, if a change is made in the rate of duty while goods are in bond, they may be withdrawn within one year from the original importation on payment of duty according to the new rate; and the second, that if they remain more than one year they may be withdrawn within three years upon payment of the duties and charges assessed on the original entry, with 10 per cent. in addition; therefore this section does not require that the "liquidation" under section 2931 shall be made at the date of the final withdrawal for consumption.—*Merritt v. Cameron*, 137 U. S. 542, 11 S. Ct. 174, 34 L. Ed. 772.

When goods are imported at New York, and thence shipped in bond, without appraisement or liquidation, to Chicago, under Act of June 10, 1880, the date of their arrival at New York must be considered the "date of original importation," within the meaning of Rev. St. § 2970, and, in order to save the additional duty of 10 per cent., the goods must be withdrawn from bond within one year from that date.—*Seeberger v. Schweyer*, 153 U. S. 609, 14 S. Ct. 881, 38 L. Ed. 839.

☞92. Fees and charges.

See 15 Cent. Dig. Cust. Dut. §§ 207, 220.

Where goods without invoice and unclaimed are sent to a general order warehouse, and subsequently, upon the application of the assignees of the bill of lading for entry of the same, are sent to the public store for examination and appraisement, the charges for cartage to the appraiser's store and for storage and labor there may properly be exacted from the importer, although the value of the goods is less than \$100. Rev. St. §§ 2859-2865.—*Kennedy v. Magone*, 158 U. S. 212, 15 S. Ct. 814, 39 L. Ed. 954, affirming judgment (C. C.) 41 F. 768.

V. PAYMENT AND COLLECTION, REFUNDING, AND DRAWBACK.

Due process of law, see Constitutional Law, ☞305.

☞95. Payment under protest.

See 15 Cent. Dig. Cust. Dut. §§ 231, 232-241.

Rev. St. § 2931, providing that the decision of the collector of customs as to the rate and amount of duties shall be final, unless the owner, etc., "shall within ten days after the ascertainment and liquidation of the duties * * * give notice in writing to the collector on each entry, if dissatisfied with his decision," setting forth the grounds of objection, etc., fixes the limit beyond which notice cannot be given, and does not fix the final ascertainment and liquidation of duties as the time at which the notice may be first given; and notice given after the collector's estimation of the rate and amount, and before final ascertainment and liquidation as stamped on the entry, is good.—*Davies v. Miller*, 130 U. S. 284, 9 S. Ct. 560, 32 L. Ed. 932.

Insertion by importers, on entries and invoices, of additional charges, in order to avoid onerous penalties imposed by the appraisers for their omission, though such penalties may be illegal, renders payment of the increased duties caused thereby involuntary.—*Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 S. Ct. 5, 33 L. Ed. 236.

Under Rev. St. § 2931, requiring protests against the assessment of duties to be filed within 10 days from the ascertainment and liquidation of them, the protest must be filed within 10 days from the decision of the collector at the time of the entry of the goods for warehouse, and when filed within 10 days from the final withdrawal of the goods for consumption it comes too late.—*Cadwalader v. Partridge*, 137 U. S. 553, 11 S. Ct. 182, 34 L. Ed. 783, following *Merritt v. Cameron*, 137 U. S. 542, 11 S. Ct. 174, 34 L. Ed. 772.

The omission of the date from a protest in proper form, and attached to the invoice of the merchandise mentioned therein, is immaterial.—*Schell v. Fauché*, 138 U. S. 562, 11 S. Ct. 376, 34 L. Ed. 1040, affirming judgment (C. C.) *Fauché v. Schell*, 33 F. 336.

A protest against the payment of a duty of 24 per cent. imposed by the collector, accompanied with a claim that the goods are only liable to a duty of 19 per cent., "as a manufac-

ture of worsted," shows that it was the importer's intention to object to the collector's failure to classify the goods as manufactures of worsted, and sufficiently complies with Act Feb. 26, 1845, which requires the importer to "distinctly and specifically set forth the grounds of objection" to the payment of the duty imposed by the collector.—*Id.*

Goods imported in 1881, composed of calf hair and cotton, of which the hair constituted more than 85 per cent. in weight, being dutiable, under Rev. St. § 2504, Schedule M, as "manufactures of hair," a protest against a classification of them under the first clause of section 2499, as nonenumerated, which claims only that they should be classified under the second clause of section 2499, is insufficient.—*Herrman v. Robertson*, 152 U. S. 521, 14 S. Ct. 686, 38 L. Ed. 538, affirming (C. C.) 41 F. 881.

Rev. St. § 3011, as amended by Act Feb. 27, 1877, provides that "any person who shall have made payment under protest" in order to obtain possession of his goods may sue to recover back any excess paid, "but no recovery shall be allowed * * * unless a protest and appeal shall have been taken as provided in section 2931." Section 2931 required a notice in writing, specifying the grounds of objection to the amount of duties claimed, to be given within 10 days after the ascertainment and liquidation of the duties, and provided that the action to recover the duties must be brought within 90 days after the decision on appeal by the secretary of the treasury. *Held*, that a right of action accrued to an importer who paid the duties complained of in order to get possession of his merchandise, if he made his protest within 10 days after the ascertainment and liquidation of the duties, it not being necessary that protest be made before payment. 14 C. C. A. 205, 66 F. 969, affirmed.—*Saltonstall v. Birtwell*, 17 S. Ct. 19, 164 U. S. 54, 41 L. Ed. 348.

☞96. Actions for duties.

See 15 Cent. Dig. Cust. Dut. §§ 222, 224-226.

Bill by United States to recover for fraud difference between duties paid and those which should have been paid must conform to general rule of pleading where recovery is sought for fraud.—*United States v. Sherman & Sons Co.*, 35 S. Ct. 520, 237 U. S. 146, 59 L. Ed. 883.

☞98. Lien of carrier and collection of carrier's charges.

See 15 Cent. Dig. Cust. Dut. § 223.

The terminal carrier, which, under its tariff agreements, has paid the duties exacted under the laws of the United States on bonded goods at the port of entry that the initial carrier was forced to pay in order to regain possession and forward the goods, has a lien on such goods for the amount of such duties. Judgment *Pearce v. Wabash R. Co.*, 89 Mo. App. 437, reversed.—*Wabash R. Co. v. Pearce*, 24 S. Ct. 231, 192 U. S. 179, 48 L. Ed. 397.

The right of a terminal carrier to a lien for the amount paid by it to satisfy the duties exacted under the laws of the United States on bonded goods at the port of entry is not defeated because the initial carrier wrongfully changed their bonded destination, to the owner's damage, where the contract of shipment stipulated that each carrier should be liable only for loss or damage accruing upon its own road, and that such carriers should not be jointly liable, nor either for any loss or damage accruing upon the road of the other.—*Id.*

☞100. Drawbacks.

See 15 Cent. Dig. Cust. Dut. § 230.

The provision in Act March 3, 1883, allowing, as amended by Act June 19, 1886, a draw-

back of 75 cents per ton on imported coal used by United States vessels, was repealed by Act Oct. 1, 1890, § 25 (26 Stat. 587), merely imposing a duty of 75 cents per ton on imported coal; and the drawback was not continued in force by the provision in the latter act that there should be allowed, on the exportation of articles into which imported materials entered, a drawback equal in amount to the duties paid on such materials less 1 per cent. thereof, and that the drawback on any article "allowed under existing law" should be continued "at the rate herein provided."—*United States v. Allen*, 163 U. S. 499, 16 S. Ct. 1071, 41 L. Ed. 242, reversing judgment (D. C.) 52 F. 575, and 58 F. 864, 7 C. C. A. 547.

Boxes put together in this country from imported shooks, and with nails made here from imported rods, are not "wholly manufactured" in this country, so as to be entitled to a drawback, under Rev. St. § 3019; and, while the nails may be considered as wholly manufactured here, they lost their identity in the box, so that no separate drawback can be allowed on them.—*Tide-Water Oil Co. v. United States*, 18 S. Ct. 837, 171 U. S. 210, 43 L. Ed. 139.

A drawback of duties upon imported bottles and corks used in the manufacture of bottled beer cannot be allowed under Tariff Act 1890, § 25 (26 Stat. 587, 617, c. 1244), allowing drawback of duties on imported materials used in the manufacture of exported articles, since the bottles and corks are not "imported materials," but finished products and usable for any liquor which the importer may choose to put in them; and the fact that the beer must be steamed after bottling, to kill yeast germs, and for that purpose must be inclosed in some vessel to prevent the escape of the carbonic gas, does not convert the bottle from an incasement into an ingredient.—*Joseph Schlitz Brewing Co. v. United States*, 21 S. Ct. 740, 181 U. S. 584, 45 L. Ed. 1013.

The drawback provided for by Act Cong. Aug. 27, 1894, c. 349, § 22, 28 Stat. 551, reenacted as Act July 24, 1897, c. 11, § 30, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1991], "on the exportation" of articles manufactured from imported materials on which duties had been paid, will not be allowed on goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed. Judgment, 37 Ct. Cl. 101, affirmed.—*Swan & Finch Co. v. United States*, 23 S. Ct. 702, 190 U. S. 143, 47 L. Ed. 984.

Imported corks used in bottling beer for export are not articles manufactured from imported materials within the meaning of Act Oct. 1, 1890, c. 1244, § 25, 26 Stat. 617, allowing a drawback of duties on such articles when exported, although such corks were subjected to a special treatment after importation to make them fit for the purpose intended. Judgment (1906) 41 Ct. Cl. 389, affirmed.—*Anheuser-Busch Brewing Ass'n v. United States*, 28 S. Ct. 204, 207 U. S. 556, 52 L. Ed. 336.

VI. RECOVERY OF DUTIES PAID.

Directing judgment in lower court, in action to recover duties paid, see Appeal and Error, 1176.

Direction of verdict, in action to recover duties paid, see Trial, 170.

Limitation of action to recover duty paid, see Limitation of Actions, 2, 119.

Objection to evidence, in action to recover duty paid, see Trial, 84.

Review of decisions, see Appeal and Error, 170.

Right to trial by jury in action to recover duties, see Jury, 12.

101. Right of action in general.

See 15 Cent. Dig. Cust. Dut. § 231.

Rev. St. §§ 2907, 2908, required the collector, in determining the dutiable value of merchandise, to add to the cost of the goods in the principal markets of the country from whence they were imported, at the time of exportation, the cost of transportation, etc., from the place of production to the vessel in which they were shipped. The consignors of goods shipped after the passage of Act March 3, 1883 (22 Stat. 481), repealing said sections, being unaware of that act, sent a consular invoice, stating the value of the goods "free on board." *Held*, that if this included charges for transportation, etc., from the place of production to the vessel, duties levied and paid on the amount of such charges could be recovered.—*Robertson v. Bradbury*, 132 U. S. 491, 10 S. Ct. 158, 33 L. Ed. 405.

A right of action against a collector to recover back moneys exacted by him, under color of the revenue laws, upon goods which have never been imported at all, but which the plaintiff entered as imported merchandise, with a protest against the exaction of duties upon them as such, in order to prevent the seizure of the property, is not waived by the failure to refuse to enter the goods and then bring an action of replevin to recover their possession, since, if replevin would lie, the plaintiff might waive the tort and proceed in assumpsit.—*De Lima v. Bidwell*, 21 S. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041.

102. Statutory provisions.

See 15 Cent. Dig. Cust. Dut. §§ 231-259.

The right to maintain an action at law against the collector to recover excessive duties paid, whether existing by virtue of the statutory or common law, was taken away by sections 25 and 29 of the customs administrative act of June 10, 1890.—*Schoenfeld v. Hendrichs*, 152 U. S. 691, 14 S. Ct. 754, 38 L. Ed. 601.

The right which the owner of merchandise may have against a collector, in cases not falling within the customs administrative act, to recover money exacted as duties, is not taken away by the repeal of Rev. St. U. S. § 3011, or by the provision of Customs Administrative Act, June 10, 1890, c. 407, § 25, 26 Stat. 141 [U. S. Comp. St. 1901, p. 1896], declaring that no collector shall be liable on account of his rulings or decisions as to duties, or the collection of any dues, charges, or duties on or on account of such merchandise.—*De Lima v. Bidwell*, 21 S. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041.

Any recognition by congress of the right to collect duties upon importations from Porto Rico, or of the status of that island as a foreign country, which was made by the act of congress of March 24, 1900 (31 Stat. 51), applying for the benefit of Porto Rico the amount of the customs revenue received on importations from that island since its evacuation by the Spanish forces, can have no retroactive effect as to moneys theretofore paid as duties under protest, for which an action to recover back had already been brought.—*Id.*

103. Conditions precedent.

See 15 Cent. Dig. Cust. Dut. §§ 232-242.

105. — Protest.

See 15 Cent. Dig. Cust. Dut. §§ 233-241.

A protest against paying 35 per cent. duty on a carriage brought into the United States by the owner, which states that the carriage is "personal effects," and had been used over a year (as shown by affidavit), and that under Rev. St. § 2505, "personal effects in actual use" are free from duty, is a sufficient protest, on which the amount paid for duty can be recovered back on the ground that the carriage was free from duty as "household effects," under the

same section.—*Arthur v. Morgan*, 112 U. S. 495, 5 S. Ct. 241, 28 L. Ed. 825.

Where duties are illegally exacted, and they are paid after the delivery of the goods to the importer, such duties cannot be recovered back, although it appears that the payment was made by the importer under protest.—*Porter v. Beard*, 124 U. S. 429, 8 S. Ct. 554, 31 L. Ed. 490; *Rossman v. Hedden*, 145 U. S. 561, 12 S. Ct. 925, 36 L. Ed. 817, affirming (C. C.) 37 F. 90.

A protest against the payment of a duty of 60 per cent. on an importation of "cotton gloves mixed with silk, * * * although the article is only liable to a duty of 35 per cent. less 10 per cent., being composed of cotton and silk, cotton chief part, the duty of 60 per cent. being only legal where silk is the chief part," shows that it was the importers' intention to object to the goods being classified, under Act June 30, 1864, § 8 (13 Stat. 202), as silk gloves, or Act March 3, 1865, § 3 (13 Stat. 492), as ready-made clothing of silk, or of which silk shall be the component material of chief value, and is a sufficient compliance with the statute (Act Feb. 26, 1845). It is not necessary that the protest should specify under what provision the goods were dutiable.—*Heinze v. Miller*, 144 U. S. 28, 12 S. Ct. 604, 36 L. Ed. 333.

Certain codfish, not pickled, but cured with dry salt, were imported in barrels, and erroneously assessed, under Act March 3, 1883 (22 Stat. 503), Schedule G, as "pickled" fish. The importers filed a protest reading, "We understand that you have assessed duties at the rate of one cent per lb. as 'pickled fish,' whereas they are 'dry fish' and the duty should be but one-half cent per lb." *Held*, that this was insufficient to indicate the true classification, namely, "fish prepared or preserved," on which the duty was 25 per cent. *ad valorem*, and therefore an action to recover the excess of duty could not be maintained.—*Presson v. Russell*, 152 U. S. 577, 14 S. Ct. 728, 38 L. Ed. 559.

Cases, cans, and cost of packing were erroneously included in an assessment of canned blueberries entered (October 22, 1887) at Eastport, for warehouse and immediate transportation, without being removed from the steamship while in transit to Boston. The collector at Eastport, having refused to correct the error upon notice from the collector at Boston, was instructed (November 11, 1887) by the secretary of the treasury, upon the report of the collector at Boston, to make the correction. The goods were subsequently (November 18, 1887) entered at Boston for rewarehousing and withdrawal, and the collector having included the cases, cans, and cost of packing in this assessment, the importers filed a protest, and mailed notice thereof to the collector at Eastport. *Held*, under Rev. St. § 2931, that, Eastport being "the port of importation and entry" of these goods, the decision of the collector at that port as to the rate and amount of duties to be paid was "the ascertainment and liquidation of the duties by the proper officers of the customs," and the plaintiffs, not having given notice in writing of their objection to that decision within 10 days thereafter, cannot maintain an action to recover back the whole or any part of the duties paid.—*Saltonstall v. Russell*, 152 U. S. 628, 14 S. Ct. 733, 38 L. Ed. 576.

107. Defenses.

See 15 Cent. Dig. Cust. Dut. § 243.

Where the complaint alleges that defendant, as collector, exacted more than the true amount as duty on certain goods, and the answer alleges that the amount collected was the amount properly due according to the rate of duty imposed by law on the goods in question, the fact that the duty was assessed on the theory that the

goods contained wool does not prevent defendant from showing that, though they contained no wool, they were liable on other grounds to the amount of duty collected.—*Herrman v. Miller*, 127 U. S. 363, 8 S. Ct. 1090, 32 L. Ed. 186.

108. Persons entitled to sue.

See 15 Cent. Dig. Cust. Dut. § 244.

Under Rev. St. §§ 2931, 3011, only the importer of goods can sue to recover duties paid under protest, and no mere assignee of the claim can maintain the action.—*Hager v. Swayne*, 149 U. S. 242, 13 S. Ct. 841, 37 L. Ed. 719, distinguishing *Castro v. Seeberger* (C. C.) 40 F. 531.

One who purchased goods then in bond, pending an appeal to the secretary of the treasury in respect to the duties assessed, and, after an adverse decision, paid the duties in order to obtain possession, was not a mere assignee of the claim for excess of duties, and was therefore not debarred from suing to recover the same.—*Seeberger v. Castro*, 153 U. S. 32, 14 S. Ct. 766, 38 L. Ed. 624; *Spalding v. Same*, 153 U. S. 38, 14 S. Ct. 768, 38 L. Ed. 626, affirming judgment *Castro v. Seeberger* (C. C.) 40 F. 531, and distinguishing *Hager v. Swayne* 149 U. S. 242, 13 S. Ct. 841, 37 L. Ed. 719.

111. Time to sue and limitations.

See 15 Cent. Dig. Cust. Dut. § 246.

The right of action against a collector of customs, under Rev. St. § 2931, to recover duties illegally exacted, does not arise until after a decision of the secretary of the treasury adverse to the claimant, and is barred if not brought within 90 days from such adverse decision; but it is provided that, if the decision is delayed more than 90 days from the date of the appeal, the claimant may treat the delay as a denial, and bring suit, or wait until a decision is rendered. *Held*, that the remedy is exclusive, and that it was error to apply, as a bar, the limitation prescribed by the state statute.—*Arnson v. Murphy*, 109 U. S. 238, 3 S. Ct. 184, 27 L. Ed. 920.

112. Pleading.

See 15 Cent. Dig. Cust. Dut. § 247.

Under Rev. St. § 3012, providing for a bill of particulars in suits to recover duties, the declaration need not show that the action was brought within the time limited by statute.—*Beard v. Porter*, 124 U. S. 437, 8 S. Ct. 556, 31 L. Ed. 492.

Code Civ. Proc. N. Y. § 522, provides that each material allegation of the complaint not controverted by the answer must be taken as true. A complaint to recover an excess of duties exacted alleged that plaintiff "duly made and filed due and timely protest in writing," and "duly appealed to the secretary of the treasury," and "that 90 days have not elapsed since the decision of the secretary." These allegations were not denied in the answer. *Held*, that defendant could not move for a verdict on the ground that the protest was premature, and that no proof was offered that there was an appeal to the secretary, or a decision on such appeal, or of the date of such decision, to show that suit had been brought in time.—*Robertson v. Perkins*, 129 U. S. 233, 9 S. Ct. 279, 32 L. Ed. 686, reversing (C. C.) *Perkins v. Robertson*, 29 F. 842.

113. Evidence.

See 15 Cent. Dig. Cust. Dut. §§ 248-250.

It is incumbent on an importer to show, in order to recover money paid to a collector, under Rev. St. § 3011, amended by Act Feb. 27, 1877, c. 69 (19 Stat. 247), not only due protest and appeal to the secretary of the treasury within 30

days after the liquidation, but also a decision on such appeal, and a bringing of a suit within the 90 days limited by Id. § 2931, after the decision, or else that there has been no decision, and the prescribed time after the appeal has elapsed.—*Arnson v. Murphy*, 115 U. S. 579, 6 S. Ct. 185, 29 L. Ed. 491, affirming (C. C.) 24 F. 355.

Rev. St. § 2901, provides the manner in which an examination of imported goods shall be conducted on appraisement. In an action by an importer to recover an alleged excess of duties collected, it is competent for the importer to show that the appraisement was void by evidence that the examination was not conducted as required by law.—*Oelbermann v. Merritt*, 123 U. S. 356, 8 S. Ct. 151, 31 L. Ed. 164; *Mustin v. Cadwalader*, 123 U. S. 369, 8 S. Ct. 158, 31 L. Ed. 169.

In an action to recover an alleged excess of duties exacted by a collector, it is competent for the importer to prove the appraisement void by showing that the merchant appraiser was not "familiar with the character and value of the goods in question," as required by Rev. St. § 2930.—Id.

The evidence of a merchant appraiser, appointed, under Rev. St. § 2930, to value the goods imported, is admissible to show that the appraiser did not possess the qualifications required by that section, and to show the extent and character of the examination made.—Id.

In an action to recover duties paid, it is not competent to ask a merchant appraiser if he proceeded with the appraisement in accordance with the instructions of the secretary of the treasury of June 9, 1885, since the question merely calls for the witness' opinion.—*Auffmordt v. Hedden*, 137 U. S. 310, 11 S. Ct. 103, 34 L. Ed. 674, affirming judgment (C. C.) 30 F. 360.

A report received by the collector from a United States consul in the country from which the goods were imported, purporting to be a memorandum made by a government silk expert concerning undervaluations of certain merchandise, which embraced the goods in question, was inadmissible, since it did not appear that it was used at the appraisals, and, if it had been, its use would have been proper.—Id.

Two papers pasted together, and attached to the entry by a wafer, the first of which protested against the imposition of excessive duties, and the second against the exaction of illegal commissions, are admissible as one protest, though only the second paper was signed by the importer, especially where it appears from the records of the custom house that the two papers were regarded as one protest against two illegal exactions.—*Schell v. Fauché*, 138 U. S. 562, 11 S. Ct. 376, 34 L. Ed. 1040, affirming judgment (C. C.) *Fauché v. Schell*, 33 F. 336.

Under Act Feb. 26, 1845, which required a written protest signed by the importer at or before the payment of duties, to enable him to maintain an action against the collector for the recovery of excessive charges, but which did not specify the person on whom or the manner in which the protest was to be served, a custom prevailed of passing protests in with the entry of the merchandise. *Held*, in an action to recover back duties paid under protest, and tried many years after the occurrence of the transaction, that the production of the protests from the proper repository gave rise to the presumption that they were properly served, according to the custom, and on the day of their date, and that they were admissible without specific proof on whom and the time when they were served.—Id.

The failure of the customhouse officials to make a record of a protest against the imposition of an excessive duty, as required by treasury regulation No. 387, does not render the original protest inadmissible in an action for the recovery of the excess.—Id.

In an action to recover duties paid under protest after a reappraisal, the question being as to whether there had been a substantial reappraisal according to law, it was not error to admit, over a mere general objection, a paper presented to the general appraiser at the time of the reappraisal stating that the importers demanded to be present during the same, personally, as well as by their employés and agents, to furnish witnesses of the true dutiable value of the goods, and to cross-examine witnesses who testify against the correctness of the invoice; and also alleging that the merchant appraiser was not qualified to act under the statute; since the paper was not introduced for the purpose of showing that the importers had the rights which they claimed, but merely to show that they protested seasonably.—*Hedden v. Iselin*, 142 U. S. 676, 12 S. Ct. 330, 35 L. Ed. 1155.

In an action to recover duties paid, the plaintiff having claimed that by custom a ton of iron ore was a ton dried at 212° Fahrenheit, it was proper to admit evidence for defendant that native ores of the same kind as those imported were dealt in in the United States without any allowance for moisture.—*Earnshaw v. Cadwalader*, 145 U. S. 247, 12 S. Ct. 851, 36 L. Ed. 693.

In an action by an importer against a collector to recover an excess of duty exacted by defendant on certain importations, where it was not claimed in the protest under which the duty was paid that any reappraisal was called for and refused, evidence as to what plaintiff's manager said to an assistant appraiser as to the production of evidence of value of the goods, and of his conversation with the collector about a reappraisal or a call for reappraisal had after the appraisement, is incompetent.—*Origet v. Hedden*, 155 U. S. 228, 15 S. Ct. 92, 39 L. Ed. 130.

In an action by an importer against a collector to recover an excess of duty exacted by defendant on certain importations, evidence as to whether or not the goods in the several cases were all of the same character as to value is immaterial, where it appears that the appraisers examined one case of each importation.—Id.

In an action to recover duties paid under protest on certain dress goods, where the trial was had many years after the date of importation, no pieces of the goods having been preserved, *held*, that it was error to permit the introduction of certain samples in connection with testimony tending, perhaps, to show that they somewhat resembled the imported goods, but not fairly tending to establish a substantial identity between them.—*Barney v. Rickard*, 157 U. S. 352, 15 S. Ct. 642, 39 L. Ed. 730.

116. Trial.

See 15 Cent. Dig. Cust. Dut. §§ 252-255.

In an action to recover duties, a charge to the jury, where all the evidence showed that the goods were "trimmings," that it is the use to which articles are chiefly adapted, and for which they are used, which determines their character within the meaning of the act; that they will therefore determine to which use the articles are chiefly devoted; if they are hat trimmings, and used for making and ornamenting hats, then the rate of duty imposed was excessive, and the plaintiff is entitled to recover; if they are chiefly used for other purposes, the defendants must recover.—fairly presents the question, under 22 Stat. 512, which provides for a duty on trimmings used for making or ornamenting hats.—*Hartranft v. Langfeld*, 125 U. S. 128, 8 S. Ct. 732, 31 L. Ed. 672.

In an action to recover duties on goods claimed to be "trimmings used for making or ornamenting hats," the refusal of an instruction in accordance with Rev. St. § 2490, which provides that, if a nonenumerated article equally resem-

bles two enumerated articles, it shall pay the highest duty imposed on either, is immaterial where the jury finds that the goods belong to an enumerated class.—*Id.*

The question of similitude is one of fact for the jurv.—*Herrman v. Miller*, 127 U. S. 363, 8 S. Ct. 1090, 32 L. Ed. 186.

The question whether the collector acted within the power given him by statute in compelling the importer to pay duties, not only on the market value of the goods, but also on an additional value equal to a reduction made from the value of the cases, is a question of law, which can be raised by the importer in a suit at law to recover overpayments.—*Badger v. Cusimano*, 130 U. S. 39, 9 S. Ct. 431, 32 L. Ed. 851.

Under Rev. St. § 2499, providing that non-enumerated articles shall pay the same rate of duty as enumerated articles to which they bear a similitude, either in material, quality, texture, or the use to which they may be applied, it is proper to instruct that if any one of the articles in question did not fall within the class of aniline dyes, but bore a similitude in material or quality, or in the use to which it might be applied, to what were known as "aniline dyes" when the statute imposing the duty thereon was enacted, it was dutiable at the same rate as an aniline dye, and that the mere application to the dyeing of fabrics would not create a similitude in use; but if there were a similitude in the same kind of dyeing, producing the same colors in substantially the same way, so as to take the place of aniline dyes in use, then there would be a similitude in use.—*Pickhardt v. Merritt*, 132 U. S. 252, 10 S. Ct. 80, 33 L. Ed. 353.

After such instruction, it was not error to refuse to instruct that if the jury should find that any one of the articles was used as a substitute for and in the place of cochineal, and not as a substitute for any aniline dye known at the time of its introduction, the plaintiffs, as to that branch of the case, would be entitled to a verdict.—*Id.*

Whether certain articles shall be classed as "philosophical apparatus," dutiable at 35 per cent., under Schedule N of Act March 3, 1883 (22 Stat. 481), or as "manufactured articles, or wares not specially enumerated or provided for in this act," and composed wholly or in part of any metal, is to be determined by ascertaining whether they are used wholly or mainly in carrying on observations and experiments of a philosophical character, or wholly or mainly in the practice of the arts and professions, and, where, an instrument is much used for both purposes, it is a question for the jury to determine by the preponderance of use.—*Robertson v. Oelschlaeger*, 137 U. S. 436, 11 S. Ct. 148, 34 L. Ed. 744.

In an action to recover duties paid under protest after a reappraisement, it is not error to refuse a charge that the statute empowers the secretary of the treasury to establish rules and regulations, not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisal of all imported merchandise, when the court has already in effect stated the same thing in its remarks denying a motion to direct a verdict, and has said nothing inconsistent therewith in its general charge.—*Hedden v. Iselin*, 142 U. S. 676, 12 S. Ct. 330, 35 L. Ed. 1155.

In an action to recover duties paid under protest after a reappraisement, where there is evidence tending to show that the importer may have been deprived of his right to be present at the examination of the goods, by the appraisers, and that the merchant appraiser was a domestic manufacturer of goods competing with the imports in question, or that he entertained a strong prejudice against importers, it is proper to submit to the jury the question as

to whether there has been a valid reappraisement.—*Id.*

The question whether goods are known to the trade simply as "webbing," or as both "webbing" and "goring," in an action to recover duties paid, is a question for the jury, and not for the court.—*Robertson v. Salomon*, 144 U. S. 603, 12 S. Ct. 752, 36 L. Ed. 560.

In an action to recover duties paid under protest, the inquiry was whether the goods were dutiable, under Schedule K of the act of March 3, 1883, as "knit goods made on knitting frames," as assessed by the collector, or under Schedule N, as "bonnets, hats, and hoods for men, women, and children," as claimed by the importer. *Held* that, the court having offered to submit to the jury the question whether the word "bonnet" had any well-known commercial meaning, such as would cover the goods in question, and the offer being declined by plaintiffs, a verdict was properly directed for the United States; for this was the only question which plaintiffs could properly ask to have submitted.—*Toplitz v. Hedden*, 146 U. S. 252, 13 S. Ct. 70, 38 L. Ed. 961, affirming judgment (C. C.) 33 F. 617.

The phrase, "expressly used for manure," means used "especially" or "particularly" for manure; and when there is testimony that an import invoiced as "manure salts," and containing 90 to 95 per cent. of sulphate of potash, and more than 40 per cent. of pure potash, is used as a fertilizer, or in the manufacture of fertilizers, but there is also other testimony that it is used for other purposes, it is a question for the jury whether or not it is used "expressly for manure," as above defined.—*Magone v. Heller*, 150 U. S. 70, 14 S. Ct. 18, 37 L. Ed. 1001, reversing judgment (C. C.) *Heller v. Magone*, 38 F. 908.

Findings of fact made by the court (a jury being waived, under Rev. St. §§ 649, 700) will not support a judgment for the importer, if they fail to show what duty the collector charged, and to sufficiently describe the goods, and if it does not appear from the record under what provisions the respective parties claim.—*Saltonstall v. Birtwell*, 150 U. S. 417, 14 S. Ct. 169, 37 L. Ed. 1128.

In an action to recover back duties paid on certain fish pastes, known in the trade as "anchovy paste" and "bloaters paste," plaintiffs gave evidence that the goods were made of anchovies and bloaters ground up and spiced; were used as food, in a distinct form, or as an appetizer, principally in a sandwich, or sometimes with a cracker, and not as a condiment; and that the word "sauces," as used in commerce in 1883 and previously, was applied to liquids only, and not to pastes. *Held*, that this evidence was sufficient to warrant a jury in finding that the goods were not "sauces," but were "fish preserved or prepared," within the meaning of Schedule G. Act March 3, 1883 (22 Stat. 481), and it was therefore error to direct a verdict on the ground that as matter of law, and without regard to commercial usage, the articles came within the words "sauces of all kinds."—*Bogle v. Magone*, 152 U. S. 623, 14 S. Ct. 718, 38 L. Ed. 574, reversing judgment (C. C.) 40 F. 226.

The question whether particular products, such as beans and lentils, are properly classifiable under "seeds" or "vegetables," is a matter for the court to decide, and it is proper, in such case, to direct a verdict.—*Sonn v. Magone*, 159 U. S. 417, 16 S. Ct. 67, 40 L. Ed. 203.

◀118. Appeal and error.

See 15 Cent. Dig. Cust. Dut. § 258.

In reviewing a judgment entered in a suit against the collector of customs by an import-

er to recover allowances, under Rev. St. § 2927, for damage to certain beer, where it is objected that there was no evidence that the beer was sound when purchased, the court will apply the doctrine that a sound price implies a sound article; and it appearing that 17.70 cents per gallon was paid for the beer in Germany, and that here most of it was thrown in the streets as worthless, and a little sold for 3 cents per gallon, the court will assume that the article was sound when purchased.—*Hollender v. Magone*, 149 U. S. 586, 13 Sup. Ct. 932, 37 L. Ed. 860, reversing judgment (C. C.) 38 F. 912.

An action to recover back duties paid on certain goatskins was tried wholly on the theory that the skins were classifiable either as "rugs," as was claimed by the collector, or as "skins dressed and finished," as stated in the protest. *Held*, that the collector was in no position to seek a reversal of the judgment on the ground that the goods were properly classifiable as "furs."—*Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 L. Ed. 560, reversing judgment (C. C.) *Schlesinger v. Seeberger*, 40 F. 872.

VII. VIOLATIONS OF CUSTOMS LAWS.

Abatement of action for forfeiture, see Abatement and Revival, ¶8, 10.
Best evidence, in prosecution for violation, see Criminal Law, ¶400.
Challenge of jurors in prosecution for receiving smuggled goods, see Jury, ¶136.
Evidence of other offenses, see Criminal Law; ¶372.
Final judgments from which appeal lies, see Appeal and Error, ¶76.
Instruction invading province of jury, see Criminal Law, ¶759.
Jurisdiction of admiralty of proceeding to enforce forfeiture, see Admiralty, ¶23.
Right to confront witness in prosecution for violation of custom law, see Criminal Law, ¶662.

¶120. Nature and elements of offenses in general.

See 15 Cent. Dig. Cust. Dut. §§ 260-264.

Act Feb. 18, 1875 (18 Stat. 307), entitled "An act to correct errors and to supply omissions in the Revised Statutes," was not designated as new legislation, in such wise as to alter any enactment made since the passage of the Revised Statutes; and the amendment to section 2864 being intended merely to make said section read as it ought to have read in the printed volume in the shape in which it was in force (December 1, 1873), did not make said section 2864 a valid, existing law, so as to declare that the value of merchandise fraudulently entered at the custom house should be forfeited thereunder, Act June 22, 1874, having repealed the same.—*United States v. Auffmordt*, 122 U. S. 197, 7 S. Ct. 1182, 30 L. Ed. 1182, affirming judgment (D. C.) 19 F. 893.

Act June 22, 1874, § 12, which provides for a forfeiture of the merchandise fraudulently entered at the custom house, and for penalties to be imposed upon persons guilty of such fraudulent entries, is inconsistent with the alternative forfeiture of the goods or their value, as provided in Rev. St. § 2864, and hence repeals the same.—*Id.*

¶122. — Criminal intent.

See 15 Cent. Dig. Cust. Dut. § 263.

Under the international postal treaty of Berne of October 9, 1874 (19 Stat. 604, art. 25), dutiable goods cannot lawfully be imported in the foreign mail, but are liable to seizure in the hands of the person receiving them from the post office by the officers of customs; and

it is immaterial that there was no intent on the part of the sender or receiver to defraud the government.—*Von Cotshausen v. Nazro*, 107 U. S. 215, 2 S. Ct. 503, 27 L. Ed. 540, affirming (C. C.) 15 F. 891.

¶123. — Criminal act or omission.

See 15 Cent. Dig. Cust. Dut. §§ 260, 264.

Concealment by agent consignee of imported goods of facts not proper to be included in the invoice, account, and bill of lading, but which would have excited the suspicion of a collector, is not a violation of Act Aug. 5, 1909, § 23, making it a felony to state falsely in declaration of an agent consignee that nothing has been suppressed or concealed, whereby the United States may be defrauded of duties lawfully due.—*United States v. Salen*, 35 S. Ct. 51, 235 U. S. 237, 59 L. Ed. 210.

¶125. Offenses by owners or others in regard to importation of goods.

See 15 Cent. Dig. Cust. Dut. § 264.

Rev. St. § 2865, which makes it an offense to smuggle or clandestinely introduce into the United States any goods or merchandise subject to duty without paying or accounting for the duty, does not include mere attempts, and under it the offense is not complete until the obligation to pay or account for the duty has arisen; hence the concealment of merchandise on board an incoming vessel, though with the intent and for the purpose of clandestinely introducing the same into the United States without the payment of the duty thereon, and although continued until after the vessel has entered the waters of a port of the United States, does not constitute the offense.—*Keck v. United States*, 19 S. Ct. 254, 172 U. S. 434, 43 L. Ed. 505.

By the established definition of the word "smuggling," both in English and American law, to constitute the offense the goods must be unladen and brought on shore.—*Id.*

An employé in the customs service who returns false weights with an entry of imported merchandise is within the words "other person" in the customs administration act (Act June 10, 1890, c. 407, § 1, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886]).—*United States v. Mescal*, 30 S. Ct. 19, 215 U. S. 26, 54 L. Ed. 77, reversing judgment (C. C.) 164 F. 580.

¶126. Searches and seizures.

See 15 Cent. Dig. Cust. Dut. §§ 290-295.

A pleasure yacht brought from a foreign country to the United States was seized by the collector of customs for failure to pay duty. The owner thereupon libeled her in the federal district court, and caused the marshal to seize her, claiming that she was not an imported article, within the meaning of the tariff laws, and that her seizure by the collector was a marine tort. The collector answered the libel, putting in issue these claims. Rev. St. § 944, provides that all property taken or detained under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. *Held*, that the district court had jurisdiction of the yacht, with authority to determine whether or not she was an imported article.—*Ex parte Fassett*, 142 U. S. 479, 12 S. Ct. 295, 35 L. Ed. 1087.

The jurisdiction would not fail on the ground that the owner's remedy was under the customs administrative act of 1890 (26 Stat. 131), since, under sections 14 and 15 thereof, the decision of the collector, of the board of general appraisers, and of the circuit court, on appeal therefrom, is limited to determining

"the rate and amount" of duties chargeable, and does not extend to the question whether or not an article is imported merchandise within the meaning of the tariff laws.—Id.

—130. Forfeitures.

See 15 Cent. Dig. Cust. Dut. §§ 296-315.

Where imported goods are the property of their manufacturer, the invoice need only state the fair market value of the goods at the place of manufacture, and it need not state "the actual cost thereof at the place of exportation"; and such invoice of goods which belong to their manufacturer is not, nor is an entry of such goods, within the purview of Rev. St. § 2839, so as to make the person entering them, with design to evade payment of duty, liable to a forfeiture of their value.—*United States v. Aufmordt*, 122 U. S. 197, 7 S. Ct. 1182, 30 L. Ed. 1182, affirming judgment (D. C.) 19 F. 893.

Fraudulent undervaluation by foreign consignors in the foreign country of goods consigned to New York *held*, when unloaded and placed in general order, "introduced" into commerce of the United States within Customs Administrative Act June 10, 1890, § 9, as amended by Act Aug. 5, 1909, § 28, providing for forfeiture of imported merchandise introduced by fraudulent invoices.—*United States v. Twenty-Five Packages of Panama Hats*, 34 S. Ct. 63, 231 U. S. 358, 58 L. Ed. 267, reversing judgment 195 F. 438, 115 C. C. A. 340.

—133. Proceedings for enforcement of forfeitures.

See 15 Cent. Dig. Cust. Dut. §§ 316-331.

In a proceeding to condemn goods seized as forfeited under the customs revenue laws, where a motion is made to dismiss after the government's evidence is in, but the ground of the motion is not stated, any defect in the information which could have been availed of by demurrer, exception, or motion to dismiss at the trial, made on the ground of such defect, or by a motion in arrest of judgment, must on appeal be considered as waived, or as cured by the verdict of condemnation.—*Friedenstein v. United States*, 125 U. S. 224, 8 S. Ct. 838, 31 L. Ed. 736.

Informations of seizure for forfeitures are civil proceedings in rem, and controlled by Rev. St. § 954, providing that no judgment or other proceedings in civil causes "shall be arrested or reversed for any defect or want of form * * * except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof."—Id.

Diamonds were found by a government agent at a jewelry store where the person having them in charge was trying to dispose of them, and taken to the custom house, where, after an examination of such person, they were appraised and placed in the seizure room. *Held*, that it was not calling for a conclusion of law to ask the agent, "When and where did you make the seizure of those diamonds?"—Id.

The diamonds seized were claimed by a third person. *Held*, that the declarations of the person having them in custody, made to the agent in regard to them while he was making an official examination as to whether they should be seized for forfeiture, and while he had them in his possession, were admissible against the claimant as part of the *res gestæ*.—Id.

Act June 22, 1874, c. 391, § 16, provides that, in all proceedings for forfeitures under the customs laws, it shall be the duty of the court to submit to the jury for special finding the question whether the alleged acts were done with an actual intention to defraud the United States. *Held*, that the information need not aver that the acts were done with such inten-

tion.—*Friedenstein v. United States*, 125 U. S. 224, 8 S. Ct. 838, 31 L. Ed. 736; *Origet v. Same*, 125 U. S. 240, 8 S. Ct. 846, 31 L. Ed. 743.

Act June 22, 1874, c. 391, § 16 (18 Stat. 189), provides that, in all proceedings for forfeitures under the customs laws, it shall be the duty of the court to submit to the jury for special finding the question whether the alleged acts were done with an actual intention to defraud the United States. *Held*, that it was not necessary that the judgment should recite that such finding was rendered.—Id.

Act June 22, 1874, c. 391, § 12, provides that any person who shall, with intent to defraud the revenue, make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, shall, for each offense, be fined or imprisoned, etc., and, in addition to such fine, such merchandise shall be forfeited. *Held*, that the forfeiture may be enforced by proceedings in rem independently of the criminal prosecution.—*Origet v. United States*, 125 U. S. 240, 8 S. Ct. 846, 31 L. Ed. 743.

Under Act June 22, 1874, c. 391, § 16 (18 Stat. 189), providing that in all proceedings for forfeitures under the customs laws it shall be the duty of the court to submit to the jury for special finding the question "whether the alleged acts were done with an actual intention to defraud the United States," a verdict "that the goods were brought in with intent to defraud the United States" is sufficient, without stating that the "acts alleged" in the information were done with such intent.—Id.

—134. Criminal prosecutions.

See 15 Cent. Dig. Cust. Dut. §§ 336-339.

A count of an indictment based on Rev. St. § 2865, charging the defendant with having smuggled and clandestinely introduced into the United States certain diamonds of a stated value, which should have been invoiced, and duty paid thereon, with intent to defraud the revenue, sufficiently describes the smuggled goods, though certain classes of diamonds were free of duty.—*Keck v. United States*, 19 S. Ct. 254, 172 U. S. 434, 43 L. Ed. 505.

In Rev. St. § 3082, making it an offense to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise contrary to law," the words "contrary to law" relate to other legal provisions, and an indictment substantially in the language of that section, without indicating the specific provision violated, does not sufficiently inform the defendant of the nature of the accusation against him.—Id.

A count of an indictment charging that defendant "did willfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States" certain opium, sufficiently alleges a scienter, it not being necessary to specifically aver that defendant knew that the duty had not been paid on the opium.—*Dunbar v. United States*, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (D. C.) *United States v. Dunbar*, 60 F. 75.

An indictment, under Rev. St. § 2865, making it an offense to smuggle into the country any "goods, wares, or merchandise subject to duty by law," and section 3082, declaring a punishment for bringing into the country any "merchandise" contrary to law, or assisting in so doing, sufficiently describes the article as "prepared opium, subject to duty by law, to wit, the duty of \$12 per pound," where the only opium subject to a duty of \$12 per pound

is "opium containing less than nine per cent. of morphia, and opium prepared for smoking" (Act Oct. 1, 1890, § 1, par. 48); especially where no objection was made to the indictment till after verdict, and in view of section 1025, providing that "no indictment * * * shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."—Id.

135. Disposition of proceeds of penalties, forfeitures and fines.

See 15 Cent. Dig. Cust. Dut. §§ 340-342.

The provision, in Act March 2, 1867, c. 188, § 1, regulating the distribution by the secretary of the treasury of the proceeds of fines, forfeitures, and penalties, "the remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of

them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred," will not be held to include in such division the surveyors of several ports of delivery, which are not ports of entry, within the collection district, but will apply only to the surveyor of the port of entry.—*Hahn v. United States*, 107 U. S. 402, 2 S. Ct. 494, 27 L. Ed. 527.

CUTTING TIMBER.

See Logs and Logging, 6-8.

DAIRIES.

Regulation and inspection of dairy products, see Food.
Regulations as denying due process of law, see Constitutional Law, 293.

DAMAGES.

Scope-Note.

[INCLUDES pecuniary compensation, indemnity, or satisfaction allowed by law for injuries by the unlawful act or default of another; nature and grounds of recovery thereof in general; rights to substantial or nominal damages, to immediate, consequential, remote, or prospective damages, and to compensatory or exemplary damages; penalties and liquidated damages and measure of damages for breach of contract in general; measure of damages for torts in general; interest as an element of damages; what amounts are inadequate or excessive as awards of damages; and proceedings relating to recovery and assessment of damages in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds in General.

[No paragraphs or references in this Digest. But see 15 Cent. Dig. Damag. §§ 1-6.]

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10. Nominal or substantial damages.

11. — In general.

III. Grounds and Subjects of Compensatory Damages.

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50. — Physical injury to the person.

(B) AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS.

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(C) INTEREST, COSTS, AND EXPENSES OF LITIGATION.

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VII. Inadequate and Excessive Damages.

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VIII. Pleading, Evidence, and Assessment.**(A) PLEADING.**

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(B) EVIDENCE.

- ⇒ 164. Admissibility.
- 165. — In general.
- 168. — Health and physical condition of person injured.
- 172. — Loss of earnings or services.
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(C) PROCEEDINGS FOR ASSESSMENT.

- ⇒ 206. Physical examination of person injured.
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- 210. — In general.
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(D) COMPUTATION AND AMOUNT, DOUBLE AND TREBLE DAMAGES, AND REMISSION.

- ⇒ 228. Remission of excess.

Cross-References.

Compensation for property taken for public use, see Eminent Domain, ⇒ 69-153.
 Liabilities of insurer under indemnity insurance policy, see Insurance, ⇒ 514.
 Release of claim for damages, see Release.
 Workmen's Compensation Act, see Master and Servant, ⇒ 347.

Damages for particular injuries.
 See—
 Bills and Notes, ⇒ 533.
 Carriers, ⇒ 229, 277, 319.
 Collision, ⇒ 128-146.
 Costs, ⇒ 259-263.
 Death, ⇒ 52, 77, 80-101.

See—

Ejectment, 127.
 Fraud, 59.
 Injunction, 252.
 Insurance, 602.
 Landlord and Tenant, 142.
 Levees, 19.
 Master and Servant, 331.
 Mines and Minerals, 51.
 Monopolies, 28.
 Municipal Corporations, 378.
 Nuisance, 50.
 Patents, 275, 319.
 Sales, 418.
 Telegraphs and Telephones, 67.

See—

Towage, 15, 16.
 Trespass, 50.
 Trover and Conversion, 43-53.
 Vendor and Purchaser, 351.

Recovery in particular actions or proceedings.

See—

Attachment, 351.
 Bonds, 134.
 Ejectment, 127.
 Injunction, 185, 186, 195, 252.
 Trespass, 50.
 Trover and Conversion, 43-53.

I. NATURE AND GROUNDS IN GENERAL.

[No paragraphs or references in this Digest. But see 15 Cent. Dig. Damag. §§ 1-6.]

II. NOMINAL DAMAGES.

See Eminent Domain, 122.
 Misdelivery of telegram, see Telegraphs and Telephones, 67.

10. Nominal or substantial damages.

See 15 Cent. Dig. Damag. §§ 19-33.

11. — In general.

See 15 Cent. Dig. Damag. §§ 19-30, 32, 33.

In an action for breach of a contract for the manufacture and sale of certain washing machines by plaintiff to defendant, which contract also gives plaintiff the option to manufacture for defendant any other machines, at such price "as may be bid for them in open competition * * * by any responsible manufacturers other than" plaintiff, where it appears that plaintiff never exercised or sought this option, nominal damages only can be recovered with reference to machines other than those first specified.—*Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617, 11 S. Ct. 412, 34 L. Ed. 1083.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE, CONSEQUENCES OR LOSSES.

In actions for causing death, see Death, 80-88

17. Proximate or remote consequences.

See 15 Cent. Dig. Damag. §§ 27-53.

19. — Intervening cause of damage.

See 15 Cent. Dig. Damag. §§ 38-53.

In an action for false representations, whereby plaintiff was induced to purchase mining stock, it is reversible error to charge that "the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property had been as represented to be, or, in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant," as the measure of damages is the loss sustained, and does not include expected profits.—*Smith v. Bolles*, 132 U. S. 125, 10 S. Ct. 39, 33 L. Ed. 279.

25. Prospective and anticipated consequences.

See 15 Cent. Dig. Damag. §§ 69, 70, 236; 26 Cent. Dig. Mun. Corp. § 1767.

26. — In general.

See 15 Cent. Dig. Damag. §§ 69, 236.

In an action for personal injuries, plaintiff may recover for future damages when the evidence justifies a finding that such damages will inevitably and necessarily result.—*Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

31. Physical suffering and inconvenience.

See 15 Cent. Dig. Damag. §§ 40-43, 71; 9 Cent. Dig. Carr. § 1338.

33. — Aggravation of previous injury, disease, or disability.

See 15 Cent. Dig. Damag. § 42; 9 Cent. Dig. Carr. § 1338.

A person injured by the negligence of another is entitled to recover for an increase of existing ailments thereby occasioned. Judgment, *Mathew v. Wabash R. Co.*, 78 S. W. 271, 115 Mo. App. 468, affirmed.—*Wabash R. Co. v. Mathew*, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

35. Pecuniary losses.

See 15 Cent. Dig. Damag. §§ 72-83, 237-241, 260-234; 26 Cent. Dig. Mun. Corp. § 1767.

37. — Loss of earnings or services.

See 15 Cent. Dig. Damag. §§ 237-241.

In an action for personal injuries, it is error to permit plaintiff to make an estimate of the annual value of his labor, and the jury to find a verdict, based on the business of a steam thrasher in which plaintiff at one time had an interest, but which he had parted with before he met his injuries, where no allowance was made for cost and wear of machinery, where the amounts earned in the business fluctuated widely, and where plaintiff had partners who divided with him, but it did not appear in what proportions.—*Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830, 39 L. Ed. 1006.

40. — Loss of profits.

See 15 Cent. Dig. Damag. §§ 72-83.

In an action to recover the price of machinery furnished for use in a silver mill, where defendant claims damages on account of defects in the machinery, evidence of the value of ore delivered to the mill or of the amount of ore milled during a certain period, offered for the purpose of showing the loss of profits that would have accrued but for the delay in the operation of the mill on account of defective machinery, is properly excluded; damages shown by such evidence being too remote and speculative.—*New York & C. Min. Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 S. Ct. 665, 32 L. Ed. 1031.

An inadvertent sale of a patented article in territory for which the seller has granted an exclusive right to another renders him liable only

for actual damages, represented by the profits actually realized, and not for profits which the grantee would have realized if he himself had made the sale, at the higher prices established by him; especially when there is evidence that he could not have effected such a sale.—*Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 S. Ct. 523, 58 L. Ed. 411.

Prospective profits in mining ore from a certain level at so much per ton are not conjectural and speculative, so as to prevent recovery, when the evidence shows the cost of past mining, the condition in which the mine was left, and, while not showing with certainty the amount of ore remaining in the level, is yet sufficient to enable the jury to make a fair and reasonable finding in regard thereto.—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814.

The profits which a subcontractor would have gained if the general contractor had proceeded with ordinary dispatch are not speculative, where there is expert testimony as to the probable cost of doing the work called for by the subcontract.—*Guerini Stone Co. v. P. J. Carlin Const. Co.*, 36 S. Ct. 300, 240 U. S. 264, 60 L. Ed. 636.

◄47. Mental suffering.

See 15 Cent. Dig. Damag. §§ 100-105, 255-259; 9 Cent. Dig. Carr. § 1333.

◄49. — As distinct cause of action or element of damage.

See 15 Cent. Dig. Damag. §§ 100, 255.

Damages for mental suffering only are not recoverable from a carrier on account of its delay in the delivery of an interstate shipment.—*Southern Express Co. v. Byers*, 36 S. Ct. 410, 240 U. S. 612, 60 L. Ed. 825, reversing judgment *Byers v. Southern Exp. Co.*, 81 S. E. 741, 165 N. C. 542.

◄50. — Physical injury to the person.

See 15 Cent. Dig. Damag. §§ 100, 255, 257-259; 9 Cent. Dig. Carr. § 1333.

An instruction that, in assessing the damages, the jury might take into consideration plaintiffs' "bodily and mental suffering, both taken together, but not his mental pain alone," and "such as inevitably and necessarily resulted from the original injury," is proper. When the injury, whether caused by willfulness or by negligence, produces mental as well as bodily suffering, independently of the cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded.—*Kennon v. Gilmer*, 131 U. S. 22, 9 S. Ct. 696, 33 L. Ed. 110.

Mental anxiety, naturally resulting from personal injuries, may be considered in estimating damages.—*McDermott v. Severe*, 26 S. Ct. 709, 202 U. S. 600, 50 L. Ed. 1162.

(B) AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS.

◄62. Duty of person injured to prevent or reduce damage.

See 15 Cent. Dig. Damag. §§ 119-131; 36 Cent. Dig. Mun. Corp. § 1767.

On breach of a contract to purchase a right to buy public lands, it is the vendor's duty to resell his right, or, failing to do this, he must show its market value as a foundation for the

recovery of damages.—*Telfener v. Russ*, 145 U. S. 522, 12 S. Ct. 930, 36 L. Ed. 800.

(C) INTEREST, COSTS, AND EXPENSES OF LITIGATION.

See 15 Cent. Dig. Damag. §§ 135-153.

Interest as element of damages in suit for collision, see *Collision*, ◄130; for conversion, see *Trover and Conversion*, ◄53.

IV. LIQUIDATED DAMAGES AND PENALTIES.

Limitation of amount of carrier's liability, see *Carriers*, ◄158.

◄75. Construction of stipulations.

See 15 Cent. Dig. Damag. §§ 154-177.

◄78. — Form and language of instrument.

See 15 Cent. Dig. Damag. §§ 157-163.

Parties to a charter party may stipulate the agreed value of the vessel as liquidated damages to be paid in the event of a failure to return the vessel, and such stipulation is conclusive upon them, in the absence of fraud or mistake. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

Liquidated damages, and not a penalty, must be deemed intended by the clause in a contract with the government for the construction of certain disappearing gun carriages, executed when war was imminent, providing for a deduction of \$35 from the purchase price for each day's delay in delivery, where the government had accepted the proposal at the highest price for delivery in the shortest time, and the sum named was arrived at, to the knowledge of the bidder, by computing the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid. Judgment, *Bethlehem Steel Co. v. United States* (1905) 41 Ct. Cl. 19, reversed.—*United States v. Bethlehem Steel Co.*, 27 S. Ct. 450, 205 U. S. 105, 51 L. Ed. 731.

The measure of damages where the government annuls a contract for public work for failure of the contractor to commence the work by a stipulated day is found in a provision that the contractor shall forfeit all moneys and percentages due on notice of annulment, where he fails to commence the performance on the day specified, and where he fails to prosecute the same faithfully, and the government cannot recover, as damages, the excess cost of reletting the contract.—*Stone, Sand & Gravel Co. v. United States*, 34 S. Ct. 865, 234 U. S. 270, 58 L. Ed. 1308, reversing judgment 195 F. 68, 115 C. C. A. 252.

◄79. — Certainty as to amount of actual damage.

See 15 Cent. Dig. Damag. §§ 164-169.

Whether a particular stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

V. EXEMPLARY DAMAGES.

See Master and Servant, —331.

—92. Persons for or against whom exemplary damages may be awarded.

See 15 Cent. Dig. Damag. §§ 206-215; 36 Cent. Dig. Mun. Corp. § 1768.

A master is liable in exemplary damages for the misconduct of his servant, when the servant is acting in the execution of an unlawful purpose when the injury was committed, which purpose was sanctioned by the master.—*Denver & R. G. Ry. v. Harris*, 122 U. S. 597, 7 S. Ct. 1286, 30 L. Ed. 1146.

VI. MEASURE OF DAMAGES.

Compensation for appropriation under power of eminent domain, see Eminent Domain, —122-148.

For particular injuries.

See—

- Brokers, —38.
- Death, —95.
- Ejectment, —132.
- Fraud, —59.
- Landlord and Tenant, —142.
- Mines and Minerals, —51.
- Trover and Conversion, —43-52.

(A) INJURIES TO THE PERSON.

—95. Mode of estimating damages in general.

See 15 Cent. Dig. Damag. §§ 222-229; 9 Cent. Dig. Carr. §§ 1338, 1339.

In determining damages for personal injuries, the jury may consider a servant's loss of time, any impairment of his ability to work, his disfigurement and pain, past or future, and should deduct disbursements under a release which the jury set aside.—*Southwestern Brewery & Ice Co. v. Schmidt*, 33 S. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment *Schmidt v. Southwestern Brewery & Ice Co.*, 107 P. 677, 15 N. M. 232.

—98. Permanent injuries.

See 15 Cent. Dig. Damag. §§ 235, 236.

Where plaintiff was made impotent by the tortious conduct of defendant, the jury, in an action for the tort, may consider such impotency in estimating compensatory damages.—*Denver & R. G. Ry. v. Harris*, 122 U. S. 597, 7 S. Ct. 1286, 30 L. Ed. 1146.

(B) INJURIES TO PROPERTY.

—106. Detention or loss of use of property.

See 15 Cent. Dig. Damag. § 272.

The best evidence of damage suffered by tortious detention of a vessel is the sum for which vessels of the same size and class can be chartered in the market. In the absence of such market value, the value of her use to the owner in the business in which she was engaged at the time of detention is a proper basis for estimating damages; and the books of her owner showing her earnings about that time, are competent evidence of her probable earnings during detention.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D.C.) 49 F. 99.

The fact that the marshal is limited to \$2.50 a day for keeping vessels libeled or attached (Rev. St. § 829) does not prevent the owner from recovering, in an action for the wrongful detention of the vessel by a customs officer, money expended in excess of such limit for crew and provisions necessary to properly care for the vessel.—*Id.*

(C) BREACH OF CONTRACT.

—120. Failure to perform in general.

See 15 Cent. Dig. Damag. §§ 291-305.

The measure of damages for the breach of a contract for the right to purchase public lands is the difference between the contract price and the salable value of such right.—*Telfener v. Russ*, 145 U. S. 522, 12 S. Ct. 990, 36 L. Ed. 800.

The damages for breach of a contract by renunciation thereof before performance is due are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. Judgment 91 F. 345, 33 C. C. A. 550, affirmed.—*Roehm v. Horst*, 20 S. Ct. 780, 178 U. S. 1, 44 L. Ed. 953.

—123. Defects in performance.

See 15 Cent. Dig. Damag. §§ 320-325.

Where defendant contracted to furnish machinery of a certain description, and set it up in a mill, and the machinery, on being set up, turned out to be unsatisfactory, the measure of damages is the reasonable cost of altering the construction of the machinery so as to make it conform to the contract.—*Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

—129. Injuries to the person.

See 15 Cent. Dig. Damag. §§ 357-370, 372-396.

—134. — Impairment of earning capacity.

See 15 Cent. Dig. Damag. §§ 368, 386-394.

Plaintiff, 24 years of age, employed in handling dynamite, was injured by an explosion of dynamite, which destroyed his eyes, and inflicted other severe injuries, whereby he was deprived of all means of earning a livelihood. Held, that a verdict for \$10,000 was a moderate compensation.—*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464, affirming judgment (C.C.) *Rillston v. Mather*, 41 F. 743.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) PLEADING.

For causing death, see Death, —52.

—156. Issues, proof, and variance.

See 15 Cent. Dig. Damag. §§ 429-453.

—157. — In general.

See 15 Cent. Dig. Damag. §§ 429-438, 440, 447, 449-453; 9 Cent. Dig. Carr. § 1467.

Where damages are sought, on a cross petition, for breach of a guaranty of patented articles against repairs, no recovery can be had for probable future repairs during the period of the guaranty, when the cross petition only alleges past damages in a sum stated; and this allegation is not aided by a general prayer for judgment, introduced by the word "wherefore" (thus referring to the prior allegations), in a sum which is merely the aggregate of the various amounts claimed in separate counts.—*Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 S. Ct. 523, 38 L. Ed. 411.

—158. — Personal injuries and physical suffering.

See 15 Cent. Dig. Damag. §§ 441-444.

Where plaintiff was made impotent through the tortious conduct of defendant, evidence of

that fact is admissible in an action for the tort, though the complaint does not in terms specify it.—*Denver & R. G. Ry. v. Harris*, 122 U. S. 597, 7 S. Ct. 1286, 30 L. Ed. 1146.

⚡159. — **Pecuniary losses.**

See 15 Cent. Dig. Damag. §§ 429-438, 440-444, 447, 449-453; 9 Cent. Dig. Carr. § 1467.

Under a declaration seeking to recover damages to an entire lot by reason of the unlawful obstruction of an adjacent street, plaintiff may recover for injuries to such portion of the lot as she owns, though it is shown that it has been subdivided into smaller lots, and that she does not own all the subdivisions. 7 App. D. C. 524 reversed.—*Hetzel v. Baltimore & O. R. Co.*, 18 S. Ct. 255, 169 U. S. 26, 42 L. Ed. 648.

An unnecessary allegation, in a declaration to recover damages for injuries to land by reason of an unlawful obstruction of a street, that plaintiff had attempted to sell the land, but was unable because of such obstruction, does not restrict the right of recovery to damages for failure to make such sale.—*Id.*

(B) EVIDENCE.

For causing death, see Death, ⚡77.

⚡164. **Admissibility.**

See 15 Cent. Dig. Damag. §§ 460-501.

⚡165. — **In general.**

See 15 Cent. Dig. Damag. § 460.

In case of a claim for damages by reason of the breaking out of smallpox among the claimant's workmen, the payment of money to take care of them, and loss of trade, a witness who has not testified to items of damages cannot give his estimate of the whole amount.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

⚡168. — **Health and physical condition of person injured.**

See 15 Cent. Dig. Damag. §§ 480, 482-486.

On an issue as to whether plaintiff's injuries were temporary or permanent, physicians may testify as to plaintiff's utterances and exclamations when undergoing physical examination by them during the two years which had elapsed between the happening of the accident and the trial, and the fact that plaintiff is a competent witness does not alter the rule.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. Ed. 977.

⚡172. — **Loss of earnings or services.**

See 15 Cent. Dig. Damag. §§ 490-492, 501.

In an action for personal injuries by a physician, evidence that theretofore he had been a contributor to various medical journals is admissible, as tending to show the nature of his pursuits, and in connection with other evidence, as bearing on the question of damages.—*District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472.

⚡173. — **Impairment of earning capacity.**

See 15 Cent. Dig. Damag. §§ 490-492, 501.

An engine belonging to defendant railroad company, and standing in its yard, exploded, and inflicted permanent injuries on plaintiff, who was in the service of another company, to which defendant had granted the right to use such yard. In his action for damages based on this injury, plaintiff was allowed to testify as to the wages received in the higher grades of the employment in which he was engaged, and to state that, had he remained in the service of the company, there was a chance or probability

that he would be promoted, but it was not shown that there was any rule or recognized custom governing promotions that would have inured to plaintiff's benefit. *Held*, that the admission of such evidence was reversible error, especially where the judge charged the jury that, in estimating the damages, they might consider the probability of plaintiff's promotion, if such were shown by the evidence.—*Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 13 S. Ct. 837, 37 L. Ed. 728.

Testimony of a fellow workman of plaintiff, that now defendant "just keep him on, being he got hurt, so he could make a living for his wife and family," is competent upon the question how far his capacity to earn a livelihood has been impaired.—*Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 S. Ct. 239, 38 L. Ed. 78.

⚡175. — **Breach of contract.**

See 15 Cent. Dig. Damag. §§ 469-471.

In an action for a breach of contract by a railroad company in which it agreed to send all the live stock coming to a certain point over its road to plaintiff's stock yard, except when specially ordered otherwise by shippers and owners, where it has been shown in evidence that defendant had diverted all its business to rival stock yards, evidence of the number of cars of live stock taken from the rival stock yards is competent as furnishing a basis to estimate damages.—*Terre Haute & I. Ry. Co. v. Struble*, 109 U. S. 381, 3 S. Ct. 270, 27 L. Ed. 970.

⚡183. **Weight and sufficiency.**

See 15 Cent. Dig. Damag. §§ 502-514.

⚡184. — **In general.**

See 15 Cent. Dig. Damag. § 502.

On the question of damage caused by rags sold to a purchaser being infected with smallpox, evidence that the rags caused the smallpox to break out among the purchaser's workmen; that he paid sums of money to support workmen thus disabled; and that, in consequence of the epidemic, he had run his mill short-handed, and lost a considerable part of a profitable trade,—is competent, and sufficiently definite to go to the jury.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

⚡186. — **Loss of earnings or services.**

See 15 Cent. Dig. Damag. § 509.

Where plaintiff had sold out his business, together with the good will, prior to the accident, it is error to permit him to testify what his personal earnings in such business were, and that, when he sold out, he did it with the intention of resuming the business.—*Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830, 39 L. Ed. 1006.

⚡189. — **Breach of contract in general.**

See 15 Cent. Dig. Damag. §§ 283, 512.

Under a contract of agistment, where the defendant agreed to preserve the hides of all steers which should die, in order to recover damages for the nondelivery of the hides, their value must be shown.—*Teal v. Bilby*, 123 U. S. 572, 8 S. Ct. 239, 31 L. Ed. 263.

When one who is under contract to furnish lamps of the most approved form, made by a certain company, in good faith furnishes lamps made by it having a new kind of burner, the purchaser cannot recover damages on the ground that this burner was a failure, and that it would cost three dollars per lamp to exchange it for the old kind, when there is no evidence that it ever made any such change, or paid any money therefor, or sold the lamps for any less price on account of the burner, or how much less the lamps were worth with the

new burner than with the old.—*Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 S. Ct. 523, 38 L. Ed. 411.

(C) PROCEEDINGS FOR ASSESSMENT.

In condemnation proceedings, see *Eminent Domain*, 225-239.

206. Physical examination of person injured.

See 15 Cent. Dig. Damag. § 531; 16 Cent. Dig. Discov. §§ 92-93.

Under the common law, the courts of the United States have no power, in an action for personal injuries, to order before the trial an examination of the body of the injured person.—*Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734.

208. Questions for jury.

See 15 Cent. Dig. Damag. §§ 54, 64, 68, 132, 144, 145, 206, 220, 533, 534.

The question whether or not interest shall be allowed on damages for a tort is a question for the jury.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440, affirming judgment 14 App. D. C. 512.

209. Instructions.

See 15 Cent. Dig. Damag. §§ 537-532.

210. — In general.

See 15 Cent. Dig. Damag. §§ 537, 533.

Defense of malpractice on part of surgeons who operated on plaintiff *held* properly presented in an action for personal injuries received by a woman in a railroad collision by the instructions given.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918.

214. — Mitigation or reduction of damages.

See 15 Cent. Dig. Damag. § 541.

An instruction that it was the duty of an injured employé to submit to all treatment that a reasonably prudent person would have submitted to, in order to improve his condition, and that his employer was liable for no damages which might have been prevented by reasonable care, is not objectionable as authorizing the inference that as a prudent man the employé might have postponed recovery from his injury to recovery of damages. Judgment 112 F. 35, 50 C. C. A. 106, affirmed.—*Texas & P. Ry. Co. v. Behymer*, 23 S. Ct. 622, 189 U. S. 468, 47 L. Ed. 905.

216. — Measure of damages for injuries to the person.

See 15 Cent. Dig. Damag. §§ 543-555.

In an action for personal injuries, while standard life and annuity tables, showing, at

any age, the probable duration of life and present value of a life annuity, are competent evidence, the rules derived therefrom are not the absolute guides of the judgment and conscience of the jury; and an instruction directing the jury to ascertain the loss of income by the use of such rules, the charge nowhere suggesting that the jury are at liberty to ascertain such loss according to their own judgment, is erroneous.—*Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257.

Instructing jury in action under Employers' Liability Act as amended by Act April 5, 1910, *held* not objectionable as permitting the jury to indulge in speculation as to future results of injuries and as leaving the amount of damages to conjecture.—*Chesapeake & O. Ry. Co. v. Carnahan*, 36 S. Ct. 594, 241 U. S. 241, 60 L. Ed. 979, affirming judgment (Va.) 86 S. E. 863.

(D) COMPUTATION AND AMOUNT, DOUBLE AND TREBLE DAMAGES, AND REMISSION.

Comparative negligence, see *Negligence*, 101.

Double damages for trespass, due process of law, see *Constitutional Law*, 302.

Refusal to pay for killing of stock by railroad, see *Railroads*, 444.

Review of amount of recovery, see—*Appeal and Error*, 221, 1004, 1021, 1063, 1140, 1151.

New Trial, 162.

Treble damages for violation of anti-trust law, see *Monopolies*, 28.

228. Remission of excess.

See 15 Cent. Dig. Damag. §§ 576-579.

Where a remittitur does not appear on the record to have been made in open court, as required by statute, the court has power at the same term, before a writ of error is sued out, to amend the record according to the fact.—*Pacific Exp. Co. v. Malin*, 132 U. S. 531, 10 S. Ct. 166, 33 L. Ed. 450.

DAMS.

Obstruction of navigable waters, see *Navigable Waters*, 22.

DAYS.

Computation of time, see *Time*, 9.

DEAD BODIES.

See 15 Cent. Dig. Dead Bodies.

See *Cemeteries*.

DEATH.

Scope-Note.

[INCLUDES presumptions and proof as to death and survivorship in general; also, actions for causing death.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Evidence of Death and of Survivorship.

- ☞ 2. Presumption as to death from absence.

II. Actions for Causing Death.

(A) RIGHT OF ACTION AND DEFENSES.

- ☞ 8. What law governs.
- 10. Survival of right of action of person injured.
- 11. Creation of new cause of action.
- 12. Grounds of action.
- 14. — Nature of act or omission causing death.
- 17. — Proximate cause of death.
- 31. Persons entitled to sue.
- 32. Persons for whose benefit suit may be maintained.

(B) JURISDICTION, VENUE, AND LIMITATIONS.

- ☞ 34. Jurisdiction of cause of action.
- 35. — Actions under laws of other state or foreign country.

(C) PARTIES AND PROCESS.

- ☞ 44. Intervention, addition, or substitution of parties.

(D) PLEADING AND EVIDENCE.

- ☞ 45. Declaration, complaint, or petition.
- 52. — Damages.
- 74. Weight and sufficiency of evidence.
- 76. — Cause of death.
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(E) DAMAGES, FORFEITURE, OR FINE.

- ☞ 80. Elements of compensation.
- 81. — In general.
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- ☞ 102. Trial.
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I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

See Descent and Distribution, 18.

2. Presumption as to death from absence.

See 15 Cent. Dig. Death, §§ 1-3; 16 Cent. Dig. Des. & Dist. § 10; 49 Cent. Dig. Wills, § 1178.

The presumption of death which arises from seven years' absence may be rebutted.—*Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108, 38 L. Ed. 896, reversing judgment 5 Wash. 309, 31 P. 873, 34 Am. St. Rep. 863.

II. ACTIONS FOR CAUSING DEATH.

Application of state laws to action for death on high seas as interfering with commerce, see Commerce, 10.

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Wrongful death from sale of liquor, see Intoxicating Liquors, 283.

(A) RIGHT OF ACTION AND DEFENSES.

Action in admiralty, see Admiralty, 28.

Construction of state's statute by state courts as authority in federal court, see Courts, 366.

Effect of treaties upon right of nonresident aliens to sue for death, see Treaties, 8.

Impairing obligation of contract, see Constitutional Law, 117.

8. What law governs.

See 15 Cent. Dig. Death, §§ 12, 36, 53, 121, 123.

The damages recoverable from an employer for the death of his employé, caused by his negligence, are controlled by the law of the place where the contract of employment was made and the accident occurred, although the death took place, and action is brought, in another state.—*Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 S. Ct. 978, 38 L. Ed. 958.

In an action based solely on the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149 [U. S. Comp. Stat. Supp. 1909, p. 1171]), to recover for death of a railroad employé from injury suffered in course of employment, the injury and death occurring in Montana, the recovery is for the exclusive benefit of the widow, as provided by such act, and not for the joint benefit of the widow and surviving sister as authorized by the Montana statutes.—*Mondou v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

The distribution of the damages recoverable under the act of April 22, 1908, from an interstate railway carrier, for the death of an employé while engaged in interstate commerce, is governed by the provisions of that statute which necessarily supersedes any applicable state legislation.—*Id.*

10. Survival of right of action of person injured.

See 39 Cent. Dig. Phys. § 35.

The right of action created by Employers' Liability Act April 22, 1908, in behalf of an injured interstate railway employé, is extinguished by his death.—*Michigan Cent. R. Co. v. Vreeland*, 33 S. Ct. 192, 227 U. S. 59, 57 L. Ed. 417, Ann. Cas. 1914C, 176, reversing judgment (C. C.) *Vreeland v. Michigan Cent. R. Co.*, 189 F. 495.

Right of action under Employers' Liability Act April 22, 1908, in behalf of an injured interstate railway employé, is extinguished by his death from his injuries.—*Garrett v. Louisville & N. R. Co.*, 35 S. Ct. 32, 235 U. S. 308, 59 L. Ed. 242, affirming judgment 197 F. 715, 117 C. C. A. 109.

11. Creation of new cause of action.

See 15 Cent. Dig. Death, §§ 10, 15.

Liability to certain relatives dependent on decedent, imposed by Employers' Liability Act April 22, 1908, is not limited to cases where death was instantaneous; the right created being independent of any cause of action he might have had.—*Michigan Cent. R. Co. v. Vreeland*, 33 S. Ct. 192, 227 U. S. 59, 57 L. Ed. 417, Ann. Cas. 1914C, 176, reversing judgment (C. C.) *Vreeland v. Michigan Cent. R. Co.*, 189 F. 495.

12. Grounds of action.

See 15 Cent. Dig. Death, §§ 16-21, 48.

14. — Nature of act or omission causing death.

See 15 Cent. Dig. Death, § 14.

The death of a free passenger on a railway train, not due to the omission on the part of the railway company of any duty owing to the deceased, cannot be considered wrongful or negligent at the suit of his heirs, brought under Rev. St. Idaho, § 4100, providing that when a person's death is caused by "the wrongful act or neglect of another," his heirs or personal representatives may maintain an action for damages against the person causing the death. Judgment 118 F. 324, 54 C. C. A. 196, reversed.—*Northern Pac. Ry. Co. v. Adams*, 24 S. Ct. 408, 192 U. S. 440, 48 L. Ed. 513.

17. — Proximate cause of death.

See 15 Cent. Dig. Death, §§ 19, 21.

Under a state statute which requires the action to be brought within two years from the death (Rev. St. Ind. § 284), and which, as interpreted by the state courts, does not merely revive the right of action for the injury, but rather gives a new cause of action unknown to the common law, the existence of the right of action cannot be made to depend (by analogy to the common-law rule in cases of murder, appeals of death, and inquisitions against deodands) upon the dying of the injured person within a year and a day from the date of the injury.—*Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 S. Ct. 579, 38 L. Ed. 422.

31. Persons entitled to sue.

See 15 Cent. Dig. Death, §§ 35, 37-46, 48; 22 Cent. Dig. Ex. & Ad. § 232.

The widow and son of a deceased railway employé cannot sue in their own names for damages given by Employers' Liability Act April 22, 1908, § 2, especially in Porto Rico, where the difference between heirs and personal rep-

representatives is recognized, and where there existed a local employer's liability act giving a cause of action to the widow of the deceased, or his children or dependent parents.—*American R. Co. of Porto Rico v. Birch*, 32 S. Ct. 603, 224 U. S. 547, 56 L. Ed. 879.

Administrator of deceased minor cannot maintain for the benefit of the parents an action for death given by a state law to the decedent's father, as the compensation would belong to the mother as well as the father.—*Winfree v. Northern Pac. R. Co.*, 33 S. Ct. 273, 227 U. S. 296, 57 L. Ed. 518, affirming judgment 173 F. 65, 97 C. C. A. 392.

⚡32. **Persons for whose benefit suit may be maintained.**

See 15 Cent. Dig. Death, §§ 47, 48.

The only right of action given by Federal Employers' Liability Act April 22, 1908, on death of an interstate railway employé, is for the benefit of the next of kin.—*St. Louis, I. M. & S. R. Co. v. Hesterly*, 33 S. Ct. 703, 228 U. S. 702, 57 L. Ed. 1031, reversing judgment 135 S. W. 874, 98 Ark. 240.

That beneficiaries are nonresident aliens will not prohibit action for damages under Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, to personal representatives for the benefit of certain specified dependent relatives of an employé of an interstate carrier.—*McGovern v. Philadelphia & R. Ry. Co.*, 35 S. Ct. 127, 235 U. S. 389, 59 L. Ed. 283, reversing judgment (D. C.) 209 F. 975.

The "next of kin" under Act April 22, 1908, as amended by Act April 5, 1910, are those who are the next of kin under the local law.—*Seaboard Air Line Ry. v. Kenney*, 36 S. Ct. 458, 240 U. S. 489, 60 L. Ed. 762, affirming judgment *Kenney v. Seaboard Air Line R. Co.*, 82 S. E. 968, 167 N. C. 14.

(B) JURISDICTION, VENUE, AND LIMITATIONS.

Exclusive or concurrent jurisdiction of state and federal court, see Courts, ⚡489, 494. Jurisdiction of admiralty, see Admiralty, ⚡21.

⚡34. **Jurisdiction of cause of action.**

See 15 Cent. Dig. Death, § 50.

⚡35. **— Actions under laws of other state or foreign country.**

See 15 Cent. Dig. Death, § 50.

Since the statutes of Louisiana and Texas, giving action for death, are substantially alike, except that under the former such an action will lie against a receiver, while under the latter it will not, there is no such inconsistency as will prevent an action in Texas against a railroad receiver for the wrongful death of a brakeman in Louisiana.—*Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

An action for damages for negligently causing death may be maintained in other jurisdictions than that in which the cause of action arose, where the statutes giving the right of action are not inconsistent with the statutes or public policy of the jurisdiction in which the suit is brought. Judgment 6 App. D. C. 56, reversed.—*Stewart v. Baltimore & O. R. Co.*, 18 S. Ct. 105, 168 U. S. 445, 42 L. Ed. 537.

An action may be maintained in the District of Columbia to recover damages for a death caused by negligence in Maryland, since in both jurisdictions the statutes have removed the common-law obstacle to such a suit, and permitted a recovery for the benefit of the near relatives of the deceased. The fact that in Maryland the action must be brought in the name of the state, while in the District it is brought in the name of

the personal representative, or the fact that the Maryland statute names as beneficiaries the wife, husband, parent, and child of the deceased, while the District statute provides for a distribution of a recovery according to the statute of distribution, does not show such an inconsistency between the two statutes as would prevent the maintenance of the suit.—Id.

A federal court is without jurisdiction of a common-law action founded on the liability for a death by wrongful act, created by the Mexican laws, because of its lack of power to make a decree of the kind required by such laws, which demand that the damages be awarded as support in the nature of alimony or pension, by a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change. Judgment, *Mexican Nat. R. Co. v. Slater*, 115 F. 593, 53 C. O. A. 239, affirmed.—*Slater v. Mexican Nat. R. Co.*, 24 S. Ct. 581, 194 U. S. 120, 48 L. Ed. 900.

(C) PARTIES AND PROCESS.

⚡44. **Intervention, addition, or substitution of parties.**

The trial court under Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), may allow amendment to petition in action by surviving parent in her individual capacity, setting up a right to sue as personal representative for death of a son, in which capacity alone can action be maintained under Employers' Liability Act April 22, 1908.—*Missouri, K. & T. Ry. Co. v. Wulf*, 33 S. Ct. 135, 226 U. S. 570, 57 L. Ed. 355, Ann. Cas. 1914B, 184, affirming judgment 192 F. 919, 113 C. C. A. 665.

(D) PLEADING AND EVIDENCE.

⚡45. **Declaration, complaint, or petition.**

See 15 Cent. Dig. Death, §§ 60-69.

⚡52. **— Damages.**

See 15 Cent. Dig. Death, § 69.

Declaration in an action against an interstate carrier under Employers' Liability Act April 22, 1908, for the benefit of parents of an employé dying from the injuries received in interstate commerce, is fatally defective where it fails to show facts apprising defendant of the pecuniary loss in fact suffered.—*Garrett v. Louisville & N. R. Co.*, 35 S. Ct. 32, 235 U. S. 308, 59 L. Ed. 242, affirming judgment 197 F. 715, 117 O. C. A. 109.

⚡74. **Weight and sufficiency of evidence.**

See 15 Cent. Dig. Death, §§ 93-96.

⚡76. **— Cause of death.**

See 15 Cent. Dig. Death, § 94.

The fact that the only witnesses in an action for wrongful death were defendant's employes did not warrant submission of the case to the jury to determine the weight of the testimony, where the only evidence showed negligence on the part of the deceased.—*Bunt v. Sierra Butte Gold-Min. Co.*, 138 U. S. 483, 11 S. Ct. 464, 34 L. Ed. 1031, affirming judgment (C. C.) Same *v. Sierra Buttes Gold Min. Co.*, 24 F. 847.

⚡77. **— Damages.**

See 15 Cent. Dig. Death, § 96.

Evidence held to justify a finding that a railroad employé endured conscious pain during the half hour after a car had passed partly over his body.—*St. Louis, I. M. & S. Ry. Co. v. Craft*, 35 S. Ct. 704, 237 U. S. 648, 59 L. Ed. 1160, affirming judgment (Ark.) 171 S. W. 1185.

(E) DAMAGES, FORFEITURE, OR FINE.

80. Elements of compensation.

See 15 Cent. Dig. Death, §§ 103-119.

81. — In general.

See 15 Cent. Dig. Death, §§ 103-105.

A vessel met with an accident, and sank 10 minutes later, drowning libellant's daughter. Held, that an action for her suffering and fright during such 10 minutes, separate and apart from the cause of action arising out of her subsequent death, could not be maintained.—*The Corsair*, 145 U. S. 335, 12 S. Ct. 949, 36 L. Ed. 727.

82. — Suffering of deceased.

See 15 Cent. Dig. Death, § 106.

No recovery can be had under federal Employers' Liability Act April 22, 1908, for pain suffered by deceased.—*St. Louis, I. M. & S. R. Co. v. Hesterly*, 33 S. Ct. 703, 228 U. S. 702, 57 L. Ed. 1031, reversing judgment 135 S. W. 874, 98 Ark. 240.

Conscious pain substantially contemporaneous with death, intervening between fatal injuries and death, affords no basis for a separate award of damages under Act April 5, 1910, amending Employers' Liability Act April 22, 1908.—*St. Louis, I. M. & S. Ry. Co. v. Craft*, 35 S. Ct. 704, 237 U. S. 648, 59 L. Ed. 1160, affirming judgment (Ark.) 171 S. W. 1185.

Recovery in an action by personal representative of deceased employé under Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, may include damages for decedent's conscious pain during the period between fatal injuries and death, and damages for pecuniary loss to relatives or next of kin.—*Id.*

Recovery in action by personal representative of deceased railway employé under Employers' Liability Act of April 22, 1908, as amended April 5, 1910, may include damages for decedent's conscious suffering before death and damages for pecuniary loss of relatives or next of kin.—*Kansas City Southern R. Co. v. Leslie*, 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment 167 S. W. 83, 112 Ark. 305.

85. — Pecuniary loss to plaintiff or beneficiary in general.

See 15 Cent. Dig. Death, § 111.

Recovery in action by personal representative of deceased railway employé under Employers' Liability Act of April 22, 1908, as amended April 5, 1910, may include damages for decedent's conscious suffering before death, and damages for pecuniary loss of relatives or next of kin.—*Kansas City Southern R. Co. v. Leslie*, 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment 167 S. W. 83, 112 Ark. 305.

86. — Loss of prospective pecuniary benefits.

See 15 Cent. Dig. Death, §§ 108, 109, 112-114, 117, 119.

It is competent to show the income of the deceased before his death, as well as his ability and capacity for labor and his skill in his calling.—*Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 S. Ct. 579, 38 L. Ed. 422.

In an action for death by wrongful act, the jury may consider the dependent condition of decedent's family.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

In an action for death by wrongful act, evidence of deceased's earning capacity is admissible as bearing on the amount of loss to her estate.—*Id.*

88. — Loss of society.

See 15 Cent. Dig. Death, § 116.

Loss to parents of companionship of son is not an element of damages recoverable in an action against a carrier under Employers' Liability Act April 22, 1908.—*American R. Co. of Porto Rico v. Didricksen*, 33 S. Ct. 224, 227 U. S. 145, 57 L. Ed. 458.

94. Measure and amount awarded.

See 15 Cent. Dig. Death, §§ 108, 109, 111-115, 129-130.

95. — In general.

See 15 Cent. Dig. Death, §§ 108, 109, 111-115, 129.

The financial benefit which might be expected from a husband is the measure of damages in an action under Employers' Liability Act April 22, 1908, for the benefit of the widow of an employé.—*Michigan Cent. R. Co. v. Vreeland*, 33 S. Ct. 192, 227 U. S. 59, 57 L. Ed. 417, Ann. Cas. 1914C, 176, reversing judgment (C. C.) *Vreeland v. Michigan Cent. R. Co.*, 180 F. 495.

It is reversible error to instruct that, in fixing damages under federal Employers' Liability Act, the age, health, occupation, and earning capacity should be considered, and that from that amount the personal expenses should be deducted, and the remainder should be the amount of recovery.—*Kansas City Southern R. Co. v. Leslie*, 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment 167 S. W. 83, 112 Ark. 305.

The present cash value of the future benefits of which beneficiaries were deprived by death is a proper measure of recovery in an action against an interstate railroad under the Employers' Liability Act as amended by Act April 5, 1910, for the benefit of the widow and dependent children.—*Chesapeake & O. Ry. Co. v. Kelly*, 36 S. Ct. 630, 241 U. S. 485, 60 L. Ed. 1117, reversing judgment *Same v. Kelly's Adm'r*, 169 S. W. 736, 160 Ky. 296; *Same v. Gainey*, 36 S. Ct. 633, 241 U. S. 494, 60 L. Ed. 1124, reversing judgment *Same v. Dwyer's Adm'r*, 172 S. W. 918, 162 Ky. 427.

101. Apportionment and distribution of amount recovered.

See 15 Cent. Dig. Death, §§ 123-140.

Rev. St. Ariz. 1887, tit. 36, §§ 2145-2155, providing that an action for wrongful death may be brought for the benefit of the husband, wife, children, and parents of deceased, by one of them, for the benefit of all and that a recovery shall be divided among the persons entitled thereto, do not authorize one of such persons suing for the benefit of all to remit damages allotted to some of the persons entitled.—*Southern Pac. Co. v. Tomlinson*, 163 U. S. 369, 16 S. Ct. 1171, 41 L. Ed. 193, reversing judgment (Ariz.) 33 P. 710.

Recovery under federal Employers' Liability Act for the death of a railroad employé engaged in interstate commerce must be limited to compensating relatives shown to have sustained pecuniary loss, and a surviving child not dependent on decedent and with no expectation of pecuniary benefit from him can have no share in such recovery.—*Gulf, C. & S. F. Ry. Co. v. McGinnis*, 33 S. Ct. 426, 228 U. S. 173, 57 L. Ed. 785, reversing judgment (Tex. Civ. App.) 147 S. W. 1188.

(F) TRIAL, JUDGMENT, AND REVIEW.

Instructions cured by giving other instructions, see Trial, 296.

Persons concluded, see Judgment, 688.
Remand for new trial, see Appeal and Error, 1144.

102. Trial.

See 15 Cent. Dig. Death, §§ 141-148.

⌘104. — Instructions.

See 15 Cent. Dig. Death, §§ 142-148.

A request to charge that the burden was on plaintiff, in the first instance, to show that "plaintiff" was in the exercise of due care, is properly refused.—Union Pac. Ry. Co. v. O'Brien, 181 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 768.

⌘105. Verdict and findings.

See 15 Cent. Dig. Death, § 149.

General verdict for plaintiff may be returned by jury in action by an administratrix under Employers' Liability Act for benefit of widow and minor children without apportioning the damages.—Central Vermont R. Co. v. White, 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment White v. Central Vermont R. Co., 89 A. 618, 87 Vt. 380.

DEBATES.

Congressional debates, aid to construction of statute, see Statutes, ⌘216, 217.

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DEBT.

Imprisonment for debt, see—
Arrest, ⌘3.
Constitutional Law, ⌘83.

DEBT. ACTION OF.

See 15 Cent. Dig. Debt, Action of.

Recovery of stamp taxes, see Internal Revenue, ⌘28.

DEBTOR AND CREDITOR.

See—

Assignments for Benefit of Creditors.
Attachment.
Bankruptcy.
Compositions with Creditors.
Compromise and Settlement.
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Estates, see—

Descent and Distribution.
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Testimony as to transactions with persons since deceased, see Witnesses, ⌘127-163.

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See Fraud.

DECEPTION.

See Fraud.

DECISION.

Judicial decisions as impairing obligation of contract, see Constitutional Law, ⌘116.

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Accompanying invoices, see Customs Duties, ⌘65.
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DECLARATIONS.

As evidence, see—

Criminal Law, ⌘413-417, 422-427.
Evidence, ⌘268-274.
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Dying declarations, see Homicide, ⌘210-220.

DECLARATORY STATEMENT.

Mining location or claim, see Mines and Minerals, ⌘21.

DECOY LETTERS.

Defense to crime, see Criminal Law, ⌘37.

DECREE.

See—

Admiralty, ⌘92.
Equity, ⌘415-441.
Judgment.

DEDICATION.

Scope-Note.

(INCLUDES giving or devoting real property or easements therein to the use of the public, and acceptance and revocation of such dedication; nature, requisites, incidents, operation, and effect thereof; evidence relating thereto; estates, interests, or easements created; and rights, duties, and liabilities of parties making such dedications and of the public as to the property dedicated.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Requisites.

⌚16. Acts constituting dedication in general.

19. — Designation in maps or plats, and sale of lots.

II. Operation and Effect.

⌚49. Extent of dedication.

50. — In general.

59. Rights and liabilities as to control and care of property.

Cross-References.

See—
Literary Property, ⌚5.
Patents, ⌚82, 83.

I. NATURE AND REQUISITES.

⌚16. Acts constituting dedication in general.

See 15 Cent. Dig. Dedl. §§ 15-49.

⌚19. — Designation in maps or plats, and sale of lots.

See 15 Cent. Dig. Dedl. §§ 35, 37-47.

The recording in 1839, under direction of the secretary of war, pursuant to act of congress, of the plat of the Ft. Dearborn addition to Chicago, following the requirements of Act III. Feb. 27, 1833, relating to town plats, which provided that the land intended for streets or other public uses in any town or city, or addition thereto, "shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended," and the sale of the lots shown on the plat, vested in the city of Chicago the legal title to that part of the ground designated on the plat as "public ground."—United States v. Illinois Cent. R. Co., 154 U. S. 225, 14 S. Ct. 1015, 38 L. Ed. 971.

II. OPERATION AND EFFECT.

Adverse possession of property dedicated, see

Adverse Possession, ⌚8.

Estoppel by dedication, see Estoppel, ⌚33.

⌚49. Extent of dedication.

See 15 Cent. Dig. Dedl. §§ 91-95.

⌚50. — In general.

See 15 Cent. Dig. Dedl. §§ 91-94.

Certain streets having been dedicated as terminating at a river, the river bed in front was, by legislative authority, filled in below high-water mark, and the land so formed, described by metes and bounds, was deeded by the state, for value, to defendants, who had

also succeeded to the title of the dedicator. *Held*, that the title to the filled-in land, being derived directly from the state, was not affected by the dedication, and that the streets terminated at the former high-water mark.—City of Hoboken v. Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. Ed. 543, affirming judgment (C. C.) 16 F. 816.

⌚59. Rights and liabilities as to control and care of property.

See 15 Cent. Dig. Dedl. §§ 112, 115-121.

Since the recording, in 1839, under direction of the secretary of war, pursuant to act of congress, of the plat of the Ft. Dearborn addition to Chicago, following the requirements of Act III. Feb. 27, 1833, relating to town plats, which provided that the land intended for streets or other public uses in any town or city, or addition thereto, "shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended," and the sale of the lots shown on the plat, vested in the city of Chicago the legal title to that part of the ground designated on the plat as "public ground," and the enforcement, as a subordinate agency of the state, of the rights of the public therein, the United States are not entitled to restrain the diversion of such "public ground" to private uses.—United States v. Illinois Cent. R. Co., 154 U. S. 225, 14 S. Ct. 1015, 38 L. Ed. 971.

DEDUCTIONS.

Benefits arising from condemnation of property from compensation, see Eminent Domain, ⌚144, 145.

From compensation for performance of contract, see Contracts, ⌚234.

From duty, see Customs Duties, ⌚78.

DEEDS.

Scope-Note.

[INCLUDES instruments in writing under seal in general, and, more particularly, conveyances of real property; nature, requisites, validity, incidents, construction, operation, and effect of such instruments; evidence relating thereto; delivery, acceptance, and recording or registration thereof; and estates or interests created, exceptions or reservations therefrom, and conditions or restrictions imposed thereon.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity.

(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.

- ⌘ 4. Conveyances distinguished from other transactions.
- 5. — In general.
- 6. — Executory contracts.
- 14. Consideration.
- 17. — Sufficiency.
- 20. Particular modes of conveyance.
- 25. — Quitclaim.

(B) FORM AND CONTENTS OF INSTRUMENTS.

- ⌘ 30. Designation and description of parties.
- 31. — In general.
- 32. — Blanks.
- 37. Description of property.
- 38. — Certainty in general.
- 40. — Reference to maps or plats.

(C) EXECUTION.

(D) DELIVERY.

- ⌘ 63. Acceptance.
- 64. — Necessity.

(E) VALIDITY.

- ⌘ 70. Fraud and misrepresentation.
- 72. Undue influence.

II. Recording and Registration.

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III. Construction and Operation.

(A) GENERAL RULES OF CONSTRUCTION.

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(D) EXCEPTIONS AND RESERVATIONS.

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- ⌘ 159. Performance or breach.
- 160. — Breach in general.
- 162. — Sufficiency of performance.

(F) LOSS OR RELINQUISHMENT OF RIGHTS.

[No paragraphs or references in this Digest. But see 16 Cent. Dig. Deeds, §§ 549-555.]

IV. Pleading and Evidence.

- 191. Presumptions and burden of proof.
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Cross-References.

See—

Acknowledgment.
Alteration of Instruments.
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Absolute deed as mortgage, see Mortgages, 31-34.

Conclusiveness, as against grantee, of judgment against grantor, see Judgment, 682.

Estoppel by deed, see Estoppel, 20-38.

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Necessity and sufficiency to, comply with contract of sale, see Vendor and Purchaser, 145-148.

Parol or extrinsic evidence, see Evidence, 429-434.

Preferences by debtor, see Bankruptcy, 158-185.

Priorities between judgments and conveyances, see Judgment, 786, 787.

Deeds by or to particular classes of persons.

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Assignments for Benefit of Creditors, 2-151.
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Descent and Distribution, 82.
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Deeds of particular species of, or estates or interest in, property.

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Champerly and Maintenance, 7.
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Particular classes of deeds.

See—

Assignments for Benefit of Creditors.
Chattel Mortgages.
Mortgages.
Taxation, 756-788.
Trusts, 3-61.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.

Persons executing instruments relied on as color of title, see Adverse Possession, 81.

4. Conveyances distinguished from other transactions.

See 16 Cent. Dig. Deeds, 6-9.

5. — In general.

See 16 Cent. Dig. Deeds, 7-9.

No transfer of title was effected by an instrument which recites that the party of the first part "sells" certain mining claims to the party of the second part for a specified consideration, and "upon the terms and consideration following," and which, in its subsequent provisions, authorizes the party of the second part to sell and negotiate the mines for any sum above \$45,000, and retain out of the purchase price seven-eighths of the excess, the party of the first part agreeing to execute any conveyance thereafter necessary to convey a good title, and the party of the second part assuming no obligations except a general one by which both parties mutually agree to aid each other in the negotiation and sale; such document is not a deed, but simply a power of attorney, and, as such, subject to revocation. Decree (Ariz. 1904) 76 P. 623, affirmed.—Taylor v. Burns, 27 S. Ct. 40, 203 U. S. 120, 51 L. Ed. 116.

6. — Executory contracts.

See 16 Cent. Dig. Deeds, 6.

An instrument executed by an agent, by virtue of a power of attorney to convey proper-

ty thereto annexed, and which contains apt words to constitute a conveyance and recites the receipt of the consideration, is a conveyance, and not a contract of sale, though it is signed by the agent in his own name, and contains a further agreement that his principals shall execute a deed as soon as convenient, the latter provision being only a covenant for further assurance.—Williams v. Paine, 18 S. Ct. 279, 169 U. S. 55, 42 L. Ed. 658.

An informal unacknowledged document signed by both parties, reciting that one has sold and transferred property under an unconfirmed Mexican grant and will execute conveyances as soon as another grant should be confirmed, is an executory contract for a conveyance.—Chavez v. De Bergere, 34 S. Ct. 144, 231 U. S. 482, 58 L. Ed. 325, affirming judgment De Bergere v. Chavez, 93 P. 762, 14 N. M. 352.

14. Consideration.

See 16 Cent. Dig. Deeds, 23-23; 26 Cent. Dig. Hus. & W. 235.

17. — Sufficiency.

See 16 Cent. Dig. Deeds, 26-27.

A deed from a father for the benefit of an illegitimate child is upon a good consideration, and is not invalidated by the fact that there was a remainder over to the mother in the event of the child's dying.—Conley v. Nailor, 118 U. S. 124, 6 S. Ct. 1001, 30 L. Ed. 112.

20. Particular modes of conveyance.

See 16 Cent. Dig. Deeds, 39-49.

25. — Quitclaim.

See 16 Cent. Dig. Deeds, 48.

A deed declared that the grantor did thereby "alien, release, grant, bargain, sell, and con-

vey" to the grantee, his heirs and assigns, the "undivided one-half of all and singular the lands lying and being in the state of Oregon, granted or intended to be granted to the state of Oregon by the act of congress, * * * to have and to hold, all and singular, the lands and premises hereby conveyed," and "all the right, title and interest" of the grantor therein. *Held*, that this was not a quitclaim deed, but a deed of bargain and sale.—*United States v. California & O. Land Co.*, 148 U. S. 31, 13 S. Ct. 453, 37 L. Ed. 354, affirming decree 49 F. 496, 1 O. C. A. 330; *Same v. Dallas Military Road Co.*, 148 U. S. 49, 13 S. Ct. 465, 37 L. Ed. 362.

(B) FORM AND CONTENTS OF INSTRUMENTS.

Tax deeds, see Taxation, ¶756-764.

¶30. Designation and description of parties.

See 16 Cent. Dig. Deeds, §§ 60-64.

¶31. — In general.

See 16 Cent. Dig. Deeds, §§ 60-63.

S., the wife of B., joined with him in a deed to H. of land of B., in trust, for the use of S. during her life, and at any time to convey it to such person as S. might request or direct in writing, with the written consent of B. Afterwards B. made a deed of the land to W., in which H. did not join, and S. was not described as a party, but which was signed by S. and bore her seal, and was acknowledged by her in the proper manner. *Held*, that the latter deed did not convey the interest of S. in the land.—*Batchelor v. Brereton*, 112 U. S. 396, 5 S. Ct. 180, 28 L. Ed. 743.

¶32. — Blanks.

See 16 Cent. Dig. Deeds, § 64.

A deed, executed with the name of the grantee in blank, conveys nothing, unless the blank is filled by a person having authority to do so before the deed is delivered.—*Allen v. Withrow*, 110 U. S. 119, 3 S. Ct. 517, 28 L. Ed. 90.

¶37. Description of property.

See 16 Cent. Dig. Deeds, §§ 65-67.

¶38. — Certainty in general.

See 16 Cent. Dig. Deeds, §§ 65-79.

A deed conveying "a certain tract or parcel of land, * * * containing by estimation 890 acres of land," lying in a named land district, "on Cow Bayou and Bull Hide streams, patented to the heirs of James Stewart for 900 acres," is not void on its face, for insufficiency of description.—*Cox v. Hart*, 145 U. S. 376, 12 S. Ct. 932, 38 L. Ed. 741.

¶40. — Reference to maps or plats.

See 16 Cent. Dig. Deeds, §§ 81-83.

The vagueness of the descriptive language in a deed, when considered alone, is not material, if, when taken in connection with the plats to which it refers, it is sufficiently certain to identify the land. Judgment 23 App. D. C. 587, affirmed.—*Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co.*, 26 S. Ct. 25, 199 U. S. 247, 50 L. Ed. 175.

(C) EXECUTION.

See 16 Cent. Dig. Deeds, §§ 83-115.

See Acknowledgment.

Tax deeds, see Taxation, ¶765.

(D) DELIVERY.

See Escrows.

¶63. Acceptance.

See 16 Cent. Dig. Deeds, §§ 142-144.

¶64. — Necessity.

See 16 Cent. Dig. Deeds, §§ 143, 145.

Under Act Colo. Dec. 9, 1867, locating the seat of government at Denver, and authorizing a board of managers to take title to a site for public buildings, plaintiff donated a tract of 10 acres of land, and made a deed thereof to the managers in fee simple. By Act Colo. Feb. 9, 1872, proposals for the erection of a capitol building thereon were authorized, and by Act Colo. Feb. 13, 1874, the improvement of the grounds and the erection of a capitol building thereon were provided for, but nothing was done before the admission of the territory as a state August 1, 1876. On May 9, 1879, plaintiff resumed possession of the site, and put on record a deed revoking his former conveyance, on the ground that it had never been accepted, and filed a bill to restrain the state officers from interfering with his possession. *Held*, that a demurrer thereto was properly sustained.—*Brown v. Grant*, 116 U. S. 207, 6 S. Ct. 357, 29 L. Ed. 598.

(E) VALIDITY.

Cancellation for invalidity, see Cancellation of Instruments, ¶32-57.

Parol or extrinsic evidence, see Evidence, ¶429-434.

¶70. Fraud and misrepresentation.

See 16 Cent. Dig. Deeds, §§ 155-153.

Conveyances made by plaintiff's attorney in fact, in exchange for other property, will not be set aside on the ground that the exchange was induced by the vendee's false representations, where it appears that the attorney is an experienced real-estate dealer, capable of taking care of his own interests, and that in making the exchange he acted on his own judgment, and on information obtained from third persons, and not on the vendee's representations.—*Shields v. Hanbury*, 128 U. S. 584, 9 S. Ct. 176, 32 L. Ed. 565.

Where a principal conveys property to his agent in anticipation of judgments which, when added to the existing liens on such property, would exceed the value of the same, the consideration, being \$10,000 and the discharge of all liens, is not so inadequate as to raise a presumption of fraud against the principal on the part of the agent, though he subsequently procures a discharge of all liens by paying a small percentage of the creditors' claims.—*Dent v. Ferguson*, 132 U. S. 50, 10 S. Ct. 13, 33 L. Ed. 242.

Equity will set aside a conveyance by which the grantee, by means of fraud, oppression, and undue influence acquired in settlement of a debt a tract of land of far greater value than the amount of such debt. Judgment (1907) 92 P. 250, 19 Okl. 525, affirmed.—*Wagg v. Herbert*, 30 S. Ct. 218, 215 U. S. 546, 54 L. Ed. 321.

¶72. Undue influence.

See 16 Cent. Dig. Deeds, §§ 190-199.

Plaintiff in 1872 purchased from D. an undivided half of a tract of land for \$23,425, paying part cash, and giving her note and mortgage on the land for the balance, \$10,135. In 1876 she brought an action to rescind the purchase for false representations as to the value of the land; and foreclosure proceedings were begun by the assignee of the mortgage. While both actions were pending, plaintiff's husband, who was in ill health, and extremely nervous and sensitive, advised her to settle all the matters in dispute, and avoid the danger of expensive litigation; whereon, with the advice of her counsel, she dismissed her action, received back

her note and mortgage, procured D. to pay debts of hers to the amount of \$1,200, and executed to the assignee of the mortgage a deed of the land, the value of the undivided half of which did not at that time exceed the amount of her mortgage. The land was afterwards reconveyed to D. by the assignee, who had acted as his agent, and by him to B. In a suit by plaintiff, in 1884, against D. and B., to set aside the latter conveyance, and compel a conveyance to her under the original purchase, because her settlement and deed were made under the influence of her husband, *held*, that the above facts did not support her claim.—*De Wolf v. Hays*, 125 U. S. 614, 8 S. Ct. 990, 31 L. Ed. 818.

One R., on coming of age, in 1869, after the settlement of his guardian T.'s accounts, employed the firm of which T. was a member to look after his property. In 1874, R. made a will devising one-half his estate to T., in trust for T.'s children. T. had held very intimate relations with the father of R., which continued with R. In the fall of 1879, R. made a second will, devising certain specified property to T. for the same purposes, and certain property to a woman who had been living with him as his mistress for some years. R. had lived a dissolute and drunken life for some years, and three weeks after making the will of 1879 married his mistress. In the summer of 1880, T. visited R. at his home, and told him that his will was invalidated by his marriage, under the laws of Georgia, and suggested the making of a deed, if he desired still to provide for T.'s children. Nothing was done by T. to influence R. or his wife to do anything against their wishes. A deed of the property devised in the will was made at that time to T. for the same uses, August 26, 1880. On August 28, 1880, owing to a mistake in the former deed, a second to the same effect was made. On both occasions the wife of R. signed a separate instrument, acknowledging that she fully confirmed the act of her husband. In 1881, T. received a third deed to the same property for the same uses, there being a mistake in the others, which R.'s wife ratified under a separate instrument, renouncing all claims to the property conveyed. R. had been for many years intemperate, and continued so until his death, in 1883, and, when intoxicated, was unable to transact business; but his capacity when sober was shown, and there was evidence that he was perfectly sober when the deeds were executed. *Held*, that the deed would not be set aside, on the complaint of R.'s wife, on account of undue influence on the part of T., or for want of capacity on the part of R.—*Ralston v. Turpin*, 129 U. S. 663, 9 S. Ct. 420, 32 L. Ed. 747, affirming 25 F. 7.

Testator devised all his property to his children, except one, declaring that he gave nothing to him, as he had theretofore made him large advances. A short time thereafter, and but a few days before his death, testator deeded to him certain land. In a suit by the other children to set aside the conveyance as obtained by undue influence, it appeared that defendant had been testator's favorite child; that for over 20 years they had been constant companions and friends, except that there had been an estrangement for a short time, on two occasions, during the latter of which the will was made; that up to the time of testator's last sickness he had been a strong man, physically and mentally; that at the time of executing the deed he retained his mental faculties in full vigor; that defendant had at all times great influence over testator, and that during the latter's last sickness he used efforts to prevent others seeing him. It was not contended but that testator knowingly and intentionally executed the deed. *Held*, that the influence of defendant, resulting from the partiality of testator for him, did not constitute undue influence; and that,

to defeat the conveyance, imposition, fraud, importunity, duress, or something of that nature must appear.—*Mackall v. Mackall*, 135 U. S. 167, 10 S. Ct. 705, 34 L. Ed. 84.

II. RECORDING AND REGISTRATION.

Competency of transcript or certified copies of records as evidence, see Evidence, 343.

83. Instruments entitled to record.

See 16 Cent. Dig. Deeds, §§ 218-221.

A conveyance of a mining claim in Alaska is not entitled to registration under Act June 6, 1900, tit. 1, § 15, tit. 3, §§ 82, 95, where it has but one witness, and acknowledgment was taken before an alteration made by consent.—(1912) *Waskey v. Chambers*, 32 S. Ct. 597, 224 U. S. 564, 56 L. Ed. 885, Ann. Cas. 1913D. 998, reversing judgment (1909) *Eadie v. Same*, 172 F. 73, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879, 18 Ann. Cas. 1096.

III. CONSTRUCTION AND OPERATION.

Dedication of property to public use, see Dedication, 49-59.

Deeds of trust, see Trusts, 121-140.

Estoppel by deed, see Estoppel, 20-38.

(A) GENERAL RULES OF CONSTRUCTION.

Parol or extrinsic evidence, see Evidence, 390.

96. Recitals.

See 16 Cent. Dig. Deeds, §§ 256-260.

A recital of the consideration in an instrument, "which said sum of * * * the said * * * have this day advanced and paid to said, * * *" does not show prior or simultaneous payment.—*Mills v. Allen*, 133 U. S. 423, 10 S. Ct. 413, 33 L. Ed. 717.

In Massachusetts the recital in a deed, acknowledging payment of the consideration, is only prima facie proof, and may be rebutted by other evidence.—*Id.*

Recitals in deeds of payment of the considerations expressed therein are not proof of such payments, as against persons not parties thereto.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

(B) PROPERTY CONVEYED.

Description of boundaries, see Boundaries, 3-14.

112. References to maps, plats, other instruments, or records.

See 16 Cent. Dig. Deeds, §§ 323, 324.

Where, in a conveyance, a reference is made to a map of the premises conveyed, the map and the deed are to be construed together.—*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566.

114. Particular description.

See 16 Cent. Dig. Deeds, §§ 316-322, 326-329, 332.

A deed from A. to plaintiff, executed in 1856, described the land conveyed by metes and bounds, and also as "being the land set off to the Indian chief Buffalo, at the Indian treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to said A., and is now recorded with the government documents." *Held*, that such deed did not convey the equitable interest of A. in another tract described by different metes and bounds, granted to A. as one of the connections of the said chief, by a

subsequent patent in 1858, in conformity with said treaty.—*Prentice v. Stearns*, 113 U. S. 435, 5 S. Ct. 547, 28 L. Ed. 1059.

A deed described the land conveyed by metes and bounds, and as "being the land set off" by a certain Indian treaty to a person named, and afterwards disposed of by him to the grantor. *Held*, that this general description could not be regarded as independent of the specific description, and as referring to the general right of the grantor to have land located and patented under the treaty, and did not entitle the grantee, rejecting such specific description as erroneous, to maintain ejectment for lands not included by metes and bounds, but which, subsequently to the deed, were patented to the grantor by the United States pursuant to the treaty, on a location following as nearly as practicable the selection made under and at the same time with the treaty.—*Prentice v. Northern Pac. R. Co.*, 154 U. S. 163, 14 S. Ct. 907, 38 L. Ed. 947, affirming judgment (C. C.) 43 F. 270.

(C) ESTATES AND INTERESTS CREATED.

Construction and execution of powers, see Powers, Ⓔ17–39.

Ⓔ121. Operation of quitclaim deed.

See 16 Cent. Dig. Deeds, §§ 394–400.

A deed by a disseisee which purports, for a substantial consideration, to "remit, release, and forever quitclaim" to a stranger all the former's "right, title, and interest in and to" the premises, is sufficient in Hawaii to pass all the estate which the grantor could convey by a deed of bargain and sale, there being no question but that a disseisee can convey a title.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

Ⓔ124. Fee simple.

See 16 Cent. Dig. Deeds, §§ 345–355, 416–423, 434, 435, 439, 452.

Certain trustees named were authorized by legislative act to purchase a site and erect a court house thereon, taking a conveyance to themselves and their heirs in trust for the inhabitants of the county. A patent to a lot was executed to such persons and their heirs, and purported to convey title in fee. The habendum, however, contained the words: "In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent, or purpose whatever." *Held*, that such clause was not a qualification of the prior grant in fee, but merely conformed the grant to the terms of the legislative authority previously given the grantees. Judgment 74 F. 854, 21 C. C. A. 146, affirmed.—*Stuart v. City of Easton*, 18 S. Ct. 650, 170 U. S. 383, 42 L. Ed. 1078.

(D) EXCEPTIONS AND RESERVATIONS.

See 16 Cent. Dig. Deeds, §§ 455–468.

Reservations of minerals and mineral rights, see Mines and Minerals, Ⓔ55.
Validity as to creditors of grantor or subsequent purchasers, see Fraudulent Conveyances, Ⓔ110–113.

(E) CONDITIONS AND RESTRICTIONS.

Conveyances by religious societies, see Religious Societies, Ⓔ20.
Restraining violations, see Injunction, Ⓔ58.

Ⓔ159. Performance or breach.

See 16 Cent. Dig. Deeds, §§ 505–521.

Ⓔ160. — Breach in general.

See 16 Cent. Dig. Deeds, §§ 505–517; 11 Cent. Dig. Contracts, § 1175.

A construction company, having acquired title to an uncompleted railroad under a deed thereof by trustees subject to conditions that the railroad should be completed within a certain time, contracted with complainants for rails for that purpose, but soon afterwards notified them that it was unable to carry out the contract. Thereafter the trustees made a contract with a railway company, reciting their deed and its conditions, the passing to the railway company of the title to the property subject to the conditions, and its inability to perform them, declaring them annulled, and entering into new stipulations with the railway company, under which it was in possession of the property when the time fixed by the deed for performance of the conditions expired. *Held*, that the trustees having elected to treat the property as reverted to them, and their action being equivalent, without judicial proceedings, to a re-entry, the interest of the construction company in the property was divested at the expiration of the time limited for performance of the conditions, and the property could not be subjected, by a suit brought after that time, to a judgment against the construction company recovered by complainants on the contract for the rails.—*Schlesinger v. Kansas City & S. Ry. Co.*, 152 U. S. 444, 14 S. Ct. 647, 38 L. Ed. 507, affirming decree (C. C.) 39 F. 741.

Ⓔ162. — Sufficiency of performance.

See 16 Cent. Dig. Deeds, § 519.

A mere technical school, which excludes all religious instruction, does not satisfy the condition on which a Protestant mission was transferred by the American board of commissioners for foreign missions to the Hawaiian government, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, where the government knew, when accepting the transfer of the mission to its "fostering care and patronage," that the mission was founded to convert the Hawaiians to Christianity and to educate young men to be Christian ministers, and for more than 50 years recognized its obligation under the agreement to afford religious instruction in the doctrines represented by the mission.—*Lowrey v. Territory of Hawaii*, 27 S. Ct. 622, 206 U. S. 206, 51 L. Ed. 1026.

(F) LOSS OR RELINQUISHMENT OF RIGHTS.

[No paragraphs or references in this Digest. But see 16 Cent. Dig. Deeds, §§ 549–555.]

IV. PLEADING AND EVIDENCE.

Competency of deed as evidence, see Evidence, Ⓔ353.

Parol or extrinsic evidence, see Evidence, Ⓔ390, 429–434.

Ⓔ191. Presumptions and burden of proof.

See 16 Cent. Dig. Deeds, §§ 562–594, 634, 649; 3 Cent. Dig. Can. of Inst. §§ 100, 101.

Ⓔ193. — Execution, existence, and identity.

See 16 Cent. Dig. Deeds, §§ 562–573.

The fact that an instrument offered in evidence purports to be executed by a man of some education, with a cross-mark instead of his own handwriting, is a suspicious circumstance,

though susceptible of explanation by the supposition that he was ill at the time. Where, however, it was acknowledged in accordance with the registration laws, the burden of proof is shifted to the party attacking it, and where the person whose name is signed as a witness to its execution is alive, and is not called to testify, a strong inference arises that its execution cannot be disproved.—*Gay v. Parpart*, 106 U. S. 679, 1 S. Ct. 456, 27 L. Ed. 256.

—194. — **Delivery.**

See 16 Cent. Dig. Deeds, §§ 574-583, 623, 634; 1 Cent. Dig. Ack. § 261.

A deed was executed in 1860, and left with the notary. There was no evidence of formal delivery of possession of the land; and the grantor continued to pay taxes until 1875, when she sold it to another. The deed was recorded in 1889, but there was no evidence as to who recorded it or where it was in the meantime. After suit was brought by the heirs of the grantee for the land, the attorney for plaintiffs received the deed by mail from one claiming an interest by deed from one of the heirs. *Held*, that, as some presumption of delivery might arise from plaintiff's possession of the deed, the court could not say, as a matter of law, that the deed was not delivered.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 29 S. W. 90, 8 Tex. Civ. App. 679.

—205. **Weight and sufficiency of evidence.**

See 16 Cent. Dig. Deeds, §§ 614-622, 635-647, 650; 3 Cent. Dig. Can. of Inst. § 102.

—211. — **Validity.**

See 16 Cent. Dig. Deeds, §§ 637-647; 3 Cent. Dig. Can. of Inst. § 102.

Evidence that a person was incompetent to transact business while he was drunk is not sufficient to warrant the setting aside of deeds made by him when sober, on the ground of mental incapacity.—*Conley v. Nailor*, 118 U. S. 127, 6 S. Ct. 1001, 30 L. Ed. 112.

Where a person whose lands were heavily incumbered, and who had quitclaimed them to another to avoid an immediate sale of them, consented, with full knowledge, to an agreement by which his grantee conveyed them to third persons, who assumed the incumbrances thereon, and did everything required of him under the agreement, these conveyances will not be set aside on his own unsupported testimony that the grantees had conspired together to defraud him, and to procure his property without consideration.—*Hunt v. Oliver*, 118 U. S. 211, 6 S. Ct. 1083, 30 L. Ed. 128.

DE FACTO CORPORATIONS.

See—
Corporations, —28.
Municipal Corporations, —17.

DE FACTO COUNTIES.

See Counties, —4.

DE FACTO OFFICERS.

See—
Judges, —6.
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DEFALCATION.

See Embezzlement.

DEFAMATION.

See Libel and Slander.

DEFAULT.

Decree in equity pro confesso, see Equity, —417-420.
In actions for divorce, see Divorce, —159-161.
Judgment, see Judgment, —94-167, 652.
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Contracts, —278-320.
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See Parties, —24-29.

DEFICIENCY.

On foreclosure of mortgage, see Mortgages, —555-561.

DEFILEMENT.

Of female, see Rape.

DEFRAUD.

See Fraud.

DELAY.

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See Homicide, —155-158, 286.

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See Taxation, —625-629.

DELIVERY.

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Element of conversion, see Trover and Conversion, —9.
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DEMISE.

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DEMONSTRATIVE EVIDENCE.

See—

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Evidence, ⌘196, 197.

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See—

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DEMURRER.

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In pleading, see Pleading, ⌘116-129, 176.

DEPARTMENTS.

Municipal departments and officers thereof, see
Municipal Corporations, ⌘179-187.

DEPARTURE.

In pleading, see Pleading, ⌘180.

DEPORTATION.

Chinese, see Aliens, ⌘30-32.

Immigrants excluded, see Aliens, ⌘52-54.

DEPOSITARIES.*Scope-Note.*

[INCLUDES delivery of money or other personal property for safe-keeping, either with or without compensation, to be redelivered in accordance with the purpose of the deposit; rights, duties, and liabilities of those receiving such deposits in general, and more particularly of depositaries of public moneys; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

⌘5. Deposits of public moneys.

9. — Control and disposition of deposits.

Cross-References.

See—

Bailment.
Bankruptcy, ⌘273.
Banks and Banking.

See—

Deposits in Court.
Escrows.
Warehousemen.

⌘5. Deposits of public moneys.

See 16 Cent. Dig. Depositaries, §§ 20-23.

⌘9. — Control and disposition of deposits.

See 16 Cent. Dig. Depositaries, § 22.

When money is deposited with a designated depositary of the United States to the credit and in the name of a federal court, as provided

by Rev. St. § 995, checks drawn by the court, and specifying, according to section 996, the cause in which they are drawn, must be paid out of the account generally; and naming the cause in the check is merely a memorandum for the benefit of the court, and not a direction to the bank to pay it out of any particular fund.—State Nat. Bank v. Dodge, 124 U. S. 333, 8 S. Ct. 521, 31 L. Ed. 458.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

DEPOSITIONS.

Scope-Note.

[INCLUDES testimony taken in judicial proceedings in writing, upon interrogatories, oral or written, with opportunity for cross-examination, whether taken under a bill to perpetuate testimony, or to take testimony de bene esse, or under a commission or letters rogatory issued for the purpose, or on notice to or consent of parties to the proceeding, as authorized by provisions of statute or of rules of court, to be used instead of the oral examination of the witness in open court; in what actions or proceedings and for what purposes such depositions may be taken and used; requisites of bills to perpetuate testimony or take testimony de bene esse, and proceedings thereon; issue of commissions, etc., settlement of interrogatories, taking and requisites of depositions, and returning and filing them; objections to and motions to suppress depositions, and amendment of defects; and use in evidence in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⌘ 18. Nature and form of proceeding.
- 21. — Bill to take testimony de bene esse.
- 39. Issuance, form, and requisites of commission in general.
- 56. Notice of taking.
- 83. Suppression.
- 85. Destruction or loss.
- 87. Admissibility in evidence.
- 90. — Deponent present or within reach of process.
- 102. Defects and objections.
- 107. — Necessity of objection before trial.
- 108. — Renewal at trial of previous objection.

Cross-References.

- | | |
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| <p>See—
Affidavits.
Discovery.
Records, ⌘ 14.
Witnesses.
Action for penalty for violation of immigration laws, see Aliens, ⌘ 58.</p> | <p>Admission of, as denial of right to confront witness, see Criminal Law, ⌘ 662.
Conformity to state practice, see Courts, ⌘ 350, 351.
Fees of commissioner for filing, see United States Commissioners, ⌘ 3.
Review of decisions, see Appeal and Error, ⌘ 203, 692.</p> |
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- ⌘ 18. Nature and form of proceeding.
See 16 Cent. Dig. Depositions, §§ 30-36.

- ⌘ 21. — Bill to take testimony de bene esse.
See 16 Cent. Dig. Depositions, § 32.

Where there is nothing to show that testimony cannot be taken under Rev. St. § 866, providing for taking depositions perpetuum rei memoriam, the court will not order the taking of the testimony de bene esse.—*Richter v. Jerome*, 115 U. S. 55, 5 S. Ct. 1162, 29 L. Ed. 345.

- ⌘ 39. Issuance, form, and requisites of commission in general.
See 16 Cent. Dig. Depositions, §§ 54-60.

Defendants were duly notified that plaintiffs purposed to take the deposition of a named witness on a specified date, before one Corey, as commissioner; and defendants, after making certain untenable objections, which they abandoned, filed cross interrogatories, and the deposition was actually taken in accordance with the notice. The clerk, in issuing the commission, however, addressed it to "Carey," instead of "Corey." Held that, as defendants were not misled by the mistake, it furnished no ground

for suppressing the deposition.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

- ⌘ 56. Notice of taking.
See 16 Cent. Dig. Depositions, §§ 90-117.

Where a notice to take depositions in a suit pending in a federal circuit court correctly states the title of the case and the name of the court, but lays the venue in the state and county, instead of in the district, such technical irregularity does not vitiate the deposition.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

Where a notice to take a deposition states that the deposition will be taken before a certain notary public, "or some other officer authorized by law to take depositions," the deposition may properly be taken before some other notary than the one named.—*Id.*

- ⌘ 83. Suppression.
See 16 Cent. Dig. Depositions, §§ 219-224.

A commission to take a deposition was issued April 18th, was executed May 17th, and the deposition published by the clerk under a general order of the court on May 29th. The court was then in session, and so continued until July 8th. Its next term began in Novem-

ber. Defendants moved to suppress the deposition on January 10th, the day set for the trial. *Held*, that the motion came too late.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

Depositions taken by plaintiff need not be suppressed because preliminary notice described the case as pending in the district court in which it was originally brought, instead of that to which the case had been transferred by defendant.—*Grant Bros. Const. Co. v. United States*, 34 S. Ct. 452, 232 U. S. 647, 58 L. Ed. 776, affirming judgment 114 P. 955, 13 Ariz. 388.

Ⓔ85. Destruction or loss.

See 16 Cent. Dig. Depositions, §§ 232, 233.

Where depositions on behalf of plaintiff, on file, are destroyed by fire, and copies furnished by counsel for defendant are substituted on the files with his consent, it is not error to admit them in evidence, though the death of the witnesses was not shown, nor that they were incompetent to testify, nor that their depositions could not be retaken.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

Ⓔ87. Admissibility in evidence.

See 16 Cent. Dig. Depositions, §§ 234-236½, 242-279.

Ⓔ90. — Deponent present or within reach of process.

See 16 Cent. Dig. Depositions, §§ 248-255, 258-260.

A deposition cannot be read in evidence when the deponent is in court and capable of being examined.—*Whitford v. Clark County*, 119 U. S. 522, 7 S. Ct. 306, 30 L. Ed. 500.

Ⓔ102. Defects and objections.

See 16 Cent. Dig. Depositions, §§ 239-239.

Ⓔ107. — Necessity of objection before trial.

See 16 Cent. Dig. Depositions, §§ 309-319; 46 Cent. Dig. Trial, § 189.

A motion to suppress a deposition on account of defects in the manner of taking it, and in the form of the commission, comes too late after the party moving to suppress has consented to the issue of the commission, and has practically united with the adverse party in executing it by adding his own cross interrogatories, and has raised no objection until after the trial has begun.—*Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 S. Ct. 500, 35 L. Ed. 147.

Ⓔ108. — Renewal at trial of previous objection.

See 16 Cent. Dig. Depositions, § 320.

Though a motion was made before the trial to suppress a deposition because of irregularities in its taking, the objection will be waived if no objection is made or exception taken when it is offered at the trial.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. Ed. 977.

DEPOSITS.

See—

Bailment.
Bankruptcy, Ⓔ122-153, 273.
Banks and Banking, Ⓔ263.
Depositaries.
Deposits in Court.
Gaming, Ⓔ37.
Gifts, Ⓔ66.
Taxation, Ⓔ100.

DEPOSITS IN COURT.

Scope-Note.

[INCLUDES delivery of money or goods to courts or officers of courts, incident to civil actions, made pursuant to statute, rule or order of court, or consent of parties to the action; rights and liabilities of the parties in respect of such money or property; and payment or delivery out of court or other disposition thereof.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- Ⓔ3. Deposit with clerk or other officer without authority.
- 4. Custody and investment of funds in general.

Cross-References.

Compensation for property condemned, see Eminent Domain, Ⓔ76.

Duties and liabilities of depositaries, see Depositaries.

Ⓔ3. Deposit with clerk or other officer without authority.

See 16 Cent. Dig. Dep. in Court, § 2.

A clerk of a circuit court of the United States must be deemed to have authority to receive money paid into court by a private suitor in a pending cause, with the sanction of the court, in view of *Rev. St. U. S. § 828* [U. S. Comp. St. 1901, p. 635], giving commissions to the clerk "for receiving, keeping, and paying

out money in pursuance of any statute or order of court," when read in connection with sections 798, 995, 996, 5504, 5505 [Id. pp. 621, 711, 3710, 3711], which manifestly proceed on the ground that money paid into court under its sanction may be received by the clerk, whose duty it then is to deposit the amount in the name and to the credit of the court. Judgment, 102 F. 77, 42 C. C. A. 169, affirmed.—*Howard v. United States*, 22 S. Ct. 543, 184 U. S. 676, 46 L. Ed. 754.

4. Custody and investment of funds in general.

See 16 Cent. Dig. Dep. in Court, §§ 5, 6.

The proceeds of the sale of a vessel seized as a prize, deposited by a marshal in a national bank which is a special or designated depository of public moneys, do not constitute public moneys of the United States, within the meaning of the statutes applicable to public money and authorizing its deposit in a public depository; and such deposit does not, therefore, constitute

a payment of such moneys to the United States, which will make the government liable therefor in case of the failure of the bank pending appeal. Judgment, *United States v. Coudert*, 73 F. 505, 19 C. C. A. 543, affirmed.—*Coudert v. United States*, 20 S. Ct. 56, 175 U. S. 178, 4 L. Ed. 122.

DEPUTIES.

United States marshals, see *United States Marshals*, 3, 22.

DESCENT AND DISTRIBUTION.

Scope-Note.

[INCLUDES transmission of property, real or personal, by hereditary succession; rights to inherit or share in the division of intestates' estates in general; and liabilities of heirs, next of kin, and other distributees.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Course in General.

- 8. Property subject to descent or distribution.
- 18. Fact of death.

II. Persons Entitled and Their Respective Shares.

(A) HEIRS AND NEXT OF KIN.

- 37. Remote collaterals.
- 38. — In general.
- 44. Operation and effect of will.
- 47. — Pretermitted child or issue of child.

(B) SURVIVING HUSBAND OR WIFE.

III. Rights and Liabilities of Heirs and Distributees.

(A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.

- 71. Establishment and determination of heirship or right to share in distribution.
- 79. Rents and profits, income, and accumulations.
- 82. Conveyances and other transactions between heirs and distributees.
- 83. Actions between heirs and distributees.
- 88. Actions by heirs or distributees.
- 90. — Relating to real property or interests therein.

(B) ADVANCEMENTS.

(C) DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

- 119. Nature and grounds of liability of heirs and distributees.
- 136. Deductions and set-offs.
- 137. Actions against heirs, distributees, or purchasers.
- 147. — Evidence.

(D) RIGHTS AND REMEDIES OF CREDITORS OF HEIRS AND DISTRIBUTEEES.

Cross-References.

See—

Curtesy.
Dower.
Escheat.
Executors and Administrators.
Homestead, 135.
Wills.

Distribution by executor or administrator, see
Executors and Administrators, 297-315.

Distribution of damages recovered for causing death, see Death, 101.
Estoppel by heir, see Estoppel, 28.
Inheritance and transfer taxes, see Taxation, 856-876.
Inheritance by, from or through bastards, see Bastards, 99-101; Indiana, see Indiana, 18.

I. NATURE AND COURSE IN GENERAL.

Evidence of death, see Death, ◀2.

◀8. Property subject to descent or distribution.

See 16 Cent. Dig. Des. & Dist. §§ 22-29.

The doctrine of relation cannot successfully be invoked to confer any right or interest by inheritance in the land under the operation of the state laws on the daughter of a deceased homestead settler as against his widow to whom, in accordance with Rev. St. U. S. § 2291 [U. S. Comp. St. 1901, pp. 1300, 1394], the patent has issued. Decree, 122 F. 588, 59 C. C. A. 429, affirmed.—McCune v. Essig, 26 S. Ct. 78, 199 U. S. 382, 50 L. Ed. 237.

◀18. Fact of death.

See 16 Cent. Dig. Des. & Dist. § 10.

The prima facie evidence of the death of a person by presumption from his being absent and not heard of for seven years, on which a probate court may assume him to be dead, and appoint an administrator of his estate, may be overthrown by proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator.—Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. Ed. 896, reversing judgment 5 Wash. 309, 31 P. 873, 34 Am. St. Rep. 863.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) HEIRS AND NEXT OF KIN.

Enabling acts affecting rights of heirs of aliens, see Aliens, ◀12.

◀37. Remote collaterals.

See 16 Cent. Dig. Des. & Dist. §§ 111-120.

◀38. — In general.

See 16 Cent. Dig. Des. & Dist. §§ 111, 114, 115.

Under the law of Pennsylvania, first cousins are entitled to take the property of an intestate to the exclusion of second cousins.—Byers v. McAuley, 149 U. S. 906, 13 S. Ct. 906, 37 L. Ed. 867.

◀44. Operation and effect of will.

See 16 Cent. Dig. Des. & Dist. §§ 122-121.

◀47. — Pretermitted child or issue of child.

See 16 Cent. Dig. Des. & Dist. §§ 126-130.

Under Act Utah, Feb. 18, 1876, § 10 (Comp. Laws, § 694), which provides that, "when any testator shall omit to provide in his or her will for any of his or her children, * * * unless it shall appear that such omission was intentional, such child * * * shall have the same share in the estate of the testator as if he or she had died intestate," where children of a testator living at the time his will is executed are omitted therefrom, evidence aliunde is admissible to show that such omission was intentional.—Coulam v. Doull, 133 U. S. 216, 10 S. Ct. 253, 33 L. Ed. 596.

(B) SURVIVING HUSBAND OR WIFE.

See 16 Cent. Dig. Des. & Dist. §§ 135-205.

Rights as to homestead, see Homestead, ◀135.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

Liability for debts of national bank, see Banks and Banking, ◀246.

Partition among coheirs, see Partition.

(A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.

Chancery jurisdiction of federal courts, see Courts, ◀262.

Right of heir to mortgage an accrued undivided interest, see Mortgages, ◀10, 13.

Right to sue for causing death of intestate, see Death, ◀31.

Stay of proceedings in federal court to establish heirship pending escheat proceedings in state court, see Courts, ◀493.

◀71. Establishment and determination of heirship or right to share in distribution.

See 16 Cent. Dig. Des. & Dist. §§ 229-236.

Payment into court of sums due under a mortgage, pending proceedings under Code Porto Rico, §§ 976-980, to have the petitioner declared sole heir ab intestato of the mortgagee, discharged the obligation, where made under an order of the court and before any proceedings were begun to establish the rights of an alleged coheir.—Sixto v. Sarria, 25 S. Ct. 186, 196 U. S. 175, 49 L. Ed. 436.

After a judgment of an appellate court reinstating an order of the court below by which installments due under a mortgage had been directed to be paid into court, pending the determination of the rights of a party claiming to be an heir of the mortgagee, who had died intestate, the mortgagor, acting with full knowledge of this decision of the higher court, cannot discharge his liability by obtaining an order from the lower court permitting the withdrawal of his deposit to pay an assignee of the mortgage, and by paying such assignee pursuant to a decree in a suit to which the alleged heir was not a party.—Id.

The validity of a payment on the principal of a mortgage to the person who has been decreed the sole heir ab intestato of the mortgagee in proceedings taken under Code Porto Rico, §§ 976-980, is a question for the jury, where the evidence shows that it was made more than one month before maturity, and after an unsuccessful attempt by a son of the mortgagee, whose relationship was well known to the mortgagor, to establish his rights by invoking the "voluntary jurisdiction" of the court, and on the same day on which he began a "contentious" proceeding, which the court had held was his only remedy, making the adjudged heir a party defendant, and seeking an order requiring the registrar to make a cautionary entry concerning the mortgaged property and requiring the mortgagor to retain, at the disposition of the court, whatever sums he owed to the mortgagee's estate.—Id.

Payments by a mortgagor to the person who has been decreed the heir ab intestato of the mortgagee in proceedings under Code Porto Rico, §§ 976-980, are not made at the risk of being required to respond to others who may subsequently be found to be coheirs, because the decree expressly reserved the rights of third parties.—Id.

Payment of debts due an intestate to the legally declared heirs is not made at the risk of being required to respond to others who may within five years establish a right to the property, because the Porto Rico mortgage law provides that property acquired through inheritance or legacy cannot be cleared until five years from the date of recording; but the effect of the proceedings to designate the heirs ab intestato is, under Code Porto Rico, §§ 1000, 1001, to permit them, after final decision, to receive and collect the estate.—Id.

◀79. Rents and profits, income, and accumulations.

See 16 Cent. Dig. Des. & Dis. §§ 276-279.

The right of an emancipated minor to recover the rents during his minority from real

property inherited from his father, but illegally sold by widow and guardian ad litem, is not defeated by the administrative authority vested by law in his mother.—*Longpré v. Díaz*, 35 S. Ct. 731, 237 U. S. 512, 59 L. Ed. 1080.

82. Conveyances and other transactions between heirs and distributees.

See 16 Cent. Dig. Des. & Dist. §§ 318-321.

One-half the net proceeds of the sale of real property in which a testator owned an undivided half interest, and not the entire net proceeds of the sale, is meant by the word "remainder," as used in an agreement for the division of the inheritance between the widow as usufructuary heiress and the heirs, who were also the owners of the other undivided half interest of the property, by which such property was to be sold, certain admitted debts or liabilities were to be deducted from the proceeds, and the remainder was to be turned over to the widow, to be used by her as usufructuary heiress.—*Calvo v. De Gutierrez*, 28 S. Ct. 382, 208 U. S. 443, 52 L. Ed. 564.

83. Actions between heirs and distributees.

See 16 Cent. Dig. Des. & Dist. §§ 337-345.

The widow of one P. was indebted to his daughters by reason of her receipt of a share of P.'s estate belonging to them. They executed an agreement to accept certain sums in settlement. After the widow's death, four of the daughters brought suit against the fifth to establish their claims. *Held* that, as the agreement of settlement was only an acknowledgment of the indebtedness, not the basis thereof, the fact that it was not an enforceable contract did not prevent the daughters, who could not sue at law because they were the executrices of their mother's will, from coming into equity to establish their claims.—*Glover v. Patten*, 17 S. Ct. 411, 165 U. S. 394, 41 L. Ed. 760.

88. Actions by heirs or distributees.

See 16 Cent. Dig. Des. & Dist. §§ 346-351.

90. — Relating to real property or interests therein.

See 16 Cent. Dig. Des. & Dist. §§ 351-353, 363-381; 24 Cent. Dig. Fraud. Conv. § 528.

Ejectment may be brought by an infant sole heir to recover his deceased father's real property privately sold contrary to law by the widow and guardian ad litem in extra judicial partition proceedings without seeking a rescission of such proceedings.—*Longpré v. Díaz*, 35 S. Ct. 731, 237 U. S. 512, 59 L. Ed. 1080.

(B) ADVANCEMENTS.

See 16 Cent. Dig. Des. & Dist. §§ 389-432.

As affecting rights under will, see Wills, 757-759.

(C) DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

Due process of law, see Constitutional Law, 309.

119. Nature and grounds of liability of heirs and distributees.

See 16 Cent. Dig. Des. & Dist. §§ 215-220, 224, 433-439.

The liability of the succession after the inheritance has been divided is by virtue of Civ. Code Porto Rico 1889, arts. 1003, 1023, 1084, at an end, and gives place to a personal liability of each heir for the whole debt to the extent of the assets received by him if he has accepted with benefit of inventory, or, otherwise, in full.—*Ubarri y Yramategui v. Laborde*, 29 S. Ct. 549, 214 U. S. 168, 53 L. Ed. 953; *Laborde v. Ubarri*, 29 S. Ct. 552, 214 U. S. 173, 53 L. Ed. 955.

136. Deductions and set-offs.

See 16 Cent. Dig. Des. & Dist. § 494.

Where, on a bill by creditors against the estate of a decedent to subject it to the payment of their debts, it appears that part of the estate was the property of decedent's wife, and descended to her heirs free from his debts, and that these heirs, who were decedent's heirs also, have been in possession of the entire estate for many years, during which time they received the rents and spent large sums in improving the property and restoring the plantations after overflows, the estate will be subjected to the creditors' claims upon an equitable basis. The heirs will not be allowed to prove their claims for the property which descended to them from decedent's wife as debts against decedent's estate; but, as that interest when it descended was about 30 per cent. of the entire estate as it then stood, they will be allowed to retain free from the claims of creditors about 40 per cent. of the estate as it stands; and said interest may be set off in severalty with any buildings erected thereon by the heirs, which buildings shall not be charged against their share, and the balance will be decreed to be sold to satisfy the creditors.—*Mellen v. Buckner*, 139 U. S. 388, 11 S. Ct. 598, 35 L. Ed. 199.

137. Actions against heirs, distributees, or purchasers.

See 16 Cent. Dig. Des. & Dist. §§ 495-520.

147. — Evidence.

See 16 Cent. Dig. Des. & Dist. §§ 511-513.

There is no presumption that the heirs waived the benefit of inventory, and hence under Civ. Code Porto Rico, arts. 1003, 1023, 1084, were liable after the inheritance was divided for the entire debt of the succession.—*Ubarri y Yramategui v. Laborde*, 29 S. Ct. 549, 214 U. S. 168, 53 L. Ed. 953; *Laborde v. Ubarri*, 29 S. Ct. 552, 214 U. S. 173, 53 L. Ed. 955.

(D) RIGHTS AND REMEDIES OF CREDITORS OF HEIRS AND DISTRIBUTEES.

See 16 Cent. Dig. Des. & Dist. §§ 523-532.

Diverse citizenship, jurisdiction of federal court, see Courts, 312.

Pendency of proceedings in state court, affecting proceedings in federal court, see Courts, 493.

DESCRIPTION.

Devisees or legatees in will, see Wills, 493-531.

Invention in specification accompanying application for patent, see Patents, 69.

Land in memorandum of contract of sale, see Frauds, Statute of, 110.

Land in tax deed, see Taxation, 764.

Names of individuals, see Names.

Parties to action, see Parties, 66.

Parties to deeds, see Deeds, 30-32.

Person in assessment rolls, see Taxation, 413-416.

Property see—

Boundaries, 3-14.

Deeds, 37-40, 112-114.

Embezzlement, 28.

Insurance, 164.

Mechanics' Liens, 136.

Sales, 67-71.

Taxation, 419-421.

Vendor and Purchaser, 60-65.

Wills, 558-578.

Reformation of instrument as to matters of description, see Reformation of Instruments, 13.

Subject-matter of contract, specific performance dependent on certainty, see Specific Performance, 29.

DESERTION.

See—
 Aliens, ¶56.
 Army and Navy, ¶38.
 Constitutional Law, ¶83.
 Treaties, ¶8.

DESIGNATION.

Persons, see Names.

DESIGNS.

See Patents, ¶43.

DESTRUCTION.

See Evidence, ¶178.

DETAINDER.

See Forcible Entry and Detainer.

DETECTIVES.

[No paragraphs or references in this Digest. But see 16 Cent. Dig. Detectives.]

DETENTION.

Wrongful detention of property ground for civil action, see Trover and Conversion, ¶6-9.

DETINUE.*Scope-Note.*

[INCLUDES actions for recovery of specific personal property wrongfully detained, or the value thereof as damages where it cannot be delivered, founded on the right of property; nature and scope of the remedy in general; grounds of such actions, and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; alternative or incidental recovery of damages; verdict and judgment, and enforcement thereof; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
 Bailment, ¶21.
 Replevin.

See—
 Trespass.
 Trover and Conversion.

¶14. Proceedings for taking and delivery of property.

See 16 Cent. Dig. Detinue, §§ 22, 23.

Under Code Ala. 1876, §§ 2942, 2943, relating to suits for the recovery of personal chattels in specie, and requiring an affidavit by "the plaintiff, his agent or attorney," that the property sued for belongs to the plaintiff, and the giving by the plaintiff of a bond for costs and damages, as prerequisites to the making of an order for the seizure of the property, and affidavit in such a suit by the United States in the federal circuit court, made by a special agent of the general land office, in which he swears, "to the best of his knowledge, information, and belief," that the property sued for belongs to the

United States, is sufficient.—United States v. Bryant, 111 U. S. 499, 4 S. Ct. 601, 28 L. Ed. 496.

Code Ala. 1876, §§ 2942, 2943, relating to suits for the recovery of personal property in specie, provided for the giving by plaintiff of a bond for costs and damages, as a prerequisite to the making of an order for the seizure of the property. *Held*, that under Rev. St. § 1001, providing that whenever any process issues from a circuit court by the United States, no bond or other security shall be required from the United States, the giving of the bond provided for by such provisions of the Alabama Code is not a condition precedent to the right of the United States to avail themselves of said provisions.—*Id.*

DEVELOPMENT.

Mines, as affecting validity of location, see Mines and Minerals, ¶23.

DÉVISES.

See Wills.

DIAMONDS.

See Customs Duties, ¶37.

DICTA.

See Courts, ¶92.

DILIGENCE.

Affecting particular rights or liabilities, see Carriers; Continuance, etc.

DIMINUTION OF RECORD.

See Appeal and Error, ¶635-660.

DIPLOMATIC OFFICERS.

See Ambassadors and Consuls.

DIRECTING VERDICT.

See Trial, ¶167-181, 420.

DIRECTORS.

Corporation, election, see Corporations, ¶283.
 Liability for negligence, management of bank,
 see Banks and Banking, ¶82.

DIRECT TAXES.

See—
 Internal Revenue, ¶6.
 United States, ¶98.

DISABILITIES.

Particular classes of persons, see Aliens; Con-
 victs; Indians, etc.

DISAGREEMENT.

Jury, see Criminal Law, ¶867.

DISBARMENT.

See Attorney and Client, ¶37-50.

DISBURSEMENTS.

See Costs.

DISBURSING CLERKS.

See United States, ¶39.

'DISCHARGE.

Guardian, see Guardian and Ward, ¶23.
 Imprisonment for contempt, see Contempt,
 ¶82.

Injunction, see Injunction, ¶185, 186.
 Jury for failure to agree, see Criminal Law,
 ¶867.
 Officer of army or navy, see Army and Navy,
 ¶11.
 Servant, see Master and Servant, ¶34-40.
 Sureties of administrator, see Executors and
 Administrators, ¶531.

From indebtedness, obligation, or liability.

See—
 Accord and Satisfaction.
 Bankruptcy, ¶419-438.
 Bills and Notes, ¶140, 174, 426-429.
 Chattel Mortgages, ¶240.
 Compositions with Creditors.
 Compromise and Settlement.
 Guaranty, ¶61.
 Judgment, ¶883.
 Mortgages, ¶298-316.
 Principal and Surety, ¶96-129.
 Release.

DISCLAIMER.

See Patents, ¶149-156.

DISCLOSURE.

By garnishee, see Garnishment, ¶138-148.

DISCOUNTS.

See Banks and Banking, ¶177-186.

DISCOVERED PERIL.

Injury avoidable notwithstanding contributory
 negligence, see Negligence, ¶83.

DISCOVERY.*Scope-Note.*

[INCLUDES obtaining disclosures of facts, writings, or other things, within the knowledge, possession, or control of a defendant in a civil action or other person, as being part of a cause of action or evidence to sustain an action brought or about to be brought by or against the party seeking disclosure, by compelling answers to bills in equity for such discovery, or to interrogatories, or by oral examination of parties, or by inspection of documents, books, or other matters; nature and scope of the remedy in general; in what cases, and to and against whom, and as to what matters it is allowed; grounds of discovery and jurisdiction over and proceedings to obtain discovery, examination, inspection, etc., either by bill of discovery in equity or under statutory provisions; defenses and objections to such proceedings; and use of facts and evidence discovered.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. In Equity.**

- ¶3. Existence of other remedies.
- 27. Use of evidence obtained.

II. Under Statutory Provisions.**(A) INTERROGATORIES AND EXAMINATION OF PARTIES AND OF OTHER PERSONS.**

- ¶77. Failure to appear or answer on oral examination.
- 78. Physical examination.

II. Under Statutory Provisions—Continued.**(B) PRODUCTION AND INSPECTION OF WRITINGS AND OF OTHER MATTERS.**

◄83. Pendency and condition of cause.

107. Failure to comply with order.

Cross-References.

See Depositions.

Attendance of witnesses and production of books, due process of law, see Constitutional Law, ◄312; equal protection of laws, see Constitutional Law, ◄249; unreasonable search and seizure, see Searches and Seizures, ◄7.

Compelling production of documents at trial by witnesses, see Witnesses, ◄16.

Fraud as time of accrual of cause of action for relief, see Limitation of Actions, ◄100.

In suit for violation of anti-trust law, see Monopolies, ◄25.

Vein or lode, see Mines and Minerals, ◄17.

I. IN EQUITY.**◄3. Existence of other remedies.**

See 16 Cent. Dig. Discov. §§ 3, 4.

The alleged inability of the United States to state just when or by whom the wrongful cutting of timber on the public domain had been performed, or when or by whom the logs manufactured into lumber had been sold and the proceeds obtained, and when such proceeds were divided, shows no necessity for a discovery in equity which would render the remedy more adequate than in an action at law, in view of the law providing for the examination of defendants, and of the provision of Rev. St. U. S. § 724 [U. S. Comp. St. 1901, p. 583], for the production of books and writings in actions at law under the same circumstances which would authorize their compulsory production under the ordinary rules of proceedings in chancery. Decree 133 F. 274, 66 C. C. A. 652, affirmed.—United States v. Bitter Root Development Co., 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

◄27. Use of evidence obtained.

See 16 Cent. Dig. Discov. §§ 39, 40.

A responsive answer to a bill for discovery brought in preparation for an action for damages is not conclusive against the plaintiff or his representatives, when they offer it in evidence in the action at law. Judgment 14 App. D. C. 512, affirmed.—District of Columbia v. Robinson, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440.

II. UNDER STATUTORY PROVISIONS.**(A) INTERROGATORIES AND EXAMINATION OF PARTIES AND OF OTHER PERSONS.****◄77. Failure to appear or answer on oral examination.**

See 16 Cent. Dig. Discov. § 91.

The immateriality of the evidence sought to be elicited cannot justify the refusal of witnesses to obey the orders of the federal Circuit Court, requiring them to answer the questions put to them, on their examination before a special examiner.—Nelson v. United States, 26 S. Ct. 358, 201 U. S. 92, 50 L. Ed. 673.

◄78. Physical examination.

See 16 Cent. Dig. Discov. §§ 92-98.

Rev. St. §§ 861, 863, provide that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter

provided. The only power of discovery conferred by Congress (Rev. St. § 724) is to require the parties to produce books or writings in their possession or power in cases where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. *Held*, that such statutes do not authorize the physical examination of a party before trial.—Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734.

(B) PRODUCTION AND INSPECTION OF WRITINGS AND OF OTHER MATTERS.

Attendance of witnesses and production of books, due process of law, see Constitutional Law, ◄312; equal protection of laws, see Constitutional Law, ◄249; unreasonable search and seizure, see Searches and Seizures, ◄7; violating anti-trust laws, see Monopolies, ◄25.

◄83. Pendency and condition of cause.

See 16 Cent. Dig. Discov. § 107.

A court of law is not empowered to compel one party to an action to produce books and papers in advance of trial for his adversary's examination and inspection, by the provisions of Rev. St. § 724 (U. S. Comp. St. 1901, p. 583) that "in the trial" of actions at law the federal courts may, on motion and notice, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.—(1911) *Carpenter v. Winn*, 31 S. Ct. 683, 221 U. S. 533, 55 L. Ed. 842, reversing judgment (1908) 165 F. 638, 91 C. C. A. 301.

◄107. Failure to comply with order.

See 16 Cent. Dig. Discov. § 139.

The refusal of corporate officers to obey orders of a federal Circuit Court, requiring them to produce certain documentary evidence, on their examination before a special examiner, cannot be justified on the theory that such evidence was not in their possession or under their control, because their possession was not personal, but was that of the corporations.—*Nelson v. United States*, 26 S. Ct. 358, 201 U. S. 92, 50 L. Ed. 673.

The materiality of the evidence sought to be elicited cannot justify the refusal of witnesses to obey the orders of the federal Circuit Court requiring them to produce written evidence in their possession on their examination before a special examiner.—*Id.*

This Digest is compiled on the Key-Number System. For explanation, see page iii.

DISCRETION OF COURT.

See Habeas Corpus, ¶6.
 Admission in rebuttal of evidence proper in chief, see—
 Criminal Law, ¶684.
 Trial, ¶63.
 Allowance of bill of review, see Equity, ¶455.
 Allowance of interest, see Interest, ¶22.
 Allowance of supersedeas or stay on appeal or writ of error, see Appeal and Error, ¶479.
 Allowing plea to jurisdiction, see Abatement and Revival, ¶2.
 Amendment of pleading, see—
 Equity, ¶267.
 Pleading, ¶236.
 Attorney's fees for violation of anti-trust law, see Monopolies, ¶26.
 Change of venue, see Venue, ¶42.
 Continuance, see Criminal Law, ¶586.
 Costs in civil actions, see Costs, ¶11-13.
 Examination of witnesses, see Witnesses, ¶226.
 Exclusion of jurors, see Jury, ¶85.
 Following rule of stare decisis, see Courts, ¶89.
 Interest as damages for collision, see Collision, ¶130.
 Mandamus to control acts of courts, judges, or judicial officers in matters of discretion, see Mandamus, ¶28.
 New trial, see—
 Criminal Law, ¶911.
 New Trial, ¶6.
 Order of proof, see Criminal Law, ¶680-684.
 Reopening case for further evidence, see Trial, ¶65-68.
 Review, see Courts, ¶383.
 Review of discretion, see—
 Admiralty, ¶118.
 Appeal and Error, ¶86-89, 957-986, 1092.
 Criminal Law, ¶1146-1156.

Separate trials, see Criminal Law, ¶622.
 Submission of special findings to jury, see Trial, ¶349.
 Submitting issues to jury, see Equity, ¶377.
 Taking further proof in prize case, see War, ¶28.
 Writ of certiorari, see Certiorari, ¶9.

DISCRIMINATION.

See—
 Carriers, ¶2, 13, 32.
 Civil Rights.
 Commerce, ¶54.
 Constitutional Law, ¶204-250.
 Taxation, ¶39-45.

DISEASE.

See Health.
 Cause of death insured against, see Insurance, ¶438-448.
 Contagious and infectious diseases of animals, see Animals, ¶28-33.
 Penalties for bringing into United States aliens afflicted with contagious diseases, see—
 Aliens, ¶40.
 Constitutional Law, ¶80, 303.

DISHONOR.

See Bills and Notes, ¶393-410, 533.

DISJUNCTIVE ALLEGATIONS.

Affidavit for attachment, see Attachment, ¶115.

DISMISSAL AND NONSUIT.*Scope-Note.*

[INCLUDES termination of civil actions by voluntary act of the plaintiff in discontinuing or withdrawing from the suit, becoming nonsuit, etc., or by order of the court entered on consent of the parties, or made because of delay, defect, or fault in the proceedings; nature and grounds of such disposition of actions, proceedings therefor, and operation and effect thereof in general; and setting aside discontinuance, dismissal, or nonsuit, and reinstating cause.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Voluntary.**

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Dismissal, §§ 1-91.]

II. Involuntary.

- ¶45. Statutory provisions.
- 48. Condition of cause.
- 50. Estoppel or waiver of right.
- 55. Want of jurisdiction.
- 57. Defects and objections as to process.
- 58. Defects and objections as to pleadings.
- 60. Want of prosecution.
- 65. Dismissal by court on its own motion.
- 75. Dismissal without prejudice.

Cross-References.

As affecting limitation of actions, see Limitation of Actions, ¶130.

At trial, on failure of proof, see Trial, ¶160-162.

At trial, waiver of, see Trial, ¶419.

Conclusiveness of judgment on dismissal or nonsuit, see Judgment, ¶654.

Judgment on dismissal or nonsuit as bar to another action, see Judgment, ¶570.

Practice in equity, see Equity, ¶359-368.

Review of decisions, see Appeal and Error, ¶105.

In particular actions or proceedings.

See—

Appeal and Error, ¶13, 14, 20, 384, 387, 392, 400, 406, 409, 415, 430, 432, 592, 627, 635, 745, 777-807.

Courts, ¶397.

Criminal Law, ¶302, 1131.

I. VOLUNTARY.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Dismissal, §§ 1-91.]

II. INVOLUNTARY.

Mandamus to compel dismissal, see Mandamus, ¶43.

Remedy by appeal as affecting right of mandamus to compel dismissal, see Mandamus, ¶4.

¶45. Statutory provisions.

The provision in the fifth section of the judiciary act of 1875, making it the duty of the court to dismiss a case if it shall appear that it does not really and substantially involve a controversy properly within the jurisdiction of such court, or if the parties have been collusively joined for the purpose of creating a case cognizable therein, was not superseded by the act of 1887-88.—Board of Com'rs of Lake County, Colo., v. Dudley, 19 S. Ct. 398, 173 U. S. 243, 43 L. Ed. 684, reversing judgment Dudley v. Board of Com'rs of Lake County, Colo., 80 F. 672, 26 C. C. A. 82.

¶48. Condition of cause.

See 17 Cent. Dig. Dismissal, § 96.

Where defendant, on the day the case is set for trial to a jury, and after it is at issue, files a plea or peremptory exception praying that the suit be dismissed because a partner of plaintiff in the transaction which is the basis of the suit is not made a party plaintiff, it is within the discretion of the trial court to overrule such plea or exception on the ground that it comes too late.—Burbank v. Bigelow, 154 U. S. 558, 14 S. Ct. 1163, 19 L. Ed. 51, following Breedlove v. Nickolet, 32 U. S. (7 Pet.) 413, 8 L. Ed. 731.

¶50. Estoppel or waiver of right.

See 17 Cent. Dig. Dismissal, §§ 100-102.

Defendant waives his motion for a nonsuit, and cannot base any claim of error upon it, where, after it is overruled, he proceeds with his defense, and introduces testimony.—Bogk v. Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631, affirming judgment Gassert v. Bogk, 19 P. 281, 7 Mont. 585.

¶55. Want of jurisdiction.

See 17 Cent. Dig. Dismissal, §§ 115, 116.

The provision in the fifth section of the judiciary act of 1875, making it the duty of the court to dismiss a case if it shall appear that it does not really and substantially involve a controversy properly within the jurisdiction of such court, or if the parties have been collusively joined for the purpose of creating a case cognizable therein, applies to a case in which citizens of a state, owning coupons cut from bonds of a county of that state, transfer the same, without consideration, to a citizen of

another state, in order that he may join the causes of action thereon with the causes of action on other coupons transferred to him for the same purpose by other persons, and thereby make a case cognizable in a federal court, though these latter persons might themselves have sued in the federal court.—Board of Com'rs of Lake County, Colo., v. Dudley, 19 S. Ct. 398, 173 U. S. 243, 43 L. Ed. 684, reversing judgment Dudley v. Board of Com'rs of Lake County, Colo., 80 F. 672, 26 C. C. A. 82.

¶57. Defects and objections as to process.

See 17 Cent. Dig. Dismissal, §§ 129-133.

Where an action against a foreign corporation is commenced, and personal service is fraudulently obtained upon the president, but the corporation appears, pleads, and petitions to remove the cause, such corporation cannot, during the trial, object to the invalidity of the service by motion for a nonsuit or to dismiss, since such motion attacks the jurisdiction of the courts over the subject-matter, and not the jurisdiction over the person of defendant.—Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

¶58. Defects and objections as to pleadings.

See 17 Cent. Dig. Dismissal, §§ 134-139; 39 Cent. Dig. Plead. § 1078.

Plaintiff's failure to amend his declaration, for which, in good faith, he has obtained leave, with a continuance of the case by withdrawing a juror, and his failure to pay the term costs imposed on him as a condition of the amendment by an order subsequently made, when he could no longer have any choice as to the acceptance of the leave on those conditions, will not justify the dismissal of his action. Judgment 13 App. D. C. 289, reversed.—Jackson v. Emmons, 20 S. Ct. 466, 176 U. S. 532, 44 L. Ed. 576.

¶60. Want of prosecution.

See 17 Cent. Dig. Dismissal, §§ 140-152.

A bill in foreclosure was properly dismissed, where complainant's claim to a final decree nunc pro tunc has been rightfully denied and no effort to revive the cause has been made, though defendant has been dead for some years.—Cuebas y Arredondo v. Cuebas y Arredondo, 32 S. Ct. 277, 223 U. S. 376, 56 L. Ed. 476.

¶65. Dismissal by court on its own motion.

See 17 Cent. Dig. Dismissal, § 160.

A court which has no jurisdiction of a cause properly orders it to be stricken from the docket, though no question of jurisdiction has been made by demurrer or plea.—Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 S. Ct. 771, 39 L. Ed. 913.

75. Dismissal without prejudice.

See 17 Cent. Dig. Dismissal, § 169.

Certain moneys were deposited in court in satisfaction of a judgment rendered on a certain note, and were afterwards, by order of the court, placed to the credit of a suit in equity pending therein, to which various persons claiming an interest in the note were parties, "to remain subject to the order of the court in that cause." Afterwards the clerk deposited the money with a bank and a trust company, and this bill was brought against them by certain of the parties to the equity suit to recover the same. *Held*, that the proper disposition of the fund could only be determined in the equity suit, and it appearing that the court below, while basing its action on this ground, had nevertheless dismissed the suit on the merits, its order should be modified so as to dismiss without prejudice to the rights of the plaintiffs to prosecute their claim in the equity suit.—*Gregory v. Boston Safe Deposit & Trust Co.*, 144 U. S. 665, 12 S. Ct. 783, 36 L. Ed. 585, modifying decree (C. C.) 36 F. 408.

The dismissal of a bill seeking to enjoin enforcement of legislative regulation of gas rates as confiscatory in advance of any actual experience of the practical result of such rates should be without prejudice. Decree (C. C. 1907) Consolidated Gas Co. v. City of New York, 157 F. 849, reversed.—*Willcox v. Consolidated Gas Co. of New York*, 29 S. Ct. 192, 212 U. S. 19, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

DISORDERLY CONDUCT.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Disorderly C.]

DISORDERLY HOUSE.

See 17 Cent. Dig. Disorderly H.

See—

Criminal Law, 200.
Obscenity.

DISPARAGEMENT.

Title or interest by grantors, former owners, or privies as admission, see Evidence, 231.

DISPATCH.

See Telegraphs and Telephones.

DISPENSARY LAW.

Regulation of commerce, see Commerce, 54, 55, 57, 60.

DISPOSSESSION.

See Forcible Entry and Detainer.

DISPUTE.

Existence of actual controversy as requisite to appellate jurisdiction, see Appeal and Error, 19.

Jurisdictional amount in dispute, see—

Appeal and Error, 45-65.

Courts, 326-330.

Removal of Causes, 71-76.

Submission to arbitrators, see Arbitration and Award.

Want of actual controversy ground for dismissal of appeal or other proceeding for review, see Appeal and Error, 781.

DISPUTED CLAIMS.

See Compromise and Settlement, 6.

Part payment operating as accord and satisfaction, see Accord and Satisfaction, 10.

DISQUALIFICATION.

Coal land entryman, see Mines and Minerals, 11.

Judge, see Judges, 41-54.

DISSEISIN.

See Forcible Entry and Detainer.

DISSOLUTION.

See Monopolies, 16, 24, 26.

Bonds to dissolve attachment, see Attachment, 334.

Community, see Husband and Wife, 272.

Corporation or association, see—

Associations, 25.

Corporations, 611-623, 691.

Injunction, see Injunction, 185, 186.

Partnership, see Partnership, 263-340.

DISTILLED SPIRITS.

Following decisions of state court as to construction of statute imposing tax, see Courts, 366.

License taxes, equal protection of law, see Constitutional Law, 230.

DISTRIBUTION.

Assets, see Partnership, 304-311.

Damages, see Death, 101.

Estate, see—

Assignments for Benefit of Creditors, 297-317.

Bankruptcy, 307-364.

Descent and Distribution.

Executors and Administrators, 297-315.

Insolvency, 105.

Governmental powers and functions, see Constitutional Law, 50-80.

Prize money, see War, 28.

Proceeds of mortgage sale, see Mortgages, 443-568.

DISTRICT AND PROSECUTING ATTORNEYS.

Scope-Note.

[INCLUDES public prosecutors for particular districts or counties in civil as well as criminal cases; their eligibility for the office; appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of public prosecutors and their assistants and associate counsel in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ➡ 2. Appointment or election, and qualification and tenure.
- 4. Compensation and fees.
- 6. — United States district attorneys.
- 9. Prosecution or defense of civil actions.

Cross-References.

Argument to jury, see Criminal Law, ➡709, 713, 722½, 726, 728-730.
Communication to, as privileged communication, see Libel and Slander, ➡38.

Effect of treaty on right to office of solicitor of courts, see Treaties, ➡8.
Misconduct as ground for new trial, see Criminal Law, ➡919.

➡2. Appointment or election, and qualification and tenure.

See 17 Cent. Dig. Dist. & Pros. Attys. §§ 2-9.

The provision of Rev. St. § 769, that "district attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates," is one of limitation, and not of grant, and under the settled construction of the constitution the president has the power to remove an incumbent before the expiration of the term so limited.—*Parsons v. United States*, 17 S. Ct. 880, 167 U. S. 324, 42 L. Ed. 185.

➡4. Compensation and fees.

See 17 Cent. Dig. Dist. & Pros. Attys. §§ 13-33.

➡6. — United States district attorneys.

See 17 Cent. Dig. Dist. & Pros. Attys. §§ 26-33.

Under Rev. St. § 824, providing that, when an indictment is tried and conviction is had, "the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars," the amount of such fee, within the prescribed limit, is within the discretion of the trial court, and its allowance is not subject to reduction by the attorney general, though Rev. St. § 368, provides that "the attorney general shall exercise general supervisory powers over the accounts of district attorneys."—*United States v. Waters*, 133 U. S. 208, 10 S. Ct. 249, 33 L. Ed. 594, affirming *Waters v. United States*, 21 Ct. Cl. 30.

A United States district attorney is entitled to charge a per diem for services before a United States commissioner upon the same day that he is allowed a per diem for attendance upon the court.—*United States v. Erwin*, 147 U. S. 685, 13 S. Ct. 443, 37 L. Ed. 331.

Under Rev. St. § 380, district attorneys are charged with the duty, under the direction of the solicitor of the treasury, of conducting suits brought by receivers of national banks in collecting assets and winding up their affairs, and they are not entitled to any compensation or allowance therefor beyond the salary attached to

the office.—*Gibson v. Peters*, 150 U. S. 342, 14 S. Ct. 134, 37 L. Ed. 1104, affirming judgment (C. C.) 36 F. 487, and overruling (C. C.) 85 F. 721.

A claim for services in investigating revenue cases, in which no legal proceedings were instituted, rejected by the secretary of the treasury on the ground that a judicial certificate could not be given, cannot be allowed by the courts.—*United States v. Bashaw*, 152 U. S. 436, 14 S. Ct. 638, 38 L. Ed. 505, reversing judgments 50 F. 749, 1 C. C. A. 653, and (C. C.) 47 F. 40.

Where there is no adjournment of court for any judicial day, but only from Saturday to Monday, travel by the district attorney in going from the place of holding court to his place of abode on Saturday, and returning on Monday morning, is not "necessarily performed," within Act Feb. 22, 1875, § 7, so as to entitle him to mileage therefor, even though he makes no charge for the intervening Sunday.—*United States v. Shields*, 153 U. S. 88, 14 S. Ct. 735, 38 L. Ed. 645.

The per diem fee allowed by Rev. St. § 824, to district attorneys for attendance in court or before a judge or commissioner, is intended as compensation, and not as reimbursement for expenses incurred, and hence must be included as part of the maximum compensation allowed by law.—*United States v. Smith*, 158 U. S. 346, 15 S. Ct. 846, 39 L. Ed. 1011.

Mileage is not to be included, as part of the compensation allowed to a United States district attorney, in determining whether such compensation has reached the maximum allowed by statute for his services.—*Id.*

Under Rev. St. § 771, making it the duty of district attorneys to prosecute all civil actions in which the United States are concerned, where an extra compensation is paid the district attorney of New Mexico for services performed at the direction of the attorney general in suits in which the government was interested, though not entitled thereto, yet, having received it, he must account therefor as part of the fees and emoluments of his office, under Act Aug. 7, 1882 (22 Stat. 344), requiring all fees and moneys received by him above \$3,500 to be paid into the treasury of the United States.—*Id.*

Rev. St. § 771, requiring a district attorney to "prosecute all civil actions in which the United States are concerned," covers a habeas corpus proceeding brought to release Chinese immigrants detained by orders of the collector of the port; and hence an assimilated fee allowed him for defending such a case is one to which he is entitled "by reason of the discharge of the duties of his office," within the meaning of Rev. St. § 834, requiring him to make return of all such fees.—*Hilborn v. United States*, 163 U. S. 342, 16 S. Ct. 1017, 41 L. Ed. 183, affirming judgment 28 Ct. Cl. 237.

Under Rev. St. § 365, it is a condition precedent to the recovery of a judgment against the government for compensation, by one specially appointed by the attorney general to assist the district attorney in the prosecution of particular cases, that a certificate be given by the attorney general that the services were actually rendered, and could not have been performed by the district attorney or his assistants or any of the officers of the department of justice.—*United States v. Crosthwaite*, 18 S. Ct. 107, 168 U. S. 375, 42 L. Ed. 507.

One who is commissioned by the attorney general as special assistant to a district attorney for particular cases or for a limited time is not an "assistant district attorney," within the meaning of Rev. St. § 365, so as to be entitled to compensation as such; and he can recover no compensation in the absence of the certificate of the attorney general which is provided for in that section.—*Id.*

A district attorney is not required to represent the government in the circuit court of appeals, which is not a court of the district, and, when designated to do so by the attorney general in a particular case, acts as special counsel, and is entitled to payment therefor, without regard to the amount of his compensation as an officer. 19 C. C. A. 419, 73 F. 149 affirmed.—*United States v. Winston*, 18 S. Ct. 701, 170 U. S. 522, 42 L. Ed. 1130.

The giving by the attorney general of the certificate required by Rev. St. § 365, is a prerequisite to the recovery of extra compensation by a district attorney for services rendered in the circuit court of appeals, outside his district. *United States v. Crosthwaite*, 18 S. Ct. 107, 168

U. S. 375, 42 L. Ed. 507, followed.—*United States v. Winston*, 18 S. Ct. 701, 170 U. S. 522, 42 L. Ed. 1130, *Same v. Herron*, 18 S. Ct. 703, 170 U. S. 527, 42 L. Ed. 1132, affirming judgment 73 F. 149, 19 C. C. A. 419.

Services rendered by a district attorney in a government case in the circuit court of appeals, even when held in his own district, are not in the course of his official duties, and he is entitled to extra compensation therefor.—*United States v. Garter*, 18 S. Ct. 703, 170 U. S. 527, 42 L. Ed. 1133.

A district attorney, prosecuting a suit in a federal court of his district to condemn lands for the site of a fortification, is acting in the line of his duty under Rev. St. § 771, which requires him, among other things, to prosecute "all civil actions in which the United States are concerned." In so doing he appears in court "on the business of the United States," in the meaning of section 824, prescribing his per diem compensation. For such services, therefore, he is entitled to no extra compensation, since Rev. St. §§ 1764, 1765, declare that no office in any branch of the public service shall receive any additional compensation for "any service or duty whatever" unless the same is authorized by law, and the appropriation therefor expressly states that it is for such additional pay, extra allowance, or compensation.—*United States v. Johnson*, 19 S. Ct. 427, 173 U. S. 363, 43 L. Ed. 731.

9. Prosecution or defense of civil actions.

See 17 Cent. Dig. Dist. & Pros. Attys. §§ 36, 37.

A district attorney has no authority to accept a compromise judgment in favor of the United States merely because of representations by the defendants that they have no property, and that an execution against them would avail nothing, while they agree that, if the compromise judgment shall be entered, it shall be paid.—*United States v. Beebe*, 21 S. Ct. 371, 180 U. S. 343, 45 L. Ed. 563.

DISTRICT COURTS.

See Courts, 418-426.

DISTRICT OF COLUMBIA.

Scope-Note.

[INCLUDES the district ceded to the United States as the seat of government; the cessions and their effect in general; status of the District as a body politic and corporate; establishment and control of the capitol and other public buildings and public reservations; power of the national government over the District; local laws and laws of the United States applicable thereto; establishment and organization of the local government, appointment of officers thereof, and rights, powers, proceedings, and liabilities of such government, its officers and agents; public improvements and assessments therefor; property, contracts, indebtedness, bonds, and other securities of the District; taxation by the District and its revenue; and actions by or against the District.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

1. Operation and effect of cessions.
2. Status and governmental powers and functions in general.
3. Legislative power of Congress.
5. Local law.
7. Officers, agents, and employes.
9. Contracts in general.

- 11. Public improvements.
- 13. — Preliminary proceedings.
- 14. — Contracts.
- 16. — Assessments.
- 18. Police power and regulations.
- 19. — In general.
- 21. Use and regulation of public places, property, and works.
- 22. — Streets and public ways.
- 23. — Public buildings, parks, and other public places and property.
- 24. Torts.
- 26. — Acts or omissions of officers or agents.
- 27. — Defects or obstructions in streets and other public ways.
- 30. Power to incur indebtedness or make expenditures.
- 32. Bonds and other securities.
- 35. Claims against District.
- 36. Actions.

Cross-References.

Courts, see Courts, ¶443-446.

Creation of park commission as encroachment on executive powers, see Constitutional Law, ¶58.

Effect on actions in District of Columbia of invalidity of employers' liability act as applied to interstate commerce, see Statutes, ¶64.

Exclusive control by federal government, see United States, ¶3.

Jurisdiction of claims against district, see Courts, ¶453.

Limitation of actions against, see Limitation of Actions, ¶11.

Power of officers to arbitrate, see Arbitration and Award, ¶1.

Power of United States to condemn lands in District of Columbia, see Eminent Domain, ¶5.

Validity of law creating drainage system for as denying equal protection of law, see Constitutional Law, ¶233; due process of law, see Constitutional Law, ¶290.

¶1. Operation and effect of cessions.

See 17 Cent. Dig. Dist. of Col. § 1.

The state of Maryland could grant no title to lands within the District of Columbia after the act of cession in 1791, and the proviso in that act, continuing the jurisdiction of the laws of Maryland until congress should provide for the government thereof, applied only to laws affecting private rights, and did not continue the land laws of Maryland as to public lands owned by the state within that territory.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

By the cession of the District of Columbia by the state of Maryland, such rights as the state possessed in that portion of the Potomac river lying within the territory ceded, and in the soil under it, passed to the United States.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

If the lord proprietary of Maryland held the title to the lands under the waters of the Potomac in 1781, such title was vested in the state by the confiscation acts, and such of the lands as lay within the limits of the District of Columbia, as public property of the state, passed by the cession of the District, in 1791, to the United States.—*Id.*

¶2. Status and governmental powers and functions in general.

See 17 Cent. Dig. Dist. of Col. § 2.

Act Cong. Feb. 21, 1871 (16 Stat. 419), constituted the District of Columbia "a body corporate for municipal purposes," with power to make contracts and sue and be sued. A governor and legislature were created, and a board of public works, to consist of the governor and four persons appointed by the president and senate. Prior to that time the government had been strictly municipal, and the United States government did not participate therein, in local

matters. Act June 20, 1874 (18 Stat. 116), abolished the government created by the act of 1871, and authorized the president and senate to appoint a commission to exercise the functions of the board of public works. Act June 11, 1878 (20 Stat. 102), provided that the District should "remain and continue a municipal corporation," and preserved all rights of action by and against it, in statu quo. *Held*, that the District is a municipal corporation, with a right to sue and be sued, and not a department of the United States government, or a sovereignty.—*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 S. Ct. 19, 33 L. Ed. 231; *Washington & G. Ry. Co. v. Same*, 136 U. S. 653, 10 S. Ct. 1075, 34 L. Ed. 549.

¶3. Legislative power of Congress.

See 17 Cent. Dig. Dist. of Col. § 3.

Congress, as a local legislature for the District of Columbia, and levying taxes for district purposes, may wholly exempt from taxation certain classes of property, or tax them at a lower rate than other property.—*Gibbons v. District of Columbia*, 116 U. S. 404, 6 S. Ct. 427, 29 L. Ed. 680.

¶5. Local law.

See 17 Cent. Dig. Dist. of Col. § 5.

Rev. St. D. C. c. 18, concerning corporations, confers no powers on corporations created by states of the Union, governed by the laws of those states, but applies only to corporations organized under the act.—*Edmonds v. Baltimore & P. R. Co.*, 114 U. S. 453, 5 S. Ct. 1098, 29 L. Ed. 216.

¶7. Officers, agents, and employes.

See 17 Cent. Dig. Dist. of Col. § 6.

Act Cong. June 11, 1878, entitled "An act providing a permanent form of government for the District of Columbia," giving the commissioners of the District control of the police

force, is an organic act, intended to dispose of the whole question of government for the District; and the plenary power given them by section 3 "to abolish any office, * * * reduce the number of employes, remove from office," etc., authorizes them to remove a policeman from the force without preferring charges against him, and without notice or hearing.—*Eckloff v. District of Columbia*, 135 U. S. 240, 10 S. Ct. 752, 34 L. Ed. 120.

Act June 11, 1878, to provide "a permanent form of government for the District of Columbia" (20 Stat. 102), which abolished the board of metropolitan police, and gave the commissioners of the District the "authority to employ such officers and agents, and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them" by the act, is an organic act, and superseDED and repealed by implication Rev. St. D. C. § 354, which provided that no person should be appointed a policeman or watchman on the police force of the District of Columbia except an honorably discharged soldier or sailor of the United States.—*District of Columbia v. Hutton*, 143 U. S. 18, 12 S. Ct. 369, 36 L. Ed. 60.

The sureties on the official bond of the auditor of the District of Columbia are not accountable for moneys deposited by citizens with the collector for street improvements; there being no statute authorizing the commissioners of the District to receive or expend such deposits, and they not being public moneys in any legal sense.—*District of Columbia v. Petty*, 33 S. Ct. 881, 229 U. S. 593, 57 L. Ed. 1343, affirming judgment 37 App. D. C. 156.

Responsibility for faults of disbursing clerk was not imposed on the auditor of the District of Columbia by Act March 3, 1891, providing that such clerk shall be subordinate to the commissioners of the District, and authorizing payments by him for moneys advanced to him by the commissioners on pay rolls or vouchers, or by rules relating to the disposition of moneys deposited by citizens with the collector of taxes for street improvements under the permit system.—*Id.*

9. Contracts in general.

See 17 Cent. Dig. Dist. of Col. § 3.

An agreement for a common-law submission to arbitration is a contract in the meaning of the acts restricting the power of the commissioners of the District of Columbia to bind the District, by contract, to the payment of money.—*District of Columbia v. Bailey*, 18 S. Ct. 868, 171 U. S. 161, 43 L. Ed. 118, reversing judgment *Bailey v. District of Columbia*, 9 App. D. C. 360.

The omission of the seal of the District of Columbia from a contract which the commissioners executed as for the corporation, with their signatures and seals, will not prevent the instruments from binding the corporation as a specialty, although the commissioners had adopted a corporate seal which had not at that time been generally used, since they could adopt for the time being any seal they chose for the corporation, whether intended to be permanently used or not. Judgment 15 App. D. C. 198, affirmed.—*District of Columbia v. Camden Iron Works*, 21 S. Ct. 680, 181 U. S. 453, 45 L. Ed. 948.

11. Public improvements.

See 17 Cent. Dig. Dist. of Col. §§ 10-12.

13. Preliminary proceedings.

See 17 Cent. Dig. Dist. of Col. § 10.

The order of publication in newspapers, made by the supreme court of the District of Columbia, is sufficient to give due notice of the filing of a petition, and an opportunity to all persons interested to show cause why the prayer of the petition in the matter of a street improvement should not be granted. Decree,

Davidson v. Wight, 16 App. D. C. 371, reversed.—*Wight v. Davidson*, 21 S. Ct. 616, 181 U. S. 371, 45 L. Ed. 900.

14. Contracts.

See 17 Cent. Dig. Dist. of Col. § 11.

The board of public works of the District of Columbia awarded a contract to claimant, not fixing rates. The secretary informed him that he had been awarded the contract "at board rates." *Held*, that the act of the secretary did not bind the board.—*Shipman v. District of Columbia*, 119 U. S. 148, 704, 7 S. Ct. 134, 30 L. Ed. 337.

A contract awarded by the board of public works of the District of Columbia was not reduced to writing until long after the work under it was begun. When it was put in writing, one of the three who signed on behalf of the board was no longer a member thereof. *Held*, even if the written contract was invalid because it was not executed by a majority of the five members of the board, it was effective, as embodying the parties' understanding of the oral contract.—*Id.*

Under 16 Stat. 423, c. 62, §§ 15, 37, "to provide a government for the District of Columbia," which requires that all contracts by the board shall be in writing, and forbids the allowance of extra compensation, plaintiff, who had contracted to do certain grading, excavating, and refilling, at specified prices, cannot claim additional compensation for grading or excavating stone or rock where the contract was silent on that subject, and the work to be done not limited to earth free from stone or rock, though the journal of the board contained an entry that the chief engineer had been notified to allow larger pay therefor, as such entry formed no part of the contract, and the prices stated in the latter were evidently fixed upon the supposed average character of the work.—*Barnard v. District of Columbia*, 127 U. S. 409, 8 S. Ct. 1202, 32 L. Ed. 207.

A pavement company made oral propositions to the vice president of the board of public works for laying pavements, and received a writing, signed by the assistant secretary, reciting and accepting the proposition. There was no evidence that the assistant secretary was authorized to execute this writing, nor that the vice president was authorized to contract for the work, nor that the board ever ratified it. *Held*, that the alleged contract did not meet the requirements of Act Feb. 21, 1871, § 37, providing that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District."—*Brown v. District of Columbia*, 127 U. S. 579, 8 S. Ct. 1314, 32 L. Ed. 262.

16. Assessments.

See 17 Cent. Dig. Dist. of Col. § 12.

Congress has power to provide that the cost of a highway improvement in the District of Columbia shall be paid by the District, or by the owners of lands benefited by the improvement, and not by the United States.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

It is no objection to the statute that the owners of lands assessed for benefits under one proceeding will be left liable to be assessed anew under future proceedings for establishing other highways in other subdivisions.—*Id.*

The benefits to be taken into consideration and deducted in estimating the compensation or damages under Act March 2, 1893, c. 197, §§ 10, 11, 13 (27 Stat. 532), are the special and direct benefits which the appropriation of part of the tract of land for a highway may cause to the remainder of the tract; and the benefits for which an assessment is to be made under section 15 upon such remainders and upon all

other lands benefited are the general benefits accruing to all the lands in the neighborhood from the establishment of the highway.—Id.

Under Act March 2, 1893, c. 197, § 15 (27 Stat. 532), providing that the assessment shall be made upon the "lands benefited," any lands in the District of Columbia which are benefited by the improvement may be assessed, whether or not in the particular subdivision in which the highway is established.—Id.

The fact that a public park in the District of Columbia is dedicated by the act of congress creating it to the use and enjoyment of the people of the United States does not take it out of the rule as to special assessments applicable in the cases of streets and highways; and such assessments to aid in its purchase and improvement may constitutionally be made against property specially benefited.—*Craighill v. Lambert*, 18 S. Ct. 217, 168 U. S. 611, 42 L. Ed. 599.

An assessment made under Act Aug. 11, 1894, providing that assessments for laying water mains shall be at the uniform rate of \$1.25 per front foot against all abutting lots, is valid, though made without notice to the property owners.—*Parsons v. District of Columbia*, 18 S. Ct. 521, 170 U. S. 45, 42 L. Ed. 943.

The acts of congress establishing waterworks in the District of Columbia, and Act Aug. 11, 1894, providing that assessments for laying water mains shall be at the uniform rate of \$1.25 per front foot against all abutting lots, are conclusive and binding on the property owners, though passed without notice to them, or opportunity to be heard on these questions.—Id.

A reassessment against abutting property for one-half the cost of a sidewalk, levied by the District of Columbia under Act Cong. April 24, 1896, authorizing such reassessment, is valid, if made after due notice and within 90 days from the date of the judgment annulling the first assessment for failure to give due notice of such assessment to the property owner, since, where an assessment has been vacated on such ground, the legislature may provide for a reassessment. Judgment, *District of Columbia v. Wormley* 15 App. D. C. 58, affirmed.—*Wormley v. District of Columbia*, 21 S. Ct. 609, 645, 181 U. S. 402, 45 L. Ed. 916, 921.

Notice to a property owner by the District of Columbia of an intention to assess his property for special improvements under Act Aug. 6, 1890 (26 Stat. 296), is not necessary before the commencement of the work, but only at some time before the settlement and entry on the tax record of the assessment against his property, in order that he may have an opportunity to question the constitutionality of the law under which the assessment is to be made, the facts in respect of the cost of the work, and whether the amount charged exceeds the special benefits received by him.—Id.

The power of congress to legislate for the District of Columbia includes the power to provide by the act of March 3, 1899, for the assessment on abutting lands and lands benefited of one-half or more of the damages for and in respect of land condemned for the opening of streets. Decree, *Davidson v. Wight*, 16 App. D. C. 371, reversed.—*Wight v. Davidson*, 21 S. Ct. 616, 181 U. S. 371, 45 L. Ed. 900.

A reassessment of benefits under Act June 6, 1900, c. 809, 31 Stat. 668, § 12, upon lots benefited by the extension of Eleventh street, in the District of Columbia, is properly made, where the earlier act (March 3, 1899, c. 431, 30 Stat. 1344), under which the original assessment of benefits was made, had been superseded by the new enactment at the time of the court's refusal to confirm such assessment, which refusal was assumed by the parties to

amount to an annulment of the award of benefits by the first jury.—*Columbia Heights Realty Co. v. Rudolph*, 30 S. Ct. 581, 217 U. S. 547, 54 L. Ed. 877, 19 Ann. Cas. 854, affirming judgment *Columbia Heights Realty Co. v. MacFarland* (1908) 31 App. D. C. 112.

Objections that the court did not examine the jurors in the proceeding under Act June 6, 1900, c. 809, 31 Stat. 665, for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, as to whether they possessed the qualifications required by section 4 of that act, nor administer to them the oath required by statute, come too late when not made at the time the jurors were accepted and sworn.—Id.

The refusal of the court, after the acceptance and swearing of the jury, in a proceeding under Act June 6, 1900, c. 809, 31 Stat. 665, for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, to permit counsel to examine the jurors as to their qualifications, is not reversible error, although counsel was not present at the time they were accepted and sworn, where, under the statute and the warning order, the parties interested were required to be present and "continue in attendance" until the matter was ended.—Id.

A journal entry in the proceeding under Act June 6, 1900, c. 809, 31 Stat. 665, for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, which recites that the oath was administered to the jurors in accordance with the provisions of that statute, imports that the statutory oath was followed as far as applicable.—Id.

An instruction in the proceeding under Act June 6, 1900, c. 809, 31 Stat. 665, for the reassessment of benefits upon the lots benefited by the extension of Eleventh street, in the District of Columbia, is not open to the objection that the jury was not limited to the benefits resulting immediately from the opening of the street, but might consider all enhancement which might come from subsequent improvement of or upon the street, where the court eliminated any doubt as to its meaning by other parts of its charge, in which the jury was told that the benefits must come immediately from the extension of the street, and not from any subsequent improvement.—Id.

The power of the court to review the award made by the jury appointed to view the premises and hear the testimony in the proceeding under Act June 6, 1900, c. 809, 31 Stat. 665, for the reassessment of benefits resulting from the extension of Eleventh street, in the District of Columbia, is limited to plain errors of law, misconduct, or grave error of fact, indicating plain partiality or corruption.—Id.

Whether or not the court below erred in holding the award of the jury appointed under Act June 6, 1900, c. 809, 31 Stat. 665, to reassess the benefits resulting from the extension of Eleventh street, in the District of Columbia, not unreasonable, nor so unjust as to require a new trial before another jury, is not open in the federal Supreme Court, where it has not all the evidence before it, and there is no agreed statement of facts.—Id.

A proceeding for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, taken under Act June 6, 1900, c. 809, 31 Stat. 665, superseding Act March 3, 1899, c. 431, 30 Stat. 1344, cannot be regarded as a new action, for the purpose of applying the statute of limitations, but must be deemed a continuance of the old proceeding.—Id.

Confirmation of that part of the verdict of the jurors in the proceeding under Act

March 3, 1899, c. 431, 30 Stat. 1344, for the extension of Eleventh street, in the District of Columbia, which awards damages to the land not taken, from being left high above or below the grade, is not res judicata as to the benefits accruing to the same land, which the statute says shall not be less than 50 per cent. of the damages sustained.—Id.

A judgment of the Supreme Court of the District of Columbia confirming a special assessment for benefits resulting from a street extension cannot be attacked collaterally because that court, upon an objection challenging the assessment as excessive, did not call the second jury provided for by Rev. St. (Dist. of Col.) § 263, since this was, at most, an error which can only be available in appropriate proceedings in error.—(1911) *Briscoe v. Rudolph*, 31 S. Ct. 679, 221 U. S. 547, 55 L. Ed. 848, affirming decree (1908) *Same v. MacFarland*, 32 App. D. C. 167.

Cost of changing sewers and water mains inside and outside of railroad right of way, made necessary by elimination of grade crossings, pursuant to Act Feb. 12, 1901, held chargeable to the railroad company's contractor.—(1912) *New York Continental Jewell Filtration Co. v. District of Columbia*, 32 S. Ct. 300, 223 U. S. 253, 56 L. Ed. 426, affirming judgment (1909) 33 App. D. C. 377.

The burden is on commissioners of District of Columbia, in street improvements instituted under Act June 30, 1911, to establish extent of special benefits to property to be charged.—*Newman v. Lynchburg Inv. Corp.*, 35 S. Ct. 477, 236 U. S. 692, 59 L. Ed. 792, affirming judgment *Lynchburg Inv. Corp. v. Rudolph*, 40 App. D. C. 129.

Error in failing to instruct under Code D. C. § 491g, to consider in assessing benefits for a street improvement dedication of land for the improvements and its value, cannot be corrected by reversal in part, where assessments cannot be separated.—Id.

18. Police power and regulations.

See 17 Cent. Dig. Dist. of Col. § 14.

19. — In general.

See 17 Cent. Dig. Dist. of Col. § 14.

By Act Cong. Feb. 21, 1871 (16 Stat. 419, § 1), the District of Columbia was constituted a body corporate, with all the powers of a municipal corporation not inconsistent with the constitution and laws of the United States and the provisions of this act. By section 18 the legislative power of the District was extended to all rightful subjects of legislation, subject to all the restrictions and limitations imposed upon states by Const. art. 1, § 10; all acts to be subject to repeal or modification by congress. *Held*, that the act conferred upon the District only municipal powers, and did not authorize it to impose a license upon persons soliciting the sale of goods on behalf of individuals or firms doing business outside of the District.—*Stoutenburgh v. Hennick*, 129 U. S. 141, 9 S. Ct. 256, 32 L. Ed. 637.

The fact that congress repealed and modified various parts of the act of the legislative assembly of the District, containing the clause imposing such license, cannot be held to amount to a ratification of that clause by congress; the parts repealed and modified being separately operative, and such as were within the scope of municipal action.—Id.

21. Use and regulation of public places, property, and works.

See 17 Cent. Dig. Dist. of Col. § 15.

22. — Streets and public ways.

See 17 Cent. Dig. Dist. of Col. § 15.

Under Rev. St. D. C. c. 18, § 673, providing that "no railroad shall be built under that

chapter until the route and termini have been approved by congress," the right to designate the route of a railroad through the city, and on what streets its track shall be located, and which streets it shall use, is retained by congress.—*Edmonds v. Baltimore & P. R. Co.*, 114 U. S. 453, 5 S. Ct. 1098, 29 L. Ed. 216.

Under the agreement between the original proprietors of the lands on which the city of Washington was laid out and the commissioners of the president, and the Maryland act of December 19, 1791, ratifying the cession of the District of Columbia, the United States became the owner in fee of the streets of the city, although no conveyance thereof by the trustees was ever in fact made as provided in such agreement.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

Taxicab company is a common carrier within Act March 4, 1913, § 8, and subject to jurisdiction of Public Utilities Commission of District of Columbia, as to its exercise of exclusive rights under lease from owner of Washington Union Railway station in soliciting taxicab business, but not as to business of furnishing automobiles from its central garage on individual orders.—*Terminal Taxicab Co. v. Kutz*, 36 S. Ct. 583, 241 U. S. 252, 60 L. Ed. 984, modifying decree *Same v. Harding*, 43 App. D. C. 120.

Jurisdiction of Public Utilities Commission of District of Columbia over public utility under Act March 4, 1913, § 8, cannot be defeated because such jurisdiction has not been assumed over other similar concerns.—Id.

23. — Public buildings, parks, and other public places and property.

A market company, incorporated by act of congress in the District of Columbia, addressed to the governor of the District a proposal that it grade the market grounds, and place thereon inexpensive stands to enable marketmen to do business, charging them therefor such sums as he and the District authorities might prescribe; and the governor indorsed on such proposal, "Approved, subject to such regulations as the legislative assembly may hereafter prescribe." *Held*, that the proposal and its qualified approval did not import a surrender by the legislative assembly of the right vested in it by the act, to establish rules and regulations with respect to the manner of occupancy, and the tolls to be exacted for the use of stands. Decree 6 App. D. C. 34, affirmed.—*Washington Market Co. v. District of Columbia*, 19 S. Ct. 218, 172 U. S. 361, 43 L. Ed. 478.

Act Cong. May 20, 1870 (16 Stat. 124), incorporating a market company in Washington, authorized (section 2) the municipal government of the city to make and enforce regulations, with regard to the market to be operated, necessary for the convenience, health, and safety of the community, and provided (section 16) "that the city government of Washington shall have the right to hold and use, under such rules and regulations as the said corporation may prescribe," a certain open space for the marketing of products. *Held*, that section 16 should not be construed as providing that the market company was the corporation authorized to make rules and regulations with respect to the market. Decree 6 App. D. C. 34, affirmed.—Id.

The plan referred to by President Washington, as being annexed to his letter of March 2, 1797, to the trustees holding title to the lands on which the city of Washington was laid out, requesting them to convey to the commissioners for the United States the streets, squares, and other grounds reserved for public purposes thereon shown, but which plan was not in fact annexed, was undoubtedly the Dermott map,

then recently prepared, which was thus officially recognized; but such map cannot be regarded as the completed and final map of the city, but merely as embodying the plan so far as thus completed, and should be considered in connection with the previous maps of L'Enfant and Ellicott, as well as those subsequently made, as marking progressive steps in the development of the plan of the founders. So considered, taking also into consideration the agreements and transactions between the original proprietors of the land and the government, and the prevailing custom in laying out cities having water fronts on navigable streams, it must be held that it was the intention of the president and commissioners at all times to reserve to the United States for public uses the entire water front of the Potomac river and the Eastern Branch, together with the vacant space left adjacent thereto, as shown on such maps, to form a street, to be called Water street, for convenient access to such docks and wharves as might be constructed in the interests of the commerce and navigation of the city, and which street should form the southern boundary of the city. In view of such evident plan and intention on the part of the founders of the city, which was never departed from, the title to the water frontage and the reserved space adjacent did not remain in, nor revert to, the original proprietors, nor did any riparian rights appertain to the lots or blocks laid out fronting on said Water street.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

◀24. Torts.

See 17 Cent. Dig. Dist. of Col. § 16.

◀26. — Acts or omissions of officers or agents.

See 17 Cent. Dig. Dist. of Col. § 16.

Under Act Cong. June 11, 1878 (20 Stat. 102, c. 180), declaring the District of Columbia a municipal corporation, and vesting its government as such in three commissioners, among whose duties is the control of streets therein, the District is liable for injuries to the person arising from the negligence of the commissioners in maintaining the streets of the city of Washington in a safe condition for public use.—*District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472.

◀27. — Defects or obstructions in streets and other public ways.

See 17 Cent. Dig. Dist. of Col. § 16.

The District of Columbia is not charged with the duty so to light a street as to show the presence of a stepping stone on the sidewalk, near the curb, by Rev. St. D. C. § 233, directing the proper authorities to increase, as the public good may require, the number of street lamps in the city of Washington, and to do any and all things pertaining to the well lighting of the city. Judgment, *Wolf v. District of Columbia*, 21 App. D. C. 464, affirmed.—*Wolf v. District of Columbia*, 25 S. Ct. 198, 196 U. S. 152, 49 L. Ed. 426, 1 Ann. Cas. 967.

◀30. Power to incur indebtedness or make expenditures.

See 17 Cent. Dig. Dist. of Col. § 17.

The commissioners of the District, having no power to contract except for purposes for which congress has made an appropriation, cannot by agreement bind the District to the payment of a claim for damages for a breach of a contract previously made by authority.—*District of Columbia v. Bailey*, 18 S. Ct. 868, 171 U. S. 161, 43 L. Ed. 118, reversing judgment *Bailey v. District of Columbia*, 9 App. D. C. 360.

◀32. Bonds and other securities.

See 17 Cent. Dig. Dist. of Col. § 19.

Assignees of audit certificates, who are entitled, under the act of congress of August 13, 1894, to a residue of unpaid legal interest thereon, include an assignee who became such after the payment of the certificates. Judgment 13 App. D. C. 38, affirmed.—*Roberts v. United States*, 20 S. Ct. 376, 176 U. S. 221, 44 L. Ed. 443.

Certificates of the board of audit of the District of Columbia, issued pursuant to the act of congress of June 20, 1874, § 6, were redeemed, within the meaning of the act of August 13, 1894, providing for the payment of additional interest thereon, when a judgment of the court of claims based solely on such instruments was paid by the treasurer of the United States—*Id.*

◀35. Claims against District.

See 17 Cent. Dig. Dist. of Col. § 21.

Plaintiff indorsed, in blank, certificates of the board of public works of the District of Columbia, and delivered them to another to secure a debt. Afterwards, hearing that such other had absconded, and knowing that the certificates were negotiable, he gave oral notice to the president and treasurer of the board, and protested against their payment. The board being afterwards abolished, a commission, which succeeded it, after giving public notice, examined all such claims, including these certificates, which were presented by other persons, and allowed; plaintiff making no appearance. *Held*, that he could not recover, as he was negligent in indorsing over in blank the certificates merely as security, and in giving imperfect notice on discovering the fraud.—*Gleason v. District of Columbia*, 127 U. S. 133, 8 S. Ct. 1118, 32 L. Ed. 92.

Neglect of the proper officers of the corporation of Washington to take in due time the steps necessary, under the act of the corporation of Washington of May 23, 1853 (*Webb's Dig.* p. 155), to create a lien on lots for the cost of setting a curb in front thereof, rendered the corporation and its successor, the District of Columbia, liable for the amount of the certificates of indebtedness issued by the mayor to the contractor for the deferred payments, under the act of the council of October 28, 1867; and where a purchaser of such certificates, in order to protect his lien, bought in the lots at an invalid tax sale, and paid therefor with his certificates, he was entitled, after the sale was set aside, to a judgment against the District for the amount of such certificates, with interest.—*District of Columbia v. Lyon*, 161 U. S. 200, 16 S. Ct. 450, 40 L. Ed. 670.

Act Feb. 13, 1895, requiring the court of claims to allow claimants, under Act June 16, 1880, for work done under contract with the District of Columbia the rates established by the board of public works, instead of those fixed by the contract, in effect conferred upon the claimants a gratuity to the amount of the difference between the contract and the board rates, and this became due only on the passage of the act, and bore interest from that date only.—*District of Columbia v. Johnson*, 17 S. Ct. 362, 165 U. S. 330, 41 L. Ed. 734.

The legislative powers of the District of Columbia as a municipal corporation are vested in congress, the District commissioners being administrative officers only; hence the commissioners have no implied power to contract, and cannot, in the absence of express authority, bind the District by an agreement for a common-law submission to arbitration of a claim against it.—*District of Columbia v. Bailey*, 18 S. Ct. 868, 171 U. S. 161, 43 L. Ed. 118, re-

versing judgment *Bailey v. District of Columbia*, 9 App. D. C. 860.

Under the act of June 11, 1878, creating the commissioners of the District (20 Stat. c. 180, § 5), which provides that all contracts made by them in behalf of the District involving an expenditure of more than \$100 shall be invalid, unless copied in a book, and signed by the commissioners, an agreement to submit to arbitration a claim of several thousand dollars against the District, if authorized, could only be made in the manner prescribed.—Id.

—36. **Actions.**

See 17 Cent. Dig. Dist. of Col. § 22.

In an action by a claimant prior to Act Feb. 13, 1895, the referee allowed the District, as a counterclaim, the excess of board rates paid claimant over the contract rates. *Held*, that the act had the same effect as payment of the counterclaim, and therefore the interest thereon could not be offset against a recovery under the act.—*District of Columbia v. Johnson*, 17 S. Ct. 362, 165 U. S. 330, 41 L. Ed. 734.

DISTRICTS.

Irrigation districts, see Waters and Water Courses, —223-231.

Judicial districts in which suits in federal courts must be brought, see Courts, —267-276.

School districts, see Schools and School Districts, —22-105.

Taxing and assessment districts, see Taxation, —265-285.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Distur. of Pub. A.]

DITCHES.

See—
Drains.

Waters and Water Courses, —213-257.

DIVERSE CITIZENSHIP.

As ground of jurisdiction affecting appeal to Supreme Court, see Courts, —382.

Ground of jurisdiction of United States courts, see—

Courts, —301-325.

Removal of Causes, —26-61.

Requisite to jurisdiction of Circuit Court in bankruptcy proceedings, see Bankruptcy, —294.

DIVERSION.

Waters, see Waters and Water Courses, —79.

DIVIDENDS.

See Corporations, —152, 153.

DIVISION LINES.

See Boundaries, —8.

DIVORCE.

Scope-Note.

[INCLUDES dissolution of the relation of marriage, total or partial, by legislative or judicial action, and judicial separation of husband and wife; nature and scope of the remedy in general; grounds of actions for divorce or separation and defenses thereto; jurisdiction to grant divorces or separations, and proceedings therefor; incidental relief as to alimony, disposition of property, custody and support of children, etc.; judgments or decrees and operation and effect thereof; review of proceedings; costs in actions for divorce or separation; and status, rights, and liabilities of divorced persons.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Form of Remedy.

—5. Legislative divorces.

II. Grounds.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 22-139.]

III. Defenses.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 140-197.]

IV. Jurisdiction, Proceedings, and Relief.

(A) JURISDICTION, VENUE, AND LIMITATIONS.

—58. Jurisdiction of cause of action.

62. — Domicile or residence of parties.

64. — Acquisition of domicile for purpose of divorce.

65. Jurisdiction of the person.

IV. Jurisdiction, Proceedings, and Relief—Continued.**(B) PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.**

⌘ 75. Process or notice.

77. — Personal service.

(C) PLEADING.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 283-352.]

(D) EVIDENCE.

⌘ 123. Weight and sufficiency of evidence.

130. — Cruelty or other ill treatment.

(E) DISMISSAL, TRIAL OR HEARING, AND NEW TRIAL.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 461-513.]

(F) JUDGMENT OR DECREE.

⌘ 159. By default or pro confesso.

161. — Opening or setting aside.

172. Conclusiveness of adjudication.

(G) APPEAL.

⌘ 184. Review.

(H) FEES AND COSTS.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 578-584.]

V. Alimony, Allowances, and Disposition of Property.

⌘ 278. Appeal.

285. — Record.

VI. Custody and Support of Children.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 773-806.]

VII. Operation and Effect of Divorce and Rights of Divorced Persons.

⌘ 322. Property not disposed of by judgment or decree of divorce.

325. Foreign divorces.

326. — Conclusiveness in general.

327. — Objections to jurisdiction.

328. — Defects as to process or other proceedings.

331. — Alimony and disposition of property.

Cross-References.

Bar to dower, see Dower, ⌘ 52.

Divorce as impairing marriage contract, see Constitutional Law, ⌘ 153.

Restraining defenses, see Injunction, ⌘ 29.

I. NATURE AND FORM OF REMEDY.**⌘ 5. Legislative divorces.**

See 17 Cent. Dig. Divorce, §§ 14-21.

A special act of a legislature of a territory, dissolving the marriage relation between a husband, a resident of the territory, and a non-resident wife, was a valid exercise of legislative power, within the organic act of such territory (9 Stat. c. 177, § 4), declaring that the legislative power thereof should "extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."—*Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

A special act of a legislature, dissolving the marriage relation between a husband and wife, being within the competency of the legislature,

the fact that the wife was not notified cannot affect the validity of the act.—*Id.*

A special act of a legislature, dissolving the marriage relation between a husband and wife, being within the competency of the legislature, the fact that there was no cause for a divorce cannot affect the validity of the act.—*Id.*

An act of the legislature granting a divorce is not void as an assumption of judicial power.—*Id.*

II. GROUNDS.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 22-139.]

III. DEFENSES.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 140-197.]

This Digest is compiled on the Key-Number System. For explanation, see page iii.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) JURISDICTION, VENUE, AND LIMITATIONS.

58. Jurisdiction of cause of action. See 17 Cent. Dig. Divorce, §§ 200-220, 282.

62. — Domicile or residence of parties.

See 17 Cent. Dig. Divorce, §§ 200-202, 208-215, 220, 282.

A Pennsylvania court has no jurisdiction of a suit for divorce against a resident of the state of New York by a party who is not a bona fide resident of Pennsylvania. Judgment 53 N. E. 1123, 157 N. Y. 719, affirmed.—Bell v. Bell, 21 S. Ct. 551, 181 U. S. 175, 45 L. Ed. 804.

No valid divorce can be decreed on constructive service by courts of a state in which neither party is domiciled.—Id.

64. — Acquisition of domicile for purpose of divorce.

See 17 Cent. Dig. Divorce, §§ 218, 219.

A husband had no bona fide domicile for 90 days in North Dakota, as required by the law of that state as a prerequisite to jurisdiction of a suit for divorce, where, during the pendency of a similar suit instituted by his wife in the state of their matrimonial domicile, he went to North Dakota without informing any one where he was going or that he intended to change his residence, and commenced his suit three months after the date of his first arrival; his stay in that state being interrupted by a trip to Yellowstone Park and a visit to New York, in which place, in an interview with his son, he stated that he was going to Germany to secure a legacy, and neither the son nor any other person, so far as it appears, having had any idea that he had been away from his home with a view to changing his residence. Judgment 43 A. 683, 58 N. J. Eq. 563, 78 Am. St. Rep. 630, affirmed.—Streitwolf v. Streitwolf, 21 S. Ct. 553, 181 U. S. 179, 45 L. Ed. 807.

65. Jurisdiction of the person.

See 17 Cent. Dig. Divorce, §§ 201, 221-226.

The appearance of the nonresident defendant cannot invest a court with jurisdiction of a suit for divorce instituted by a person who has no bona fide domicile within the state. Decree, 57 N. E. 333, 176 Mass. 92, affirmed.—Andrews v. Andrews, 23 S. Ct. 237, 188 U. S. 14, 47 L. Ed. 366.

(B) PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

75. Process or notice.

See 17 Cent. Dig. Divorce, §§ 247-264.

77. — Personal service.

See 17 Cent. Dig. Divorce, §§ 251-254.

Actual notice of proceedings for divorce in a court of a state which has always been the domicile of the plaintiff and the only matrimonial domicile need not be given a nonresident defendant, to bind her by the decree, if reasonable efforts to give her actual notice are required by the statutes of the state, and are actually made. Judgment 49 N. E. 933, 155 N. Y. 129, 40 L. R. A. 291, 63 Am. St. Rep. 650, reversed.—Atherton v. Atherton, 21 S. Ct. 544, 181 U. S. 155, 45 L. Ed. 794.

(C) PLEADING.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 283-352.]

(D) EVIDENCE.

123. Weight and sufficiency of evidence.

See 17 Cent. Dig. Divorce, §§ 392-456.

130. — Cruelty or other ill treatment.

See 17 Cent. Dig. Divorce, §§ 442-445.

The evidence is sufficient to establish that the adultery of the husband was accompanied by public scandal and disgrace of the wife, as is required by the Spanish laws to sustain a divorce, by testimony that he abandoned his wife, excluded her from his house, and formed open and illicit relations with three other women, who bore him a family of children.—De La Rama v. De La Rama, 26 S. Ct. 485, 201 U. S. 303, 50 L. Ed. 765.

(E) DISMISSAL, TRIAL OR HEARING, AND NEW TRIAL.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 461-513.]

(F) JUDGMENT OR DECREE.

159. By default or pro confesso.

See 17 Cent. Dig. Divorce, §§ 521-526.

161. — Opening or setting aside.

See 17 Cent. Dig. Divorce, §§ 522-528.

The discretion of the court, under Code Civ. Proc. St. Okl. 1893, § 3984, to permit a defaulting defendant to answer "upon such terms as may be just," is not abused by making it a condition of granting such permission in a suit for divorce that defendant comply with an order theretofore made, directing him to pay temporary alimony and attorney's fees, which was reasonable in itself, and reasonable in relation to the means and obligations of defendant to plaintiff. Judgment (1905) 83 P. 550, 16 Okl. 164, affirmed.—Bennett v. Bennett, 28 S. Ct. 356, 208 U. S. 505, 52 L. Ed. 590.

172. Conclusiveness of adjudication.

See 17 Cent. Dig. Divorce, §§ 559-561.

Decree of divorce in favor of the husband by a state court held to foreclose any right of the wife to have alimony or maintenance from her husband where the local law provides that where the wife is the offender she cannot have alimony.—Thompson v. Thompson, 33 S. Ct. 129, 226 U. S. 551, 57 L. Ed. 347, affirming decree 35 App. D. C. 14.

(G) APPEAL.

184. Review.

See 17 Cent. Dig. Divorce, §§ 570-573; 2 Cent. Dig. App. & E. § 564.

The finding of the court of first instance in a divorce proceeding that the wife had not committed adultery should not have been reversed by the Supreme Court of the Philippine Islands unless such finding was plainly and manifestly against the weight of the evidence, even where there was a literal compliance with Code Civ. Proc. § 497, empowering such court to review the evidence in case the excepting party filed a motion in the court of first instance for a new trial on the ground that the findings of fact were plainly and manifestly against the weight of evidence, and such motion was overruled, and due exception was taken to the ruling.—De La Rama v. De La Rama, 26 S. Ct. 485, 201 U. S. 303, 50 L. Ed. 765.

(H) FEES AND COSTS.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 576-584.]

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

As claim provable against bankrupt's estate, see Bankruptcy, ¶315.

Debt dischargeable in bankruptcy, see Bankruptcy, ¶421.

Review by Supreme Court, see Courts, ¶387(1).

¶278. Appeal.

See 17 Cent. Dig. Divorce, §§ 565, 764-771; 1 Cent. Dig. Action, § 100.

¶285. — Record.

See 17 Cent. Dig. Divorce, § 768.

Taking date of divorce decree as date for liquidating wife's claim for division of conjugal property held not erroneous on appeal from decree of the Supreme Court of the Philippine Islands, because there was no formal decree of property, and no inventory filed.—*De La Rama v. De La Rama*, 36 S. Ct. 518, 241 U. S. 154, 60 L. Ed. 932.

VI. CUSTODY AND SUPPORT OF CHILDREN.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Divorce, §§ 773-806.]

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

Effect in federal courts of judgments of state courts, see Judgment, ¶828.

¶322. Property not disposed of by judgment or decree of divorce.

See 17 Cent. Dig. Divorce, §§ 822-825.

Act Cong. Sept. 27, 1850, which conferred title to lands in Oregon territory on certain settlers, required four years residence on, and cultivation of, the land before the settler should become the grantee, and that, if he were married, the title at the end of that time should inure to the benefit of himself and wife, in equal parts. Plaintiff's father settled on land, under the act, as a married man, but, before the four years had expired, was divorced from his wife, plaintiff's mother, whose share, under the act, he claims as her heir. *Held*, that the right of the wife to one-half of the lands settled was defeated by the divorce.—*Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

¶325. Foreign divorces.

See 17 Cent. Dig. Divorce, §§ 827-843.

¶326. — Conclusiveness in general.

See 17 Cent. Dig. Divorce, §§ 827-830, 840.

The full faith and credit clause of the federal constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with Pub. St. Mass. c. 146, § 41, to give effect to a decree of divorce rendered by a court of another state in a suit instituted by one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state. Decree, 57 N. E. 333, 176 Mass. 92, affirmed.—*Andrews v. Andrews*, 23 S. Ct. 237, 188 U. S. 14, 47 L. Ed. 366.

¶327. — Objections to jurisdiction.

See 17 Cent. Dig. Divorce, §§ 831-834.

The recital in proceedings for divorce of the facts necessary to give jurisdiction may be contradicted in a suit between the same parties in another state. Judgment, 53 N. E. 1123, 157 N. Y. 719, affirmed.—*Bell v. Bell*, 21 S. Ct. 551, 181 U. S. 175, 45 L. Ed. 804.

A decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the plaintiff's want of domicile, even when the record purports to show such jurisdiction and the appearance of the other party. Decree, *Dormitzer v. German Savings & Loan Soc.*, 62 P. 862, 23 Wash. 132, affirmed.—*German Savings & Loan Soc. v. Dormitzer*, 24 S. Ct. 221, 192 U. S. 125, 48 L. Ed. 373.

The mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the federal constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action. Judgment, 70 N. E. 1099, 178 N. Y. 557, affirmed.—*Haddock v. Haddock*, 26 S. Ct. 525, 201 U. S. 562, 50 L. Ed. 867, 5 Ann. Cas. 1.

¶328. — Defects as to process or other proceedings.

See 17 Cent. Dig. Divorce, §§ 831-834.

The mailing of a letter to a nonresident defendant in a suit for divorce brought in Kentucky by an attorney appointed, pursuant to the requirements of Code Civ. Proc. Ky. 1876, tit. 4, c. 2, art. 2, to represent her, fully advising her of the nature of the suit, addressed to her at her residence as truly stated on oath in the petition, with a printed direction on the envelope to return it to him if not delivered in 10 days, is such an effort to give her actual notice of the suit in Kentucky, which has always been the domicile of her husband and the only matrimonial domicile, as will make the decree granting a divorce for abandonment as binding on her in a court of the state where she resides as though she had been served with notice in Kentucky or had voluntarily appeared in the suit. Judgment, 49 N. E. 933, 155 N. Y. 129, 40 L. R. A. 291, 63 Am. St. Rep. 650, reversed.—*Atherton v. Atherton*, 21 S. Ct. 544, 181 U. S. 155, 45 L. Ed. 794.

¶331. — Alimony and disposition of property.

See 17 Cent. Dig. Divorce, §§ 841, 842.

Code Civ. Proc. Or. § 495, as amended by Act Dec. 20, 1865, providing that, whenever a marriage shall be declared void or dissolved, the party at whose prayer the decree shall be made shall be entitled to an undivided third part in fee of the real property owned by the other party at the time of the decree, in addition to a decree for maintenance under section 497, and that it shall be the duty of the court to enter a decree accordingly, applies only to divorces granted by the courts of Oregon; and a wife obtaining a decree of divorce in a court of another state, having jurisdiction of the cause and of the parties, acquires no title in the husband's land in Oregon.—*Barrett v. Failing*, 111 U. S. 523, 4 S. Ct. 598, 28 L. Ed. 505, affirming (C. C.) 3 F. 471.

A judgment for alimony based on a decree of a court in another state is properly restricted to the fixed sum already due, excluding provision for future alimony, which is subject to the discretion of the court in the other state, which may at any time alter it. Judgment, 56 N. E. 979, 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, affirmed.—*Lynde v. Lynde*, 21 S. Ct. 555, 181 U. S. 183, 45 L. Ed. 810.

A decree for the future payment of alimony is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the federal Constitution, provided that no modification of the decree was made prior to the maturity of such installments, unless by the law of the state in which the decree was

rendered its enforcement is so completely within the discretion of the courts of that state that they may annul or modify the decree, even as to overdue and unsatisfied installments.—(1810) *Sistare v. Sistare*, 30 S. Ct. 682, 218 U. S. 1, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, reversing judgment (1907) 66 A. 772, 80 Conn. 1, 125 Am. St. Rep. 102.

Decrees of the New York courts for the future payment of alimony are not subject to annulment or modification by those courts as to overdue and unsatisfied installments, so as to deprive such decrees of the protection, as to past-due and unpaid installments, of the full faith and credit clause of the federal Constitution.—*Id.*

DOCKET FEES.

Allowance in action on bond of government contractor, see United States, 67.

DOCKETS.

Civil causes, see Appeal and Error, 432, 811.

DOCKS.

See—
Collision, 70-73, 96.
Navigable Waters, 43.
Wharves.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

As evidence, see—
Appeal and Error, 524.
Criminal Law, 429-444.
Evidence, 326-383.
Best and secondary evidence, see—
Criminal Law, 400-404.
Evidence, 157-182.
Falsification, see Records, 22; cruel and unusual punishment, see Criminal Law, 1213; partial invalidity of statute, see Statutes, 64.
Privilege of witness, see Witnesses, 298.
Production and inspection before trial, see Discovery, 83-107.
Production at trial, see—
Evidence, 366.
Witnesses, 16.
Searches and seizures, see Searches and Seizures, 7.
Use by witness to refresh memory, see Witnesses, 252-255.

DOGS.

See Animals.

DOING BUSINESS.

Corporations liable to excise tax, see Internal Revenue, 9.
In state, by foreign corporation, see Corporations, 642.

DOMESTIC ANIMALS.

See Animals.

DOMICILE.

Scope-Note.

[INCLUDES places of fixed habitation of individuals; nature, acquisition, and change thereof in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 4. Domicile of choice and change of domicile.
- 5. Domicile by operation of law.

Cross-References.

See Corporations, 52.
Affecting qualification of assignee, see Assignments for Benefit of Creditors, 201.
Affecting right to sue in federal court, see Courts, 307.

Parties as affecting jurisdiction, see—
Courts, 301-325.
Divorce, 62, 64.
Removal of Causes, 26-61.

4. Domicile of choice and change of domicile.

See 17 Cent. Dig. Domicile, §§ 5-23; 27 Cent. Dig. Ins. Per. § 76.

Domicile is a question of intention; and the inquiry is quo animo the party changed his residence.—*Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 6 S. Ct. 632, 29 L. Ed. 837.

One removing his family from Michigan to Connecticut on the death of a relative in the latter state, and residing there until his death in a house to which he holds title, held to have acquired a domicile in Connecticut, so far as a

federal court jurisdiction is concerned.—*Gilbert v. David*, 35 S. Ct. 164, 235 U. S. 561, 59 L. Ed. 360.

5. Domicile by operation of law.

See 17 Cent. Dig. Domicile, §§ 24-35; 27 Cent. Dig. Ins. Per. § 76.

The widow of a citizen of one state does not, by marrying again, and taking the infant children of the first husband from that state to live with her at the home of the second husband in another state, change the domicile of the children.—*Lamar v. Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, reversing (C. C.) *Micou v.*

Lamar, 1 F. 14, and (C. C.) Micou v. Same, 7 F. 180.

Infants having a domicile in one state, who after the death of both their parents take up their residence at the home of their paternal grandmother and next of kin in another state, acquire her domicile.—Lamar v. Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. Ed. 94.

DONATIONS.

See—
Gifts.

Public Lands, ↔42-46.

DORMANT JUDGMENTS.

See Judgment, ↔853.

DOUBLE DAMAGES.

Due process of law, see Constitutional Law, ↔302, 303.

DOUBLE TAXATION.

See Taxation, ↔47.

DOWER.

Scope-Note.

[INCLUDES nature and incidents of the interest in the real property of a deceased husband to which his widow is entitled for her life or absolutely, at common law or by statute; abolition of dower and its effect; rights, powers, and liabilities of married women and widows in respect of their dower; releasing, barring, or defeating rights of dower; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Requisites.

- ↔2. What law governs.
 - 10. Property subject to dower.
 - 11. Estates and interests subject to dower.
 - 12. — In general.

II. Inchoate Interest.

(A) RIGHTS AND REMEDIES OF WIFE.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Dower, §§ 81-88.]

(B) BAR, RELEASE, OR FORFEITURE.

- ↔44. Conveyance by husband after marriage.
- 45. Assignment by husband for benefit of creditors or in insolvency.
- 52. Divorce.

III. Rights and Remedies of Widow.

- ↔70. Actions for dower.
- 72. — Right of action and defenses.

Cross-References.

See Curtesy.

Assignment in bankruptcy, effect on dower, see Bankruptcy, ↔143.

I. NATURE AND REQUISITES.

↔2. What law governs.

See 17 Cent. Dig. Dower, §§ 4, 5.

Act March 3, 1887 (Edmunds-Tucker Act), provides, in section 18, that "a widow shall be endowed of a third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage," and that the widow of an alien shall have dower if

she be an inhabitant of "the territory" at the time of her husband's death. Most of the sections of the act relate to the territory of Utah only, and the three sections immediately preceding section 18, and the seven sections following it, are expressly restricted to that territory. Held, that section 18 related exclusively to Utah territory, and did not give dower in lands in Wyoming territory to the widow; Rev. St. Wyo. § 2221, having abolished dower.—France

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v. Connor, 161 U. S. 65, 16 S. Ct. 497, 40 L. Ed. 619, affirming judgment 3 Wyo. 445, 27 F. 569.

10. Property subject to dower.

See 17 Cent. Dig. Dower, §§ 20-25.

The Guano Islands Act Aug. 18, 1856, c. 164 (11 Stat. 119), as re-enacted in Rev. St. tit. 72, providing (section 2) that any citizen of the United States who discovers an unoccupied guano island shall have the exclusive right to occupy it at the pleasure of congress, for the purpose of removing the guano, and that the United States shall not be obliged to retain possession after the guano is removed, gives a discoverer only a revocable license to occupy the island and remove guano, an estate in which his widow can have no dower, and it is not aided by Act Cong. April 2, 1872, c. 81, extending the provisions of the act of 1856 to the "widow, heirs, executors, or administrators" of the discoverer (17 Stat. 48; Rev. St. §§ 5572, 5574), so as to give the widow any dower right in such islands.—Duncan v. Navassa Phosphate Co., 137 U. S. 647, 11 S. Ct. 242, 34 L. Ed. 825, affirming decree (C. C.) Grafflin v. Nevassa Phosphate Co., 35 F. 474.

11. Estates and interests subject to dower.

See 17 Cent. Dig. Dower, §§ 18, 36-65.

12. — In general.

See 17 Cent. Dig. Dower, §§ 36-43, 48.

The interest of the locator of a mining claim prior to the payment of money for the grant of a patent, being merely a right to the exclusive possession of the land, based on conditions subsequent, is not such an estate that dower attaches thereto.—Black v. Elkhorn Min. Co., 103 U. S. 445, 16 S. Ct. 1101, 41 L. Ed. 221, affirming judgment 52 F. 859, 3 C. C. A. 312, 7 U. S. App. 393.

II. INCHOATE INTEREST.

(A) RIGHTS AND REMEDIES OF WIFE.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Dower, §§ 81-83.]

(B) BAR, RELEASE, OR FORFEITURE.

44. Conveyance by husband after marriage.

See 17 Cent. Dig. Dower, §§ 3, 130-143.

A conveyance by a locator of his interest in a mining claim constitutes an abandonment thereof, which terminates his interest, and bars all possible claim by his wife to dower in the

premises.—Black v. Elkhorn Min. Co., 103 U. S. 445, 16 S. Ct. 1101, 41 L. Ed. 221, affirming judgment 52 F. 859, 3 C. C. A. 312, 7 U. S. App. 393.

45. Assignment by husband for benefit of creditors or in insolvency.

See 17 Cent. Dig. Dower, § 144.

An assignment by a husband for the benefit of creditors does not impair the wife's right of dower.—Porter v. Lazear, 109 U. S. 84, 3 S. Ct. 58, 27 L. Ed. 865.

52. Divorce.

See 17 Cent. Dig. Dower, §§ 102-107; 17 Cent. Dig. Divorce, § 703.

A decree of divorce from the bond of matrimony, obtained by a husband in a territorial court, upon notice to his absent wife by publication, insufficient to support the jurisdiction to grant the divorce under the statutes of the territory, as repeatedly and uniformly construed by the highest court of the state after its admission into the Union, is no bar to an action by the wife, after the husband's death, in the circuit court of the United States, to recover such an estate in his land as the local statutes give to a widow.—Cheely v. Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. Ed. 298.

A divorce from the bond of matrimony bars the wife's right of dower, unless preserved by the *lex rei sitæ*.—Barrett v. Failing, 111 U. S. 523, 4 S. Ct. 598, 28 L. Ed. 503, affirming (C. C.) 3 F. 471.

III. RIGHTS AND REMEDIES OF WIDOW.

70. Actions for dower.

See 17 Cent. Dig. Dower, §§ 247-316, 353; 41 Cent. Dig. Pub. Lands, § 206.

72. — Right of action and defenses.

See 17 Cent. Dig. Dower, §§ 252-255.

The widow of one who discovered an unoccupied guano bed cannot claim dower therein as against her husband's assignee on the ground that the assignee is estopped to deny that her husband had an inheritable estate, when it does not appear that the conveyance from him purported to pass an estate in fee.—Duncan v. Navassa Phosphate Co., 137 U. S. 647, 11 S. Ct. 242, 34 L. Ed. 825, affirming decree (C. C.) Grafflin v. Nevassa Phosphate Co., 35 F. 474.

DRAFTS.

See—

Banks and Banking, 75.
Bills and Notes.

DRAINS.

Scope-Note.

[INCLUDES channels and other works constructed by public authority for drainage of swamp or low lands; nature and scope of power to establish and maintain such works; constitutional and statutory provisions relating thereto; creation of drainage districts, and appointment, rights, powers, duties, and liabilities of drainage boards, officers, etc.; and construction and maintenance of such works, and taxes and local assessments therefor.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Establishment and Maintenance.

- ⌚ 1. Right to establish and maintain in general.
- 2. Constitutional and statutory provisions.

II. Assessments and Special Taxes.

- ⌚ 67. Constitutional and statutory provisions.

Cross-References.

In cities, injuries from defects or obstructions, see Municipal Corporations, ⌚ 831.

Right of abutting owner to question validity of statute creating drainage system, see Constitutional Law, ⌚ 42.

I. ESTABLISHMENT AND MAINTENANCE.

Condemnation of property for drainage purpose, see Eminent Domain, ⌚ 31.

Due process of law, see Constitutional Law, ⌚ 289.

Equal protection of law, see Constitutional Law, ⌚ 233, 290.

Impairment of obligation of contract, see Constitutional Law, ⌚ 125.

⌚ 1. Right to establish and maintain in general.

See 17 Cent. Dig. Drains, § 1.

The power of the legislature of the state of California to authorize the formation of districts for the reclamation of swamp lands within the state at the expense of the lands so reclaimed is not dependent upon the source or channel through which the title to such lands became vested in the state.—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, affirming judgment (C. C.) *Reclamation Dist. No. 108 v. Hagar*, 4 F. 366, 6 Sawy. 567.

Lands in California, the title to which is derived from grants by Mexico, are not, by the treaty under which California was acquired, exempted from the legislation of the state respecting the reclamation of swamp and overflowed lands.—*Id.*

⌚ 2. Constitutional and statutory provisions.

See 17 Cent. Dig. Drains, § 17; 10 Cent. Dig. Const. Law, § 884.

A state statute authorizing an appointed drainage board to determine whether a proposed drain will be a benefit and to create a drainage district consisting of land which it decides will be benefited by such drain and to make special assessments accordingly is not unconstitutional if notice is given and an opportunity to be heard

is afforded the landowner before the assessment becomes a lien against his property.—(1912) *Soliah v. Heskin*, 32 S. Ct. 103, 222 U. S. 522, 56 L. Ed. 294, affirming judgment (1908) *Same v. Cormack*, 117 N. W. 125, 17 N. D. 393.

II. ASSESSMENTS AND SPECIAL TAXES.

Due process of law, see Constitutional Law, ⌚ 289, 290.

Person entitled to raise constitutional question, see Constitutional Law, ⌚ 42.

⌚ 67. Constitutional and statutory provisions.

See 17 Cent. Dig. Drains, §§ 73, 76, 81.

Where drains are constructed under proper laws in California the legislature has power to provide that the expense shall be especially assessed against the lands in the district benefited, and the rules of equality and uniformity in taxation do not apply.—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, affirming *Reclamation Dist. No. 108 v. Hagar*, 4 F. 366, 6 Sawy. 567.

The special assessments for drains, ditches, and other works, which Act III. April 24, 1871, provides may be imposed in proceedings taken in the county court, with the aid of commissioners and a jury, are not authorized by Const. III. 1870, art. 9, § 9, which provides that the general assembly may vest corporate authorities of cities, towns, and villages with power to make local improvements by special assessments and by special taxation of contiguous property, since this constitutional provision limits the grant of such power to the authorities of cities, towns, and villages, and thereby excludes the grant of it to a county court, board of commissioners, or jury. Decree, 95 F. 883, 37 O. C. A. 309, affirmed.—*O'Brien v. Wheelock*, 22 S. Ct. 354, 184 U. S. 450, 46 L. Ed. 636.

DRAMA.

See Literary Property, ¶5.

DRAWBARS.

Injuries to servant, see Master and Servant, ¶110.

DRAWBRIDGES.

Regulation as interference with commerce, see Commerce, ¶48.

DRAWINGS.

Accompanying application for patent, see Patents, ¶167.

DREDGING.

Contracts with government, see United States, ¶72.
Injunction to restrain, see Injunction, ¶21.
Restraining dredging, bed or river in front of premises of riparian owner, see Navigable Waters, ¶38.

DRUGGISTS.

Scope-Note.

[INCLUDES regulation of the manufacture, dispensing, and sale of medicines and other drugs by apothecaries or others, and liability for injuries from negligence therein.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶2. Statutory and municipal regulation.
- 5. Conduct of business.
- 11. Penalties and forfeitures and actions therefor.

Cross-References.

See Indictment and Information, ¶56.
Due process of law, see Constitutional Law, ¶295, 296.

Equal protection of law, see Constitutional Law, ¶239.
Regulations of manufacture and sale of poisons, see Poisons.

¶2. Statutory and municipal regulation.

See 17 Cent. Dig. Drug. § 1.

Prohibiting the sale by itinerant vendors of any drugs intended for the treatment of disease or injury under Act No. 49, of 1894, La., § 12, held not to violate the Constitution, although the sale by other persons is permitted.—Bacuss v. State of Louisiana, 34 S. Ct. 439, 232 U. S. 334, 58 L. Ed. 627.

Circulars contained in the package are comprehended by Act Aug. 23, 1912, amendatory of Food and Drugs Act, § 8, providing that any false statement on a package as to the curative effect of the drug contained therein shall constitute a misbranding.—Seven Cases v. United States, 36 S. Ct. 190, 239 U. S. 510, 60 L. Ed. 411.

¶5. Conduct of business.

See 17 Cent. Dig. Drug. § 5.

False and misleading statements in the labels on a proprietary medicine as to its curative effects held not misbranding within the meaning of the food and drugs act of June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1191).—United States v. Johnson, 31 S. Ct. 627, 221 U. S. 488, 55 L. Ed. 823, affirming judgment (D. C.) 177 F. 313.

¶11. Penalties and forfeitures and actions therefor.

See 17 Cent. Dig. Drug. § 10.

The falsity of statements as to the curative property of drugs constituting a misbranding, in violation of Food and Drugs Act, § 8, as amended by Act Aug. 23, 1912, held sufficiently alleged in a libel for condemnation of packages containing the drugs.—Seven Cases v. United States, 36 S. Ct. 190, 239 U. S. 510, 60 L. Ed. 411.

DRUNKARDS.

See 17 Cent. Dig. Drunk.

See—

Commerce, ¶5.
Homicide, ¶294.
Intoxicating Liquors, ¶283.

DRY DOCKS.

Appellate jurisdiction of United States Supreme Court, see Courts, ¶385(4).
Jurisdiction of admiralty, see Admiralty, ¶4, 6.

DUE COURSE OF TRADE.

Transfer of negotiable instruments, see Bills and Notes, ¶331-382.

DUELING.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Duel.]

DUE PROCESS OF LAW.

See Constitutional Law, ¶251-320.
Orders of military government, see War, ¶31.

DUES.

Members of mutual benefit insurance associations, see Insurance, ¶749-753.

DUPLICITY.

In indictment or information, see Indictment and Information, ¶125.

DURESS.

Affecting validity of contract, see Contracts, ¶95.

DUTIES.

Customs duties, see Customs Duties.
Excise duties, see Internal Revenue.
Immigrants, see Aliens, ¶40.

DWELLING HOUSE.

See Domicile.

DYING DECLARATIONS.

See Homicide, ¶210-220.

DYNAMITE.

Injuries to servants, see Master and Servant, ¶107, 158, 230.

EARNING CAPACITY.

See—
Damages, ¶134, 173.
Death, ¶88.

EARNINGS.

See Damages, ¶37, 172, 188.

EASEMENTS.*Scope-Note.*

[INCLUDES nature and incidents of privileges of proprietors of real property in lands of others, independent of ownership of the soil; creation thereof by reservation, grant, express or implied, or prescription, and use, transfer, and extinguishment thereof; rights, powers, and liabilities of proprietors of dominant and servient estates; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Creation, Existence, and Termination.**

¶15. Implication.

17. — Ways in general.

18. — Ways of necessity.

26. Termination in general.

II. Extent of Right, Use, and Obstruction.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Ease. §§ 61-149.]

Cross-References.

As incumbrance on title of vendor defeating contract of sale, see Vendor and Purchaser, ¶135.

Compensation for easement taken for public use, see Eminent Domain, ¶85.

Compensation for obstruction of light and air, see Eminent Domain, ¶105.

Licenses in respect to real property, see Licenses, ¶43.

Right of way, see Railroads, ¶62-82.

In particular species of property.

See Waters and Water Courses, ¶158.

Public easements.

See—

Dedication.

Highways.

Municipal Corporations, ¶664-686.

Navigable Waters.

I. CREATION, EXISTENCE, AND TERMINATION.

¶15. Implication.

See 17 Cent. Dig. Ease. §§ 42-53.

¶17. — Ways in general.

See 17 Cent. Dig. Ease. §§ 45-49.

The execution and recording of a plat subdividing a parcel of ground into blocks and lots, and the execution of a trust deed on certain of the latter, are a sufficient dedication of

streets marked on the plat to create an easement in a purchaser under the trust deed, which the grantor is estopped to deny, whether or not the plat is a statutory plat.—*Gormley v. Clark*, 134 U. S. 338, 10 S. Ct. 554, 33 L. Ed. 909.

¶18. — Ways of necessity.

See 17 Cent. Dig. Ease. §§ 50-55.

The fact that there was no building upon the property when a deed of trust was executed conveying the described property "with all and

This Digest is compiled on the Key-Number System. For explanation, see page iii.

singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining," does not prevent an easement on the adjacent property of the grantor, made necessary to the use and enjoyment of an apartment house built flush upon the line of the property described, from passing under the deed, where it was within the knowledge and purpose of the parties that a building should be constructed which would be the principal security for a loan. Appeal 22 App. D. C. 432, dismissed, and decree 24 App. D. C. 55, modified.—Warner v. Grayson, 26 S. Ct. 240, 200 U. S. 257, 50 L. Ed. 470.

26. Termination in general.

See 17 Cent. Dig. Ease. §§ 72½-74, 80-82.

Under Rev. St. D. C. § 480, providing that alleys laid out on any plat or subdivision shall remain subject to the uses declared by the person making such subdivision, where the owners in common of a lot subdivided it into smaller lots, leaving a private alley "exclusively for the sole benefit and use of said lots," and, in a deed of partition, declared that such alley should never be closed except by common consent of the lot owners, one of the owners, who afterwards acquired title to all the remaining lots, could close the alley, and convey title to the entire original lot in fee. 7 App. D. C. 524 reversed.—Hetzl v. Baltimore & O. R. Co., 18 S. Ct. 255, 169 U. S. 26, 42 L. Ed. 648.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Ease. §§ 61-149.]

ECCLESIASTICAL CORPORATIONS.

See Religious Societies.

EDUCATION.

See—

Colleges and Universities.

Schools and School Districts.

Instruction of Indians, see Indians, 8.

Validity of charter to educational institution by territorial legislature, see Statutes, 55.

EIGHT-HOUR LAW.

See Master and Servant, 13.

EJECTION.

Passengers or intruders, see Carriers, 354-384.

EJECTION.

Scope-Note.

[INCLUDES actions for recovery of specific real property, founded on right of possession and right to damages for being deprived thereof, whether proceeding according to common-law or statutory forms; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; incidental recovery, in the same action or in a separate proceeding, for use and occupation, profits, damages, improvements, etc.; verdict and judgment and enforcement thereof by writ of possession or otherwise; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Action and Defenses.

6. Property which may be subject of action.

8. Title to support action.

9. — In general.

10. — Adverse possession.

11. — Interest in public lands.

15. — Title from common source.

19. Possession of defendant.

21. Demand or notice to quit.

22. Defenses.

25. — Title or right of possession of third person.

26. — Equitable defenses in general.

35. Persons against whom action may be brought.

II. Jurisdiction, Parties, Process, and Incidental Proceedings.

39. Time to sue and laches.

III. Pleading and Evidence.

62. Declaration, complaint, or petition.

65. — Title, estate, and possession of plaintiff.

III. Pleading and Evidence—Continued.

- 86. Presumptions and burden of proof.
- 87. Admissibility of evidence.
- 90. — Title and right to possession.
- 92. Weight and sufficiency of evidence.
- 95. — Title and right to possession.

IV. Trial, Judgment, Enforcement of Judgment, and Review.

- 111. Verdict and findings.

V. Damages, Mesne Profits, Improvements, and Taxes.

- 127. Recovery of actual damages or mesne profits in action of ejectment.
- 128. Actions for mesne profits.
- 132. Measure of damages or profits.
- 142. Grounds for compensation for improvements or taxes paid.

VI. Equitable Ejectment.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Eject, §§ 536-550.]

Cross-References.

See—

Forcible Entry and Detainer, 1-6.
Trespass to Try Title.

Forms of action in federal courts, see Courts, 342.
Of cotenant, see Tenancy in Common, 38.

I. RIGHT OF ACTION AND DEFENSES.

Effect of adequate remedy at law, on jurisdiction in equity, see Equity, 47.

6. Property which may be subject of action.

See 17 Cent. Dig. Eject. §§ 7-11.

Ejectment lies to recover land under water.—*Lowndes v. Board of Trustees of Town of Huntington*, 153 U. S. 1, 14 S. Ct. 758, 38 L. Ed. 615, affirming judgment (C. C.) *Board of Trustees of Town of Huntington v. Lowndes*, 40 F. 625.

8. Title to support action.

See 17 Cent. Dig. Eject. §§ 16-32.

9. — In general.

See 17 Cent. Dig. Eject. §§ 16-29.

A Spanish grant of the beach and shore of a bay to the depth of 10 feet below the bottom, "the whole in full property, and for the purpose of constructing wharves and houses for bathing," reserving the right of the king and of the public to construct wharves, "with whatsoever funds, municipal or common, intending the exclusion only with respect to particular individuals," is a mere license or right of use, and is insufficient to support ejectment, without evidence of prior possession. Judgment, *Richardson v. Sullivan's Ex'rs*, 20 So. 815, 38 Fla. 90, affirmed.—*Richardson v. Louisville & N. R. Co.*, 18 S. Ct. 268, 169 U. S. 128, 42 L. Ed. 687.

Proof of possession of plaintiff in ejectment, at least if it is under color of right, on the day in question, is sufficient to sustain an action of ejectment, in the absence of any proof of defendant's right. Judgment 14 App. D. C. 485, affirmed.—*Bradshaw v. Ashley*, 21 S. Ct. 297, 180 U. S. 59, 45 L. Ed. 423.

Plaintiffs in ejectment, who have neither a valid title nor prior possession, cannot recover because of the laches of the defendant in not sooner taking possession of the property under a patent issued to his ancestor under the treaty of May 10, 1854 (10 Stat. 1053), with the Shaw-

nee Indians, although a demand is made by a cross-petition that the title be quieted, and that plaintiffs be enjoined from setting up or making any claim to the property. Judgment 72 F. 243, 66 Kan. 557, reversed.—*Dunbar v. Green*, 25 S. Ct. 620, 198 U. S. 166, 49 L. Ed. 998.

A plaintiff in ejectment must recover upon the strength of his own title.—*McGuire v. Blount*, 26 S. Ct. 1, 199 U. S. 142, 50 L. Ed. 125, affirming judgment 121 F. 1020, 56 C. C. A. 682.

10. — Adverse possession.

See 17 Cent. Dig. Eject. §§ 30-41; 1 Cent. Dig. Adv. Poss. § 616.

In ejectment by one claiming by prior possession under color of title, where the evidence fails to show continuous possession to the time when dispossessed by defendant, plaintiff cannot recover.—*Sabariego v. Maverick*, 124 U. S. 261, 8 S. Ct. 461, 31 L. Ed. 430.

After adverse possession for 20 years, the occupant can maintain an action of ejectment against the former owner if he intrudes upon the property.—*Sharon v. Tucker*, 144 U. S. 533, 12 S. Ct. 720, 36 L. Ed. 532; *Stellwagen v. Same*, 144 U. S. 548, 12 S. Ct. 724, 36 L. Ed. 537.

Twenty years' uninterrupted possession not only tolls the right of entry of all adversary claimants who are under no disability, but gives a right of re-entry to the party who had such possession, and those claiming under him, when ousted. Such right of entry must prevail in ejectment, although defendant may rely on an older title.—*Id.*

11. — Interest in public lands.

See 17 Cent. Dig. Eject. §§ 42-46.

Neither the certificate of location issued by the register of the local land office nor the receiver's receipt upon final proof are sufficient evidence of title to support ejectment in the United States courts, though a different rule may prevail in the state courts by statutory provision.—*Langdon v. Sherwood*, 124 U. S. 74, 8 S. Ct. 429, 31 L. Ed. 344.

Plaintiff, claiming under a grant to a railroad of all odd-numbered sections within certain

limits, subject to certain conditions and exceptions, must prove, not only compliance with the conditions, and that the tract is within such odd-numbered sections, but that it is not within the exceptions.—*Corinne Mill, Canal & Stock Co. v. Johnson*, 156 U. S. 574, 15 S. Ct. 409, 39 L. Ed. 537, affirming judgment 7 Utah, 327, 28 P. 922.

The mere location of Sioux half-breed scrip, issued under the act of April 17, 1854 (10 Stat. 304), vests in the locator only an equitable title, upon which ejectment cannot be sustained in a federal court prior to the issuance of a patent.—*Carter v. Ruddy*, 17 S. Ct. 640, 166 U. S. 493, 41 L. Ed. 1090, affirming judgment 56 F. 542, 6 C. C. A. 3.

A Mexican land grant will not support an action in ejectment where the evidence offered to identify the boundaries of such grant is insufficient to show that they included the land in dispute.—(1911) *Sena v. American Turquoise Co.*, 31 S. Ct. 488, 220 U. S. 497, 55 L. Ed. 559, affirming judgment (1908) 98 P. 170, 14 N. M. 511.

415. — Title from common source.

See 17 Cent. Dig. Eject. §§ 59-62.

Where both parties claim title under the same grantor, it is sufficient to prove a title derived from him without proving his title, as neither party can deny such title.—*Robertson v. Pickrell*, 109 U. S. 608, 3 S. Ct. 407, 27 L. Ed. 1049.

419. Possession of defendant.

See 17 Cent. Dig. Eject. §§ 65-73.

An officer in custody of property for the state, and one who, under his employment, guards and takes care of it, have such possession that ejectment will lie against them.—*Tindal v. Wesley*, 17 S. Ct. 770, 167 U. S. 204, 42 L. Ed. 137, affirming judgment *Tindal v. Wesley*, 65 F. 731, 13 C. C. A. 160.

421. Demand or notice to quit.

See 17 Cent. Dig. Eject. §§ 76-80.

A demand for surrender of possession is not a prerequisite to an action in ejectment by heirs of a vendor in an executory contract for the sale of land, where those claiming under the vendees continued in possession after their right to do so under the agreement had terminated.—*Chavez v. De Bergere*, 34 S. Ct. 144, 231 U. S. 482, 58 L. Ed. 325, affirming judgment *De Bergere v. Chavez*, 93 P. 762, 14 N. M. 352.

422. Defenses.

See 17 Cent. Dig. Eject. §§ 81-114.

425. — Title or right of possession of third person.

See 17 Cent. Dig. Eject. §§ 99-104.

A defendant in ejectment who is not a mere trespasser or interloper may show an outstanding and subsisting title in a stranger, to defeat the plaintiff's right of recovery. Judgment 121 F. 1020, 56 C. C. A. 682, affirmed.—*McGuire v. Blount*, 26 S. Ct. 1, 199 U. S. 142, 50 L. Ed. 125.

426. — Equitable defenses in general.

See 17 Cent. Dig. Eject. §§ 107-113.

In an action at law to recover possession of land, circumstances which, in equity, might entitle plaintiff to a reformation of the description in the deed under which plaintiff claims, will not be considered.—*Prentice v. Stearns*, 113 U. S. 435, 5 S. Ct. 547, 28 L. Ed. 1059.

Under Code or statutory provisions eliminating the distinction between legal and equitable forms of action, equitable defenses are available in actions to recover land to defeat a legal title.—*Bohall v. Dilla*, 114 U. S. 47, 5 S. Ct. 782, 29 L. Ed. 61.

At common law, an equitable defense is not available in ejectment.—*Burnes v. Scott*, 117 U. S. 582, 6 S. Ct. 865, 29 L. Ed. 991; *Scott v. Armstrong*, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059, reversing judgment (C. C.) *Armstrong v. Scott*, 36 F. 63.

In ejectment for mining claims, it appeared that one of defendants, while employed by plaintiff, conceived the intention of taking possession of the claims for his own benefit; that he procured the assistance of the other defendant in making a pretended location on the same ground; that shortly thereafter the former defendant in the nighttime ousted plaintiff. Held that defendants, being mere trespassers, could not question plaintiff's title as a defense.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 S. Ct. 282, 40 L. Ed. 436.

435. Persons against whom action may be brought.

See 17 Cent. Dig. Eject. § 124.

Under Code Civ. Proc. N. Y. § 1502, which provides that, where a complaint demands judgment for immediate possession of real property, the occupant must be made defendant, if the property is actually occupied, and, if not, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto or an interest therein, an action to recover possession of land under water may be maintained against one who claims the right to occupy it for cultivation of oysters, and who has planted oysters thereon.—*Lowndes v. Board of Trustees of Town of Huntington*, 153 U. S. 1, 14 S. Ct. 758, 38 L. Ed. 615, affirming judgment (C. C.) *Board of Trustees of Town of Huntington v. Lowndes*, 40 F. 625.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

Laches, see Equity, 486.

439. Time to sue and laches.

See 17 Cent. Dig. Eject. § 131.

The right of a holder of a certificate of purchase of land from the United States to maintain ejectment therefor in the federal courts against a defendant in possession, ejectment being in those courts an action at law, accrues, so as to set the statute of limitations in motion against him, only when the patent is issued, as the legal title until that time is in the United States, against whom the statute of limitations does not run, and the issue of the patent does not cause the plaintiff's legal title to relate back to the date of the certificate.—*Redfield v. Parks*, 132 U. S. 239, 10 S. Ct. 83, 33 L. Ed. 327.

III. PLEADING AND EVIDENCE.

462. Declaration, complaint, or petition.

See 17 Cent. Dig. Eject. §§ 154-180.

465. — Title, estate, and possession of plaintiff.

See 17 Cent. Dig. Eject. §§ 165-174.

The nature of plaintiff's estate in land is sufficiently pleaded under Hill's Code Or. § 313, which is made applicable to Alaska under the act of congress of May 17, 1884, requiring him to set forth the nature of his estate, whether "in fee, for life, or for a term of years," when he alleges that his ownership is by right of prior occupancy and actual possession, and that is in fact the only kind of estate that it is possible to have in the land claimed.—*Malony v. Adsit*, 20 S. Ct. 115, 175 U. S. 281, 44 L. Ed. 163.

◀86. Presumptions and burden of proof.

See 17 Cent. Dig. Eject. §§ 238-245.

The burden of proof is on plaintiff that lands sued for are not within an exception in the deed under which he claims.—*Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

Possession of a railway roadbed will be presumed, in ejectment, to have followed the title until the dispossession by defendant took place, where the railway tracks were on the land, and the plaintiff railway company claimed under a series of deeds purporting to convey the property. Judgment 23 App. D. C. 587, affirmed.—*Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co.*, 26 S. Ct. 25, 199 U. S. 247, 50 L. Ed. 175.

◀87. Admissibility of evidence.

See 17 Cent. Dig. Eject. §§ 246-273.

◀90. — Title and right to possession.

See 17 Cent. Dig. Eject. §§ 254-277.

In ejectment in California, where plaintiff traces title to the lands from a patent of the United States issued to a settler under the pre-emption laws, oral evidence is inadmissible, on the part of defendant, to show that the lands were not open to settlement under those laws, but were swamp and overflowed lands, which passed to the state under Act Cong. Sept. 28, 1850.—*Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 S. Ct. 1157, 29 L. Ed. 346.

Assuming that the civil law, as existing in the territories acquired from Mexico by the treaty of the Guadalupe Hidalgo, permitted the transfer of land by parol, a defendant in ejectment could not support his claim of title by evidence of loose conversations had by him with certain third persons to the effect that they said they had a contract with the original owner for a large "block of land," which included the drainage of a certain river between designated points, and that defendant might have the part of it lying above a certain landmark, there being nothing further to define the boundaries, or show delivery of possession; and the admission of such evidence is erroneous.—*Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

In ejectment by the heirs of J. H. Chism, who died in 1839, it appeared that Texas had issued to deceased, as a reward for services in the war with Mexico, "a bounty certificate" for 1,280 acres of land, and also "a head-right certificate" for 1,400 acres, which was located on the land in dispute; that defendants claimed under a deed of the latter certificate signed "J. H. Chisholm," made December 2, 1838, in consideration of \$100, which plaintiffs claimed was a forgery. Evidence was admitted without objection that deceased had declared that he had sold land in Texas. *Held*, that it was not error to admit in evidence a deed of such bounty certificate, made by J. H. Chism, October 31, 1838, in consideration of \$500, against an objection that "it was res inter alios, and irrelevant."—*White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. Ed. 55.

Proof that heirs of the vendor, in an agreement for the sale of certain lands and for the execution of the conveyance when a Mexican land grant should be confirmed, have sold certain claims acquired under Act March 3, 1891, §§ 17, 18, as amended by Acts Feb. 21, 1893, and June 27, 1898, within the limits of such grant after it had been rejected, is not admissible in ejectment against those in possession claiming under the vendees in such grant.—

Chavez v. De Bergere, 84 S. Ct. 144, 231 U. S. 482, 58 L. Ed. 325, affirming judgment *De Bergere v. Chavez*, 93 P. 762, 14 N. M. 352.

◀92. Weight and sufficiency of evidence.

See 17 Cent. Dig. Eject. §§ 279-282.

◀95. — Title and right to possession.

See 17 Cent. Dig. Eject. §§ 280-295.

Evidence showed that defendant in ejectment claimed under a deed from his ancestor more than 100 years old, and that defendant and his ancestors had been in open possession, and had paid taxes on the land ever since, while plaintiff and his ancestors had only occasionally made unimportant interruptions of plaintiff's possession. *Held*, that the jury might presume a deed to defendant's ancestors without finding that one had in fact been made.—*Fletcher v. Fuller*, 120 U. S. 534, 7 S. Ct. 667, 30 L. Ed. 759.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

Presumptions on appeal, see Appeal and Error, ▶934.

◀111. Verdict and findings.

See 17 Cent. Dig. Eject. §§ 327-345; 46 Cent. Dig. Trial, §§ 787, 877, 928.

A judgment for plaintiff is vitiated by failure of the verdict to comply with the requirement of Act Feb. 22, 1881, providing that the verdict for plaintiff in ejectment shall describe the land and state the quantity of the estate.—*Pensacola Ice Co. v. Perry*, 120 U. S. 318, 7 S. Ct. 576, 30 L. Ed. 663.

A finding and judgment embraced in a single order stated that "the court * * * finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot," etc. The description following included only a part of the land in litigation. *Held*, that the finding was for only that part of the land which was described in the judgment, and not a general finding for plaintiffs.—*Morgan v. Eggers*, 127 U. S. 63, 8 S. Ct. 1041, 32 L. Ed. 56, affirming judgment (C. C.) 20 F. 666.

The petition described the premises as "the west half of the northeast quarter of the southwest quarter," etc. The finding and judgment described "a tract 1,400 feet in length by 750 feet in width." *Held* that, as excess frequently occurs in government surveys, it could not be said that there was error.—*Deputron v. Young*, 134 U. S. 241, 10 S. Ct. 539, 33 L. Ed. 923, affirming (C. C.) *Young v. De Putron*, 37 F. 46.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

◀127. Recovery of actual damages or mesne profits in action of ejectment.

See 17 Cent. Dig. Eject. §§ 438-443, 453.

Where the bad faith of the possessor is technical merely, and the opposition to the real owner's title has been made in good faith, and the property is an unimproved waste from which no revenue was obtained, nor could have been obtained, in its unimproved state, it is improper to charge the possessor with the rents and revenues which he ought to have obtained, based upon what was obtained by other persons from improved property. The possessor was under no obligations to change the condition of the property. 17 F. 16 (C. C.) reversed.—*City of New Orleans v. Christmas*, 131 U. S. 191, 9 S. Ct.

745, 33 L. Ed. 99; Same v. United States, 131 U. S. 220, 9 S. Ct. 755, 33 L. Ed. 110.

128. Actions for mesne profits.

See 17 Cent. Dig. Eject. §§ 438-440, 442, 443, 454, 456.

If the action against the disseisor cannot be maintained on purely equitable grounds, it can be under the rule of the civil law that creditors may exercise all the rights and actions of their debtor, except those that are exclusively attached to the person.—City of New Orleans v. Christmas, 131 U. S. 191, 9 S. Ct. 745, 33 L. Ed. 99; Same v. United States, 131 U. S. 220, 9 S. Ct. 755, 33 L. Ed. 110.

Where the owner has sued the grantee, and obtained judgment against him, of which suit the disseisor was sufficiently notified to bind him as guarantor, equity will subrogate the owner to the rights of the grantee against the disseisor on his warranty, the act of sale containing an express agreement of guaranty, with right of subrogation, and the law of Louisiana being that the person evicted may recover from his warrantor, not only the price, but the rents and revenues, for which he is bound to respond to the true owner.—Id.

132. Measure of damages or profits.

See 17 Cent. Dig. Eject. §§ 444-447, 449-452.

It is the rule that the liability of a disseisor to account for rents and revenues must be restricted to the time he was in possession, the rule of the civil law to the contrary never having been adopted there; and he cannot be held primarily liable for rents accruing during the possession of his grantee.—City of New Orleans v. Christmas, 131 U. S. 191, 9 S. Ct. 745, 33 L. Ed. 99; Same v. United States, 131 U. S. 220, 9 S. Ct. 755, 33 L. Ed. 110.

Where plaintiff recovers lots in the Hot Springs reservation which were awarded to defendant by the commissioners appointed, under Act Cong. March 3, 1877, to settle titles in the reservation, defendant, having held in good faith under the award, will not be charged with the rental value of the premises, but only with the actual receipts from the property.—Lawrence v. Rector, 137 U. S. 139, 11 S. Ct. 33, 34 L. Ed. 600.

142. Grounds for compensation for improvements or taxes paid.

See 17 Cent. Dig. Eject. §§ 472, 476, 477, 483-501.

Though a diligent inspection of the records would have revealed an outstanding paramount title, a purchaser of land who has honestly paid the purchase money without any notice of such title, and without any cause to suspect its existence, is nevertheless a purchaser in "good faith," within the meaning of Rev. Code, § 1557, which permits defendants in ejectment, who have acquired land in "good faith" to recover

the value of improvements made by them.—Canal Bank v. Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. Ed. 354.

In an action to foreclose a trust deed, it appeared that defendants claimed title under a deed of trust executed after the original bill in the suit was filed, and before the grantor in such deed was served with process in this suit. Afterwards a supplemental bill was filed, and defendants were served with process. Held, that defendants, being in fact purchasers in good faith, were not chargeable with notice of the intention of plaintiffs to bring this suit, within the provisions of Rev. Code 1871, c. 17, art. 4, § 1557, in regard to allowances for improvements on land to purchasers in good faith, until they were served with process on the supplemental bill.—Id.

As title to land known to be valuable for its minerals cannot be acquired under the town-site laws (Rev. St. tit. 32, c. 8), the occupant of a town-site lot which is patented to plaintiff as a placer mining claim had no color of title, and consequently cannot claim an allowance for his improvements under the act of Dakota providing that in an action for the recovery of real property a defendant holding under color of title adversely to plaintiff, in good faith, must be allowed the value of his improvements as a counterclaim.—Deffebach v. Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. Ed. 423, affirming Hawke v. Deffebach, 4 Dak. 20, 22 N. W. 480.

Purchaser of an infant's inherited real property illegally sold by the widow and guardian ad litem lacks that good faith essential under Civ. Code Porto Rico, §§ 436, 437, 453, to entitle him to retain on eviction the revenue for the period of his possession.—Longpré v. Diaz, 35 S. Ct. 731, 237 U. S. 512, 59 L. Ed. 1080.

The right of possessor of real property to retain on evictions revenues while in possession is personal, so as to relieve successors in title, possessing in good faith from liability on eviction for revenues pending their possession, despite bad faith of their ancestor in view of section 444.—Id.

VI. EQUITABLE EJECTMENT.

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Eject. §§ 536-550.]

ELASTIC GOODS.

Duty on, see Customs Duties, 34.

ELECTION.

Between counts, see Indictment and Information, 132.

ELECTION OF REMEDIES.

Scope-Note.

[INCLUDES choice between different means of redress afforded by law for the same injury or different forms of proceeding on the same cause of action; when such election is allowed or required; and nature, requisites, operation, and effect of such election.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ③. Inconsistency of alternative remedies.
- 7. Acts constituting election.
- 8. Validity and finality of election.
- 9. — In general.
- 10. — Mistake or ignorance of facts.

Cross-References.

Election to forfeit contract or enforce specific performance, see Specific Performance, ④4.
In admiralty, see Admiralty, ④27-37.

③. Inconsistency of alternative remedies.

See 18 Cent. Dig. Elect. of Rem. § 3, 4.

The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer.—(1910) *Thomas v. Sugarman*, 30 S. Ct. 650, 218 U. S. 129, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250, reversing decree *Same v. Sugarman* (1907) 157 F. 669, 85 C. C. A. 337, 15 L. R. A. (N. S.) 1267.

The bringing of an action at law by one partner to recover damage for the other's breach of contract by a declaration of dissolution followed by exclusion from possession is not such an election as bars a right to sue to obtain a decree of dissolution and an accounting.—*Zimmerman v. Harding*, 33 S. Ct. 387, 227 U. S. 489, 57 L. Ed. 608.

Any right to sue on a supersedeas bond on writ of error from the federal Supreme Court to review a judgment of a state court awarding mandamus to recover for business losses pending the writ of error, by defendant's refusal to obey the mandamus, does not exclude the right to sue to recover for damages, if such election should be made.—*Missouri Pac. R. Co. v. Larabee*, 34 S. Ct. 979, 234 U. S. 459, 58 L. Ed. 1398, reversing judgment *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 116 P. 901, 85 Kan. 214.

⑦. Acts constituting election.

See 18 Cent. Dig. Elect. of Rem. § 12.

The prosecution of an action at law upon a policy of fire insurance to final judgment, denying recovery upon the ground that the policy could neither be recovered upon as it stood nor be helped out by any doctrine of the common law, is not an election which bars a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. Decree, *Grand View Bldg. Ass'n v. Northern Assur. Co.* (Neb, 1905) 102 N. W. 246, affirmed.—*Northern Assur. Co. v. Grand View Bldg. Ass'n*, 27 S. Ct. 27, 203 U. S. 106, 51 L. Ed. 109.

⑧. Validity and finality of election.

See 18 Cent. Dig. Elect. of Rem. §§ 13-15.

⑨. — In general.

See 18 Cent. Dig. Elect. of Rem. §§ 13-15.

A suit for an injunction against infringement of a copyright, in which an accounting of profits is asked, but in which no evidence of profits is offered, or any decree or finding made concerning them, but in which a decree is made for an injunction only, does not constitute such an election of remedy as will preclude a subsequent action for the recovery of damages for the infringement. Judgment 83 F. 1007, 28 C. C. A. 253, affirmed.—*Brady v. Daly*, 20 S. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

⑩. — Mistake or ignorance of facts.

See 18 Cent. Dig. Elect. of Rem. § 13.

Defendant purchased land for himself and plaintiff, the latter having sent him the money for his half interest. Subsequently defendant, who had the active management of the investment, induced plaintiff, who lived in another city, to join him in a deed of the land to B. at a slight advance over what they paid. Plaintiff afterwards found that defendant's statements as to the first cost of the land were false, and that the consideration in the deed from them to B. had been altered from \$6,000 to \$10,000; and thereupon defendant induced B. to write plaintiff that \$6,000 was the real consideration, and that defendant had acted honestly. Held, that the fact that plaintiff at that time demanded only an accounting for money claimed to be due him by defendant on account of these transactions did not show an election to let the sale to B. stand, which would bind him on his subsequent discovery that the sale to B. was merely fictitious, and for the purpose of placing the whole title in defendant.—*Dickson v. Patterson*, 160 U. S. 584, 16 S. Ct. 373, 40 L. Ed. 543.

The seller in a contract of conditional sale does not, by instituting proceedings to enforce a materialman's lien, based upon the mistaken theory that the title has passed to the purchaser, make an election which prevents him from bringing suit in replevin based on the theory that title still remains in the seller.—*William W. Bierce v. Hutchins*, 27 S. Ct. 524, 205 U. S. 340, 51 L. Ed. 828.

ELECTIONS.

Scope-Note.

[INCLUDES choice by popular vote at general or special elections of public officers, and determination by such vote of questions submitted thereto in general; nature of right of suffrage and regulation of its exercise in general; constitutional and statutory provisions relating thereto; qualifications and registration of voters; ordering or calling elections, regular or special, and notice thereof; election districts or precincts, election officers, and places and times of voting; nominations and ballots; conduct of elections; ascertaining results and making returns thereof; proceedings to contest result; and violations of election laws.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Suffrage and Regulation Thereof in General.

⌚ 2. Power to confer and regulate.

4. — Congress.

11. Operation of provisions of Constitution of United States.

12. Denial or abridgment on account of race.

19. Power to require registration or proof of qualifications.

II. Ordering or Calling Election, and Notice.

[No paragraphs or references in this Digest. But see 18 Cent. Dig. Elections, §§ 19-39.]

III. Election Districts or Precincts and Officers.

⌚ 53. Compensation of officers.

58. Actions against officers.

IV. Qualifications of Voters.

⌚ 60. Constitutional and statutory provisions.

V. Registration of Voters.

⌚ 99. Registration officers.

104. — Liabilities.

107. Compelling registration.

VI. Nominations and Primary Elections.

VII. Ballots.

[No paragraphs or references in this Digest. But see 18 Cent. Dig. Elections, §§ 137-168.]

VIII. Conduct of Election.

[No paragraphs or references in this Digest. But see 18 Cent. Dig. Elections, §§ 169-205.]

IX. Count of Votes, Returns, and Canvass.

⌚ 240. Count of votes.

241. — In general.

X. Contests.

XI. Violations of Election Laws.

⌚ 311. Constitutional and statutory provisions.

318. Fraud.

324. Criminal prosecutions.

328. — Indictment or information.

Cross-References.

Corporate elections, see Corporations, ⌚ 283-292.	Submitting questions to voters as delegation of legislative powers, see Constitutional Law, ⌚ 65.
Presidential electors, see United States, ⌚ 25.	<i>To determine particular questions.</i>
Prohibiting federal officers from contributing to political funds, see United States, ⌚ 52.	See—
Senators, see United States, ⌚ 11.	Counties, ⌚ 29, 154.
	Municipal Corporations, ⌚ 918.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

Jurisdiction of federal court of action for denial of rights under election laws, see Courts, ¶ 282.

Partial invalidity of statute, see Statutes, ¶ 64.

¶2. Power to confer and regulate.

See 18 Cent. Dig. Elections, §§ 2-5.

¶4. — Congress.

See 18 Cent. Dig. Elections, § 2.

Under Const. art. 1, § 4, providing that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but congress may at any time make or alter such regulations, except as to the place of choosing senators," *held*, that congress has the power to legislate for the protection of all persons in their right to vote in national elections.—*Ku-Klux Cases*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274.

The provision which is made by Rev. St. U. S. § 5507 [U. S. Comp. St. 1901, p. 3712], for the punishment of individuals who, by means of bribery, prevent persons to whom the right of suffrage is guaranteed by Const. U. S. Amend. 15, from exercising that right, cannot be sustained as an exercise of the power granted to Congress by such amendment to prevent the denial of such right by state action.—*James v. Bowman*, 23 S. Ct. 678, 190 U. S. 127, 47 L. Ed. 979.

The right to have one's vote at an election for member of Congress counted is as open to protection by Congress as is the right to vote itself.—*United States v. Mosley*, 35 S. Ct. 904, 238 U. S. 383, 59 L. Ed. 1355.

¶11. Operation of provisions of Constitution of United States.

See 18 Cent. Dig. Elections, § 2.

Const. Amend. 15, providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude," gives the negro the right to vote in any state which may by its laws confine that right to white persons.—*Ku-Klux Cases*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274.

The right to vote secured by Const. U. S. Amend. 15, against denial on account of race, color, or previous condition of servitude, extends to municipal corporations.—*Myers v. Anderson*, 35 S. Ct. 932, 238 U. S. 368, 59 L. Ed. 1349, affirming judgment (C. C.) *Anderson v. Myers*, 182 F. 223.

¶12. Denial or abridgment on account of race.

See 18 Cent. Dig. Elections, § 2.

The exemption from literacy test prescribed by 1910 amendment of Const. Okl. art. 3, § 4a, as condition for voting, is an abridgment of the right to vote on account of race, color, or previous condition of servitude, contrary to Const. U. S. Amend. 15.—*Guinn v. United States*, 35 S. Ct. 926, 238 U. S. 347, 59 L. Ed. 1340, L. R. A. 1916A, 1124.

Conferring the right to register and vote at city election in Annapolis, as is done by Laws Md. 1908, c. 525, on all citizens who, prior to January 1, 1868, are entitled to vote in state, abridges the right to vote on account of race, color, or previous condition of servitude in violation of Const. U. S. Amend. 15.—*Myers v. Anderson*, 35 S. Ct. 932, 238 U. S. 368, 59 L. Ed. 1349, affirming judgment (C. C.) *Anderson v. Myers*, 182 F. 223.

¶19. Power to require registration or proof of qualifications.

See 18 Cent. Dig. Elections, § 14.

The federal Constitution is not violated by the provision of Laws Md. 1902, p. 202, c. 183, requiring persons coming into the state to reside to make a declaration of their intention of becoming citizens and residents of the state before they can claim the right to be registered as voters, as applied to persons who have moved into the state since the act went into effect. Judgment 58 A. 543, 86 L. R. A. 398, 103 Am. St. Rep. 379, affirmed.—*Pope v. Williams*, 24 S. Ct. 573, 193 U. S. 621, 48 L. Ed. 817.

II. ORDERING OR CALLING ELECTION, AND NOTICE.

[No paragraphs or references in this Digest. But see 18 Cent. Dig. Elections, §§ 19-39.]

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

¶53. Compensation of officers.

See 18 Cent. Dig. Elections, §§ 49, 50.

Rev. St. § 2026, makes it the duty of the chief supervisor to prepare all necessary instructions for the use and direction of the supervisors; but section 2031, prescribing his fees, makes no mention of compensation for services of this description, but makes an allowance of 15 cents per folio for a copy "of any paper on file" in his office. *Held*, that the printing of such instructions was a proper charge against the government, and that for preparing them he was entitled to 15 cents per folio, but that he was not entitled to a similar charge for each copy furnished to supervisors, as the instructions were not original documents, and could not be considered as copies of papers on file.—*United States v. McDermott*, 140 U. S. 151, 11 S. Ct. 746, 35 L. Ed. 391, modifying judgment (C. C.) *McDermott v. United States*, 40 F. 217.

Rev. St. § 2026, makes it the duty of the chief supervisor of elections to prepare and furnish all books, blanks, etc., for the use and direction of the supervisors, and to receive, preserve, and file all oaths of office of the supervisors. Section 2031 provides that there shall be allowed and paid to the chief supervisor for his services as such officer compensation "apart from and in excess of all fees allowed by law for the performance of any duty as circuit court commissioner." *Held* that, though he was not authorized as chief supervisor to administer such oaths, he was entitled as supervisor to the ordinary fee for drawing the oaths, and as court commissioner to the fee for administering them.—*Id.*

So far as special instructions issued by him to supervisors are original, he is entitled to charge 15 cents per folio; but, so far as they are copies, he is entitled only to the expense of printing.—*Id.*

Rev. St. § 2026, provides that the chief supervisor shall receive the applications of all parties for appointment, shall present such applications to the judge, and furnish information to him in respect to the appointment by the court of such supervisors, and shall receive, preserve, and file all their oaths of office. *Held* that, though it was proper for him to notify them of their appointment, he could not, in the absence of a statutory provision, receive compensation therefor.—*Id.*

Where the attorney general requires the chief supervisor to furnish copies of the oaths of office of supervisors, the government cannot claim that they were unauthorized to avoid paying for them.—*Id.*

So, too, he having been instructed to furnish certificates to the deputy marshals' and

supervisors' accounts, he is entitled to compensation therefor.—Id.

Though, by Rev. St. § 947, a commissioner is allowed the compensation allowed clerks for the same service, and by section 828 the latter are allowed mileage, still, the chief supervisor having attended court to furnish information in respect to the appointment of supervisors in his capacity as chief supervisor, he cannot claim mileage in the absence of a statutory provision therefor.—Id.

The chief supervisor being required, by Rev. St. § 2026, to cause the names of those on the list of electors whose right to register and vote is honestly doubted to be verified by proper inquiry and examination, he may, in his capacity as commissioner, administer oaths to such persons as a proper method of inquiry and examination, and receive a fee of 10 cents for such oath and 15 cents for his jurat.—Id.

Although Rev. St. § 2026, provides that the chief supervisor shall receive the applications of all parties for appointment to supervisorships, and upon the opening of the circuit court shall present such applications to the judge thereof, and furnish information to him in respect to the appointment by the court of such supervisors, still, as he is not included in the provision of five dollars per diem to each supervisor of election and each special deputy marshal, allowed by section 2031, and there is no other provision therefor, he cannot recover for such services.—Id.

While the indexing of appointments of supervisors is proper, and should be allowed for at 15 cents per folio, there is no necessity for recording them, and a charge therefor should be disallowed.—United States v. Poinier, 140 U. S. 160, 11 S. Ct. 752, 35 L. Ed. 395, reversing judgment (D. C.) 40 F. 139.

Under the requirement of Rev. St. § 2026, that the chief supervisor prepare and furnish all necessary books, forms, blanks, and instructions for the use and direction of supervisors, what shall be deemed necessary forms and blanks must, to a certain extent, be left to the court passing on a claim for the expense of printing them, and such allowance will not be disturbed unless its discretion was abused.—Id.

Rev. St. § 2031, allows the chief supervisor of elections, "for filing and caring for every return, report, record, document, or other paper required to be filed by him under any of the preceding provisions, 10 cents." Section 2026 provides that he "shall receive the applications of all parties for appointment," and shall present such applications to the judge, and "furnish information to him in respect to the appointment by the court of such supervisors of election." *Held*, that it was proper to charge for filing the recommendations of the agents or committees of each political party, but that there was no necessity for recording them, and charges therefor should not be allowed.—Id.

Under Rev. St. § 2026 (providing that the chief supervisor of elections shall prepare and furnish blanks and instructions to the supervisors of elections; shall require of them, when necessary, lists of the persons who may register and vote, and cause the names of any on such lists whose right to vote is doubted to be verified; and shall receive, preserve, and file all certificates, returns, reports, and records contemplated or made requisite by the provisions of the act), and Id. § 2031 (providing that there shall be allowed the chief supervisor, in addition to his fees as circuit court commissioner, for filing and caring for every return, report, record, document, or other paper required to be filed by him, 10 cents, and for entering and indexing the records of his office, 15 cents per folio),—such sections being part of Act May 31, 1870 (16 Stat. 140), the object of which was declared in its title to be "to enforce the rights of citizens of the United States to vote in the several

states of the Union, and for other purposes"—the chief supervisor cannot copy the lists of voters which he may require of the supervisors, and receive therefor 15 cents per folio, as for entering and indexing the records of his office.—*Sherman v. United States*, 155 U. S. 673, 15 S. Ct. 234, 39 L. Ed. 307.

To entitle a chief supervisor to compensation for services it must appear that they were required by Rev. St. §§ 2020, 2026, or were necessarily performed in the proper execution of the duties therein prescribed, and that his charges therefor are covered by section 2031, or that by analogy to some other service he is entitled to make a corresponding charge.—*Dennison v. United States*, 18 S. Ct. 57, 168 U. S. 241, 42 L. Ed. 453.

The chief supervisor is not entitled to payment for making copies of applications from different cities for the appointment of supervisors, to be annexed to the reports made to the judge.—Id.

He is not entitled to fees for entering and indexing special letters of instruction to each local supervisor, they being no proper part of the records of his office, nor is he entitled to fees for entering and indexing special reports of the supervisors of election.—Id.

The chief supervisor is not entitled to fees for entering and indexing reports made, on presentation of applications for the appointment of supervisors of elections, to furnish information to the judge in respect to the qualifications of each applicant.—Id.

He is not entitled to fees for entering and indexing pay rolls of supervisors of election, or for entering and indexing applications for appointments as supervisors.—Id.

He is entitled to an allowance of one folio only for each oath by a supervisor.—Id.

He is not entitled to compensation for entering and indexing depositions and evidence taken in the matter of a claim made that certain supervisors had been unable to discharge the duties at their office owing to violence or threats of violence.—Id.

The chief supervisor is entitled to charge 15 cents a folio for drawing instructions to supervisors relative to their duties.—Id.

An item for auditing claims of and drawing pay rolls of supervisors for their claims for services, and certifying them to the marshal for payment, should be allowed, the account being verified by the oath of the claimant, and the item having been allowed by the district court, and the government not having shown that the claimant charged for an excessive number of folios.—Id.

The chief supervisor is not entitled to fees for making, entering, and indexing mail lists, containing supervisors' names and post-office addresses, with columns for checking matter sent out by mail, and receiving lists.—Id.

Rev. St. § 2027, requiring the commissioners to forward to the chief supervisor all oaths of office administered to any supervisor of election in order that they may be properly preserved and filed, does not entitle the chief supervisor to compensation for entering and indexing such oaths.—Id.

The approval of the accounts of a chief supervisor of election by the district court merely shows that the services were rendered as stated in the accounts, and that in certain matters of discretion the discretion was properly exercised.—Id.

58. Actions against officers.

See 18 Cent. Dig. Elections, § 54.

An allegation that the plaintiff was a duly-qualified elector, but without any allegation that he was ever registered as such, is insufficient to state a cause of action for unlawfully rejecting his vote, under Const. S. C. art. 8, §

3, and Rev. St. 1893, § 132, making it necessary to be registered in order to be entitled to vote. —*Wiley v. Sinkler*, 21 S. Ct. 17, 179 U. S. 58, 45 L. Ed. 84.

IV. QUALIFICATIONS OF VOTERS.

⇨60. Constitutional and statutory provisions.

See 18 Cent. Dig. Elections, § 58.

Act. Cong. March 22, 1882, amending Rev. St. § 5352, in reference to bigamy, etc., provides, by section 8, that "no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory, * * * shall be entitled to vote at any election held in any such territory," etc. *Held*, that any person is a bigamist or polygamist, within the meaning of the act, who, at the time he presents himself for registration as a voter, has a plurality of wives, though, since the passage of the act, he may not have cohabited with more than one of them. Such act is not *ex post facto* or retrospective in its operation, since it does not prescribe an additional penalty for the offense of polygamy, but simply makes the continuance of the polygamous relation a disqualification from voting. —*Murphy v. Ramsey*, 114 U. S. 15, 5 S. Ct. 747, 29 L. Ed. 47.

The statute of Idaho is not rendered nugatory by Act Cong. March 22, 1882 (22 Stat. 31), which declares that "no polygamist, bigamist, or any person cohabiting with more than one woman * * * in any territory * * * shall be entitled to vote at any election held in any such territory * * * or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust," etc., as the territorial statute is broader than the federal statute, and therefore does not cover the same subject. —*Davis v. Beason*, 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637.

V. REGISTRATION OF VOTERS.

Equal protection of laws, see Constitutional Law, ⇨225.

Persons entitled to question constitutionality of statute, see Constitutional Law, ⇨42.

⇨99. Registration officers.

See 18 Cent. Dig. Elections, §§ 98-101.

⇨104. — Liabilities.

See 18 Cent. Dig. Elections, § 102.

Section 8, Act Cong. March 22, 1882, amending Rev. St. § 5352, provides that "no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section," shall be entitled to vote at any election in said territory. *Held*, that a petition, in an action for refusal to register plaintiff, which alleges that plaintiff "is not, and never has been, a bigamist or polygamist"; that she is the widow of a named person; and that, since the death of said person, she has not cohabited with any man, —sufficiently excludes plaintiff from the disqualification of the act. —*Murphy v. Ramsey*, 114 U. S. 15, 5 S. Ct. 747, 29 L. Ed. 47.

So, also, does a complaint alleging that plaintiff is the wife of a certain man; that she has not, on or since the date of the passage of the act, cohabited with any bigamist, polygamist, or with any man cohabiting with more than one woman; and that she is not and never has been a bigamist or polygamist. —*Id.*

Act Cong. March 22, 1882, amending Rev. St. § 5352, in reference to bigamy, etc., provided, by section 9, that all the registration and election offices of the territory of Utah were va-

cant, and that the duties relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, the canvassing and returning of the same, and the issuance of certificates of election, should, until other provisions were made by the legislative assembly, be performed under the existing laws of the United States and the territory by persons appointed by a board of five persons. The section further provided that said board should canvass the returns of the votes at elections for the legislature, and issue certificates of election, and that such board should not exclude any person from the polls on account of opinions on the subject of bigamy or polygamy. *Held*, that such board has no power over the registration of voters, and no authority over the officers appointed by them to perform the duties in relation thereto; and that, therefore, a rule promulgated by the board for the government of registration officers, in pursuance of which such officers refused to register plaintiffs, did not enable plaintiffs to bring an action for such refusal against the board. —*Id.*

Where the complaint, in an action against registration officers for refusal to register plaintiffs as voters, alleges that plaintiffs had all the qualifications of voters, and that the refusal of defendants was wrongful and malicious, a demurrer to the complaint should be overruled. —*Id.*

State election officials, who, conforming to a state statute, deprive negro citizens of their right to vote secured by Const. U. S. Amend. 15, are liable to such citizens for resulting damages by Rev. St. § 1979 (Comp. St. 1913, § 3932). —*Myers v. Anderson*, 35 S. Ct. 932, 238 U. S. 368, 59 L. Ed. 1349, affirming judgment (C. C.) *Anderson v. Myers*, 182 F. 223.

The invalidity of provisions of Laws Md. 1908, c. 525, prescribing qualifications for voters at municipal elections not naturalized, does not relieve the election officers appointed under that statute from liability under Rev. St. § 1979 (Comp. St. 1913, § 3932), for denying right to vote at such election to negro citizens contrary to Const. U. S. Amend. 15. —*Id.*

⇨107. Compelling registration.

See 18 Cent. Dig. Elections, § 104.

The inadequacy of the relief which can be afforded by its decree will preclude a court of equity from compelling a county board of registrars to enroll a negro upon the voting lists, where the refusal to register him is alleged to be a part of a general scheme by the white population of the state, and the state itself, to disfranchise a large part, if not all, of the negroes within the state. —*Giles v. Harris*, 23 S. Ct. 6; 9, 189 U. S. 475, 47 L. Ed. 909.

Equity will not compel a county board of registrars to enroll a negro on the voting lists as a duly qualified voter, under the registration provisions of Const. Ala. art. 8, where the main object of the bill is to have these registration provisions, upon which the right to register is founded, declared void as a fraud upon the federal constitution, because of discrimination against negroes, since, if that is the character of these provisions, the court will not require officials to proceed to act under them. —*Id.*

VI. NOMINATIONS AND PRIMARY ELECTIONS.

See 18 Cent. Dig. Elections, §§ 114-136.

Termination of office as abating suit relating to certification of names of nominees, see Abatement and Revival, ⇨45.

Want of controversy, as ground for dismissal of appeal in suit relating to certification of names of nominees, see Appeal and Error, ⇨781.

VII. BALLOTS.

[No paragraphs or references in this Digest. But see 18 Cent. Dig. Elections, §§ 137-168.]

VIII. CONDUCT OF ELECTION.

[No paragraphs or references in this Digest. But see 18 Cent. Dig. Elections, §§ 169-205.]

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

Conspiracy to falsify poll books, see Conspiracy, 34, 43.

240. Count of votes.

See 18 Cent. Dig. Elections, §§ 212-222.

241. — In general.

See 18 Cent. Dig. Elections, § 218.

Code Tenn. 1884, § 1068, which provides that "when the election is finished the returning officer and judges shall, in the presence of such of the electors as may choose to attend, open the box and read aloud the names of the persons which shall appear in each ballot," does not require that the box shall be opened at the place where the election is held, or that it shall not be removed therefrom until the votes cast are counted.—United States v. Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. Ed. 190.

X. CONTESTS.

See 18 Cent. Dig. Elections, §§ 245-334.

Election to determine location of county seat, see Counties, 29.

XI. VIOLATIONS OF ELECTION LAWS.

See Conspiracy, 28, 29.

Jurisdiction of state court to punish fraudulent voting for presidential electors, see Criminal Law, 96.

Limitations applicable in federal court in action for assault to prevent voting, see Courts, 375.

Review on habeas corpus, see Habeas Corpus, 92.

311. Constitutional and statutory provisions.

See 18 Cent. Dig. Elections, § 334.

Rev. St. §§ 5612, 5615, providing for the indictment of election officers for misconduct at elections of members of congress, is not repugnant to or in violation of the constitution of the United States.—United States v. Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. Ed. 857.

The operation of Rev. St. U. S. § 5507 [U. S. Comp. St. 1901, p. 3712], which was manifestly enacted to punish the bribery at all elections, state and federal, of persons guaranteed the right to vote by Const. U. S. Amend. 15, cannot be limited by judicial construction, for the purpose of sustaining its constitutionality, to the bribery of voters at elections for federal officers.—James v. Bowman, 23 S. Ct. 678, 190 U. S. 127, 47 L. Ed. 979.

318. Fraud.

See 18 Cent. Dig. Elections, § 345.

The removal of a ballot box before it is opened, no fraud being charged or intent to affect the election, is not an indictable offense, under Rev. St. § 5515, making it a crime for the officer of an election for member of congress to do knowingly any act unauthorized by state or federal law, "with the intent to affect any such election or the result thereof."—United States v. Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. Ed. 190.

324. Criminal prosecutions.

See 18 Cent. Dig. Elections, §§ 351-353, 355-363.

328. — Indictment or information.

See 18 Cent. Dig. Elections, §§ 355, 357-363.

The offense of fraudulently registering as a voter and illegally voting at an election for a member of congress may be punished by imprisonment in the penitentiary for a period longer than one year, and is an infamous crime, within the meaning of the fifth amendment of the United States constitution, that must be prosecuted by indictment, and not by information.—Parkinson v. United States, 121 U. S. 281, 7 S. Ct. 896, 30 L. Ed. 959.

It is not sufficient to charge, in the words of the statute (Rev. St. § 5511), that defendant knowingly voted in the name of another "at an election for representative in congress," when such election was for both state and federal officers; for this does not show that he may not have voted for state officers only.—Blitz v. United States, 153 U. S. 308, 14 S. Ct. 924, 38 L. Ed. 725.

An indictment, under Rev. St. § 5511, for unlawfully interfering with the officers of an election for representative in congress, alleged that defendant unlawfully carried away the ballot box containing the ballots; that he aided and assisted in carrying away such ballot box; and that he counseled and procured the carrying away of such ballot box. *Held*, that the indictment charged but the single offense of interfering with the officers of an election.—Connors v. United States, 158 U. S. 406, 15 S. Ct. 951, 39 L. Ed. 1083.

ELECTRICITY.

Scope-Note.

[INCLUDES regulation of the production and use of electricity, and of machinery, structures, and apparatus employed therein, in general; supply of electricity as a motive power, or for illuminating, heating, or other purposes; and rights, duties, and liabilities incident thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⌚ 1½. Establishment of plant by public authorities.
- 2. Electric companies.
- 4. — Franchises and privileges in general.
- 12. Injuries incident to production or use.
- 19. — Actions.

Cross-References.

Appellate jurisdiction in action to restrain disconnection, see Courts, ⌚ 382.
Condemnation of property for purpose of supplying electricity, see Eminent Domain, ⌚ 35.
Constitutional guaranty of liberty to contract, see Constitutional Law, ⌚ 89.
Electric railroads, see Street Railroads.

Equal protection of laws, see Constitutional Law, ⌚ 240.
Impairing obligation of contract, see Constitutional Law, ⌚ 128.
Privileges and immunities, see Constitutional Law, ⌚ 208.
Telegraph and telephone lines, see Telegraphs and Telephones.

⌚ 1½. Establishment of plant by public authorities.

An implied contract that the city will not, for 20 years, enter into the business of commercial electric lighting, does not arise from a municipal grant to certain persons under the authority of Laws Mo. 1891, p. 60, of the right to erect and maintain an electric light plant for that period, where such grant is not exclusive. Decree (C. C.) Southwest Missouri Light Co. v. City of Joplin, 113 F. 817, reversed.—City of Joplin v. Southwest Missouri Light Co., 24 S. Ct. 43, 191 U. S. 150, 48 L. Ed. 127.

⌚ 2. Electric companies.

See 18 Cent. Dig. Electricity, §§ 1-3.

⌚ 4. — Franchises and privileges in general.

See 18 Cent. Dig. Electricity, § 1; 36 Cent. Dig. Mun. Corp. §§ 1482-1485.

A reservation in a municipal grant of a franchise for distribution of electricity, that whenever the city council declares the necessity of removing the poles from the public highways the grantee shall within 60 days remove the same, does not indicate that the franchise was only for the corporate life of the grantee.—Old Colony Trust Co. v. City of Omaha, 33 S. Ct. 987, 230 U. S. 100, 57 L. Ed. 1410.

A municipal grant of a franchise to do a general electric light business in Nebraska includes distribution of current for power and heating as well as lighting under the interpretation of the franchise by the city and grantee, in view of decisions of Nebraska courts that

the practical interpretation of contracts is applicable to public service franchises.—Id.

The franchise created by acceptance of a permit given by a city under authority of Laws N. Y. 1881, c. 483, laying electric conductors in the public streets, may be revoked for non-exercise, where for many years after judicial decision as to the validity of the state legislation authorizing a comprehensive scheme of subway construction the grantee made no attempt to build conduits or place its wires under the city streets.—New York Electric Lines Co. v. Empire City Subway Co., 35 S. Ct. 72, 235 U. S. 179, 59 L. Ed. 184, Ann. Cas. 1915A, 906, affirming judgments 125 N. Y. S. 1133, 140 App. Div. 934, and In re New York Electric Lines Co., 94 N. E. 1056, 201 N. Y. 321.

⌚ 12. Injuries incident to production or use.

See 18 Cent. Dig. Electricity, §§ 6-11.

⌚ 19. — Actions.

See 18 Cent. Dig. Electricity, § 11; 44 Cent. Dig. St. R. R. § 251.

In an action for death of a customer of a company supplying electricity for lighting purposes, the doctrine of *res ipsa loquitur* applies where the accident was caused by excessive current in the secondary wire which could only be caused by improper converters which were wholly within the control of the company, and the converters being in fact found out of order after the accident.—San Juan Light & Transit Co. v. Requena, 32 S. Ct. 399, 224 U. S. 89, 56 L. Ed. 680.

ELECTRIC RAILROADS.

See—

Master and Servant, ⌚ 111.
Railroads, ⌚ 33, 229, 254.

ELECTROCUTION.

Due process of law, see Constitutional Law, ⌚ 270.
Privileges and immunities, see Constitutional Law, ⌚ 208.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

ELEEMOSYNARY CORPORATIONS.

See Asylums.

ELEVATORS.

Grain elevators, see Warehousemen.

Passenger elevators, injuries, see Carriers, ¶ 320.

ELIGIBILITY.

See cross-references under Qualifications.

ELKINS ACT.

See—

Carriers, ¶ 23.

Criminal Law, ¶ 1172.

EMBANKMENTS.

See Levees.

EMBEZZLEMENT.*Scope-Note.*

[INCLUDES fraudulent appropriation of personal property by one in possession thereof, to whom it has been intrusted by or for the owner, as bailee, servant, agent, trustee, public officer, etc.; nature and elements of the crimes of embezzlement, larceny by bailee, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

¶ 3. Elements of offenses.

- 11. — Conversion or appropriation of property.
- 12. Embezzlement by particular classes of persons.
- 21. — Public officers or employés.
- 25. Indictment or information.
- 28. — Description of property.
- 34. — Against public officer.
- 35. — Issues, proof, and variance.

Cross-References.

See—

False Personation.

Larceny.

Additional imprisonment in lieu of restoration of sum embezzled as imprisonment for debt, see Arrest, ¶ 3.

By army officer, see Army and Navy, ¶ 36, 47. By officer of bank, see Banks and Banking, ¶ 256, 257.

Civil liability for conversion, see Trover and Conversion.

Discharge of bankrupt, effect on debts created by embezzlement, see Bankruptcy, ¶ 426.

Dismissal of prosecution without prejudice to civil action, see Criminal Law, ¶ 302.

Due process of law, see Constitutional Law, ¶ 257.

Mail matter, see Post Office, ¶ 41, 42.

Remarks of judge on evidence, see Criminal Law, ¶ 656.

Review of decisions, see Criminal Law, ¶ 1018.

Right to money embezzled, see Criminal Law, ¶ 1221.

¶ 3. Elements of offenses.

See 18 Cent. Dig. Embez. §§ 1, 3-10.

¶ 11. — Conversion or appropriation of property.

See 18 Cent. Dig. Embez. §§ 9, 10.

A clerk of a federal district court cannot be charged with embezzling the surplus fees and emoluments of his office until he refuses or fails to make his half-yearly return, or to pay over the surplus shown to exist by such return or the audit thereof, even if such surplus fees and emoluments can in any event be the subject of embezzlement.—United States v. Mason, 31 S. Ct. 28, 218 U. S. 517, 54 L. Ed. 1133, affirming judgment (C. C.) 177 F. 552.

¶ 12. Embezzlement by particular classes of persons.

See 18 Cent. Dig. Embez. §§ 11-29.

¶ 21. — Public officers or employés.

See 18 Cent. Dig. Embez. §§ 24-29.

Rev. St. § 3639, provides for the safe-keeping of public money which may come into the hands of public officers, until transferred or paid out by them. *Held*, that a clerk in the office of the collector of customs for the collection district of the city of New York is not such a public officer, charged with the safe-keeping of public money, and is not indictable as a public officer for the unlawful conversion to his own use of such public money.—United States v. Smith, 124 U. S. 525, 8 S. Ct. 595, 31 L. Ed. 534.

The duty of a clerk of a federal district court to pay over to the United States the surplus fees and emoluments of his office which his half-yearly return or the audit thereof shows to exist over and above the compensation .

and allowances authorized by law to be retained by him is not governed by the federal statutes relating to the embezzlement of "public money," or "money or property of the United States," but such fees and emoluments are received by the clerk, not as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and, with respect to the amount payable when the return is made, the clerk is not a trustee, but a debtor.—*United States v. Mason*, 31 S. Ct. 28, 218 U. S. 517, 54 L. Ed. 1133, affirming judgment (C. C.) 177 F. 552.

⚡25. **Indictment or information.**

See 18 Cent. Dig. Embez. §§ 37-59.

⚡28. — **Description of property.**

See 18 Cent. Dig. Embez. §§ 41, 42; 27 Cent. Dig. Ind. & Inf. § 279.

Where, in an indictment under Act March 3, 1875, charging the embezzlement of money belonging to the United States by defendant, a post-office employé, the words charging defendant's employment are treated as surplusage, the property embezzled must be identified with particularity, a mere averment that it was a certain amount not being sufficient.—*Moore v. United States*, 160 U. S. 268, 16 S. Ct. 294, 40 L. Ed. 422.

⚡34. — **Against public officer.**

See 18 Cent. Dig. Embez. §§ 53, 54.

Where an indictment charges, under Act March 3, 1875, the embezzlement of a certain sum of money, belonging to the United States, by defendant, a post-office employé, if the words charging defendant with being such an employé are material, it must be averred that the money embezzled came into his hands by virtue of such employment, since otherwise the allegation of employment is meaningless, and may be mis-

leading.—*Moore v. United States*, 160 U. S. 268, 16 S. Ct. 294, 40 L. Ed. 422.

⚡35. — **Issues, proof, and variance.**
See 18 Cent. Dig. Embez. §§ 55-59.

On a prosecution of a postmaster's assistant for embezzlement, the fact that the indictment failed to charge that the embezzlement was without the consent of the postmaster who employed defendant does not necessitate proof that the embezzlement was without his consent.—*Faust v. United States*, 163 U. S. 452, 16 S. Ct. 1112, 41 L. Ed. 224.

EMBLEMENTS.

See Crops.

EMBRACERY.

See 18 Cent. Dig. Embracery.

See Bribery.

EMERGENCIES.

Acts in emergency, see Master and Servant, ⚡138, 246.

EMIGRANT AGENTS.

Equal protection of laws, see Constitutiona Law, ⚡230.
License tax as interference with commerce, see Commerce, ⚡63.
Privileges and immunities, see Constitutional Law, ⚡206.

EMIGRATION.

See Aliens, ⚡39-59.

EMINENT DOMAIN.

Scope-Note.

[INCLUDES taking property from its owner for public use; nature, extent, and delegation of the power in general; constitutional and statutory provisions relating thereto; what property is subject thereto; for what uses or purposes the power may be exercised, and necessity therefor; necessity and sufficiency of compensation; proceedings for condemnation of property and for assessment of compensation; what constitutes taking of or injury to property, and rights and remedies of the owners; rights acquired by exercise of power of eminent domain, and effect of abandonment of property or of public use thereof.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Extent, and Delegation of Power.

- ⚡1. Nature and source of power.
- 2. Distinction between eminent domain and other powers.
- 4. Power of state in general.
- 5. Power of United States.
- 6. Delegation of power.
- 10. — To private corporation.
- 16. Particular uses or purposes.
- 17. — In general.

I. Nature, Extent, and Delegation of Power—Continued.

- ⇒ 18. — Public buildings or grounds, or other purposes of government.
- 20. — Railroads.
- 23. — Canals.
- 24. — Improvement of navigation.
- 28. — Water supply in general.
- 29. — Irrigation.
- 31. — Drainage of lands.
- 33. — Development or working of mines.
- 35. — Production and supply of electric power or light.
- 41. — Parks and reservations.
- 44. Property subject to appropriation.
- 45. — In general.
- 53. Statutory exercise of power.
- 54. Exercise of delegated power.
- 55. — In general.
- 59. — Exhaustion or further exercise of power.
- 63. Acts constituting appropriation of property.
- 65. Determination of questions as to validity of exercise of power.
- 66. — Jurisdiction of courts in general.
- 67. — Conclusiveness and effect of legislative action.

II. Compensation.**(A) NECESSITY AND SUFFICIENCY IN GENERAL.**

- ⇒ 69. Necessity of making compensation in general.
- 71. Sufficiency of statutory provisions for compensation.
- 73. Necessity of payment before taking.
- 74. — In general.
- 75. — Taking by state or municipality.
- 76. — Entry on making deposit or payment into court.
- 79, 80. Waiver of, or estoppel to claim, compensation.

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

- ⇒ 81. Property and rights subject of compensation.
- 83. — Rights in public lands.
- 84. — Water rights.
- 85. — Easements and other rights in real property.
- 86. — Franchises.
- 89. Nature of injury to property not taken.
- 93. — Direct or remote, contingent, or prospective consequences or losses.
- 94. Elements of compensation for injuries to property not taken.
- 97. — Taking water rights.
- 98. — Alteration of flow or discharge of water.
- 99. — Prevention of access to navigable waters.
- 100. — Occupation or use of street or other highway.
- 104. — Effect of smoke, foul odors, noise, or vibration.
- 105. — Obstruction of light or air.
- 106. — Obstruction of access.
- 108. — Interference with franchise.
- 114. Temporary use.
- 116. — Use during construction of works.
- 121. Corporations and persons liable for compensation.

(C) MEASURE AND AMOUNT.

- ⇒ 122. Necessity of just or full compensation or indemnity.
- 124. Time with reference to which compensation to be made.
- 125. Nature and extent of right taken.
- 126. — In general.
- 128. — Railroad rights of way.

II. Compensation—Continued.**(C) MEASURE AND AMOUNT—Continued.**

- ☞ 129. Taking entire tract or piece of property.
- 130. — Measure of compensation in general.
- 133. — Improvements and fixtures.
- 134. — Value for special use.
- 135. Taking part of tract or property.
- 138. — Injuries to part not taken.
- 139. Injuries to property not taken.
- 141. — Depreciation of value.
- 144. Deduction or set-off of benefits.
- 145. — In general.
- 148. Interest as element, and damages for delay in payment of compensation.

(D) PERSONS ENTITLED AND PAYMENT.

- ☞ 151. Persons entitled.
- 153. — Vendor or purchaser.

III. Proceedings to Take Property and Assess Compensation.

- ☞ 167. Statutory provisions and remedies.
- 171. Defenses and objections.
- 172. Jurisdiction.
- 175. Parties.
- 178. — Intervention or substitution.
- 179. Process or notice.
- 181. — Form, requisites, and sufficiency.
- 182. — Service.
- 184. — Defects, objections, and amendment.
- 186. Maps, plans, or surveys.
- 189. Pleading.
- 191. — Petition or complaint.
- 206. Mode of assessment of compensation.
- 209. — Trial by jury.
- 211. — Trial by court or reference.
- 225. Assessment by commissioners, appraisers, or viewers.
- 229. — Oath.
- 231. — Conduct of proceedings in general.
- 232. — View.
- 234. — Report and findings or award.
- 238. — Review by court in general.
- 239. — Trial by jury on appeal.
- 242. Collateral attack.
- 245. Right to compensation awarded.

IV. Remedies of Owners of Property.

- ☞ 266. Nature and grounds in general.
- 271. Recovery of damages.
- 272. Injunction.
- 274. — Restraining taking of or injury to property.
- 278. Defenses.
- 279. — In general.
- 280. — Consent or acquiescence of owner.
- 281. — Payment of compensation or other satisfaction.
- 284. Persons entitled to sue.
- 293. Pleading.
- 315. Appeal and Error.

V. Title or Rights Acquired.

- ☞ 320. Time of passing of title or right.

Cross-References.

Dedication of property to public use, see Dedication.
Due process of law, see Constitutional Law, ¶279-281.

Impairing obligation of contracts, see Constitutional Law, ¶118.
Public improvements by municipalities, see Municipal Corporations, ¶272-279.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

See Constitutional Law, ¶206.
Jurisdiction of Supreme Court as to questions of taking property without compensation, see Courts, ¶394(11).

¶1. Nature and source of power.

See 18 Cent. Dig. Em. Dom. §§ 1, 2.

Limitation on the power of eminent domain, and not a grant of the power itself, held intended by provisions of article 2 of the Ordinance of 1787 (Rev. St. p. 15 [U. S. Comp. St. 1901, p. 1x]) § 14, for the government of the Northwest Territory.—(1912) *City of Cincinnati v. Louisville & N. R. Co.*, 32 S. Ct. 267, 223 U. S. 390, 56 L. Ed. 481, affirming judgment (1910) 92 N. E. 1111, 82 Ohio St. 466.

¶2. Distinction between eminent domain and other powers.

See 18 Cent. Dig. Em. Dom. §§ 3-12; 10 Cent. Dig. Const. Law, § 888; 36 Cent. Dig. Mun. Corp. §§ 916, 1435, 1454.

The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state, by reasonable regulations, to protect the lives and secure the safety of the people.—*Chicago, B. & Q. R. Co. v. City of Chicago*, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

Proceedings by a village, under a state statute, by which ground for a street was condemned through plaintiff's property, the damages awarded were paid, and the amount of such damages, together with all the costs and expenses of the condemnation, were assessed back on the remaining property of plaintiff, lying on either side of the street, without inquiry as to special benefits, constituted a taking of plaintiff's property for public use without compensation, to the extent of the excess of the cost of opening the street over the benefits.—*Village of Norwood v. Baker*, 19 S. Ct. 187, 172 U. S. 269, 43 L. Ed. 443, affirming judgment *Baker v. Village of Norwood* (C. C.) 74 F. 997.

The only just basis upon which special assessments for public improvements can rest is that of special benefits to the property taxed; and the exaction from the owner of private property of the cost of such an improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.—*Id.*

Where a city is situated on one bank of a river, and its limits extend to low-water mark on the further shore, bridge property outside of low-water mark on the nearer shore is not so far beyond the reach of municipal protection by the city authorities that it cannot receive any benefits whatever from the municipal government, so that to impose taxes on it for city purposes would be a taking of private property for public use without compensation. Exact equality and absolute justice in taxation are not attainable under any system of government.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

A railway company is not deprived of its right reasonably to manage or control its property, nor is its property arbitrarily taken without compensation, by Gen. Laws Minn. 1901, c. 270, under which is imposed upon it the burden of showing, in proceedings to compel it to provide a station at an incorporated village on its line, that the establishment of a station there is unreasonable and unnecessary. Judgment, *State v. Minneapolis & St. L. R. Co.*, 91 N. W. 465, 87 Minn. 195, affirmed.—*Minneapolis & St. L. R. Co. v. State of Minnesota ex rel. Railroad & Warehouse Commission*, 24 S. Ct. 396, 193 U. S. 53, 48 L. Ed. 614.

A gas company has no such property right in the location of its pipes and mains, laid under an exclusive franchise to supply gas to the city and its inhabitants, as to make the imposition upon it of the cost of changes in the location of such pipes and mains, necessitated by the construction of the municipal drainage system authorized by Act La. July 9, 1896, a taking of property without due compensation. Judgment 35 So. 929, 111 La. 838, affirmed.—*New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 25 S. Ct. 471, 197 U. S. 453, 49 L. Ed. 831.

Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on state tide lands for the compensation, does not contravene Const. art. 11, § 15, inhibiting the taking of private property for the debt of a public or municipal corporation, there being no debt till the purchase of the tide lands from the state, when the purchasers agree to pay for the improvements the state has permitted to be placed thereon. Judgment, *Seattle & L. W. Waterway Co. v. Seattle Dock Co.*, 77 P. 845, 35 Wash. 503, affirmed.—*Seattle Dock Co. v. Seattle & L. W. Waterway Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 350.

The making of the alterations or changes in a bridge erected under the sanction of a state over an interstate waterway which the Secretary of War, acting under the authority of Act March 3, 1899, c. 425, § 18, 30 Stat. 1121, 1133 [U. S. Comp. St. 1901, p. 3545], requires to secure navigation against an unreasonable obstruction, is not a taking of private property for public use for which the federal Constitution requires compensation to be made, but is merely incidental to the exercise by the government of its power to regulate commerce among the states. Judgment, *United States v. Union Bridge Co.* (D. C. 1906) 143 F. 377, affirmed.—*Union Bridge Co. v. United States*, 27 S. Ct. 367, 204 U. S. 364, 51 L. Ed. 523.

The provision of Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47, requiring all school sinks in existing tenement houses in cities of the first class to be removed, does not violate the constitutional provision against taking private property for public use without just compensation, in so far as it applies to existing buildings. Judgment, *Tenement House Department of City of New York v. Moeschel* (1904) 72 N. E. 231, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, affirmed.—*Moeschen v. Tenement House Department of City of New York*, 27 S. Ct. 781, 203 U. S. 583, 51 L. Ed. 328.

Legislative regulation of gas rates is invalid, where such rates are plainly unreasonable

to the extent that their enforcement will be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public. Decree (C. C. 1907) Consolidated Gas Co. v. City of New York, 157 F. 849, reversed. —Willcox v. Consolidated Gas Co. of New York, 29 S. Ct. 192, 212 U. S. 19, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

The action of the Secretary of War in requiring changes in a bridge over an interstate waterway within a specified time, and after the parties have been heard, conformably to Act March 3, 1890, c. 425, § 18, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545), enacted to secure navigation against unreasonable obstruction, is not such a taking of private property for public use as must, under the federal Constitution, be preceded by making, or sufficiently securing, compensation to the owners of the bridge. Judgment, *United States v. Monongahela Bridge Co.* (D. C. 1908) 160 F. 712, affirmed.—President, etc., of *Monongahela Bridge Co. v. United States*, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435.

Private property is not taken for public use without compensation under Act Feb. 10, 1890, c. 150, 30 Stat. 834, which provides that one-half the amount awarded as damages in the street extension proceeding authorized by that act is to be assessed against the lands within a designated area as benefits, considering the benefits received by each lot within such area, where there is nothing to show that the actual assessments thereunder are in substantial excess of the benefits.—(1911) *Briscoe v. Rudolph*, 31 S. Ct. 679, 221 U. S. 547, 55 L. Ed. 848, affirming decree (1908) *Same v. MacFarland*, 32 App. D. C. 167.

The building of levees along the Mississippi river, or closing of breaks therein to retain the water in the river, whereby the levee of riparian owners became ineffective because of the increase of the volume of water, could not give a right of action against an individual for resulting injury, and much less support a claim against the United States, where the acts are those of the government, on the theory of taking the property for public use.—*Jackson v. United States*, 33 S. Ct. 1011, 230 U. S. 1, 57 L. Ed. 1363, affirming judgment 47 Ct. Cl. 579.

Raising and extending levees at certain points along the Mississippi river, increasing the flood level, without building levees along minor basins on the east bank, would not render even an individual liable for resulting injury to lands and crops, and does not amount to a taking of property, when done by the federal government, for which compensation must be made.—Id.

The building by the federal government, when improving navigation of the Mississippi river, of a levee behind a plantation, which was thereby placed between the old and the new levee, is not a taking of property for which compensation must be made.—*Hughes v. United States*, 33 S. Ct. 1019, 230 U. S. 24, 57 L. Ed. 1374, 46 L. R. A. (N. S.) 624, modifying judgment 47 Ct. Cl. 663.

Use of dynamite by a federal officer in an emergency in opening a levee along the Mississippi river after giving way, if wrongful, affords no ground for holding that the United States had taken for public use the property of a riparian owner, damaged thereby.—Id.

Lands which are the most suitable field of fire for an adjacent coast defense battery in times of peace were not appropriated by the government so as to raise an agreement for compensation for the impairment of the value of the land, where the guns have been fired on two occasions and not at all within the last

eight years.—*Peabody v. United States*, 34 S. Ct. 159, 231 U. S. 530, 58 L. Ed. 351, affirming judgment 46 Ct. Cl. 39.

Congress is prohibited by Const. U. S. Amend. 5, relating to the taking of private property for public use without just compensation, from conferring immunity in action for a private nuisance which amounts in effect to a taking of private property for public use.—*Richards v. Washington Terminal Co.* 34 S. Ct. 654, 233 U. S. 546, 58 L. Ed. 1088, L. R. A. 1915A, 887, reversing judgment 37 App. D. C. 289.

Property of one carrier is not appropriated without compensation to the use of another carrier, contrary to Const. U. S. Amend. 5, by an order of the Interstate Commerce Commission under Act Feb. 4, 1887, § 3, requiring first carrier to interchange car load freight with a connecting carrier within switching limits while performing such service with other connecting carriers.—*Pennsylvania Co. v. United States*, 35 S. Ct. 370, 236 U. S. 351, 59 L. Ed. 616, affirming decree (D. C.) 214 F. 445.

Riparian owners who have erected on a water front wharves conforming to harbor line adopted by the federal government have no right to compensation under Const. U. S. Amend. 5, where Congress establishes a new harbor line requiring destruction of a portion of such structures.—*Greenleaf-Johnson Lumber Co. v. Garrison*, 35 S. Ct. 551, 237 U. S. 251, 59 L. Ed. 939, affirming decree *Garrison v. Greenleaf Johnson Lumber Co.*, 215 F. 576, 131 C. C. A. 644.

Mere location of a harbor line across the land of a riparian owner on a tidal stream is not a taking of his property for public use.—*Willink v. United States*, 36 S. Ct. 422, 240 U. S. 572, 60 L. Ed. 808, affirming judgment 49 Ct. Cl. 701.

The property of a riparian owner on a tidal stream was not taken merely because he was prevented by United States officers under Act Sept. 19, 1890, §§ 11, 12, from renewing the sheet piling protecting his marine railway, or rebuilding his wharf, where the piling and wharf were below the mean high-water line and within the harbor area as defined conformably to Act Aug. 11, 1888, § 12.—Id.

☞ 4. Power of state in general.

See 18 Cent. Dig. Em. Dom. §§ 14-18.

Power of eminent domain possessed by state of Ohio was not restricted, after admission to the Union, by Ordinance of 1787 (Rev. St. p. 15 [U. S. Comp. St. 1901, p. 1x]) § 14, art. 2, relating to the government of the Northwest Territory.—(1912) *City of Cincinnati v. Louisville & N. R. Co.*, 32 S. Ct. 267, 223 U. S. 390, 56 L. Ed. 481, affirming judgment (1910) 92 N. E. 1111, 82 Ohio St. 466.

☞ 5. Power of United States.

See 18 Cent. Dig. Em. Dom. §§ 19-23.

Congress has the right, in the exercise of the power of eminent domain, to grant the right of way to a railroad company, incorporated under the laws of a state, through the lands owned by the Cherokee Nation, where the operation of the railroad will have relation to interstate commerce.—*Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295, reversing (D. C.) 33 F. 900.

It is not necessary that an act of congress shall express in words the purpose for which it was passed, so as to show that its objects are such as admit of the exercise of the right of eminent domain.—Id.

The United States, by virtue of the constitutional grant of power to exercise over the District of Columbia "exclusive legislation in all cases whatsoever" (article 1, § 8, cl. 17), possesses, not only political, but municipal, authority over the District, and therefore has authority to condemn lands lying within the District for a public park.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

Nor was the power thus granted in any way limited by the provision in the Maryland act of cession (Act Md. 1791, c. 45) that nothing in that act should be so construed as to vest in the United States any right of property in the soil, so as to affect the right of individuals therein "otherwise than the same shall or may be transferred by such individuals to the United States."—*Id.*

The fact that congress possesses supreme power does not cause a grant of such a franchise by the state to be a mere license, which is revoked or annulled when congress, in the subsequent exercise of its power, takes possession of the improvement.—*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463.

The only authority which the United States has to condemn a lock and dam belonging to a corporation chartered by a state is derived from the power to regulate interstate and foreign commerce, and such power must always be subject to the obligation imposed by the fifth amendment to make "just compensation" for private property taken for public use.—*Id.*

§6. Delegation of power.

See 18 Cent. Dig. Em. Dom. §§ 24-50.

§10. — To private corporation.

See 18 Cent. Dig. Em. Dom. §§ 35-48.

Telegraph companies were not granted the right of eminent domain, or any right to enter upon and occupy the rights of way of railway companies without the latter's consent, by Act July 24, 1866, c. 230, 14 Stat. 221 [U. S. Comp. St. 1901, p. 3579], giving telegraph companies the right to construct, maintain, and operate telegraph lines through and over the public domain, and "over and along any of the military or post roads of the United States," since such statute must be deemed but an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph. Decree (1903) 123 F. 33, 59 C. O. A. 113, affirmed.—*Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 S. Ct. 133, 195 U. S. 540, 49 L. Ed. 312, 1 Ann. Cas. 517.

The lessee of a telegraph company cannot, as such lessee, exercise the right of eminent domain possessed by its lessor. Judgment (1903) 123 F. 33, 59 C. O. A. 113, affirmed.—*Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 S. Ct. 150, 195 U. S. 594, 49 L. Ed. 332, 1 Ann. Cas. 533.

§16. Particular uses or purposes.

See 18 Cent. Dig. Em. Dom. §§ 5, 6, 55-90.

§17. — In general.

See 18 Cent. Dig. Em. Dom. §§ 6, 90.

The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is for a public use, although, judged from the proximate effect of the taking, the use seems to be a private one.—*Noble State Bank v. Haskell*, 31 S. Ct. 299, 219 U. S. 575, 55 L. Ed. 341, amending opinion 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1032, Ann. Cas. 1912A, 487.

§18. — Public buildings or grounds, or other purposes of government.

See 18 Cent. Dig. Em. Dom. §§ 55, 57, 83.

Act Aug. 1, 1888, c. 723, authorizing the secretary of the treasury to acquire land for a lighthouse by condemnation under judicial process in a United States court, was a constitutional exercise of the powers of congress.—*Chappell v. United States*, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

§20. — Railroads.

See 18 Cent. Dig. Em. Dom. §§ 59-57.

Private property is not taken for private use contrary to Const. U. S. Amend. 14, by the exercise of eminent domain, under St. Wis. 1898, § 1831a, to condemn land needed for the extension of a railroad spur track ordered by the railway commission conformably to St. 1898 (sections 1797—11m, 1797—12n, added by Laws 1907, c. 352, as amended by Laws 1909, c. 481, and Laws 1911, c. 137), though such extension is for the benefit of a single industry, where the state courts declare the use a public one.—*Union Lime Co. v. Chicago & N. W. R. Co.*, 34 S. Ct. 522, 233 U. S. 211, 58 L. Ed. 924, affirming judgment in re *Chicago & N. W. Ry. Co.*, 140 N. W. 346, 152 Wis. 633.

§23. — Canals.

See 18 Cent. Dig. Em. Dom. § 69.

While a state has no power to take private property for the purpose of creating a water power to be leased to private parties, yet, when a dam is built for the bona fide purpose of furnishing water to a public canal, great latitude must be allowed to the agents of the state in determining the head of water necessary for that purpose; and, although the surplus of water seems unnecessarily large, it will still be regarded as an incident to the public improvement, and therefore subject to the state's control.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

§24. — Improvement of navigation.

See 18 Cent. Dig. Em. Dom. § 70.

The taking by the United States for purposes of navigation under Act March 3, 1909, § 11, all property north of the St. Marys Falls ship canal between such canal and international boundary line is none the less for public use because section 12 of that act permits the lease by the Secretary of War of any water power resulting from such conservation and the works the government may construct.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

§28. — Water supply in general.

See 18 Cent. Dig. Em. Dom. § 75.

The state may authorize a city to condemn a water-supply system, and to continue to charge for the use of the water, as the fact that such a charge is made does not make the use other than a public one.—*Long Island Water-Supply Co. v. City of Brooklyn*, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

§29. — Irrigation.

See 18 Cent. Dig. Em. Dom. § 76.

The peculiar local conditions in Utah justify, as authorizing condemnation for a public use, a statute of that state, under which an individual landowner may condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch therein, in order to enable him to obtain water from a stream in which he has an interest to irrigate his land, which otherwise would remain absolutely value-

less. Judgment, *Nash v. Clark*, 75 P. 371, 27 Utah, 158, 101 Am. St. Rep. 953, affirmed.—*Clark v. Nash*, 25 S. Ct. 676, 198 U. S. 361, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

Acts 1895, p. 21, c. 21 (Rev. St. 1895, tit. 60, c. 2), authorizes the organization of corporations for the construction of reservoirs, ditches, etc., and the furnishing of water "to all persons entitled to the same" for irrigation and other purposes, to make contracts for the sale of permanent water rights, to lease, to rent, and to otherwise dispose of water, and provides that all persons possessing land adjacent to any ditch shall have a right of water for any of the purposes mentioned at just prices, and that, if any shortage occurs, the distribution of water shall be pro rata. *Held*, that the purposes for which the act authorizes the taking of private property are public in character. Judgment (1905) 86 S. W. 11, 98 Tex. 494, 107 Am. St. Rep. 640, affirmed.—*Borden v. Trespacios Rice & Irrigation Co.*, 27 S. Ct. 785, 204 U. S. 667, 51 L. Ed. 671.

Rev. St. 1895, art. 642, subd. 23, provides for the organization of corporations for "the construction, maintenance, and operation of dams, reservoirs, * * * and other necessary appurtenances for the purpose of irrigation, navigation, milling, mining, stock raising, and city water works." Article 704 provides (subdivision 4) that canal corporations shall have power "to furnish water for irrigation," and (subdivision 6) "to enter on and condemn" land. Acts 1895, p. 23, c. 21, § 11, provides for the organization of corporations for the purpose of supplying water for irrigation, mining, milling, stock raising, etc. Section 12, p. 24, provides that such corporations shall have power to obtain the right of way over private property and water belonging to riparian owners by condemnation. *Held*, that a corporation organized for the purpose of irrigation, milling, navigation, and stock raising has power to condemn private land for a right of way for its works.—*Id.*

◀31. — Drainage of lands.

See 18 Cent. Dig. Em. Dom. § 77.

It is proper for the legislature, in the exercise of its police power, and its power to take private property for public use, to authorize a city to obtain the fee in swamp lands within its limits, by purchase or condemnation, for the purpose of abating a nuisance by filling up the lands, and thus preserve public health, as it did by St. Mass. 1867, c. 308.—*Sweet v. Rechel*, 159 U. S. 380, 16 S. Ct. 43, 40 L. Ed. 188.

◀33. — Development or working of mines.

See 18 Cent. Dig. Em. Dom. § 79.

The condemnation of a right of way across a placer mining claim for the aerial bucket line of a mining corporation cannot be said to be a taking of private property for private use, in defiance of Const. U. S. Amend. 14, if authorized by the construction given by the state courts to the provisions of state legislation for the exercise of the right of eminent domain in behalf of certain uses declared to be public. Judgment, *Highland Boy Gold Min. Co. v. Strickley*, 78 P. 296, 28 Utah, 215, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711, affirmed.—*Strickley v. Highland Boy Gold Min. Co.*, 26 S. Ct. 301, 200 U. S. 527, 50 L. Ed. 581, 4 Ann. Cas. 1174.

◀35. — Production and supply of electric power or light.

See 18 Cent. Dig. Em. Dom. § 80.

Manufacture, supply, and sale to the public of power produced by water is a public use for which land, water, and water rights may be condemned consistently with Const. Amend. 14.—*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 36 S. Ct. 234, 240

U. S. 30, 60 L. Ed. 507, affirming judgment *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 65 So. 287, 186 Ala. 622.

◀41. — Parks and reservations.

See 18 Cent. Dig. Em. Dom. § 86.

Land taken in a city for public parks and squares, advantageous to the public for recreation, health, or business, is taken for a public use, and the power of eminent domain extends thereto.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

The purpose of preserving and marking, on the site of the battle of Gettysburg, the positions occupied by the different military organizations at that battle, is a public use or purpose, for which congress may authorize the condemnation of the necessary land.—*United States v. Gettysburg Electric Ry. Co.*, 160 U. S. 668, 16 S. Ct. 427, 40 L. Ed. 576.

◀44. Property subject to appropriation.

See 18 Cent. Dig. Em. Dom. §§ 91-130; 37 Cent. Dig. Nav. Wat. § 237.

◀45. — In general.

See 18 Cent. Dig. Em. Dom. §§ 94-100, 102, 106; 37 Cent. Dig. Nav. Wat. § 237.

A contract is property which may be taken by condemnation proceedings for public use.—*Long Island Water-Supply Co. v. City of Brooklyn*, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

◀53. Statutory exercise of power.

See 18 Cent. Dig. Em. Dom. §§ 131-134.

The recital in the joint resolution of June 6, 1894, that "there is imminent danger that portions of said [Gettysburg] battle field may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution" of the provisions of a previous act appropriating money for the purchase and improvement of such site, clearly showed that it was the intention of congress to take land which was already devoted to the use of the railway.—*United States v. Gettysburg Electric Ry. Co.*, 166 U. S. 668, 16 S. Ct. 427, 40 L. Ed. 576.

The mere fact that congress limited the amount to be appropriated for the purposes of preserving and marking, on the site of the battle of Gettysburg, the positions occupied by the different military organizations at that battle, does not render the law providing for the taking of the land invalid.—*Id.*

The right to condemn necessary land forming part of Gettysburg battle field, and belonging to a railway company, was not affected by the fact that only a part of the company's land was taken.—*Id.*

◀54. Exercise of delegated power.

See 18 Cent. Dig. Em. Dom. §§ 135-145, 147-160.

◀55. — In general.

See 18 Cent. Dig. Em. Dom. §§ 97, 135.

The owner of property taken by eminent domain for the approaches and terminal facilities necessary to the use of a bridge erected, under the authority of Act Jan. 26, 1901, c. 181, 31 Stat. 741, over a navigable stream, is denied no federal right because the erection of the bridge was not begun within the time limit set by Congress, where the bridge has been constructed without complaint by the federal authorities, Congress having, by Act Jan. 18, 1904, c. 5, 33 Stat. 6, extended the time for its completion. Judgment, *Southern Illinois & M. Bridge Co. v. Stone* (1906) 92 S. W. 475, 194 Mo. 175, affirmed.—*Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

⚡59. — **Exhaustion or further exercise of power.**

See 18 Cent. Dig. Em. Dom. §§ 143-145.

The right of a bridge company or its municipal successor to change, under legislative authority, the grade of a street for its full width for an approach to a bridge without making compensation to abutting owners for consequential damages, is not so exhausted by exercising the right as to a portion of the street only as will prevent a subsequent change of grade of the rest of the street by extending the approach to cover an opening left in the center of the street to permit access to the wharves of abutting owners. Decree, 76 P. 347, 45 Or. 1, affirmed.—*Mead v. City of Portland*, 26 S. Ct. 171, 200 U. S. 148, 50 L. Ed. 413.

⚡63. **Acts constituting appropriation of property.**

See 18 Cent. Dig. Em. Dom. §§ 161-164.

Under Act March 2, 1893, c. 197, § 2, providing for the recording of a map of the plan prepared by the commissioners for the extension of a permanent system of highways in the District of Columbia outside of cities, and further providing that after the map is recorded no further subdivision of any land included therein shall be admitted to record unless the same be first approved by the commissioners, or be in conformity to the map, the mere recording of the map does not entitle the owners of lands to any compensation or damages.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270; *Ross v. Bauman*, Id.; *Abbott v. Ross*, Id.; *Ross v. Armes*, Id.

⚡65. **Determination of questions as to validity of exercise of power.**

See 18 Cent. Dig. Em. Dom. §§ 165-170.

⚡66. — **Jurisdiction of courts in general.**

See 18 Cent. Dig. Em. Dom. §§ 165-167.

A question whether the use for which private property is authorized by the legislature to be taken is in fact a public use is one for the courts to determine, but the extent to which property shall be taken for such use rests wholly in the legislative discretion, provided that just compensation is made for all so taken.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

⚡67. — **Conclusiveness and effect of legislative action.**

See 18 Cent. Dig. Em. Dom. §§ 165-167.

Congress having determined by Act March 3, 1909, § 11, that the entire St. Marys river between the American bank and the international line and all of the upland north of the present ship canal were necessary for purposes of navigation, that determination is conclusive in condemnation proceedings by the United States under that act.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

II. COMPENSATION.

(A) NECESSITY AND SUFFICIENCY IN GENERAL.

⚡69. **Necessity of making compensation in general.**

See 18 Cent. Dig. Em. Dom. §§ 171-179; 25 Cent. Dig. High. § 358.

The liability of the United States, under the fifth amendment to the federal Constitution, to make just compensation for an appropriation of land for public use, is not defeated because such land was taken by the government in the exercise of its power to improve navigation.—*United States v. Lynah*, 23 S. Ct. 349, 188 U. S. 445, 47 L. Ed. 539; Same v.

Williams, 23 S. Ct. 363, 188 U. S. 485, 47 L. Ed. 554, affirming judgment (C. C.) *Williams v. United States*, 104 F. 50.

⚡71. **Sufficiency of statutory provisions for compensation.**

See 18 Cent. Dig. Em. Dom. §§ 180-187.

The power vested in the federal government of appropriating private property for the public uses of the United States cannot be transferred to a state any more than its other sovereign attributes, but the ascertainment of the amount of compensation to be made for property taken is not an essential element of the power of appropriation, and Act Cong. March 3, 1875, providing that damages to lands, incurred in the improvement of the navigation of the Fox and Wisconsin rivers, be "ascertained in the mode provided by the laws of the state," is not an unconstitutional delegation of power to a state court.—*United States v. Jones*, 109 U. S. 513, 3 S. Ct. 346, 27 L. Ed. 1015.

Act Sept. 27, 1890 (26 Stat. 492), authorizing the establishment of a public park in the District of Columbia, appropriated a fixed sum to pay all expenses of the park commission, including the cost of lands taken. Held, that this was merely a limitation of the amount to be expended by the government, and was not a direction to the appraisers to keep within any given limit in valuing any particular piece of property, and that the act, since it did not arbitrarily fix the value of the property taken, was constitutional.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

Where the legislature authorized a city to take land within a district, the grade of which was below that of surrounding lands, and to raise the grade thereof, and thereby preserve the public health, a provision in the act requiring the city to forthwith pay the amount of damage agreed upon by the persons injured and the city, and giving the right to any person having an interest in the land taken to file a bill in his own behalf, and that of all others interested, within a year, setting forth his claims for damage, and requiring that notice be given bringing in all parties interested within a time fixed, and appointing commissioners to hear the parties and assess the damages, and providing for the entry of separate judgments, etc., was sufficiently certain and adequate to protect the landowners' rights to compensation.—*Sweet v. Rechel*, 159 U. S. 380, 16 S. Ct. 43, 40 L. Ed. 188.

The suit in the Court of Claims for compensation provided for by Act June 25, 1910, whenever a patented invention shall be used by the United States without license of the owner, answers all requirements as to compensation necessary to sustain the statute as an exercise of eminent domain.—(1912) *Crozier v. Fried. Krupp Aktiengesellschaft*, 32 S. Ct. 488, 224 U. S. 290, 56 L. Ed. 771, reversing judgment (1908) *Fried. Krupp Aktiengesellschaft v. Crozier*, 32 App. D. C. 1, 15 Ann. Cas. 1108.

⚡73. **Necessity of payment before taking.**

See 18 Cent. Dig. Em. Dom. §§ 183-204; 25 Cent. Dig. High. § 359.

⚡74. — **In general.**

See 18 Cent. Dig. Em. Dom. §§ 183-197; 10 Cent. Dig. Const. Law, § 879.

Where private property is taken for public use, the compensation need not be made instant. It will be sufficient if due provision is made for future payment.—*Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295, reversing (D. C.) 33 F. 900.

A statute authorizing the taking of private property for public use, which makes such pro-

vision for compensation as will be adequate, though it is not required to be paid before the taking, satisfies the requirements of the constitution that no property of any individual can be taken for public uses without his consent, or that of the representative body of the people, and that he shall receive compensation therefor.—*Sweet v. Rechel*, 159 U. S. 380, 16 S. Ct. 43, 40 L. Ed. 188.

875. — **Taking by state or municipality.**

See 18 Cent. Dig. Em. Dom. §§ 198, 199; 25 Cent. Dig. High. § 359.

It is competent for the legislature to authorize a city to take lands for the purpose of raising the grade thereof, and preserving the public health, prior to making compensation therefor.—*Sweet v. Rechel*, 159 U. S. 380, 16 S. Ct. 43, 40 L. Ed. 188.

876. — **Entry on making deposit or payment into court.**

See 18 Cent. Dig. Em. Dom. §§ 200-203.

An act of congress granting to a railroad company a right of way through lands owned by private persons, which provides for the appointment of three disinterested commissioners to assess the compensation, and gives the owners the right of appeal from their award to the courts, where the case shall be tried de novo, and provides that on such appeal the railroad company shall pay into court, to abide its judgment, double the amount of the award, makes adequate provision to secure compensation to the owner.—*Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295, reversing (D. C.) 33 F. 900.

879, 80. **Waiver of, or estoppel to claim, compensation.**

See 18 Cent. Dig. Em. Dom. §§ 205-214; 25 Cent. Dig. High. § 360.

By the act of 1875 (18 Stat. 506), congress made provision for compensating riparian owners for all damages caused by the erection of Fox and Wisconsin river improvements, but this act was repealed by the deficiency bill of 1888 (25 Stat. 4). *Held*, that a landowner who failed to take measures for obtaining compensation during the 14 years this act was in force must be considered to have waived all right thereto.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

If a railroad company is entitled to compensation for a bridge, the removal of which is necessitated by a change in the grade of a street, it waives its right thereto by failing to file its claim within the time after publication of notice prescribed by Rev. St. Ohio, § 2315, and cannot thereafter enjoin the improvement on the ground that compensation has not been tendered.—*Wabash R. Co. v. City of Defiance*, 17 S. Ct. 748, 167 U. S. 88, 42 L. Ed. 87.

(B) **TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.**

881. **Property and rights subject of compensation.**

See 18 Cent. Dig. Em. Dom. §§ 215-232.

883. — **Rights in public lands.**

See 18 Cent. Dig. Em. Dom. § 220.

A railroad company seeking to appropriate public lands in the actual possession of a settler, who is entitled to claim a pre-emption

right thereto when the proper time shall come, and who has made improvements thereon, must make compensation therefor.—*Spokane Falls & N. Ry. Co. v. Ziegler*, 17 S. Ct. 723, 167 U. S. 65, 42 L. Ed. 79, affirming judgment 61 F. 392, 9 C. C. A. 548.

Even if the holder of a possessory claim is not entitled, under the act of March 3, 1875 (18 Stat. 482), to the same measure of compensation for land taken by a railroad company as if he had secured his patent from the United States, yet, plaintiff having been in possession, and done all the law required to give him a patent, before defendant seized the land, the grant of a patent after such seizure, but before suit was brought, conferred on him the right to damages as the owner of the fee, and not merely to pay for improvements.—*Id.*

884. — **Water rights.**

See 18 Cent. Dig. Em. Dom. §§ 227-230.

As the rule is firmly settled in Wisconsin that riparian owners own the fee to the middle of the stream, a riparian owner who does not grant to an improvement company of a river the right to build an embankment along the front of his lot, and a dam abutting thereon, was entitled to compensation for the taking of his land for that purpose.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

Compensation to a riparian owner by the revocation made by Act March 3, 1909, § 11, of permits issued by the Secretary of War to place in the rapids of the St. Marys river the dams and dykes necessary to control the current and to use the water power for commercial purposes, was not contemplated by the provisions of such section for compensating the owners of the property taken in the interests of navigation throughout the entire length of the St. Marys Falls ship canal lying between said ship canal and the international boundary line.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

Riparian owners of the shore and bed of the St. Marys river have no right of private property in the water power for which compensation must be made by the United States condemning, for purposes of navigation under Act March 3, 1909, § 11, all land and property of every kind north of St. Marys Falls ship canal lying between such canal and the entire international boundary line.—*Id.*

Any right which a riparian owner on the St. Marys river, having title to the middle thread of the stream, may have to maintain structures for water power purposes, is not a right of private property for which compensation must be made by the United States condemning, in the interests of navigation under Act March 3, 1909, § 11, all property north of the St. Marys Falls ship canal between such canal and the international boundary line.—*Id.*

The owner of legal title of land under the water of Great South Bay, whether derived from the state of New York or from royal patents, has no property right therein entitling him to compensation for the destruction of an oyster plantation thereon by the dredging of a deep-water channel across the bay by the United States, in the interests of navigation.—*Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 33 S. Ct. 679, 229 U. S. 82, 57 L. Ed. 1083, Ann. Cas. 1915A, 232, affirming judgment 91 N. E. 846, 198 N. Y. 287, 34 L. R. A. (N. S.) 1084, 19 Ann. Cas. 694.

85. — Easements and other rights in real property.

See 18 Cent. Dig. Em. Dom. § 221-226.

The owner of a farm, a part of which is permanently flooded by a government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road.—*United States v. Welch*, 30 S. Ct. 527, 217 U. S. 333, 54 L. Ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

86. — Franchises.

See 18 Cent. Dig. Em. Dom. § 221.

Congress could, by Act April 12, 1900, c. 191, 31 Stat. 77, confiscate without compensation, so far as the federal Constitution is concerned, the office of solicitor of the courts of first instance of the capital of Porto Rico, lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military authorities of the United States, and the cession of that island to the United States. Judgment, *Sanchez v. United States* (1907) 42 Ct. Cl. 458, affirmed.—*Sanchez v. United States*, 30 S. Ct. 361, 216 U. S. 167, 54 L. Ed. 432.

89. Nature of injury to property not taken.

See 18 Cent. Dig. Em. Dom. § 233-238.

93. — Direct or remote, contingent, or prospective consequences or losses.

See 18 Cent. Dig. Em. Dom. § 237-238.

Act Pa. April 18, 1846 (Laws Pa. 1846, No. 262, p. 312) § 11, authorized defendant, the Pennsylvania Railroad Company, to build a railroad between Harrisburg and Pittsburg, and to occupy all land necessary for that purpose, and to "take" the necessary materials, on making compensation therefor. Section 17 authorized it to make lateral railroads. Act Pa. March 27, 1848 (Laws Pa. 1848, No. 224, p. 274), provided a mode for ascertaining damages for land or materials "taken" by defendant, and declared (section 5) that it might change the site of any public road, when necessary, on paying the damages. This section was extended by Act Pa. April 12, 1851 (Laws Pa. 1851, No. 297, p. 518), to streets in cities. Act Pa. May 16, 1857, provided for the sale of a railroad owned by the state, authorized any railroad company then incorporated to purchase it, authorized the purchaser to extend it to the Delaware river in Philadelphia, and provided (section 11) that, should any then incorporated company become the purchaser, "they shall possess, hold, and use the same under the provisions of their act of incorporation, and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act," and repealed all inconsistent provisions. Defendant company afterwards purchased the road. Held, that it derived power to build a branch road through the streets of Philadelphia, not from the act of 1846, but from the act of 1857, § 11, and that there was no such contract between it and the state as prevented the state from afterwards, by constitutional provision, subjecting it to liability for consequential damages arising from the construction of such branch road, as well as to liability for property "taken" therefor, though the latter was the extent of its previous liability.—*Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 10 S. Ct. 34, 33 L. Ed. 267.

The damage to lands and crops of riparian owners along the Mississippi river from the increase of water from the prevention of outflow by work of the federal government in its tributaries to deepen the channels is too remote to require compensation.—*Jackson v. United States*,

33 S. Ct. 1011, 230 U. S. 1, 57 L. Ed. 1363, affirming judgment 47 Ct. Cl. 579.

94. Elements of compensation for injuries to property not taken.

See 18 Cent. Dig. Em. Dom. § 234, 239-240; 25 Cent. Dig. High. § 273, 358, 361.

97. — Taking water rights.

See 18 Cent. Dig. Em. Dom. § 250, 251.

A claim for damages by reason of the draining and destruction of a well located about 500 feet from the right of way, and not embraced in the lands taken, is within Act July 15, 1882 (22 Stat. 168) § 1, authorizing the construction of a tunnel to supply the city of Washington with water, and providing that any person who by reason of the construction shall be directly injured in any property right may present a claim for damages to the court of claims.—*United States v. Alexander*, 148 U. S. 186, 13 S. Ct. 529, 37 L. Ed. 415.

The doctrine that the draining and destruction of a well by an adjoining owner of land exercising his right to dig therein is *damnum absque injuria*, where the well is not supplied by a distinct vein of water, has no application where such draining and destruction are caused by the construction of a tunnel for the water supply of a city, under authority of an act of congress, over land in which a right of way only is acquired, and the act provides a remedy for such an injury.—*United States v. Alexander*, 148 U. S. 186, 13 S. Ct. 529, 37 L. Ed. 415; *Same v. Truesdell*, 148 U. S. 186, 13 S. Ct. 532, 37 L. Ed. 419.

98. — Alteration of flow or discharge of water.

See 18 Cent. Dig. Em. Dom. § 252-255.

The turning of a valuable rice plantation into an irreclaimable and valueless bog, as the necessary result of an improvement in navigation undertaken by the United States government, is a taking of the land, within the meaning of the fifth amendment to the federal Constitution.—*United States v. Lynah*, 23 S. Ct. 349, 188 U. S. 445, 47 L. Ed. 539; *Same v. Williams*, 23 S. Ct. 363, 188 U. S. 485, 47 L. Ed. 564, affirming judgment (C. C.) *Williams v. United States*, 104 F. 50.

The injury from overflow and erosion to the lands of a riparian proprietor as the result of the action of the Mississippi river through a series of years is not such a direct consequence of the construction by the federal government farther up the stream of a revetment along the banks, which did not change the course of the river as it then existed, but operated to prevent further changes, as to make such governmental action a taking of private property for public use within the meaning of the fifth amendment to the federal Constitution. Judgment 36 Ct. Cl. 474, affirmed.—*Bedford v. United States*, 24 S. Ct. 238, 192 U. S. 217, 48 L. Ed. 414.

99. — Prevention of access to navigable waters.

See 18 Cent. Dig. Em. Dom. § 290.

The building of a dyke in a navigable river by the federal government, which prevents access to the landing place of a lower riparian owner, is not a taking of property for public use, for which the government must make compensation.—*Gibson v. United States*, 17 S. Ct. 578, 166 U. S. 269, 41 L. Ed. 996.

A pier erected by the United States on land submerged under navigable water, the title to which is owned by the riparian proprietor, when this is done merely for the improvement of navigation, though it permanently destroys his access to the navigable waters, does not entitle him to any compensation under Const. U. S. Amend. 5, prohibiting property to be taken

for public use without just compensation, since the title to the land, whether owned by the riparian owner or by the state, was acquired subject to the rights which the public have in the navigation of such waters. Judgment, 71 N. W. 1091, 113 Mich. 565, 6 Detroit Leg. N. 409, 67 Am. St. Rep. 484, affirmed.—*Scranton v. Wheeler*, 21 S. Ct. 48, 179 U. S. 141, 45 L. Ed. 126.

◀100. — Occupation or use of street or other highway.

See 18 Cent. Dig. Em. Dom. §§ 256-264, 267; 25 Cent. Dig. High. § 278.

Rev. St. Ohio, § 3283, provides that a municipal corporation may agree with a railroad company as to the terms and conditions on which it may lay its tracks on a street, and that, if unable to agree, the right to use any necessary street may be acquired as if it were private property; but further provides that the owner of property lying on or near to the ground so used may recover for injuries sustained by the construction of the road on the street. *Held*, that it authorizes a recovery for damages to land lying on a street intersecting one so taken by a railroad company with the consent of the municipal government, and within 33 feet of, but not touching, the one on which the track is laid.—*Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 S. Ct. 598, 32 L. Ed. 970.

Where congress grants a right of way to a railroad company over streets, the title to which is in the United States, or where a city grants such right of way, when the title is in it, the company takes the grant subject to a liability to abutting property owners for any damages to their property by reason of its building the road, under Const. Ark. 1873, which provides that "private property shall not be taken, appropriated, or damaged for public use without just compensation."—*Hot Springs R. Co. v. Williamson*, 136 U. S. 121, 10 S. Ct. 955, 34 L. Ed. 355, affirming 45 Ark. 429.

◀104. — Effect of smoke, foul odors, noise, or vibration.

See 18 Cent. Dig. Em. Dom. §§ 278-281.

Const. U. S. Amend. 5, does not require that an owner of property, no part of which was actually appropriated, but which lies near a railway tunnel maintained under Acts Feb. 12, 1901, and Feb. 28, 1903, on property acquired by condemnation, be compensated for damage through smoke and dirt and vibration incident to the operation of the railroad.—*Richards v. Washington Terminal Co.*, 34 S. Ct. 654, 233 U. S. 546, 58 L. Ed. 1068, L. R. A. 1915A, 887, reversing judgment 37 App. D. C. 289.

An owner of property in the neighborhood of railroad tracks and a tunnel constructed under authority of Acts Feb. 12, 1901, and Feb. 28, 1903, is entitled under Const. U. S. Amend. 5, to compensation for damage from gas and smoke emitted from locomotives in the tunnel and forced out of it near his property so as to render it less habitable.—*Id.*

◀105. — Obstruction of light or air.

See 18 Cent. Dig. Em. Dom. §§ 282-289.

An owner of real property abutting on a street in New York City, who derived his title from the grantor to the city, in trust for a public highway, of the strip of land constituting the street, and acquired such title when the state courts had decided that one so situated had a contract right to easements of light, air, and access, which could not be taken from him without compensation by the construction of an elevated railroad in the adjoining street, is protected against impairment of his easements of light and air by the substitution by a railroad company, at the subsequent command of the state, as expressed in Laws N. Y. 1892, c. 339,

of an elevated structure in lieu of its surface or partly depressed roadbed, which occupied the street at the time of his purchase, and cut off his access to the street. Judgment, 69 N. Y. S. 910, 60 App. Div. 621, affirmed, and judgment, 66 N. E. 558, 173 N. Y. 549, reversed.—*Muhlker v. New York & H. R. Co.*, 25 S. Ct. 522, 197 U. S. 544, 49 L. Ed. 872; *Birrell v. Same*, 25 S. Ct. 607, 198 U. S. 380, 49 L. Ed. 1096; *Kierns v. Same, Id.*, reversing judgments 66 N. E. 1105, 173 N. Y. 644, and *Keirns v. New York & H. R. Co.*, 66 N. E. 1110, 173 N. Y. 642.

◀106. — Obstruction of access.

See 18 Cent. Dig. Em. Dom. §§ 282-289.

A viaduct constructed by a city, under power conferred by its charter and special ordinances, was so built that access to a coal yard from one street was practically cut off, and the use of another seriously impaired as a way of approach and exit, and the property was often flooded by water from the approaches on each side of it to a neighboring bridge. *Held*, that the lot was "damaged," within the meaning of Const. Ill. 1870, providing that "private property shall not be taken or damaged for public use without just compensation."—*City of Chicago v. Taylor*, 125 U. S. 161, 8 S. Ct. 820, 31 L. Ed. 638.

Just compensation to the owner of a farm, a part of which is taken by the United States by permanently flooding it in improving navigation, as an incident to which a public highway crossing the flooded land is also flooded, demands an award of the damages to that part of the farm not taken by reason of the destruction of the easement of access to the turnpike by way of the highway thus destroyed.—*United States v. Grizzard*, 31 S. Ct. 162, 219 U. S. 180, 55 L. Ed. 165, 31 L. R. A. (N. S.) 1135.

◀108. — Interference with franchise.

See 18 Cent. Dig. Em. Dom. §§ 292, 293.

The question as to what is "just compensation" for private property taken for public use is a judicial, and not a legislative, question; and the provision in the act authorizing the condemnation of a lock and dam belonging to the Monongahela Navigation Company (25 Stat. 411), "that in estimating the sum to be paid by the United States the franchise of said corporation to take tolls shall not be considered or estimated," does not preclude the court from giving compensation for such franchise.—*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463.

◀114. Temporary use.

See 18 Cent. Dig. Em. Dom. §§ 301, 302.

◀116. — Use during construction of works.

See 18 Cent. Dig. Em. Dom. §§ 301, 302.

The obstruction of the streets during the building of the road, whereby access to such property is impaired or suspended, is not an injury to the property, within the statute, from which a cause of action necessarily arises, as the use of the streets is incidental to the improvement, though, if the obstruction is unreasonably prolonged, the special damages resulting therefrom may be recovered.—*Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 S. Ct. 598, 32 L. Ed. 970.

◀121. Corporations and persons liable for compensation.

See 18 Cent. Dig. Em. Dom. §§ 320-324; 25 Cent. Dig. High. § 352.

Act Wis. June 29, 1848, providing for the improvement of the Fox and Wisconsin rivers,

and for connecting the same by a canal, declared that any water power created by any dams built in the course of such improvement should belong to the state. The state subsequently granted all the property rights and privileges to an improvement company. The property and franchises of the improvement company having been transferred to a canal company by the foreclosure of a mortgage thereon, the canal company subsequently conveyed the same to the United States under authority of an act of congress passed in 1870, reserving, however, the right to the surplus water power created by the dam, together with such rights and privileges in the land as were necessary to the enjoyment thereof. *Held* that, notwithstanding this reservation, the duty to make compensation to the landowner followed the public use, and the United States became liable therefor.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

(C) MEASURE AND AMOUNT.

122. Necessity of just or full compensation or indemnity.

See 18 Cent. Dig. Em. Dom. §§ 325, 325½.

An award of only nominal damages in proceedings to acquire by eminent domain the fee to lands under the waters of a navigable stream does not take property for public use without compensation, and hence without due process of law, where substantially all the land abutting upon the stream on either side had already been conveyed away by the owner of the bed, and the proceedings were had under a statute providing adequate machinery for the ascertainment of compensation upon notice and hearing, and the record discloses no ruling of law preventing just compensation to the owner for the property taken.—(1911) *Appleby v. City of Buffalo*, 31 S. Ct. 699, 221 U. S. 524, 55 L. Ed. 838, affirming judgment (1907) *In re City of Buffalo*, 81 N. E. 954, 189 N. Y. 163, which reverses judgment (1906) 101 N. Y. S. 966.

124. Time with reference to which compensation to be made.

See 18 Cent. Dig. Em. Dom. §§ 332-344.

In proceedings to condemn land for park purposes, it is not error to exclude evidence as to value showing the prices actually paid for similar property near or adjoining the park, where the sales took place after the boundaries had been ascertained and laid out.—*Kerr v. South Park Com'rs*, 117 U. S. 379, 6 S. Ct. 801, 29 L. Ed. 924; *Id.*, 117 U. S. 388, 6 S. Ct. 805, 29 L. Ed. 927.

Under the provision of Act March 2, 1893, c. 197, § 11 (27 Stat. 532), as to highways in that part of the District of Columbia lying outside of cities, that when the use of a part only of any parcel or tract of land is condemned, the jury, in assessing damages therefor, shall take into consideration the benefit that "the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the remainder of the same," the benefits as well as the damages are to be assessed as of the date of the appropriation, and the damages thus assessed constitute the entire compensation.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270; *Ross v. Bauman*, *Id.*; *Abbot v. Ross*, *Id.*; *Ross v. Armes*, *Id.*

The value of property taken by eminent domain should be fixed as of the date of the proceedings and with reference to the loss the owner sustains in the condition of the property at the time.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

125. Nature and extent of right taken.

See 18 Cent. Dig. Em. Dom. §§ 345-351.

126. — In general.

See 18 Cent. Dig. Em. Dom. §§ 345-347.

The award to riparian owners of the bed and shore of the St. Marys river for the upland taken by the United States in condemnation proceedings under Act March 3, 1909, § 11, should not include the additional value of the land for use as factory sites in connection with the development of water power by the owners, where they had no vested property rights in the water power.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

128. — Railroad rights of way.

See 18 Cent. Dig. Em. Dom. §§ 349-351.

A city extending a street across a railroad is not bound to make compensation for the probable expense to the railroad company of constructing gates, planking the crossing, and maintaining watchmen, as required by public regulations for the safety of lives and property.—*Chicago, B. & Q. R. Co. v. City of Chicago*, 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

The measure of compensation upon the extension of a street across a railroad on land of which the railroad company owns the fee is the decrease in the value of the use for railroad purposes of the land taken, but the effect on the land's value for other purposes, and the possible depreciation in the value of the railroad and its terminal facilities, need not be considered.—*Id.*

129. Taking entire tract or piece of property.

See 18 Cent. Dig. Em. Dom. §§ 352-351½.

130. — Measure of compensation in general.

See 18 Cent. Dig. Em. Dom. §§ 352, 354, 355.

An instruction to fix the value of the lands to be taken at their market price for residence, agriculture, or other purposes, but excluding speculative values based upon the anticipated effect of the condemnation proceedings, was a proper one.—*Kerr v. South Park Com'rs*, 117 U. S. 379, 6 S. Ct. 801, 29 L. Ed. 924; *Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

133. — Improvements and fixtures.

See 18 Cent. Dig. Em. Dom. §§ 358-351½.

In proceedings to condemn land for school purposes, it appeared that the school district purchased the "squatter" title of the parties in possession, paying the full value of the land, relying on the erroneous advice of reputable counsel that this title was superior to that of the parties claiming under a patent, that it took possession and erected school buildings thereon, though notified by the parties claiming under the patent that it would do so at its peril; that the premises were necessary for school purposes, and were taken for that public use. *Held*, that just compensation did not include compensation for the improvements.—*Searl v. School Dist. No. 2 of Lake County*, 133 U. S. 553, 10 S. Ct. 374, 33 L. Ed. 740.

134. — Value for special use.

See 18 Cent. Dig. Em. Dom. § 356.

The availability for lock and canal purposes of the land between the canals in use and the bank of St. Marys river, taken by the United States in condemnation proceedings under Act March 3, 1909, § 11, is a proper element of value in fixing the compensation.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

The so-called strategic value of an island lying in the St. Marys river, growing out of the necessity of including it as a tailrace site, in

any efficient plan of water development by any owner, is not an element of value in awarding compensation for property condemned by the United States under Act March 3, 1909, § 11, in the interests of navigation.—*Id.*

Compensation to an owner of one of many parcels of land condemned for a reservoir for a water supply should not include part of an increase in value for a use as a reservoir due to its union with other parcels not practicable except by condemnation proceedings.—*City of New York v. Sage*, 36 S. Ct. 25, 239 U. S. 57, 60 L. Ed. 143, reversing decree in *re Bense*, 206 F. 369, 124 C. C. A. 251.

⚡135. Taking part of tract or property.

See 18 Cent. Dig. Em. Dom. §§ 363-370.

⚡138. — Injuries to part not taken.

See 18 Cent. Dig. Em. Dom. § 370.

Just compensation to the owner of three absolutely separate and independent, though adjoining, farms, one of which only was taken in condemnation proceedings, does not demand an award of the damage to the two remaining farms, arising from the proposed use of the condemned property for military purposes. *Judgment Sharpe v. United States*, 112 F. 893, 50 C. C. A. 597, 57 L. R. A. 932, affirmed.—*Sharp v. United States*, 24 S. Ct. 114, 191 U. S. 341, 48 L. Ed. 211.

⚡139. Injuries to property not taken.

See 18 Cent. Dig. Em. Dom. §§ 371-377.

⚡141. — Depreciation of value.

See 18 Cent. Dig. Em. Dom. §§ 372-376.

In a suit for damage to a lot used as a coal yard, by the erection through an adjoining street of a viaduct, whereby the lot was often flooded, and access to it from the street seriously impaired, the true measure of damages is the diminution, if any, in the selling or renting value of the property; but no recovery can be had for the flooding, unless it affected that value, nor for the value of the improvements on the lot, for its use as a coal yard, unless the lot was rendered useless for such purposes.—*City of Chicago v. Taylor*, 125 U. S. 161, 8 S. Ct. 820, 31 L. Ed. 638.

⚡144. Deduction or set-off of benefits.

See 18 Cent. Dig. Em. Dom. §§ 378-393.

⚡145. — In general.

See 18 Cent. Dig. Em. Dom. §§ 378-389.

Congress has power, in the exercise of the right of eminent domain, to direct, as it has done by Act March 2, 1893, c. 197 (27 Stat. 532), that when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270; *Ross v. Bauman*, *Id.*; *Abbot v. Ross*, *Id.*; *Ross v. Armes*, *Id.*

⚡148. Interest as element, and damages for delay in payment of compensation.

See 18 Cent. Dig. Em. Dom. §§ 397-399½.

The owners of land taken for a park, who received the rents and profits therefrom during the time occupied in fixing the amount of compensation, should not be allowed interest on the valuation of their land from the date of filing the map, for the inconveniences to which

they were subject during the time so occupied are presumed to have been considered and allowed for in fixing the amount of the compensation.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

Under the constitution, the payment of the damages to the owner of the land, and the vesting of title in the United States, are properly required to be contemporaneous, and the owner is not entitled to interest pending the proceedings.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270; *Ross v. Bauman*, *Id.*; *Abbot v. Ross*, *Id.*; *Ross v. Armes*, *Id.*

(D) PERSONS ENTITLED AND PAYMENT.

⚡151. Persons entitled.

See 18 Cent. Dig. Em. Dom. §§ 403-426; 25 Cent. Dig. High. § 360.

⚡153. — Vendor or purchaser.

See 18 Cent. Dig. Em. Dom. §§ 407-416.

It is well settled that after a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and the right to payment from the railroad company if it entered under an agreement to pay, or to damages if it entered without authority, belongs to the owner at the time possession was taken.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C.C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

See Removal of Causes, ⚡35.

Amount in controversy as affecting appellate jurisdiction, see Appeal and Error, ⚡61.

Appealability of final judgments, see Appeal and Error, ⚡77, 80, 84.

Conclusiveness of award of damages for street extension in District of Columbia, see District of Columbia, ⚡16.

Conformity of federal courts to state practice, see Courts, ⚡334.

Due process of law, see Constitutional Law, ⚡281.

Equal protection of laws, see Constitutional Law, ⚡228.

Review of decisions, see Appeal and Error, ⚡201.

⚡167. Statutory provisions and remedies.

See 18 Cent. Dig. Em. Dom. §§ 451-456.

The direction in Act Aug. 1, 1888, c. 728, that, in a proceeding in the United States court to condemn land for the use of the United States, the practice and proceedings shall conform as near as may be to the practice and proceedings existing in the state courts, must give way when to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of congress.—*Chappell v. United States*, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

⚡171. Defenses and objections.

See 18 Cent. Dig. Em. Dom. §§ 468, 469.

The appropriation by eminent domain of land for the approaches and terminal facilities necessary to the use of a bridge erected, under the authority of Act Jan. 26, 1901, c. 181, 31 Stat. 741, over a navigable stream, is not forbidden by that act because the plans submitted to the Secretary of War, and specifically approved by him, although fully subserving the purpose of showing the extent to which naviga-

tion would be affected, do not include such terminal and connecting facilities, and cannot, under the act, be altered without his consent. Judgment, Southern Illinois & M. Bridge Co. v. Stone, 92 S. W. 475, 194 Mo. 175, affirmed.—Stone v. Southern Illinois & M. Bridge Co., 27 S. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

172. Jurisdiction.

See 18 Cent. Dig. Em. Dom. §§ 470-473; 25 Cent. Dig. High. § 386.

Neither jurisdiction of state probate court over condemnation proceedings or establishment of a water power, nor constitutionality of laws authorizing proceedings, held affected because the rights to be condemned are below the contemplated dam, nor because before condemnation petitioner must have obtained at least an acre on either side of the stream for a dam site.—Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 36 S. Ct. 234, 240 U. S. 30, 60 L. Ed. 507, affirming judgment Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co., 65 So. 287, 186 Ala. 622.

175. Parties.

See 18 Cent. Dig. Em. Dom. §§ 477-487; 25 Cent. Dig. High. § 386.

178. Intervention or substitution.

See 18 Cent. Dig. Em. Dom. §§ 479, 484-487.

A proceeding to condemn land under the federal statute having been commenced in the name of the secretary of the treasury, it was proper to amend by making the United States the formal petitioner.—Chappell v. United States, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

179. Process or notice.

See 18 Cent. Dig. Em. Dom. §§ 488-498; 25 Cent. Dig. High. § 386.

181. Form, requisites, and sufficiency.

See 18 Cent. Dig. Em. Dom. §§ 488, 490-492; 10 Cent. Dig. Const. Law, § 880.

A published notice of the proposed taking of land for a railroad, and of a meeting of commissioners on a day named to lay off the route and assess damages, directed "to all persons owning land on the line of the railroad, as the same is now or may be located through section 23, township 11, range 25, in the county of Wyandotte and state of Kansas," is a sufficient notice to the owners of a quarter section of land in that section that some portion of their land may be taken for the railroad.—Huling v. Kaw Val. Ry. & Imp. Co., 130 U. S. 559, 9 S. Ct. 608, 32 L. Ed. 1045.

182. Service.

See 18 Cent. Dig. Em. Dom. §§ 493-496.

One publication of notice of condemnation in each of three daily papers, not less than 20 days before date for appearance, satisfies Code D. C. § 491c.—Newman v. Lynchburg Inv. Corp., 35 S. Ct. 477, 236 U. S. 692, 59 L. Ed. 792, affirming judgment Lynchburg Inv. Corp. v. Rudolph, 40 App. D. C. 129.

184. Defects, objections, and amendment.

See 18 Cent. Dig. Em. Dom. § 498.

In proceedings by the United States, an objection that the notice published by the attorney general was defective is waived by instituting proceedings in the court of claims to obtain pay for the land taken.—Great Falls Mfg. Co. v. Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. Ed. 527, affirming decree (C. C.) 25 F. 521.

186. Maps, plans, or surveys.

See 18 Cent. Dig. Em. Dom. §§ 500-504.

In proceedings by the United States, objections that the survey and map made by the secretary of war were not sufficiently accurate are waived by instituting proceedings in the court of claims to obtain pay for the land taken.—Great Falls Mfg. Co. v. Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. Ed. 527, affirming decree (C. C.) 25 F. 521.

The third section of the act of 1890, for establishing a park in the District of Columbia, provided that the park commissioners should cause to be made a map of the park, showing the location, quality, and character of each parcel of land to be taken, which map should be filed in the public records of the District, and that from and after the date of filing said map the lands embraced in the park should be held as condemned for public use, and the title thereof vested in the United States, subject to the payment of just compensation. The commissioners made and filed the map, but it was found that the compensation for the lands included therein would exceed the authorized expenditure, and thereupon they designated a smaller area upon the map, as to which condemnation proceedings were had. Held, that such proceedings for the reduced area were valid, since the map did not bind the commissioners to take all the parts included in it.—Shoemaker v. United States, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

189. Pleading.

See 18 Cent. Dig. Em. Dom. §§ 503-534.

191. Petition or complaint.

See 18 Cent. Dig. Em. Dom. §§ 503-513.

The provision of the Maryland statute that a petition in the state court to condemn land for the use of the United States shall be verified by affidavit of an agent of the United States is inapplicable to a petition presented to a United States court by the officer designated in the act of congress.—Chappell v. United States, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

206. Mode of assessment of compensation.

See 18 Cent. Dig. Em. Dom. §§ 545-550.

209. Trial by jury.

See 18 Cent. Dig. Em. Dom. § 548.

By the constitution of the United States, the estimate of just compensation for property taken for the public use under the right of eminent domain is not required to be made by jury, but may be intrusted by congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.—Bauman v. Ross, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

211. Trial by court or reference.

See 18 Cent. Dig. Em. Dom. § 550.

The provision of the Maryland statute relating to the condemnation of land in that state for purposes of the United States government, which requires a sheriff's jury, appointed to assess damages, to reduce to writing and to return to the clerk of the court the testimony taken before them, has no application to a trial before the court itself, under the federal statute relating to condemnation of lands by the United States government for purposes of the government.—Chappell v. United States, 160 U. S. 499, 16 S. Ct. 397, 40 L. Ed. 510.

225. Assessment by commissioners, appraisers, or viewers.

See 18 Cent. Dig. Em. Dom. §§ 530-539, 653-658, 663, 669, 671, 673, 674, 687; 25 Cent. Dig. High. §§ 112, 367-370, 372; 26 Cent. Dig. Mun. Corp. § 941.

229. — Oath.

See 18 Cent. Dig. Em. Dom. § 533.

The court refused to administer to the appraisers appointed under Act Sept. 27, 1890 (26 Stat. 492), authorizing the establishment of a public park in the District of Columbia, an oath to fix the value of the lands to be taken upon the whole evidence, guided by the rules of law furnished by the court, but instead administered an oath to faithfully and impartially appraise the value to the best of their skill and judgment. The statute did not prescribe any form for the oath. *Held*, that this was a rightful exercise of the court's discretion, and that the oath actually administered did not leave the appraisers at liberty to make their appraisement at their discretion, without regard to the evidence.—*Shoemaker v. United States*, 147 U. S. 282, 18 S. Ct. 361, 37 L. Ed. 170.

231. — Conduct of proceedings in general.

See 18 Cent. Dig. Em. Dom. § 535-539.

An instruction by the court to the appraisers, directing them to rely, not merely upon the evidence brought before them, but also upon their own powers of judgment and observation, was proper.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

232. — View.

See 18 Cent. Dig. Em. Dom. §§ 590, 591.

Appraisers in condemnation proceedings are not bound by the opinions of experts, or by the apparent weight of evidence, but may give their own conclusions derived from their observations on the view.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

234. — Report and findings or award.

See 18 Cent. Dig. Em. Dom. §§ 592-600, 603; 25 Cent. Dig. High. §§ 112, 357, 363, 371.

Where the report of appraisers in condemnation proceedings under the right of eminent domain contains no gross error in valuation, showing prejudice or corruption, a court will not correct such report, especially where the evidence is conflicting.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

238. — Review by court in general.

See 18 Cent. Dig. Em. Dom. §§ 614, 619, 653-660, 666, 668, 669, 671, 673, 674, 687; 25 Cent. Dig. High. §§ 370, 373; 34 Cent. Dig. Mun. Corp. § 381.

The 60 days allowed by the Nebraska statute in which to appeal from the award of commissioners in the assessment of damages for land condemned for use of a railroad company are to be computed from the time the board of commissioners file their report in the county court.—*Clinton v. Missouri Pac. Ry. Co.*, 122 U. S. 469, 7 S. Ct. 1268, 30 L. Ed. 1214.

On appeal to a district court in Nebraska from an award by commissioners of damages for land condemned for railroad purposes, where the transcript is imperfect, but can be amended by writ of certiorari, the appeal will be held valid.—*Id.*

239. — Trial by jury on appeal.

See 18 Cent. Dig. Em. Dom. §§ 615-620, 675, 676, 678, 680.

The jury on a trial de novo upon an appeal from an award of commissioners in condemnation proceedings are properly instructed that they must be satisfied as to the value and damage by the testimony produced before them, without reference to any testimony produced before the commissioners, and that they must not be influenced by the commissioners' report.

Judgment Sharpe v. United States, 112 F. 893, 50 C. C. A. 597, 57 L. R. A. 932, affirmed.—*Sharp v. United States*, 24 S. Ct. 114, 191 U. S. 341, 48 L. Ed. 211.

242. Collateral attack.

See 18 Cent. Dig. Em. Dom. § 626; 30 Cent. Dig. Judgm. § 214.

The objection that a commissioner appointed in condemnation proceedings was not a freeholder, as required by the statute, cannot be raised collaterally, and after the proceedings have been confirmed, and the compensation awarded paid.—*Huling v. Kaw Val. Ry. & Imp. Co.*, 130 U. S. 559, 9 S. Ct. 603, 32 L. Ed. 1045.

245. Right to compensation awarded.

See 18 Cent. Dig. Em. Dom. § 637.

Under the bill of rights (Const. 1870, art. 2, § 13), and the eminent domain act passed in pursuance thereof (Rev. St. 1874, c. 47, p. 475), when the issue in condemnation proceedings is simply as to the damages resulting to a particular tract claimed by one whose ownership is in no way challenged, and who offers no evidence as to the nature or extent of his interest, the judgment should secure to him personally the entire damages awarded, and an order directing the same to be paid to the county treasurer "for the benefit of the owners and parties interested" in the lands is erroneous.—*Convers v. Atchison, T. & S. F. R. Co.*, 142 U. S. 671, 12 S. Ct. 351, 35 L. Ed. 1153.

IV. REMEDIES OF OWNERS OF PROPERTY.

Jurisdiction of federal courts, see Courts, 282(1).

266. Nature and grounds in general.

See 18 Cent. Dig. Em. Dom. §§ 694-696, 702, 703, 705.

Act Cong. approved July 15, 1882, which provides that any person injured by the construction of certain waterworks may apply to the court of claims for indemnity, affords a method of relief to those whose lands have been taken without being properly condemned.—*Great Falls Mfg. Co. v. Garland*, 124 U. S. 581, 8 S. Ct. 631, 31 L. Ed. 527, affirming decree (C. C.) 25 F. 521.

271. Recovery of damages.

See 18 Cent. Dig. Em. Dom. §§ 725-736, 741.

A bill in equity will lie to recover damages by way of compensation under Act Cong. July 4, 1884, granting a right of way to the Southern Kansas Railroad Company through the Indian Territory.—*Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295, reversing (D. C.) 33 F. 900.

272. Injunction.

See 18 Cent. Dig. Em. Dom. §§ 743-749, 752-774.

274. — Restraining taking of or injury to property.

See 18 Cent. Dig. Em. Dom. §§ 753, 755-758.

Equity will not—at least, in the absence of any allegation of financial irresponsibility—enjoin until the damages are paid the private erection of a dam across a navigable stream, at the instance of one who claims that his lands will be flooded as a result of its construction unless prevented by raising the dikes around his lands, and that his access thereto will be interrupted and his rights of navigation impaired, where the legislation authorizing the construction of the dam to subserve the drainage of lowlands makes provisions for compensation to any landowner claiming that his land is damaged by reason of its erection. *Judgment (C. C.) Manigault v. S. M. Ward & Co.*, 123 F. 707, af-

firmed.—*Manigault v. Springs*, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

278. Defenses.

See 18 Cent. Dig. Em. Dom. §§ 701, 775-781.

279. — In general.

See 18 Cent. Dig. Em. Dom. §§ 775, 776, 781.

In Missouri, where the statutes provide for the assessment of compensation for a taking of property for public use, but not for any assessment when property is merely damaged and not taken, an injunction will not issue on the complaint of an abutting owner to restrain the construction and operation of a railroad in a public street, the fee whereof is in the public, when access to the property will not be seriously obstructed, nor the value thereof materially decreased; and in such case complainant will be remitted to his remedy at law.—*D. M. Osborne & Co. v. Missouri Pac. Ry. Co.*, 147 U. S. 248, 13 S. Ct. 299, 37 L. Ed. 155.

280. — Consent or acquiescence of owner.

See 18 Cent. Dig. Em. Dom. § 776.

If one asserting title to land, with knowledge of the facts, permits a railway company, without objection to take possession of such land, construct its track, and operate its road, he or his grantee may not afterwards bring an action of ejectment against the company.—*Northern Pac. R. Co. v. Smith*, 18 S. Ct. 794, 171 U. S. 260, 43 L. Ed. 157, reversing judgment 69 F. 579, 16 C. C. A. 336.

A railroad company, which enters upon the use and occupation of real property under a lease, with a view to its purchase when that can properly be effected, and constructs a portion of its line thereon, is entitled to an injunction restraining its lessors for a reasonable time from proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose. *Decree, Baltimore & O. Ry. Co. v. Winslow*, 18 App. D. C. 438, reversed.—*Winslow v. Baltimore & O. R. Co.*, 23 S. Ct. 443, 188 U. S. 646, 47 L. Ed. 635.

281. — Payment of compensation or other satisfaction.

See 18 Cent. Dig. Em. Dom. §§ 776, 780.

A condemnation proceeding becomes *functus officio* where the owners of the condemned property, who originally insisted that the petition could not be maintained, have accepted and received the sum awarded as the value of so much of their lands as was actually taken, and such owners therefor cannot thereafter demand the condemnation of the remaining land, although they have neither asked for nor received the sum awarded as the amount of the damage to the portion of their lands not actually taken. *Judgment (1906) 28 App. D. C. 126*, affirmed.—*Winslow v. Baltimore & O. R. Co.*, 28 S. Ct. 190, 208 U. S. 59, 52 L. Ed. 388.

By accepting the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are estopped to insist that the petition was not maintainable.—*Id.*

284. Persons entitled to sue.

See 18 Cent. Dig. Em. Dom. §§ 789, 790.

A vendee of land on which a railroad entitled to enter, on condition of compensation, constructed its road without objection from the then owner to its failure to make compensation, takes the land subject to the burden of the right of way, and the right to payment belongs to the owner at the time the company entered.—(1912) *Kindred v. Union Pac. R. Co.*, 32 S. Ct. 780, 225 U. S. 582, 56 L. Ed. 1216, affirming decree (1909) 168 F. 648, 94 C. C. A. 112.

293. Pleading.

See 18 Cent. Dig. Em. Dom. §§ 797-802.

The prayer for the removal of a dyke constructed by a state college under state authority on state land may be stricken from the bill without affecting the jurisdiction of the court to hear and determine the question whether the college, by building such dyke for its own proprietary and corporate purposes, is liable to an opposite riparian owner for damaging or taking his land without due process of law.—(1911) *Hopkins v. Clemson Agricultural College of South Carolina*, 31 S. Ct. 654, 221 U. S. 636, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, reversing judgment (1907) 57 S. E. 551, 77 S. C. 12.

315. Appeal and error.

See 18 Cent. Dig. Em. Dom. §§ 829-833.

Though damages to a lot owner for the permanent injury to the value of the lot by the construction of a railroad in a street and those sustained by the obstruction of the street constitute distinct causes of action, if the same are blended in the petition, an objection for that reason, not made in the trial court, will be waived.—*Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 S. Ct. 598, 32 L. Ed. 970.

Where, on trial of an action for damages caused to a lot owner by the construction of a railroad in the street, the plaintiff is treated and referred to as the owner of the property alleged to have been damaged, and the right to recover is denied on other grounds and made the issue of the case, on which the court erroneously rules against plaintiff, the judgment for defendant will not be affirmed for the failure of plaintiff to introduce evidence of ownership, which was formally denied by defendant's answer.—*Id.*

V. TITLE OR RIGHTS ACQUIRED.

Offense on military reservation, evidence, see Criminal Law, 429, 564.

320. Time of passing of title or right.

See 18 Cent. Dig. Em. Dom. §§ 861, 862.

Section 18 of the act of March 2, 1893, c. 197, § 11, as to establishment of highways in the District of Columbia, which provides that if the court enters judgment of condemnation in any case, and appropriation for the payment of the award of damages is not made by congress after being six months in session, "the proceedings shall be void and the land shall revert to the owners," means that the title shall be held to have remained in the owners as if no proceedings for condemnation had been had, and is within the constitutional authority of the legislature.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

EMPLOYERS' LIABILITY ACTS.

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- Appeal and Error, 216, 292, 719, 854, 1144.
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EQUITY.

Scope-Note.

[INCLUDES administration of equity as a distinct system of jurisprudence, either by separate courts of chancery or by other courts exercising chancery powers; nature, grounds, limits, and subjects of jurisdiction in equity in general; principles and maxims of equity jurisprudence; and procedure peculiar to suits in equity.

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 Usury, 95.

Review on appeal.

See Appeal and Error, 76, 78, 79, 87, 847, 1009, 1054, 1065, 1094, 1178.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.**(A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION IN GENERAL.**

Grounds for injunction, see Injunction, 11-24.

3. Grounds of jurisdiction in general.

See 19 Cent. Dig. Equity, §§ 7-12.

To give a court of equity jurisdiction of a cause, the nature of the relief asked must be equitable, even when the suit is based on an equitable title.—*Fussell v. Gregg*, 113 U. S. 550, 5 S. Ct. 631, 28 L. Ed. 993; *Same v. Hughes*, 113 U. S. 565, 5 S. Ct. 639, 28 L. Ed. 998.

The fact that an action at law is submitted on an agreed statement of facts does not enable a court, whose jurisdiction in equity and at law is distinct, to grant equitable relief therein.—*Willard v. Wood*, 135 U. S. 309, 10 S. Ct. 831, 34 L. Ed. 210, affirming 4 Mackey, 538.

Equitable jurisdiction must be determined by the conditions existing at the time the bill is filed, and not by conditions which come into existence, after the commencement of the suit. *Judgment* 16 App. D. C. 23, reversed.—*Busch v. Jones*, 22 S. Ct. 511, 184 U. S. 598, 46 L. Ed. 707.

Mere complication of facts alone and difficulty of proof are not a basis for equity jurisdiction.—*Curriden v. Middleton*, 34 S. Ct. 458, 232 U. S. 633, 58 L. Ed. 765, affirming decree 37 App. D. C. 568.

10. Fraud.

See 19 Cent. Dig. Equity, §§ 21-24.

12. — Actual fraud.

See 19 Cent. Dig. Equity, § 22.

A bill in equity alleged that defendant T., as president of defendant corporation, to induce complainant to purchase stock therein, sent her a letter on which she had a right to rely, and did rely, and which contained fraudulent statements which induced complainant to purchase stock; that the purchase price thereof went into the company's treasury, was expended by it, and was justly due to complainant from the company and T.; and that the company was insolvent,—and prayed an accounting of the company's assets, their application to the debts due complainant and others, and the appointment of a receiver, and required answers to interrogatories as to the debts and assets of the company. *Held*, that the bill stated a case for equitable relief, and a decree stating that defendant T. represented to plaintiff that the company was in a flourishing condition, when in fact it was insolvent, supported the allegations as to fraud.—*Tyler v. Savage*, 143 U. S. 79, 12 S. Ct. 340, 36 L. Ed. 82.

Where an attorney enters an unauthorized and fraudulent appearance for trustees in an action against them and their grantor to subject the interest of the grantor to claims of creditors, consents to a decree that the land be sold devoted of their interest, and afterwards converts the proceeds of sale, a court of equity is the proper tribunal to afford the trustees effectual relief.—*Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52.

13. — Inequitable or unconscionable transactions.

See 19 Cent. Dig. Equity, § 26.

The owner of some 65 patents for improvements on bicycles and tricycles granted a license to another to manufacture and sell under 15 of them, in consideration whereof the licensee expressly admitted the validity of all the licensor's patents, covenanted not to manufacture or sell machines covered by any of them after the license expired or was in any way terminated, even after the patents themselves expired, and agreed that on violation of such covenants the licensor might treat him as liable for the breach, or as a mere infringer, and that, in either case, upon suit brought, an injunction might issue against him without notice. Held, that these stipulations were oppressive and unconscionable, and, it appearing that the licensee was probably unaware of their legal import, equity will not lend its aid to enforce them.—*Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 12 S. Ct. 632, 36 L. Ed. 414; *Same v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 238, 12 S. Ct. 637, 36 L. Ed. 419, affirming decree (C. C.) 34 F. 877.

20. Liens.

See 19 Cent. Dig. Equity, § 50.

Defendant's intestate agreed that if plaintiff would pay a certain sum towards the building of a house on a lot belonging to the former, and superintend the erection of the house, she would convey to him a half interest in the house and lot. The intestate thereafter incumbered the property by a deed of trust to another person. Held, that plaintiff, having paid the agreed sum, and superintended the erection of the house, could treat the property as subject to a lien in his favor, and by bill in equity have it sold to satisfy his claim for half its original value.—*Townsend v. Vanderwerker*, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.

21. Fiduciary rights and obligations.

See 19 Cent. Dig. Equity, §§ 48, 49.

Such a fiduciary relation existed between the testator and one who had, through a series of years, invested and reinvested the moneys of the former, and who was directed in the will to distribute the proceeds of the testator's property equally between certain minor legatees, as makes a court of equity the proper forum in which to seek relief for the alleged wrongful transfer of such property to the father of the legatees, who devoted it to his own use and benefit. Decree 24 App. D. C. 573, reversed.—*Darlington v. Turner*, 26 S. Ct. 630, 202 U. S. 195, 50 L. Ed. 992.

22. Administration of estates.

See 19 Cent. Dig. Equity, §§ 51-62.

A court of equity has no jurisdiction to set aside administration proceedings in a court having probate jurisdiction, on the ground of fraud.—*Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 L. Ed. 1054.

26. Torts.

See 19 Cent. Dig. Equity, §§ 86, 87.

Relief cannot be had in equity for the wrongful cutting, carrying away, and conversion of timber from the public domain because one of the defendants is the executrix of the person alleged to have been the principal wrongdoer, whose estate is largely solvent. Decree 133 F.

274, 66 C. C. A. 652, affirmed.—*United States v. Bitter Root Development Co.*, 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

35. Ancillary and incidental jurisdiction.

See 19 Cent. Dig. Equity, §§ 99-102.

An action at law was brought to recover damages caused by refusal to accept delivery of coke according to contract. The defendants filed a bill in equity in the court in which the action at law was pending to recover damages owing to the coke not being equal to sample, nor fit for the purposes intended, and praying that the assets of the plaintiffs at law, who had become insolvent, might be applied in satisfaction, and that the action at law might be stayed. The plaintiffs demurred to the jurisdiction of the court. Held, that the suit in equity was properly entertained as ancillary to the jurisdiction already acquired by the court in the action at law.—*Dewey v. West Fairmont Gas Coal Co.*, 123 U. S. 329, 8 S. Ct. 148, 31 L. Ed. 179.

A federal court has jurisdiction, without regard to the citizenship of the parties, of a supplemental and ancillary bill to carry into effect its own previous decree removing a cloud from title, and declaring the title to be vested in complainant's predecessor in interest and estate; and, although defendant is in possession, the suit will not be dismissed on the ground of an adequate remedy at law.—*Root v. Woolworth*, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123, affirming decree (C. C.) *Woolworth v. Root*, 40 F. 723.

36. Exercise of jurisdiction beyond territorial limits.

See 19 Cent. Dig. Equity, §§ 94, 96.

Action to prevent Secretary of War from causing threatened criminal proceedings to be brought against riparian owner for occupation of land outside the prescribed harbor limits will lie in a court of equity in the District of Columbia, though the land is in a navigable river in Pennsylvania.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree (1909) *Same v. Dickinson*, 33 App. D. C. 338.

37. Retention of jurisdiction acquired.

See 19 Cent. Dig. Equity, §§ 103-112.

38. — In general.

See 19 Cent. Dig. Equity, § 103; 16 Cent. Dig. Discov. § 33.

A cause properly brought in equity will be retained for all purposes.—*McGowan v. Parrish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parrish v. McGowan*, 39 App. D. C. 184.

39. — Complete relief.

See 19 Cent. Dig. Equity, §§ 104-114.

Where the record of a patent for land in Illinois, and of a deed therefor by the patentee, has been destroyed, and the deed has never been re-recorded, a subsequent purchaser of the land may proceed in equity to have the record established under the "Burnt Records Act" (Rev. St. Ill. c. 116; 2 Starr & C. Ann. St. § 1993); and equity, having acquired jurisdiction for that purpose, will retain the case, and grant full relief, though the right of possession—a purely legal question—is involved.—*Gormley v. Clark*, 134 U. S. 338, 10 S. Ct. 554, 33 L. Ed. 909.

Equity having acquired jurisdiction for the purpose of canceling the invalid agreements between the U. P. R. Co. and the W. U. Tel. Co., giving the latter control of the former's telegraphic business, in violation of the former's charter, the court, in order to avoid a multiplicity of suits, may settle all matters in dispute between the United States, the railway company, and the telegraph company, which relate to the

subject of telegraphic communication.—*United States v. Union Pac. Ry. Co.*, 160 U. S. 1, 16 S. Ct. 190, 40 L. Ed. 319, reversing decree *Union Pac. R. Co. v. United States*, 59 F. 813, 8 C. C. A. 282, 19 U. S. App. 531.

(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

Review of decisions, see Appeal and Error, ¶ 184.

Remedy at law as bar to particular actions or proceedings.

See—

Cancellation of Instruments, ¶ 9-15.

Specific Performance, ¶ 5.

Trusts, ¶ 359.

¶ 43. Existence of remedy at law and effect in general.

See 19 Cent. Dig. Equity, §§ 121-140, 164-166.

Certain holders of bonds, secured by a mortgage, filed a bill to recover on a contract made by the city of Memphis with the mortgagor, which contract was assigned in the mortgage as part of the security for the bonds. *Held* that, as the demand against the city was cognizable at law in the name of the mortgagor, and no special circumstances were shown for a resort to equity, the bill should be dismissed.—*New York Guaranty & Indemnity Co. v. Memphis Water Co.*, 107 U. S. 205, 2 S. Ct. 279, 27 L. Ed. 484.

An action against an agent of executors in their own wrong, to recover proceeds in his hands of sales of property of a decedent, brought by the lawful representative ratifying such sales, is not within the jurisdiction of equity, being simply a case of money had and received, in which the remedy at law is adequate and complete.—*Gaines v. Miller*, 111 U. S. 395, 4 S. Ct. 426, 29 L. Ed. 466.

Complainants filed a bill to recover from defendants damages for the unlawful conversion of certain bonds, which they had sold, while holding them as collateral security, and applied on the debt. There was no actual fraud proven. *Held* that, if complainants could recover at all, they had a complete remedy at law.—*Lacombe v. Forstall*, 123 U. S. 562, 8 S. Ct. 247, 31 L. Ed. 255.

A principal may maintain a bill in equity against a bank to recover moneys deposited therein by his factor as the proceeds of property consigned to him for sale, since the legal title thereto is in the factor, and the principal could not have an action at law.—*Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 S. Ct. 118, 34 L. Ed. 724, affirming decree (C. C.) *Gillespie v. Union Stock-Yards Nat. Bank*, 41 F. 231.

A court of equity has jurisdiction of an action by a person in possession of lands against defendant's trespassing thereon under a claim of title to establish a lost deed under which plaintiff claims, to correct the description therein so as to include the land in dispute, and to set aside defendant's later deeds from the same source as a cloud upon plaintiff's title, notwithstanding an action at law would lie, and proof of the lost deed might be made therein.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

Where the controversy involves merely the legal title to lands, there is an adequate remedy at law, and equity has no jurisdiction.—*Lacassagne v. Chapuis*, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368.

A court of equity has no jurisdiction where one having an adequate remedy at law has neglected to avail himself thereof, and has failed to

bring his bill until after the claim has been barred by the statute of limitations.—*Baker v. Cummings*, 18 S. Ct. 367, 169 U. S. 189, 42 L. Ed. 711.

Equity does not take jurisdiction for fraud where relief may be obtained at law, and where, so far as is necessary, discovery may be obtained as well as in equity. Decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversed.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

A suit to recover damages from a conspiracy to defraud may be tried at law and not in equity, though the bill asks for a discovery.—*Curriden v. Middleton*, 84 S. Ct. 458, 232 U. S. 633, 58 L. Ed. 765, affirming decree 37 App. D. C. 568.

¶ 45. Adequacy of legal remedy.

See 19 Cent. Dig. Equity, §§ 151-163; 12 Cent. Dig. Courts, § 89.

¶ 46. — In general.

See 19 Cent. Dig. Equity, §§ 151, 152, 157, 159-163.

A bill alleging that a decedent died in France, leaving a will; that his brother, on the allegation that he had died domiciled in Alabama, obtained letters of administration in that state; that the brother appointed S. J., a native of France, his agent by power of attorney; that S. J., through an agent in New York, handed the complainants, who are bankers and brokers, certain United States registered to bearer bonds, with instructions to sell them, and purchase bearer or coupon bonds of the same issue; that such bearer or coupon bonds were duly purchased, and delivered to S. J.; that the decedent's widow, having obtained letters of administration in England and ancillary letters in New York, had brought suit against complainants for the conversion of the bonds received by them from S. J., alleging that the deceased was domiciled in France, and therefore the Alabama letters of administration were void; that the widow was, under the laws of France, entitled to a share of the deceased's estate more than equal to the value of the bonds; and that she is estopped by her actions from claiming the amount of the bonds from complainants, and praying that the widow be enjoined from maintaining such action, is not open to demurrer on the ground that the complainants may maintain their defense in the action at law, where it appears that in the action at law the complainants' right to prove the facts upon which the estoppel rests may be denied on the ground that the plaintiff in the action at law is not bound as executrix for what she did and assented to in her character as widow and legatee.—*Drexel v. Berney*, 122 U. S. 241, 7 S. Ct. 1200, 30 L. Ed. 1219.

The question of the validity, under the provision of the federal Constitution forbidding the taking of property without due process of law, of a state statute establishing rates for railroad transportation which are alleged to be so low as to be confiscatory, is not, because of its complication, a proper one for investigation by a jury.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

The remedy at law of a railroad company to test the validity of a statute fixing rates for railroad transportation by disobeying the statute once and submitting to a criminal prosecution is not so adequate as to deprive equity of jurisdiction, where several years might elapse before a final determination of the question, pending which observance of the statute, if finally found to be invalid, would result in taking its property without due process of law, with no possibility of its recovery.—*Id.*

47. — Title to or possession of property.

See 19 Cent. Dig. Equity, §§ 153-155.

Where no equitable title is involved, the assignee of a chose in action cannot maintain a bill in equity to enforce, for his own use, the strictly legal right of his assignor, merely because he cannot sue at law in his own name.—*Hayward v. Andrews*, 106 U. S. 672, 1 S. Ct. 544, 27 L. Ed. 271; *New York Guaranty & Indemnity Co. v. Memphis Water Co.*, 107 U. S. 205, 2 S. Ct. 279, 27 L. Ed. 484.

Complainant purchased and took possession of land, and paid for it principally with money borrowed from R. For the purpose of securing R. without his knowledge, complainant caused the conveyance from his vendor to be made directly to R. Four years later, R., without complainant's knowledge, conveyed the land, without valuable consideration, to defendant, to whom he was soon after married. Complainant repaid the loan to R., and continued to reside on the land without any assertion of title by defendant until, after the lapse of many years, she brought ejectment. *Held*, that equity would require defendant to convey to complainant, as his remedy at law is not adequate and complete.—*Ruckman v. Cory*, 129 U. S. 387, 9 S. Ct. 316, 32 L. Ed. 728.

An amended bill, alleging that defendant T. was in possession of complainant's land as his agent; that his codefendant, M., knowing complainant to have perfect title to the land, falsely represented it to be unappropriated, and thus procured a patent therefor from the state; and that T. collusively surrendered possession to M.,—and praying alternatively that complainant's title and possession might be quieted, or that he might be reimbursed for his improvements, if the title should be adjudged to be in M.,—presents a case for which there is no adequate legal remedy, and a demurrer to the whole bill should be overruled.—*Stewart v. Masterson*, 131 U. S. 151, 9 S. Ct. 682, 33 L. Ed. 114.

The government land surveys were extended over the region immediately surrounding New Orleans in 1871 and 1872, and certain lands in the suburbs were found to be swamp lands, and listed to the state as such in pursuance of the swamp-land grant of 1849. Subsequently certain old French and Spanish grants were brought forward by parties claiming thereunder, and, on a reconsideration by the land department, the old grants were held to be established, and the listing to the state was canceled. Complainant, having in the meantime acquired title from the state, brought a bill to have the same declared valid, and to obtain possession, together with rents and profits, alleging that the reconsideration was illegal, and that he was prevented from obtaining patents from the state to part of his lands by the fraudulent conduct of the defendants in bringing forward their old grants. *Held*, that the title set up was a purely legal one, the right to its enforcement depending upon whether the old grants were invalid, which can be shown in an action at law; and, the allegations of fraud and of illegal action by the land department being unnecessary, equity had no jurisdiction.—*Smyth v. New Orleans Canal & Banking Co.*, 141 U. S. 656, 12 S. Ct. 113, 35 L. Ed. 891, affirming decree (C. C.) 34 F. 825.

48. — Performance or breach of contract.

See 19 Cent. Dig. Equity, §§ 156, 158; 13 Cent. Dig. Courts, § 89.

Where a lease of a railroad for 99 years contained covenants for the payment of monthly installments of rent to keep the road in repair, and to keep accounts of all matters connected with its business, as affecting the

amount of rent to be paid, which covenants were guaranteed by other parties than the lessee, a bill which shows failure to pay rent, depreciation of the road, and combination of the guarantors and lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction, when it prays for specific performance of the obligations of the lease; and a suit at law on each installment of rent as it falls due is not an adequate remedy.—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 S. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 S. Ct. 24, 30 L. Ed. 284.

The fact that there is no remedy at law because a contract is void for want of power to make it, under express statutory or constitutional provisions, does not give a court of equity authority to give it validity or effect.—*Hedges v. Dixon County*, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044, affirming judgment (C. C.) 37 F. 304.

50. Statutory creation of remedy.

See 19 Cent. Dig. Equity, §§ 146-150.

A change in state laws creating a remedy at law in cases of the nature of a bill quia timet cannot of itself curtail the court jurisdiction of the federal courts in such cases.—*McConihay v. Wright*, 121 U. S. 201, 7 S. Ct. 940, 30 L. Ed. 932.

The courts of the United States are not ousted of their equity jurisdiction because of the existence of an adequate remedy at law, created by statute, where such remedy did not exist when the judiciary act of 1789 was adopted.—*Id.*

51. Multiplicity of suits.

See 19 Cent. Dig. Equity, §§ 167-171.

In a bill for relief against an alleged illegal taxation, allegations that such tax would involve complainant in a multiplicity of suits as to the title of lots laid out to be sold, prevent the sale of such lots, and cloud complainant's title to all his real estate, are sufficient to give jurisdiction to a court of equity.—*Union Pac. Ry. Co. v. Ryan*, 113 U. S. 516, 5 S. Ct. 601, 28 L. Ed. 1098.

In a suit for possession of bonds and for the amount of coupons cut from them, defendant alleged that they were in his hands as collateral security. Other parties claimed interests in the bonds, partly prior and partly subsequent to the rights of defendant D., and the owner's general creditors. *Held* a proper subject of equity jurisdiction, as an accounting was necessary, and a multiplicity of suits would otherwise follow.—*Reynes v. Dumont*, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934.

The prevention of multiplicity of suits cannot successfully be relied upon to sustain a bill in equity, filed on behalf of the United States for redress for the acts of persons licensed to cut timber from certain described lands of the public domain, in wrongfully cutting, carrying away, and converting timber from other lands. Decree 133 F. 274, 66 C. C. A. 652, affirmed.—*United States v. Bitter Root Development Co.*, 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

Equity jurisdiction cannot depend on the fact that defendant will be saved a multiplicity of suits by other parties, where defendant raises no objection to such suits, and urges no such ground for jurisdiction in equity of the suit in question. Decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversed.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

53. Waiver of objections.

See 19 Cent. Dig. Equity, §§ 173-176.

The court being competent to give the relief sought, and having jurisdiction of the subject-matter, the objection that there was an adequate legal remedy, not taken before a defense to the suit is entered upon, is too late.—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 S. Ct. 594, 32 L. Ed. 1005.

In an equity cause it is too late, after the evidence has been taken, to object to the jurisdiction on the ground that plaintiffs had an adequate remedy at law.—*Id.*

Where defendant corporation, in a bill filed by creditors alleging its insolvency and praying the appointment of a receiver, suffers the bill to be taken pro confesso, it is too late, nine months after the receiver has taken possession of the property and undertaken to carry on the business for the benefit of creditors, to object that plaintiffs had an adequate remedy at law.—*Brown, Bonnell & Co. v. Lake Superior Iron Co.*, 134 U. S. 530, 10 S. Ct. 604, 33 L. Ed. 1021.

The court, for its own protection, may prevent matters properly cognizable at law from being drawn into chancery at the pressure of the parties interested; but it by no means follows that, where the subject-matter belongs to that class over which a court of equity has jurisdiction, and the objection that the complainant had an adequate remedy at law was not made until the hearing in the appellate tribunal, the latter could exercise no discretion in the disposition of such objection.—*Tyler v. Savage*, 143 U. S. 79, 12 S. Ct. 340, 36 L. Ed. 82.

A United States circuit court, as a court of equity, may restrain a corporation at the suit of one of its stockholders, from voluntarily making returns for the imposition of and paying an unconstitutional tax levied under an act of congress, on the ground of the breach of trust or duty in such misapplication or diversion of the corporate funds, and on allegations of threatened multiplicity of suits and irreparable injury, where the objection of adequate remedy at law is not raised, and the question of jurisdiction is waived so far as it is within the power of the government to do so.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

The objection that complainant had an adequate remedy at law does not, when not made until the hearing, require the dismissal of a cause the subject-matter of which is within the jurisdiction of a court of equity, such as is presented by a bill filed on behalf of the United States, which avers that certain public lands had been erroneously patented to a railroad company, and, in addition to the relief sought by way of cancellation of the patents for lands still held by the railroad company, which was eliminated from the litigation by the decree, prays a discovery of any sales to bona fide purchasers, and a confirmation of their titles, and asks a recovery from the railroad company of the value of the lands so conveyed. Decree 133 F. 651, 66 C. C. A. 581, affirmed.—*Southern Pac. R. Co. v. United States*, 26 S. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

Equity jurisdiction having been invoked, defendant may waive right to object for existence of legal remedy.—*McGowan v. Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parrish v. McGowan*, 39 App. D. C. 184.

Consent decree, in a suit by attorneys against the United States to enforce an attorney's lien on a fund paid into court, held waiver of objections to jurisdiction in equity.—*Id.*

(C) PRINCIPLES AND MAXIMS OF EQUITY.

Application in suit to quiet title, see *Quieting Title*, 514.

Application to rescission of contract for municipal water supply, see *Waters and Water Courses*, 200.

Estoppel by acts making injury possible as between actor and another equally blameless, see *Estoppel*, 72.

56. Equity regards substance rather than form.

See 19 Cent. Dig. Equity, § 173.

A court of equity is not concluded in a suit in which fraud, oppression, and undue influence are charged by what appears upon the face of the papers, but may institute an inquiry into the real facts of the transactions. Judgment (1907) 92 P. 250, 19 Okl. 525, affirmed.—*Wagg v. Herbert*, 30 S. Ct. 218, 215 U. S. 646, 54 L. Ed. 321.

60. Where equities are equal, the first in time will prevail.

See 19 Cent. Dig. Equity, § 181.

A court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent, where the equities are equal. Decree, 34 C. C. A. 649, 92 F. 745, affirmed.—*Holly v. Domestic and Foreign Missionary Soc. of the Protestant Episcopal Church*, 21 S. Ct. 395, 180 U. S. 284, 45 L. Ed. 531.

62. Equity follows the law.

See 19 Cent. Dig. Equity, § 183.

Equity follows the law.—*Hedges v. Dixon County*, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044, affirming judgment (C. C.) 37 F. 304.

65. He who comes into equity must come with clean hands.

See 19 Cent. Dig. Equity, §§ 185-187.

The surviving members of a firm to which a deceased partner had transferred by the firm agreement a lease of land on which the firm business was to be conducted with a paramount mortgage thereon are not precluded, as attempting to profit by their own fraud, from insisting in equity, as against his widow and heirs, that such lease was extinguished by the purchase of the land by the firm at foreclosure, though the firm and the partner who still appeared on the records to be the owner of the lease had agreed that the lease was to have priority over the mortgage, since this was a right which the firm had to prevent the depreciation of the lease by the enforcement of the mortgage.—*Van Syckel v. Arsua*, 34 S. Ct. 263, 231 U. S. 601, 58 L. Ed. 393.

II. LACHES AND STALE DEMANDS.

Limitation of actions, see *Limitation of Actions*, 37.

Particular remedies or proceedings.

See—

Account, 15.

Attorney and Client, 30.

Cancellation of Instruments, 34.

Injunction, 113.

Specific Performance, 105.

Trusts, 365.

67. Nature and elements in general.

See 19 Cent. Dig. Equity, §§ 191-196.

Laches is not imputable to the United States when it has a direct pecuniary interest in the subject of litigation.—*San Pedro & Cañon del Agua Co. v. United States*, 146 U. S. 120, 13 S. Ct. 94, 36 L. Ed. 911, affirming decree *United*

States v. San Pedro & Cañon del Agua Co., 17 P. 337, 4 N. M. (Gild.) 405.

Independently of any statute of limitation, courts of equity have inherent powers to refuse relief after undue and unexplained delay, and when injustice would be done by granting the relief asked, and the doctrine applies to suits relating to land.—*Abraham v. Ordway*, 158 U. S. 418, 15 S. Ct. 894, 39 L. Ed. 1036.

The objection of laches on the part of the grantors in attacking a sale in attachment proceedings of property covered by a trust deed is not available to the defendants, in a suit to set aside the attachment proceedings and enforce the trust deed, who claim title to the property under the attachment proceedings, where they make their title the basis of an assertion of a right to affirmative relief. Judgment (1906) 85 P. 459, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

68. Grounds and essentials of bar.

See 19 Cent. Dig. Equity, §§ 197-220, 222-224.

69. — In general.

See 19 Cent. Dig. Equity, §§ 197-199.

In a suit in a United States circuit court to foreclose a mortgage on a railroad, a decree of sale was made, and a sale thereunder was had, which was confirmed in October, 1876. In February, 1877, the defendant railroad corporation appealed to the supreme court, by which the decree was affirmed in April, 1880. In June, 1880, the corporation filed a bill in the circuit court to have the decree in the foreclosure suit set aside on the ground of fraud in fact in the conduct of such suit by its solicitor and directors. *Held*, on a demurrer to the bill, that the time during which the appeal was pending would not be counted against plaintiff on the question of laches.—*Pacific Railroad of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498.

The holder of bonds issued by a town in payment of its subscription to railroad stock, which bonds had been held void, sued the town and the railroad company, and procured a decree, the town not objecting, that the bonds should be surrendered and canceled, and the stock, in payment of which they were issued, transferred by the town to him. *Held*, plaintiff's rights as against the railroad company were for the first time fixed by the decree, and hence he could not have been guilty of laches if, after such decree, he sued the railroad company to recover such stock.—*Illinois G. T. Ry. Co. v. Wade*, 140 U. S. 65, 70, 11 S. Ct. 709, 35 L. Ed. 342.

70. — Knowledge of facts.

See 19 Cent. Dig. Equity, §§ 200-203.

Complainants filed a bill in 1882 to correct an alleged mistake in a deed made in 1853 to a corporation of which they were stockholders. The corporation was practically dissolved in 1862, up to which time it had an opportunity of knowing the facts relied on for reformation, and even up to the time of commencing suit there was a director surviving who might at any time have brought the suit. *Held*, that complainants were barred by their laches.—*Taylor v. Holmes*, 127 U. S. 489, 8 S. Ct. 1192, 32 L. Ed. 179.

On bill by principals against their agents for an accounting, when plaintiffs have moved with sufficient promptness on discovering the fraud, defendants cannot charge them with laches, because they reposed confidence in defendants, and thus neglected to avail themselves of some sources of knowledge they might have sought.—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 S. Ct. 594, 32 L. Ed. 1008.

The heirs at law of a deceased owner of stock in a Texas corporation were guilty of laches, and

a bill in equity, filed by them against the corporation in 1881, to cancel transfers of shares by the attorney in fact of deceased for fraud, and to revive such shares in their names, was properly dismissed, where it appeared that complainants lived in Alabama; that their ancestor died there in 1841; that his attorney in fact made the transfers in question in 1842, and died in 1858; that agents of the estate went to Texas in the years 1843, 1854, and 1858, and obtained full reports from the corporation concerning the transfers; that the executor went to Texas in 1844 and in 1854, but neither saw deceased's attorney nor made inquiries of the corporation; that he went again in 1858, when he learned of the liability of the corporation; that in administering the Texas estate in 1844 no rights were asserted against the corporation; that all the heirs at law became of age before 1854; that the executor died, and that an agent of the executor's estate went to Texas in 1869, and raised the question of the corporation's liability, but, being advised, in 1873, by his attorneys, that no recovery could be had against the company, the matter was dropped until 1881.—*Ware v. Galveston City Co.*, 146 U. S. 102, 13 S. Ct. 33, 36 L. Ed. 904.

A bill by creditors, charging fraud in judgment notes and transfers, by which all the tangible property of debtors failing for a large amount was appropriated to preferred creditors, nearly five years previously, alleged that plaintiffs were ignorant of the facts until within a month before bringing suit, but did not disclose how their knowledge was obtained, or why they did not have the same means of ascertaining the facts before. The only matters complained of concealed from plaintiffs were that the judgment notes were largely in excess of the real demands, and a transfer in trust of the debtors' bills and accounts receivable, the existence of which was known to plaintiffs. *Held*, that, as these facts would have been disclosed by a thorough examination, a demurrer to the bill for laches should be sustained.—*Hardt v. Heidweyer*, 152 U. S. 547, 14 S. Ct. 671, 38 L. Ed. 548.

In 1848 a warrant for 160 acres of land was issued to the widow of a soldier in the Mexican War and her minor children of whom she was guardian. In the same year, acting for herself and her children, but without obtaining leave of the orphans' court, she sold and assigned the warrant to one T., who located it near St. Paul, Minn. T. received a patent for the land in 1850, and it subsequently became very valuable, and passed by mesne conveyances to numerous purchasers, who made valuable improvements. The widow's youngest child attained majority in 1863, and in 1892 the surviving children and the heirs of those deceased sued to establish title, relying on the lack of the orphans' court's approval of the sale of the warrant. *Held*, that though plaintiffs claimed that they were ignorant, until a few years before bringing suit, of the existence of the land warrant, the bill must be dismissed for laches. 12 C. C. A. 490, 65 F. 23, affirmed.—*Wetzel v. Minnesota Ry. Transfer Co.*, 18 S. Ct. 307, 169 U. S. 237, 42 L. Ed. 730.

71. — Lapse of time.

See 19 Cent. Dig. Equity, §§ 204-211.

A lessor re-entered under a clause in a 90-year lease, which provided that upon default in payment of rent he might retake the premises and hold them until all arrearages of rent, interest, costs, and expenses were paid. No effort was made by the lessee to repossess himself until 45 years after the re-entry, when a bill was filed by his administratrix offering to pay all the rents, interest, charges, and costs that had accrued, and asking to be permitted to redeem. *Held*, that the claim had been delayed for an unreasonable length of time, and the bill would be dismissed.—*Lansdale v. Smith*, 106 U. S. 391, 1 S. Ct. 350, 27 L. Ed. 219.

In case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law.—*Speidel v. Henrici*, 120 U. S. 377, 7 S. Ct. 610, 30 L. Ed. 718.

After the lapse of five years from the entry of a decree declaring a tax levied by a county illegal, and enjoining its collection, the county is estopped to sue to set aside the decree for fraud on the ground of laches.—*Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 S. Ct. 687, 35 L. Ed. 319.

Where the commission to determine the rights of claimants to land in the Hot Springs reservation erroneously found in favor of the tenant, and the landlord expressed himself as satisfied with the justice thereof, and took no steps to assert his rights for several years, and until after the decision in *Rector v. Gibbon*, 111 U. S. 276, 4 S. Ct. 605, 28 L. Ed. 27, he is not entitled to an accounting for the period between the date of the awards and filing of the bills.—*Goode v. Gaines*, 145 U. S. 141, 12 S. Ct. 839, 36 L. Ed. 654.

In considering the question of laches by a stockholder in bringing a bill to set aside an alleged fraudulent decree foreclosing a railroad mortgage, it is a strong circumstance against complainant that he does not show that his interest would receive any benefit from the granting of the relief asked, for a court of equity will not do a vain thing, nor will it entertain a bill merely to vindicate an abstract principle of justice, or to compel defendants to buy their peace.—*Foster v. Mansfield, C. & L. M. R. Co.*, 146 U. S. 88, 13 S. Ct. 28, 36 L. Ed. 899, affirming decree (C. C.) 36 F. 627.

A delay in an action for the infringement of a patent for more than 14 years is such laches as will defeat any right to relief.—*Leggett v. Standard Oil Co.*, 149 U. S. 287, 13 S. Ct. 902, 37 L. Ed. 737, affirming decree (C. C.) 38 F. 842.

One claiming under a Mexican grant died in 1848, leaving a will devising his property to his wife, who retained possession till 1853, when she transferred the land to W. and others, who then incorporated defendant company, which immediately took possession, erected valuable improvements, and operated mines thereon. The grant under which the former owner claimed was favorably reported on by the surveyor general to congress, which in 1851 confirmed it, but no patent issued till 1876. *Held*, that collateral heirs of such deceased owner, having made no claim to the land until 1890, and apparently acquiesced in the claims of those in possession, though residing in the vicinity, were barred by laches from claiming that the will made by such former proprietor was invalid.—*Gildersleeve v. New Mexico Min. Co.*, 161 U. S. 573, 16 S. Ct. 663, 40 L. Ed. 812.

One who had a settlement with his partner, and, for more than three years after he must have known of any fraud in the settlement, continued to enjoy the profits arising from the labor of such partner, cannot invoke the aid of equity to set aside the settlement on the ground of fraud. 8 App. D. C. 515, reversed.—*Baker v. Cummings*, 18 S. Ct. 367, 169 U. S. 189, 42 L. Ed. 711.

—72. — Prejudice from delay in general.

See 19 Cent. Dig. Equity, §§ 207, 210-220, 225, 226.

The laches of a party aggrieved by alleged fraud in mortgage foreclosure and bankruptcy proceedings, had from 7 to 14 years since, should defeat his endeavor to have such proceedings set aside, and the property placed in

the hands of receivers for the benefit of stockholders of the old company, where the records of such proceedings have been meantime open all the while to his inspection, and innocent parties become holders of the bonds of the new corporation.—*Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 S. Ct. 1009, 30 L. Ed. 186.

Where a debtor transfers manufacturing property to a trustee, who is to carry on the business for the benefit of creditors, most of whom assent thereto, a creditor who neither assented nor objected to the transfer, though he had notice of it, cannot, after waiting nine years, sue in equity to set it aside as invalid.—*Jencks v. Quidnick Co.*, 135 U. S. 457, 10 S. Ct. 655, 34 L. Ed. 200.

Where the devisees, living in Tennessee, of a head-right certificate to land in Texas, know of the appointment of an ancillary administrator in Texas, and of his sale of the certificate, and take no steps to set it aside or to assert their rights for 13 years, except by taking possession of a part of the land located under the certificate, they are barred by their laches from attacking the sale; the original parties to it being dead, and no party interested in the land when the suit is brought having been implicated in the alleged fraudulent sale by the administrator.—*Hanner v. Moulton*, 138 U. S. 486, 11 S. Ct. 408, 34 L. Ed. 1032, affirming decree (C. C.) 23 F. 5.

A person to whom a land certificate was issued in 1838 by the state of Texas assigned his interest in it a few days after he received it by indorsement on the back, but kept the certificate. The assignee did not locate any land under the certificate. In 1855 the original owner of the certificate, having pasted paper over the assignment on the back, sold it to another, who located it and obtained a patent for the land. In 1860 the first assignee was notified of these facts, but took no action, though he lived for 12 years afterwards. In 1881 his heirs brought suit for the land, which had greatly increased in value, and was held by various innocent purchasers. All the parties to the original transaction were dead. *Held*, that laches was a bar to the suit, instituted 25 years after the accrual of the adverse title and 20 years after notice of it to plaintiffs' ancestor.—*Underwood v. Dugan*, 139 U. S. 380, 11 S. Ct. 618, 35 L. Ed. 197, affirming decree (C. C.) 24 F. 74.

Where a person, in violation of the letter and policy of the law, but without actual intent to defraud, buys from a third person inalienable land scrip issued to an Indian, and originally obtained from him by fraud, and locates and procures title thereunder, equity does not require that after the lapse of 28 years, and after the land has increased a thousandfold in value, it shall be surrendered to the Indian's heirs, especially when they have failed to show that they are entirely free from laches.—*Felix v. Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719, affirming decree (C. C.) 86 F. 457.

The widow of one who made a homestead entry abandoned the land in 1876, and in 1879 the entry was canceled for failure to make final proofs within seven years. On November 23, 1880, she applied for the benefit of Act Cong. June 15, 1880, granting certain privileges as to lands theretofore entered for homesteads, but her application was rejected in June, 1881. In 1884 she petitioned for a rehearing, which was denied. In 1880 the land was entered by another, who received a patent therefor in 1882. The widow made no attempt to assert her alleged rights as against this patent until the filing of this bill to quiet title against her.

During the whole time she lived within 40 miles of the land, and in the meantime its value increased many fold, the patentee died, several conveyances were made, the tract was subdivided as an addition to the city of Tacoma, lots were sold, and valuable improvements made. *Held*, that she was estopped by laches from asserting her claim.—*Gallihier v. Cadwell*, 145 U. S. 368, 12 S. Ct. 873, 38 L. Ed. 738, affirming decree 3 Wash. Ct. 501, 18 Pac. 68.

On October 12, 1880, plaintiff conveyed a quarter interest in a mining claim pursuant to a written contract, which the vendee agreed to record, and which stated that the vendee was to have suit instituted to vest title in him as against certain adverse claimants, and, when this was accomplished, to reconvey a one-eighth interest. The vendee never recorded the contract, and failed to institute any suit, and compromised a suit begun by the adverse claimants. Soon after receiving the conveyance, the vendee conveyed the property to a corporation in which he was interested. Of these facts plaintiff had notice, or knowledge sufficient to put him on inquiry. The corporation, or its successor, obtained a patent for the claim in February, 1884, of which plaintiff obtained knowledge in February, 1885. August 1, 1885, he filed a bill to compel a reconveyance and accounting, but the suit was not prosecuted with diligence, and about a year later was dismissed for want of jurisdiction. August 19, 1886, a second suit was filed, which was afterwards dismissed because of defective summons. October 21, 1887, the present suit was filed. In the meantime the property was developed, and had increased in value from a few thousand to several million dollars, and the stock of the corporation had largely come into the hands of persons ignorant of plaintiff's claim. *Held*, that plaintiff was guilty of laches barring the suit.—*Johnston v. Standard Min. Co.*, 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480, affirming decree (C. C.) 39 F. 304.

A survey unchallenged for 25 years will not be set aside at suit of one who was stockholder of grantor corporation as against bona fide purchaser without notice of mistake.—*Hallstead v. Grinnan*, 152 U. S. 412, 14 S. Ct. 641, 38 L. Ed. 495.

Defendants had acted as trustees under an agreement, between themselves, or their predecessors in the trust, and the other lien and bond holders and creditors of a certain insolvent railroad company, of whom plaintiff was one, by the terms of which they were to receive the various instruments of indebtedness issued by such company from any of the holders thereof who desired to become cestuis que trustent, and, acting for all of them, were to manage their interests for the benefit of all in an attempt to reorganize the company, reduce its indebtedness, and secure to it a paying property. The trustees wound up the trust, and conveyed the property to a reorganized company, free from all incumbrances except the first mortgage, and, upon plaintiff's informing them that he still held six of the old mortgage bonds, he was told that they were worthless in consequence of the foreclosure made at the time of the reorganization. Four years later, by formal written notice, he demanded of the trustees payment of, or security for, the amount then due on these bonds, and nearly six years later, six of the seven original trustees being deceased, plaintiff brought a bill in equity to compel the trustees to account for their value. *Held*, that plaintiff was guilty of such laches as to prevent the intervention of a court of equity in his behalf.—*Alsop v. Riker*, 155 U. S. 448, 15 S. Ct. 162, 39 L. Ed. 218, reversing decree *Riker v. Alsop* (C. C.) 27 F. 251.

If a sale under a decree was voidable either by reason of a fraudulent combination to deter plaintiffs from being present at the sale, or to

prevent competition, or by reason of false reports circulated to prevent plaintiffs from being able to satisfy the decree within six months, as allowed thereby, it was their duty, instead of executing quitclaim deeds, and thus putting themselves again in the hands of parties whom they alleged to have twice played them false, to promptly disaffirm their acts, and seek to repossess them of the property; and a delay of four years, during which much of the property had been sold, presumably to innocent purchasers, will prevent their maintaining a suit to set aside the sale.—*Evers v. Watson*, 156 U. S. 527, 15 S. Ct. 430, 39 L. Ed. 520.

An unexplained delay of nearly seven years in asserting the alleged lien of railroad-mortgage bonds, after a sale of the road under the provisions of the general improvement law of Florida (Act Jan. 6, 1855), during which time new bonds are issued by the purchasing company to innocent holders, is laches sufficient to preclude the holders of the original bonds from attempting to enforce their claim.—*Johnson v. Atlantic, G. & W. I. Transit Co.*, 156 U. S. 618, 15 S. Ct. 520, 39 L. Ed. 558.

A married woman conveyed lands to secure a note. Nineteen years thereafter an action was brought to establish a resulting trust, on the theory that the note was given for a debt of the husband. The grantor was divorced from her husband 13 years before institution of the suit, and had paid interest on the note without objection for 8 years, some of the payments being made after the divorce. The property had been sold to pay the note, and the purchaser had held undisputed possession until institution of suit, during which time all the original parties to the transaction had died, and the property appreciated in value. *Held*, that relief was barred by laches.—*Abraham v. Ordway*, 158 U. S. 416, 15 S. Ct. 804, 39 L. Ed. 1036.

In 1874, W. conveyed to B. certain land, subject to a mortgage which W. had assumed; the deed, signed by both parties, reciting the assumption by B. of the unpaid balance of the mortgage debt, which was then past due. B. soon afterwards conveyed to P., who also assumed the mortgage debt. P. was joined with the mortgagor in the bill to foreclose in 1877, neither W. nor B. being made parties. In 1879 suit was brought against B. for the deficiency after the foreclosure sale, but was subsequently dismissed. No further attempt was made to recover against B. until 1881, when a bill was filed against W. and B., service being had on W. only. W. died in 1882, and the bill was dismissed as to his estate. B. was not served until 1890. Both P. and the original mortgagor had died several years before, their estates and that of W. had been settled, and the claim as against W. was barred. Since 1874, B. had lived seven years within the jurisdiction of the court, and seven years in Illinois, where, under the statutes, he might have been sued on the covenant. *Held* that, in view of the laches of the complainant, the changes in the situation of the parties, and the decrease in the value of the property, relief as against B. was properly refused.—*Willard v. Wood*, 17 S. Ct. 176, 164 U. S. 502, 41 L. Ed. 531.

Where a soldier's widow, for herself and minor children, but without approval of the orphans' court, transferred a land warrant in 1848 which was located in 1850, and the land subsequently became very valuable in the hands of numerous holders by mesne conveyance, *held*, that delay of the children until 1892 in bringing suit to recover the lands was laches, it appearing that the youngest attained majority in 1863. Decree, 65 F. 23, 12 C. C. A. 490, affirmed.—*Wetzel v. Minnesota Ry. Transfer Co.*, 18 S. Ct. 307, 169 U. S. 237, 42 L. Ed. 730.

The application of the doctrine of courts of equity, to withhold relief from those who have

delayed the assertion of their claims for an unreasonable length of time, does not depend upon mere lapse of time, but upon change of situation during neglectful repose, rendering it inequitable to afford relief. Decree, 95 F. 883, 37 C. C. A. 309, affirmed.—O'Brien v. Wheelock, 22 S. Ct. 354, 184 U. S. 450, 46 L. Ed. 636.

The delay in bringing a suit to charge land-owners in equity or on the principle of estoppel with liability for the amount of levee assessments under an unconstitutional statute is fatal where, after a decree in a former suit permitting the owner of the bonds, by supplemental or original bill, to bring in the land-owners, he took no steps to do so during his life, which continued for about six years after the decree, and the bill was brought by his executors about nine years after such decree, during which time the owners of the property assessed were constantly changing, and they had spent large sums for the repair of the levee, and had also become liable to very large assessments under a new statute.—Id.

73. — Loss of evidence.

See 19 Cent. Dig. Equity, §§ 222-224.

On the foreclosure of a railroad mortgage it is the duty of a stockholder who believes he has any interest to protect to acquaint himself with the proceedings, and after a delay of 10 years, during which many of those engaged in the transactions have died, he cannot maintain a bill to set aside a foreclosure decree alleged to have been procured by the fraudulent withdrawal of the company's answer, when such answer in fact remains upon the files, and sets forth certain matters which disclose the alleged fraudulent transactions, and of which complainant, in order to excuse his delay, alleges that he was ignorant until a short time before bringing the suit.—Foster v. Mansfield, C. & L. M. R. Co., 146 U. S. 88, 13 S. Ct. 28, 36 L. Ed. 899, affirming decree (C. C.) 36 F. 627.

74. Excuses.

See 19 Cent. Dig. Equity, §§ 227-231, 233-241.

75. — In general.

See 19 Cent. Dig. Equity, §§ 227, 228, 230, 233, 234, 239, 240.

Defendant conveyed to M. land to which he then had no title, but only an oral agreement by the owners to convey. A deed of the owners to defendant's wife was recorded March 16, 1881, after M.'s death, and while complainants, his widow and heirs, were living in Canada. His widow did not learn until the following summer that defendant disputed their title, and this suit to enforce their rights was instituted in February, 1882. Held no unreasonable delay.—Moore v. Crawford, 130 U. S. 122, 9 S. Ct. 447, 32 L. Ed. 878, affirming decree (C. C.) Crawford v. Moore, 28 F. 824.

Plaintiff alleged that in 1850, at a time when he was mentally incompetent to do business, defendants, his attorneys, induced him to execute to them a note and mortgage which were without consideration, and that by the foreclosure of such mortgage, and by sales under judgments which defendants fraudulently procured to be rendered against him, they had obtained the legal title to his land. He alleged that his mental incapacity continued for about 10 years after the execution of the mortgage, that in 1869 he applied to one who had at one time been his attorney for information as to his relations with defendants, and that such attorney told him he could not act, as he had been employed by defendants. But, although defendants foreclosed and got possession of the land in 1862, and remained in possession thereafter, receiving the rents and profits, and although the foreclosure proceedings and judgments were of record, plaintiff did not file his bill for the recovery of the

land until 1884; and the only excuse given for the delay was that he could not get a lawyer who could put him in possession of the facts. Held, that the bill was demurrable for laches.—Norris v. Haggin, 136 U. S. 386, 10 S. Ct. 942, 34 L. Ed. 424, affirming (C. C.) 28 F. 275.

It appearing from the great weight of evidence that the trustees made no attempt to conceal their intention to buy at a public sale of the trust property, and that the beneficiaries in fact knew that they were the purchasers, the mere fact that the beneficiaries had great confidence in them, and were ignorant of the rule in relation to trustees purchasing at their own sales, would not excuse a delay of 19 years in asserting their claim.—Hammond v. Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. Ed. 134.

The mere institution of a suit does not, of itself, relieve a person from the charge of laches, and, if he fail to prosecute it with diligence, the consequences are the same as if it had never been instituted.—Johnston v. Standard Min. Co., 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480.

Where, in excuse of a delay of eight years in bringing suit to avoid a release of demands under a contract, on the ground of inadequacy of consideration and fraudulent concealment of facts, it was alleged that complainant was constrained to execute and rest upon the release because it feared that litigation to recover its demands would imperil its receipt of future royalties to become due under the contract (which were in fact actually paid by defendant) held, that this excuse for laches was entitled to less favorable consideration than if complainant's conduct had been that of mere inaction.—Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

76. — Personal disabilities.

See 19 Cent. Dig. Equity, § 241.

The mere fact that the cestui que trust of land is an Indian living in the tribal relation, and therefore incapable of suing in the federal courts, while of great force, is not conclusive evidence that a delay of 28 years was not laches, especially where the land in question is located in Nebraska, whose courts are open to an Indian.—Felix v. Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719, affirming decree (C. C.) 36 F. 457.

77. — Pecuniary condition, insolvency, or bankruptcy.

See 19 Cent. Dig. Equity, § 238.

A delay of more than 14 years to take any action for the infringement of a patent is not excused by poverty during that period.—Leggett v. Standard Oil Co., 149 U. S. 287, 13 S. Ct. 902, 37 L. Ed. 737, affirming decree (C. C.) 38 F. 842.

80. — Fraud, concealment, or other act of adverse party.

See 19 Cent. Dig. Equity, § 237.

A party who, in reliance upon another, places his property and business interests in his hands, is not guilty of laches if, misled by the errors and misstatements of the other in regard to the condition of the account between them, so that he is made to believe the balance is against him, he delays bringing suit to recover his rights until he learns the true state of the case.—Loring v. Palmer, 118 U. S. 321, 6 S. Ct. 1073, 30 L. Ed. 211.

Plaintiff alleged that he and defendant's intestate had long lived together in the same house, she treating him and speaking of his as a foster child, and that from the time he rendered the services under the contract until her death, in 1889, he had repeatedly urged a settlement, but that she, while acknowledging the

justice of his claim, assured him that she had provided for him in her will, saying that she intended the house, to a half interest in which, under the contract, he was entitled, to be his after her death, and that he did not know until her death that she had failed to make a will in his favor. *Held* that, in view of these allegations, the fact that the advances by him under the contract were made from 1879 to 1884, and the bill was not filed until 1889, did not show laches on his part.—*Townsend v. Vanderwerker*, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.

A delay of nine years and four months from the consummation of the fraud, and of four years from the discovery thereof, *held* not to constitute laches in the case of an ignorant colored woman who had been wheedled out of her real estate by an audacious fraud, committed by one in whom she placed entire confidence, and who assumed to act as her agent. Decree, 10 App. D. C. 432, affirmed.—*McIntire v. Pryor*, 19 S. Ct. 352, 173 U. S. 38, 43 L. Ed. 606.

When fraud is clearly proven, the court will look with much more indulgence on any disability under which the defrauded party may labor, as excusing his delay in bringing the suit.—*Id.*

Laches as a defense in case of an active and continuing fraud must amount to assent or acquiescence. Decree, 91 F. 536, 33 C. C. A. 291, reversed.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

81. — Negotiations and agreements between parties.

See 19 Cent. Dig. Equity, § 229.

Plaintiff's laches in delaying for 12 years to bring suit to set aside a conveyance from his father to another of defendants are not excused by allegations that he had always protested against such defendant's claim of title thereunder, and had negotiated with him in hopes of reaching an amicable adjustment, where there is nothing to show that such defendant acknowledged plaintiff's rights, or did or said anything to encourage such hope.—*Mackall v. Casilear*, 137 U. S. 556, 11 S. Ct. 178, 34 L. Ed. 776.

82. — Pendency of legal proceedings.

See 19 Cent. Dig. Equity, § 236.

An action by an individual creditor of a state against the state's debtors, for an appropriation of their debts to the payment of his claim, brought 19 years after the last payment from the state's debtors to it was due, is barred by laches, and it is of no avail to plaintiff that much litigation had intervened, and that bankruptcy proceedings against the state's debtors are pending, where plaintiff is not a party thereto.—*Cressey v. Meyer*, 138 U. S. 525, 11 S. Ct. 387, 34 L. Ed. 1018.

Ten years' delay on the part of a nonassenting, unsecured creditor of an insolvent corporation before attacking a reorganization plan, *held* not such laches as bars a suit where the corporations and their stockholders were not prejudiced thereby, and the delay was in spite of the creditor's diligent effort to reduce his claim to judgment that he might proceed in equity, which was accomplished only after protracted litigation.—*Northern Pac. R. Co. v. Boyd*, 33 S. Ct. 554, 228 U. S. 482, 57 L. Ed. 931, affirming decree 177 F. 804, 101 C. C. A. 18.

83. — Recognition of right by adverse party.

See 19 Cent. Dig. Equity, § 231.

Plaintiff filed his bill to have set aside certain conveyances by means of which his father had fraudulently obtained property belonging

to plaintiff. The bill was filed 17 years after the conveyances were made, and 5 years after the father's death. In explanation of his delay, plaintiff alleged that he and his father became reconciled shortly after the transactions complained of, and the latter acknowledged plaintiff's right in the premises, promised to remedy the wrong done him, and did in fact reconvey to him the property; but that defendants, his brothers and sisters, procured a decree adjudging such conveyance void, from which they claimed to have prosecuted an appeal, and that plaintiff thought there was no propriety in bringing his suit pending this litigation. *Held*, that plaintiff was guilty of laches, and his bill should be dismissed.—*Mackall v. Casilear*, 137 U. S. 556, 11 S. Ct. 178, 34 L. Ed. 776.

85. Rights of public.

See 19 Cent. Dig. Equity, § 221.

Acquiescence by the state of Missouri in the proceedings of the sanitary district of Chicago in devising and carrying out a system of sewerage is no bar to relief against the continuous pouring of sewage and filth into the Mississippi river through a drainage canal constructed by the sanitary district, to the detriment of the state of Missouri and her inhabitants.—*State of Missouri v. State of Illinois*, 21 S. Ct. 331, 180 U. S. 208, 45 L. Ed. 497.

The rule of nullum tempus cannot be invoked by the French republic to answer the defense of laches in a suit to enforce an exclusive right to the use of the word "Vichy" in connection with mineral waters as against persons using that word to denote a water not drawn from springs in the commune of France of that name, where it has entered into an 80-year lease of such springs to its co-plaintiff for a fixed annual rental, which lease has still 30 years to run. Decree, *La Republique Francaise v. Saratoga Vichy Springs Co.*, 107 F. 459, 46 C. C. A. 418, 65 L. R. A. 830, affirmed.—*La Republique Francaise v. Saratoga Vichy Spring Co.*, 24 S. Ct. 145, 191 U. S. 427, 48 L. Ed. 247.

86. Effect of possession of real property involved.

See 19 Cent. Dig. Equity, § 232.

One who has been in continuous and peaceful possession of land whereof he is equitable owner, no adverse claim being asserted until the institution of an action of ejectment, is guilty of no laches in not resorting to equity to obtain the legal title.—*Ruckman v. Cory*, 129 U. S. 387, 9 S. Ct. 316, 32 L. Ed. 728.

A party in possession of land under a lost unrecorded deed is not estopped by a delay of 40 years to maintain proceedings to establish the same, and correct the description therein, where upon the first claim of an adverse title he takes steps to protect his claim.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

87. Following statute of limitations.

See 19 Cent. Dig. Equity, §§ 242-244, 395; 8 Cent. Dig. Can. of Inst. § 10; 33 Cent. Dig. Lim. of Act. §§ 169, 170.

Delay to sue in equity, continued through a period which by the statute of limitations would bar an action at law, is (except by special circumstances) a bar to a suit in equity.—*Meath v. Phillips County*, 108 U. S. 553, 2 S. Ct. 869, 27 L. Ed. 819.

Under Rev. St. § 3244, which makes the absconding or concealing of himself by a defendant available as an excuse in an action at law for not bringing the action within the time limited therefor, an averment that the defendant fraudulently absconded and concealed himself, made only to take the case out of the bar of the statute, does not give a court of equity jurisdiction on the ground of fraud.—*Gaines v.*

Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. Ed. 466.

Laches may defeat a suit in equity to enforce rights in a mining location, although the time fixed in Comp. Laws N. M. § 2938, for the prosecution of actions or suits "in law or equity" for any lands, tenements, or hereditaments has not expired. Decree (N. M.) 66 P. 552, 11 N. M. 1, 55 L. R. A. 658, affirmed.—Patterson v. Hewitt, 25 S. Ct. 35, 195 U. S. 309, 49 L. Ed. 214.

III. PARTIES AND PROCESS.

In particular proceedings.

See—

Account, ¶16.
Divorce, ¶75-77.
Injunction, ¶114.
Judgment, ¶457.
Trusts, ¶366.

¶89. Parties in general.

See 19 Cent. Dig. Equity, §§ 246-251, 265.

¶91. — Nature and extent of interest.

See 19 Cent. Dig. Equity, §§ 248-251.

In a suit for the proceeds of a note, alleged to have been disposed of by one of the defendants in violation of a contract by which he had agreed to hold it "subject to the joint order and direction" of the named attorneys of the adverse claimants of the note, the contract having been made on abandonment of an arbitrator's award respecting the ownership of the note, such adverse claimants, and their respective attorneys, are necessary parties.—Gregory v. Stetson, 133 U. S. 579, 10 S. Ct. 422, 33 L. Ed. 792, affirming (C. C.) 39 F. 708.

The right to compensation for services in pressing an Indian claim against the United States was made contingent on success. Services were rendered thereunder, but failed to result in the collection of any money. Afterwards the tribe made a new contract with different parties, on the same conditions, but with a stipulation that they should adjust, on principles of equity and justice, the claims of all parties "who have rendered service heretofore in the prosecution of said claim." Held, that in a suit by one who had rendered services under the first contract, to obtain a share in the fund realized as compensation under the second contract, the Indian tribe was not a necessary party.—McKee v. Lamon, 159 U. S. 317, 16 S. Ct. 11, 40 L. Ed. 165.

In a suit by a waterworks company against a city, a decree will not be granted declaring void, and requiring the city to cancel, as in derogation of the rights of the company under its contract with the city, ordinances permitting certain property owners to lay pipes in the streets to convey water to their premises; such owners not being brought before the court, or given an opportunity to be heard.—New Orleans Water Works Co. v. City of New Orleans, 17 S. Ct. 161, 164 U. S. 471, 41 L. Ed. 518.

¶93. Necessary or indispensable parties.

See 19 Cent. Dig. Equity, §§ 246, 252-257, 259.

¶96. — Grounds for omitting or dispensing with parties.

See 19 Cent. Dig. Equity, §§ 253-256.

Plaintiffs' firm had originally consisted of S., H., and W. W. sold all his interest to S., evidenced by a bill of sale, and subsequently made a more formal assignment. All of this was done with the knowledge of defendants. In an action by the firm, W. entered appearance

and disclaimed all interest in the proceedings. Held, that he was not a necessary party to the cause.—Kilbourn v. Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. Ed. 1005.

Notwithstanding Equity Rule 47 and Rev. St. § 737, providing that, where persons otherwise necessary or proper parties are beyond the jurisdiction of the court, the court may proceed to a decree not prejudicing the rights of such persons without making them parties, the court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby.—Gregory v. Stetson, 133 U. S. 579, 10 S. Ct. 422, 33 L. Ed. 792, affirming (C. C.) 39 F. 708.

The forty-seventh rule in equity, authorizing the federal courts to entertain jurisdiction and proceed to judgment in cases in which some of the defendants are not found within the jurisdiction, and declaring that such absent parties shall not be concluded by the judgment or decree, does not apply when indispensable parties are lacking; and, in respect to necessary parties, the cause may or may not be proceeded in without them, as the court may determine in the exercise of a sound discretion.—State of California v. Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683.

A nonresident heir cannot be regarded as such an indispensable party defendant that his absence will defeat the jurisdiction of a federal court of chancery over a suit brought by an heir against the executor and other heirs, to determine her interest in an alleged lapsed legacy and the consequent increase in the residuary estate, in view of the provisions of Rev. St. U. S. § 737 (U. S. Comp. St. 1901, p. 587), and of equity rule 47, which permit the court to proceed with the trial and adjudication of a suit as between the parties who are properly before it, and preserve the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered.—Waterman v. Canal-Louisiana Bank & Trust Co., 30 S. Ct. 10, 215 U. S. 33, 54 L. Ed. 80.

¶114. Intervention.

See 19 Cent. Dig. Equity, §§ 275-279.

Allegations in petition in intervention filed by administratrix of the surety on a forfeited bail bond held to sufficiently show a right to intervene to charge the holder of certain securities with a trust in favor of the government, as against objection that petition does not negative the surety's ignorance of the facts claimed to raise the trust, and that the asserted right of intervention rests upon an implied contract.—(1912) Leary v. United States, 32 S. Ct. 599, 224 U. S. 567, 58 L. Ed. 889, Ann. Cas. 1913D, 1029, reversing decree (1910) 184 F. 433, 107 C. C. A. 27.

The right of the administratrix of the surety on a forfeited bail bond, asserting an express trust in the surety's favor in securities held by a third person, to intervene in a suit by the United States to charge the holder of the securities with a trust, is not barred by laches because not filed until the evidence had been taken and the suit was ready for final hearing.—Id.

¶119. Process in general.

See 19 Cent. Dig. Equity, §§ 293-305.

No process is required to bring in as defendant to a cross bill an infant complainant in the original bill, under the Illinois statutes relating to cross bills (1 Starr & C. Ann. St. pp. 407, 408, §§ 30-35).—Kingsbury v. Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

¶120. Subpoena.

See 19 Cent. Dig. Equity, §§ 293-304.

124. — Return.

See 19 Cent. Dig. Equity, § 303.

Above the return on a writ of subpoena in a foreclosure suit was written a designation of H. as "special bailiff to execute the within subpoena" on two defendants named, signed by C., "U. S. Marshal"; and the return of service on said defendants was signed, "C., U. S. Marshal. H., Special Bailiff." The defendant first named afterwards filed a bill to set aside the deed of land sold under the decree of foreclosure in such suit, setting forth the designation and return, and alleging that there was no sufficient service on him, and that he never appeared or answered therein. *Held*, that as it was not inconsistent with the designation or return that H. was a general deputy, or that the service was made by the marshal and H., either jointly or severally in the order named, which would make the service on the first-named defendant service by the marshal, and nothing to the contrary was averred in the bill, and as the presumption was in favor of the validity of the foreclosure proceedings, as those of a court of superior jurisdiction, a demurrer to the bill should be sustained.—*Martin v. Gray*, 12 S. Ct. 186, 142 U. S. 236, 35 L. Ed. 997.

IV. PLEADING.

In particular proceedings.

See—

Bankruptcy, 302.
Cancellation of Instruments, 36, 37.
Injunction, 116-118.
Judgment, 460.
Monopolies, 24.
Mortgages, 444-453.
Quieting Title, 33-37.
Specific Performance, 112-117.
Trusts, 371.

(A) ORIGINAL BILL.

In suits for injunction, see Injunction, 118.
In suits to foreclose mortgages, see Mortgages, 444-453.
In suits to quiet title, see Quieting Title, 34, 35.
In suits to restrain enforcement of license tax, see Licenses, 35.

128. Nature and office.

See 19 Cent. Dig. Equity, §§ 307, 308.

After a decree disposing of the issues in a cause according to the prayer of the bill, the filing of a new bill by other parties, and involving other issues, although connected with the subject-matter of the original litigation, is to be regarded as the beginning of a new litigation, although it is styled a "supplemental bill," and is permitted to be entitled in the original cause. In such case the complainant in the original bill is entitled to notice, and will not be bound without it.—*Great Western Tel. Co. v. Purdy*, 182 U. S. 329, 16 S. Ct. 810, 40 L. Ed. 986, affirming judgment 83 Iowa, 430, 50 N. W. 45, and following *Smith v. Woolfolk*, 115 U. S. 143, 5 S. Ct. 1177, 29 L. Ed. 357.

136. Averment of jurisdiction.

See 19 Cent. Dig. Equity, § 316.

Under the Code provisions abolishing forms of actions, and providing that complainant shall state the facts constituting the cause of action in ordinary and concise language, it is not necessary, in order to obtain equitable relief, to allege that plaintiff has no remedy at law.—*Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 S. Ct. 293, 32 L. Ed. 688.

A sufficient showing of equitable jurisdiction is made by a bill filed by the Cherokee Na-

tion to restrain any further action by the secretary of the interior upon applications for leases of its tribal lands for mining purposes, which contains general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title, and a claim that irreparable injury will be caused, and wrong and oppression result, and that there will be a deprivation of property rights.—*Cherokee Nation v. Hitchcock*, 23 S. Ct. 115, 187 U. S. 294, 47 L. Ed. 183.

138. Prayer for relief.

See 19 Cent. Dig. Equity, §§ 319-321.

A bill by a widow against an heir, charging him with fraudulently procuring from her a quitclaim deed to the land of her deceased husband, and alleging that said heir had mortgaged the property to his codefendant, who had full knowledge of the fraud, and that the latter had purchased part of the property at foreclosure sale, and that the residue was sold to an innocent purchaser, is not demurrable because, besides asking general relief, it prays specifically to be allowed to redeem the whole property from the mortgage, as, under the facts and prayer for general relief, complainant could have relief as to her dower interest.—*Jones v. Van Doren*, 130 U. S. 684, 9 S. Ct. 685, 32 L. Ed. 1077.

A bill in equity alleged that defendant T., as president of defendant corporation, to induce complainant to purchase stock therein, sent her a letter, on which she had a right to rely, and did rely, and which contained fraudulent statements which induced complainant to purchase stock; that the purchase price thereof went into the company's treasury, was expended by it, and was justly due to complainant from the company and T.; and that the company was insolvent,—and prayed an accounting of the company's assets, their application to the debts due complainant and others, and the appointment of a receiver, and required answers to interrogatories as to the debts and assets of the company. *Held*, that relief against T. was properly granted under the prayer for general relief.—*Tyler v. Savage*, 143 U. S. 79, 12 S. Ct. 340, 36 L. Ed. 82.

141. Form and sufficiency of allegations in general.

See 19 Cent. Dig. Equity, §§ 223-330, 332.

The allegations of a bill in equity for the removal of a trustee of a trust created by will showed the creation of a trust estate, the appointment of a trustee, the designation of a cestui que trust, and specific directions to the trustee in respect to his duties. *Held*, that a demurrer, on the ground that the bill did not sufficiently set forth the nature of the trust, was properly overruled. The court could not assume that any of the provisions of the will relating to the subject-matter of the trust were omitted from the bill.—*Cavender v. Cavender*, 114 U. S. 404, 5 S. Ct. 955, 29 L. Ed. 212, affirming (C. C.) 8 F. 641, 3 McCrary, 158.

144. Consistency, ambiguity, or repugnancy.

See 19 Cent. Dig. Equity, § 338.

In a bill by the holder of notes secured by deed of trust to set aside a release thereof as negligently and fraudulently made, an attempt to charge the trustee personally because of his negligence in executing the release is inconsistent with the purpose of the bill, and must be disregarded.—*Williams v. Jackson*, 107 U. S. 478, 2 S. Ct. 814, 27 L. Ed. 529.

146. Multifariousness.

See 19 Cent. Dig. Equity, §§ 340-379; 24 Cent. Dig. Fraud. Conv. § 753.

—147. — In general.

See 19 Cent. Dig. Equity, § 340.

An objection of multifariousness based on misjoinder of parties and causes of action does not lie against a bill to enjoin ticket brokers from dealing in nontransferable reduced rate excursion tickets, where the acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complaining carrier were identical, the relief sought against each defendant being the same, and the defenses which might be interposed being common to each defendant, and involving like legal questions. *Decree, Louisville & N. R. Co. v. Bitterman* (1906) 144 F. 34, 75 C. C. A. 192, affirmed.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693.

—148. — Misjoinder of causes of action.

See 19 Cent. Dig. Equity, §§ 341-367; 1 Cent. Dig. Acct. § 83; 44 Cent. Dig. Spec. Perf. § 371.

The objection of multifariousness is overcome by the fact that one of the deeds of trust covers the whole property, and that many of the defendants' creditors have claims against various portions of the property, which makes it indispensable to clear title by a sale under decree that all the claims be adjudicated in one suit.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 S. Ct. 841, 30 L. Ed. 905.

Creditors of a corporation filed a bill to enforce judgments obtained against it and its vendor, joining as defendant B., who was alleged to be asserting a vendor's lien on some of the property transferred by the vendor to the company. A mortgagee of the company's property filed a cross bill, alleging that B. had entered into contracts to convey the property, on payment of the price, to the company's vendor, and that the latter's right and interest had been transferred to the company, and by it mortgaged; and prayed for the specific performance of B.'s contracts, and for a foreclosure of the mortgage, and an accounting. *Held*, that the cross bill was not multifarious.—*Brown v. Guarantee Trust & Safe-Deposit Co.*, 128 U. S. 403, 9 S. Ct. 127, 32 L. Ed. 468.

The fact that a paragraph of the bill set out a verbal agreement by defendant's intestate to convey to plaintiff an interest in land, while the prayer was for the payment of a certain amount of money, did not render the bill multifarious, the discrepancy being explained by the fact that, owing to the making of a trust deed of the property by the intestate, a decree for an interest in the land in accordance with the latter's contract would fail to satisfy plaintiff's claim, and that his lien was claimed to extend to the whole property to satisfy the intestate's promise to convey a half of its unincumbered value.—*Townsend v. Vanderwerker*, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.

An amendment to a bill by the United States against a surety on an official bond, setting up an additional claim against him on another bond, does not make the bill multifarious.—*United States v. Beebe*, 21 S. Ct. 371, 180 U. S. 343, 45 L. Ed. 563.

—149. — Misjoinder of complainants.

See 19 Cent. Dig. Equity, §§ 342, 368-370; 1 Cent. Dig. Acct. § 83; 24 Cent. Dig. Fraud. Conv. § 768.

Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity.—*Stebbins v. Town of St. Anne*, 116 U. S. 386, 6 S. Ct. 418, 29 L. Ed. 667.

—150. — Misjoinder of defendants.

See 19 Cent. Dig. Equity, §§ 342, 371-379; 1 Cent. Dig. Acct. § 83; 24 Cent. Dig. Fraud. Conv. § 768.

Multifariousness cannot successfully be urged against a bill filed by a foreign railway company in a federal Circuit Court to enjoin a prosecuting attorney from enforcing a state statute requiring the stoppage of interstate passenger trains at junction points, and to restrain the Secretary of State from proceeding under the authority of another state statute to revoke the company's license and right to do local business because of bringing suit in a federal court.—(1910) *Herndon v. Chicago, R. I. & P. Ry. Co.*, 30 S. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; *Swanger v. Atchison, T. & S. F. Ry. Co.*, 30 S. Ct. 639, 218 U. S. 159, 54 L. Ed. 978. Affirming decree *Chicago, R. I. & P. Ry. Co. v. Swanger* (C. C. 1908) 157 F. 783.

Bill by United States to cancel conveyances by Indian allottees as in violation of restrictions on alienation is not open to objection or multifariousness or misjoinder because relating to a number of separate conveyances by individual allottees to distinct grantees.—(1912) *Heckman v. United States*, 32 S. Ct. 424, 224 U. S. 413, 56 L. Ed. 820, affirming judgment upon conditions (1910) *United States v. Allen*, 179 F. 13, 103 C. C. A. 1.

A bill by the United States to cancel conveyances by heirs of Indian allottees in violation of existing restrictions on alienation is not multifarious because involving a number of separate conveyances by individual Indians to distinct grantees.—(1912) *Mullen v. United States*, 32 S. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, affirming judgment upon conditions (1910) *United States v. Allen*, 179 F. 13, 103 C. C. A. 1.

(B) PLEA, ANSWER, AND DISCLAIMER.**—156. Pleas.**

See 19 Cent. Dig. Equity, §§ 393-412.

—157. — Nature and office.

See 19 Cent. Dig. Equity, § 394.

The proper office of a plea in equity is to present some distinct fact which of itself creates a bar to the suit, or to the part to which the plea applies, and thus avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large.—*Farley v. Kittson*, 120 U. S. 303, 7 S. Ct. 534, 30 L. Ed. 684.

—170. — Plea overruled by answer.

See 19 Cent. Dig. Equity, § 407.

Defendant's pleas set up defenses that were covered by his answer. *Held* no error in overruling the pleas; the rule that no plea is to be held bad only because the answer may extend to some part of the same matter as may be covered by the plea not being applicable where the answer extends to the whole of the matter covered by the plea.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 S. Ct. 841, 30 L. Ed. 905.

—175. — Hearing and determination.

See 19 Cent. Dig. Equity, § 411.

Equity rule 33, providing that if, when the plaintiff takes issue on the plea, the facts stated therein shall be determined for the defendant, "they shall avail him as far as in law and equity they ought to avail him," changes the old rule that a replication to a plea admits its sufficiency; and hence when the facts found under such an issue show that the plaintiff is equitably entitled to part of the relief prayed as against one defendant, and to all of it as against another, the bill will not be dismissed, but the

appropriate relief will be granted.—*Pearce v. Rice*, 142 U. S. 28, 12 S. Ct. 130, 35 L. Ed. 925.

Lands were donated to the state of Oregon in aid of the construction of a wagon road, which were to be patented to the state or its grantees upon the certificates of the governor that specified portions of the road had been completed. An act was afterwards passed, providing that suits in equity should be brought on behalf of the United States for the forfeiture of such grants, which recited in its preamble that the road had not been constructed as required, and that certificates of completion had been fraudulently obtained from the governor. These allegations were embodied in a bill, to which a grantee by mesne conveyances was made defendant; and this defendant filed two pleas,—one alleging that the road had been completed, and that the certificates thereof were not procured by fraud; and the other that defendant was a bona fide purchaser. *Held*, that it was not error to strike out the issuable allegations of the first plea, and to confine the inquiry to the bona fides of defendant's purchase; for that plea, if true, was a complete bar to the suit.—*United States v. California & O. Land Co.*, 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354, affirming decree 49 F. 496, 1 C. C. A. 330, 7 U. S. App. 128; *Same v. Dalles Military Road Co.*, 148 U. S. 49, 13 S. Ct. 465, 37 L. Ed. 362.

When a plea which meets and satisfies all the claims of the bill is put in issue, and the facts are found as therein stated, a final decree must be given for defendant, even under equity rule 33.—*Horn v. Detroit Dry-Dock Co.*, 150 U. S. 610, 14 S. Ct. 214, 37 L. Ed. 1199.

177. Answer.

See 19 Cent. Dig. Equity, §§ 413-434.

191. — Impertinence and scandal.

See 19 Cent. Dig. Equity, § 434.

The mother and guardian of a minor, upon his death, was appointed co-administrator with plaintiff of his estate. Thereafter she retained exclusive possession and control of the estate, and on her death it passed into the hands of her husband, who mingled it with his own property. Plaintiff as surviving administrator having sued him to recover possession of the estate, he filed an answer and a cross-bill, alleging that plaintiff, as one of the administrators of the minor's father, had wasted and misappropriated moneys which should have come to the minor, in excess of the amount of the minor's estate in defendant's hands, and in the cross-bill prayed an accounting as to the father's estate, and that a decree of the probate court finally discharging the administrators of the father's estate should be set aside, together with various other forms of relief, which would have required an investigation extending over many years. *Held*, that such allegations of the answer were impertinent.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

(C) CROSS-BILL AND PLEA AND ANSWER THERETO.

195. Nature and office of cross-bill.

See 19 Cent. Dig. Equity, §§ 446-449.

Where a bill is filed to restrain an execution sale under a judgment, defendant may file a cross-bill to have the judgment decreed a valid equitable lien on complainant's property, and to have the property sold to satisfy it.—*Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 S. Ct. 550, 33 L. Ed. 900.

A bill alleged ownership by complainant of property, including certain realty conveyed by a certain deed to his father, and standing in

the latter's name at his death; prayed that an alleged will of the latter be declared invalid, that title to the property be confirmed in complainant, and that defendants be enjoined from interfering therewith. A cross-bill alleged that the deed mentioned was a trust deed for defendants' benefit, and prayed that the trust be declared, and defendants' ownership of the property established. *Held*, that the subject-matter of the cross-bill was germane to that of the original bill.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

The mother and guardian of a minor, upon his death, was appointed co-administrator with plaintiff of his estate. Thereafter she retained exclusive possession and control of the estate, and on her death it passed into the hands of her husband, who mingled it with his own property. Plaintiff, as surviving administrator, having sued him to recover possession of the estate, he filed an answer and a cross-bill, alleging that plaintiff as one of the administrators of the minor's father had wasted and misappropriated moneys which should have come to the minor in excess of the amount of the minor's estate in defendant's hands, and in the cross-bill prayed for an accounting as to the father's estate, and that a decree of the probate court finally discharging the administrators of the father's estate should be set aside, together with various other forms of relief, which would have required investigation extending over many years. *Held*, that the cross-bill was multifarious because the matters therein set up were not connected with the issues raised by the original bill which merely involved the right of the defendant to retain possession of the minor's estate as against the surviving administrator thereof. 41 P. 529, 7 N. M. (Gild.) 666 affirmed.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

A transferee of national bank stock cannot recover the consideration paid therefor, by cross-bill, in an action brought by a receiver to enforce against the transferor his statutory liability, as such cross-bill raises an independent controversy, in which the receiver has no interest. Decree 72 F. 402, 18 C. C. A. 618, affirmed.—*Stuart v. Hayden*, 18 S. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

197. Right to file cross-bill.

See 19 Cent. Dig. Equity, §§ 456-459.

Cross-bills filed by some of the defendants in a suit brought in a federal Circuit Court to establish the relative rights of the parties as appropriators of the waters of the same stream are maintainable, although they may admit the right of complainants, since a decree as between themselves and the other defendants may be necessary to prevent a decree for complainants from working injustice.—(1910) *Rickey Land & Cattle Co. v. Miller & Lux*, 31 S. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032, affirming decree (1907) 152 F. 11, 22, 81 C. C. A. 207, 218.

198. Leave or direction of court to file cross-bill.

See 19 Cent. Dig. Equity, §§ 460-463.

Permission to file a cross-bill which seeks to suspend the operation of a decree for the discharge of the trustee in a voting trust agreement and the transfer of the stock to the new trustee, is properly refused defendants who assert claims to the stock antagonistic to the holders of the trust certificates, unless they apply for an injunction and give security—especially where there are some shares of stock held by the trustee to which such defendants assert no claim.—(1910) *Moore Printing Type-writer Co. v. National Savings & Trust Co.*, 31 S. Ct. 64, 218 U. S. 422, 54 L. Ed. 1093, affirming decree (1908) 31 App. D. C. 452.

◀ 199. Jurisdiction of subject-matter.

See 19 Cent. Dig. Equity, §§ 463, 464.

A bill alleged ownership by complainant of property, including certain realty conveyed by a certain deed to his father, and standing in the latter's name at his death, and prayed that an alleged will of the latter be declared invalid, that title to the property be confirmed in complainant, and that defendants be enjoined from interfering therewith. A cross-bill alleged that the deed mentioned was a trust deed for defendants' benefit, and prayed that the trust be declared, and defendants' ownership of the property established. *Held*, that the jurisdiction of complainant, acquired by his filing the original bill, extended to the matter alleged in the cross-bill.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

A railway company filed a bill in the United States circuit court against another company to subject the property of the latter to the payment of advances made to it for the purpose of enabling it to continue as a "going concern;" and, by a supplemental bill, the trustee in a mortgage given by defendant was brought in and made a party. *Held*, that such trustee could file a cross-bill praying for the foreclosure of the mortgage, and it was competent for the court to render a decree of foreclosure on such bill, as the subject-matter of the cross-bill was the same as that of the original bill, and the court, having jurisdiction of that, had jurisdiction of all the parties, though their citizenship might not give it jurisdiction.—*Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 S. Ct. 61, 34 L. Ed. 625.

(D) REPLICATION.

◀ 209. Right to reply.

See 19 Cent. Dig. Equity, § 481.

In suits under Act Cong. March 2, 1889 (25 Stat. 850), directing suits in the name of the United States against every one claiming any interest in the lands granted to the state of Oregon to aid in the construction of roads, by Acts Cong. July 2, 1864 (13 Stat. 355), July 5, 1866 (14 Stat. 89), and Feb. 25, 1867 (14 Stat. 409), to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of said acts, the legal effect of certain certificates of the governors of Oregon as to the completion of said roads, and the right of pre-emption of the land by the United States, and to obtain judgments declaring the lands forfeited for nonperformance of conditions, and setting aside patents therefor, saving the rights of bona fide purchasers for value, where, on argument, the pleas, alleging that there was no fraud connected with the certificates of the governors, and that defendants were bona fide purchasers for value, are sustained as sufficient, complainant should be allowed, by replication, to put in issue the allegations of the plea.—*United States v. Dalles Military Road Co.*, 140 U. S. 599, 11 S. Ct. 988, 35 L. Ed. 560, reversing decrees (C. C.) 40 F. 114, 41 F. 493, and (D. C.) 42 F. 351.

◀ 212. Sufficiency.

See 19 Cent. Dig. Equity, § 485.

Where plaintiff, on the plea being filed, does not set it down for argument, and thereby raise the question of the sufficiency in law of the facts stated, to prevent his recovery, but files a replication, and thereby admits the legal effect of such facts, but denies their existence, a determination of such issue of fact is conclusive.—*Farley v. Kittson*, 120 U. S. 303, 7 S. Ct. 534, 30 L. Ed. 684.

Plaintiff, holding certain bonds issued by the I. Co., filed his bill praying that such bonds and the mortgage securing them be declared valid,

and the mortgaged property be applied to the payment of the bonds; and alleged in his amended bill that a mortgage had been executed by the C. Co. and the I. Co. upon the property and franchises of the former to secure bonds issued by the latter, and that, the trustees in such mortgage being dead, no other had been appointed, but the C. G. Co., by purchase and otherwise, claimed a right to the property prior to plaintiff's lien. He further alleged that the judgment pleaded in bar of plaintiff's bill was obtained in fraud against the bondholders. Defendants, the C. Co. and C. G. Co., filed pleas to the amended bill, setting up a decree of a court of competent jurisdiction in a suit in which the mortgagor, the surviving trustee, and all known bondholders were parties, canceling the mortgage and the bonds secured by it, alleging that such decree was procured without fraud or collusion; the C. G. Co. further pleaded that it was an innocent purchaser of the mortgaged property from the C. Co., which pleas were supported by answers under oath. Defendant, the I. Co., pleaded a decree by which it was enjoined from making any claim to the property. Plaintiff filed a general replication to "the answers" of the three corporations. *Held*, that the uncontradicted allegations of these pleas, being directly responsive to the bill, are conclusive as against plaintiff's claim.—*Beals v. Illinois, M. & T. R. Co.*, 133 U. S. 290, 10 S. Ct. 314, 33 L. Ed. 608.

(E) DEMURRER, EXCEPTIONS, AND MOTIONS.

◀ 214. Mode of making objections to pleading.

See 19 Cent. Dig. Equity, § 487.

Where it appears on the face of the bill that the claim asserted is stale, the defense may be made by demurrer, plea, or answer.—*Lansdale v. Smith*, 106 U. S. 391, 1 S. Ct. 350, 27 L. Ed. 219.

◀ 218. Grounds for demurrer to bill.

See 19 Cent. Dig. Equity, §§ 496-503.

◀ 219. — In general.

See 19 Cent. Dig. Equity, §§ 496, 498-500.

When a bill in equity shows on its face that plaintiff, by reason of lapse of time, and of his own laches, is not entitled to relief, the objection may be taken by demurrer.—*Lansdale v. Smith*, 106 U. S. 391, 1 S. Ct. 350, 27 L. Ed. 219; *Speidel v. Henrici*, 120 U. S. 377, 7 S. Ct. 610, 30 L. Ed. 718.

◀ 239. Admissions by demurrer.

See 19 Cent. Dig. Equity, § 494.

On demurrer to a bill for foreclosure of a building association mortgage, raising the question of jurisdictional amount, it cannot be assumed that payments expressed in the bond sued on, and alleged in the bill as dues on the borrower's shares of stock, are in fact intended as payments of usurious interest.—*Building & Loan Ass'n of Dakota v. Price*, 18 S. Ct. 251, 169 U. S. 45, 42 L. Ed. 655.

◀ 241. Hearing and determination on demurrer.

See 19 Cent. Dig. Equity, § 515.

No amendment to a bill filed by one state against another state, whose averments are sufficient to present the question whether the latter state has the power wholly to deprive the former of the benefits of water from a river which rises in the former and by nature flows into and through the latter state, will be compelled on demurrer, whatever imperfections a close analysis of the bill may disclose; but any decision as to the sufficiency of the bill to war-

rant the relief prayed for will be postponed until the facts are before the court on the evidence.—*State of Kansas v. State of Colorado*, 22 S. Ct. 552, 185 U. S. 125, 46 L. Ed. 838.

Consideration of the objections of multifariousness, misjoinder of parties, and of causes of action may properly be postponed until the final hearing on a bill filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state.—*Commonwealth of Virginia v. State of West Virginia*, 27 S. Ct. 732, 206 U. S. 290, 51 L. Ed. 1068.

The question whether the commonwealth of Virginia has been released from all liability on account of the public debt evidenced by bonds of the state outstanding on January 1, 1861, will not be passed upon on a demurrer to a bill filed by that state against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state, but the consideration of such question will be postponed until final hearing.—*Id.*

6242. **Operation and effect of decision on demurrer.**

See 19 Cent. Dig. Equity, §§ 516-520.

6247. **Amendment after demurrer sustained.**

See 19 Cent. Dig. Equity, § 520.

Though an original bill by a widow alleging that defendant fraudulently procured a conveyance of land from complainant charges the fraud to have been committed by representing that the conveyance would facilitate litigation in which the estate was involved, an amended bill, filed after a demurrer to the original bill is sustained, charging defendant with having misrepresented the nature of the instrument executed by complainant, does not set up such different ground for relief that it is an abuse of discretion to refuse to strike it from the files.—*Jones v. Van Doren*, 130 U. S. 684, 9 S. Ct. 685, 32 L. Ed. 1077.

6261. **Motions relating to pleadings.**

See 19 Cent. Dig. Equity, §§ 534-540.

6264. **Striking out part of pleading.**

See 19 Cent. Dig. Equity, §§ 536-540.

Averments challenging the foreign citizenship of a corporation are properly stricken from the answer in a suit by such corporation to enjoin state officials from enforcing a forfeiture of its right to do business in the state because of its claim of right to remove an action against it from a state court to a federal court.—*Harrison v. St. Louis & S. F. R. Co.*, 34 S. Ct. 333, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915F, 1187, affirming decree (C. C.) *St. Louis & S. F. R. Co. v. Cross*, 171 F. 480.

(F) AMENDED AND SUPPLEMENTAL PLEADINGS AND REVIVOR.

6267. **Discretion of court as to amendment.**

See 19 Cent. Dig. Equity, §§ 545, 546.

A bill in equity brought by a judgment creditor of a national bank against the bank, which had gone into voluntary liquidation, and its president alleged fraudulent conversion and dispersion of part of the bank's assets by the president, and sought a discovery, injunction, and receiver. An amendment to the bill was

afterwards allowed, joining as defendants all the stockholders, some of whom were alleged to have confederated with the president, and to have surrendered their stock for assets of the bank, and praying for the enforcement of the individual liability of the stockholders in favor of the original complainant, and any other creditors who might join. *Held*, that the allowance of such amendment was within the discretion of the court, although the remedy by bill in equity to enforce the individual liability of stockholders was given by an act which took effect between the date of the filing of the original bill and the making of the amendment.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

6268. **Amendment of bill.**

See 19 Cent. Dig. Equity, §§ 418, 552-562.

6273. **Matter making new case.**

See 19 Cent. Dig. Equity, §§ 561-563.

An amendment to a bill in equity does not set forth a new and different cause of action, so as to forbid its allowance in the court's discretion, although the reasons for relief are stated more fully and in some respects differently from those in the original bill, where the purpose of both bills is the same,—to establish a resulting trust arising from the same transactions and based on the same general rule of law applicable to resulting trusts. *Judgment*, 16 App. D. C. 595, affirmed.—*Brainard v. Buck*, 22 S. Ct. 458, 184 U. S. 99, 46 L. Ed. 449.

6275. **Operation and effect in general.**

See 19 Cent. Dig. Equity, § 567.

Where a corporation is made a party defendant as such to an original bill, it must also be considered a defendant to an amended bill which prays that the "parties defendant" to the original bill be made defendants to the amended bill, and "refers" to the original bill, and "makes the same a part hereof, as if set out herein in hæc verba"; although the amended bill avers that the said organization was never legally incorporated, and that it was in reality a partnership composed of certain individual defendants doing business under the style of the pretended corporation.—*Empire Coal & Transportation Co. v. Empire Coal & Mining Co.*, 150 U. S. 159, 14 S. Ct. 68, 37 L. Ed. 1037.

6286. **Amendment of cross-bill.**

See 19 Cent. Dig. Equity, § 579.

An amendment to a cross-bill, allowed at the hearing, making it to conform to the proof, and changing the ground on which defendant originally based his right to relief, is not error, where the matter incorporated by such amendment was alleged in complainant's bill, and by it brought out in the proof.—*Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 S. Ct. 550, 33 L. Ed. 900.

6288. **Amendment to conform to proofs.**

See 19 Cent. Dig. Equity, § 547.

In a suit by the heirs and administrator of a vendor of land by title bond the bill alleged that the bond had been obtained by fraud, and that the land had not been fully paid for according to the contract of sale. Its prayer was, among other things, that the bond be canceled; that an account be taken of the rents and profits which the purchaser had enjoyed, and of the amount paid on his purchase; that the title of the complainants be quieted; and that they have such other relief as equity might require. *Held*, that complainants were properly permitted at the final hearing to amend the prayer of the bill so as to ask, in the alternative, for a decree for the balance of the purchase money, and a

lien on the land to secure the payment thereof. The amendment did not make a new case, but only enabled the court to adapt its relief to that made by the bill and sustained by the proof. The bill, with the prayer thus amended, was in the form in which it might have been originally prepared consistently with the rules of equity practice.—*Hardin v. Boyd*, 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141, distinguishing *Shields v. Barrow*, 58 U. S. (17 How.) 130, 15 L. Ed. 158.

◀294. **Supplemental bill or cross-bill.**

See 19 Cent. Dig. Equity, §§ 581-589, 591-593, 599.

◀296. — **Grounds.**

See 19 Cent. Dig. Equity, §§ 584-586, 599.

An agreement to compromise litigation should be presented to the court by supplemental bill.—*Coburn v. Cedar Val. Land & Cattle Co.*, 138 U. S. 196, 11 S. Ct. 258, 34 L. Ed. 876, affirming decrees (C. C.) 29 F. 584.

◀297. — **Leave of court.**

See 19 Cent. Dig. Equity, § 588.

Defendants are chargeable with notice of an application to file a supplemental bill, where such bill was tendered when the court was open, leave to file was given in open court, and defendants' attorney was served with a copy on the day it was tendered and filed. Decree, *United States v. Rio Grande Dam & Irrigation Co.* (1906) 85 P. 393, 13 N. M. 380, affirmed.—*Rio Grande Dam & Irrigation Co. v. United States*, 30 S. Ct. 97, 215 U. S. 266, 54 L. Ed. 190.

◀303. **Bill of revivor.**

See 19 Cent. Dig. Equity, §§ 602-611.

◀304. — **Nature and office.**

See 19 Cent. Dig. Equity, §§ 602, 604-607.

In a suit by stockholders of a railroad company against county officers to enjoin the collection of taxes on the property of the company, which had given a mortgage thereon, neither the mortgagee nor any representative of the mortgagee was made a party. *Held*, that a new corporation, deriving title under foreclosure of such mortgage, did not occupy such a relation to plaintiffs as would entitle it to file a bill of revivor; and, such foreclosure and the deeds under it having conveyed all the interests of defendants in the foreclosure suit, no title which would sustain a revivor was acquired by such corporation under a foreclosure of a subsequent mortgage which was treated by the parties as an abandoned security.—*Keokuk & W. R. Co. v. Scotland County Court*, 152 U. S. 318, 14 S. Ct. 605, 38 L. Ed. 457; *Id.*, 152 U. S. 317, 14 S. Ct. 608, 38 L. Ed. 457.

As a corporation deriving title to railroad property under foreclosure of a mortgage thereon, given before a suit by stockholders of the railroad company to enjoin the collection of taxes on the property, would not be estopped by a decree against plaintiffs in such suit, it is not entitled to the benefit of a decree in favor of plaintiffs, and cannot maintain a bill to revive such suit, even though proceedings to enforce the lien for taxes would have divested the mortgagees of their rights.—*Id.*

(G) **SIGNATURE, VERIFICATION, FILING, AND SERVICE.**

◀320. **Affidavit and certificate accompanying plea or demurrer.**

See 19 Cent. Dig. Equity, §§ 627, 628.

A demurrer is fatally defective, and may be entirely disregarded, when it lacks the affidavit of defendant and the certificate of counsel required by equity rule 31.—*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 S. Ct. 936, 37 L. Ed. 853.

◀323. **Withdrawal of pleadings.**

See 19 Cent. Dig. Equity, §§ 435, 482, 523.

An unexplained delay of over six years in filing a petition for leave to withdraw an answer containing admissions which have been made the basis of a decree will prevent the court from granting the relief prayed in favor of adult defendants, where no fraud or collusion is shown.—*White v. Miller*, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921.

Permitting the withdrawal of an original bill of a waterworks company, alleging that it had become the owner of the contract involved in a suit between the municipality and another waterworks company, where such bill, being in the nature of a supplemental bill, was filed after the city, in answer to the company's petition to be admitted as a party complainant, had denied that it had any interest in the litigation, was not an abuse of the discretion of the trial court, and the same is true of its action in suppressing the testimony on this question, and in denying the municipality leave to file a further answer, setting up the alleged transfer of ownership.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 26 S. Ct. 660, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

(H) **ISSUES, PROOF, AND VARIANCE.**

In suits for specific performance, see Specific Performance, ▶117.

◀326. **Evidence admissible under pleadings.**

See 19 Cent. Dig. Equity, §§ 648-650.

When a plea setting up an accord and satisfaction, and certain receipts signed by complainant, is put in issue by a mere general replication, complainant cannot show mistake in the agreement of accord, or give parol evidence to explain the receipt.—*Horn v. Detroit Dry-Dock Co.*, 150 U. S. 610, 14 S. Ct. 214, 37 L. Ed. 1190.

◀327. **Variance between allegations and proof.**

See 19 Cent. Dig. Equity, §§ 651, 652.

Where there is enough in the bill to warrant relief, and to prevent defendants from being taken by surprise, the decree should not be reversed on the ground that the pleading and proof do not sufficiently agree.—*Moore v. Crawford*, 130 U. S. 122, 9 S. Ct. 447, 32 L. Ed. 878, affirming decree (C. C.) *Crawford v. Moore*, 28 F. 824.

There is no such variance between the allegations of a bill seeking to charge with a trust certain property in the hands of the executors of the alleged trustee, and evidence that the latter had turned over the major portion of the property to one who was claimed to have had no authority to receive it, as requires the dismissal of such bill. Decree 24 App. D. C. 573, reversed.—*Darlington v. Turner*, 26 S. Ct. 630, 202 U. S. 195, 50 L. Ed. 992.

(I) **DEFECTS AND OBJECTIONS, AND WAIVER THEREOF.**

◀330. **Waiver of objections to pleadings in general.**

See 19 Cent. Dig. Equity, §§ 660-668, 671; 27 Cent. Dig. Inj. § 271.

When an agreement to compromise litigation is presented by petition, instead of by supplemental bill, and the opposite party appears and files proofs, he is estopped, after decision rendered, from objecting to the method of proceeding.—*Coburn v. Cedar Val. Land & Cattle Co.*, 138 U. S. 196, 11 S. Ct. 258, 34 L. Ed. 876, affirming decrees (C. C.) 29 F. 584.

Under equity rule 33, providing that if the facts stated in a plea be determined for defendant, they shall avail him as far as in law and equity they ought to avail him, where plaintiff puts down a plea for argument as to its sufficiency, and, on that question being decided against him, files a replication putting in issue the facts averred in the plea, instead of abiding by the issue as to its legal sufficiency, he is not precluded by so doing from raising the question of its sufficiency on appeal.—*Green v. Bogue*, 158 U. S. 478, 15 S. Ct. 975, 39 L. Ed. 1061.

The objection of multifariousness will not prevail on appeal, where the bill charges a conspiracy between several trespassers, and trespasses extending over the greater part of contiguous lots, treated as one—especially where defendants did not stand upon their demurrers setting up such objection, and the case has been tried after long delay. *Decree, Ashburn v. Graves* (1907) 149 F. 968, 79 C. C. A. 478, reversed.—*Graves v. Ashburn*, 30 S. Ct. 108, 215 U. S. 331, 54 L. Ed. 217.

V. EVIDENCE.

In particular proceedings.

See—

- Account, 318.
- Divorce, 123-130.
- Fraudulent Conveyances, 270-302.
- Injunction, 124-128.
- Lost Instruments, 23.
- Mortgages, 462-464.
- Reformation of Instruments, 42-45.
- Specific Performance, 118-121.

338. Answer as evidence.

See 19 Cent. Dig. Equity, §§ 685-724; 34 Cent. Dig. Mech. Liens, § 564.

339. — In general.

See 19 Cent. Dig. Equity, §§ 685, 686, 688-696, 702-705, 710, 714.

A defendant to a bill in equity, who states in his answer, under oath, the provisions of a writing which is presumed to be in his possession, cannot complain that the court acted upon his admission.—*Cavender v. Cavender*, 114 U. S. 464, 5 S. Ct. 955, 29 L. Ed. 212, affirming (C. C.) 8 F. 641, 3 McCrary, 158.

343. — Waiver of answer under oath.

See 19 Cent. Dig. Equity, § 702.

If a plaintiff in equity is unwilling that the answer should be evidence against him, he must expressly waive the oath of the defendant in his bill.—*Conley v. Nailor*, 118 U. S. 127, 6 S. Ct. 1001, 30 L. Ed. 112.

345. — Evidence to overcome answer.

See 19 Cent. Dig. Equity, §§ 715-724.

The answer of defendant, so far as responsive to the bill, must be taken as true unless it be overturned by two witnesses, or one with strong corroborative circumstances.—*Vigel v. Hopp*, 104 U. S. 441, 26 L. Ed. 765; *Morrison v. Durr*, 122 U. S. 518, 7 S. Ct. 1215, 30 L. Ed. 1225.

A sworn answer responsive to the bill must be overcome by evidence of two witnesses or evidence of one witness corroborated by circumstances.—*Campbell v. Northwest Eckington Imp. Co.*, 33 S. Ct. 796, 229 U. S. 561, 57 L. Ed. 1330, reversing decree 36 App. D. C. 149.

346. Presumptions and burden of proof.

See 19 Cent. Dig. Equity, §§ 725, 726.

In a suit in equity to impeach the validity of a note and deed of trust, as forgeries, held that the issue is one entirely of fact, in which

the burden of proof is upon the plaintiffs.—*Cissel v. Dutch*, 8 S. Ct. 829, 125 U. S. 171, 31 L. Ed. 642.

347. Admissibility.

See 19 Cent. Dig. Equity, § 727.

Where a complainant calls upon a defendant to state in his answer the consideration of a deed, and the latter does so, and supports it by evidence, the evidence will not be disregarded as inadmissible because unfavorable to the complainant.—*Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 S. Ct. 613, 28 L. Ed. 577; *Mattoon v. McGrew*, 112 U. S. 713, 5 S. Ct. 369, 28 L. Ed. 824.

VI. TAKING AND FILING PROOFS.

358. Objections to evidence.

See 19 Cent. Dig. Equity, §§ 745-748.

Under rule 21 (3 Sup. Ct. xii), providing that the exception to a master's report, and the action of the court upon it, must be stated in the specifications of error, a mere suggestion that the conclusions of an expert, incorporated in the master's report, were erroneous, is insufficient.—*Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363.

VII. DISMISSAL BEFORE HEARING.

359. Voluntary dismissal.

See 19 Cent. Dig. Equity, §§ 749-755.

After a decree sustaining a cross-bill by one of the defendants, the complainant cannot dismiss his original bill, notwithstanding his failure to reply to a plea to the jurisdiction filed by another defendant, as required by equity rule 38.—*Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 S. Ct. 594, 27 L. Ed. 1081.

360. Involuntary dismissal.

See 19 Cent. Dig. Equity, §§ 757-774.

363. — Motion and determination thereof.

See 19 Cent. Dig. Equity, §§ 762-766, 763.

After setting down a cause for hearing on bill and answer, a motion to dismiss the suit for want of the timely filing of the replication, as required by equity rule 66, is made too late.—*Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 5 S. Ct. 213, 28 L. Ed. 733.

365. — Dismissal without prejudice.

See 19 Cent. Dig. Equity, §§ 769-771.

Where the relief prayed for by a bill in equity is of a nature that can only be granted in an action at law, the bill should be dismissed without prejudice to such an action.—*Lacassagne v. Chapuis*, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368.

367. — Operation and effect.

See 19 Cent. Dig. Equity, §§ 772, 774.

The dismissal because of estoppel by former decree of a bill filed of the United States to avoid certain patents of land issued by the United States in pursuance of the wagon road grant made by Act Cong. July 2, 1864, c. 213 (13 Stat. 355), on the ground that the lands were within an Indian reservation, and therefore excepted from the operation of the grant, requires the dismissal of the cross-bill which seeks to enjoin the allotments of such lands and the issue of patents therefor to the Indians. *Decree (C. C.) United States v. Oregon Cent. Military Road Co.*, 103 F. 549, reversed.—*United States v. California & Oregon Land Co.*, 24 S. Ct. 266, 192 U. S. 355, 48 L. Ed. 476.

⚡368. Setting aside, and reinstatement of cause.

See 19 Cent. Dig. Equity, §§ 756, 775.

Where a bill against the representatives of a decedent's estate has been voluntarily dismissed by the complainant, it is not reinstated by his filing, several years afterwards, and without leave of court, a withdrawal of the order to dismiss, and a replication to the answer originally filed in the case by the decedent.—*Willard v. Wood*, 17 S. Ct. 176, 164 U. S. 502, 41 L. Ed. 531.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

In suits for cancellation of instruments, see Cancellation of Instruments, ⚡48-53.

In suits to foreclose mortgages, see Mortgages, ⚡476.

In suits to set aside transfers in fraud of creditors, see Fraudulent Conveyances, ⚡308-310.

⚡376. Submission of issues to jury.

See 19 Cent. Dig. Equity, §§ 788-830.

⚡377. — In general.

See 19 Cent. Dig. Equity, §§ 788-793.

The awarding of an issue to try a question of fact is within the discretion of a court of equity.—*Wilson v. Riddle*, 123 U. S. 608, 8 S. Ct. 255, 31 L. Ed. 280.

⚡378. — Issues proper for jury.

See 19 Cent. Dig. Equity, §§ 794-799.

Upon an intervention in railway foreclosure proceedings to recover damages against the receiver for personal injuries to an employé, the court has authority to submit to a jury the single issue as to the amount of the damages, in case there is any liability.—*Kohn v. McNulta*, 147 U. S. 238, 13 S. Ct. 298, 37 L. Ed. 150.

⚡379. — Proceedings for award and framing of issues.

See 19 Cent. Dig. Equity, §§ 800-808.

A judge, before whom certain issues in equity were tried by a jury, acted as chancellor in making the decree; the same proofs being relied on before the jury and the chancellor. *Held*, that a previous order by the judge submitting the issues to the jury, and a certificate to himself of the result, were unnecessary.—*Wilson v. Riddle*, 123 U. S. 608, 8 S. Ct. 255, 31 L. Ed. 280.

⚡381. — Verdict and findings.

See 19 Cent. Dig. Equity, §§ 813-817.

Where there is an issue out of chancery in the United States circuit court, and a verdict returned thereon, which is certified, and a decree entered, an order made at the next succeeding term nunc pro tunc, permitting a certificate of the evidence on the trial of the issue and the charge to the jury to be filed as a part of the record, is authorized.—*Kerr v. South Park Com'rs*, 117 U. S. 379, 6 S. Ct. 801, 29 L. Ed. 924; *Id.*, 117 U. S. 388, 6 S. Ct. 805, 29 L. Ed. 927.

Where a verdict, rendered upon the trial of an issue out of chancery, is set aside by the law side of the court, and a new trial ordered, and another verdict is rendered therein, which is certified, a decree entered in conformity therewith will not be reversed on appeal because the first verdict was never certified to the chancery side of the court, by which alone it could be set aside, since the decree of the chancellor adopting the second verdict amounts to an affirmation of the action of the law side of the court.—*Id.*

The verdict of a jury on an issue directed by a court of chancery is merely advisory.—*Idaho & Or. Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hasb.) 239, 10 Pac. 620.

Upon an intervention in railway foreclosure proceedings to recover damages against the receiver for personal injuries to an employé, a verdict rendered on the issue as to the amount of the damages, when returned, is merely advisory, and the court may thereafter set the same aside, and dismiss the intervening petition.—*Kohn v. McNulta*, 147 U. S. 238, 13 S. Ct. 298, 37 L. Ed. 150.

⚡392. Rehearing.

See 19 Cent. Dig. Equity, §§ 834-851.

An application for a rehearing, made after the term at which a final decree is rendered, is too late.—*Bank of Lewisburg v. Sheffey*, 140 U. S. 445, 11 S. Ct. 755, 35 L. Ed. 493, affirming decree *Sheffey v. Bank of Lewisburg (D. C.)* 33 F. 315.

Where a petition for rehearing is made at the same term, and entertained by the court, the time limited for an appeal or writ of error does not begin to run until the application is disposed of, though this is at a subsequent term. Even if final decree has, in form, been entered, the parties are not discharged, and the prohibition in equity rule 88 against granting a rehearing after the term in which final decree has been entered and recorded has no application.—*Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 988.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Reference in action at law, see Reference. Review, see Appeal and Error, ⚡273, 1016-1022.

⚡401. Questions and matters proper for reference.

See 19 Cent. Dig. Equity, §§ 869-873.

Reference to a special master decreed in a suit begun by an original bill in equity, filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state.—*Commonwealth of Virginia v. State of West Virginia*, 28 S. Ct. 614, 209 U. S. 514, 52 L. Ed. 914.

⚡406. Report.

See 19 Cent. Dig. Equity, §§ 893-904, 920-923.

⚡408. — Return of evidence.

See 19 Cent. Dig. Equity, §§ 901, 902.

A master's conclusions of fact upon the evidence cannot be impeached when the order of reference does not require him to send up the testimony, and there is no certificate that the entire evidence is returned.—*Sheffield & B. Coal, Iron & Railway Co. v. Gordon*, 151 U. S. 285, 14 S. Ct. 343, 38 L. Ed. 164.

⚡409. — Operation and effect.

See 19 Cent. Dig. Equity, §§ 904, 920-923; 35 Cent. Dig. Mtg. § 108.

Where the parties consent to a reference to a master in chancery to hear and decide all the issues, and report his findings both of fact and law, and such reference is entered as a rule of the court, his findings are to be taken as presumptively correct, and only reviewable under the reservation in the consent and order

of the court, when there has been manifest error in the consideration given to evidence, or in the application of the law.—*Kimberly v. Arms*, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764.

Findings of fact of a commissioner in chancery should be sustained, unless the evidence clearly shows that they are erroneous.—*Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363.

In a suit for the dissolution of a partnership, and the return of plaintiff's capital unimpaired, where the cause is, by consent, referred to a master "to pass upon the accounts herein, and to report thereon," the fact that he passes upon the whole controversy without objection does not make his report presumptively correct.—*Oteri v. Scalzo*, 145 U. S. 578, 12 Sup. Ct. 895, 36 L. Ed. 824.

The findings of fact by a master, to whom a cause is referred to ascertain an amount due, while not absolutely binding on the court, are supported by a strong presumption of correctness and will not be set aside or modified, in the absence of some clear error or mistake.—*Girard Life Insurance, Annuity & Trust Co. v. Cooper*, 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062, affirming decree 51 F. 332, 2 C. C. A. 245, 4 U. S. App. 631, following *Camden v. Stuart*, 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363.

410. Objections and exceptions to report and hearing thereof.

See 19 Cent. Dig. Equity, §§ 905-919.

A waiver of the right to except to a master's report stating an account of the rents and profits of property in dispute admits only the correctness of the report in regard to the amount of such rents and profits, and does not concede the correctness of the final decree determining the title to such profits or to the property itself. *Waterman v. Waterman (C. C.)* 27 F. 827, reversed.—*Waterman v. Banks*, 144 U. S. 394, 12 S. Ct. 646, 36 L. Ed. 479; *Porter v. Same*, 144 U. S. 407, 12 S. Ct. 650, 36 L. Ed. 484.

Exceptions to a master's report should point out specifically the errors relied upon; and they need not be considered if they are so broad as to amount merely to a denial of the facts and conclusions of the master, so as to require the court to rehear the entire case.—*Sheffield & Birmingham Coal, Iron & Railway Co. v. Gordon*, 151 U. S. 285, 14 S. Ct. 343, 38 L. Ed. 164.

A new defense cannot be set up by exceptions to the report of a master after the merits of the case have been fully considered and determined. Decree 101 F. 1005, 41 C. C. A. 676, affirmed.—*City of New Orleans v. Warner*, 21 S. Ct. 353, 180 U. S. 199, 45 L. Ed. 493.

X. DECREE AND ENFORCEMENT THEREOF.

In particular proceedings.

See—

- Cancellation of Instruments, 57.
- Divorce, 159-172.
- Injunction, 207-212.
- Mortgages, 485-492.

415. Nature and essentials in general.

See 19 Cent. Dig. Equity, §§ 932-944, 946, 950, 951.

Plaintiffs, in an action for canceling a deed executed by them for a mining claim, alleged that defendant, by his agents, had discovered a large vein of ore on the claim, which he concealed from plaintiffs, falsely representing that no other "ore body or vein of ore" existed on the claim except such as was known to plaintiffs, and that plaintiffs' agent, who knew of the existence of such ore vein and ore body,

falsely and collusively, and for a consideration paid by defendant, informed him of its existence and fraudulently concealed such knowledge from plaintiffs. The court found that neither plaintiffs' nor defendant's agent knew of the existence of "any vein or lode of ore" except such as was known to plaintiffs. *Held*, that the findings were not defective in failing to state what concealments were practiced on plaintiffs by their agent, what knowledge defendant had of these concealments, and why he paid the agent a certain sum of money, since, it having been found that the agent had no knowledge, the contention that he was paid to conceal his knowledge could not be true.—*Synnott v. Shaughnessy*, 130 U. S. 572, 9 S. Ct. 609, 32 L. Ed. 1038.

416. Decree on consent.

See 19 Cent. Dig. Equity, § 945.

An Illinois decree for the separate maintenance of the wife cannot be denied conclusiveness in the courts of another state on the question of her desertion, on the theory that it was rendered by consent, where to assume that it was a consent decree disregards the rule of public policy of Illinois and the express terms of the decree, and gives to the ex parte stipulation of the husband that the wife was living separate and apart from him without her fault the effect of a consent to the decree, while the Illinois courts regarded it as an admission concerning the state of the proof on the record which, though rendering it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact. Judgment 74 P. 284, 140 Cal. 690, reversed.—*Harding v. Harding*, 25 S. Ct. 679, 198 U. S. 317, 49 L. Ed. 1066.

417. Decree pro confesso.

See 19 Cent. Dig. Equity, §§ 952-985.

418. — Requisites and validity.

See 19 Cent. Dig. Equity, §§ 952-971.

After taking a decree pro confesso for want of proper pleadings by defendant, complainant, without leave of court, filed an amended bill, but withdrew the same, without furnishing defendant a copy thereof, free of expense, or paying him the costs occasioned to him thereby, as required by equity rule 28. *Held* that, as plaintiff was never in a position to claim any benefit from his amendment, the withdrawal thereof left the case as if no amendment had been made, and plaintiff's right to a final decree was not prejudiced.—*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 S. Ct. 936, 37 L. Ed. 853.

A supplemental bill filed in open court and served on defendants' attorney on the same day on which it was filed may be taken for confessed in the absence of any appearance or pleading by defendants for more than the 20 days within which, under Comp. Laws N. M. 1897, tit. 33, §§ 2635-3377, every pleading must be filed and served after service of the pleading to which it is an answer, demurrer, or reply. Decree, *United States v. Rio Grande Dam & Irrigation Co.* (1906) 85 P. 393, 13 N. M. 386, affirmed.—*Rio Grande Dam & Irrigation Co. v. United States*, 30 S. Ct. 97, 215 U. S. 266, 54 L. Ed. 190.

The trustee in a voting trust agreement, charged with the duty of holding and voting the corporate stock deposited with it, and with collecting and paying over the dividends to the holders of the trust certificates, which files a bill seeking, in accordance with the trust agreement, to be permitted to resign, and to be discharged from all liability upon transferring the stock to the new trustee chosen by the holders of the trust certificates, is entitled to judgment on the pleadings which grants the relief sought unless those defendants not consenting, but asserting in their answers claims to the stock antagonistic to their codefendants, the holders of the trust certificates, shall comply with the

terms on which the court will permit the filing of an original bill or cross-bill.—(1910) Moore Printing Typewriter Co. v. National Savings & Trust Co., 31 S. Ct. 64, 218 U. S. 422, 54 L. Ed. 1093, affirming decree (1908) 31 App. D. C. 452.

419. — Opening or setting aside.

See 19 Cent. Dig. Equity, §§ 972-985.

A defendant who has contracted with plaintiff to give a mechanic's lien on a certain lot of ground cannot have a decree pro confesso, foreclosing the same, set aside on the ground that the lot is the absolute property of a third person. If such be the fact, the true owner alone is entitled to complain.—Sheffield Furnace Co. v. Witherow, 13 S. Ct. 936, 149 U. S. 574, 37 L. Ed. 853.

420. — Effect.

See 19 Cent. Dig. Equity, § 970.

An order taking pro confesso bill on foreclosure is not a basis of a final decree, where the bill shows the court to be without jurisdiction.—Cuebas y Arredondo v. Cuebas y Arredondo, 32 S. Ct. 277, 223 U. S. 376, 56 L. Ed. 476.

Amendment of a bill to foreclose a mortgage, taken pro confesso, so as to create jurisdiction which had not theretofore existed, by dismissing the bill as to all but one defaulting defendant, and striking out the prayer to cut off every interest, will not justify final decree against remaining defendant as of a date before his death, based on the order pro confesso.—Id.

427. Conformity to pleadings, proofs, and findings.

See 19 Cent. Dig. Equity, §§ 1001-1014; 24 Cent. Dig. Fraud. Conv. § 966; 27 Cent. Dig. Inj. § 432.

In an action to cancel a deed for a mining claim, plaintiffs alleged that defendant by his agents and employés had discovered a large vein of ore on the claim, which he concealed from plaintiffs, falsely representing that no other "ore body or vein of ore" existed on the claim except such as was known to plaintiffs, and that plaintiffs' agent, who knew of the existence of said ore vein and ore body, falsely and collusively, and for a consideration paid by defendant, informed him of its existence, and fraudulently concealed such knowledge from plaintiffs. The court found that neither plaintiffs' nor defendant's agents, nor any other person, knew of the existence of "any vein or lode of ore" in place on the claim other than such as was known to plaintiffs; that no false or fraudulent representations concerning the claim were ever made to plaintiffs or any one else by defendant, or by any agent or employé of his; and that no concealment of any material fact concerning said claim was ever made by defendant or his agent. *Held* that, the pleader having used the terms "ore body" and "vein or lode of ore" synonymously in the common parlance of miners, and not with reference to any technical distinction, it could not be contended that the findings were not responsive to the allegations for failure to find as to the value of the "ore body" discovered by plaintiff's agent, and shown by him to defendant's agent.—Synnott v. Shaughnessy, 130 U. S. 572, 9 S. Ct. 609, 32 L. Ed. 1038.

Relief under a general prayer in a bill which states all the facts should not be denied because it is asked upon a different theory of the law than that upon which a special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill. Judgment, 63 P. 48, 10 N. M. 568, reversed.—Lockhart v. Leeds, 25 S. Ct. 76, 195 U. S. 427, 49 L. Ed. 263.

428. Entry and record.

See 19 Cent. Dig. Equity, §§ 1015-1019.

Final decree nunc pro tunc cannot be entered in foreclosure on a pro confesso order where no final decree has been directed.—Cuebas y Arredondo v. Cuebas y Arredondo, 32 S. Ct. 277, 223 U. S. 376, 56 L. Ed. 476.

429. Amendment or modification.

See 19 Cent. Dig. Equity, §§ 1020-1033.

From the report of a master in chancery, in an action to enforce a vendor's lien based on a contract for the sale and purchase of land at a certain price per acre, it was evident that the amount of the lien, as fixed by the decree, was found by estimating the quantity of land and not by actual survey. *Held* that, on the survey being made and the true quantity of land ascertained, the decree should be made to conform to it.—Baines v. Clarke, 111 U. S. 789, 4 S. Ct. 671, 28 L. Ed. 599.

A court of equity can correct its decrees during the term in which they are entered, and one who, with notice of the proceedings, acquires an interest on the faith of a decree, takes it subject to the possibility of its correction or vacation.—Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. Ed. 332.

430. Opening or vacating.

See 19 Cent. Dig. Equity, §§ 1034-1047.

As a general thing the jurisdiction of a court over its decrees terminates with the close of the term at which they are rendered, but by equity rule 88 an exception is made where no appeal lies to the supreme court of the United States.—Moelle v. Sherwood, 148 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350.

Where a commission is appointed by the court to mark the boundary between two states separated by a river, a decree confirming their report as to the marking at a certain bridge, leaving the rest of the boundary still to be marked and reported upon, is interlocutory merely, and may be set aside on motion at a subsequent term, for want of proper notice.—State of Iowa v. Illinois, 151 U. S. 238, 14 S. Ct. 333, 38 L. Ed. 145.

431. Construction and operation.

See 19 Cent. Dig. Equity, §§ 1048-1051.

Under Code Neb. § 429, providing that, when a decree shall be rendered in any court of the state for a conveyance, and the parties do not comply therewith within the specified time, it shall have the same effect as if the conveyance had been made conformable thereto, such decree conveys the legal title as fully as if the conveyance had been made by the parties themselves.—Langdon v. Sherwood, 124 U. S. 74, 8 S. Ct. 429, 31 L. Ed. 344.

A decree which establishes title in complainant carries with it a right of possession as effectually as if it made specific provision to that effect.—Root v. Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123, affirming decree (C. C.) Woolworth v. Root, 40 F. 723.

441. Bill to enforce decree.

See 19 Cent. Dig. Equity, §§ 1058-1064.

A decree which establishes title in complainant carries with it a right of possession, as effectually as if it made specific provision to that effect, and a supplemental and ancillary bill to effectuate the decree in favor of such complainant's privy in interest and estate may properly pray to have possession delivered up.—Root v. Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123, affirming decree (C. C.) Woolworth v. Root, 40 F. 723.

XI. BILL OF REVIEW.

443. Decrees reviewable.

See 19 Cent. Dig. Equity, §§ 1071-1077; 13 Cent. Dig. Courts, § 494.

A decree entered in conformity with the mandate of an appellate court, to which the case has been appealed, cannot be attacked by original bill on the ground of errors, apparent on the record, not involving the jurisdiction.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

444. Grounds.

See 19 Cent. Dig. Equity, §§ 1078-1094.

445. — In general.

See 19 Cent. Dig. Equity, § 1078.

A subsequent decision of the federal Supreme Court, which would have required a different result if its principles had been applied in reclamation proceedings in a bankruptcy court, is not a foundation for a bill of review for errors of law or new matter discovered since the decree in such proceedings.—*Scotten v. Littlefield*, 35 S. Ct. 125, 235 U. S. 407, 59 L. Ed. 289, affirming decree in *re A. O. Brown & Co.*, 213 F. 705, 130 C. C. A. 219, which affirmed order (D. C.) in *re Brown*, 213 F. 701.

446. — Errors and irregularities.

See 19 Cent. Dig. Equity, §§ 1079-1090.

Though a decree in equity sets forth a hearing on the pleadings and proof and awards relief, yet if a bill of exceptions, signed by the court, and made a part of the record, shows that the judge refused to permit counsel for plaintiff to argue the cause, and allowed defendant's counsel to determine whether the case was controlled by a prior decision, and refused to decide that question himself, the decree on a bill of review by plaintiff must be held for naught.—*Ensminger v. Powers*, 108 U. S. 292, 2 S. Ct. 643, 27 L. Ed. 732.

A bill of review will lie for errors in a decree that are apparent on the face of the record. Decree, *Lanning v. Osborne* (C. C.) 76 F. 319, affirmed.—*Osborne v. San Diego Land & Town Co. of Maine*, 20 S. Ct. 860, 178 U. S. 22, 44 L. Ed. 961.

450. Right of review.

See 19 Cent. Dig. Equity, § 1086.

Speculative purchasers of land knowing of a decision adverse to title, where their deed expressly excepted such land in dispute if the title was not recovered in future proceedings, may not maintain a bill of review for newly discovered evidence against a purchaser from the prevailing party in good faith and for value, after affirmation by the appellate court.—*Hopkins v. Hebard*, 35 S. Ct. 26, 235 U. S. 287, 59 L. Ed. 232, affirming decree 194 F. 301, 114 C. C. A. 261.

452. Limitations and laches.

See 19 Cent. Dig. Equity, §§ 1101-1109.

Though a bill of review must ordinarily be filed within the two years limited by Rev. St. § 1008, for taking an appeal from the decree sought to be reviewed, the time during which the control of the circuit court over the appeal was suspended by an appeal which was subsequently dismissed for failure of the appellants to file and docket the cause in the supreme court will not be computed as a part of the two years.—*Ensminger v. Powers*, 108 U. S. 292, 2 S. Ct. 643, 27 L. Ed. 732.

The period between a void order vacating an order made in a foreclosure suit giving certain intervening petitioners a lien prior to the mortgage and an order setting it aside cannot be omitted in computing the time within which the mortgagee might file a bill to review the original

order for errors apparent of record, as he had no right to rely on the validity of the vacating order, or on the acquiescence therein of the petitioners.—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97.

The time which elapsed between the tendering of a bill of review to the federal District Court for Porto Rico for filing, and the permission given to file, should not be counted in applying the two years' limitation for filing such bill, fixed by analogy to the time allowed by law for an appeal to the federal Supreme Court.—*Fraenkl v. Cerecedo*, 30 S. Ct. 322, 216 U. S. 295, 54 L. Ed. 486.

A claim in reclamation proceedings in a bankruptcy court cannot be held back during review by three successive courts and then be made the subject of a bill of review.—*Scotten v. Littlefield*, 35 S. Ct. 125, 235 U. S. 407, 59 L. Ed. 289, affirming decree in *re A. O. Brown & Co.*, 213 F. 705, 130 C. C. A. 219, which affirmed order (D. C.) in *re Brown*, 213 F. 701.

453. Leave to file bill.

See 19 Cent. Dig. Equity, §§ 1110-1115.

455. — Discretion of court.

See 19 Cent. Dig. Equity, § 1111.

Permitting a bill of review to be filed without a previous payment of the moneys awarded by the decree sought to be reviewed is not an abuse of discretion, where leave to file was conditional upon the furnishing of an indemnity bond, which was thereafter executed.—*Fraenkl v. Cerecedo*, 30 S. Ct. 322, 216 U. S. 295, 54 L. Ed. 486.

456. — Application and proceedings thereon.

See 19 Cent. Dig. Equity, §§ 1112-1115.

Leave is properly refused to file a bill of review, which does not assign any error of law appearing on the face of the record, and does not allege any discovery of new matter since the rendering of the decree sought to be reviewed.—*Nickle v. Stuart*, 111 U. S. 776, 4 S. Ct. 700, 28 L. Ed. 599.

457. Parties.

See 19 Cent. Dig. Equity, § 1099.

The objection that the widow of the testator's son should have been made a party to a bill to review a decree declaring that a trust created by the will in favor of the testator's grandchildren violated the rule against perpetuities is too late when first raised on the hearing of a demurrer to the bill of review, where the fact of her existence does not appear of record. Decree (1906) 25 App. D. C. 291, affirmed.—*Landram v. Jordan*, 27 S. Ct. 17, 203 U. S. 56, 51 L. Ed. 88.

464. Hearing and determination.

See 19 Cent. Dig. Equity, §§ 1119-1140.

Where a bill of review for errors of law of a decree adjudging the sale of mortgaged premises alleges the discovery of new matter, such new matter, if it relates to the sale cannot be considered in a review of the original decree, nor, as the affidavits disclosing it are not a part of the record, in review of the decree confirming the sale.—*Shelton v. Van Kleeck*, 106 U. S. 532, 1 S. Ct. 491, 27 L. Ed. 269.

A defense of usury and homestead rights are matters of fact dependent upon evidence, and cannot be considered upon a bill of review for errors of law to set aside a decree foreclosing a deed of trust in the nature of a mortgage, and, if alleged therein, are improperly pleaded, and will not be regarded as admitted by a demurrer thereto.—*Id.*

If, upon a bill of review, it appears from the record that a party to the cause was served

with a subpoena and did not plead, answer, or demur, the decree was pro confesso as to him, and the fact that he was not named in it is unimportant.—Id.

The action of a court of equity in setting aside the verdict of a jury and substituting its own findings for the special findings of the jury is not reviewable.—Idaho & O. Land Imp. Co. v. Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming Bradbury v. Idaho & Oregon Land Imp. Co., 2 Idaho (Hask.) 239, 10 Pac. 620.

EQUITY OF REDEMPTION.

See Mortgages, ¶591-597.

EQUITY RULES.

See—

Appeal and Error, ¶488, 597, 865.

Equity, ¶96, 175, 320, 358, 359, 363, 392, 430.

Federal Equity Rules, see Courts, ¶388.

EQUIVALENTS.

See Patents, ¶22, 245.

ERIE CANAL.

Subject to admiralty jurisdiction, see Admiralty, ¶4.

ERROR, WRIT OF.

See Appeal and Error.

ESCAPE.

See 19 Cent. Dig. Escape.

See Obstructing Justice.

Ground for dismissal of appeal, see Criminal Law, ¶1131.

Instruction relating to effect, see Criminal Law, ¶778.

ESCHEAT.

Scope-Note.

[INCLUDES reversion of property, real or personal, to the state, for want of persons legally competent to hold or take it; and conveyance, release, and enforcement of the rights of the state.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶3. Property subject to escheat.
- 6. Enforcement.

Cross-References.

Disabilities of aliens as to ownership of property, see Aliens, ¶5-13.
Due process of law, see Constitutional Law, ¶278.

Jurisdiction of probate court to enforce escheat, see Courts, ¶198.
Subject and title of statutes, see Statutes, ¶115.
Territorial laws, see Statutes, ¶54.

¶3. Property subject to escheat.

See 19 Cent. Dig. Escheat, §§ 3-5.

The fact that all the property of said corporation was held by individuals in trust for the corporation did not prevent the title from escheating according to the intent of said acts.—Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 1, 10 S. Ct. 792, 34 L. Ed. 478, affirming United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah, 361, 15 Pac. 473.

Act Cong. July 1, 1862, provided that no religious or charitable corporation in the territories should hold real estate exceeding \$50,000 in value, and that all real estate held by any such corporation contrary to such act should escheat to the United States. The title of all the real estate acquired by such corporation in Salt Lake City remained in the United States as part of the public domain until November 21, 1871, when it was entered by the mayor of said city under Act Cong. March 2, 1867, known as the "Town-Site Act." Held, that on the dissolution of the corporation all of its real estate in such city except a block

used for public purposes reverted to the United States.—Id.

¶6. Enforcement.

See 19 Cent. Dig. Escheat, §§ 7-17, 24.

Const. Tex. 1869, providing that the comptroller of public accounts should take charge of all escheated property, and keep an actual account of all moneys paid into the treasury, and of all lands escheated to the state, did not affect or repeal Act March 20, 1848, providing for a judgment, to be rendered upon due allegation and proof, and after notice to all persons interested, ascertaining and declaring that land has escheated to the state, and vesting in the state the title to the land.—Hamilton v. Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. Ed. 691.

When, in proceedings for the escheat of land upon the death of the former owner, the petition describes the land, gives the name of the former owner, and alleges that he died intestate and without heirs; that no letters of administration upon the estate have been granted; that there is no tenant or person in actual or constructive possession of the land, nor any

person, known to the petitioner, claiming an estate therein; and that the land has escheated to the state of Texas,—and an order of notice to all persons interested in the state has been published as required by the statute, and, after a hearing of all who appear and plead, judgment is entered, describing the land, and declaring

that it has escheated to the state,—the judgment is conclusive evidence of the state's title in the land, not only against any tenants or claimants having actual notice by scire facias, or having appeared and pleaded, but also against all other persons interested in the estate and having constructive notice by publication.—Id.

ESCROWS.

Scope-Note.

[INCLUDES deeds, bonds, and other obligatory writings delivered to a person not a party thereto, to be held by him until the performance of a specified condition or the happening of a certain contingency, and then to be delivered to the grantee or obligee; and rights, duties, and liabilities of parties to such instruments and of the depositaries, as affected by the delivery thereof as escrows and the final delivery.]

Analysis.

10. Delivery by depositary.

14. Unauthorized or wrongful delivery by depositary.

10. Delivery by depositary.

See 19 Cent. Dig. Escrows, § 15.

Where a trustee holding negotiable bonds of a county in escrow, and vested with discretion to determine when a condition precedent to their delivery has been performed, so decides, and delivers the bonds, the county cannot defend against them in the hands of bona fide purchasers on the ground that the condition had not in fact been performed. Decree, Mercer County v. Provident Life & Trust Co., 72 F. 623, 19 C. C. A. 44, reversed.—Provident Life & Trust Co. of Philadelphia v. Mercer County, Ky., 18 S. Ct. 788, 170 U. S. 593, 42 L. Ed. 1156.

14. Unauthorized or wrongful delivery by depositary.

See 19 Cent. Dig. Escrows, §§ 17-20; 16 Cent. Dig. Deeds, § 131.

A memorandum indorsed by the cashier of a bank on an envelope containing a contract for the sale of land and the vendee's check, stating that they were held in escrow until a specified date, pending the furnishing of an abstract of title, etc., is not a complete agreement, and the bank must answer to the vendors if it turns over the check or its equivalent to the vendee, while the vendors were doing all they were required to do under the contract to make a good title.—Citizens' Nat. Bank of Roswell v. Davison, 33 S. Ct. 625, 229 U. S. 212, 57 L. Ed. 1153, Ann. Cas. 1915A, 272, affirming judgment Davison v. Citizens' Nat. Bank, 120 P. 304, 16 N. M. 689.

ESTATES.

Scope-Note.

[INCLUDES nature and incidents of interests in real or personal property in general, and of estates in fee or absolute ownership; and union or merger of estates.

[For related matters under other topics, see cross-references following.]

Cross-References.

Bankrupts' estates, see Bankruptcy.
Created by deed, see Deeds, 121-124.
Created by will, see Wills, 592-627.
Decedents' estates, see—
Descent and Distribution.
Executors and Administrators.
Wills.
Insolvents' estates, see Insolvency.
Restrictions on creation of perpetuities, see Perpetuities.
Subject to dower, see Dower, 11, 12.

Particular estates.

See—
Curtesy.
Dower.
Homestead.
Landlord and Tenant.
Life Estates.
Remainders.
Tenancy in Common.
Trusts, 139, 140.

7. Conditional fee.

See 19 Cent. Dig. Estates, § 7.

By antenuptial settlement, a person conveyed land to his brother in trust for his intended wife for life, with remainder to the child or children of the intended marriage, if any, and, in case she died childless, remainder to another person for life, with reversion over to the grantor. After the marriage, and before the birth of any children, the trustee and the other cestui que trust conveyed the land to the wife, for the purpose, as stated in the deed, of determining

the trust, the husband witnessing the deed. *Held*, that the title so vested in the wife that she was bound by a trust deed of the property afterwards made by her.—*Knight v. Paxton*, 124 U. S. 552, 8 S. Ct. 592, 31 L. Ed. 518, affirming decree (C. C.) *Paxton v. Marshall*, 18 F. 361.

ESTATES TAIL

See 19 Cent. Dig. Estates Tail.

Construction of wills, see Wills, 604, 605.

ESTOPPEL.

Scope-Note.

[INCLUDES preclusion of persons from asserting or denying matters of fact, rights, or claims contrary to or inconsistent with previous allegations, admissions, denials, acts, or conduct of the same persons or those under whom they claim; nature and grounds of such preclusion; operation and effect of estoppel as to rights and titles subsequently acquired as well as those previously existing; pleading estoppel; and evidence relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. By Record.

- 2. Judicial records in general.
- 3. Pleadings.

II. By Deed.

(A) CREATION AND OPERATION IN GENERAL.

- 20. Grounds of estoppel.
 - 22. — Recitals.
 - 23. — Covenants.
 - 27. Grantors or mortgagors and privies.
 - 28. Effect, as against heir, devisee or donee, of covenant of ancestor, or donor.
 - 29. Grantees or mortgagees.
 - 32. Matters precluded.
 - 33. Estoppel against estoppel.

(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

- 36. Instruments operating on title subsequently acquired.
- 38. — Conveyances with covenants.

III. Equitable Estoppel.

(A) NATURE AND ESSENTIALS IN GENERAL.

- 54. Knowledge of facts.
- 58. Prejudice to person setting up estoppel.
- 62. Estoppel against public, government, or public officers.

(B) GROUNDS OF ESTOPPEL.

- 66. Possession or acts of ownership under title or claim.
- 67. Claim under written instrument.
- 68. Claim or position in judicial proceedings.
- 69. Testimony as witness.
- 70. Failure to assert title or right.
- 72. Acts making injury possible as between actor and another equally blameless.
- 73. Clothing another with apparent title or authority.
- 75. — Personal property.

III. Equitable Estoppel—Continued.

(B) GROUNDS OF ESTOPPEL—Continued.

- 77. Dealing with person asserting title or exercising authority.
- 78. Contracts.
- 79. Stipulations and consents in judicial proceedings.
- 81. Requests.
- 82. Representations.
- 87. — Relying and acting on representations.
- 89. Acquiescence.
- 92. — Acceptance of benefits.
- 93. — Permitting improvements or expenditures.
- 94. — Permitting sale or mortgage of property.
- 95. Silence.

(C) PERSONS AFFECTED.

- 97. Persons to whom estoppel is available.

(D) MATTERS PRECLUDED.

[No paragraphs or references in this Digest. But see 19 Cent. Dig. Estop. §§ 291-296.]

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

- 109. Pleading as defense.
- 110. — Necessity.

Cross-References.

See Election of Remedies.

I. BY RECORD.

By judgment, see Judgment, 541-632, 643-750.

2. Judicial records in general.

See 19 Cent. Dig. Estop. § 1.

Defendant purchased an undivided half of land, and her husband afterwards purchased the other half. A deed of the whole, recognizing their separate interests, was executed, but not recorded. Both joined in a conveyance of the husband's half, defendant's acknowledgment being for relinquishment of dower; and at that time another deed of the whole was procured from their grantor, running directly to both. After the husband's death defendant brought suit against the husband's vendee to quiet her title to a half, and to have a tax title declared to be for the benefit of herself and the vendee, and obtained a decree accordingly; and, in another suit by her and the vendee as co-owners, they obtained a decree rectifying their title deeds, and vesting the title in defendant and a purchaser from such vendee. *Held*, that defendant could not claim an estate in the whole tract by entirety.—*Hunt v. Blackburn*, 128 U. S. 464, 9 S. Ct. 125, 32 L. Ed. 488.

3. Pleadings.

See 19 Cent. Dig. Estop. §§ 2-5, 7.

Where, in an answer by one's attorney in a suit brought in a state court, the place of residence of the defendant is inadvertently misstated, this answer does not create an estoppel from alleging and proving the true residence on petition for removal of the cause to the circuit court of the United States.—*Carson v. Hyatt*, 118 U. S. 279, 6 S. Ct. 1050, 30 L. Ed. 167.

Defendant was a surety of the assignee in insolvency of his son, and was described in the bond, as "of Reading, in the county of Middlesex," Mass. Afterwards defendant attached the goods of his insolvent son in New Orleans, and was described in the petition as "residing in the state of Massachusetts." The petition was not signed by him, but by his attorney in New

Orleans. *Held*, that these words were merely descriptive, and did not estop defendant, on a motion to remove the cause to the federal court, to deny that he was a citizen of Massachusetts, where it does not appear that the party seeking the removal acted on such statements to his prejudice.—*Reynolds v. Adden*, 136 U. S. 348, 10 S. Ct. 843, 34 L. Ed. 360.

A plea stating that a judgment for a certain amount has been recovered against the party making the plea does not estop him from claiming, on appeal from such judgment, that the amount recovered is excessive.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102; modifying decree *Whitney v. City of New Orleans (C. C.)* 43 F. 215.

II. BY DEED.

Estoppel of tenant to dispute title of landlord, see Landlord and Tenant, 62, 63.

(A) CREATION AND OPERATION IN GENERAL.

20. Grounds of estoppel.

See 19 Cent. Dig. Estop. §§ 26-60.

22. — Recitals.

See 19 Cent. Dig. Estop. §§ 27-51; 25 Cent. Dig. Guard. & W. § 628.

A provision in a deed of trust that on foreclosure the terms of the sale shall be the amount due on the note and the expenses of the sale in cash, and the balance on a credit of 12 and 18 months, is not such an admission that the value of the property is in excess of the debt as will estop the mortgagee who has purchased at foreclosure sale from maintaining an action for the deficiency.—*Shepherd v. May*, 115 U. S. 505, 6 S. Ct. 119, 29 L. Ed. 458.

23. — Covenants.

See 19 Cent. Dig. Estop. §§ 52-60.

Where a person binds himself by contract to sell land which he does not own, but the title

to which he afterwards acquires and conveys by general warranty to the person to whom he contracted to sell, he cannot, in ejectment based on the title so conveyed, set up that he had no title at the time he agreed to sell.—*Ryan v. United States*, 136 U. S. 68, 10 S. Ct. 913, 34 L. Ed. 447.

A conveyance by one whose land has been confiscated, under Act Cong. July 17, 1863, of his remainder, with a covenant of seisin and warranty, estops him, and those claiming under him, from asserting title to the premises as against the grantee.—*Jenkins v. Collard*, 145 U. S. 546, 12 S. Ct. 868, 36 L. Ed. 812, distinguishing *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

—27. Grantors or mortgagors and privies.

See 19 Cent. Dig. Estop. §§ 63-67.

Where a patent has been issued by the United States, on the supposed compliance of the patentees with all the requirements of the act, the heirs of such patentees, and their grantees, deriving their title through such patent, are estopped to set up, to the prejudice of any grantee of theirs, that any of the requisites for the completion of such patent are wanting.—*Brazee v. Schofield*, 124 U. S. 495, 8 S. Ct. 604, 31 L. Ed. 484.

—28. Effect, as against heir, devisee, or donee, of covenant of ancestor or donor.

See 19 Cent. Dig. Estop. § 63.

An heir is not estopped from claiming land which his ancestor had fraudulently conveyed with covenants of warranty, where the heir has never accepted the succession of his ancestor, and does not claim title through him.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (C. C.) *Whitney v. City of New Orleans*, 43 F. 215.

—29. Grantees or mortgagees.

See 19 Cent. Dig. Estop. §§ 69-73; 46 Cent. Dig. Tresp. to T. T. § 14.

A grantee is not estopped by the acceptance of a deed poll of a life estate from denying the title of his grantor and acquiring a superior one.—*Robertson v. Pickrell*, 109 U. S. 608, 3 S. Ct. 407, 27 L. Ed. 1049.

—32. Matters precluded.

See 19 Cent. Dig. Estop. § 81.

The validity of a decree for the sale of an infant's real estate for purposes of reinvestment, and of the order appointing a trustee to make the sale, and of the bond reciting the due appointment of such trustee, executed to secure the faithful discharge by him of his duties, is not open to question by one who voluntarily became a surety upon the bond, thereby enabling his principal to obtain the proceeds of the sale.—(1910) *United States v. Morse*, 31 S. Ct. 37, 218 U. S. 493, 54 L. Ed. 1123, 21 Ann. Cas. 782, reversing judgment (1908) 31 App. D. C. 433.

The acceptance of a lease does not estop the acceptor from enforcing specific performance of the lessor's alleged contract to sell the land, where the lease provided that it should not affect the rights of either party.—*Gutierrez del Arroyo v. Graham*, 33 S. Ct. 248, 227 U. S. 181, 57 L. Ed. 472.

—33. Estoppel against estoppel.

See 19 Cent. Dig. Estop. § 82.

Conceding that, where one owned land adjoining a navigable river and dedicated a street through the same to the shore by filing a plat

thereof, a covenant is implied by estoppel that the street should be extended through any after-acquired land thereafter owned by the party or those claiming under him, if necessary to reach the shore, the state, in whom the public right to the easement in the street exists, could not assert the same against its grantor of land under water which the grantor was authorized to fill up along the shore in front of the original plat, as the latter grant gives rise to an estoppel against the state which would defeat the estoppel arising from the dedication.—*City of Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 S. Ct. 643, 31 L. Ed. 543, affirming judgment (C. C.) 16 F. 816.

(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

—36. Instruments operating on title subsequently acquired.

See 19 Cent. Dig. Estop. §§ 91-109; 27 Cent. Dig. Indem. § 35.

—38. — Conveyances with covenants.

See 19 Cent. Dig. Estop. §§ 99-107.

Covenants of warranty in a deed of the grantor's "right, title, and interest in and to" certain described premises will not convey an after-acquired title, where the deed contains no recital as to the character of his title.—*Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

An habendum in a deed, "to have and to hold to him, the said [grantee], his heirs and assigns, forever, free from the just claim or claims of any or all persons whomsoever, claiming or to claim the same," is a general warranty; and a title subsequently acquired by the grantor passes to the grantee by estoppel.—*Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 S. Ct. 206, 33 L. Ed. 487.

A conveyance to the grantor of land subsequent to his deed to another with warranty inures to the benefit of his grantee.—*Ryan v. United States*, 136 U. S. 68, 10 S. Ct. 913, 34 L. Ed. 447.

A statement in a mortgage that the mortgagor was the owner of the land, with a provision in the deed made under foreclosure that the mortgagor remains bound to guarantee the title, estops the mortgagor, acquiring the title to a parcel embraced in the description, from denying that he had a right to dispose of the property conveyed.—*Veve y Diaz v. Sanchez*, 33 S. Ct. 36, 226 U. S. 234, 57 L. Ed. 201.

III. EQUITABLE ESTOPPEL.

Implied ratification by principal of acts of agent, see Principal and Agent, —168-171.

Of particular classes of persons, or persons in particular relations.

See—

Assignment, —68.
Banks and Banking, —248.
Corporations, —388.
Husband and Wife, —129.
Landlord and Tenant, —62, 63.
Partnership, —156.
Waters and Water Courses, —200.

To assert or deny particular facts, rights, claims, or liabilities.

See—

Assignments for Benefit of Creditors, —297.
Banks and Banking, —113, 248.
Cancellation of Instrument, —18.
Chattel Mortgages, —75.
Commerce, —87.

See—

Constitutional Law, ¶43.
Corporations, ¶34, 104, 388, 425.
Husband and Wife, ¶129.
Insurance, ¶141, 372-401, 554-560, 755.
Landlord and Tenant, ¶62, 63.
Municipal Corporations, ¶488, 489.
Partnership, ¶33-37, 365.
Patents, ¶129.
Principal and Surety, ¶129.
Public Lands, ¶116.
Vendor and Purchaser, ¶189.
Waters and Water Courses, ¶200.

To maintain or oppose particular remedies or defenses.

See—

Appeal and Error, ¶153-166, 881-884.
Courts, ¶37.
Criminal Law, ¶1137.
Sales, ¶121.
Specific Performance, ¶101.

(A) NATURE AND ESSENTIALS IN GENERAL

¶54. Knowledge of facts.

See 19 Cent. Dig. Estop. ¶ 128-135.

The fact that a railroad company, under a misapprehension of its legal rights, accepted a deed of the right to construct its road over a person's ditch, and paid him therefor, does not estop it to deny afterwards that he had any title that could be set up against its own.—*Bybee v. Oregon & C. R. Co.*, 139 U. S. 663, 11 S. Ct. 641, 35 L. Ed. 305, affirming judgment (C. C.) 26 F. 586.

¶58. Prejudice to person setting up estoppel.

See 19 Cent. Dig. Estop. ¶ 144, 145.

In a suit for the infringement of a patent, the plaintiff set up an estoppel of defendant to dispute the validity of the patent by reason of the fact that he had disclosed his secret to defendant upon the latter's promise to take no advantage of it without plaintiff's consent. It was shown that when he disclosed the alleged secret he neither had a patent nor intended to apply for one, and that he afterwards procured a patent to guard against any violation of defendant's promise. *Held*, that there was no estoppel upon defendant because plaintiff did not rely upon the promise to his injury.—*Leggett v. Standard Oil Co.*, 149 U. S. 287, 13 S. Ct. 902, 37 L. Ed. 737, affirming (C. C.) 38 F. 842.

Declarations by the judgment debtor subsequent to a judicial sale of his interest in a mining claim, showing his acquiescence in such sale, will not estop him from thereafter asserting the invalidity of such sale as against persons who leased the property from the sheriff with an option to purchase, who had equal means of information as to the invalidity of the sale, and whose action in closing their option was not induced by such declarations. *Judgment, Dye v. Crary* (N. M. 1906) 85 P. 1038, 9 L. R. A. (N. S.) 1136, affirmed.—*Crary v. Dye*, 28 S. Ct. 360, 208 U. S. 515, 52 L. Ed. 595.

¶62. Estoppel against public, government, or public officers.

See 19 Cent. Dig. Estop. ¶ 151-153; 12 Cent. Dig. Corp. ¶ 82; 36 Cent. Dig. Mun. Corp. ¶ 379, 632, 632, 918.

The fact that the mayor of a city, as a member of the state board of tide land commissioners, participated in a survey by which certain lands were excluded from the city, and that the city by ordinances approved the survey and maps in accordance therewith—all such acts being prior to a confirmation of the city's title to the land—did not estop the city from claiming the land. *Judgment, United Land*

Ass'n v. Pacific Imp. Co. (1902) 69 P. 1064, 139 Cal. 370, affirmed.—*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

(B) GROUNDS OF ESTOPPEL

Recognition of title as affecting adverse possession, see Adverse Possession, ¶ 50.

¶66. Possession or acts of ownership under title or claim.

See 19 Cent. Dig. Estop. ¶ 159-162.

A railroad company in 1858 entered into an agreement with plaintiff, whereby, in consideration of the permission to use certain lands of plaintiff on the Mississippi river opposite St. Louis for terminal purposes, it agreed to give plaintiff all its business of transporting across the river at such point; and in pursuance of such contract extensive terminal facilities were constructed and the contract was carried out by the railroad until 1862, when defendant railway company took a conveyance of all its property and franchises. Defendant took possession with the tacit consent of the plaintiff, and treated the contract as of full force and binding on it until 1880, when possession of the land was surrendered to plaintiff. There was never any demand by plaintiff for rent. *Held*, that the relations between the parties were not those of landlord and tenant, nor was the defendant liable on the contract as an assignee, but by its conduct must be considered in equity to have adopted the contract and to be bound by it, and for a breach of the same a recovery might be had by intervention in a suit against defendant to foreclose a mortgage of its property.—*Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 12 S. Ct. 188, 142 U. S. 396, 35 L. Ed. 1055.

One who held possession of property as managing director of a corporation, not denying its right to possession, cannot dispute its title thereto, in ejectment, after expiration of his term.—*Seymour v. Slide & Son's Gold Mines*, 153 U. S. 523, 14 S. Ct. 847, 38 L. Ed. 907.

¶67. Claim under written instrument.

See 19 Cent. Dig. Estop. ¶ 163, 164.

No estoppel to claim that a mortgage binds only the crops results from including such mortgage among incumbrances in an application for registration of a possessory title, where it is merely a statement of a condition of the record title.—*Gallardo v. Noble*, 35 S. Ct. 280, 236 U. S. 135, 59 L. Ed. 603.

¶68. Claim or position in judicial proceedings.

See 19 Cent. Dig. Estop. ¶ 165-169.

Where an application to the land department for a grant of swamp lands, based on a list of the same, is contested on the sole ground that the land department had no jurisdiction to consider it, the contestant is not thereby estopped to raise any other objection to the list.—*Buena Vista County v. Iowa Falls & S. C. R. Co.*, 112 U. S. 165, 5 S. Ct. 84, 28 L. Ed. 680.

In an action at law upon a writing purporting to be a contract, the exclusion, upon plaintiff's objection to its competency, of certain parol evidence showing that the writing was never intended to be a binding contract, estops him, in a subsequent suit in equity to enjoin the prosecution of his action, from asserting that the defense made by this evidence could or should be availed of at law; and the equity court will receive the evidence, in order to prevent the accomplishment of a fraud.—*Michels v. Olmstead*, 157 U. S. 198, 15 S. Ct. 580, 39 L. Ed. 671.

In a suit to enforce a trust, claimed to result upon the failure of an express trust created by deed, parties claiming under the trustees will not be permitted, in contradiction to

the position always taken and acted on by them, to assert that the trust expressed in the deed was void, and that the plaintiffs are barred, by laches or otherwise, from enforcing the resulting trust which would then have arisen immediately on the execution of the deed.—*Hopkins v. Grimshaw*, 17 S. Ct. 401, 165 U. S. 342, 41 L. Ed. 739.

A plaintiff is estopped to urge that a defense which was excluded upon his objection was involved in the action and concluded by the judgment. Judgment, *Kirven v. Virginia-Carolina Chemical Co.* (1907) 58 S. E. 424, 77 S. C. 493, affirmed.—*Virginia-Carolina Chemical Co. v. Kirven*, 30 S. Ct. 78, 215 U. S. 252, 54 L. Ed. 179.

A carrier sued for the death of an employe was not estopped to urge that its liability was measured by federal Employer's Liability Act April 22, 1908, by having pleaded contributory negligence and thus having relied on the state law.—*St. Louis, I. M. & S. R. Co. v. Hesterly*, 33 S. Ct. 703, 228 U. S. 702, 57 L. Ed. 1031, reversing judgment 135 S. W. 874, 98 Ark. 240.

Person acquitted on new trial granted after conviction is not estopped to assert jurisdiction of court to grant new trial by moving to quash indictment charging him with subornation of perjury by persons who made affidavits on the motion for new trial.—*Abbott v. Brown*, 36 S. Ct. 689, 241 U. S. 606, 60 L. Ed. 1199.

◀69. Testimony as witness.

See 19 Cent. Dig. Estop. §§ 170-172.

Where, in an action against the United States on a contract, parties with whom the contractor had formed a partnership to carry it out testify that they have no interest in the suit, they are not thereby estopped from asserting their claim, in an action against the assignee in bankruptcy of the contractor to a portion of the fund after the claim is allowed and paid.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

In an action by a bailee to recover insurance effected by him, in his own name, for the benefit of whom it may concern, his testimony that he was the "owner" of the goods under certain contracts (being the contracts of bailment), which were then before the insurance companies, and of whose legal effect they were bound to take notice, is a statement of a legal conclusion, and does not estop him from showing in a subsequent suit, and as against his bailors, that they were the true owners.—*Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093.

◀70. Failure to assert title or right.

See 19 Cent. Dig. Estop. §§ 183-187.

G. attempted to obtain a lien on land by attachment, made personal service, in another state, on A., the debtor, and went through the form of obtaining a judgment against the land and selling it on execution. G. purchased the land at such sale, paid taxes thereon, acquired tax titles thereto, and subsequently sold the same to plaintiff, who has ever since, a period of 27 years, been in open, notorious, and undisturbed possession, erecting buildings and making other improvements thereon. On the day that G. commenced action against A., A. deeded the land to F., under circumstances tending to show that it was intended as a fraud on the creditors of A., for a recited consideration of \$3,000, which was double the value of the land. At the time of the deed, F. was an ordinary day laborer, without means, and he took no steps to assert his title or right of possession for 30 years, at which time the land had become quite valuable. Held, that F. was estopped to claim title against plaintiff.—*Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

◀72. Acts making injury possible as between actor and another equally blameless.

See 19 Cent. Dig. Estop. § 188.

A bank taking stock certificates duly assigned in blank as security for a loan, and intrusting them to a clerk who has them sold for his account by a stock broker, the persons paying full value must answer for the loss thereof.—*National Safe Deposit, Savings & Trust Co. v. Hibbs*, 33 S. Ct. 818, 229 U. S. 391, 57 L. Ed. 1241, affirming judgment 32 App. D. C. 459.

◀73. Clothing another with apparent title or authority.

See 19 Cent. Dig. Estop. §§ 189-197.

◀75. — Personal property.

See 19 Cent. Dig. Estop. §§ 192-195.

Where an attorney holding a judgment by unconditional assignment, but really for purposes of collection alone, fraudulently sold the same for a fraction of its value, with representations reasonably indicating that he held it merely as security for fees, the true owner was estopped, but only to the amount of the money actually paid by such purchasers, and was entitled to recover the excess realized on the judgment.—*Baker v. Wood*, 157 U. S. 212, 15 S. Ct. 577, 39 L. Ed. 677.

◀77. Dealing with person asserting title or exercising authority.

See 19 Cent. Dig. Estop. §§ 198-203.

A litigant who obtains his title to lands by the purchase of a quitclaim deed from a county is estopped, as against a former grantee of the county, from denying the county's power to make a sale of the lands.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

◀78. Contracts.

See 19 Cent. Dig. Estop. §§ 204-210.

Where a claim is assigned to a third person by a firm which afterwards becomes bankrupt, and the assignee in bankruptcy assigns the claim to a member of the firm, such member is estopped to say that the first assignment is void as in fraud of the firm's creditors.—*Crawford v. Halsey*, 8 S. Ct. 641, 124 U. S. 648, 31 L. Ed. 572.

Where one enters into a contract to do work, and receives compensation thereunder, he is estopped to claim that it did not supersede all other arrangements therefor, though at the time of making it he claimed that he had rights under a previous contract.—*United States ex rel. International Con. Co. v. Lamont*, 155 U. S. 303, 15 S. Ct. 97, 39 L. Ed. 160.

Creditors of a bankrupt seeking to enforce a contract between the bankrupt and its debtor and the lien arising therefrom may not enforce rights given under one provision of the contract and repudiate another, where the two are indissolubly associated.—*Merchants' Nat. Bank of the City of New York v. Sexton*, 33 S. Ct. 725, 228 U. S. 634, 57 L. Ed. 998, affirming decree *In re Kessler*, 186 F. 127, 108 C. C. A. 239.

◀79. Stipulations and consents in judicial proceedings.

See 19 Cent. Dig. Estop. §§ 211-213.

An agreement that, if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court, subject to be disposed of pursuant to the decision and mandate of the appellate court, estops the parties to it, as against the purchaser at the sale, from looking to the lands rather than their proceeds, although the appellate court reverses the

decree for error in overruling a defense based on a want of proper parties.—*Halliday v. Stuart*, 151 U. S. 229, 14 S. Ct. 302, 38 L. Ed. 141.

81. Requests.

See 19 Cent. Dig. Estop. §§ 216, 217.

Contractors with a company to work its mine wrote its general manager a letter, stating that the first level of the mine was practically exhausted, but afterwards, in a suit against the company for preventing them from working, claimed loss of profits on ore in that level. *Held*, that the letter did not preclude them from showing the facts, or from testifying that it was written at the solicitation of the company's superintendent, to accomplish a wrongful purpose on his part.—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814.

82. Representations.

See 19 Cent. Dig. Estop. §§ 218-224.

87. — Relying and acting on representations.

See 19 Cent. Dig. Estop. §§ 220-224.

Where a bank, drawer of a foreign bill of exchange, represents to plaintiff, to whose order it is made payable, that one W. is a bona fide holder of the bill, as purchaser or remitter, for his use in trading with K., and plaintiff, relying on such representation, takes the bill on deposit from K. knowing that he has received it from W., places it to his credit as cash, and pays his checks, the drawing bank or its receiver is estopped, in an action on the bill, to show that W. was not a bona fide holder.—*Armstrong v. American Exch. Nat. Bank of Chicago*, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747.

When county commissioners received notice of the invalidity of a cashier's check, tendered by the county treasurer in settlement of a balance due by him, before they did any act prejudicial to the county, they could not be considered as acting on the faith of representations made by the bank, and the bank would not be estopped to deny that it was indebted to the county in the amount of the check.—*Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 14 S. Ct. 94, 37 L. Ed. 1063, reversing judgment *Sioux Falls Nat. Bank v. First Nat. Bank*, 6 Dak. 113, 50 N. W. 829.

If the purchaser tells the execution defendant that the statutory time to redeem will not be insisted upon, and such defendant relies on this assurance, the purchaser is estopped to insist on the statutory period.—*Schroeder v. Young*, 161 U. S. 334, 16 S. Ct. 512, 40 L. Ed. 721.

89. Acquiescence.

See 19 Cent. Dig. Estop. §§ 242-244.

92. — Acceptance of benefits.

See 19 Cent. Dig. Estop. §§ 260-263.

Contractors, who built a railroad under an arrangement by which they were to receive stock in the railroad company in payment, but who, upon a sale of the road to another company, accepted stock in the latter, are estopped, after several years' acquiescence, having accepted the guaranteed interest on the stock, from claiming to be regarded as stockholders in the first company, or from questioning the power of the purchasing company to issue the stock in question.—*Branch v. Jesup*, 106 U. S. 468, 1 S. Ct. 495, 27 L. Ed. 279.

In a suit upon an illegal contract, defendant is not estopped to set up the illegality, by reason of having received the benefit of the contract. Any right of recovery must rest, not in affirmance, but in disaffirmance, of the contract.—*Pullman's Palace-Car Co. v. Central Transp. Co.*, 18 S. Ct. 808, 171 U. S. 138, 43 L. Ed. 108, reversing judgment 76 F. 401, 22 C. C. A. 246.

93. — Permitting improvements or expenditures.

See 19 Cent. Dig. Estop. §§ 264-275.

A county, which has made a gift or donation of lands to a railroad company, and which for years has stood by and permitted the company to construct its road and appurtenances, and has accepted from it large sums as taxes upon such lands, would seem to be estopped from interfering with the possession of the company as to those parts of the land actually needed and used for railroad purposes, even if its original grant was made without authority. A fortiori, it follows that one afterwards buying the lands from the county, with notice, could neither maintain trespass nor ejectment against the company, nor obtain affirmative relief against it in equity.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

The secretary of the interior, on January 10, 1890, decided adversely to plaintiff's claim to certain lands. Thereafter, defendant took proceedings to enter the land under the laws of the United States, went into possession, and expended \$200 in improvements. The land was worth \$8,000. Plaintiff brought ejectment on April 9, 1890. *Held*, that plaintiff was not estopped, by acquiescence in the secretary's decision, to claim the land.—*Wisconsin Cent. R. Co. v. Forsythe*, 150 U. S. 46, 15 S. Ct. 1020, 40 L. Ed. 71, reversing judgment (C. C.) 43 F. 867.

Demand by city from consolidated telephone company of the bond required of original company, and expenditure of large sums by the consolidated company in extending its system, with the acquiescence of the city, estops the city from claiming that its consent to the use of the city streets by the original company was inoperative as to the consolidated company.—*City of Louisville v. Cumberland Telephone & Telegraph Co.*, 32 S. Ct. 572, 224 U. S. 649, 56 L. Ed. 934.

94. — Permitting sale or mortgage of property.

See 19 Cent. Dig. Estop. §§ 245-247, 276-284.

A cemetery association was authorized to purchase and hold 90 acres of land for cemetery purposes, its stock to be divided among the proprietors according to their interests. No stock was issued, but the owner of the entire tract selected associated with the corporation and became its president. Afterwards 30 of the 90 acres were laid out as a cemetery, and a pamphlet published describing the cemetery as comprising 90 acres, 30 of which were prepared for purposes of interment. The president sold lots in the cemetery. *Held*, that he was estopped to deny the setting apart of the whole 90-acre tract for the purposes of the corporation.—*Close v. Glenwood Cemetery*, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

Defendants were agents of persons who had loaned money to a bank, and received certain bonds as collateral security. The bank failed, and they offered the bonds for sale, buying them themselves, at the market price, and applying the proceeds on the debt. Complainants, commissioners, appointed to close up the affairs of the bank, denied the right of defendants to sell the bonds, and apply the proceeds as they had done. Afterwards, complainants, having leave from the court, indorsed the bonds to bearer, while in the possession of defendants, knowing that they had been or were to be again sold by them, in order to give a good title. *Held*, that this indorsement and the subsequent sale by defendants constituted a waiver by both parties of the first sale, and all rights under it, and a consent to the second sale.—*Lacombe v. Forstall*, 123 U. S. 562, 8 S. Ct. 247, 31 L. Ed. 255.

§95. Silence.

See 19 Cent. Dig. Estop. §§ 235-237.

The owners of the legal title to a group of mines being operated by a corporation pursuant to the terms of an escrow agreement which required the proceeds of operation to be applied on the purchase price, and provided for a forfeiture in case of default in payment, are not chargeable, because of their silence, with the fraud perpetrated on subscribers to the stock of such corporation by misstatements as to the corporation's title, contained in prospectuses, issued to promote the sale of its stock, although they may have known the contents of such prospectuses, and that some of the payments on account of the purchase price were from proceeds of the sales of the stock. Decree 62 P. 695, 7 Ariz. 163, affirmed.—*Wiser v. Lawler*, 23 S. Ct. 624, 189 U. S. 260, 47 L. Ed. 802.

(C) PERSONS AFFECTED.**§97. Persons to whom estoppel is available.**

See 19 Cent. Dig. Estop. § 239.

The principle that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who sup-

posed himself to be the owner, to make expenditures thereon, cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none beyond a mere occupancy, and that the real title was in the government, subject to be patented to others.—*Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 S. Ct. 389, 27 L. Ed. 226.

(D) MATTERS PRECLUDED.

[No paragraphs or references in this Digest. But see 19 Cent. Dig. Estop. §§ 291-296.]

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.**§109. Pleading as defense.**

See 19 Cent. Dig. Estop. §§ 299-303.

§110. — Necessity.

See 19 Cent. Dig. Estop. § 300.

An equitable estoppel must be pleaded.—*Thomas v. Blair*, 25 S. Ct. 797, 196 U. S. 637, 49 L. Ed. 630, dismissing 35 So. 811, 111 La. 678; (*C. C.*) *Pennsylvania Co. v. Cole*, 132 F. 668.

EVIDENCE.
Scope-Note.

[INCLUDES means of ascertaining the truth respecting matters of fact in issue in civil actions and proceedings in general; admissibility for that purpose of relevant facts, statements, oral or written, opinions, character, reputation, etc.; modes of proof and production of evidence other than testimony of witnesses, particularly documentary evidence, and exclusion of oral by documentary evidence; burden of making proof, and operation of presumptions; and sufficiency and effect of evidence in civil cases in general.

[For related matters under other topics, see cross-references after analysis.]

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 - 37. Laws of foreign countries.
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 - 44. Offices and official position and authority.
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[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 1143-1154.]

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[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 1155-1161.]

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Cross-References.

See—

Affidavits.
Depositions.
Discovery.
Witnesses.

For admissibility of evidence as to particular issues or in particular actions or proceedings, see the various specific topics.

For evidence in criminal prosecutions, see Criminal Law, 304-570, and cross-references preceding those sections.

For questions relating to presumptions, burden of proof, weight and sufficiency, etc., of evidence as to particular issues or in particular actions or proceedings, see cross-references at the beginning of the corresponding subdivisions of this topic.

For review of rulings relating to evidence, see Appeal and Error.

Admissibility under pleadings, see Pleading, 379, 380.

Altered instrument admissible as evidence, see Alteration of Instruments, 24.

Applicability of instructions to evidence, see—Criminal Law, 814.

Change of rules of evidence as impairing obligation of contract, see Constitutional Law, 175.

Comments by counsel on evidence or failure to produce evidence or call witness, see Trial, 121.

Comments of judge on evidence, or witnesses, see—

Criminal Law, 656.

Trial, 186.

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Exceptions to evidence, see Trial, 99-105.

False swearing, see Perjury.

Instructions as to rules of evidence, see—

Criminal Law, 777½-789.

Trial, 231-236.

Instructions ignoring, see Trial, 253.

Instructions on evidence or witnesses as invasion of province of jury, see Trial, 185-194.

Loss of evidence element of laches, see Equity, 73.

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Newly discovered evidence ground for new trial, see New Trial, 102-108.

Objections to evidence, see—

Criminal Law, 686-698.

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Offer of proof, see Trial, 44-46.

Practice in admiralty, see Collision, 122-125.

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Questions of fact for jury, see—

Criminal Law, 733-741.

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Criminal Law, 662-684.

Trial, 44-105.

State laws as rules for decisions in federal courts, see Courts, 376.

Waiver and correction of errors in rulings as to admissibility of evidence, see Trial, 410-412.

I. JUDICIAL NOTICE.

Criminal prosecutions, see Criminal Law, 304.

Effect on pleadings, see Pleading, 6.

5. Matters of common knowledge in general.

See 20 Cent. Dig. Evid. § 4; 38 Cent. Dig. Pat. § 543.

In passing upon the novelty of an alleged improvement covered by a patent, the court may consider matters of common knowledge or things in common use.—*Phillips v. City of Detroit*, 111 U. S. 604, 4 S. Ct. 580, 28 L. Ed. 532.

It is a fact, so notorious that the court may take judicial notice of it, that mere pasturage upon unclosed Western lands is very slight evidence of possession.—*Whitney v. United States*, 17 S. Ct. 857, 167 U. S. 529, 42 L. Ed. 263.

Judicial notice will be taken by the Supreme Court of the United States of the fact that, in the territory of New Mexico and in other similar parts of the West, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country, with no other means of determining their separate ownership than by the brand or marks upon them. Judgment (N. M. 1904) 78 P. 74, affirmed.—*Territory of New Mexico v. Denver & R. G. R. Co.*, 27 S. Ct. 1, 203 U. S. 38, 51 L. Ed. 78.

The federal Supreme Court takes judicial notice of the existence of the present European

War.—*United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 36 S. Ct. 212, 239 U. S. 466, 60 L. Ed. 387, reversing decree (D. C.) *Same v. Hamburg-American S. S. Line*, 216 F. 971.

10. Geographical facts.

See 20 Cent. Dig. Evid. §§ 9-14; 37 Cent. Dig. Nav. Wat. § 12.

The district court of New Mexico cannot take judicial notice that the Rio Grande river is nonnavigable within the territory of New Mexico. Decree (N. M.) 51 P. 674, 9 N. M. 292, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 19 S. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136.

A United States circuit court cannot, on a petition for removal from a state court of a suit to enjoin the importation of armed men into Sebastian county, Ark., and the town of Huntington therein, where a strike exists, take judicial notice, for the purpose of maintaining jurisdiction, that such persons could only be brought to Huntington by way of the Indian Territory, and the word "import," as used in the bill, means to bring into from another state or foreign country, as the court cannot make the complainant's case other than it made it by taking judicial notice of facts which it did not choose to rely on in its pleading.—*State of Arkansas v. Kansas & T. Coal Co.*, 22 S. Ct. 47, 183 U. S. 185, 46 L. Ed. 144.

Federal courts cannot take judicial notice that a stream is navigable because of an apparently irregular traffic in times of high water, employing Indian canoes and small steam-

boats and gasoline launches, in face of a declaration by the Legislature that such stream is not navigable.—*Donnelly v. United States*, 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710, denying rehearing 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

The federal Supreme Court may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida.—*Sligh v. Kirkwood*, 35 S. Ct. 501, 237 U. S. 52, 59 L. Ed. 835, affirming judgment 61 So. 185, 65 Fla. 123.

The federal Supreme Court held not permitted to take judicial notice that fruit cars on which an employé was killed came from without the state, though the place of destination was but a short distance over the state line.—*Osborne v. Gray*, 36 S. Ct. 486, 241 U. S. 16, 60 L. Ed. 865.

—11. Historical facts.

See 20 Cent. Dig. Evid. §§ 15, 16.

The history of Porto Rico and its legal and political institutions, up to the time of its annexation to the United States, are matters which must be recognized by the federal Supreme Court.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 28 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

—14. Facts relating to human life, health, habits, and acts.

See 20 Cent. Dig. Evid. § 19.

The court may take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. Judgment, 92 F. 344, 34 O. C. A. 392, reversed.—*Leovy v. United States*, 20 S. Ct. 797, 177 U. S. 621, 44 L. Ed. 914.

—21. Customs and usages.

See 20 Cent. Dig. Evid. § 25.

A court may judicially notice the existence in the community of a general custom to use coal oil in kindling fires. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed.—*Waters-Pierce Oil Co. v. Deselms*, 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

—23. Matters relating to government and its administration in general.

See 20 Cent. Dig. Evid. §§ 29, 30.

Judicial notice may be taken that the island of Cuba was, at the date of the act of congress of June 6, 1900, c. 793, 31 Stat. 656 (U. S. Comp. St. 1901, p. 3591), and still is, occupied by, and under the control of, the United States.—*Neely v. Henkel*, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448, affirming judgment (C. C.) in re Neely, 103 F. 631; *Neely v. Henkel*, 21 S. Ct. 308, 180 U. S. 126, 45 L. Ed. 457, affirming judgment (C. C.) in re Neely, 103 F. 626.

—27. Laws of the state.

See 20 Cent. Dig. Evid. §§ 35-48; 3 Cent. Dig. App. & E. § 2959.

—28. — In general.

See 20 Cent. Dig. Evid. §§ 35, 36, 48.

Judicial notice is taken by the federal Supreme Court that the distinctions between law and equity, in a technical sense, do not obtain in the local law of Porto Rico.—*Garzot v. Rios De Rubio*, 28 S. Ct. 548, 209 U. S. 283, 52 L. Ed. 794; *Burset v. Same*, Id.

—29. — Public statutes.

See 20 Cent. Dig. Evid. §§ 36, 37, 39, 43-46, 48.

The courts of the United States take judicial notice of the public statutes of the several

states.—*Lamar v. Micou*, 114 U. S. 218, 5 S. Ct. 857, 29 L. Ed. 94; *Hanley v. Donoghue*, 116 U. S. 1, 6 S. Ct. 242, 29 L. Ed. 535; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 S. Ct. 757, 30 L. Ed. 825; *Gormley v. Bunyan*, 133 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

Act Mont. Dec. 26, 1864, providing for notice of location of a mining claim, did not require it to be verified, but only required an oath that the claimants were bona fide residents of the territory. By Act Mont. May 8, 1873 (Ex. Sess. 1873, p. 84), notices of discovery thereafter filed were required to be under oath, to take effect from and after the passage of the act. By a statute then in force (Rev. St. Mont. § 785) it was provided that acts taking effect by their terms from and after their passage should so take effect at the seat of government, and in other parts of the territory, allowing 15 miles from the seat of government for each day. Held, in a contest over a mining claim in which the defendant claimed under a notice which complied with the terms of the former act filed May 13, 1873, that the court should take judicial notice of whether the statute was in force at that place at that time, and that it was error to exclude defendant's evidence, in the absence of affirmative evidence of the distance, showing that the act of May 8th had not taken effect.—*Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. Ed. 914.

The supreme court, and other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in the supreme court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact there.—*Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S. Ct. 398, 30 L. Ed. 519.

Though an act private in its nature may not be changed by legislative declaration into a public one, the legislature may provide that after the passage and publication of any law the courts of the state shall take judicial notice of it without it being pleaded or proved, which enactment would be binding on the federal courts in that state.—*Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513.

—34. Laws of United States.

See 20 Cent. Dig. Evid. §§ 49, 50.

A federal court will notice that a corporate defendant was incorporated by an act of Congress, even without any averment of the fact in the petition.—*In re Dunn*, 29 S. Ct. 299, 212 U. S. 374, 53 L. Ed. 558.

—35. Laws of other states.

See 20 Cent. Dig. Evid. §§ 35, 51; 3 Cent. Dig. App. & E. § 2959.

When, under the constitutional requirement (article 4, § 1) that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," it becomes necessary for the court of one state to inquire into the effect of the law of a sister state, such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon.—*Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S. Ct. 398, 30 L. Ed. 519.

—37. Laws of foreign countries.

See 20 Cent. Dig. Evid. § 52; 3 Cent. Dig. App. & E. § 2959.

The courts do not take judicial notice of laws of foreign countries.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Same v. Insurance*

Co. of North America, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800, affirming decree (C. C.) *The Montana*, 22 F. 715; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 S. Ct. 150, 35 L. Ed. 951, affirming decree (C. C.) 32 F. 316.

The United States courts take judicial notice of the Mexican laws and regulations pertaining to grants made before the cession.—*United States v. Chaves*, 159 U. S. 452, 16 S. Ct. 57, 40 L. Ed. 215.

Judicial notice may be taken of the Canadian act of 1886 for the regulation of navigation, which is in all material respects like the act of congress of 1885. Decrees, 82 F. 819, 27 C. C. A. 154, and 86 F. 814, 30 C. C. A. 623, reversed.—*The New York*, 20 S. Ct. 97, 175 U. S. 187, 44 L. Ed. 126.

The federal Supreme Court will take judicial notice of the Spanish law, as far as it affects the insular possessions of the United States.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 28 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

—38. International law.

Prize courts, administering the law of nations, are bound to take judicial notice of and give effect to a rule of international law exempting fishing vessels from capture as a prize, when there is no treaty or other public act of their own government in relation to the matter.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320.

—43. Judicial proceedings and records.

See 20 Cent. Dig. Evid. §§ 62-65; 3 Cent. Dig. App. & E. §§ 2569, 2560; 10 Cent. Dig. Contempt, § 132.

On a demurrer to a bill alleging that defendant had obtained possession of land belonging to complainant by representing it to be unappropriated, and thus procuring a patent from the state, the court will not judicially notice actions between the remote vendor of complainant and others, in which the supreme court of the state held the land claimed by complainant to be unappropriated.—*Stewart v. Masterson*, 131 U. S. 151, 9 S. Ct. 682, 33 L. Ed. 114.

—44. Offices and official position and authority.

See 20 Cent. Dig. Evid. § 66; 3 Cent. Dig. App. & E. § 2559.

It is no objection to a certificate issuing from the office of the comptroller of the currency, and under the seal of that office, that it was given by L. as "acting" comptroller, and that such office was unknown to the law, as a deputy comptroller is provided for by Rev. St. §§ 178, 327, to act during the absence or inability of the comptroller, and the court will take judicial notice that L. was deputy comptroller, and will presume that he was authorized at the date of the certificate to act for the comptroller.—*Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531.

—45. Elections and appointments to office.

See 20 Cent. Dig. Evid. § 67.

The court will take judicial notice of the date fixed by statute for the election of members of a state constitutional convention, and of the time of the assembling of the convention.—*Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293.

—46. Official proclamations and orders.

See 20 Cent. Dig. Evid. § 68.

The public proclamation of pardon and amnesty has the force of public law, of which courts and officers will take notice, though not specially pleaded.—*Jenkins v. Collard*, 145 U. S. 540, 12 S. Ct. 868, 36 L. Ed. 812.

—47. Administrative rules and regulations.

See 20 Cent. Dig. Evid. § 69.

The court will take judicial notice of the rules and regulations prescribed by the interior department relating to contests before the land office, as of all other rules and regulations prescribed by the principal departments of the government under express authority of an act of congress, for the transaction of business in which the public are interested and have a right to participate, and by which they are controlled.—*Caha v. United States*, 152 U. S. 211, 14 S. Ct. 513, 38 L. Ed. 415.

—48. Official proceedings and acts.

See 20 Cent. Dig. Evid. § 70; 3 Cent. Dig. App. & E. § 2559.

In determining whether or not the executive has declared that a guano island is within the jurisdiction of the United States, the court is not confined to the averments in the pleadings and the documents set out in the record, but it will take judicial notice of the acts of the executive relative to such island.—*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; *Smith v. Same*, 137 U. S. 224, 11 S. Ct. 88, 34 L. Ed. 700.

The court must take judicial notice of the existence of civil war in a foreign state at a certain time, and of the result thereof, and of a subsequent recognition by the United States of one party as representing the legitimate government, and, for information in this regard, may consult the department of state. Decree, 65 F. 577, 13 C. C. A. 51, affirmed.—*Underhill v. Hernandez*, 18 S. Ct. 83, 168 U. S. 250, 42 L. Ed. 456.

A report of a state auditor in respect to the amounts of the various kinds of property subject to taxation is not a document of which the court can take judicial notice.—*First Nat. Bank of Wellington, Ohio, v. Chapman*, 19 S. Ct. 407, 173 U. S. 205, 43 L. Ed. 660.

Judicial notice of a decision of the Interstate Commerce Commission, authoritatively published in its reports, need not be taken by a state court because of the provision of Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3164), making the authorized publications of the commission competent evidence without further proof or authentication, where such decision was not mentioned in the pleadings nor in the agreed statement of facts, since the purpose of the statute is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions, and it does not otherwise change the rules of evidence.—(1912) *Robinson v. Baltimore & O. R. Co.*, 32 S. Ct. 114, 222 U. S. 508, 56 L. Ed. 288, affirming judgment (1908) 63 S. E. 323, 64 W. Va. 406.

—49. Official signatures and seals.

See 20 Cent. Dig. Evid. § 71.

In an action against the drawer of a bill of exchange payable in Norway, the notarial certificate of protest, authenticated by the notary's seal, was offered to prove presentation and nonpayment. Held, that the court will take judicial notice of the seals of notaries public, and that it was properly admitted.—*Pierce v. Indseth*, 106 U. S. 548, 1 S. Ct. 413, 27 L. Ed. 254, affirming Fed. Cas. No. 7,026.

—51. Mode of ascertaining facts required to be noticed.

See 20 Cent. Dig. Evid. § 72.

In determining the fact that the executive has declared a guano island to be within the jurisdiction of the United States, the court is not confined to the pleadings and documents in the case, but will inspect the records of the department of state.—*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691.

The records of the navy department may be consulted by the supreme court of the United States upon the question of the recognition of the exemption of coast-fishing boats from capture.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320.

II. PRESUMPTIONS.

Criminal prosecutions, see Criminal Law, ◀305-323.

To aid construction of statute, see Statutes, ◀212.

As to particular facts or issues.

See—

Deeds, ◀191-194.

Gifts, ◀47.

Alienage, see Aliens, ◀2.

Citizenship to determine jurisdiction, see Courts, ◀323.

Constitutionality of statutes, see Constitutional Law, ◀48.

Correctness of master's report, see Equity, ◀409.

Death, see Death, ◀2.

Delivery of deed, see Deeds, ◀194.

Enemy's property, see War, ◀28.

Enactment of statutes, see Statutes, ◀283.

Extension of land held adversely, see Adverse Possession, ◀85.

Fault, see Collision, ◀73, 104.

Former adjudication, see Judgment, ◀951-956.

Fraud or undue influence in procuring execution of will, see Wills, ◀163.

Fraudulent conveyance, see Fraudulent Conveyances, ◀270-282.

Good faith of purchaser of bill or note and payment of value, see Bills and Notes, ◀497.

Good faith of purchaser of municipal bonds, see Municipal Corporations, ◀955.

Jurisdiction of courts, see Judgment, ◀495.

Limitation of liability of carrier in respect to goods, see Carriers, ◀163.

Notice of election, see Counties, ◀154.

Ownership of stock, see Banks and Banking, ◀250.

Payment, see Payment, ◀64-66.

Prejudice from error in trial court, see—

Appeal and Error, ◀1031.

Criminal Law, ◀1163.

Testamentary capacity, see Wills, ◀52.

Validity of mortgage, see Equity, ◀346.

Waiver of inventory, see Descent and Distribution, ◀147.

In particular civil actions or proceedings.

See Ejectment, ◀86.

For breach of warranty, see Sales, ◀439.

Injuries from negligence, see—

Carriers, ◀163.

Collision, ◀73, 78, 104, 122.

Master and Servant, ◀265.

Negligence, ◀120-122.

Railroads, ◀346.

On bills or notes, see Bills and Notes, ◀490-497.

On contract of suretyship, see Principal and Surety, ◀159.

On insurance policies, see Insurance, ◀646.

On municipal bonds, see Municipal Corporations, ◀955.

Probate proceedings and actions relating to wills or probate, see Wills, ◀287-290.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, ◀270-282.

◀60. Innocence.

See 20 Cent. Dig. Evid. § 81.

There is no presumption, merely because contrary has not been established, that an interstate carrier is conducting its affairs in violation of federal legislation.—*Cincinnati, N. O.*

& T. P. Ry. Co. v. Rankin, 36 S. Ct. 555, 241 U. S. 319, 60 L. Ed. 1022.

◀66. Knowledge of fact.

See 20 Cent. Dig. Evid. § 88.

Ignorance on the part of the patentee of a combination of the manner of the operation of the elements which he has combined will not readily be inferred.—(1911) *Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co.*, 31 S. Ct. 444, 220 U. S. 428, 55 L. Ed. 527, affirming decree (1908) *Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York*, 162 F. 892, 89 C. C. A. 582.

◀67. Continuance of fact or condition.

See 20 Cent. Dig. Evid. §§ 87, 88, 103; 24 Cent. Dig. Fraud. Conv. § 804; 27 Cent. Dig. Ins. Per. § 6.

Nonexistence of island because field notes and plat of government survey of 1868 make no mention of it will not be inferred where the island has an area of nearly 140 acres with well-defined banks rising from 3 to 5 feet above high water.—*Scott v. Lattig*, 33 S. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107, reversing decree *Lattig v. Scott*, 107 P. 47, 17 Idaho, 506.

◀68. Consequences of acts or states of fact.

See 20 Cent. Dig. Evid. § 89.

Where the copyright of a book written by a married woman was taken out in the name of her publisher, and it appeared that from time to time she settled with him for her royalties, it will be presumed, in a suit by the publisher for infringement, that the legal title was conveyed to him in some proper manner, although it might be that in the state of her residence the property in the work was vested in her husband by virtue of his marital rights, and there was no evidence of a conveyance by him.—*Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514.

◀71. Mailing, and delivery of mail matter.

See 20 Cent. Dig. Evid. § 92.

Proof that a letter properly directed was placed in the post office raises a presumption that the letter reached the person to whom it was addressed, and this presumption is not affected by any forfeiture or penalty which might result from proof of the receipt of the letters.—*Rosenthal v. Walker*, 111 U. S. 185, 4 S. Ct. 382, 28 L. Ed. 395.

Evidence that a letter was duly posted raises the presumption that it was received.—*Kimberly v. Arms*, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764.

◀74. Evidence withheld or falsified.

See 20 Cent. Dig. Evid. §§ 95-100; 12 Cent. Dig. Corp. § 2092.

◀75. — In general.

See 20 Cent. Dig. Evid. § 96.

The failure to produce evidence within a party's control raises the presumption that, if produced, it would operate against him; and every intentment will be in favor of the opposite party.—*Kirby v. Tallmadge*, 160 U. S. 379, 16 S. Ct. 349, 40 L. Ed. 463.

When the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, would support the inferences against him. Decree (*D. C.*) *The Queen*, 78 F. 155, affirmed.—*The Queen of*

the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

81. **Laws of foreign countries.**

See 20 Cent. Dig. Evid. § 102; 32 Cent. Dig. Libel, § 274.

The federal courts cannot assume without proof that, under the law of Cuba, like that of the forum, a promise to repair or replace defective machinery, when notified by an employé of the defect, throws upon the master the risk of injury to such employé from such defect until the time for performance has expired, or that it does away with or leaves to the jury what otherwise would be negligence as a matter of law.—(1912) *Cuba R. Co. v. Crosby*, 32 S. Ct. 132, 222 U. S. 473, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40, reversing judgment (1909) 170 F. 389, 95 C. C. A. 539.

The common-law fellow-servant rule must be assumed to have existed in Porto Rico in view of the provisions of the Rev. St. & Codes Porto Rico 1902, p. 150, adopting the English employer's liability act, that the master should be liable in certain cases for injuries caused by the negligence of a fellow servant and that the act shall not apply to injuries caused to domestic servants or farm laborers by fellow employes.—*Brooks v. Central Sainte Jeanne*, 33 S. Ct. 700, 228 U. S. 688, 57 L. Ed. 1025.

83. **Official proceedings and acts.**

See 20 Cent. Dig. Evid. § 105; 44 Cent. Dig. States, § 163.

Where the statutes of a state regulating the impaneling of grand juries (Gen. St. Ky. 570; Code Cr. Proc. Ky. § 101) exclude from service all persons other than white men, it must be presumed on the trial of a negro that the officers who summoned the grand jury by which he was indicted followed the letter of the statutes, notwithstanding the state court of appeals in a decision rendered after the indictment was returned declared them to be unconstitutional, as in conflict with the fourteenth amendment, and the indictment must be set aside.—*Bush v. Commonwealth of Kentucky*, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354.

It is no objection to a certificate issuing from the office of the comptroller of the currency, and under the seal of that office, that it was given by L. as "acting" comptroller, and that such office was unknown to the law, as a deputy comptroller is provided by Rev. St. U. S. §§ 178, 327, to act during the absence or inability of the comptroller, and the court will presume that L. was authorized at the date of the certificate to act for the comptroller.—*Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531.

There is no presumption that a sheriff having custody of an alleged lunatic, whom he does not produce on the trial of lunacy proceedings, exerted his power of detention for the purpose of preventing such person from attending the hearing or being represented there and contesting the proceeding.—*Simon v. Craft*, 21 S. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165.

A presumption, though not a conclusive one, that there has been a compliance with the condition precedent to the issuance of county bonds in payment of a subscription to the capital stock of a railway company, that the county should first be exonerated from a prior subscription to the stock of another railroad company, arises from the mere fact of subscription and issuance by the officer charged with the duty of issuing the bonds upon the performance to the condition precedent. Judgment (C. C. A. 1907) *Quinlan v. Green County, Ky.*, 157 F. 33, 84 C. C. A. 537, 19 L. R. A. (N. S.) 849, modified.—*Green County, Ky., v. Quinlan*, 29 S. Ct. 162, 211 U. S. 582, 53 L. Ed. 335.

It will be presumed, in the absence of any showing to the contrary, that the governor general of the Philippines reported a grant of tide lands to his superiors at Madrid, as required by royal decree.—*Jover Y Costas v. Insular Government of Philippine Islands*, 31 S. Ct. 664, 221 U. S. 623, 55 L. Ed. 884.

In a suit to have the holder of a patent declared the trustee for adverse claimant, presumption that a contest before the town site commission for a town in the Cherokee Nation was begun within the prescribed time after notice of denial of contestant's application arises where the petition does not show when contestant's application was refused or when she was notified thereof.—*Ross v. Stewart*, 33 S. Ct. 345, 227 U. S. 530, 57 L. Ed. 626, affirming judgment 106 F. 870, 25 Okl. 611.

84. **Particular facts.**

See 20 Cent. Dig. Evid. § 106.

No presumptions exist that corporate stock is worth par.—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 238 U. S. 202, 59 L. Ed. 1272.

85. **Operation and effect.**

See 20 Cent. Dig. Evid. §§ 107-109.

87. **Presumptions of fact.**

See 20 Cent. Dig. Evid. § 109.

Spoliation or concealment of papers, though it is theoretically a serious offense, and authorizes the presumption of an intention to suppress incriminating evidence, is not in itself ground for condemnation, but is evidence, more or less convincing, of the existence of such ground; but the presumption arising therefrom is a rebuttable one, and the transaction is open to explanation. Decree (D. C.) 91 F. 274, modified.—*The Olinde Rodrigues*, 19 S. Ct. 851, 174 U. S. 510, 43 L. Ed. 1065.

III. **BURDEN OF PROOF.**

Practice in equity, see Equity, 846.

As to particular facts or issues.

See—

Boundaries, 833.

Deeds, 191-194.

Authority of agent, see Principal and Agent, 119.

Citizenship determining jurisdiction, see Courts, 323.

Error in trial court, see Appeal and Error, 901.

Execution of deed, see Deeds, 193.

Fault, see Collision, 104.

Fraud or undue influence in procuring execution of will, see Wills, 163.

Fraudulent conveyance, see Fraudulent Conveyances, 270-282.

Good faith of purchaser of bill or note and payment of value, see Bills and Notes, 497.

Limitation of liability of carrier in respect to goods, see Carriers, 163.

Loss of or injury to goods in course of transportation, see Carriers, 132.

Ownership of captured vessel, see War, 28.

Payment, see Payment, 64-66.

Preferences by debtor, see Bankruptcy, 303.

Testamentary capacity, see Wills, 52.

In particular civil actions or proceedings.

See—

Bankruptcy, 303.

Ejectment, 86.

Usury, 113.

Claim against United States, see United States, 141.

Deportation proceedings, see Aliens, 32.

Enforcement of stockholder's liability, see Banks and Banking, 250.

Establishment of trust, see Trusts, 41.

For breach of contract, see—

Contracts, ¶348.

Sales, ¶439.

For malicious prosecution, see Malicious Prosecution, ¶56.

Injuries from negligence, see—

Carriers, ¶182, 163.

Collision, ¶73, 104.

Master and Servant, ¶265.

Negligence, ¶120-122.

Railroads, ¶346.

On bills or notes, see Bills and Notes, ¶490-497.

On insurance policies, see Insurance, ¶646.

Probate proceedings and actions relating to wills or probate, see Wills, ¶287-290.

To establish boundaries, see Boundaries, ¶33.

To set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, ¶270-282.

¶94. Extent of burden in general.

See 20 Cent. Dig. Evid. §§ 116, 117.

Proof of a genuine signature to a document whose authenticity is denied casts on the opposite party the burden of showing that the writing above the signature was forged.—*Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) FACTS IN ISSUE AND RELEVANT TO ISSUES.

Criminal prosecutions, see Criminal Law, ¶338-368.

¶99. Relevancy in general.

See 20 Cent. Dig. Evid. §§ 122, 127-143.

Certain persons secured the contract to construct waterworks for a city, and, in order to raise the deposit required as a forfeit, they procured B. to discount a draft drawn on one of them. This draft was protested for nonpayment. All rights and liabilities under the contract passed by assignment to another one of the contractors, and B. sued him for the amount of the draft. *Held*, that the account between B. and the acceptor of the draft was admissible against defendant, as the assignee of the acceptor.—*Runkle v. Burnham*, 153 U. S. 216, 14 S. Ct. 837, 38 L. Ed. 694, affirming judgment *Burnham v. Runkle* (C. C.) 40 F. 408.

¶105. Nature and condition of property or other subject-matter.

See 20 Cent. Dig. Evid. §§ 169-176.

In an action for breach of a contract to sell iron, where defendant sets up a breach of warranty that the iron shall be in accordance with an analysis furnished him by letter of a certain date, evidence of experts as to the quality of, and the amount of phosphorus in, iron sold by plaintiff, at various dates preceding the sale to defendant, is not admissible.—*Albany & Rensselaer Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 S. Ct. 958, 30 L. Ed. 982.

In an action for the death of a railroad employé, alleged to have been due to the faulty construction of the road, it was proper to exclude a question to an engineer, testifying as to its construction, as to whether the cut in which the accident happened was not constructed as cuts were ordinarily constructed on roads running through such places, since this would have necessitated further testimony showing that the surroundings of other cuts were substantially similar to those of the cut in question, and would thus involve collateral issues.—*Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 768.

¶112. Value of services.

See 20 Cent. Dig. Evid. §§ 124, 254-255.

In an action to recover for services rendered in effecting the sale of land located near a large city, evidence as to the character of the land and its possible value as a future suburb of the city is admissible on the question of the value of the services.—*Forsyth v. Doolittle*, 120 U. S. 73, 7 S. Ct. 408, 30 L. Ed. 586.

¶113. Value or market price of property.

See 20 Cent. Dig. Evid. §§ 259-294.

The fact that the owner of a vessel had at the time of a collision concluded a sale of one-half the vessel for a certain sum is better evidence of her actual value than the conflicting opinion of experts. *Decree, Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

Sale by auction in a great mart of commerce is a proper method of determining the value of goods damaged in the hands of a carrier. *Decree (D. C.) The Queen*, 78 F. 155, affirmed.—*The Queen of the Pacific*, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

Value of railway stock may be proved by evidence of its intrinsic value.—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 238 U. S. 202, 59 L. Ed. 1272.

(B) RES GESTÆ.

Criminal prosecutions, see Criminal Law, ¶362-368.

¶120. Acts and statements accompanying or connected with transaction or event.

See 20 Cent. Dig. Evid. §§ 303, 307-368, 1117, 1119; 4 Cent. Dig. Assault, § 39; 9 Cent. Dig. Carr. § 1477.

¶121. — In general.

See 20 Cent. Dig. Evid. §§ 303, 307-338, 1117, 1119; 4 Cent. Dig. Assault, § 39; 9 Cent. Dig. Carr. § 1477.

The answer of garnishees, which denied possession or control of the debtors' property, was controverted by the attaching creditors, who alleged that the garnishees had "combined, colluded, and confederated together with the debtors to hinder, delay, and defeat collection of their debts." On trial, it appeared that one of the garnishees, fearing plaintiffs' attachment, induced the debtors to transfer their property to him in full payment of a debt of his firm of about \$15,000. Some hours later, and in the night, the debtors called at the garnishee's house, and he went with them to an attorney's office, where he gave direction as to the priority of other attachments then ready to issue against the debtors, and which were levied prior to plaintiffs'. *Held*, that the transfer to the garnishee and the arrangements at the attorney's office were parts of the same transaction to appropriate the property, during which time the acts of the garnishee were part of the *res gestæ*, and admissible in evidence.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373.

¶122. — Before transaction or event.

See 20 Cent. Dig. Evid. §§ 339-350; 4 Cent. Dig. Assault, § 39.

Where the nominal payee of an accommodation note has died before trial of an action thereon by the indorsees against the makers, testimony of a witness as to letters and conversations between him and such payee prior to the making of the note, tending to show the relations of the parties and the circumstances in which the note was made, is admissible as part of the *res gestæ*.—*Holmes v. Goldsmith*, 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118, affirming judgment

Goldsmith v. Holmes (C. C.) 36 F. 484, 1 L. R. A. 816.

123. — **After transaction or event.**
See 20 Cent. Dig. Evid. §§ 351-363; 4 Cent. Dig. Assault, § 39.

In an action against a railroad company to recover damages for injuries received by a passenger by the train in which he was traveling running off the track, a declaration of the engineer, made between 10 and 30 minutes after the accident occurred, as to the rate at which the train was going at the time, is not admissible in behalf of the plaintiff.—**Vicksburg & M. R. Co. v. O'Brien**, 119 U. S. 99, 7 S. Ct. 118, 30 L. Ed. 299.

Where there was independent evidence showing that the conveyance of an insolvent's assets was in pursuance of a purpose of the insolvent and his vendee to defraud the insolvent's creditors, a declaration by the insolvent to a creditor, shortly after the transfer, that he was obliged to fail, and would continue the business as soon as he could settle with his creditors, is admissible against the vendee, as part of the res gestæ. Judgment, 75 F. 350, 21 C. C. A. 390, affirmed.—**Sonnentheil v. Christian Moerlein Brewing Co.**, 19 S. Ct. 233, 172 U. S. 401, 43 L. Ed. 492.

124. **Acts and statements of person sick or injured.**
See 20 Cent. Dig. Evid. §§ 369-387; 9 Cent. Dig. Carr. § 1477.

128. — **Statements to physicians.**
See 20 Cent. Dig. Evid. §§ 383-387.

In an action for personal injuries, it is error to permit the nurse and physician to testify that plaintiff told them, some time after the accident, that a piece of nail had come out of his knee, and to permit the physician to point out the scar of the hole out of which the plaintiff had told him the nail had come, as such matters are mere hearsay.—**Boston & A. R. Co. v. O'Reilly**, 158 U. S. 334, 15 S. Ct. 830, 39 L. Ed. 1006.

(C) SIMILAR FACTS AND TRANSACTIONS.

See 20 Cent. Dig. Evid. §§ 338-423.
Other offenses, see Criminal Law, 369-372.

(D) MATERIALITY.

147. **Negative evidence.**
See 20 Cent. Dig. Evid. §§ 435-437.

The testimony of witnesses to the effect that they did not know of or see any opportunity for certain cotton to have caught fire except from a passing locomotive is not inadmissible on the question of the liability of the railroad company for the value of such cotton, if objected to, not because of any omission to state the facts which induced the witnesses' belief, but because negative in character, irrelevant, and in the nature of a conclusion. Judgment, 112 F. 402, 50 C. C. A. 230, affirmed.—**Texas & P. Ry. Co. v. Watson**, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

(E) COMPETENCY.

Criminal prosecutions, see Criminal Law, 390-396.

155. **Evidence admissible by reason of admission of similar evidence of adverse party.**
See 20 Cent. Dig. Evid. §§ 445-453, 2143.

Impeaching evidence, see Witnesses, 352.

Where the issue was as to whether A. or B. owned a note, and A., having testified that he

owned it, afterwards testified that B. owned it, and that the reason he believed so was that he had never directed the proceeds of the note to be applied to any purpose, it is competent to prove by C. that A. gave directions to C. as to how to apply such proceeds.—**Burley v. German-American Bank**, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

A defendant who has testified to conversations between the parties, for the purpose of showing that a deed absolute on its face was intended as a mortgage, cannot object on appeal that plaintiff was allowed to testify in rebuttal to the same matters, although Code Mont. § 623, provides that parol evidence shall not be admitted to show the terms of agreements that have been reduced to writing, except in cases of ambiguity, mistake, or fraud.—**Bogk v. Gassert**, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631, affirming judgment **Gassert v. Bogk**, 7 Mont. 585, 19 P. 281.

Assuming that it is proper to admit certain conversations had, by defendant in ejectment, with third persons to the effect that they had a contract with the original owner for a large block of land, and that defendant might have part of it, it is error, after admitting them, to exclude deeds from the original owner to such third persons, showing the lands actually conveyed to them, which are offered by plaintiff to contradict their statements as to the amount of land they had contracted for.—**Maxwell Land Grant Co. v. Dawson**, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

A party who produces a gun for his witness to use in connection with his testimony respecting the death of a person by the discharge of a gun that he was carrying cannot complain if the other party uses the same gun for the purposes of other illustration, without giving proof to identify this with the gun that caused the death, especially when the latter party gives some testimony tending, though perhaps only slightly, to identify it. Judgment, 94 F. 751, 36 C. C. A. 467, affirmed.—**Supreme Lodge, K. P., of the World v. Beck**, 21 S. Ct. 532, 181 U. S. 49, 45 L. Ed. 741.

V. BEST AND SECONDARY EVIDENCE.

Criminal prosecutions, see Criminal Law, 400-404.

157. **Necessity and admissibility of best evidence.**
See 20 Cent. Dig. Evid. §§ 440-470.

Rev. St. § 891, making certified copies from the books of the commissioner of the general land office evidence equally with the originals, does not forbid a party from showing by extrinsic proof, otherwise legitimate, what the contents of the lost original really were, when it is shown that the record itself, or the transcript from it, is not a true copy, and the party is not necessarily deprived of his rights on account of the defective record in the general land office.—**Campbell v. Laclede Gaslight Co.**, 119 U. S. 445, 7 S. Ct. 278, 30 L. Ed. 459.

158. **Facts or transactions described in or evidenced by writing.**
See 20 Cent. Dig. Evid. §§ 471, 473, 474½-504, 506-526; 12 Cent. Dig. Corp. § 1738.

In an action for breach of contract to deliver grain to a military station, assertions of demand made and failure to perform, contained in letters of the officials of the station, requesting authority to purchase grain in the open market, or contained in the official indorsements thereon, or vouchers for grain purchased outside the contract, are no evidence of such demand and failure. The order of the receiving officer requiring the contractor to deliver should be produced, or its absence accounted for.—**United**

States v. Corwin, 129 U. S. 381, 9 S. Ct. 318, 82 L. Ed. 710.

In a suit on a written contract to sell all defendant's cattle on certain ranches, except 2,000 head of steers already sold to another purchaser, parol evidence of the contract with such other purchaser may be introduced to show that it called for steers two years old and upward, and therefore that the contract in dispute called for all steers on such ranches under that age.—**Loneragan v. Buford**, 148 U. S. 581, 13 S. Ct. 684, 37 L. Ed. 569, affirming judgment **Buford v. Loneragan**, 6 Utah, 301, 22 P. 164.

⚡160. **Contents of writings.**

See 20 Cent. Dig. Evid. §§ 527, 529-559.

⚡161. — **In general.**

See 20 Cent. Dig. Evid. §§ 527, 529-535, 553.

Under Gen. St. Minn. 1878, c. 73, § 59, providing that the court may in its discretion allow a foreign law, though contained in a written statute or code, to be proved by parol evidence, it was not error, in an action on a bill of exchange payable in Norway, on the issue as to timely presentation thereof, to admit the deposition of a lawyer of Norway that the law there allowed a year after the issue of a foreign bill of exchange for its presentation to the drawee for payment.—**Pierce v. Indseth**, 106 U. S. 546, 1 S. Ct. 418, 27 L. Ed. 254, affirming Fed. Cas. No. 7,026.

⚡163. — **Official acts, proceedings, and records.**

See 20 Cent. Dig. Evid. §§ 536, 543-545.

Oral testimony of the contents of a written petition for public improvements in a city is inadmissible when its absence is not accounted for. Judgment, 55 N. E. 325, 182 Ill. 250, affirmed.—**Farrell v. West Chicago Park Com'rs**, 21 S. Ct. 609, 645, 181 U. S. 404, 45 L. Ed. 916, 924.

⚡166. — **Books of account.**

See 20 Cent. Dig. Evid. §§ 556, 557.

The original books of account should be produced, where copies made by a notary, who took the deposition of the bookkeeper, are objected to, both before the notary and at the trial, as not the best evidence. Judgment (1906) 87 P. 311, 17 Okl. 344, affirmed.—**Drumm-Flato Commission Co. v. Edmison**, 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

⚡176. **Grounds for admission of secondary evidence.**

See 20 Cent. Dig. Evid. §§ 557, 570-599.

⚡178. — **Destruction or loss of primary evidence.**

See 20 Cent. Dig. Evid. §§ 590-594; 39 Cent. Dig. Plead. § 1029; 42 Cent. Dig. Records, § 33.

On proof of the loss of the written authority issued by a marshal to a deputy whom he had appointed, parol evidence of the fact of the appointment and of the services of the deputy are admissible to prove such appointment.—**Wright v. United States**, 158 U. S. 232, 15 S. Ct. 819, 39 L. Ed. 963.

⚡179. — **Possession or control of primary evidence.**

See 20 Cent. Dig. Evid. §§ 595-599.

Where the primary evidence is in the possession, or under control, of the adverse party, who fails or refuses to produce it, secondary evidence is admissible.—**Union Ins. Co. v. Smith**, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; **Dunbar v. United States**, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (**D. C.**) **United States v. Dunbar**, 60 F. 75.

⚡180. **Preliminaries to admission of secondary evidence.**

See 20 Cent. Dig. Evid. §§ 600-660.

⚡182. — **Proof as to existence of primary evidence.**

See 20 Cent. Dig. Evid. §§ 601-604.

Where an instrument purporting to be a letter power of attorney to take possession of and sell land granted by the government of Coahuila and Texas is offered in evidence as an ancient instrument, a copy from a certified copy of the instrument, the latter having been lost, is admissible to show that such an instrument as the original was in existence at the time in question.—**Williams v. Conger**, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

VI. DEMONSTRATIVE EVIDENCE.

Criminal prosecutions, see **Criminal Law**, ⚡404.

⚡196. **Writings submitted for comparison.**

See 20 Cent. Dig. Evid. §§ 681-682.

⚡197. — **In general.**

See 20 Cent. Dig. Evid. §§ 681, 681½.

Where a paper, dated in 1828, properly authenticated, from the public archives of Coahuila, purporting to be signed in person by an applicant for concession of land by the government, is evidence for other purposes, the jury may, if they believe, from all the evidence, that the paper is genuine, and as old as its date imports, treat the signature as genuine, and use it as a standard of comparison in determining the genuineness of an alleged signature.—**Williams v. Conger**, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

Where the execution of a note sued on is put in issue in the circuit court, the introduction of papers, not otherwise competent, for the purpose of enabling the jury to make a comparison of handwriting, is warranted by a state statute (1 Hill's Ann. Laws Or. § 765) which provides that "evidence respecting the handwriting may also be given by comparison, made by a witness skilled in such matters, or the jury with writings admitted or treated as genuine by the party against whom the evidence is offered."—**Holmes v. Goldsmith**, 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118, affirming judgment (**C. C.**) **Goldsmith v. Holmes**, 36 F. 484, 1 L. R. A. 816.

A writing specially prepared for the purpose of comparison is inadmissible on a question of genuineness.—**Hickory v. United States**, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

Papers in evidence, and admitted to be in the handwriting of a certain person, may be compared by the jury with a paper in dispute, to determine whether the latter is in the handwriting of the same person.—(**U. S.**) **Stokes v. United States**, 157 U. S. 187, 15 S. Ct. 617, 39 L. Ed. 667.

VII. ADMISSIONS.

(A) **NATURE, FORM, AND INCIDENTS IN GENERAL.**

⚡206. **Judicial admissions.**

See 20 Cent. Dig. Evid. §§ 707-744; 4 Cent. Dig. Assault, § 39.

⚡207. — **In general.**

See 20 Cent. Dig. Evid. §§ 707-712; 4 Cent. Dig. Assault, § 39.

In all cases where a receiver is entitled to defend or appeal, as the representative of the

estate in his hands, any admissions made by him or his counsel in the course of the litigation are binding on all parties whose interests he is defending. Judgment, 80 F. 969, 26 C. C. A. 279, modified.—*Bosworth v. Terminal R. Ass'n of St. Louis*, 19 S. Ct. 625, 174 U. S. 182, 43 L. Ed. 941.

208. — Pleadings.

See 20 Cent. Dig. Evid. §§ 713-725.

Averments made under oath in a pleading in an action at law are competent evidence in another suit against the party making them; and the fact that the averments are made on information and belief goes only to their weight, and not to their admissibility.—*Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 L. Ed. 393.

In an action against a board of county commissioners on a contract that had been assigned to plaintiff by the original contractor, the complaint, in an action by plaintiff against his assignor, not under oath, nor signed by the plaintiff, is incompetent to prove an admission that, on the state of facts therein set out, which is substantially the same as that of the present action, the plaintiff had no cause of action against the present defendant.—*Board of Commissioners v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674.

210. — Petitions, affidavits, and depositions.

See 20 Cent. Dig. Evid. §§ 729-737.

In an action for conversion, an affidavit was made, by the sole managing agent of defendant company, to obtain an order for leave to amend its answer in the state court after that court had lost its jurisdiction by the filing of a petition and bond for removal. Held, that such affidavit was competent evidence in behalf of plaintiff, on a subsequent trial in the federal court, as an admission by defendant of the facts stated therein. Having affirmed that it was credible when used for one purpose, defendant will not be permitted to repudiate it when offered for another purpose.—*National S. Co. v. Tugman*, 143 U. S. 28, 12 S. Ct. 361, 36 L. Ed. 63, affirming judgment (C. C.) *Tugman v. National S. S. Co.*, 30 F. 802.

219. Acts or conduct.

See 20 Cent. Dig. Evid. §§ 762-770; 4 Cent. Dig. Assault, § 39.

The mere payment of a certain sum on a claim for a much larger sum as compensation for services rendered in delivering captured or abandoned property to the government—for which services it was under no legal obligation, express or implied, to make compensation—cannot be deemed a recognition of a legal liability to make further payments on such claim.—*Camp v. United States*, 113 U. S. 648, 5 S. Ct. 687, 28 L. Ed. 1081.

(B) BY PARTIES OR OTHERS INTERESTED IN EVENT.

221. Parties of record.

See 20 Cent. Dig. Evid. §§ 786-812; 47 Cent. Dig. Trusts, § 132; 49 Cent. Dig. Wills, § 410.

222. — In general.

See 20 Cent. Dig. Evid. §§ 786-800, 803-808; 4 Cent. Dig. Assault, § 39; 39 Cent. Dig. Paymt. § 206; 47 Cent. Dig. Trusts, § 132; 49 Cent. Dig. Wills, § 410.

Admissions by a ward's next of kin during the ward's lifetime cannot be set up in defense of a bill by such next of kin as the ward's administrator.—*Lamar v. Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, reversing (C. C.) *Micon v. Lamar*, 1 F. 14, and (C. C.) *Micou v. Same*, 7 F. 180.

Under the statute of Illinois providing that, in actions on contract against two or more defendants jointly, proof of joint liability shall

not be required to entitle plaintiff to judgment unless it is denied by plea verified by affidavit, the acts or statements of one of two defendants thus declared against are admissible against the other, if the pleadings do not contain the denial required by statute, although only the latter defendant is served with process.—*Forsyth v. Doolittle*, 120 U. S. 73, 7 S. Ct. 408, 30 L. Ed. 586.

Evidence of what the garnishee said to one of the creditors after attachment, in explanation of why he put one creditor ahead of another, was admissible, as tending to show the garnishee's recognition of the fact that he had been a controlling spirit in the attachment proceedings.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373.

(C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

231. Sellers or mortgagors of chattels.

See 20 Cent. Dig. Evid. §§ 835-840, 852-859.

A statement by debtors, after an alleged fraudulent conveyance of their property to a garnishee, reciting a conversation which occurred at an attorney's office where certain attachments against the debtors were being arranged, and which was alleged to have been in the presence of the garnishee, and concurred in by him, cannot be excluded on the ground that the debtors cannot, after parting with their interests in the property, defeat by their own statements the title they have given the garnishee.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373.

On the issue whether an instrument is a chattel mortgage or a deed of trust, testimony of the person executing it, as to statements made by him to a third person as to its character, is not admissible. Judgment, 7 C. C. A. 426, 58 F. 670, affirmed.—*W. B. Grimes Dry-Goods Co. v. Malcolm*, 17 S. Ct. 158, 104 U. S. 483, 41 L. Ed. 524.

(D) BY AGENTS OR OTHER REPRESENTATIVES.

240. Agents or employes.

See 20 Cent. Dig. Evid. §§ 887-915.

242. — Scope and extent of agency or employment.

See 20 Cent. Dig. Evid. §§ 893-907.

The declarations of an agent placed in control and management of a stock of goods by one who purchased them from an insolvent debtor as to the character and good faith of the transaction are without the scope of his agency, and are inadmissible.—*Winchester & Partridge Mfg. Co. v. Creary*, 116 U. S. 161, 6 S. Ct. 369, 29 L. Ed. 591.

Statements by the bookkeeper of a mining company as to his reasons for refusing to allow a contractor to see and copy railroad way bills in his possession, which by the contract were made the evidence of the amount of the contractor's compensation, are competent evidence as against the company.—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814.

243. — Admissions before or after transaction or event.

See 20 Cent. Dig. Evid. §§ 908-915.

In an action on a policy of marine insurance, where it appeared that the tug insured had broken her shaft, and was taken in tow by another tug, statements made by the captain, after they were taken in tow, cannot be admitted, unless shown to be part of the res gestæ.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

—244. Corporate officers or agents.

See 20 Cent. Dig. Evid. §§ 916-935.

A letter written on the paper of a bank, and by the person shown to be its cashier, and appearing with reasonable certainty to refer to the business of the bank and to the matter in controversy, is admissible in evidence against the bank, when there is nothing in the case to show that any other letters passed between the writer and the person to whom such letter was addressed.—*First Nat. Bank v. Stewart*, 114 U. S. 224, 5 S. Ct. 845, 29 L. Ed. 101.

The declarations of the cashier of a bank, on paying a note left at the bank for collection, as to who furnished the money for such payment, are admissible in an action by the administrator of the maker against the bank to recover the proceeds of certain collateral held as security for the payment of the note.—*Id.*

The declarations by the cashier of a bank, in response to inquiries from one desiring to purchase certain securities in the manual possession of the cashier, that the bank does not own such securities, are admissible against the bank.—*Id.*

In an action against a railroad company to recover damages for injuries received by a passenger by the train in which he was traveling running off the track, a declaration of the engineer, made between 10 and 30 minutes after the accident occurred, as to the rate at which the train was going at the time, is not admissible in behalf of the plaintiff.—*Vicksburg & M. R. Co. v. O'Brien*, 7 S. Ct. 118, 119 U. S. 99, 30 L. Ed. 299.

In an action against the railroad company for a personal injury, the declarations of the engineer to a witness, called on behalf of plaintiff, after the accident had become a completed fact, and when he was not performing the duties of engineer, are not competent against the defendant, for the purpose of proving the rate of speed at which the train was moving at the time of the accident.—*Vicksburg & M. R. Co. v. O'Brien*, 7 S. Ct. 172, 119 U. S. 99, 30 L. Ed. 299.

Declarations of the president of a bank that it was largely involved with the drawer of a draft with a forged bill of lading attached, and that it would have broken off its relations with him if the business had not remained unsettled, are inadmissible, because they have no bearing on the good faith of the officers, and the declarations of an agent as to past transactions of his principal are mere hearsay.—*Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 S. Ct. 318, 30 L. Ed. 515.

Declarations by an officer of a steamboat, made while a passenger was being removed from a part of the boat where he had no right to be, to the effect that farmers are too stingy to buy a stateroom, and ought to be killed, are admissible as part of the *res gestæ* in an action by the passenger to recover for injuries caused by the use of unnecessary force.—*New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 S. Ct. 1039, 30 L. Ed. 1049.

Letters and reports to a corporation by its agents in charge of mines, made in respect to their management, are admissible against the corporation as *res gestæ*.—*Decree United States v. La Abra Silver Min. Co.*, 32 Ct. Cl. 462, affirmed.—*La Abra Silver Min. Co. v. United States*, 20 S. Ct. 168, 175 U. S. 423, 44 L. Ed. 223.

—248. Husband or wife.

See 20 Cent. Dig. Evid. §§ 953-964; 26 Cent. Dig. Hus. & W. § 139.

Statements made by a husband at the time of delivering a note executed by his wife, with

reference to interest thereon being paid to a time in the future, could not affect the wife, specially in the absence of indorsements of interest on the note.—*Marchand v. Griffon*, 140 U. S. 516, 11 S. Ct. 834, 35 L. Ed. 527.

—253. Conspirators and persons acting together.

See 20 Cent. Dig. Evid. §§ 994-1002; 4 Cent. Dig. Assault, § 39; 24 Cent. Dig. Fraud. Conv. § 823.

Admissions and declarations of the vendor after an alleged fraudulent sale may be offered in evidence to affect the title of the vendee, when the facts which the evidence tended to establish, apart from such admissions and declarations, indicate collusion between the parties to the transaction for the purpose of delaying the creditors of the vendor, if such admissions and declarations, though not precisely concurrent in time with the sale, were made on the same day, and plainly in furtherance of the fraudulent design.—*Jones v. Simpson*, 116 U. S. 609, 6 S. Ct. 538, 29 L. Ed. 742.

Declarations of the parties to an alleged conspiracy by an insured and others to defraud an insurance company, which relate to their purpose and were made about the time the policy was taken out, are, where there is evidence of the existence of the conspiracy, admissible in evidence against the beneficiary in a suit on such policy, although she is not alleged to have been a party to such conspiracy. Judgment 107 F. 834, 46 C. C. A. 668, reversed.—*Connecticut Mut. Life Ins. Co. v. Hillmon*, 23 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446.

(E) PROOF AND EFFECT.**—255. Preliminary evidence.**

See 20 Cent. Dig. Evid. §§ 1003, 1006-1012.

—260. — Existence of conspiracy or common purpose.

See 20 Cent. Dig. Evid. §§ 1010-1012.

Where a debtor transfers to a creditor, as security, his stock in trade, and, by arrangement with him, conducts and manages the business, the declarations of such debtor, made after the sale, are not admissible to show that there was an intent or conspiracy to defraud other creditors, unless the alleged common purpose is first established by independent evidence, and the declarations fairly constitute a part of the *res gestæ*.—*Winchester & Partridge Mfg. Co. v. Creary*, 116 U. S. 161, 6 S. Ct. 369, 29 L. Ed. 591.

—265. Conclusiveness and effect.

See 20 Cent. Dig. Evid. §§ 1029-1050; 1 Cent. Dig. Accord, § 186; 24 Cent. Dig. Gifts, § 96; 39 Cent. Dig. Paymt. § 221.

In an action against a steamboat company for running its boat violently against a wharf and injuring plaintiff, who was standing thereon, where it is shown that immediately after the accident he declared that it was his own fault that caused it, it is not error to instruct the jury that the shock and pain of an injury may render a man incapable of telling just how the accident took place, and that in this light they must consider contradictory statements of plaintiff, if he is shown to have made any.—*Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270, affirming judgment *Tolson v. Inland & S. Coasting Co.*, 6 Mackey, 39.

VIII. DECLARATIONS.

By testator as to execution or revocation of will, see Wills, —297.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

268. Statements showing physical or mental condition.

See 20 Cent. Dig. Evid. §§ 1061, 1062.

In an action brought by a husband and wife against a railroad company to recover for injuries to the latter, plaintiffs introduced a written statement of her physician as to the nature and extent of her injuries, made at the request of the husband after the writer had been attending the wife for some time. The physician testified that it correctly stated her condition at the time, and he further testified, apart from the writing, to the material facts embodied in it. *Held*, that the statement was inadmissible, and is ground for reversal, as it cannot be determined what weight may have been given it by the jury.—*Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 S. Ct. 118, 30 L. Ed. 290.

269. Statements showing intent, motive, or nature of act.

See 20 Cent. Dig. Evid. §§ 1063-1067; 24 Cent. Dig. Gifts, §§ 91, 153; 47 Cent. Dig. Trusts, § 132; 49 Cent. Dig. Wills, § 410.

Evidence of the declarations of the trustee in several assignments executed by a bank president that the earlier assignment was made to secure the bank generally for his assignor's liability to it, is admissible as against those claiming under the subsequent assignments, which were made for the purpose of enabling the trustee "to pay himself for any paper" on which he was liable with such assignor. *Decree* 107 F. 819, 46 C. C. A. 655, affirmed.—*Fourth Nat. Bank of St. Louis v. Albaugh*, 23 S. Ct. 450, 188 U. S. 734, 47 L. Ed. 673.

271. Self-serving declarations in general.

See 20 Cent. Dig. Evid. §§ 1068-1079, 1081-1104; 4 Cent. Dig. Assault, § 39; 39 Cent. Dig. Paymt. § 205.

A party is not entitled to prove his own declarations relative to a material point in the case, unless they constituted a part of the res gestæ, and were introduced to qualify or explain some leading fact in the case, with which the party was connected, and were contemporaneous with such fact, and were made previous to the commencement of the controversy.—*Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

274. Declarations as to boundaries.

See 20 Cent. Dig. Evid. §§ 1121-1124; 8 Cent. Dig. Bound. §§ 155, 156.

In Pennsylvania the declarations of a deceased surveyor on a resurvey as to his location of land warrant, 21 years before, and the identity of the boundaries of the original and resurvey, are admissible.—*Clement v. Packer*, 125 U. S. 309, 8 S. Ct. 907, 31 L. Ed. 721.

(B) BY DECEDENTS AGAINST INTEREST.

[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 1135-1142.]

(C) AS TO PEDIGREE, BIRTH, AND RELATIONSHIP.

[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 1143-1154.]

(D) AS TO MATTERS OF PUBLIC OR GENERAL RIGHT OR INTEREST.

[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 1155-1161.]

(E) PROOF AND EFFECT.

[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 1162-1167.]

IX. HEARSAY.

314. In general.

See 20 Cent. Dig. Evid. §§ 1168-1173.

Testimony is properly rejected where it does not appear that witness personally knows anything about the matter.—*Patrick v. Graham*, 132 U. S. 627, 10 S. Ct. 194, 33 L. Ed. 460.

315. Statements by persons other than parties or witnesses.

See 20 Cent. Dig. Evid. §§ 1174-1200.

317. — Oral statements.

See 20 Cent. Dig. Evid. §§ 1174-1191.

Statements made by a widow with reference to conversations with her husband are inadmissible to show that certain transactions on his part were in fraud of creditors—especially where she was not herself called as a witness.—*Will v. Tornabelli*, 30 S. Ct. 424, 217 U. S. 47, 54 L. Ed. 660.

318. — Writings.

See 20 Cent. Dig. Evid. §§ 1193-1200.

A memorandum made by the assignee of a pledgor of national bank stock, without the knowledge or acquiescence of the pledgee, to the effect that such stock had been converted by the latter and did not sell for enough to pay the debt for which it was pledged, is inadmissible in evidence on the issue whether such pledgee had become the owner of the shares, and as such chargeable with the personal liability of the shareholders—especially where such memorandum was obviously untrue, as the stock had never been sold. *Judgment Higgins v. Fidelity Ins. Trust & Safe Deposit Co.*, 106 F. 475, 46 C. C. A. 509, affirmed.—*Rankin v. Fidelity Ins. Trust & Safe Deposit Co.*, 23 S. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

319. Evidence founded on hearsay.

See 20 Cent. Dig. Evid. §§ 1201-1223.

320. — In general.

See 20 Cent. Dig. Evid. § 1201.

Experts in cattle diseases, employed by the department of agriculture, may state what districts of Texas are infected with the cattle fever, though they have never visited those districts, the knowledge gained by them in the correspondence of the department and in the investigation of such diseases as to the places of their origin or prevalence not being properly hearsay.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

323. — Market value shown by sales, offers to purchase or sell, or market quotations.

See 20 Cent. Dig. Evid. §§ 1214-1217.

The testimony of an owner of real property of offers to purchase the same for hotel, residential, or amusement purposes, or for a ferry, or a railroad terminal, or to lease the property for hotel purposes, is inadmissible on the issue in condemnation proceedings as to the value of such property. *Judgment Sharpe v. United States*, 112 F. 893, 50 C. C. A. 597, 57 L. B. A. 932, affirmed.—*Sharp v. United States*, 24 S. Ct. 114, 191 U. S. 341, 48 L. Ed. 211.

Price current lists and market reports accepted as trustworthy are evidence of the market value of railway stock.—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 238 U. S. 202, 59 L. Ed. 1272.

X. DOCUMENTARY EVIDENCE.

Criminal prosecutions, see Criminal Law, 429-444.

Depositions, see Depositions, 87-90.

In actions to establish boundaries, see Boundaries, 36.

In trespass to try title, see Trespass to Try Title, ◀40.
Record for purpose of review, see Appeal and Error, ◀524.
Use of writing to refresh memory of witness, see Witnesses, ◀252-255.

(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.

Criminal prosecutions, see Criminal Law, ◀429.

In court of claims, see Courts, ◀464.

◀326. State papers.

See 20 Cent. Dig. Evid. § 1231.

The records and official papers of the Confederate government which have been collected and preserved by the United States, or certified copies or extracts therefrom, made by the officer in charge of the Confederate archives office of the war department, are competent evidence of facts or transactions to which they relate. Judgment 30 Ct. Cl. 378, affirmed.—Oakes v. United States, 19 S. Ct. 864, 174 U. S. 778, 43 L. Ed. 1169.

◀332. Judicial acts and records.

See 20 Cent. Dig. Evid. §§ 1237-1246.

An application for the admission of a testator to an insane asylum, and the certificate of two physicians, upon which the commitment was made, are inadmissible in evidence on the issue of his testamentary capacity, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. Judgment Kelly v. Moore (1903) 22 App. D. C. 9, affirmed.—Keely v. Moore, 25 S. Ct. 169, 196 U. S. 38, 49 L. Ed. 376.

◀333. Official records and reports.

See 20 Cent. Dig. Evid. §§ 1247-1257, 1259-1265.

A census or list filed in the office of Indian affairs, containing the names and ages of half-breeds who, upon testimony presented to that office, were regarded as entitled to participate in the allotments of lands awarded by the treaty of Prairie du Chien (July 30, 1830), was not an official record intended as a mode of preserving the recollection of facts, nor was it based upon the personal knowledge of the party making the entry, and was not, therefore, admissible to prove that one of such half-breeds was of full age when he subsequently conveyed the land which had been allotted to him.—Hegler v. Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. Ed. 653.

◀335. Grants and patents for land, and proceedings in land office.

See 20 Cent. Dig. Evid. §§ 1273-1278; 41 Cent. Dig. Pub. Lands, §§ 151, 190, 216.

The protocol, or first original, of the application and concession of land by the government of Coahuila and Texas, produced from the public archives, is admissible in evidence, under instructions by the court, for all legitimate purposes when properly authenticated (as by the certificate of the state secretary of Coahuila, and by actual identification), although the testimonio given to the party interested is admissible in evidence as an original.—Williams v. Conger, 8 S. Ct. 933, 125 U. S. 397, 31 L. Ed. 778.

The exclusion of a telegram and a letter from officials in the United States land office, to the effect that the commissioner had accepted a bond in lieu of logs alleged to have been unlawfully removed from an Indian reservation, and that such logs would be or had been released, is not error, where neither the tele-

gram nor the letter adds anything to the inferences to be derived from the face of the bond. Judgment 105 F. 1004, 44 C. C. A. 685, affirmed.—Pine River Logging & Improvement Co. v. United States, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

A certified copy of the records of the General Land Office, including the certificate of local land officers that, on the records of their office, there were no homestead, presumption, or other valid claims to certain lands within the place limits of the grant to the Atlantic & Pacific Railroad Company, made by Act July 27, 1866, c. 278, 14 Stat. 292, and that the land had not been returned or denominated as swamp or mineral land, is competent evidence, under Rev. St. U. S. § 891 [U. S. Comp. St. 1901, p. 672], on the question of the title of one claiming as grantee from the railroad company. Judgment (Ariz.) 76 P. 460, 8 Ariz. 347, affirmed.—Howard v. Perrin, 26 S. Ct. 195, 200 U. S. 71, 50 L. Ed. 374.

(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

◀341. Official documents, records, and proceedings in general.

See 20 Cent. Dig. Evid. §§ 1289-1292.

In an action upon the official bond of an internal revenue collector, transcripts from the books of the treasury department, in the usual form, and duly certified, are admissible on behalf of plaintiffs; and an objection thereto that is only apparent upon comparison between them and the transcript offered by defendant lies, not to the competency of the evidence, but to its effect.—United States v. Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. Ed. 163.

In a suit on the bond of a purser in the navy, a transcript of his account in the books of the treasury department, certified by the fourth auditor, who is charged with the examination of such accounts, with a certificate annexed, signed by the secretary of the treasury, and sealed with the department seal, attesting the official character of the said auditor, is competent evidence.—United States v. Bell, 111 U. S. 477, 4 S. Ct. 498, 28 L. Ed. 477.

Rev. St. § 882, provides that copies of any records or documents in any executive department authenticated under the seal of the department shall be admitted in evidence. Held, that a transcript of a record in the pension office, certified as a true copy by the commissioner of pensions, and accompanied by a certificate by the acting secretary of the interior, under the seal of the department, as to the official character of the commissioner, and the faith and credit to which his attestations were entitled, was admissible.—Ballew v. United States, 160 U. S. 187, 16 S. Ct. 263, 40 L. Ed. 388.

In a suit upon a disbursing officer's bond, transcripts from the books and proceedings of the treasury department, certified as required by Rev. St. § 886, were competent evidence, the transcripts, considered as a whole, showing the full account, and not mere balances.—Moses v. United States, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

◀342. Records and proceedings in land office.

See 20 Cent. Dig. Evid. §§ 1302-1314.

Where a title to land in Missouri depends upon the question whether the seal of the United States general land office was affixed to a land patent which is lost, and it appears that a certified copy of the patent, from the office of the recorder of deeds of the county in which the land is, shows the seal in due form, and the instrument perfect in every respect, and the law of

Missouri provides that all copies of patents recorded in the office of the recorder of the county in which the lands are situated shall be received in all courts in the state as prima facie evidence of the contents of such patents, the prima facie case made by the record of the patent in the county recorder's office is not overcome by a certified copy of the patent as recorded on the records of the general land office in Washington, which shows no seal to the patent.—*Campbell v. Laclede Gaslight Co.*, 119 U. S. 445, 7 S. Ct. 278, 30 L. Ed. 459.

Under Rev. St. § 891, providing that "copies of any records, books, or papers, in the general land-office, authenticated by the seal, and certified by the commissioner thereof, * * * shall be evidence equally with the originals thereof," a transcript of such records, properly certified, concerning the location of a land warrant, and containing the various acts of the register and receiver of the local land office, showing the location of the land, and that it was subject to location, and other proceedings in relation thereto, is competent evidence in an action involving the title to such land.—*Culver v. Uthe*, 133 U. S. 655, 10 S. Ct. 415, 33 L. Ed. 776, affirming *Gormley v. Same*, 116 Ill. 643, 7 N. E. 78.

343. Records of conveyances and other private writings.

See 20 Cent. Dig. Evid. §§ 1315-1330.

It being the duty of a recorder to note when a record is made, a certified copy of such memorandum is competent evidence to prove it, and the date of registration of a deed.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

345. Requisites of exemplification or certificate.

See 20 Cent. Dig. Evid. §§ 1302-1314, 1331-1360.

An exemplification of a record of naturalization may be received in evidence without a certificate of the clerk of the court, under seal of his office, that the judge of the court was duly commissioned and qualified.—*St. Paul, M. & M. Ry. Co. v. Burton*, 111 U. S. 788, 4 S. Ct. 699, 28 L. Ed. 604.

349. Acts, records, and judicial proceedings of foreign countries.

See 20 Cent. Dig. Evid. §§ 1384-1387; 30 Cent. Dig. Judgm. § 1513.

In an action relative to land formerly in the territory of Coahuila and Texas, a copy of a deed, or other instrument, taken from the public archives of Mexico, with the certificate of the proper custodian to the effect that it is a true copy, to be delivered to the United States consul, by virtue of a judicial mandate, the authority of the custodian being authenticated by the certificates of three other officers of the foreign government, and the proper United States officers in Mexico, together with the testimony of the custodian and others to the same effect, is sufficiently authenticated.—*Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

(C). PRIVATE WRITINGS AND PUBLICATIONS.

Criminal prosecutions, see Criminal Law, 343-438.

352. Corporate records and proceedings.

See 20 Cent. Dig. Evid. §§ 1398-1403; 12 Cent. Dig. Corp. § 1318.

Annual reports of railroads, required to be made on oath and which the state publishes as part of its public records, are admissible against the state on the question of value of the railroad shares.—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 238 U. S. 202, 59 L. Ed. 1272.

353. Conveyances, contracts, and other instruments.

See 20 Cent. Dig. Evid. §§ 1404-1423, 1430, 1431.

Recitals in an ancient deed that the parentee from the state of the lands in question was dead, and that the grantor was his only child and heir, are sufficient to establish the pedigree of the grantor, when supported by other circumstances, such as the similarity of names, the fact that the patent was found, together with the deed, in the possession of the grantee at his death, and the great lapse of time after the deed was recorded during which the fact was unchallenged.—*Fulkerson v. Holmes*, 117 U. S. 389, 6 S. Ct. 780, 29 L. Ed. 915.

Under Code Civ. Proc. Dak. § 493, providing that every instrument acknowledged and "duly recorded" is admissible in evidence without further proof, the omission of the clerk, in recording a deed, to make on the record a similitude of the notarial seal, or a scroll or symbol to indicate it, does not make the original inadmissible without further proof.—*Smith v. Gale*, 144 U. S. 509, 12 S. Ct. 674, 36 L. Ed. 521, affirming *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661, and *Same v. Frazier*, 4 Dak. 196, 30 N. W. 138.

354. Books of account.

See 20 Cent. Dig. Evid. §§ 1432-1433.

Books of account, to be admissible, must be regularly kept, and the entries be made contemporaneously with the items charged.—*Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

355. Private memoranda and statements in general.

See 20 Cent. Dig. Evid. §§ 1444, 1484-1491.

In an action against a railroad company to recover damages for a personal injury, the written statement of the plaintiff's physician, attached to his deposition, representing her condition as it appeared when he first saw her and as it continued up to a certain time, not being made under oath and in defendant's presence, or with its knowledge and consent, is incompetent and inadmissible, against the objections of the defendant, as evidence before the jury.—*Vicksburg & M. R. Co. v. O'Brien*, 7 S. Ct. 118, 119 U. S. 99, 30 L. Ed. 299.

Memoranda of securities deposited, made from time to time, but not contemporaneously with the deposits, and as to which the party making them swears that she cannot tell when she made them, or why she made or struck out any of them, and that they are not reliable, are not independent evidence of the character and value of the securities.—*Bates v. Preble*, 151 U. S. 149, 14 S. Ct. 277, 38 L. Ed. 108.

A pencil memorandum in the stock ledger of a national bank, at the top of an account with the person to whom certain pledged shares of stock had been transferred at the request of the pledgee, which consists merely of the name of the latter, with whom the correspondence in regard to such account was carried on, is inadmissible in evidence on the issue whether such pledgee had become the owner of the stock and was chargeable with the personal liability of a share holder. Judgment, *Higgins v. Fidelity Ins. Trust & Safe Deposit Co.*, 108 F. 475, 46 C. C. A. 509, affirmed.—*Rankin v. Fidelity Ins. Trust & Safe Deposit Co.*, 23 S. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

357. Letters, telegrams, and other correspondence.

See 20 Cent. Dig. Evid. §§ 1492-1499.

S. and B. agreed with D. that, if he would buy of them 400 shares of stock of a certain corporation at \$50 per share, they would take them back at the end of a year, if he so desired,

and give him what he paid for them, with 7 per cent. interest. D. exercised his option in time, and wrote them a letter, tendering the stocks, and demanding that they take them as agreed. They refused to do so. *Held*, in an action by D. for breach of contract, that the letter was admissible in evidence as constituting one item of proof that D. had availed himself of his option.—*Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216.

Where the question in an action on an insurance policy on a cargo of goods is as to the quantity of goods shipped, letters written to plaintiffs by their agents at the time of shipment, stating the quantity, are incompetent as evidence for plaintiffs, either in themselves or in corroboration of the agents' testimony.—*Insurance Co. of North America v. Guardiola*, 129 U. S. 642, 9 S. Ct. 425, 32 L. Ed. 802.

Where the question is as to whether a dead body found at a certain place is that of W., who is missing, and the evidence as to its identity is contradictory, letters written by W. to his sister and betrothed a few days before, stating that he was going to the place where the body was afterwards found, are admissible, not as memoranda made in the ordinary course of business, but as showing his intentions, and as tending to corroborate the evidence that it was his body that was found.—*Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 708.

Ⓒ=358. Maps, plats, and diagrams.

See 20 Cent. Dig. Evid. §§ 1500-1508.

A private survey is inadmissible in evidence in an action by the United States to recover the value of timber cut from unsurveyed lands, to show that, when surveyed, the land will be an odd-numbered section, and, therefore, included in the grant to the Northern Pacific Railroad Company, by Act July 2, 1864, c. 217, 13 Stat. 367, of the odd-numbered sections on each side of the line of the railroad.—*United States v. Montana Lumber & Mfg. Co.*, 25 S. Ct. 367, 196 U. S. 573, 49 L. Ed. 604.

Ⓒ=360. Books and other printed publications.

See 20 Cent. Dig. Evid. §§ 1513-1520.

Ⓒ=362. — Statutes, law reports, and legal text-books.

See 20 Cent. Dig. Evid. § 1515.

The works of jurists and commentators on the subject of international law are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320.

Ⓒ=363. — Scientific and technical works.

See 20 Cent. Dig. Evid. §§ 1516-1519.

Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court.—*Nix v. Hedden*, 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745, affirming judgment (C. C.) 39 F. 109.

(D) PRODUCTION, AUTHENTICATION, AND EFFECT.

Compelling production by witness, see Witnesses, Ⓒ=18.

Privilege of witness as to production, see Witnesses, Ⓒ=298.

Production and inspection before trial, see Discovery, Ⓒ=83-107.

Review, see Appeal and Error, Ⓒ=104.

Ⓒ=366. Public documents, records, exemplifications, or official copies.

See 20 Cent. Dig. Evid. §§ 1521-1539.

Copies of acts of Parliament are sufficiently authenticated to be admissible in evidence in a federal court sitting in New Hampshire, when produced by an attorney and solicitor of the Supreme Court of Judicature in England of 30 years' experience, in connection with his testimony that he was intimately acquainted with such acts, and that the copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." Judgment 108 F. 764, 48 C. C. A. 15, affirmed.—*Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 23 S. Ct. 517, 189 U. S. 221, 47 L. Ed. 782.

Ⓒ=369. Preliminary evidence for authentication.

See 20 Cent. Dig. Evid. §§ 1533, 1559-1567; 12 Cent. Dig. Corp. § 1218.

Ⓒ=370. — Necessity in general.

See 20 Cent. Dig. Evid. §§ 1533, 1559, 1560, 1562-1578, 1592; 12 Cent. Dig. Corp. § 1318.

Defendants' averments that an owner of lands gave a power of attorney authorizing the attorney to convey her lands to whomsoever he chose, that the same was executed on the attorney's representations that it would only be used to sell lands located by him under her scrip, and that plaintiff, knowing these facts, procured from the attorney a conveyance of the land now in question, constitute a clear admission that a power of attorney and a deed were executed, and render admissible in evidence instruments corresponding to these in date and description, without further proof of their execution, subject to any attack which may be made upon the manner of their procurement and the use to which they were put.—*Smith v. Gale*, 144 U. S. 509, 12 S. Ct. 674, 36 L. Ed. 521, affirming judgment *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661, and *Same v. Frazier*, 4 Dak. 196, 30 N. W. 138.

County warrants are inadmissible in evidence at common law without proof of their execution, where the genuineness of the signatures thereto is put in issue by the pleadings. Judgment 53 P. 187, 6 Ariz. 13, reversed.—*Apache County v. Barth*, 20 S. Ct. 718, 177 U. S. 538, 44 L. Ed. 878.

Ⓒ=372. — Ancient documents.

See 20 Cent. Dig. Evid. §§ 1613-1627; 41 Cent. Dig. Pub. Lands, § 622.

Where the witnesses to a deed executed more than 60 years before the trial are shown to be dead, proof of the handwriting of one of them is sufficient to establish the execution of the deed.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

Where an ancient deed, apparently genuine, without any badge of forgery, is produced from among the original papers on file in a suit in which it was evidence and a necessary exhibit, and from the record in which it appears to have been considered in rendering judgment, having, with the other papers, been found in the clerk's office of the court, where they properly belonged, and had remained for 55 years, it was error, in an action of ejectment, where it was essential to plaintiff's title, to refuse to admit it in evidence for lack of proof of execution.—*Applegate v. Lexington & Carter County Min. Co.*, 117 U. S. 255, 6 S. Ct. 742, 29 L. Ed. 892.

In ejectment, where a deed more than 60 years old is produced from the custody of the heirs of the grantee, together with a patent from the state for the same lands, which precedes it in the chain of title, and it appears that the lands were listed for taxation to the grantee and his heirs for a period of nearly 40 years, and un-

til after the commencement of the suit; that the taxes were paid by or released to them; that the judge before whom the deed was acknowledged was dead, and that his signature to the certificate was genuine; that more than 42 years before it was offered in evidence the deed was put upon record in the county where the lands lay; and that all that time they were known and designated in the neighborhood as the lands of the grantee and his heirs,—such facts justify the admission of the deed as an ancient document, without other proof.—*Fulkerson v. Holmes*, 117 U. S. 389, 6 S. Ct. 780, 29 L. Ed. 915.

It is no objection to the admission in evidence, as an ancient instrument, of a paper, dated 1828, purporting to be an original letter power of attorney to take possession and sell land granted by the government of Coahuila and Texas, found in the possession of one to whom it had been indorsed for the purpose of taking possession and perfecting the title, that some 40 years before, and after the date of its indorsement, the indorser had executed a deed under it; there being nothing to show that the power was not in possession of the indorser when the deed was executed, and the laws then in force permitting a copy to have the same force and effect as an original, and there being nothing unreasonable in the presumption that it was executed in duplicate, the power not being incorporated in the deed.—*Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

Documents which show the probate of a will in proceedings had during the Spanish control of Florida, and a judicial sale of the testator's lands and bear upon their face every evidence of age and authenticity, and come from the official custody of the Surveyor General of the United States, are admissible in evidence as ancient documents, especially where the proceedings have been given express or tacit recognition in subsequent official investigations and conveyances. Judgment, 121 F. 1020, 56 C. C. A. 682, affirmed.—*McGuire v. Blount*, 28 S. Ct. 1, 199 U. S. 142, 50 L. Ed. 125.

A deed more than 30 years old, purporting to have been signed by an executrix and reciting that it was executed under power conferred by the will, proves itself where the possession of the land has been consistent with its terms.—*Wilson v. Snow*, 33 S. Ct. 487, 228 U. S. 217, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604, affirming judgment 35 App. D. C. 562.

374. — Attesting witnesses.

See 20 Cent. Dig. Evid. §§ 1583, 1584, 1587-1612.

A deed executed abroad is properly proved by testimony that the grantor and subscribing witnesses reside abroad, and that the testifying witness is acquainted with the handwriting of one of the subscribing witnesses, and believes that appearing on the deed to be genuine.—*Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

377. — Memoranda and statements.

See 20 Cent. Dig. Evid. § 1647.

A memorandum in writing of a transaction made 20 months after the transaction, and which the person who made the memorandum testifies that he has no recollection of, but knows it took place because he had so stated in the memorandum, and because his habit was never to sign a statement unless it was true, cannot be read in aid of his testimony.—*Parsons v. Wilkinson*, 113 U. S. 656, 5 S. Ct. 691, 28 L. Ed. 1037.

378. — Letters, telegrams, and other correspondence.

See 20 Cent. Dig. Evid. §§ 1648-1655.

Foundation for introduction of a telegram is laid by witness testifying that he received it, and that defendant admitted that it was the message which he sent.—*Dunbar v. United States*, 156 U.

S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (D. C.) *United States v. Dunbar*, 60 Fed. 75.

380. — Photographs and other pictures.

See 20 Cent. Dig. Evid. § 1657.

Enlarged photographic copies of an alleged forged signature and a signature offered as a standard of comparison are admissible in evidence on proof by the photographer of the accuracy of the method pursued and the results obtained by him in making the copies.—*United States v. Ortiz*, 20 S. Ct. 466, 176 U. S. 422, 44 L. Ed. 529.

383. Conclusiveness and effect.

See 20 Cent. Dig. Evid. §§ 1660-1677; 41 Cent. Dig. Pub. Lands, § 216.

The master, in determining the market value of railway stock, may disregard published quotations and base his findings as to value of railway stock on book value and earnings, where quotations shown are of unknown significance.—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 238 U. S. 202, 59 L. Ed. 1272.

Book value need not necessarily control the master's finding as to value of railway shares, but he may consider earning capacity.—*Id.*

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

Extrinsic evidence as to jurisdictional facts on collateral attack on judgment, see Judgment, 499.

To establish trust, see Trusts, 443.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

See Customs and Usages, 15, 17.

386. Judicial records and proceedings.

See 20 Cent. Dig. Evid. §§ 1678-1697; 5 Cent. Dig. Bail, § 404; 30 Cent. Dig. Judgm. § 971; 46 Cent. Dig. Trial, § 815.

Parol evidence is inadmissible to vary or add to the language of a judgment, decree, or record of court expressed in plain and unambiguous terms.—*Lyon v. Perin & Gaff Mfg. Co.*, 125 U. S. 698, 8 S. Ct. 1024, 31 L. Ed. 839.

390. Deeds.

See 20 Cent. Dig. Evid. §§ 1719-1721, 1722-1723.

Evidence that a grantor, when executing a deed containing a reservation, did not make any claim or assertion of the right reserved, is not admissible to affect the reservation.—*Hornbuckle v. Stafford*, 111 U. S. 389, 4 S. Ct. 515, 28 L. Ed. 468.

395. Mortgages.

See 20 Cent. Dig. Evid. §§ 1746-1753.

A contract recited that W., one of the parties, was indebted to F. & Co., the other party, "in the sum of \$70,000, over and above all discounts and set-offs of every name and nature," and F. & Co. agreed to make further advances to pay other debts of W., in consideration of which he conveyed certain property to them as security for the ultimate amount of his indebtedness, including the \$70,000. *Held*, that in the absence of evidence that W. did not fully understand and assent to the contract, or that he was the victim of fraud or duress, it could not be shown that the actual amount of his indebtedness at the date of the contract (arising out of transactions covering a series of years) was less than \$70,000, or that he was entitled to prior credits, or that the amount included improper charges of inter-

est.—*Goodwin v. Fox*, 129 U. S. 601, 9 S. Ct. 367, 32 L. Ed. 805.

The rule prohibiting the varying of written contracts by parol is applicable to a mortgage executed in Porto Rico in 1885.—*Veve y Diaz v. Sanchez*, 33 S. Ct. 36, 226 U. S. 234, 57 L. Ed. 201.

◀397. Contracts in general.

See 20 Cent. Dig. Evid. §§ 1756-1765.

Where a contract is susceptible of a sensible construction, and in the absence of mistake or fraud, parol evidence is inadmissible to explain or determine its construction.—*Culver v. Wilkinson*, 145 U. S. 205, 12 S. Ct. 832, 36 L. Ed. 676, affirming judgment (C. C.) *Wilkinson v. Culver*, 33 F. 708.

◀400. Contracts of sale or exchange.

See 20 Cent. Dig. Evid. §§ 1778-1793; 43 Cent. Dig. Sales, § 721.

Where the owner of lands made a written contract stipulating that plaintiff should cut a certain quantity of timber on each acre, paying therefor a certain stumpage, and should have the privilege of purchasing a half interest in the lands within two years, at a stipulated price per acre, parol evidence is inadmissible, in a suit for specific performance, to show, as one of the unexpressed terms of the contract, that one-half the proceeds of timber sold should be indorsed on the contract as payments by plaintiff.—*Richardson v. Hardwick*, 106 U. S. 252, 1 S. Ct. 213, 27 L. Ed. 145.

◀402. Bills and notes.

See 20 Cent. Dig. Evid. §§ 1799-1806.

In an action on a note, evidence that it was not intended as a note from defendant to plaintiff, but only as a memorandum of the value of certain bonds, and to be used in the settlement of certain accounts, contradicts the written contract, and is properly excluded.—*Burnes v. Scott*, 117 U. S. 582, 6 S. Ct. 865, 29 L. Ed. 991.

◀404. Contracts of guaranty and suretyship.

See 20 Cent. Dig. Evid. §§ 1813-1817.

A written guaranty in the words, "We will satisfy all orders G. gives this spring, such as plows and cultivators," is complete in itself, and cannot be varied by parol evidence.—*Gilbert v. Moline Plow Co.*, 119 U. S. 491, 7 S. Ct. 305, 30 L. Ed. 476.

◀408. Receipts.

See 20 Cent. Dig. Evid. §§ 1829-1842; 39 Cent. Dig. Paymt. §§ 138, 139.

A fire broke out in the hold of a vessel, and, in order to save her and her cargo, she was scuttled and sunk. She was afterwards raised at an expense of about \$15,000, and the damage to the vessel and furnishing was found to be about the same in amount. An agreement was entered into between the owner and the insurance agents for adjusting the loss, which provided that such adjustment related only to the damage to the property covered, and did not apply to "any question that may arise for saving boat and cargo." Proofs of loss made out on this basis were forwarded to the different companies, accompanied by a statement that the insured would make further claim for the expense of raising the vessel. After a conference between the owner and a committee of the insurance companies, a paper was signed reciting that the loss and damage by fire which occurred to the vessel were adjusted for \$15,364.78 (the exact sum covered by the proofs already furnished), "payable, without discount, upon presentation of the policies to the several companies by the assured," etc. In accordance therewith the sum was paid nearly two months before actually due by the terms of the policies,

and receipts in full were given to the companies, respectively. *Held*, that parol evidence was admissible to show that this settlement referred only to the damage to the vessel, and that the expense of raising her was left open for future adjustment.—*Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 12 S. Ct. 84, 35 L. Ed. 860.

Although the payment of one-half the liability before it was due was a sufficient consideration for releasing the claim to the remainder, if so intended by the parties, yet parol evidence was admissible to show that it was not so intended, but was a mere waiver by the insurance companies.—*Id.*

A clause in the receipts reciting that the policies were thereby surrendered and canceled, and all claims thereunder forever waived, was not a contract, which would take the instrument out of the rule which admits parol evidence to show that a receipt expressed more than was intended, when such clause was inserted in pursuance of a provision in the policies that the insurer might, at its option, terminate the same on notice to the insured, in which case the latter was entitled to a ratable proportion of the premiums for the unexpired term.—*Id.*

◀410. Memoranda not constituting contract or disposition of property.

See 20 Cent. Dig. Evid. §§ 1846-1854.

A bill rendered plaintiff by defendant for the transfer of money by cable recited that it was for cable transfer on defendant in London, in favor of M. & Co., Glasgow, £5,000. *Held* that, in the absence of any evidence on the subject, this bill does not so embody the contract between the parties as to render parol evidence inadmissible to show how the money was to be delivered to M. & Co., and for what purpose.—*Bank of British North America v. Cooper*, 137 U. S. 473, 11 S. Ct. 160, 34 L. Ed. 759, affirming judgment *Cooper v. Bank of British North America* (C. C.) 30 Fed. 171.

Parol evidence is inadmissible to show that no such lease as that described in a demand for rent had been given, and that another lease was meant.—*Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 S. Ct. 691, 35 L. Ed. 332.

◀414. Date of instrument.

See 20 Cent. Dig. Evid. § 1858; 9 Cent. Dig. Chat. Mtg. § 111.

It is competent to show by parol that a contract was finally executed and delivered at a date subsequent to that shown on its face. Judgment 15 App. D. C. 198, affirmed.—*District of Columbia v. Camden Iron Works*, 21 S. Ct. 680, 181 U. S. 453, 45 L. Ed. 948.

◀419. Nature of consideration.

See 20 Cent. Dig. Evid. §§ 1912-1928; 7 Cent. Dig. Bills & N. §§ 1738, 1798; 11 Cent. Dig. Contracts, §§ 229, 408; 14 Cent. Dig. Covenants, § 267.

Where the consideration mentioned in a deed is one dollar, the true consideration may be shown by parol.—*Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 S. Ct. 613, 28 L. Ed. 577; *Mattoon v. McGrew*, 112 U. S. 713, 5 S. Ct. 369, 28 L. Ed. 824.

Parol evidence is admissible to show the actual consideration for a deed.—*Mills v. Allen*, 133 U. S. 423, 10 S. Ct. 413, 33 L. Ed. 717.

◀420. Existence of condition or contingency.

See 20 Cent. Dig. Evid. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944.

When a paper purporting to be a note is sued on by the payee himself, the maker may show a parol agreement that the note was to become a binding obligation only on a certain

contingency, which never happened.—Burke v. Dulaney, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698, reversing judgment Dulaney v. Burke, 2 Idaho, 719, 23 P. 915.

A question whether a grant in a patent for lands was upon a condition is one to be determined by the court from the construction of the instrument, and extrinsic evidence relating to other grants is inadmissible. Judgment 74 F. 854, 21 C. C. A. 146, affirmed.—Stuart v. City of Easton, 18 S. Ct. 650, 170 U. S. 383, 42 L. Ed. 1078.

423. **Nature and extent of liability.**
See 20 Cent. Dig. Evid. §§ 1957-1966; 7 Cent. Dig. Bills & N. §§ 1719-1727, 1791-1797.

The following note: "1,061.24. Detroit, Mich., August 4, 1880. Four (4) months after date we promise to pay to the order of Geo. Moebis, sec. & treas., ten hundred sixty-one and 24/100 dollars, at Merchants' & Manufacturers' National Bank, value received. Peninsular Cigar Co., Geo. Moebis, Sec. & Treas." Indorsed: "Geo. Moebis, Sec. & Treas."—is not ambiguous, and is in terms the note and indorsement of the Peninsular Cigar Company; and parol evidence is not admissible to show that the indorsement was intended to be that of Moebis personally.—Falk v. Moebis, 127 U. S. 597, 8 S. Ct. 1319, 32 L. Ed. 266.

In an action by the indorsee of a note, in order to sustain the jurisdiction of the United States circuit court parol evidence is admissible to show that the indorsee was, in fact, the payee, and not the assignee, of the note.—Holmes v. Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118, affirming judgment (C. C.) Goldsmith v. Holmes, 36 F. 484, 1 L. R. A. 816.

424. **Effect of writing as to persons not parties thereto or privies.**
See 20 Cent. Dig. Evid. §§ 1966-1968.

Real character of a contract between a corporation and a creditor in the form of a conditional sale may be shown in a case in Porto Rico presenting not only a controversy between the parties to the contract but its effect on the creditors of the corporation.—Valdes v. Central Altigracia, 32 S. Ct. 664, 225 U. S. 58, 56 L. Ed. 980.

(B) INVALIDATING WRITTEN INSTRUMENT.

429. **Matters affecting validity in general.**
See 20 Cent. Dig. Evid. §§ 1969-1971, 1973, 1974.

In an order to show that the record of a lost deed and the copy of the record contained a clerical error, the testimony of witnesses who had read the original deed as to their recollection of its contents, and a certified copy of an entry made by the recorder of the county where the land was situate, made as required by law, were admissible as tending to prove the mistake, though the statutes provided that such copies should be admitted with the same effect as originals.—Booth v. Tiernan, 109 U. S. 205, 3 S. Ct. 122, 27 L. Ed. 907.

431. **Insufficiency or irregularity of execution or delivery.**
See 20 Cent. Dig. Evid. §§ 1975-1980.

A person sued as a partner, and whose name is shown to have been signed by another person to the articles of the partnership, may prove that before the articles were signed, or the partnership began business, he instructed that person that he would not be a partner.—Thompson v. First Nat. Bank of Toledo, Ohio, 111 U. S. 529, 4 S. Ct. 689, 28 L. Ed. 507.

433. Mistake.

See 20 Cent. Dig. Evid. §§ 1990-2004.

Defendant, in ejectment for land derived from the United States under different surveys, is not debarred by Rev. St. § 2396 (U. S. Comp. St. 1901, p. 1473), introducing evidence other than field notes identifying the precise location of tract occupied by him, though showing a mistake in the field notes of the survey of tract claimed by plaintiff.—(1912) Graham v. Gill, 32 S. Ct. 396, 223 U. S. 643, 56 L. Ed. 586, affirming judgment (1909) 47 So. 917, 56 Fla. 316.

434. Fraud.

See 20 Cent. Dig. Evid. §§ 2005-2020.

Parol evidence of previous promises by a defendant inconsistent with a written contract in suit held admissible where the pleadings relied, not only upon the contract, but on alleged fraudulent conduct, beginning with representations of the means and property of the defendants, on the strength of which plaintiffs entered into the written agreement.—Tewis v. Ryan, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 P. 461, 13 Ariz. 120, and 114 P. 557, 13 Ariz. 282.

(C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

440. Prior and contemporaneous collateral agreements.

See 20 Cent. Dig. Evid. §§ 1719-1845, 1874-1899, 1929-1944, 2030-2051; 43 Cent. Dig. Sales, § 721.

441. — In general.

See 20 Cent. Dig. Evid. §§ 1719, 1723-1763, 1765-1845, 2030-2047; 11 Cent. Dig. Contracts, § 1616; 43 Cent. Dig. Sales, § 721.

Parol evidence of another condition of a contract of accord and satisfaction made with the sureties on an appeal bond, namely, that the other defendants and interveners, who had become parties to an appeal to the United States circuit court, should not take and perfect their appeal to the supreme court, is inadmissible, such parol evidence varying and contradicting the written agreement of the parties.—Boffinger v. Tuyen, 120 U. S. 198, 7 S. Ct. 529, 30 L. Ed. 649.

Where parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject-matter, varying, modifying, or contradicting the written agreement, is inadmissible.—De Witt v. Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896.

A contract in writing, by which a party agrees to furnish another with "a No. 2 size refrigerating machine, as constructed by the party of the first part, to be put up and put in operation in the brewery of the party of the second part," is complete and unambiguous, and parol evidence is not admissible to show an alleged collateral warranty that the machine should maintain a given quantity of air at a certain temperature, as that would add another term to the written contract.—Seitz v. Brewster's Refrigerating Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. Ed. 837.

A written stipulation made pending an action of forcible entry and detainer to recover possession of certain land held as security for the fulfillment of a contract, that the sum then due under the contract was \$25,000, being absolute in its terms, could not be contradicted by evidence of a contemporaneous parol understanding that that sum was to be paid in cash or securities within a limited time, and on default thereof the stipulation was to be void.—Johnson v. St. Louis, I. M. & S. Ry. Co., 141 U. S. 602, 12 S. Ct. 124, 35 L. Ed. 875.

445. Subsequent agreements.

See 20 Cent. Dig. Evid. §§ 2052-2055; 43 Cent. Dig. Sales, § 721.

A verbal arrangement between vendors and vendee, made on or about the date fixed in the written contract for final settlement for an extension of time to the vendors to procure judicial authority for the sale, *held* not to modify the contract of sale where it did not provide for the passing of title on that date, unless the abstract showed good title.—*Citizens' Nat. Bank of Roswell v. Davison*, 33 S. Ct. 625, 229 U. S. 212, 57 L. Ed. 1153, Ann. Cas. 1915A, 272, affirming judgment *Davison v. Citizens' Nat. Bank*, 120 P. 304, 16 N. M. 689.

(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

Extrinsic evidence to aid construction of will, see Wills, 485-490.

448. Grounds for admission of extrinsic evidence.

See 20 Cent. Dig. Evid. §§ 2068-2082, 2084.

A contract to grind all the sugar cane raised by a lessee upon certain specified plantations leased to him for a certain number of grinding seasons is a contract to grind in the grinding season, and parol evidence is admissible to show what that season is.—*Porto Rico Sugar Co. v. Lorenzo*, 32 S. Ct. 133, 222 U. S. 481, 56 L. Ed. 277.

449. Nature of ambiguity or uncertainty in instrument.

See 20 Cent. Dig. Evid. §§ 2066-2082, 2084-2101; 30 Cent. Dig. Judgm. § 971.

450. — In general.

See 20 Cent. Dig. Evid. §§ 2066-2082, 2084.

Intrinsic ambiguity in a document justifies, under *Porto Rico Laws* 1905, p. 73, § 28, the right to resort to extrinsic proof to dispel it.—*Van Syckel v. Arsuaga*, 34 S. Ct. 263, 231 U. S. 601, 58 L. Ed. 393.

Articles of copartnership concerning the method of carrying on the business of the firm are so ambiguous as to justify the admission of explanatory proof, where the agreement is silent on the subject, and the property, one-half of which was bought from one partner by the others and the whole of which constituted the capital of the firm, appears to be an inventory of the property of a former cattle business and included in which was money stated to be the value of the working capital.—*Id.*

Including in an agreement to form a firm for carrying on the dairy and cattle business previously conducted on leased land by one of the partners a paramount mortgage debt on the leased land as part of the assets transferred to the firm creates an ambiguity as to whether it was not intended also to pass to the firm the subordinate lease right and justifies the admission of explanatory parol proof.—*Id.*

452. — Latent ambiguity.

See 20 Cent. Dig. Evid. §§ 2093-2101; 30 Cent. Dig. Judgm. § 971.

The statement in a note given by a partner to his co-partner that it was "received on settlement to this date," may be shown by parol evidence to refer to a settlement for the preceding year, and not for the whole period of the co-partnership, since the ambiguity is a latent one.—*Clay v. Field*, 138 U. S. 464, 11 S. Ct. 419, 34 L. Ed. 1044.

460. Identification of subject-matter.

See 20 Cent. Dig. Evid. §§ 2115-2128; 9 Cent. Dig. Chat. Mtg. §§ 102, 109.

Parol evidence of circumstances surrounding a sale of real property was admissible to identify the premises and to remove the ambiguity created by the use of the word "about." Judgment (1907) 29 App. D. C. 490, affirmed.—*Harten v. Löffler*, 29 S. Ct. 351, 212 U. S. 397, 53 L. Ed. 568.

A mortgagor cannot prove by parol in ejectment against the mortgagee, purchaser at foreclosure sale, that a lot in the center of a body of land conveyed by the mortgagor was not covered by the mortgage.—*Veve y Diaz v. Sanchez*, 33 S. Ct. 36, 226 U. S. 234, 57 L. Ed. 201.

461. Showing intent of parties as to subject-matter.

See 20 Cent. Dig. Evid. §§ 2129-2133; 14 Cent. Dig. Covenants, § 219.

A partnership, engaged in the milling business, entered into a written contract for the purchase of machinery from plaintiff, agreeing to pay part of the purchase price in cash, and to give its notes for the balance. During the time in which the machinery was being furnished, the partnership was transformed into a corporation, and the notes for the deferred purchase money were executed by the corporation, and accepted by plaintiff. *Held*, in an action by plaintiff to charge the partners, individually with the payment of the notes, that parol evidence was admissible to show that plaintiff knew of the contemplated formation of the corporation when the machinery was ordered, and agreed that its obligations were to be given for the deferred payments, as such testimony makes against plaintiff's contention that its acceptance of the notes of the corporation was through misunderstanding and mistake.—*Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 S. Ct. 360, 34 L. Ed. 1019.

Parol evidence of the understanding of the parties is not admissible to contradict the terms of the agreement of April 8, 1867, negotiated between representatives of the Delaware and Cherokee Nations, meeting upon equal terms. Decree 38 Ct. Cl. 234, modified.—*Delaware Indians v. Cherokee Nation*, 24 S. Ct. 342, 193 U. S. 127, 48 L. Ed. 646.

Recourse may be had to the prior negotiations between the parties, where it is doubtful whether a penalty or liquidated damages were meant by a clause in the written contract relating to the payment of damages for its non-fulfillment. Judgment, *Bethlehem Steel Co. v. United States*, 41 Ct. Cl. 19, reversed.—*United States v. Bethlehem Steel Co.*, 27 S. Ct. 450, 205 U. S. 105, 51 L. Ed. 731.

463. Showing mode of performance of obligation.

See 20 Cent. Dig. Evid. §§ 2140-2143.

Extrinsic evidence of the circumstances preceding the agreement by which the American Board of Commissioners for Foreign Missions transferred to the Hawaiian government a Protestant mission, and of the immediate and long-continued practice under it, is admissible as an aid to the interpretation of the condition on which the transfer was made, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith.—*Lowrey v. Territory of Hawaii*, 27 S. Ct. 622, 206 U. S. 206, 51 L. Ed. 1026.

(E) SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION.

[No paragraphs or references in this Digest. But see 20 Cent. Dig. Evid. §§ 2144-2148.]

XII. OPINION EVIDENCE.

Criminal prosecutions, see Criminal Law, 449-489.

(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

470. Grounds for admission.

See 20 Cent. Dig. Evid. § 2220.

A question asked of a medical witness, as to whether the examinations made by him were made in a careful or a superficial manner, is not objectionable as substituting the opinion of the witness for the judgment of the jury on that point.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. Ed. 977.

471. Conclusions and matters of opinion or facts.

See 20 Cent. Dig. Evid. §§ 2149-2185; 50 Cent. Dig. Witn. §§ 833-836, 988.

It appeared that after the death of plaintiff's ancestor, his father placed the papers relating to his son's claim in the hands of one M., and gave him a power of attorney to perfect the claim, but he was unable to obtain a patent, because his power of attorney, being acknowledged in a foreign state, was not acknowledged by a commissioner of Texas; that he left the papers in Texas; and that they were afterwards returned to him, and by him given to deceased's mother. There was evidence that the papers received by the latter from M., whatever they were, were sent by plaintiffs to Texas for the purpose of obtaining a patent, and that they were burned by accident. *Held*, that it was not error to permit M. to testify that "he should say" that the headright certificate of which the one produced was a copy was among the papers turned over to him by deceased's father, especially where it appeared from the context of his testimony that the quoted words were simply a form of speech, and not the expression of a conjecture.—*White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. Ed. 55.

In an action for the death of a railway employé, alleged to have been due to the faulty construction of the railroad, an engineer, testifying as to the construction of the track and the probability of deposits of sand thereon in rainy weather, could not, on cross-examination, state that the engineers on the road were all aware of that fact, this being a mere inference.—*Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766.

A statement that the principal chief of the Choctaw Nation ratified an illegal sheriff's sale, giving no facts upon which the alleged ratification was based, is a conclusion of law, and as such is inadmissible in evidence. *Decree* (1905) 138 F. 394, 70 C. C. A. 534, affirmed.—*Walker v. McCloud*, 27 S. Ct. 293, 204 U. S. 302, 51 L. Ed. 495.

474. Special knowledge as to subject-matter.

See 20 Cent. Dig. Evid. §§ 2196-2219; 49 Cent. Dig. Witn. §§ 116, 680.

In an action for compensation for the right of way of a railroad, witnesses resident in the neighborhood, and familiar with the property, are competent to testify as to its value, though their opinions may not be based on sales of the same or similar property.—*Montana Ry. Co. v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. Ed. 681, affirming judgment 6 Mont. 275, 12 F. 641.

There is no error in excluding the testimony of a bank cashier as to what is indicated by the marks on the back of certain checks, and how and by whom they were made, when it does not appear that he is familiar with the course of business in the banks through which the checks have passed.—*Shauer v. Alterton*, 151 U. S. 607, 14 S. Ct. 442, 38 L. Ed. 286.

A lay witness who has had an adequate opportunity to observe the speech and other conduct of a person whose soundness or unsoundness of mind is in issue may, in addition to relating the significant instances of speech and conduct, testify to his opinion as to mental capacity, formed at the time from such observation. *Decree* (1907) 29 App. D. C. 460, affirmed.—*Turner v. American Security & Trust Co.*, 29 S. Ct. 420, 213 U. S. 257, 53 L. Ed. 788.

477. Bodily appearance or condition.

See 20 Cent. Dig. Evid. §§ 2237-2241.

Statements by witnesses as to the symptoms of the disease with which plaintiff's cattle were afflicted, and the resemblance of these symptoms to such as they had previously observed in other cattle, together with declarations that the disease was generally called "Texas fever," being as to matters of common observation, were admissible, though the witnesses were not experts.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

493. Cause and effect.

See 20 Cent. Dig. Evid. §§ 2275-2282.

The testimony of workmen, not shown to be experts, that infected rags in a papermill where they worked were the cause of smallpox which they or their children took, is incompetent.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

Plaintiffs imported cattle for breeding purposes, and, in the course of their transportation by a railroad company, they were so injured in a collision due to its negligence that many of them, which were with calf, aborted. In an action for the resulting damages, plaintiffs offered the testimony of the herder who accompanied the cattle from overseas that the ocean voyage, and subsequent shipment by rail, would not cause them to abort, unless some unusual accident happened to them. *Held*, that the testimony was admissible.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, modifying judgment *Estill v. New York, L. E. & W. R. Co.* (C. C.) 41 F. 849.

499. Examination of witnesses.

See 20 Cent. Dig. Evid. §§ 2290-2307.

502. — Cross-examination and re-examination.

See 20 Cent. Dig. Evid. §§ 2306, 2307.

Where, on a question of the genuineness of the signatures of makers of a note, a witness testifies to his acquaintance with the handwriting of one or more of the makers, and to his belief of the genuineness of the signatures of the parties, with whose handwriting he was familiar, the question whether he would act on the signatures attached to the note, if they came to him in an ordinary business transaction, is allowable, to show the strength and value of the witness' opinions.—*Holmes v. Goldsmith*, 147 U. S. 150, 13 S. Ct. 283, 37 L. Ed. 118, affirming judgment (C. C.) *Goldsmith v. Holmes*, 36 F. 484, 1 L. R. A. 816.

(B) SUBJECTS OF EXPERT TESTIMONY.

Criminal prosecutions, see Criminal Law, 468-475.

506. Matters directly in issue.

See 20 Cent. Dig. Evid. § 2309.

Whether openings in buffers of passenger cars on interstate interurban electric railway

were sufficient protection to employes within federal Safety Appliance Act and its amendments is a question for the jury.—*Spokane & I. E. R. Co. v. United States*, 36 S. Ct. 668, 241 U. S. 344, 60 L. Ed. 1037, affirming judgment 210 F. 243, 127 C. C. A. 61.

◀512. **Due care and proper conduct in general.**

See 20 Cent. Dig. Evid. § 2316.

It is not error to exclude the testimony of a boat officer, introduced as an expert, who had never been at a wharf on which plaintiff was standing when a boat in making a landing struck the pier and injured him, upon the question whether it was a safe place to stand while a boat was making a landing, because the question requires no expert knowledge or training, and hence the opinions of witnesses are inadmissible.—*Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270, affirming judgment *Tolson v. Inland & S. Coasting Co.*, 6 Mackey, 39.

◀514. **Management and operation of vehicles, machinery, and appliances.**

See 20 Cent. Dig. Evid. §§ 2319-2323.

A competent expert witness may, on the trial of an action to recover the value of cotton claimed to have been destroyed by a fire set by a passing locomotive, give his opinion on a hypothetical state of facts based on the evidence as to whether a locomotive which in moving $4\frac{1}{4}$ miles should set from five to eight fires and should emit live cinders was properly operated or constructed, where there is evidence that it is impossible, even with the most effective spark arresters, to prevent the escape of sparks. Judgment, 112 F. 402, 50 C. O. A. 230, affirmed.—*Texas & P. Ry. Co. v. Watson*, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

◀521. **Value.**

See 20 Cent. Dig. Evid. §§ 2330-2333.

◀523. — **Services.**

See 20 Cent. Dig. Evid. § 2331.

In an action against the United States for work done in the construction of cofferdams, claimants are not debarred from relying on the testimony of experts to show the value of their work by the fact that they kept no accurate account of the cost.—*Harvey v. United States*, 113 U. S. 243, 5 S. Ct. 465, 28 L. Ed. 987.

(C) COMPETENCY OF EXPERTS.

◀536. **Knowledge, experience, and skill in general.**

See 20 Cent. Dig. Evid. §§ 2343, 2344, 2347.

A witness shown to have been acting cashier in a bank for a period of two months, though without previous experience, is competent to express an opinion on the question whether a particular note shown to him is a rediscounted note.—*Cochran v. United States*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704.

◀537. **Bodily and mental condition.**

See 20 Cent. Dig. Evid. § 2345; 49 Cent. Dig. Wills, §§ 116, 117.

Professors of veterinary medicine, employed for many years by the department of agriculture in the investigation of diseases of animals, are competent to testify as to the nature and symptoms of Texas cattle fever.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

◀538. **Due care and proper conduct in general.**

See 20 Cent. Dig. Evid. § 2348.

In an action on a policy of marine insurance, where the issue was the negligence of the master of the vessel, witnesses who are shown to have been seamen for 20 and 30 years are competent as experts.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

◀539. **Machinery and mechanical devices and appliances.**

See 20 Cent. Dig. Evid. §§ 2349-2352.

The discretion of the trial court is not abused by permitting witnesses who have had practical railroad experience and are familiar with overhead structures and buffers to testify as to whether a buffer at the end of a spur track was a reasonably safe and proper one, and as to whether reasonable and proper care had been exercised in so building an overhead structure as to prevent the use of the hand brakes on a freight car until about 100 feet from the end of the spur track. Judgment (*Ariz.* 1905) 80 P. 337, affirmed.—*Gila Valley, G. & N. Ry. Co. v. Lyon*, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276.

◀543. **Value.**

See 20 Cent. Dig. Evid. §§ 2356½-2358.

A witness who had been a hydraulic engineer, engaged for many years in the construction of steam engines and other machinery, though he had never built any engines to be used on western rivers, is competent to give an opinion as to the value of propelling engines for an Ohio river boat which he had examined, and what it would cost to repair them.—*McGowan v. American Pressed Tan-Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.

One is incompetent to testify as to the fair rental value of the first silver mill with which he was ever connected, where it appears that he knows of no other mill of the same kind that has been rented in the state in which the mill in question is located, although he has been engaged in mining for 20 years, and is acquainted with gold mills.—*New York & C. Min. Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 S. Ct. 665, 32 L. Ed. 1031.

Where one called as an expert testifies that he is the owner of a roller-mill in the adjoining county, having about the same capacity as that of the mill in controversy, and is personally familiar with roller mills and the milling business, but that he has never seen the one in controversy and knows nothing personally of the extent of its custom work, its business, or product, or of the water power, it is not error to refuse to permit him to testify as to rental value of such mill.—*Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 S. Ct. 601, 32 L. Ed. 1035.

Stockmen who for 10 years have been engaged in shipping and selling cattle in the principal markets, and are familiar with the grading of cattle therein, and with prices as given in the market quotations, are competent to testify to the value in such markets at a given time of a particular shipment of cattle, of whose quality and condition they had personal knowledge. Judgment, 104 F. 728, 41 C. C. A. 179, affirmed.—*Missouri, K. & T. Ry. Co. v. Trussett*, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259.

◀546. **Determination of question of competency.**

See 20 Cent. Dig. Evid. § 2363.

The ruling of a trial court that the general manager of an iron company, who had acted in that capacity for six years, and usually went

to the ore mill once a week, but who was not a practical machinist, and had no special knowledge of crushing machinery, was not competent to testify as an expert as to the daily capacity of an ore crusher, will not be disturbed.—*Cha-teaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510.

(D) EXAMINATION OF EXPERTS.

Criminal prosecutions, see Criminal Law, 5482-489.

547. Mode of examination in general.

See 20 Cent. Dig. Evid. § 2364; 50 Cent. Dig. Witn. § 849.

A witness cannot testify as to values in answer to a question which assumes as a fact what there is no evidence to support. Judgment (1907) 29 App. D. C. 490, affirmed.—*Harten v. Löffler*, 29 S. Ct. 351, 212 U. S. 397, 53 L. Ed. 568.

548. Questions and answers based on personal knowledge of expert.

See 20 Cent. Dig. Evid. §§ 2344, 2365.

An expert witness cannot base his opinion as to the mental capacity of a testator upon his personal knowledge of any undisclosed facts concerning the testator's condition. Judgment, 17 App. D. C. 505, affirmed.—*Raub v. Carpenter*, 23 S. Ct. 72, 187 U. S. 159, 47 L. Ed. 119.

551. Hypothetical questions and answers.

See 20 Cent. Dig. Evid. §§ 2363-2375.

553. — Form and sufficiency of questions.

See 20 Cent. Dig. Evid. §§ 2369-2374.

The length of hypothetical statements made to a witness should be left to the discretion of the trial judge; and if the latter carefully explains to the jury the character of the statements, and instructs them that the value of questions based upon them depends upon whether the statements are sustained by proof, and it does not appear that the witness or the jury were confused or misled by them, they will not be held objectionable.—*Forsyth v. Doolittle*, 120 U. S. 73, 7 S. Ct. 408, 30 L. Ed. 586.

556. References to authorities on subject.

See 20 Cent. Dig. Evid. § 2377.

After a witness has once qualified himself as an expert, and given his own professional opinion in reference to what he has seen and heard, or upon hypothetical questions, it is then within the court's discretion to limit further interrogatories as to what other scientific men have said on such matters, or in respect to the general teachings of science thereon.—*Davis v. United States*, 17 S. Ct. 360, 165 U. S. 373, 41 L. Ed. 750.

(E) COMPARISON OF HANDWRITING.

563. Competency of expert.

See 20 Cent. Dig. Evid. §§ 2347, 2383, 2384.

A person who has acquired great familiarity, during a long course of official action, with the official records and the signatures of a Mexican governor and his military secretary on grants of land, is qualified as an expert to testify as to the genuineness of such signatures.—*United States v. Ortiz*, 20 S. Ct. 466, 176 U. S. 422, 44 L. Ed. 529.

564. Standard of comparison.

See 20 Cent. Dig. Evid. §§ 2385-2389.

Signatures of Mexican officials on documents produced from official archives, the genuineness

of which has never been challenged, and which are officially treated as authentic, may be admitted in evidence as standards of comparison, when there is an issue as to the forgery of the signatures of the same persons on an alleged grant.—*United States v. Ortiz*, 20 S. Ct. 466, 176 U. S. 422, 44 L. Ed. 529.

566. Examination of expert.

See 20 Cent. Dig. Evid. § 2390.

An opinion of a witness as to the genuineness of handwriting cannot be based in part upon knowledge of and familiarity with the legal attainments, the style, and composition of the alleged writer of the instrument in question. Judgment, 12 App. D. C. 552, reversed.—*Throckmorton v. Holt*, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

(F) EFFECT OF OPINION EVIDENCE.

569. Testimony of experts.

See 20 Cent. Dig. Evid. §§ 2395-2398.

570. — In general.

See 20 Cent. Dig. Evid. § 2395.

In an action on a life insurance policy the jury have the right to reject the diagnosis of a physician who was examined as an expert as to the nature of the disease of which the assured died.—*Ætna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

571. — Nature of subject.

See 20 Cent. Dig. Evid. §§ 2395-2398.

The weight to be given to expert testimony is a question to be determined by the jury, and there is no rule of law which requires them to surrender their own judgment, or to give a controlling influence to the opinion of witnesses. Therefore, when opinions as to value are given by persons duly qualified to judge of the subject-matter, the jury may exercise an independent judgment, even if the testimony is contradicted.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree 49 F. 99.

A new pleasure yacht, of 272 tons, costing \$75,000, intended solely for the use of her owner, was wrongfully detained by a collector of customs from August 27th to February 3d. A steamboat broker and a yacht broker each testified, in substance, that the value of her use was \$100 a day; the latter fortifying his opinion by no facts whatever, and the former merely referring to the charter of a boat of about the same size, three or four years before, under circumstances which he said were "a little different." Another yacht broker said her value, without the crew, for the whole period of detention, was about \$20,000; stating that there was a large demand for such vessels, and great difficulty in getting them. *Held*, that this evidence was insufficient to justify an award for demurrage, and that an award of \$15,000 was so great as to induce the belief that the witnesses were most friendly to the owner, especially as the court would take judicial notice of the fact that the yachting season in Northern waters comes to an end before November 1st.—*Id.*

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

580. Identity of parties.

See 20 Cent. Dig. Evid. § 2413.

Contribution by a corporation to the expenses of the defense of a patent infringement suit, induced by business reasons and indirect interest, but without the right to intermeddle in any way with the conduct of the case, does not make such corporation a privy to the suit, so as to render admissible, in a suit against it for infringement of the same patent, the testimony in the former suit of a witness since de-

ceased. Decrees (1907) 154 F. 65, 83 C. C. A. 177, affirmed, and (1908) 159 F. 436, 86 C. C. A. 416, reversed.—*Rumford Chemical Works v. Hygienic Chemical Co. of New Jersey*, 30 S. Ct. 45, 215 U. S. 156, 54 L. Ed. 137.

XIV. WEIGHT AND SUFFICIENCY.

As to particular facts or issues, see the various specific topics under black letter sections covering evidence, e. g. Boundaries, ¶37; Deeds, ¶205-211; Marriage, ¶50.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, ¶320-404.

Criminal prosecutions, see Criminal Law, ¶564-570.

Effect of tax deeds as evidence, see Taxation, ¶787, 788.

In particular actions or proceedings, see the various specific topics under black letter sections covering evidence, e. g. Death, ¶74-77; Ejectment, ¶92-95; Sales, ¶441.

Instructions as to weight and sufficiency, see Trial, ¶194, 231-236.

Instruction invading province of jury, see Criminal Law, ¶763, 764.

Number of witnesses to overcome answer in equity, see Equity, ¶345.

Questions for jury, see Trial, ¶139-143. Review, see Appeal and Error, ¶208-212, 268, 294, 693-697, 987-1022.

Waiver and correction of errors in rulings as to weight and sufficiency, see Trial, ¶416-420.

¶597. Sufficiency to support verdict or finding.

See 20 Cent. Dig. Evid. § 2449.

Evidence is insufficient in law only, where there is a total absence of such proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of a fact sought to be proved, e. g. where the law requires written evidence or two witnesses, and only oral evidence or one witness is produced. Insufficiency in point of fact may exist where there is none in law, as where there is some evidence to sustain every element of the case, competent both in quantity and quality, in law, to sustain it, but met by countervailing proof sufficiently potent to lead to the opposite conclusion. In such cases the verdict is not supported by sufficient evidence, because it is against the weight of evidence.—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022.

¶598. Preponderance of evidence.

See 20 Cent. Dig. Evid. §§ 2450-2452.

The testimony of two witnesses to the existence of a parol contract whereby plaintiff was to have a joint interest in the purchase of railroad bonds, and ultimately of the railroads themselves, is not sufficient to establish the same as against the positive denial of one witness, coupled with the inherent improbability that a matter of such magnitude would be allowed to rest in parol, and the further fact that, although the transactions covered a considerable period, no letters or memoranda relating to it are produced.—*Farley v. Hill*, 150 U. S. 572, 14 S. Ct. 186, 37 L. Ed. 1086, affirming decree (C. C.) 39 F. 513.

¶601. Particular facts or issues.

See 20 Cent. Dig. Evid. §§ 2425, 2456-2459.

Where the title to real estate was derived through a deed from the patentee thereof 60

years before the trial, the identity of the names in the deed and the patent is prima facie evidence of the identity of the person, and, together with the grantor's affidavit, indorsed on the deed, that he is the same person to whom the patent was issued, is sufficient to establish the fact.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

J. H., a mechanic, who left Canada in 1831, with no reason to change his name, will not be held to be the same person as T. H., to whom Mexico granted land in California in 1843, for services as a soldier in the Mexican service, T. H. having been at the battle of San Jacinto, April 21, 1836, on evidence that in 1836 a person calling himself J. H., from Canada, was for four months of the year 1836 seen in Mississippi by a Canadian, to whom he stated that he had come down the river, where he had been working as a carpenter, without mentioning the Mexican service; evidence that J. H. was seen in Mexico at different times between 1839 and 1846; and testimony that in 1847 he wrote a letter from California, stating that he had a block of land there,—there being testimony that T. H. was continuously on his land grant at the time it was claimed J. H. was at other points in California, there being no sufficient identification of their handwriting as the same, the testimony of most of the witnesses showing that their appearances and characteristics were different, the majority of the witnesses stating that T. H. claimed to be an Englishman and a sailor, and his petition for the grant reciting that he was a sailor in the Mexican service in 1825.—*Hardy v. Harbin*, 154 U. S. 598, 14 S. Ct. 1172, 22 L. Ed. 378.

EXAMINATION.

Adverse party before trial, see Discovery, ¶77, 78.

Articles of merchandise by public authorities, see Inspection.

Bankrupt or others in bankruptcy proceedings, see Bankruptcy, ¶233-243.

Expert witnesses, see—

Criminal Law, ¶482-489.

Evidence, ¶547-556.

Goods imported, see Customs Duties, ¶73.

Jurors on challenge for cause, see Jury, ¶131.

Nonexpert witnesses giving opinions, see Evidence, ¶499-502.

Persons injured, see—

Criminal Law, ¶232.

Damages, ¶206.

Discovery, ¶78.

Witnesses, see Witnesses, ¶226-308.

EXCEPTIONS.

In contracts and conveyances.

See—

Insurance, ¶410-465.

Public Lands, ¶74-79.

In judicial proceedings.

See—

Appeal and Error, ¶248-280, 501, 878.

Criminal Law, ¶728, 841-845, 868, 1047-1054.

Equity, ¶358, 410.

Exceptions, Bill of.

Trial, ¶99-105, 131, 181, 273-284.

EXCEPTIONS, BILL OF.

Scope-Note.

[INCLUDES statements in writing of exceptions taken to rulings or other action of the court at trials of civil causes, required for correction of errors at such trials; nature and scope of bills of exceptions in general; in what cases and as to what objections such bills are available; requisites, contents, making, and filing of such bills; and proceedings to compel settlement, signing, sealing, and filing thereof.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Form, and Contents in General.

- ⚡6. Scope and contents of bill in general.
- 20. Form and arrangement of bill.
- 26. Construction of bill.
- 27. Operation and effect of bill.

II. Settlement, Signing, and Filing.

- ⚡32. Authority to allow or settle.
- 35. Time for presentation, allowance, and filing.
- 37. — At or after trial.
- 38. — During or after term.
- 39. — Time prescribed or allowed.
- 40. — Extension of time.
- 42. — Waiver of objections to delay.
- 44. — Allowance and filing nunc pro tunc.
- 49. Stipulations as to allowance or settlement.
- 52. Resettlement.
- 56. Certificate, signature, and seal of judge.
- 59. Amendment or correction.

Cross-References.

Authentication and certification for purpose of review, see Appeal and Error, ⚡613.
Criminal cases, see Criminal Law, ⚡1089-1091.
Necessity for purpose of review, see Appeal and Error, ⚡544-554.
Necessity for purpose of review on writ of error

from federal supreme court to district court, see Courts, ⚡385(4).
Practice in federal courts, see Courts, ⚡356.
Presumptions as to making and contents, see Appeal and Error, ⚡938.
Taking exceptions at trial, see Trial, ⚡99-105, 273-284.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

⚡6. Scope and contents of bill in general.

See 21 Cent. Dig. Exceptions, Bill of, §§ 8, 12.

A paper in the record on writ of error, styled "Exceptions to the Charge to Jury," initialed "J. B. McP., Trial Judge," and signed by the plaintiff, is not a bill of exceptions. —(1911) United States ex rel. Kinney v. United States Fidelity & Guaranty Co., 32 S. Ct. 101, 222 U. S. 283, 56 L. Ed. 200, affirming judgment (1911) 188 F. 477, 108 C. C. A. 455, which affirms (C. C. 1910) Kinney v. United States Fidelity & Guaranty Co., 182 F. 1005.

⚡20. Form and arrangement of bill.

See 21 Cent. Dig. Exceptions, Bill of, §§ 21-23.

The office of a bill is the same under Code Civ. Proc. Mont. as at common law, and whatever brings up on the record, properly verified by the attestation of the judge, the matters of fact occurring at the trial on which the point of law arises, which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of ex-

ceptions.—Kleinschmidt v. McAndrews, 117 U. S. 282, 6 S. Ct. 761, 29 L. Ed. 905, reversing judgment 4 Mont. 8, 5 P. 281.

Where a bill, instead of stating distinctly, as required by the fourth rule of the supreme court of the United States, the matters of law in the charge which are excepted to, refers to an exhibit annexed containing the evidence, with minutes that certain parts of it were objected to, and another exhibit containing the charge in full, with the stenographer's notes of a conversation afterwards showing that counsel "excepted" to that part of the charge which bore upon a certain subject, or to the refusal of the court to charge as orally requested in the course of that conversation, the bill is insufficient in form, and will not be considered by the supreme court.—Hanna v. Maaß, 122 U. S. 24, 7 S. Ct. 1055, 30 L. Ed. 1117.

⚡26. Construction of bill.

See 21 Cent. Dig. Exceptions, Bill of, § 22.

When the bill distinctly specifies the parts of the charge excepted to and the legal propositions to which exceptions are taken, and these matters are sufficient, in the view of the court, to dispose of the case, it will not consider

whether, in presenting exceptions to the rulings on evidence, the bill is open to objection as being a mere transcript of the testimony.—*Ward v. Cochran*, 150 U. S. 597, 14 S. Ct. 230, 37 L. Ed. 1195.

A general statement in a bill of exceptions in an action on a bond to secure performance of a building contract, that the plaintiff gave evidence by several witnesses that the buildings were not completed according to the plans and specifications, in the particulars set forth in the assignment of breaches of such contract, and that the value by reason of the omissions, structural defects, and defective materials, was from \$2,000 to \$3,000 less on each building than if they had been so completed, furnishes no basis for the assertion that there was no evidence of the amount of damage sustained from each of the breaches of the contract, but only of the total damage. Judgment (1906) 27 App. D. C. 210, affirmed.—*Mercantile Trust Co. v. Hensey*, 27 S. Ct. 535, 205 U. S. 298, 51 L. Ed. 811, 10 Ann. Cas. 572.

§27. Operation and effect of bill.

See 21 Cent. Dig. Exceptions, Bill of, § 34.

The fact that the bill, while showing that work was performed in collecting the claim, failed to show that any evidence was given as to the value thereof, did not indicate that the verdict could not have been rendered wholly under the count for work and labor, since the bill did not purport to set out, even in substance, all the evidence, and the charge of the court assumed that there was such evidence.—*Delaware City, S. & P. Steamboat Nav. Co. v. Reybold*, 142 U. S. 636, 12 S. Ct. 290, 35 L. Ed. 1141.

II. SETTLEMENT, SIGNING, AND FILING.

Mandamus to review order striking out bill, see Mandamus, §4.

§32. Authority to allow or settle.

See 21 Cent. Dig. Exceptions, Bill of, §§ 37-41, 94; 29 Cent. Dig. Judges, §§ 88, 103, 122, 144, 149, 157, 162.

A controversy over settlement of bill of exceptions tried before a District Court judge, which remained unacted upon at his death, is governed by Rev. St. § 953 (U. S. Comp. St. 1901, p. 696), authorizing any judge of a court in which a case was tried, or the successor of a trial judge, to allow and sign a bill of exceptions.—*Guardian Assur. Co. of London v. Quintana*, 38 S. Ct. 236, 227 U. S. 100, 57 L. Ed. 437.

§35. Time for presentation, allowance, and filing.

See 21 Cent. Dig. Exceptions, Bill of, §§ 44-72.

§37. — At or after trial.

See 21 Cent. Dig. Exceptions, Bill of, §§ 47, 48.

A bill of exceptions, showing that the plaintiff excepted to the granting of a motion for nonsuit, is not insufficient, under Code Civ. Proc. Mont. § 279, defining an exception as "an objection taken at the trial to a decision upon a matter of law, at any time from the calling of the action for trial to the rendering of the verdict or decision," because it was not taken at the trial.—*Kleinschmidt v. McAndrews*, 117 U. S. 282, 6 S. Ct. 761, 29 L. Ed. 905, reversing judgment, 4 Mont. 8, 5 P. 281.

§38. — During or after term.

See 21 Cent. Dig. Exceptions, Bill of, §§ 49-53.

The fact that the term expired before the exceptions were perfected is immaterial, as the federal circuit court rules do not limit the time in which exceptions may be prepared to the

session of court.—*In re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 S. Ct. 150, 32 L. Ed. 508.

A bill, signed and filed after the term at which judgment is entered, comes too late, unless it appears that it was so signed and filed by consent of parties, or in compliance with a rule of court, or an order made at the trial term, or the court's control over the record was preserved by the pendency of a motion for a new trial.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

When a bill of exceptions is presented to and signed by the judge after the close of the term, and the record fails to disclose any order extending the time for its presentation, or any consent of parties thereto, or any standing rule of court authorizing such approval, the supreme court will affirm the judgment.—*United States v. Jones*, 149 U. S. 262, 13 S. Ct. 840, 37 L. Ed. 726.

A bill of exceptions should be settled and signed during the term of court at which the trial is had, unless the time is extended by special order or by consent.—*Morse v. Anderson*, 150 U. S. 156, 14 S. Ct. 43, 37 L. Ed. 1037.

The Supreme Court of the District of Columbia is not bound to prolong its term by the adjournment, authorized by rule 2 of that court, for "not longer than 38 days," to enable bills of exceptions to be prepared, where its duty under such rule is not invoked.—*Gordon v. Randle*, 23 S. Ct. 635, 189 U. S. 417, 47 L. Ed. 875.

A bill of exceptions may not be allowed by the Supreme Court of the District of Columbia when not presented until after the close of the term at which the judgment sought to be reversed has become final, and an appeal has been allowed and perfected, although the 38 days allowed by common-law rule No. 55 of that court have not yet elapsed, since this rule is applicable only so long as the judgment term is running, and does not operate to extend the power of the trial judge over the record beyond the term.—(1910) *Jennings v. Philadelphia, B. & W. Ry. Co.*, 31 S. Ct. 1, 218 U. S. 255, 54 L. Ed. 1031, affirming judgment (1908) 31 App. D. C. 173.

§39. — Time prescribed or allowed.

See 21 Cent. Dig. Exceptions, Bill of, §§ 51, 52, 54-56, 60.

The provision of St. Mont. 1879, § 408, that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed" on appeal from the judgment unless taken within 60 days, does not apply to the ruling of the court granting a motion for nonsuit, which is purely a matter of law.—*Kleinschmidt v. McAndrews*, 117 U. S. 282, 6 S. Ct. 761, 29 L. Ed. 905, reversing judgment, 4 Mont. 8, 5 P. 281.

A bill of exceptions may be settled and signed after the judgment term, if within a time fixed by order of court for the purpose.—*Ward v. Cochran*, 150 U. S. 597, 14 S. Ct. 230, 37 L. Ed. 1195.

§40. — Extension of time.

See 21 Cent. Dig. Exceptions, Bill of, §§ 44, 45, 57-64; 29 Cent. Dig. Judges, § 149.

Where a bill of exceptions in a United States circuit court has been partially settled by the judge, but, by stipulation of counsel for the parties, and to suit the convenience of the judge, the matter is postponed and the bill is not signed until after the beginning of the term of the supreme court at which the writ of error is made returnable, and during a term of the circuit court succeeding that at which the case was tried, it will not be stricken from the record because not allowed and signed in

time.—*Davis v. Patrick*, 122 U. S. 138, 7 S. Ct. 1102, 30 L. Ed. 1090.

Where parties, under the mistaken impression that the state, instead of the federal court, rules govern the preparation of bills of exception, 10 days after exceptions have been served agree that plaintiff may have an additional 10 days in which to serve amendments thereto, and upon their service notice is given by defendant of an intended application to the judge to settle the exceptions, at a date too late under the federal court rules, but complying with those of the state court, and where, by reason of the absence of the trial judge from the district, he being a district judge of another district assigned to hold the circuit court, the application could not have been made in conformity with the rule of the federal court, plaintiff, having received and retained the amendments after agreeing to the extension of time, is estopped from objecting to the delay, and it is the duty of the judge to sign a bill of exceptions.—*In re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 S. Ct. 150, 32 L. Ed. 508.

A bill of exceptions may be filed after the term at which judgment was rendered, by agreement of parties given during such term.—*Waldron v. Waldron*, 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453.

42. — Waiver of objections to delay.

See 21 Cent. Dig. Exceptions, Bill of, § 72.

Objection to the failure of appellant's counsel to deliver a bill of exceptions to appellee's counsel, for inspection and correction, within the time fixed by a stipulation for extension of time for settling such bill, must be made when the bill is settled, to be available.—(U. S.) *Waldron v. Waldron*, 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453.

44. — Allowance and filing nunc pro tunc.

See 21 Cent. Dig. Exceptions, Bill of, § 73.

The silence of counsel for appellee when a proposed bill of exceptions was presented to the court after the close of the term, and after it had lost all judicial power over the record, does not show that the appellee consented to the filing and allowance of the bill nunc pro tunc.—(1910) *Jennings v. Philadelphia, B. & W. Ry. Co.*, 31 S. Ct. 1, 218 U. S. 255, 54 L. Ed. 1031, affirming judgment (1908) 31 App. D. C. 173.

49. Stipulations as to allowance or settlement.

See 21 Cent. Dig. Exceptions, Bill of, § 77½.

Counsel cannot stipulate the correctness of a bill of exceptions not signed by the trial judge.—*Malony v. Adsit*, 20 S. Ct. 115, 175 U. S. 281, 44 L. Ed. 163.

52. Resettlement.

See 21 Cent. Dig. Exceptions, Bill of, § 79.

The judge of a circuit court will not be required, by mandamus, to resettle a bill of exceptions in a cause tried before him, as to the language of a certain request to charge, on affidavits that the bill of exceptions, as settled and signed by him, was incorrect in that respect, where a motion in the circuit court for such re-

settlement has been denied.—*In re Streep*, 156 U. S. 207, 15 S. Ct. 353, 39 L. Ed. 399.

56. Certificate, signature, and seal of judge.

See 21 Cent. Dig. Exceptions, Bill of, §§ 94-96.

The indorsement on a paper purporting to be a bill of exceptions: "Allowed and ordered on file, November 22, '83. A. B."—cannot be regarded as a proper signing by the judge, nor can the paper be received for the purposes of review as a bill of exceptions.—*Origet v. United States*, 125 U. S. 240, 8 S. Ct. 846, 31 L. Ed. 743.

Rev. St. § 953, providing that a bill of exceptions shall be deemed sufficiently authenticated if signed by the judge of the trial court, without any seal of court or judge being annexed, merely dispenses with a seal; and the judge's signature is still necessary.—*Id.*

The reviewing court cannot consider a paper signed by the attorney, and purporting to be a bill of exceptions, but which is not a part of the bill of exceptions, signed by the judge.—*Sire v. Ellithorpe Air-Brake Co.*, 137 U. S. 579, 11 S. Ct. 195, 34 L. Ed. 801, affirming judgment *Ellithorpe Air-Brake Co. v. Sire*, 41 Fed. 662.

A statement in the concluding sentence of a bill that the judge "did put his seal to this bill of exceptions" is an authentication of the entire bill.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150.

The bill must be signed by the trial judge.—*Malony v. Adsit*, 20 S. Ct. 115, 175 U. S. 281, 44 L. Ed. 163.

59. Amendment or correction.

See 21 Cent. Dig. Exceptions, Bill of, §§ 104-111.

An omission to state in a bill of exceptions that plaintiff in error excepted to certain rulings of the court, being the fault of the party, cannot be amended at a subsequent term by an order nunc pro tunc, especially after a writ of error has been filed in the supreme court.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

There is no error in amending a bill of exceptions, after an appeal bond has been given and approved, so as to conform to the facts, by showing that the court stated when a physician appointed by the court in a negligence action to ascertain plaintiff's present condition was called to testify, that his examination of the plaintiff had been made by consent, and that counsel had agreed that his evidence should be considered as correct, where it does not appear that such statement was unjustified, or that objection to it was made.—*Herencia v. Guzman*, 31 S. Ct. 135, 219 U. S. 44, 55 L. Ed. 81.

EXCESSIVE DAMAGES.

See Damages, 129-134.

EXCESSIVE FINES.

See Criminal Law, 1214.

EXCHANGE.

See Banks and Banking, 192.

EXCHANGE OF PROPERTY.

Scope-Note.

[INCLUDES mutual transfers of ownership of property by way of interchange without fixed price or valuation; contracts for such transfers, executory or executed; rights and liabilities of parties to such transfers or contracts; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ②. Exchange of real property.
- 3. — Requisites and validity.
- 7. — Rights and liabilities of parties.

Cross-References.

Exchange of land in forest reserve, see Woods and Forests, ⑧8. | Parol or extrinsic evidence to contradict or vary written contract, see Evidence, ④400.

②. Exchange of real property.

See 21 Cent. Dig. Exch. of Prop. §§ 3-13.

③. — Requisites and validity.

See 21 Cent. Dig. Exch. of Prop. §§ 3, 7.

Where bank stock and cash were traded for mortgaged realty, the vendee assuming the mortgage, the transferee cannot set aside the transfer of the stock, and recover the amount for which it was received in the transaction, when the bill does not show that the transferor has been tendered a return of the cash he paid, or released from the mortgage which he assumed, and the proof discloses that the complainants have elected to ratify the sale of the stock by bringing an action against the transferor for damages for false representations as to its value. Decree 72 F. 402, 18 C. C. A. 618, affirmed.—Stuart v. Hayden, 18 S. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

⑦. — Rights and liabilities of parties.

See 21 Cent. Dig. Exch. of Prop. §§ 12-14.

Where land is conveyed in exchange for other land, the liability of the vendor for a deficiency should not be enforced with the same

rule of strictness as where it is a sale for money.—Lawson v. Floyd, 8 S. Ct. 409, 124 U. S. 108, 31 L. Ed. 347.

Plaintiff and defendant agreed to exchange property, each to assume the incumbrances thereon for which the other was liable. Afterwards defendant requested plaintiff to convey to defendant's wife, which was done without her knowledge or consent, the deed containing an express assumption by her of the incumbrance on the property. As a compliance with his contract to assume the incumbrance, defendant gave plaintiff a bond conditioned on the payment by his wife of such incumbrance. Held, in an action to recover a deficiency arising on foreclosure, that defendant's liability was limited to the amount of his bond, and that he could not be made liable for the whole deficiency, either as a trustee ex maleficio or in consequence of having acted as agent for his wife without her authority.—Episcopal City Mission v. Brown, 158 U. S. 222, 15 S. Ct. 833, 39 L. Ed. 980.

Where two persons exchange property, each assuming mortgages of the other, in equal amounts, and both make default in payment thereof, neither party can recover anything from the other, as the obligations mutually cancel.—Id.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 1059]

EXCHANGES.

Scope-Note.

[INCLUDES bodies formed by the incorporation or association of persons engaged in business of the same nature for the purpose of facilitating and regulating the transaction of such business among the members.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④12. Rights and liabilities as to persons not members.
- 13. Quotations of prices and transactions.

Cross-References.

See Taxation, ④47, 67, 98.

Contracts restraining use of market quotations as restraint of trade, see Monopolies, ④12.

Due process of law, see Constitutional Law, ④287, 296.

Equal protection of laws, see Constitutional Law, ④230.

Interference with liberty to contract, see Constitutional Law, ④276.

Interstate commerce regulations, see Commerce, ④29, 65.

Membership passing to trustee in bankruptcy, see Bankruptcy, ④143, 150, 396.

Regulations as to deduction from weight of commodities purchased, see Weights and Measures, ④2.

Rules as restraining trade, see Monopolies, ④12.

④12. Rights and liabilities as to persons not members.

See 21 Cent. Dig. Exchanges, § 15.

Where plaintiff, a commission merchant, acting under the rules of the Chicago Board of Trade (Rule 26, § 6), which provides that a member thereof, having made sales or purchases for the account of another person, may make offset and settlement of such trades by other trades, and substitute some person for the one from or to whom he may have purchased or sold the property originally, releases the seller from purchases made for the account of defendant, without making at the time the substitution of any specific contract, intending to apply to defendant's account any produce available under other contracts on the date of delivery or settlement, there is no proper compliance with the rule, and he cannot recover the amounts paid in settlement of defendant's contracts.—*Higgins v. McCrea*, 116 U. S. 671, 6 S. Ct. 557, 29 L. Ed. 764.

④13. Quotations of prices and transactions.

See 21 Cent. Dig. Exchanges, § 15.

The use and distribution of the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected by the Chicago board of trade, and which cannot be obtained by those so using and distributing them, without a known breach of the confidential terms on which they are communicated by the board of trade to its customers, may be enjoined, even assuming that such quotations relate to "pretended buying and selling," within the meaning of Act Ill. June 6, 1837, prohibiting the keeping of places where such transactions are committed. *Decrees Board of Trade of City of Chicago v. L. A. Kinsey Co.*, 130 F. 507, 64 C. C. A. 669, 69 L. R. A. 59, affirmed, and *Christie Grain & Stock Co. v. Board of Trade of City of Chicago*, 125 F. 161, 61 C. C. A. 11, reversed.—*Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 25 S. Ct. 637, 196 U. S. 236, 49 L. Ed. 1031.

EXCLUSION.

See Aliens, ④18-32, 45-51.

From possession, element of adverse possession, see Adverse Possession, ④36.

EXCLUSIVE AGENCIES.

See Monopolies, ④17.

EXCLUSIVE PRIVILEGES.

See—
Constitutional Law, ④205.
Monopolies, ④4-7.

EXCUSABLE HOMICIDE.

See Homicide, ④108-124, 242, 297-300.

EXCUSE.

Delay in bringing suit, see Equity, ④75-83.

Delay in filing record on appeal or writ of error, see Appeal and Error, ④628.

Nonpayment of insurance premium or assessment, see Insurance, ④362.

Nonperformance or defects in performance of contracts in general, see Contracts, ④303.

Publication of libel, see Libel and Slander, ④2.

EXECUTION.

Scope-Note.

[INCLUDES enforcement of judgments and orders in civil actions and proceedings in general, by final process, against property or against the person; nature of such process in general and of different forms of writs of execution; property subject to execution in general; issuance, requisites, and validity of executions, and correction and amendment thereof; levy or service, and lien of executions; quashing or setting aside executions, affidavits of illegality, restraining enforcement or stay of execution, discharge of poor debtors, and other relief from executions; claims of third persons to property levied on, and trial of right of property; sales under execution, redemption of property sold, or conveyance thereof by officer to purchaser; return of executions, satisfaction and discharge thereof, and distribution of proceeds; proceedings supplementary to execution; and liabilities of persons other than officers for wrongful procuring, issuance, levy, etc., of executions.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Essentials in General.

- ⇒ 13. Effect of agreement for stay.

II. Property Subject to Execution.

- ⇒ 40. Equitable estates or interests in general.
 - 50. Ownership or possession of property.
 - 51. — In general.
 - 54. — Property in custody of agent or depository.

III. Issuance, Form, and Requisites of Writ.

- ⇒ 99. Alias and pluries writs.
- 104. Presumption of validity.

IV. Lien, Levy or Extent, and Custody of Property.

- ⇒ 107. Creation and existence of lien.
 - 109. — As dependent on levy.
 - 110. Commencement of lien.
 - 111. Property or interests affected, and extent of lien.
 - 113. Priorities between executions and other liens or claims.
 - 115. Transfers of property pending or subject to execution.
 - 116. Duration of lien.
 - 146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.

V. Stay, Quashing, Vacating, and Relief Against Execution.

- ⇒ 169. Injunction.
- 171. — Grounds.

VI. Claims by Third Persons.

- ⇒ 187. Proceedings for establishment and determination of claims.
- 202. — Appeal.

VII. Sale.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

- ⇒ 219. Mode of sale.
 - 241. Certificate of sale.
 - 246. Opening or vacating.
 - 251. — Inadequacy of price in connection with other objections.
 - 256. Actions to set aside sale.
 - 257. Effect of setting aside sale.

VII. Sale—Continued.

(B) TITLE AND RIGHTS OF PURCHASER.

270. Bona fide purchasers.

272. — Notice.

276. Effect of modification, vacation, or reversal of judgment.

(C) REDEMPTION.

295. Time of redemption.

301. Actions to redeem and for accounting.

(D) CONVEYANCE TO PURCHASER.

305. Authority to make.

(E) PROCEEDS.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 949-998.]

VIII. Return.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 999-1063.]

IX. Payment, Satisfaction, and Discharge.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1064-1090.]

X. Supplementary Proceedings.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1091-1206.]

XI. Execution Against the Person.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1207-1381.]

XII. Wrongful Execution.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1382-1406.]

Cross-References.

See—

Attachment.
Garnishment.
Judicial Sales.

Death sentence, see Criminal Law, 1219.

Exemptions, see—
Exemptions.
Homestead.

Fixing date of execution of sentence, see Criminal Law, 1003.

Practice in federal courts, see Courts, 355.

Trust by trustee or by court, see Trusts, 271-273.

In particular actions or proceedings.

See—

Bankruptcy, 111.
Bills and Notes, 541.

Of written instruments.

See—

Bills and Notes, 501.
Contracts, 35-41.
Deeds, 193.
Taxation, 765.
Wills, 113-123.

I. NATURE AND ESSENTIALS IN GENERAL.

13. Effect of agreement for stay.

See 21 Cent. Dig. Execution, § 81.

Executions issued within the time fixed by agreement for a stay of execution are not absolutely void.—*Beebe v. United States*, 161 U. S. 104, 16 S. Ct. 532, 40 L. Ed. 633.

II. PROPERTY SUBJECT TO EXECUTION.

40. Equitable estates or interests in general.

See 21 Cent. Dig. Execution, §§ 50, 88-94.

In Illinois an equitable interest in land is not subject to sale under execution against the equitable owner.—*Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721.

50. Ownership or possession of property.

See 21 Cent. Dig. Execution, §§ 119-136; 6 Cent. Dig. Banks, § 331.

51. — In general.

See 21 Cent. Dig. Execution, §§ 119, 124-136.

Certain spaces of ground along the Mississippi river in the city of New Orleans were dedicated as locus publicus before the cession of Louisiana to the United States, and were devoted to the exclusive public use as a landing place for sugar and molasses. There being no shelter for these commodities, the city by ordinance and lease granted to F. the exclusive right to erect sheds for their protection on these spaces for a term of years, and additional sheds elsewhere in case these were insufficient, guarantying that no other landing for sugar and molasses should be allowed in the city. He was allowed to charge certain rates for storage, of which a prescribed proportion was to be paid to the city

as rent, and at the end of the term the sheds were to revert to the city. *Held*, that this did not so change the character of the spaces as locus publicus as to make them subject to execution on a judgment recovered against the city.—*City of New Orleans v. Louisiana Const. Co.*, 140 U. S. 654, 11 S. Ct. 968, 35 L. Ed. 556.

⚡54. — **Property in custody of agent or depositary.**

See 21 Cent. Dig. Execution, §§ 122, 123; 6 Cent. Dig. Banks, § 331.

A contract between the owner of a farm and his son, by which the latter is given the management of the farm, farm implements, and live stock, with full liberty to sell and dispose of them, replace old stock and implements with new, and appropriate the net proceeds to himself, and is charged with the duty to make all repairs, pay all taxes and other expenses, replace all implements as they are worn out, and keep up all live stock, and is given as his own the net profits, but without fixing any purchase price or providing for payment by the son for the property, while either party is at liberty to terminate the arrangement at any time, upon which the son is required to turn back the farm with its implements, stock, and other personalty of the same kind and amount as was on the farm when he took charge of it, and in as good condition as when he took them, and the fact that the personal property on the farm is assessed in the name of the son, do not give him title to such personalty, so as to subject it to levy on execution against him.—*Arnold v. Hatch*, 20 S. Ct. 625, 177 U. S. 276, 44 L. Ed. 769, affirming judgment 89 F. 1013, 32 C. C. A. 602.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

⚡99. **Alias and pluries writs.**

See 21 Cent. Dig. Execution, §§ 195-202, 607.

Alias writs issued May 10th bore the indorsement of the receipt by the marshal, January 23d, of previous writs, their levy on the property in controversy, and their return, April 6th, for want of time to advertise the sale. The return of the marshal, covering the date of the receipt and the levy of the prior writs, was duly indorsed upon the alias writs, and certified to by the clerk of the court, under his hand and seal. *Held*, that this was sufficient to show the issue of the prior writs, in the absence of any objection that the writs themselves should be produced.—*Beebe v. United States*, 161 U. S. 104, 16 S. Ct. 532, 40 L. Ed. 633.

⚡104. **Presumption of validity.**

See 21 Cent. Dig. Execution, § 191.

Though there is a memorandum on the judgment records of a stay of execution, by consent, for a certain time, yet if executions were issued within that time, and notice was given the execution debtor thereof, it will be presumed that they were properly issued.—*Beebe v. United States*, 161 U. S. 104, 16 S. Ct. 532, 40 L. Ed. 633.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

Loss of jurisdiction on death of owner of property, see Courts, ⚡30.

⚡107. **Creation and existence of lien.**

See 21 Cent. Dig. Execution, §§ 209-212.

⚡109. — **As dependent on levy.**

See 21 Cent. Dig. Execution, § 212.

The delivery to the sheriff of an execution on a judgment operates without levy in Illinois

to create a lien upon the real and personal property of the judgment debtor within the county.—(1912) *Rock Island Plow Co. v. Reardon*, 32 S. Ct. 164, 222 U. S. 354, 56 L. Ed. 231, affirming decree (1909) *Reardon v. Rock Island Plow Co.*, 168 F. 654, 94 C. C. A. 118.

⚡110. **Commencement of lien.**

See 21 Cent. Dig. Execution, §§ 213-215.

Executions create a lien on property of the debtor when delivered to a sheriff for service under Hurd's Rev. St. Ill. 1913, c. 77, § 9, providing delivery for service must be deemed to be delivery to be executed.—*Fallows v. Continental & Commercial Trust & Savings Bank*, 35 S. Ct. 29, 235 U. S. 300, 59 L. Ed. 238, affirming decree *In re Tengwall Co.*, 201 F. 82, 119 C. C. A. 420.

⚡111. **Property or interests affected, and extent of lien.**

See 21 Cent. Dig. Execution, §§ 216-225.

The lien created in Illinois by the delivery to the sheriff of an execution on a judgment attaches to the property held by the judgment debtor under a contract of conditional sale.—(1912) *Rock Island Plow Co. v. Reardon*, 32 S. Ct. 164, 222 U. S. 354, 56 L. Ed. 231, affirming decree (1909) *Reardon v. Rock Island Plow Co.*, 168 F. 654, 94 C. C. A. 118.

⚡113. **Priorities between executions and other liens or claims.**

See 21 Cent. Dig. Execution, §§ 241-248; 43 Cent. Dig. Sales, § 677.

The lien created in Illinois by the delivery to the sheriff of an execution on a judgment on property held by the judgment debtor under a contract of conditional sale is paramount to the rights of the conditional vendor.—(1912) *Rock Island Plow Co. v. Reardon*, 32 S. Ct. 164, 222 U. S. 354, 56 L. Ed. 231, affirming decree (1909) *Reardon v. Rock Island Plow Co.*, 168 F. 654, 94 C. C. A. 118.

⚡115. **Transfers of property pending or subject to execution.**

See 21 Cent. Dig. Execution, §§ 257-265, 377.

Under the recording act for the District of Columbia of April 20, 1878, providing that deeds, etc., shall take effect, as to creditors and subsequent purchasers, etc., only from the time of delivery for record, where a deed is not filed for record until after a judgment is recovered against the grantor, the judgment creditor having no notice of its existence until after issue of execution and levy, the lien of the judgment is superior to the conveyance.—*Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 S. Ct. 613, 28 L. Ed. 577; *Mattoon v. McGrew*, 112 U. S. 713, 5 S. Ct. 369, 28 L. Ed. 824.

⚡116. **Duration of lien.**

See 21 Cent. Dig. Execution, §§ 266-271.

Under Code Ala. 1867, § 2872, when an execution comes to the hands of a sheriff the lien attaches, and it continues from term to term if alias and pluries writs are duly issued and delivered without the lapse of an entire term; and while so kept alive the lien is, on levy and sale, paramount to any intermediate conveyance by the debtor.—*Beebe v. United States*, 161 U. S. 104, 16 S. Ct. 532, 40 L. Ed. 633.

⚡146. **Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.**

See 21 Cent. Dig. Execution, §§ 331-334, 553.

A levy of execution under which the officer has seized the property, and given due notice of a sale thereof, is not defeated by an order from the clerk, under seal of the court, pur-

suant to a direction of the judge in vacation, without notice to the judgment creditor, requesting the officer to return the execution unexecuted; nor by the officer, on receiving such order, ceasing to keep actual possession of the property, and returning the execution, with his doings indorsed thereon, to the court, for further directions.—*Freeman v. Dawson*, 110 U. S. 264, 4 S. Ct. 94, 28 L. Ed. 141, affirming *Steers v. Daniel* (C. C.) 4 F. 587.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

Review of judgment quashing execution, see Appeal and Error, Ⓒ82, 84.

Ⓒ169. Injunction.

See 21 Cent. Dig. Execution, §§ 497-539.

Ⓒ171. — Grounds.

See 21 Cent. Dig. Execution, §§ 497-518; 30 Cent. Dig. Judgm. §§ 794, 795, 813, 825.

A wife in possession of land constituting her separate estate may maintain a bill in equity to enjoin the sale of such land under an execution levied by her husband's creditors.—*Allen v. Hanks*, 10 S. Ct. 961, 136 U. S. 300, 34 L. Ed. 414.

VI. CLAIMS BY THIRD PERSONS.

Ⓒ187. Proceedings for establishment and determination of claims.

See 21 Cent. Dig. Execution, §§ 559, 560, 562-564.

Ⓒ202. — Appeal.

See 21 Cent. Dig. Execution, § 583.

A petition of intervention or a third opposition, under Code Prac. La. arts. 395-400, to obtain the release of property seized under execution, is a legal remedy, and reviewable.—*City of New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 9 S. Ct. 223, 32 L. Ed. 607.

VII. SALE.

Restraining sale by bankruptcy court, see Bankruptcy, Ⓒ301.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

Ⓒ219. Mode of sale.

See 21 Cent. Dig. Execution, § 621.

Rev. St. Ind. 1852, provided that personal property should not be sold on execution unless the same should be present and subject to the view of those attending the sale; that real estate taken on execution should be sold at the door of the court house; and classed chattels real among real estate liable to be sold on execution. B. conveyed to H., for a term of 50 years, all the mineral coal upon and under a described tract of land, with the exclusive right to enter on the land to dig for the coal, and remove it, and to occupy with constructions and buildings as might be necessary and useful for the full development and enjoyment of the advantages of the coal; H. to have the right to remove all buildings or fixtures placed on the land when the agreement should expire, and to pay a fixed royalty for the coal mined. *Held*, under such statutes, and an execution issued against H. prior to the termination of such agreement, that the interest of H. in the term of years, and certain buildings and articles belonging to him, which were a part of the structures and machinery for operating a coal mine on the land, and which were firmly attached to the land, was properly sold as real

estate.—*Hyatt v. Vincennes Nat. Bank*, 113 U. S. 408, 5 S. Ct. 573, 28 L. Ed. 1009.

Ⓒ241. Certificate of sale.

See 21 Cent. Dig. Execution, § 663.

A sheriff's certificate recited that the sale is made "subject to an execution in favor of" R. The record showed that the execution under which the sale was made was in fact prior to that in favor of R. *Held*, that such recital in the sheriff's certificate was a mistake, which could not be taken advantage of by a person claiming under the execution in favor of R.—*White v. Crow*, 110 U. S. 183, 4 S. Ct. 71, 28 L. Ed. 113, affirming decree (C. C.) 17 F. 98, 5 McCrary, 310.

Ⓒ246. Opening or vacating.

See 21 Cent. Dig. Execution, §§ 687-722.

Ⓒ251. — Inadequacy of price in connection with other objections.

See 21 Cent. Dig. Execution, §§ 708-716.

Property worth \$26,000 was sold for \$1,700 at execution sale, under a single judgment to the attorneys of the judgment creditors, one of whom had furnished the officer a description of the property to be levied on and sold. At none of the sales was any person present except one of such attorneys and the officer conducting the sale. One of the sales was under an alias execution issued for the full amount of the judgment, without deducting an amount equal to more than half thereof realized upon the first execution; and on this sale property in excess of the amount remaining unpaid was sold, and the excess was paid over to these attorneys. *Held*, that there was ground for setting aside the sales, though the period of redemption had expired.—*Schroeder v. Young*, 161 U. S. 334, 16 S. Ct. 512, 40 L. Ed. 721.

The fact that the purchaser refused an offer made by the execution debtor to pay the full amount of the judgment, with interest at 1 per cent. a month, and also to compensate him for his services, and pay him a bonus, if he would reconvey the property to such debtor, when taken in connection with the grossly inadequate price paid at the execution sale, tended to impeach the fairness of the transaction.—*Id.*

A sale in defiance of a restraining order by the court rendering judgment will be set aside, where its existence, whether valid or not, was cause of the very inadequate price obtained.—*Van Gieson v. Maile*, 29 S. Ct. 492, 213 U. S. 338, 53 L. Ed. 821.

Ⓒ256. Actions to set aside sale.

See 21 Cent. Dig. Execution, §§ 723-732.

Land held by plaintiff under an oral gift, which he also purchased at tax sale but failed to record the tax deed, was sold on execution against him. He filed, but failed to prosecute, a bill to enjoin the sale on the ground that his title was merely equitable under the oral gift. Ten years after, the donor gave him a deed of the land, and two years after that, plaintiff brought suit to set aside the sale. *Held*, that he was in laches in sleeping on his legal title under the tax deed.—*Richards v. Mackall*, 124 U. S. 183, 8 S. Ct. 437, 31 L. Ed. 396.

Ⓒ257. Effect of setting aside sale.

See 21 Cent. Dig. Execution, §§ 734, 735.

As under the laws of Nebraska the title of a purchaser at execution sale depends on the confirmation of the sale, and a court has power to vacate or modify its own orders or to rescind decrees, the purchaser at an execution sale, which is temporarily confirmed but finally set aside, cannot thereafter convey any title.—*Deputron v. Young*, 10 S. Ct. 539, 134 U. S. 241, 33 L. Ed. 923, affirming (C. C.) *Young v. De Putron*, 37 F. 46.

(B) TITLE AND RIGHTS OF PURCHASER.**Ⓒ270. Bona fide purchasers.**

See 21 Cent. Dig. Execution, §§ 769-790.

Ⓒ272. — Notice.

See 21 Cent. Dig. Execution, §§ 771, 781-783.

Complaint, in a suit to enforce a lien in favor of a partner contributing the entire capital and advances, which alleged that the agreement was in writing and provided for repayment of sums advanced out of the sales of the land and prayed for an equitable mortgage lien on the interest of the other partner, paramount to the latter's judgment creditors, was sufficient to put the latter on inquiry to prevent them from claiming the protection of Civ. Code Ariz. 1901, par. 749, as purchasers for value, without notice.—*Luke v. Smith*, 33 S. Ct. 356, 227 U. S. 379, 57 L. Ed. 558, affirming judgment 108 P. 494, 13 Ariz. 155.

Ⓒ276. Effect of modification, vacation, or reversal of judgment.

See 21 Cent. Dig. Execution, §§ 797-799.

The legal title transferred by an execution sale and conveyance regular in all respects is not revested in the former owner, so as to enable his grantee to maintain ejectment thereon, by a subsequent decree establishing his right to redeem on certain conditions, when he fails to perform such conditions, and subsequently, pursuant to a compromise, consents to a modification of the decree so as to deny the right of redemption.—*Miller v. Courtney*, 152 U. S. 172, 14 S. Ct. 517, 38 L. Ed. 401.

(C) REDEMPTION.

See Estoppel, Ⓒ87.

Ⓒ295. Time of redemption.

See 21 Cent. Dig. Execution, §§ 846-850.

On a bill to redeem from a sale of real estate under execution, it appeared that plaintiff was a nonresident married woman, and had sometimes used the property as a summer residence, and sometimes rented it furnished; that it was worth \$10,000; that two of the defendants, having small claims for services, brought suits thereon by attachment, and recovered judgments, and that executions were levied, and the whole property sold for less than \$200; that, although plaintiff had notice of the suits and the judgments, she was ignorant of the sale; that defendants took every precaution to prevent her being informed of it until the year allowed for redemption had expired; that the purchaser under the prior execution bought the claim of the subsequent execution creditor, who had a right to redeem from the prior execution sale; that he made no demand on complainant for the amount of these claims, but waited until the year within which complainant was entitled to redeem had expired, during which he saw her, in ignorance of his claim, expend considerable sums in repairs and improvements, and still remained silent; that he then employed men to watch her movements, broke into the house in her absence, took possession, and removed her personal property, including wearing apparel and private papers; that the value of the personalty so removed was more than \$3,000, and that it had all the time been accessible to a levy of execution. *Held* that, though mere inadequacy of price would not invalidate the sale, yet the conduct of defendant in misleading complainant and lulling her into security until the time for redemption had passed, was so inequitable that an order allowing complainant to redeem upon payment of the judgment and costs, and permitting defendant to retain the rents and profits in compensation of his expenses and the care and custody of the property, was not error.—*Graffam*

v. Burgess, 117 U. S. 180, 6 S. Ct. 686, 29 L. Ed. 839.

Ⓒ301. Actions to redeem and for accounting.

See 21 Cent. Dig. Execution, §§ 833-839.

A gratuitous donee of lands sold since the donation upon execution to satisfy pre-existing debts incumbering it, if aggrieved by the proceedings, must seek a remedy in equity, for the redemption of the land, and not at law.—*Evans v. Pike*, 118 U. S. 241, 6 S. Ct. 1090, 30 L. Ed. 234.

By Laws Wash. T. 1873, p. 94, relating to sales under execution, the judgment debtor or redemptioner is permitted to redeem within six months from confirmation of the sale, and, if the sheriff wrongfully refuse to allow any person to redeem, "his right thereto shall not be prejudiced thereby, and upon the submission of the evidence and the tender of the money to the sheriff, as herein provided, he may be required, by order of the court or judge thereof, to allow such redemption." Plaintiff applied to redeem at the proper time, but on the sheriff's refusal to permit him to do so he made no application to the court as provided above, and after waiting nearly nine years he brought suit to cancel the sheriff's deeds. *Held*, that equity would afford him no relief, because of his unreasonable delay.—*Parker v. Dacres*, 130 U. S. 43, 9 S. Ct. 433, 32 L. Ed. 848, affirming decree, *Same v. D'Acres*, 2 Wash. T. 439, 7 P. 893.

(D) CONVEYANCE TO PURCHASER.**Ⓒ305. Authority to make.**

See 21 Cent. Dig. Execution, §§ 903-908, 911.

Where a sale is had and approved, and a deed ordered, and before its execution the judgment debtor dies, it is not necessary to revive proceedings in the name of the heirs or legal representatives before the deed is executed.—*Insley v. United States*, 150 U. S. 512, 14 S. Ct. 158, 37 L. Ed. 1163, affirming decree *United State v. Insley*, 54 F. 221, 4 C. C. A. 296.

(E) PROCEEDS.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 949-993.]

VIII. RETURN.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 999-1063.]

IX. PAYMENT, SATISFACTION, AND DISCHARGE.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1064-1090.]

X. SUPPLEMENTARY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1091-1206.]

XI. EXECUTION AGAINST THE PERSON.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1207-1231.]

XII. WRONGFUL EXECUTION.

[No paragraphs or references in this Digest. But see 21 Cent. Dig. Execution, §§ 1332-1406.]

EXECUTIVE POWER.

Constitutional limitations, see Constitutional Law, Ⓒ78-80.

EXECUTORS AND ADMINISTRATORS.

Scope-Note.

[INCLUDES general administration of decedents' estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors or administrators in respect to the collection, management, and disposition of their testators' or intestates' estates; and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Administration in General.

- ⚡ 3. Necessity of administration.
- 4. Fact of death.

II. Appointment, Qualification, and Tenure.

- ⚡ 8. Jurisdiction of courts.
- 10. — Domicile of decedent.
- 12. — Situs of assets.
- 13. — Particular courts.
- 24. Public administrators.
- 29. Operation and effect of appointment.
- 33. Resignation and discharge.
- 35. Removal.

III. Assets, Appraisal, and Inventory.

- ⚡ 48. Debts and rights of action.
- 49. — In general.
- 60. Foreign assets.
- 62. Appraisal and inventory.
- 63. — Necessity and purpose.

IV. Collection and Management of Estate.

(A) IN GENERAL.

- ⚡ 77. Powers before issue of letters or qualification.
- 83. Discovery and collection of assets.
- 87. — Compromise or release of claims.
- 104. Interest on funds of estate.
- 115. Individual interest in transactions.
- 120. Administrators de bonis non.
- 123. Coexecutors and coadministrators.
- 126. — Acting executor or administrator.
- 127. — Surviving executor or administrator.

(B) REAL PROPERTY AND INTERESTS THEREIN.

- ⚡ 135. Contracts of decedent.
- 136. Sale.
- 138. — Power under will.
- 146. — Payment or recovery of purchase money.
- 149. — Setting aside.

(C) PERSONAL PROPERTY.

- ⚡ 157. Sale.
- 160. — Manner and conduct.
- 170. Indorsement and transfer of bills and notes.
- 172. Property acquired by executor or administrator.

V. Allowances to Surviving Wife, Husband, or Children.

VI. Allowance and Payment of Claims.

(A) LIABILITIES OF ESTATE.

- ⚡ 218. Expenses of administration.

VI. Allowance and Payment of Claims—Continued.**(B) PRESENTATION AND ALLOWANCE.**

- ↔ 225. Time for presentation.
- 241. Effect of allowance or disallowance.

(C) DISPUTED CLAIMS.**(D) PRIORITIES AND PAYMENT.**

- ↔ 266. Advances to pay claims.
- 267. Interest.

VII. Distribution of Estate.

- ↔ 297. Requirement of receipt or release.
- 302. Mode and sufficiency of payment.
- 303. — In general.
- 314. Proceedings for payment or distribution.
- 315. Order or decree for distribution.

VIII. Sales and Conveyances Under Order of Court.**(A) WHEN AUTHORIZED.**

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1332-1368.]

(B) APPLICATION AND ORDER.

- ↔ 345. Order or decree.
- 349. — Operation and effect.
- 356. Actions for sale.

(C) SALE.

- ↔ 380. Actions to set aside.

(D) CONVEYANCE.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1594-1605.]

(E) PROCEEDS.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1606-1613.]

IX. Insolvent Estates.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1614-1659.]

X. Actions.

- ↔ 428. Rights of action against executors or administrators.
- 430. — Personal or representative capacity.
- 438. Parties.
- 453. Judgment.
- 455. Appeal and Error.
- 456. Costs.

XI. Accounting and Settlement.**(A) DUTY TO ACCOUNT.**

- ↔ 462. Acting in different capacities.

(B) PROCEEDINGS FOR ACCOUNTING.

- ↔ 469. Jurisdiction of courts.
- 472. Special proceedings to compel accounting.

(C) CHARGES AND CREDITS.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 2061-2068.]

(D) COMPENSATION.

- ↔ 491. Effect of agreements.
- 495. Commissions.

(E) STATING, SETTLING, OPENING, AND REVIEW.

XII. Foreign and Ancillary Administration.

- 519. Collection and disposition of assets.
- 521. Presentation and allowance of claims.
- 524. Actions by foreign executors or administrators.

XIII. Liabilities on Administration Bonds.

- 528. Property covered.
- 531. Discharge of sureties.
- 533. Necessity of accounting and default by principal.
- 537. Actions.

XIV. Executors De Son Tort.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 2582-2603.]

Cross-References.

See—
Descent and Distribution.
Wills.

Administration of community property, see
Husband and Wife, 276.

Conflicting jurisdiction of state and federal
courts, see Courts, 505.

Courts of probate, see Courts, 198.

Designation of heirs or representatives of decedents
in assessment rolls, see Taxation, 416.

Executor of will annexed as trustee, see Trusts,
156.

Jurisdiction of equity to administer estates, see
Equity, 22.

Pendency of proceedings in state court, affecting
proceedings in federal court, see Courts, 493.

Persons concluded by judgment against executor,
see Judgment, 688.

Testamentary trustees, see Trusts.

Testimony as to transactions with persons subsequently
deceased, see Witnesses, 127-163.

I. ADMINISTRATION IN GENERAL.

Evidence of death, see Death, 2.

3. Necessity of administration.

See 22 Cent. Dig. Ex. & Ad. § 1, 3-14½, 1782; 6
Cent. Dig. Banks, § 332.

It is not within the power of a testator to bequeath personal property directly to a trustee, without the intervention of an executor, and thereby defeat the provisions and policy of the testamentary law of the state; and the fact that the person named as executor, but who has failed to qualify, is also the trustee, does not render valid a disposition of the legacy, made by him "as executor."—*Wall v. Bissell*, 125 U. S. 382, 8 S. Ct. 979, 31 L. Ed. 772.

4. Fact of death.

See 22 Cent. Dig. Ex. & Ad. §§ 15, 16.

Const. U. S. Amend. 14, provides that no state shall deprive any person of life, liberty, or property without due process of law. Code Wash. T. § 1, adopts the common law of England so far as not inconsistent with the local law. Section 1299 declares that the probate court shall have exclusive power to grant letters testamentary and of administration. *Held* that, in the light of the common law and in the absence of express authorization, the jurisdiction of the probate court could not take effect until the actual death of a decedent, and hence plaintiff could recover land sold to defendant by an administrator appointed for his estate, though at the time of such appointment plaintiff was supposed to be dead and had been absent for more than seven years. 5 Wash. 309, 31 P. 873, reversed.—*Scott v. McNeal*, 14 S. Ct. 1108, 154 U. S. 34, 38 L. Ed. 890, reversing judgment 5 Wash. 309, 31 P. 873, 34 Am. St. Rep. 863.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Effect of death of executor on contract with attorney, see Attorney and Client, 134.

8. Jurisdiction of courts.

See 22 Cent. Dig. Ex. & Ad. §§ 21-23.

10. — Domicile of decedent.

See 22 Cent. Dig. Ex. & Ad. §§ 23, 23.

A dismissal of proceedings for administration upon property in the District of Columbia, by a court of that District which has obtained jurisdiction, is not required by the act of congress (24 Stat. 431) authorizing administrators appointed in any state to maintain suit or recover claims in that District, where a party to the proceedings in the District, while they are pending and undecided, goes to a state and obtains letters of administration on an assertion that the decedent was domiciled in that state. Judgment, 13 App. D. C. 392, affirmed.—*Overby v. Gordon*, 20 S. Ct. 603, 177 U. S. 214, 44 L. Ed. 741.

12. — Situs of assets.

See 22 Cent. Dig. Ex. & Ad. § 24.

A policy of life insurance, issued by a company incorporated in one state, payable to the assured, his executors or administrators, is assets for the purpose of founding administration upon his estate in another state, in which the corporation, at and since the time of his death, does business, and, as required by the statutes of that state, has an agent on whom process against it may be served.—*New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 S. Ct. 364, 28 L. Ed. 379.

13. — Particular courts.

See 22 Cent. Dig. Ex. & Ad. § 24.

Intestate died leaving heirs and an unlocated purchase land claim. No one claimed the succession, and after 40 years a petition was filed in the parish court for the parish in which he was domiciled at his death, reciting his death, and that the property consisted of the land claim, and asking for an inventory, appraisal, and sale to pay debts. *Held*, that the parish court had jurisdiction to administer the estate, under Code Prac. La. arts. 921, 924, giving probate courts jurisdiction to superintend administration of vacant successions, and exclusive power to appoint curators to vacant estate, and to make inventories and sales of property of successions administered by a curator, and Rev.

St. La. 1870, extending such jurisdiction to parish courts.—*Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 L. Ed. 1054.

Ⓒ24. Public administrators.

See 22 Cent. Dig. Ex. & Ad. §§ 132-140.

Civ. Code La. art. 1190, providing that, where no one will accept the curatorship of a vacant estate, the court, "after ordering an inventory," shall appoint the district attorney curator, is complied with where the inventory is ordered and the administrator appointed in the same order.—*Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 L. Ed. 1054.

The most-favored-nation clause in Italian Treaty May 8, 1878 (20 Stat. 732) arts. 16, 17, does not give Italian consul general right to administer estate of intestate Italian citizen because of privilege conferred by Argentine Treaty July 27, 1853 (10 Stat. 1009) art. 9.—(1912) *Rocca v. Thompson*, 32 S. Ct. 207, 223 U. S. 317, 56 L. Ed. 453, affirming judgment (1910) *In re Ghio's Estate*, 108 P. 516, 157 Cal. 552, 137 Am. St. Rep. 145.

Ⓒ29. Operation and effect of appointment.

See 22 Cent. Dig. Ex. & Ad. §§ 177-182, 1411.

The order of the parish court having jurisdiction of a vacant succession, appointing a curator to administer it, cannot be collaterally attacked on the ground that under the statute the public administrator should have been appointed curator.—*Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 L. Ed. 1054.

The appointment of an administrator in a state where the decedent died, and where there are immovable property and effects of the estate, does not constitute an adjudication that the decedent was domiciled there at the time of his death, where the court did not make, and the letters did not recite, any finding as to his domicile. Judgment *Frame v. Thormann*, 79 N. W. 39, 102 Wis. 653, affirmed.—*Thormann v. Frame*, 20 S. Ct. 446, 176 U. S. 350, 44 L. Ed. 500.

Appointment of an administrator is not subject to collateral attack for any informality in the petition for his appointment.—*Christianson v. King County*, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

Ⓒ33. Resignation and discharge.

See 22 Cent. Dig. Ex. & Ad. §§ 213-222.

Code Ga. §§ 2512, 2514, provide that upon the revocation of the letters of one administrator, where there are more than one, the trust remains in the hands of the other, "and with him, as to an administrator de bonis non, the removed co-administrator must account," and his sureties are "liable for his acts in connection with his trust, up to the time of his settlement with an administrator de bonis non or the distributees." By section 2610, when an administrator is allowed to resign, he "shall be discharged from his trust whenever he has fairly settled his accounts with his successor, and filed with the ordinary the receipt in full of such successor." Held that, where one of two administrators resigns, the court may make an order appointing the survivor sole administrator, and requiring him to execute a new bond, conditioned as in the case of an administrator de bonis non.—*Veach v. Rice*, 131 U. S. 293, 9 S. Ct. 730, 33 L. Ed. 163.

Ⓒ35. Removal.

See 22 Cent. Dig. Ex. & Ad. §§ 227-262.

Bill was filed to set aside a sale of real estate by an administrator appointed on application for his predecessor's removal, alleging want of notice to said predecessor of the removal pro-

ceedings. With the mortuary papers was filed an "opposition" to the application, signed by the attorneys of the estate. The former administrator was made a defendant to the bill, and appeared personally, but did not testify in denial of the facts alleged in the application as causes for his removal, nor of the authority of the attorneys to oppose the application, nor did he deny that he had notice. Held, that he was an actual party.—*Boyd v. Wyly*, 124 U. S. 98, 8 S. Ct. 364, 31 L. Ed. 369, affirming decree (C. C.) *Same v. Wyley*, 18 F. 355.

The insanity of an executor does not affect the power of the probate court to remove him.—*Michigan Trust Co. v. Ferry*, 33 S. Ct. 550, 228 U. S. 346, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221, and 175 F. 681, 99 C. C. A. 235.

III. ASSETS, APPRAISAL, AND INVENTORY.

Ⓒ48. Debts and rights of action.

See 22 Cent. Dig. Ex. & Ad. §§ 301-305, 1873; 15 Cent. Dig. Death, §§ 132-138.

Ⓒ49. — In general.

See 22 Cent. Dig. Ex. & Ad. §§ 301, 308-305.

Where a receiver dies after the sale of the property, and the entry of judgment in his favor against the purchaser for a sum due for his compensation, and for indebtedness incurred, as receiver, the right to collect such judgment will pass to his personal representatives.—*Cake v. Mohun*, 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447.

Under an act of congress for the relief of "the estate" of a deceased claimant for the proceeds of cotton owned by him, but seized and sold by the government during the Civil War, and referring the claim of his "legal representatives" to the court of claims for adjustment, the amount recovered in such proceedings became assets of his estate, and subject to the claims of his creditors. Judgment, 43 S. W. 479, 102 Ky. 359, affirmed.—*Briggs v. Walker*, 19 S. Ct. 1, 171 U. S. 466, 43 L. Ed. 243.

Ⓒ60. Foreign assets.

See 22 Cent. Dig. Ex. & Ad. § 299.

Administration in a foreign state, under the laws and in the courts of that state, is only ancillary to that of the testator's domicile; and, though the statutes and decrees of such state may bar all claims against the estate of the decedent, they do not relieve the assets of the trust to pay decedent's debts, and these assets remain assets, when brought into the state of decedent's domicile, for the payment of any unpaid debtor choosing that forum.—*Borer v. Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532, affirming decree (C. C.) *Chapman v. Borer*, 1 F. 274.

Ⓒ62. Appraisal and inventory.

See 22 Cent. Dig. Ex. & Ad. §§ 311-322.

Ⓒ63. — Necessity and purpose.

See 22 Cent. Dig. Ex. & Ad. §§ 311, 312.

In an action by executors on a note which is shown to have been the property of their testator at the time of his death, the fact that the note was not inventoried as part of the estate is immaterial.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

Death of owner of property in litigation as affecting right of administration, see Courts, Ⓒ30.

Jurisdiction of probate court of action for devisavit, see Courts, Ⓒ198.

(A) IN GENERAL.

77. Powers before issue of letters or qualification.

See 22 Cent. Dig. Ex. & Ad. §§ 326-329.

Under Rev. St. Ind. 1881, §§ 2222-2225, 2242, 2243, providing that, in order to secure the interests of creditors and legatees, every executor shall give bond and take out letters testamentary before he can do any act as executor, except such as may be necessary to preserve the property from loss, though a testator directed that his executor should act without giving bond or taking out letters, a release of a debt due the estate, by such executor, without having qualified, is invalid.—*Wall v. Bissell*, 125 U. S. 382, 8 S. Ct. 979, 31 L. Ed. 772.

83. Discovery and collection of assets.

See 22 Cent. Dig. Ex. & Ad. §§ 339-396; 6 Cent. Dig. Banks, § 332.

87. — Compromise or release of claims.

See 22 Cent. Dig. Ex. & Ad. §§ 323, 334-332.

An administrator has authority to make a contract with an attorney to prosecute a doubtful claim in favor of the estate for a portion of the proceeds, and to authorize the attorney to compromise the claim as he should please.—*Jeffries v. Mutual Life Ins. Co. of New York*, 110 U. S. 305, 4 S. Ct. 8, 28 L. Ed. 156.

104. Interest on funds of estate.

See 22 Cent. Dig. Ex. & Ad. §§ 423-432.

An administrator is properly charged with interest on a sum which stands on the record charged to him with his consent as money which he should have put into his account and held as an identified fund. Decree 20 App. D. C. 134, affirmed.—*McIntire v. McIntire*, 24 S. Ct. 196, 192 U. S. 116, 48 L. Ed. 369.

Interest is properly charged against an administrator on a sum which he retained in his own hands after the assets of the decedent's estate had been ordered paid into court, and then had been transferred to the solicitors of the parties as custodians, by an order made with the consent of the parties.—*Id.*

115. Individual interest in transactions.

See 22 Cent. Dig. Ex. & Ad. §§ 467, 468.

A bill alleging that the property of plaintiff's decedent was sold on foreclosure in a suit brought by decedent's administrator, in his individual capacity, against himself as administrator, to foreclose mortgages held by him on the property, though he had at the time money in his hands as administrator sufficient to discharge the debt, and that defendants, subsequent purchasers, had knowledge of the facts, and praying for cancellation of the foreclosure sale and the subsequent sales, if filed within the period of limitation, is not demurrable for want of equity.—*Bryan v. Kales*, 134 U. S. 126, 10 S. Ct. 435, 33 L. Ed. 829, reversing decree, 20 P. 311.

120. Administrators de bonis non.

See 22 Cent. Dig. Ex. & Ad. §§ 485-492.

A balance against an administrator, found on the settlement of his accounts after removal, consisting of the proceeds of a debt due decedent and collected by him, is not unadministered assets, within the meaning of Rev. St. § 976, providing that the court may require assets of the decedent remaining unadministered to be delivered to the newly-appointed administrator de bonis non; and an order of the court to that effect is without jurisdiction and void.—*United States v. Walker*, 100 U. S. 258, 3 S. Ct. 277, 27 L. Ed. 927.

Money due an intestate's estate, which is collected by the administrator's agent, is an ad-

ministered asset, and cannot be recovered from the agent by the administrator de bonis non.—*Wilson v. Arrick*, 112 U. S. 83, 5 S. Ct. 75, 28 L. Ed. 617.

123. Coexecutors and coadministrators.

See 22 Cent. Dig. Ex. & Ad. §§ 496-530.

126. — Acting executor or administrator.

See 22 Cent. Dig. Ex. & Ad. §§ 523-526.

A bill in equity against the executrix and the executor of the estate of W. was, by order of the complainant, dismissed as to the executrix, she only having acted in the settlement of the estate up to that time. *Held* a dismissal as to both defendants.—*Willard v. Wood*, 17 S. Ct. 176, 164 U. S. 502, 41 L. Ed. 531.

127. — Surviving executor or administrator.

See 22 Cent. Dig. Ex. & Ad. §§ 527-530.

A testator, leaving property in Pennsylvania, New Jersey, and elsewhere, directed the application thereof to a charitable purpose, and charged his executors, one of whom lived in New Jersey, with the execution of the trust. The Pennsylvania executor founded a charitable institution in Pennsylvania with the remainder of testator's property, but the New Jersey executor took no steps to apply the New Jersey property to the trust. After the latter's death, an administrator with the will annexed was appointed in New Jersey, and sold testator's lands in that state, and, though the surviving executor in Pennsylvania claimed the proceeds, turned them over to a charitable institution in New Jersey. *Held*, that such sale was without authority, and that the administrator must account for the proceeds to the surviving executor in Pennsylvania, since, so long as one of the testamentary executors survived, the execution of the trust devolved solely on him.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

(B) REAL PROPERTY AND INTERESTS THEREIN.

135. Contracts of decedent.

See 22 Cent. Dig. Ex. & Ad. §§ 551-556; 44 Cent. Dig. Spec. Perf. § 46.

An executor may maintain a suit for the specific performance of a contract for the sale of land, the property of the testator, under Code Pub. Gen. Laws Md. 1888, art. 93, § 104, empowering an executor to prosecute any personal action whatever, whether in law or in equity, that the testator might have prosecuted, except an action for slander, and section 81 of the same article, authorizing the executor of a person who shall have made sale of real estate, and has died before receiving the purchase money, or conveying the same, to make a conveyance to the purchaser, provided he shall satisfy the court that such purchaser has paid the full amount of the purchase price. Decree, *Griffith v. Stewart* (1908) 31 App. D. C. 29, affirmed.—*Stewart v. Griffith*, 30 S. Ct. 528, 217 U. S. 323, 54 L. Ed. 782, 19 Ann. Cas. 639.

Authority to carry out an executory contract for the sale of testator's real property is conferred upon the executor by a will which invests him with full and complete authority over the testator's estate, and empowers him to sell the real property at public sale after one month's notice upon such terms as he thinks proper.—*Id.*

136. Sale.

See 22 Cent. Dig. Ex. & Ad. §§ 557-606½.

138. — Power under will.

See 22 Cent. Dig. Ex. & Ad. §§ 560-568, 568-575; 40 Cent. Dig. Powers, §§ 84, 85, 87-98.

The power of sale given executors under a will held coupled with an interest which could

be exercised by the survivor, where the active duty of managing the property and changing investments was given by the will, which provided that the debts were to be paid and the slaves taken care of and reinvestments made for the benefit of testator's wife and children.—*Wilson v. Snow*, 33 S. Ct. 487, 228 U. S. 217, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604, affirming judgment 35 App. D. C. 562.

←146. — **Payment or recovery of purchase money.**

See 22 Cent. Dig. Ex. & Ad. §§ 583-590.

Real estate of a testator was sold by the executors in Virginia in 1860, and when a bond for a part of the purchase money fell due, in 1862, one of the executors, who still resided in Virginia, accepted payment thereof, in good faith in Confederate money and distributed a portion of the amount to such heirs and legatees as were within reach, and charged himself in his accounts with the balance. The other executor at that time resided in Indiana. *Held*, in an action brought by the latter, after the death of the Virginia executor, against the executor of the purchaser, to recover the amount of the bond, that the payment in Confederate money discharged the debt.—*Glasgow v. Lipse*, 117 U. S. 327, 6 S. Ct. 757, 29 L. Ed. 901.

←149. — **Setting aside.**

See 22 Cent. Dig. Ex. & Ad. §§ 602-606.

A widow, who, being the devisee under her husband's will, received the purchase price of an estate in real property which was conveyed by his executor in the mistaken belief that it was subject to testamentary devise, and rested 10 years without asserting her claim to the property after a decision of the highest court of the state to the effect that a moiety of such property was in law her community property, must be deemed to have ratified the sale, so as to preclude her grantees from asserting title as against the United States, claiming under the executor's deed.—(1911) *Hussey v. United States*, 32 S. Ct. 33, 222 U. S. 88, 56 L. Ed. 106, affirming judgment (1909) *Crane v. Same*, 44 Ct. Cl. 324.

(C) PERSONAL PROPERTY.

Rights of distributees as against administrators, see Descent and Distribution, ←79.

←157. **Sale.**

See 22 Cent. Dig. Ex. & Ad. §§ 634-646½.

←160. — **Manner and conduct.**

See 22 Cent. Dig. Ex. & Ad. § 637.

Code La. art. 1115, requiring 10 days' public notice before appointment of a public administrator, and article 1167, providing that property belonging to vacant successions can only be sold at public auction after advertisement, do not apply to sales under article 1190, which provides that, if a succession is so small that no one will accept the curatorship, the judge, after ordering an inventory, shall appoint the district attorney curator, who shall cause the effects to be sold, and the proceeds applied to payment of the debts; the whole to be done in as summary a manner as possible to diminish costs.—*Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 L. Ed. 1054.

←170. **Indorsement and transfer of bills and notes.**

See 22 Cent. Dig. Ex. & Ad. § 642.

An administrator, by virtue of his appointment, obtains his title in promissory notes or other written evidences of debt held by the intestate at his death and coming to administrator's possession, and may sell, transfer, and indorse the same.—*Wilkins v. Ellett*, 108 U. S. 256, 2 S. Ct. 641, 27 L. Ed. 718.

←172. **Property acquired by executor or administrator.**

See 22 Cent. Dig. Ex. & Ad. § 650½.

Defendant procured appointment as administrator of a deceased partner, and then obtained a conveyance of the surviving partner, who was of feeble intellect, of certain firm property for a consideration of \$500, and immediately sold it for \$12,500 to one who had previously offered \$13,000 for it to defendant's knowledge. *Held*, in an equitable action by the surviving partner, that the administrator should be required to account for the profit realized, as the decree of the probate court settling the account did not conclude the surviving partner from recovering profits fraudulently made.—*Griffith v. Godey*, 113 U. S. 89, 5 S. Ct. 383, 28 L. Ed. 934.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

See 22 Cent. Dig. Ex. & Ad. §§ 651-729.

Allowance from estate of bankrupt, see Bankruptcy, ←403.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) LIABILITIES OF ESTATE.

Liabilities of heirs and distributees, see Descent and Distribution, ←119-147.

←218. **Expenses of administration.**

See 22 Cent. Dig. Ex. & Ad. § 759.

A decedent's estate is properly charged with the counsel fees paid to counsel for services rendered for an administrator with the will annexed in defending the will against attack, although certain of the legatees as well as the administrator had a share in calling in such counsel. Decree, 20 App. D. C. 134, affirmed.—*McIntire v. McIntire*, 24 S. Ct. 196, 192 U. S. 116, 48 L. Ed. 369.

(B) PRESENTATION AND ALLOWANCE.

←225. **Time for presentation.**

See 22 Cent. Dig. Ex. & Ad. §§ 789-800, 802, 803, 805.

The Arkansas statute of nonclaim, providing that all demands against the estate of a decedent not exhibited to the executor or administrator before the end of two years from the granting of letters shall be forever barred, runs against nonresident minors for whom no guardian has been appointed, and whose claims are alleged to have been founded on a concealed fraud.—*Morgan v. Hamlet*, 113 U. S. 449, 5 S. Ct. 583, 28 L. Ed. 1043.

←241. **Effect of allowance or disallowance.**

See 22 Cent. Dig. Ex. & Ad. §§ 827, 849; 30 Cent. Dig. Judgm. § 1069.

Where a claim against a succession has been acknowledged by the executor, and ranked by a probate judge among the acknowledged debts, as provided by Code Prac. arts. 984, 985, no judgment on it is necessary, and it is not subject to prescription so long as the property of the succession remains in the hands of the executor under administration.—*Johnson v. Waters*, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

(C) DISPUTED CLAIMS.

See 22 Cent. Dig. Ex. & Ad. §§ 850-922.

Action to set aside judgment, jurisdiction of federal courts, see Courts, ←330.

(D) PRIORITIES AND PAYMENT.

286. Advances to pay claims.

See 22 Cent. Dig. Ex. & Ad. §§ 1023-1031.

An administrator with the will annexed is entitled to be reimbursed for advances made by him in settling the estate.—*Manson v. Duncan*, 17 S. Ct. 647, 166 U. S. 533, 41 L. Ed. 1105.

287. Interest.

See 22 Cent. Dig. Ex. & Ad. §§ 1032-1043.

In an action to compel an accounting by the administrators of an agent who had loaned his principals money at the rate of 10 per cent. per annum, the administrators were liable only for interest at the legal rate from the date of the agent's death, in the absence of sufficient evidence that they themselves received interest at a higher rate.—*Dillman v. Hastings*, 144 U. S. 136, 12 S. Ct. 662, 36 L. Ed. 378.

VII. DISTRIBUTION OF ESTATE.

Conflicting jurisdiction of state and federal courts, see Courts, 505.

Damages recovered for causing death, see Death, 101.

Necessary parties in suit for distribution, see Equity, 96.

Partition of property, see Partition.

297. Requirement of receipt or release.

See 22 Cent. Dig. Ex. & Ad. §§ 1199-1204; 42 Cent. Dig. Release, § 81.

Where a will directed all debts from the legatees to be canceled, held, that the receipt by a legatee, from the administrators executing the will, of collateral given by him for a debt due the testator, did not estop him to dispute a receipt taken by such administrators for his share of the estate as having been paid, by its application to such debts, and in view of the position of trust in which the administrators stood to the legatee, such receipt, which he was under no legal obligation to give, should not stand in the way of the enforcement of the legatee's rights in the estate. Decree, *Cowen v. Adams*, 78 F. 536, 24 C. C. A. 198, rehearing denied 80 F. 448, 25 C. C. A. 547, affirmed.—*Adams v. Cowen*, 19 S. Ct. 873, 174 U. S. 800, 43 L. Ed. 1183, affirmed on rehearing, 20 S. Ct. 668, 177 U. S. 471, 44 L. Ed. 851.

A receipt acknowledging payment of a legacy which is not paid except by the cancellation of an alleged debt of the legatee to the testator for advances which, by the will, were to be treated as a gift to the son, will not be upheld when it was obtained by the representatives of the estate, who were in a fiduciary relation to the legatee, and who insisted that he was morally, if not legally, bound to execute the release, thereby securing it from him, when he was by business reverses broken in spirit and wavering in his purposes. Decree, *Cowen v. Adams* (1897) 80 F. 448, 25 C. C. A. 547, affirmed.—*Adams v. Cowen*, 20 S. Ct. 668, 174 U. S. 471, 44 L. Ed. 851.

302. Mode and sufficiency of payment.

See 22 Cent. Dig. Ex. & Ad. §§ 1229-1245.

303. — In general.

See 22 Cent. Dig. Ex. & Ad. §§ 1229-1242, 1245.

Counsel fees paid from a decedent's estate upon a petition of legatees which stated that counsel had been managing their interests are properly directed to be borne by such legatees, where they consented to the order directing the same to be charged to their distributive shares, without reserving any right to apply to have it finally charged to the estate. Decree, 20 App. D. C. 134, affirmed.—*McIntire v. McIntire*, 24 S. Ct. 196, 192 U. S. 116, 48 L. Ed. 369.

Charging the sums paid to the legatees on a partial distribution of a decedent's estate against their legacies, instead of against their share in the residuary estate, is not objectionable as stopping the running of interest on the legacies to the disadvantage of such legatees, because the sum paid on such distribution to one entitled to share only in such residuary estate necessarily is charged against his share thereof.—Id.

314. Proceedings for payment or distribution.

See 22 Cent. Dig. Ex. & Ad. §§ 1274-1297.

The mother's estate and her children by a second marriage are necessary parties defendant to a bill which seeks to set aside for fraud a family settlement made between the mother and the children of the first marriage, to annul the title which apparently flowed therefrom, to avoid collaterally decrees of the Porto Rican courts concerning the same, and to set aside, as simulated and fraudulent, the sales made in virtue of the title apparently vested by the settlement, where such bill, though alleging that the property transferred to the mother by such settlement was acquired by the husband by inheritance, contains no averment concerning the property allotted to the daughters which tends to rebut the legal presumption of community as to the property acquired during marriage, which the bill seeks to administer and distribute.—*Garzot v. Rios De Rubio*, 28 S. Ct. 548, 209 U. S. 283, 52 L. Ed. 794.

315. Order or decree for distribution.

See 22 Cent. Dig. Ex. & Ad. §§ 1298-1314; 30 Cent. Dig. Judgm. § 1067.

A decree of a probate court in 1864, finding that a distributee's share was a certain amount, expressed in money, which had been invested in Confederate bonds, and ordering the executor to pay the amount in such bonds, was not a decree on which the executor could be sued to pay in anything but the bonds.—*Alexander v. Bryan*, 110 U. S. 414, 4 S. Ct. 107, 28 L. Ed. 195.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) WHEN AUTHORIZED.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1382-1393.]

(B) APPLICATION AND ORDER.

345. Order or decree.

See 22 Cent. Dig. Ex. & Ad. §§ 1444-1455.

349. — Operation and effect.

See 22 Cent. Dig. Ex. & Ad. §§ 1446, 1449-1455; 30 Cent. Dig. Judgm. § 949.

Jurisdiction of state probate court to order land patented to deceased homestead entryman to be sold for debts cannot be attacked collaterally because of Rev. St. § 2296 (Comp. St. 1913, § 4551).—*Doran v. Kennedy*, 35 S. Ct. 615, 237 U. S. 362, 59 L. Ed. 996, affirming decree 141 N. W. 551, 122 Minn. 1.

356. Actions for sale.

See 22 Cent. Dig. Ex. & Ad. §§ 1463-1467.

Though a deceased debtor may have had only a life estate, a decree subjecting the land to pay her debts is not void; the construction of the deed under which she held the property being a question before the court.—*Manson v. Duncan*, 17 S. Ct. 647, 166 U. S. 533, 41 L. Ed. 1105.

A decree subjecting real estate to pay debts of a deceased debtor, rendered in a suit brought by one claiming to be a creditor, is not void, though the court may have erred in holding that the allegations and proof were sufficient to show a collectible debt.—Id.

(C) SALE.

Laches in suit to set aside sale, see Equity, ¶72.

¶380. Actions to set aside.

See 22 Cent. Dig. Ex. & Ad. §§ 1545-1553, 1555-1564, 1567.

A creditor of the estate of a decedent may maintain a suit to set aside a sale of real estate of the deceased, made and confirmed by orders of a probate court, for fraud rendering such sale invalid, although he was a party to the proceedings, where he was not a party to the fraud, and was ignorant of it until after confirmation of the sale and settlement of the executor's accounts.—*Johnson v. Waters*, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

Code Miss. 1871, § 2173, by which any action to recover property because of the invalidity of an administrator's sale by order of a probate court must be brought within one year, "if such sale shall have been made in good faith, and the purchase money paid," does not apply to an action brought by the heir to recover land bid off by a creditor at such a sale for the payment of his debt, and conveyed to him by the administrator, and not otherwise paid for than by giving the administrator a receipt for the amount of the bid.—*Clay v. Field*, 115 U. S. 260, 6 S. Ct. 36, 29 L. Ed. 375.

A plantation in Louisiana appraised in 1860 at \$119,393, and in 1866 at \$95,645, was sold in 1868 at an administrator's sale for \$2,533. *Held*, that considering the overflows of the river, and other causes affecting values of real estate similarly situated, together with the bankrupt condition of the South at this period, and in comparison with prices received at other sales, the consideration was not inadequate.—*Boyd v. Wily*, 124 U. S. 98, 8 S. Ct. 364, 31 L. Ed. 369, affirming decree (C. C.) *Same v. Wyley*, 18 F. 355.

(D) CONVEYANCE.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1594-1605.]

(E) PROCEEDS.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1606-1613.]

IX. INSOLVENT ESTATES.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 1614-1659.]

X. ACTIONS.

Continuance or revival of action by or against decedents, see Abatement and Revival, ¶73-76.

Diverse citizenship as ground of jurisdiction of federal court, see Courts, ¶312.

Due process of law, see Constitutional Law, ¶309.

Effect of death and administration in general, see Limitation of Actions, ¶80-83.

Right to sue for causing death of decedent, see Death, ¶31.

Survival of actions by or against decedents, see Abatement and Revival, ¶49-69.

¶428. Rights of action against executors or administrators.

See 22 Cent. Dig. Ex. & Ad. §§ 1677-1691.

¶430. — Personal or representative capacity.

See 22 Cent. Dig. Ex. & Ad. §§ 1683-1688.

One who, on marrying the mother of a minor, obtains possession of the minor's estate, reduces it to money, mixes the proceeds with his

own funds and those of the mother, deposits them in bank to his own personal credit, and, after the death of the minor and the mother, continues such possession and control, to the exclusion of the surviving administrator of the minor, refusing the latter's demand for a surrender of the estate, and willfully hindering and obstructing the distribution thereof, is liable to such surviving administrator personally (and not merely as administrator of his wife) for the amount of the minor's estate in his hands. 41 P. 529, 7 N. M. 666, affirmed.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

¶438. Parties.

See 22 Cent. Dig. Ex. & Ad. §§ 1765-1785, 1790; 35 Cent. Dig. Mtg. § 1232; 37 Cent. Dig. Parties, §§ 17, 25, 37, 50.

Legatees under a will are not necessary parties defendant to a suit by creditors to establish claims against the estate.—*Glover v. Patten*, 17 S. Ct. 411, 165 U. S. 394, 41 L. Ed. 760.

In a suit by the assignee of a legatee under a will against the administrators with the will annexed to set aside a receipt given by such legatee for his share, and to establish his right to an interest in the estate, the other legatees are not necessary parties. *Decree, Cowen v. Adams*, 78 F. 536, 24 C. C. A. 198, rehearing denied 80 F. 448, 25 C. C. A. 547, affirmed.—*Adams v. Cowan*, 19 S. Ct. 873, 174 U. S. 800, 43 L. Ed. 1188, affirmed on rehearing, 20 S. Ct. 668, 177 U. S. 471, 44 L. Ed. 851.

¶453. Judgment.

See 22 Cent. Dig. Ex. & Ad. §§ 1894-1908; 30 Cent. Dig. Judgm. § 440.

Executors, who are also made by the will trustees for infant legatees of their legacies, so long as they hold the personal property as part of the estate of the testator for the payment of debts or legacies, or as a residuum to be distributed, hold it by virtue of their office, and are accountable for it as executors; and where they, being made defendants as executors to a suit to determine the interests of distributees in the residuum in their hands, appear as such, and the infants are also represented by guardian, the judgment therein is conclusive on the beneficial interest of the infants, as against the objection that the executors were not before the court in their capacity as trustees.—*Colt v. Colt*, 111 U. S. 566, 4 S. Ct. 553, 28 L. Ed. 520.

When one is sued as executor, and judgment is rendered against him as such, payable out of his own goods, which judgment is subsequently reversed and is made payable out of the estate, the judgment is *res adjudicata* as to whether he is executor or not.—*Borer v. Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532, affirming decree (C. C.) *Chapman v. Borer*, 1 F. 274.

An absolute judgment against the administrator of a surety on the official bond of a federal official, rendered by a federal court sitting in Louisiana, is not objectionable on the theory that it should have been against the administrator, payable only in due course of administration, since, if by the law of that state the judgment is so payable, it will be thus interpreted and enforced, subject to the priority given to the federal government by Rev. St. U. S. §§ 3466, 3467 [U. S. Comp. St. 1901, p. 2314], in the distribution of the proceeds of the estate of any person indebted to the United States, whose estate is insufficient to pay all debts against it. Judgment 107 F. 376, 46 C. C. A. 354, affirmed.—*Smythe v. United States*, 23 S. Ct. 279, 188 U. S. 156, 47 L. Ed. 425.

455. Appeal and error.

See 22 Cent. Dig. Ex. & Ad. §§ 1929-1940; 2 Cent. Dig. App. & E. § 129.

An executor represents the person of his testator, and is charged with the duty of resisting unfounded claims against his estate; hence he may maintain a writ of error to review the decision of the supreme court of a state so construing a statute of the United States as to sustain the claims of creditors against the estate. Judgment 43 S. W. 479, 102 Ky. 359, 19 Ky. Law Rep. 1490, affirmed.—Briggs v. Walker, 19 S. Ct. 1, 171 U. S. 466, 43 L. Ed. 243.

456. Costs.

See 22 Cent. Dig. Ex. & Ad. §§ 1941-1967.

Where an administrator recovers possession of the estate of his intestate from one who has wrongfully converted it to his own use, the costs should be charged against the defendant personally, and not against the fund recovered.—Harrison v. Perea, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478, reversing 41 P. 529, 7 N. M. 666.

On the recovery by an administrator of the estate of his intestate from one who has wrongfully converted it, the fee of his solicitor is properly chargeable against the fund recovered, to an amount to be fixed in the discretion of the trial court.—Id.

XI. ACCOUNTING AND SETTLEMENT.

Allowance by court of foreign state, see Judgment, 4828.

(A) DUTY TO ACCOUNT.

462. Acting in different capacities.

See 22 Cent. Dig. Ex. & Ad. § 1987.

Where, on the death of a minor, his guardian is appointed as one of his administrators, and thereafter continues to hold the assets of his estate, such continued holding is as administrator, and not as guardian. His right and duty to account as guardian do not affect the title to the property on the death of the ward.—Harrison v. Perea, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

(B) PROCEEDINGS FOR ACCOUNTING.

Jurisdiction of Supreme Court on appeal in action involving question of due process of law, see Courts, 385(7).

469. Jurisdiction of courts.

See 22 Cent. Dig. Ex. & Ad. §§ 2000-2009, 2012, 2013.

The insanity of an executor does not affect the power of the probate court to require a settlement of his account.—Michigan Trust Co. v. Ferry, 33 S. Ct. 550, 228 U. S. 346, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221, and 175 F. 681, 99 C. C. A. 235.

472. Special proceedings to compel accounting.

See 22 Cent. Dig. Ex. & Ad. §§ 2025-2040.

Notice to an executor of a petition to a probate court for an accounting is notice that the accounting will cover all his accounts as executor, where the jurisdiction of the probate court extends to requiring him to account for and distribute all that comes into his hands.—Michigan Trust Co. v. Ferry, 33 S. Ct. 550, 228 U. S. 346, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221, and 175 F. 681, 99 C. C. A. 235.

(C) CHARGES AND CREDITS.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 2061-2068.]

(D) COMPENSATION.

Fees of consuls administering estates, see Ambassadors and Consuls, 47.

491. Effect of agreements.

See 22 Cent. Dig. Ex. & Ad. § 2082.

The restoration of the assets of a decedent's estate to the hands of the administrator, with the duty of distribution, which was effected by an order made on condition of his filing a new bond, did not relieve him from his obligation assumed under a prior order, made by consent of all parties, which directed that the assets should remain under the control of the court, and that he should act as administrator without any allowance for commission or other charge for his services as such. Decree 20 App. D. C. 134, affirmed.—McIntire v. McIntire, 24 S. Ct. 196, 192 U. S. 116, 48 L. Ed. 369.

495. Commissions.

See 22 Cent. Dig. Ex. & Ad. §§ 2089-2106, 2108.

An administrator who has obtained a decree for the recovery of the estate of his intestate, against one who has converted the same to his own use, is entitled to his statutory commissions upon the full amount of the estate, though the court has found that the person against whom the recovery is had is entitled, on a distribution of the estate, to a certain portion thereof, and has authorized him to retain such portion, only paying over to the administrator the remainder. Decree (N. M.) 41 P. 529, reversed.—Harrison v. Perea, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

(E) STATING, SETTLING, OPENING, AND REVIEW.

See 22 Cent. Dig. Ex. & Ad. §§ 2149-2296.

Proper mode of review, see Appeal and Error, 45.

Review of final judgments, see Appeal and Error, 84.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

Jurisdiction of federal courts, see Courts, 311.

519. Collection and disposition of assets.

See 22 Cent. Dig. Ex. & Ad. §§ 2310-2322; 6 Cent. Dig. Banks, § 332.

When a debt due to a deceased person is voluntarily paid by the debtor at his own domicile in a state in which no administration has been taken out, and in which no creditors or next of kin reside, to an administrator appointed in another state, and the sum paid is inventoried and accounted for by him in that state, the payment is good as against an administrator afterwards appointed in the state in which the payment is made, although that is the domicile of the deceased.—Wilkins v. Ellett, 108 U. S. 258, 2 S. Ct. 641, 27 L. Ed. 718.

For the purpose of founding administration, a simple-contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found or payable; and the treasurer of the United States cannot be compelled by writ of mandamus to pay to an administrator appointed in the District of Columbia of an inhabitant of one of the states of the Union the amount of a draft payable to the intestate at the treasury out of an appropriation made by congress and held by such administrator.—Wyman v. United States, 109 U. S. 654, 3 S. Ct. 417, 27 L. Ed. 1068.

⚡521. Presentation and allowance of claims.

See 22 Cent. Dig. Ex. & Ad. §§ 2328, 2327.

The Illinois statutes barring a claim against an estate by the omission to file it within two years, or by the settlement of the estate and discharge of the administrator (Rev. St. 1874, c. 3, §§ 60, 70, 111), cannot affect the rights of a claimant who has obtained a decree, in the federal circuit court in Arkansas, against an administrator appointed in Illinois.—*Lawrence v. Nelson*, 143 U. S. 215, 12 S. Ct. 440, 36 L. Ed. 130.

⚡524. Actions by foreign executors or administrators.

See 22 Cent. Dig. Ex. & Ad. §§ 2330-2343.

It is well settled that an executor or administrator cannot, as such, maintain a suit in one state by virtue of letters granted in another.—*Johnson v. Powers*, 139 U. S. 156, 11 S. Ct. 525, 35 L. Ed. 112.

In an action by an administrator appointed in Michigan, in the circuit court in New York, as creditor, to set aside alleged fraudulent conveyances by his intestate, the allowance of his claim against the intestate by the commissioners appointed for that purpose under How. Ann. St. Mich. §§ 5888-5906, is not competent as against these defendants to show that he is a creditor; for if it be a judgment in rem it binds only such assets as are in Michigan, while if it be in personam it only binds the parties and their privies, and defendants in this action are neither.—*Id.*

An executor appointed in another state may, by the express terms of the New Jersey statute (Acts 1879, p. 28), sue as such in that state, without obtaining an appointment there, upon filing the record of his appointment as required by said statute.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

A foreign administrator, who has brought an action in Illinois to recover for the negligent killing of his intestate, is not precluded from filing a plea to the jurisdiction of the federal Circuit Court, to which the action has been removed, by the proviso to Hurd's Rev. St. Ill. 1905, c. 3, § 18, that no nonresident shall be appointed or act as administrator.—*Patch v. Wabash R. Co.* 28 S. Ct. 80, 207 U. S. 277, 52 L. Ed. 204, 12 Ann. Cas. 518.

An executor who could have maintained in Maryland, where the land lies, a suit for the specific performance of a contract for its sale, can, under Code, D. C. § 329 (31 Stat. 1242, c. 854), maintain the suit in the District of Columbia if the defendant resides there. Decree, *Griffith v. Stewart* (1908) 31 App. D. C. 29, affirmed.—*Stewart v. Griffith*, 30 S. Ct. 528, 217 U. S. 323, 54 L. Ed. 782, 19 Ann. Cas. 639.

XIII. LIABILITIES ON ADMINISTRATION BONDS.**⚡528. Property covered.**

See 22 Cent. Dig. Ex. & Ad. §§ 2375-2394.

The heirs of one K. sold his land to H. on his agreement to pay the debts of K. *Held*, that the fact that the administrator of K., who was also the executor of H., wasted the estate of H., so that her agreement to pay the debts of K. could not be enforced, does not impose any liability on the sureties in the administrator's bond.—*Norman v. Buckner*, 135 U. S. 500, 10 S. Ct. 835, 34 L. Ed. 252.

By the sale of the land the heirs withdrew it from the custody of the administrator, which relieved him and his sureties from liability therefor, and they are not again rendered liable by the fact that the administrator afterwards acquires the property in his individual capacity.—*Id.*

⚡531. Discharge of sureties.

See 22 Cent. Dig. Ex. & Ad. §§ 2406-2430.

The effect of the resignation and discharge of one of two administrators, and the appointment of the remaining administrator as sole administrator under a new bond, is to release the sureties from further liability on the joint bond of the two administrators, though no application to that end was made on behalf of such sureties.—*Veach v. Rice*, 131 U. S. 293, 9 S. Ct. 730, 33 L. Ed. 163.

⚡533. Necessity of accounting and default by principal.

See 22 Cent. Dig. Ex. & Ad. §§ 2452-2457, 2500.

A decree of the probate court in 1864, finding that the distributee's share was a certain amount, expressed in money, and had been invested in Confederate bonds, and ordering the executor to pay the amount in such bonds, was not a decree on which a surety on the executor's bond could be sued to pay in lawful money of the United States.—*Alexander v. Bryan*, 110 U. S. 414, 4 S. Ct. 107, 28 L. Ed. 195.

⚡537. Actions.

See 22 Cent. Dig. Ex. & Ad. §§ 2453, 2485-2581.

In an action by an administrator de bonis non on the bond of the former administrator, who had been removed, the failure of the administrator to comply with the order of the court to pay over to the administrator de bonis non a balance found against him on settlement of his accounts was alleged as a breach. Defendant pleaded that the estate consisted of a claim against the United States, and that the balance found against the administrator was wholly for money collected from the government, and was not unadministered assets, and that the administrator de bonis non had no claim thereon. *Held*, that the common-law rule that the title of an administrator de bonis non extends only to the unadministered assets of the decedent which remain in specie is unchanged by Rev. St. §§ 975-978, and that a demurrer to the plea was properly overruled.—*United States v. Walker*, 109 U. S. 258, 3 S. Ct. 277, 27 L. Ed. 927.

Code Ala. 1876, § 3226, requires an action against the sureties of executors to be brought within six years after the cause of action accrued; the time to be computed from the act done or omitted by their principal which fixes the liability of the surety. A decree of the probate court in 1864 found the amount of a distributee's share in money, and that it had been invested in Confederate bonds, and ordered the executor to pay the amount in such bonds. *Held*, that a failure of the executor to comply with the decree did not fix the liability of the surety, so as to set the statute of limitations in operation.—*Alexander v. Bryan*, 110 U. S. 414, 4 S. Ct. 107, 28 L. Ed. 195.

XIV. EXECUTORS DE SON TORT.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Ex. & Ad. §§ 2582-2603.]

EXECUTORY CONTRACTS.

See Contracts.

Assignment, see Assignments, ⚡17-19.

Distinguished from deed, see Deeds, ⚡6.

EXEMPLARY DAMAGES.

See Damages, ⚡92.

EXEMPLIFICATIONS.

As evidence, see Evidence, ⚡341-349.

EXEMPTIONS.

Scope-Note.

[INCLUDES exemption from liability to seizure and sale, under legal process for payment of debts, of property of debtors, more particularly of personal property; constitutional and statutory provisions for such exemption; nature, grounds, and extent thereof in general: who are entitled to benefit of such exemptions; what articles, amount, or value, are exempt; against what liabilities exemption is allowed; waiver or loss of right to exemption; and protection and enforcement of the right.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Extent.

(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.

⌚ 2. What law governs.

3. Constitutional and statutory provisions.

(B) PERSONS ENTITLED.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 13-34.]

(C) PROPERTY AND RIGHTS EXEMPT.

⌚ 48. Earnings, wages, or salaries.

50. Life insurance.

53. Proceeds of exempt property.

58. — Property purchased with exempt money.

(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 88-104.]

II. Transfer or Incumbrance of Exempt Property.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 106-111.]

III. Waiver or Forfeiture.

IV. Protection and Enforcement of Rights.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 129-181.]

Cross-References.

See Homestead.

Congressmen from arrest, see United States, ⌚ 12.

Equal protection of law, see Constitutional Law, ⌚ 230.

From assessments, or taxation, see—

Internal Revenue, ⌚ 2.

Levees, ⌚ 24.

Licenses, ⌚ 19.

Municipal Corporations, ⌚ 434, 967.

Taxation, ⌚ 192-251, 871-876.

From being sued, see United States, ⌚ 125.

From liability, see—

Carriers, ⌚ 148-163, 180, 218, 307, 405.

Shipping, ⌚ 135-142.

Telegraphs and Telephones, ⌚ 54.

From prosecution to one furnishing evidence, see Criminal Law, ⌚ 42.

From requirement of security on appeal or other proceeding for review, see Appeal and Error, ⌚ 374.

Of bankrupt, see Bankruptcy, ⌚ 394-399.

I. NATURE AND EXTENT.

(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.

⌚ 2. What law governs.

See 23 Cent. Dig. Exemp. § 2.

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum.—Chicago, R. I. & P. Ry. Co. v. Sturm, 19 S. Ct. 797, 174 U. S. 710, 43 L. Ed. 1144, reversing judgment, 51 P. 1100, 58 Kan. 818.

⌚ 3. Constitutional and statutory provisions.

See 23 Cent. Dig. Exemp. §§ 2, 3.

The exemption of the proceeds or avails of life insurance from all liability for any debt, which is made by Laws Wash. 1896, p. 356, and Laws Wash. 1897, p. 70, was not forbidden by the provision of the Constitution of that state that the Legislature "shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." Judgment, In re Holden, 113 F. 141, 51 C. C. A. 97, reversed.—Holden v. Stratton, 25 S. Ct. 658, 198 U. S. 202, 49 L. Ed. 1018.

Exemption of seamen's wages from attachment under Act June 7, 1872, § 61, re-enacted as Rev. St. § 4536 (Comp. St. 1913, § 8325), was repealed as to seamen in the coastwise trade by Act June 9, 1874.—*Inter-Island Steam Nav. Co. v. Byrne*, 36 S. Ct. 132, 239 U. S. 459, 60 L. Ed. 382.

(B) PERSONS ENTITLED.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 13-34.]

(C) PROPERTY AND RIGHTS EXEMPT.

⚡48. Earnings, wages, or salaries.

See 23 Cent. Dig. Exemp. §§ 64-72.

Seamen's wages are protected from seizure after judgment by attachment or proceedings in aid of execution by the provisions of Rev. St. U. S. § 4536 (U. S. Comp. St. 1901, p. 3082), that no wages due or accruing to any seaman shall be subject to attachment or arrestment from any court, and declaring that payment of wages to seamen shall be valid notwithstanding any previous sale or assignment or any attachment, incumbrance, or arrestment, and that no assignment or sale of wages, made prior to the accruing thereof, shall be binding, except certain authorized advance securities, when construed in the light of other provisions of the same title, enacted to secure to the seaman his remedy in admiralty for the recovery of his wages by condemnation of the ship.—*Wilder v. Inter-Island Steam Nav. Co.*, 29 S. Ct. 58, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127.

⚡50. Life insurance.

See 23 Cent. Dig. Exemp. § 75.

The general exemption from liability for debt of the proceeds or avails of all life insurance, which is made by Laws Wash. 1895, p. 336, and Laws Wash. 1897, p. 70, includes two policies of life insurance, both payable to the wife of the insured in the event of her surviving her husband, otherwise to his estate or assigns, and one of which the husband, if surviving the designated period, may surrender and recover its full cash value. Judgment, *In re Holden*, 113 F. 141, 51 C. C. A. 97, reversed.—*Holden v. Stratton*, 25 S. Ct. 656, 198 U. S. 202, 49 L. Ed. 1018.

⚡53. Proceeds of exempt property.

See 23 Cent. Dig. Exemp. §§ 76-80.

⚡58. — Property purchased with exempt money.

See 23 Cent. Dig. Exemp. § 80.

Real estate purchased by a pensioner of the United States government with pension money is not exempted from seizure and sale on execution, by Rev. St. § 4747 [U. S. Comp. St. 1901, p. 3279], declaring that no money due

or to become due to any pensioner shall be liable to attachment, levy or seizure, whether the same remains with the pension office or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner, since the exemption provided by that section protects the fund only while in the course of transmission to the pensioner.—*McIntosh v. Aubrey*, 22 S. Ct. 561, 185 U. S. 122, 46 L. Ed. 834.

(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 88-104.]

II. TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 106-111.]

III. WAIVER OR FORFEITURE.

See 23 Cent. Dig. Exemp. §§ 112-123.

By bankrupt, see Bankruptcy, ⚡399.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Exemp. §§ 129-151.]

EXHIBITIONS.

See Theaters and Shows.

EXPENDITURES.

See Mines and Minerals, ⚡23.

Permitting expenditure as ground of estoppel in pais, see Estoppel, ⚡93.

EXPENSES.

Interstate commerce commission, see Commerce, ⚡84.

Municipal corporations, see Municipal Corporations, ⚡258.

EXPERIMENTS.

At trial, see Criminal Law, ⚡650.

EXPERT TESTIMONY.

See—

Criminal Law, ⚡468-489.

Evidence, ⚡506-523, 536-556, 563-566, 569-571.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

EXPLOSIVES.

Scope-Note.

[INCLUDES regulation of manufacture, dealing in, and use of explosive substances, and liabilities for injuries therefrom caused by negligence.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 2. Statutory and municipal regulation in general.
- 6. Injuries from accidental explosions.
- 9. — Illegal or negligent sale.

Cross-References.

Blasting levee in emergency as taking property for public use, see Eminent Domain, 2.
Conditions in insurance policies against keeping explosives on premises, see Insurance, 326.
Equal protection of laws, see Constitutional Law, 240.

Explosion as risk within insurance policy, see Insurance, 422.
Interstate commerce regulations, see Commerce, 60.
Partial invalidity of statute, see Statutes, 64.

2. Statutory and municipal regulation in general.

See 23 Cent. Dig. Explos. § 1.

The exclusion from the territory by Sess. Laws Okl. 1899, p. 187, c. 21, § 2, of illuminating fluids which have a specific gravity above 46 degrees Baume, is within the police power of the territory, although some oils may thus be excluded which are as safe for use as those which comply with the statutory standard. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed.—Waters-Pierce Oil Co. v. Deselma, 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

The plain purpose of the oil inspection provisions of Sess. Laws Okl. 1899, p. 187, c. 21, § 2, is to permit the use of illuminating fluids which, when tested by the Baume hydrometer, indicate at least 46 degrees specific gravity, and to exclude all oils of a lighter character, although the language of the statute, that all illuminating fluids shall be branded "rejected" which "have not a specific gravity of not less than 46 degrees Baume," is somewhat confusing from the use of the two negatives, and from the fact that the Baume scale is to be read inversely.—Id.

6. Injuries from accidental explosions.

See 23 Cent. Dig. Explos. §§ 3-7.

9. — Illegal or negligent sale.

See 23 Cent. Dig. Explos. § 6.

The sale by an oil company to a retail dealer as coal oil, in violation of statute, of an explosive mixture of coal oil and gasoline, with the expectation that it would be retailed to the public for domestic use as coal oil, is the proximate cause of an accident from its use by a consumer in the ordinary manner; the consumer and retailer being ignorant of its character. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed.—Waters-Pierce Oil Co. v. Deselma, 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

The absence of contractual relation between an oil company and a private consumer does not relieve the company from liability for injury to the latter in using, in the customary manner, a fluid which he and his vendor supposed was coal oil, but which the company, knowing that it contained gasoline, sold to such vendor as coal oil in violation of statute, and with the expectation that it would be retailed to the public for domestic use as such.—Id.

EXPORTS.

Tax on, see Commerce, 77.

EX POST FACTO LAWS.

Constitutional restrictions, see Constitutional Law, 197-203.

EXPRESS COMPANIES.

See—

Carriers, 32, 38.
Commerce, 33, 69.
Taxation, 45.

Due process of law, see Constitutional Law, 280, 283.

Equal protection of laws, see Constitutional Law, 229.

Gross earnings tax, partial invalidity of statute imposing, see Statutes, 64.

Liability to consignor of intoxicating liquors seized and destroyed under default judgment rendered in another state, see Judgment, 825.

Taxation of property in interstate commerce, see Commerce, 72, 73.

EXPRESS TRUSTS.

See Trusts, 3-61, 140.

EXPROPRIATION.

See Eminent Domain.

EXPULSION.

Chinese, see Aliens, 30-32.

Members of mutual benefit insurance associations, see Insurance, 749-759.

EXTRA COMPENSATION

EXTENSION.

Lease, see Landlord and Tenant, ¶87.
 Street railway franchise, see Street Railroads, ¶28.
 Time, see—
 Appeal and Error, ¶352, 353, 459, 624.
 Bills and Notes, ¶137.
 Contracts, ¶242.

Time, see—

Exceptions, Bill of, ¶40.
 Executors and Administrators, ¶225.
 Mechanics' Liens, ¶210.
 Principal and Surety, ¶103-105.

EXTINGUISHMENT.

Mortgage, see Chattel Mortgages, ¶240.

EXTORTION.

Scope-Note.

[INCLUDES obtaining or attempting to obtain from another, under color of official or other right, money or other property, more particularly by the taking or claiming, by a public officer, of illegal or excessive fees or compensation for official services, and acts of oppression or other injuries to person, property, or rights, committed by such officer under color of official authority; nature and elements of the crimes of extortion under color of office or right, oppression, etc.; nature and extent of criminal responsibility therefor; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶10. Persons liable.
- 15. Evidence.

Cross-References.

See False Personation.

Argument of counsel, see Criminal Law, ¶722.

Consolidation of indictment, see Criminal Law, ¶619.
 Jurisdiction of courts, see Criminal Law, ¶95.

¶10. Persons liable.

See 23 Cent. Dig. Extort. § 10.

A Chinese inspector, appointed by the treasury department to assist the collector of a port in enforcing the Chinese exclusion laws, is not a person acting under authority of any "revenue" or "customs" law, within the meaning of Rev. St. § 3169, or of the act of February 8, 1875, § 23, so as to be subject to indictment thereunder for extorting money under color of his office.—*Williams v. United States*, 18 S. Ct. 92, 168 U. S. 382, 42 L. Ed. 509.

A Chinese inspector may be prosecuted for extorting money under color of his office, under Rev. St. § 5481, which provides for the punishment of "every officer of the United States" who is guilty of extortion, etc., except those officers and agents otherwise specially provided for.—*Id.*

¶15. Evidence.

See 23 Cent. Dig. Extort. § 14.

On the trial of an indictment for extorting money under color of office, *held*, that it was error to admit in evidence for the prosecution an affidavit made by the defendant in a divorce suit, tending to show his financial condition at the time he entered upon the duties of his office, and, in connection therewith, a bank book showing deposits of various sums (in excess of his salary) made by him during several months comprehending the time in which the offense was laid, where there was no correspondence between the sums alleged to have been extorted and any of the items of deposit, and no evidence to connect the same with the alleged offenses.—*Williams v. United States*, 18 S. Ct. 92, 168 U. S. 382, 42 L. Ed. 509.

EXTRA COMPENSATION.

See District and Prosecuting Attorneys, ¶6.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

EXTRADITION.

Scope-Note.

[INCLUDES delivery, by one country or state to another, of persons charged with the commission of crime within the jurisdiction of such other country or state, either as matter of comity or under provisions of treaties, constitutions, or other compacts; nature and scope of the remedy in general; constitutional treaty, and statutory provisions relating thereto; in what cases, and as to what persons, and for what offenses extradition is allowed; jurisdiction over and proceedings to obtain extradition; issuance, requisites, and validity of demands, requisitions, warrants, etc.; arrest and delivery of persons accused; their rights and liabilities after extradition; review of proceedings; and costs and expenses of such proceedings.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. International.

⌘ 2. Treaties.

- 4. Authority and duty to demand or deliver persons accused.
- 5. Offenses ground for extradition.
- 8. Proceedings for extradition to foreign country.
- 9. — In general.
- 10. — Preliminary demand and executive warrant.
- 11. — Complaint.
- 13. — Arrest and bail.
- 14. — Examination and determination.
- 17. — Review of proceedings.
- 19. Rights and liabilities of accused after extradition.

II. Interstate.

⌘ 23. Authority and duty to demand or deliver persons accused.

- 24. — In general.
- 25. — From or to the territories.
- 27. Offenses ground for extradition.
- 28. Persons subject to extradition.
- 29. — Persons charged with crime.
- 30. — Fugitives from justice.
- 32. Indictment or affidavit charging offense.
- 34. Requisition and accompanying documents.
- 35. Application for arrest and proceedings thereon.
- 38. Agents to receive delivery.
- 39. Examination, determination, and review of proceedings.
- 41. Rights and liabilities of accused after extradition.

Cross-References.

Release on habeas corpus, see Habeas Corpus, ⌘19, 21, 30, 45, 76, 85, 92, 103.

I. INTERNATIONAL.

Delegation of legislative power, see Constitutional Law, ⌘61.

Due process of law, see Constitutional Law, ⌘261.

⌘2. Treaties.

See 23 Cent. Dig. Extrad. § 1.

The treaties of extradition to which the United States are parties do not guaranty a fugitive from the justice of one of the countries an asylum in the other. They only make provision that for certain crimes he shall be deprived of that asylum, and surrendered to justice, and they prescribe the mode in which this

shall be done.—*Ker v. People of State of Illinois*, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421.

There is no principle of international law by which citizens of a country are excepted from an extradition convention for surrender of "persons," where no such exception was made in the treaty.—*Charlton v. Kelly*, 33 S. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, affirming decree (C. C.) *Ex parte Charlton*, 185 F. 880.

Citizens of country of asylum are "persons," within the treaty of March 23, 1868, with Italy, in which the two countries agreed to deliver up all persons convicted or charged with any of the

crimes specified, committed within the jurisdiction of one of the contracting parties.—*Id.*

Executive recognition of the obligation of the United States to surrender its own citizens under the extradition treaty with Italy of March 23, 1868, and the supplemental treaty of 1884, notwithstanding refusal of the Italian government to surrender fugitives of Italian nationality committing crimes in the United States, is a waiver of the breach, if any.—*Id.*

◀4. Authority and duty to demand or deliver persons accused.

See 23 Cent. Dig. Extrad. §§ 4, 5.

Cuba is foreign territory, within Act Cong. June 6, 1900, c. 793, 31 Stat. 656 [U. S. Comp. St. 1901, p. 3591] amending Rev. St. U. S. § 5270, so as to provide for extradition of persons violating laws of foreign territory occupied by or under the control of the United States, notwithstanding the fact that the island is under a military government appointed by and representing the president of the United States in the work of assisting the inhabitants of that island to establish a government of their own.—*Neely v. Henkel*, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448, affirming judgment in *re Neely* (C. C.) 103 F. 631; *Neely v. Henkel*, 21 S. Ct. 308, 180 U. S. 126, 45 L. Ed. 457, affirming judgment (C. C.) 103 F. 626.

◀5. Offenses ground for extradition.

See 23 Cent. Dig. Extrad. §§ 6, 7.

A person arrested on complaint of a consular agent for the crime of forgery alleged to have been committed in Mexico is not entitled to be discharged on habeas corpus where the undisputed evidence shows that petitioner, knowing of the future engagement of a theatrical company in the city of Mexico, falsely represented himself to be its agent, printed and sold tickets of admittance, and then escaped with the money, as the treaty with Mexico (12 Stat. 1199, art. 1) provides for the surrender of fugitives if the evidence would justify committal for trial if the crime had been committed in the country where the fugitive was apprehended, and forgery may be committed by printing as well as writing instruments purporting to be the act of another.—*Benson v. McMahon*, 127 U. S. 457, 8 S. Ct. 1240, 32 L. Ed. 234.

Under Rev. St. § 5270, a United States circuit court commissioner has jurisdiction to hear a complaint for forgery, made by a Mexican consul against a fugitive from that country, and, if he deems the evidence sufficient to sustain the charge, to commit the accused until a warrant for his surrender be issued, as forgery is one of the crimes enumerated in the extradition treaty with Mexico (12 Stat. 1199).—*Id.*

A band of over 100 men crossed from Texas into Mexico and attacked about 40 Mexican soldiers, killing and wounding some of them, burning their barracks, and taking away their horses and equipments. The same band violently assaulted private citizens, taking their horses, and burning houses, and extorted small sums of money from the women, and appropriated clothes and provisions. The members of the band, who were without uniform or flag, but had red bands on their hats, remained in Mexico about 6 hours, and then recrossed. There was evidence, on the other side, that there had been on that border a revolutionary movement directed against the Mexican government the year before, and that the aim and purpose of the expedition in question was the same. *Held*, that the magistrate was justified in finding that the offense was not "of a purely political character," within the meaning of the extradition treaty with Mexico.—*Ornelas v. Ruiz*, 161 U. S. 502, 16 S. Ct. 689, 40 L. Ed. 787.

A violation of a law of the German empire against crime, such as forgery, is an offense ex-

traditable under the treaty of the United States with Prussia, when such offense is committed in Prussia, and such law is recognized and enforced in that kingdom as its law on that subject.—*Terlinden v. Ames*, 22 S. Ct. 484, 184 U. S. 270, 46 L. Ed. 534.

Absolute identity of statutes in Great Britain and the United States defining the offense of fraud by a corporate director is not necessary to make such offense "criminal by the laws of both countries," within the meaning of the provisions of article 1 of the treaty with Great Britain of 1889 (26 Stat. 1508), defining extraditable crimes. It is sufficient if the essential character of the transaction is the same and is made criminal by both statutes.—*Wright v. Henkel*, 23 S. Ct. 781, 190 U. S. 40, 47 L. Ed. 948, affirming order (C. C.) in *re Wright*, 123 F. 463.

A fugitive from the justice of Great Britain, charged with the commission of fraudulent acts as a corporate director, which are made criminal by the laws of that country and by the laws of the state of the United States in which the fugitive is found, is extraditable under the treaty with Great Britain of 1889, art. 1, including, among other extraditable crimes, fraud by a corporate director "made criminal by the laws of both countries."—*Id.*

◀8. Proceedings for extradition to foreign country.

See 23 Cent. Dig. Extrad. §§ 9-20.

◀9. — In general.

See 23 Cent. Dig. Extrad. §§ 9, 10.

A United States commissioner was not without jurisdiction over extradition proceedings because, at the time the warrant of arrest was issued, he had not been specially designated to act in such proceedings, as required by Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], where he did not assume to act therein until after he was so specially designated. Judgment (C. C.) in *re Grin*, 112 F. 790, affirmed.—*Grin v. Shine*, 23 S. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

◀10. — Preliminary demand and executive warrant.

See 23 Cent. Dig. Extrad. § 11.

The initiative of proceedings for the extradition of an alleged criminal does not necessarily rest on a requisition by the foreign government, but may be commenced by the arrest of the person charged, under a warrant issued by a United States commissioner on complaint of a foreign consul.—*Benson v. McMahon*, 127 U. S. 457, 8 S. Ct. 1240, 32 L. Ed. 234.

No preliminary requisition from the demanding government is essential to the jurisdiction of a United States commissioner, under Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], over extradition proceedings. Judgment (C. C.) in *re Grin*, 112 F. 790, affirmed.—*Grin v. Shine*, 23 S. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

The requirement in the supplemental treaty of 1884 with Italy, following provisions for arrest on a certificate from the Secretary of State that a requisition has been made, and for remand of accused until formal demand, should be made supported by evidence that if the requisition, with the evidence, shall not be made within 40 days from the arrest, the accused should be set at liberty, does not require formal demand to be proved in the preliminary proceedings within 40 days after arrest, in view of Rev. St. § 5270 (U. S. Comp. St. 1901, p. 3591), authorizing the committing magistrate, on complaint charging one of the crimes named in the treaty, to issue a warrant of arrest, to hear the evidence and commit accused to jail, and to

certify his conclusions to the Secretary of State, who, under sections 5272, 5273 (pages 3595, 3596), may issue his warrant for the surrender of the accused on proper requisition.—*Charlton v. Kelly*, 33 S. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, affirming judgment (C. C.) *Ex parte Charlton*, 185 F. 880.

11. — Complaint.

See 23 Cent. Dig. Extrad. § 12; 43 Cent. Dig. Sheriffs, § 340.

A complaint in extradition proceedings, sworn to before a United States commissioner authorized generally to take affidavits, but not specially designated to act in extradition proceedings, is sufficient under Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], which only requires that the warrant of arrest in such proceedings shall issue upon complaint made under oath. Judgment (C. C.) *In re Grin*, 112 F. 790, affirmed.—*Grin v. Shine*, 23 S. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

The omission of the word "fraudulently" from a complaint in extradition proceedings charging embezzlement does not render such complaint defective, where it alleges that the accused "wrongfully, unlawfully, and feloniously" appropriated the property.—*Id.*

A complaint in extradition proceedings does not insufficiently charge the crime of embezzlement, as defined in Pen. Code Cal. § 508, because it alleges that the money embezzled was intrusted to and received by the accused "in his capacity as clerk," instead of charging, in the language of that section, that such money came into his control or care "by virtue of his employment as such clerk."—*Id.*

A sufficient showing that one accused, in extradition proceedings, of the crime of embezzlement, had the care and control of the property within the meaning of Pen. Code Cal. § 508, defining that crime, is made by a complaint which charges him with having converted to his own use the proceeds of a check after having cashed it at a bank to which he had taken it in accordance with his employer's instructions to draw the money and take it to a railroad station, to be forwarded to another city.—*Id.*

To give jurisdiction to a United States Commissioner of a proceeding to extradite a fugitive from the justice of a foreign state, the record of proceedings before the foreign court, and the depositions of witnesses therein contained, upon which the extradition proceeding is based, need not be attached to the complaint, if they are in the custody and keeping of the one making the complaint, and the commissioner is possessed of the information which they contain, which is sufficient to satisfy him that the proceeding is based upon real grounds. Order, *Ex parte Yordi* (D. C.) 166 F. 921, affirmed.—*Yordi v. Nolte*, 30 S. Ct. 90, 215 U. S. 227, 54 L. Ed. 170.

The irregularity, if any, in making a complaint in extradition proceedings on information and belief, without attaching thereto the record of the foreign court which is the basis of the proceeding, is cured by the production at the hearing of such record, which is sufficient to justify the detention of the accused.—*Id.*

Where the consul of Mexico when making a complaint charging petitioner, who was a fugitive from justice of that republic, with the offense of forgery on information and belief, had before him the record from Mexico and the depositions of witnesses therein contained, which were sufficient to show the commission of an offense, and such record and depositions were before the commissioner when he issued the warrant based on such complaint, the proceedings were not invalidated because the record and depositions were not attached to the complaint or referred to therein as the sources from which the consul obtained his information.—*Id.*

A variance in proceedings for the extradition to a foreign country of a person charged with forgery and uttering forged paper, in that the complaint speaks of bills of exchange, while the evidence shows the forged instruments to have been promissory notes, is not fatal, where the instruments are sufficiently identified.—*Glucksman v. Henkel*, 31 S. Ct. 704, 221 U. S. 508, 55 L. Ed. 830.

The effect of a variance between the complaint and the evidence in proceedings for the extradition of a person to a foreign country is to be decided on general principles, irrespective of the law of the state where the proceedings are had.—*Id.*

A complaint sworn to upon information and belief is sufficient in proceedings for the extradition of a person to a foreign country, where it is supported by the testimony of witnesses who are stated to have deposed, and who therefore must be presumed to have been sworn.—*Id.*

A complaint in foreign extradition charging perjury is not insufficient on habeas corpus because under the law of the demanding government some false statements, immaterial under the law of the surrendering state, would constitute perjury; the alleged false statements being in fact material.—*Kelly v. Griffin*, 36 S. Ct. 487, 241 U. S. 8, 60 L. Ed. 861.

A complaint in foreign extradition proceedings charging the obtaining of money by false bills or progress estimates on government work is sufficient on habeas corpus, though the money was in fact paid on vouchers; the officer issuing the vouchers having relied on the bills and progress estimates.—*Id.*

Extradition to Canada on charge of receiving and retaining stolen goods will not be denied because Canadian statute treats the receiving and retaining as distinct offenses where the complaints charge both offenses, since receiving stolen goods is extraditable by treaties with Great Britain of August 9, 1842, art. 10, and July 12, 1889, art. 1, and this does not render the detention of accused under extradition warrant unlawful, as it will not be presumed that the demanding government will, contrary to article 3 of the latter treaty, punish for any offense other than that for which he is surrendered.—*Bingham v. Bradley*, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1138.

British Consul General's complaint in proceeding to extradite accused to Canada held to sufficiently charge that the crime was committed in Canada.—*Id.*

13. — Arrest and bail.

See 23 Cent. Dig. Extrad. § 14.

The denial of an application for bail in foreign extradition proceedings, supported by the affidavit of petitioner's physician that he was suffering from bronchitis and a severe chill which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment, is not reversible error, although the refusal was put upon the ground of the want of power.—*Wright v. Henkel*, 23 S. Ct. 781, 190 U. S. 40, 47 L. Ed. 948, affirming order (C. C.) *In re Wright*, 123 F. 463.

14. — Examination and determination.

See 23 Cent. Dig. Extrad. §§ 15, 16.

Act Cong. Aug. 3, 1882, § 5, provides that, in all cases where depositions, warrants, or other papers are offered in evidence in any extradition case, they shall be admitted as evidence and received for all the purposes of the hearing, if they are authenticated in the manner therein prescribed. *Held*, that this applies only to papers offered in evidence by the prosecution to establish the criminality of the person apprehended, and not to papers offered on the part of the accused.—*Oteiza v. Jacobus*,

136 U. S. 330, 10 S. Ct. 1031, 34 L. Ed. 464, affirming (C. C.) *In re Cortes*, 42 Fed. 47.

On examination before a commissioner of one charged with forgery, larceny, and embezzlement, the evidence showed that the accused, as bookkeeper for a firm, had access to its check books, and that three checks were missing therefrom, for which no corresponding memoranda were made on the stubs; that three checks were presented to a bank at which the firm kept a deposit by another bank, at which the accused kept a personal account; that this account showed a credit of three checks, which, upon the following day, were presented to and paid by the firm's bank; and that the accused had no authority to sign checks for the firm. *Held*, that this was sufficient evidence to justify the commissioner in committing the accused for extradition.—*Ex parte Bryant*, 17 S. Ct. 744, 167 U. S. 104, 42 L. Ed. 94.

The continuation of proceedings before an extradition commissioner for a longer period than an examining magistrate is authorized to continue a case under the state laws does not invalidate proceedings for extradition under the treaty with Great Britain, which provides that the extradition shall be carried out "in conformity with the laws regulating extradition for the time being in force in the surrendering states," as the laws contemplated therein are those of the United States, and not the laws of the particular state within which the proceedings are taken.—*Rice v. Ames*, 21 S. Ct. 406, 180 U. S. 371, 45 L. Ed. 577.

The certificate of the ambassador to Russia that the depositions and other documents offered in evidence in an extradition case "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia," which, except for the introduction of the words "as evidence," is in the language of Act Aug. 3, 1882, § 5, 22 Stat. 216, c. 378 [U. S. Comp. St. 1901, p. 3595], by which the proceeding is governed, is not defective because of the addition of these words. Judgment (C. C.) *In re Grin*, 112 F. 790, affirmed.—*Grin v. Shine*, 23 S. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

No evidence is required in extradition proceedings, that the consul of the foreign government who made the complaint had authority to do so, since all that is required by Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], is that such complaint be made under oath.—*Id.*

The production of a certified copy of an order purporting to be signed and sealed by a Russian examining magistrate, which, though not in the form of a warrant of arrest as used in the United States, was evidently designed to secure the apprehension of the accused and his production before an examining magistrate, satisfies the requirement of the extradition treaty with Russia of June 5, 1893 (28 Stat. 1071), that applications for extradition shall be accompanied by an authenticated copy of the warrant of arrest, or of some other equivalent judicial document issued by a judge or magistrate duly authorized to do so.—*Id.*

Congress has dispensed with the requirement of the extradition treaty with Russia of June 5, 1893 (28 Stat. 1071) with respect to the production of a copy of a warrant of arrest, or other equivalent document issued by a magistrate of the Russian empire, by Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], which is applicable to all foreign governments with which extradition treaties have been considered and simply requires a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty, and a certificate by the magistrate of such evidence and his conclusions thereon, to the secretary of state.—*Id.*

The preliminary examination of a person sought to be extradited under treaties of August 9, 1842 (8 Stat. 572, 576), and July 12, 1889 (26 Stat. 1508, 1510) between the United States and Great Britain on a conviction of murder must be had in the state where he was found and arrested, in view of the provision of the tenth article of the earlier treaty, that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his apprehension and commitment for trial if the crime had there been committed, and of the proviso in Sundry Civil Appropriation Act Aug. 18, 1894, c. 301, 28 Stat. 416 [U. S. Comp. St. 1901, p. 717], by which it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial, notwithstanding those parts of Act Aug. 12, 1848, c. 167 (9 Stat. 302), and of Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], which provides for bringing the accused in extradition proceedings before the justice, judge, or commissioner who issued the warrant of arrest. Judgment, *In re Walshe* (C. C.) 125 F. 572, affirmed.—*Pettit v. Walshe*, 24 S. Ct. 657, 194 U. S. 205, 48 L. Ed. 938.

The evidence is sufficient to justify commitment in extradition proceedings on a charge of forgery of railway wheat certificates purporting to show the true weight of car loads of wheat shipped from the United States to Mexico, where the accused was a member of a firm of customs brokers which presented to the Mexican customs authorities certificates showing weights much less than the true weight; that the Mexican government was thereby defrauded of a large amount of import duties; that the accused was the principal, if not the only, beneficiary of the fraud; and that, instead of reparation or explanation, resort was had to flight. Judgment, *Ex parte Ramirez* (Ariz. 1907) 90 P. 323, reversed.—*Elias v. Ramirez*, 30 S. Ct. 131, 215 U. S. 398, 54 L. Ed. 253.

Unsworn statements certified by the United States ambassador and the chargé d'affaires to be authenticated properly and legally so as to be received for similar purposes by tribunals of the country from which the accused has fled are, by the express terms of Act August 3, 1882, c. 378, 22 Stat. 215 (U. S. Comp. St. 1901, p. 3593), admissible in evidence in extradition proceedings.—*Id.*

Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty of crime as to make it proper that he should be tried.—*Glucksman v. Henkel*, 31 S. Ct. 704, 221 U. S. 508, 55 L. Ed. 830.

The right to introduce evidence of the insanity of accused in proceedings for extradition under treaty with Italy of March 23, 1868, of a fugitive from justice, was not given by Act Aug. 3, 1882, § 3, providing the means in foreign extradition for obtaining testimony of material witnesses, without which accused could not go to trial, so as to authorize a departure from the first article of the treaty, requiring a surrender on evidence of criminality, which according to laws of the place where the fugitive was found would justify his arrest if the crime had been there committed.—*Charlton v. Kelly*, 33 S. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, affirming judgment (C. C.) *Ex parte Charlton*, 185 F. 880.

Properly authenticated affidavits are not inadmissible in proceedings for extradition to Canada because taken *ex parte* under treaty

with Great Britain Aug. 9, 1842, art. 10, and Rev. St. § 5271 (Comp. St. 1913, § 10111), rendering warrants or other papers admissible in evidence at the hearing if properly authenticated.—*Bingham v. Bradley*, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1136.

17. — Review of proceedings.

See 23 Cent. Dig. Extrad. § 20.

A finding that the identity of the prisoner with the person whose extradition to a foreign country is sought is made out cannot be said to be erroneous where, in addition to a photograph under seal of the foreign magistrate, which represents the prisoner, there are other facts tending to establish such identity.—*Gluckman v. Henkel*, 31 S. Ct. 704, 221 U. S. 508, 55 L. Ed. 830.

19. Rights and liabilities of accused after extradition.

See 23 Cent. Dig. Extrad. §§ 22-24.

A person brought within the jurisdiction of a court by virtue of an extradition treaty can only be tried for an offense described in that treaty, and only for the offense charged against him in the extradition proceedings, until reasonable opportunity has been given him after trial or release from such charge to return to the asylum from which he has been forcibly taken by means of the extradition proceedings. Hence a person extradited on a charge of murder of a seaman cannot be tried in this country under section 5347, Rev. St., charging him with inflicting cruel and unusual punishment on a seaman, even though the evidence on the two charges be identical.—*United States v. Rauscher*, 119 U. S. 407, 7 S. Ct. 234, 30 L. Ed. 425.

So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner who committed him for extradition, and upon one of the charges for which he was surrendered, it is immaterial whether he is indicted on all of such charges.—*Ex parte Bryant*, 17 S. Ct. 744, 167 U. S. 104, 42 L. Ed. 94.

Under article 3 of the extradition convention of 1890 between the United States and Great Britain (26 Stat. 1508), which provides that no person surrendered by either of the parties shall be triable or tried for any offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered, construed in connection with Rev. St. § 5275, which authorizes and requires the United States authorities to protect all persons surrendered by any foreign government for trial until the conclusion of their trial, and their final discharge from custody or imprisonment, and for a reasonable time thereafter, a person surrendered by the Canadian authorities on a requisition from the United States cannot be arrested and held for a different offense committed prior to his extradition, until the charge on which he was surrendered has been finally disposed of, although, after having been admitted to bail on such charge, he may have returned to Canada, as until his final discharge he is in the custody either of the authorities or of his bail.—*Cosgrove v. Winney*, 19 S. Ct. 598, 174 U. S. 64, 43 L. Ed. 897.

The omission of the words, "or be punished," from the provision of article 3 of Extradition Treaty July 12, 1889 (26 Stat. 1508), with Great Britain, that no person extradited "shall be triable or be tried" for any crime or offense committed prior to his extradition other than the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered, does not justify the imprisonment, upon a former conviction for another and different offense, of a person extradited from Canada for an offense against the United States, until he has had an opportunity to return to

Canada—especially where extradition has been refused for the other offense—since this omission is inadequate to overcome the positive provisions (Rev. St. U. S. §§ 5272, 5275 [U. S. Comp. St. 1901, pp. 3595, 3596]), and the otherwise manifest scope and object of the treaty, and the earlier Ashburton treaty of 1842 (8 Stat. 572-576), which are to limit imprisonment as well as the trial to the crime for which extradition has been demanded and granted.—(1907) *Johnson v. Browne*, 27 S. Ct. 539, 205 U. S. 309, 51 L. Ed. 816, 10 Ann. Cas. 636, affirming order (1906) *Ex parte Browne*, 148 F. 68.

Immunity from trial for an offense committed by a person after his extradition until he has been afforded an opportunity to return to the country whence he was extradited was not given by the provisions of the treaties with Great Britain of August 9, 1842 (8 Stat. 576), and July 12, 1889 (26 Stat. 1508), or Rev. St. U. S. § 5275 (U. S. Comp. St. 1901, p. 3596), under which such immunity as to prior offenses only is secured. Judgments *Ex parte Collins*, 90 P. 827, 151 Cal. 340, and 91 P. 397, 151 Cal. 341, affirmed.—*Collins v. O'Neil*, 29 S. Ct. 573, 214 U. S. 113, 53 L. Ed. 933.

An extradited person is given no right to have his trial brought to a conclusion before he can be tried for an offense subsequently committed by the provisions of the treaties with Great Britain of August 9, 1842 (8 Stat. 576), and July 12, 1889 (26 Stat. 1508), or Rev. St. U. S. § 5275 (U. S. Comp. St. 1901, p. 3596), under which he is entitled to a reasonable time to return to the country whence he was extradited before he can be tried for another offense committed prior to his extradition.—*Id.*

Immunity from trial for an offense committed after extradition, before opportunity to return to the country whence he was extradited, was not given by treaties with Great Britain of August 9, 1842, and July 12, 1889, or by Rev. St. § 5275 (Comp. St. 1913, § 10121).—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

Extradited person has no right to have trial of the offense for which he was extradited before he can be tried for an offense subsequently committed, by treaties with Great Britain of August 9, 1842, and July 12, 1889, or Rev. St. § 5275 (Comp. St. 1913, § 10121).—*Id.*

II. INTERSTATE.

23. Authority and duty to demand or deliver persons accused.

See 23 Cent. Dig. Extrad. §§ 23, 29.

24. — In general.

See 23 Cent. Dig. Extrad. § 23.

The mere suggestion that the alleged fugitive from the justice of another state, because of his race and color, will not receive a fair and impartial trial, and will not be adequately protected against violence while in custody, does not require the executive of the state in which he may be found to refuse to surrender him on demand made in conformity with the federal Constitution and laws, nor furnish a ground for his release on habeas corpus.—*Marbles v. Creecy*, 30 S. Ct. 32, 215 U. S. 63, 54 L. Ed. 92.

25. — From or to the territories.

See 23 Cent. Dig. Extrad. § 29.

Porto Rico is a territory, within the meaning of the provision of Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), authorizing the executive authority, of any state or territory to make requisition for the extradition of fugitive criminals. Order (1907) 81 N. E. 773, 189 N. Y. 124, affirmed.—*People of State of New York ex rel. Kopel v. Bingham*, 29 S. Ct. 190, 211 U. S. 468, 53 L. Ed. 286.

Precisely the same power to issue a requisition for the return of a fugitive criminal as

is possessed under Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), by the governor of any organized territory, is given the governor of Porto Rico by the provisions of the Foraker act (Act April 12, 1900, c. 191, § 14, 31 Stat. 80), that the laws of the United States not locally inapplicable shall be in force and effect in Porto Rico, and of section 17 (page 81) that the governor of Porto Rico shall have all the powers of governors of the territories of the United States that are not locally inapplicable.—Id.

◀27. Offenses ground for extradition.

See 23 Cent. Dig. Extrad. § 30.

Rev. St. § 5278, requiring the surrender of a fugitive from justice, found in one of the territories, to the state in which he stands charged with "treason, felony, or other crime," embraces every offense known to the laws of the demanding state, including misdemeanors.—*Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. Ed. 250.

◀28. Persons subject to extradition.

See 23 Cent. Dig. Extrad. §§ 31-32.

◀29. — Persons charged with crime.

See 23 Cent. Dig. Extrad. § 31.

A person against whom a complaint for a felony has been filed before a committing magistrate, who can only charge or hold for trial before another tribunal, is charged with the crime within the meaning of Const. U. S. art. 4, § 2, subd. 2, and of Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], providing for the extradition of persons charged with treason, felony, or other crime.—*In re Strauss*, 25 S. Ct. 535, 197 U. S. 324, 49 L. Ed. 774.

◀30. — Fugitives from justice.

See 23 Cent. Dig. Extrad. § 32.

To be a fugitive from justice, in the sense of the act of congress regulating the subject of extradition (Rev. St. § 5278), it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against its laws, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another state. *Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544, affirming judgment *In re Roberts* (D. C.) 24 F. 132.

One who comes into a state on business for a single day, eight days after the alleged commission of a crime therein, and months before an indictment is bound against him for such offense, does not, by his departure from the state after the conclusion of his business, become a "fugitive from justice" within the meaning of Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled. Judgment, *People v. Hyatt*, 64 N. E. 825, 172 N. Y. 176, 80 L. R. A. 774, reversing order (Sup.) 76 N. Y. Supp. 1028, affirmed.—*Hyatt v. People of State of New York*, 23 S. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

One who was not within a state when the crime of larceny or false pretense was, if ever, committed therein, cannot be deemed a "fugitive from justice" within the meaning of Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled.—Id.

The belief of the accused, when leaving the demanding state, that he had not committed any crime against the laws of that state, does

not prevent his being a fugitive from justice within the meaning of the provision of Const. U. S. art. 4, § 2, and Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], relating to extradition proceedings.—*Appleyard v. Commonwealth of Massachusetts*, 27 S. Ct. 122, 203 U. S. 222, 51 L. Ed. 161, 7 Ann. Cas. 1073.

To be a fugitive from justice within the meaning of the provisions of Const. U. S. art. 4, § 2, and Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], relating to extradition proceedings, it is only necessary that the accused, having been in the demanding state when the crime was committed, thereafter leave that state and be found within the territory of another.—Id.

A second indictment for the same offense may serve as the basis for the second extradition of a person as a fugitive from justice without violating any rights secured to him by the federal Constitution or laws, where the first indictment, on which the accused was originally extradited, was dismissed on motion of the state's attorney before the accused was placed in jeopardy.—*Bassing v. Cady*, 23 S. Ct. 392, 208 U. S. 386, 52 L. Ed. 540, 13 Ann. Cas. 906.

A person indicted the second time for the same offense is none the less a fugitive from justice within the meaning of Const. U. S. art. 4, § 2, and Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), governing extradition, because, after the dismissal of the first indictment, on which he was originally extradited, he left the state with the knowledge of, or without objection by, the state authorities.—Id.

One who does, within the state, an overt act which is, and is intended to be, a material step towards accomplishing a crime, and then absents himself from the state, and does the rest elsewhere, becomes a fugitive from justice for extradition purposes when the crime is complete, if not before.—*Straasheim v. Daily*, 31 S. Ct. 558, 221 U. S. 280, 55 L. Ed. 735.

The motive inducing departure from demanding state of a person accused of having successfully conspired to escape from a hospital for insane criminals is immaterial in an interstate extradition proceeding if the conspiracy charged constituted a crime.—*Drew v. Thaw*, 35 S. Ct. 137, 235 U. S. 432, 59 L. Ed. 302, reversing order (D. C.) *Ex parte Thaw*, 214 F. 423.

The surrender of a person in one state for removal to another as a fugitive is prohibited by Rev. St. § 5278 (Comp. St. 1913, § 10126), where the person was not a fugitive from the justice of the demanding state.—*Innes v. Tobin*, 36 S. Ct. 290, 240 U. S. 127, 60 L. Ed. 562, affirming judgment *Ex parte Innes*, 173 S. W. 291.

◀32. Indictment or affidavit charging offense.

See 23 Cent. Dig. Extrad. §§ 36-38.

Upon a demand for the surrender, under Rev. St. § 5278, of a fugitive from justice from one of the states, found in a territory, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state.—*Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. Ed. 250.

Where the indictment sufficiently charges an offense against the laws of the demanding state, an objection not apparent on the face of it, but which can only arise at the trial on the evidence, will not affect the validity of the extradition proceedings.—*Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544, affirming judgment *In re Roberts* (D. C.) 24 F. 132.

An indictment, whether good or bad as a pleading, which unmistakably describes every

element of the crime of false swearing, as defined by Pen. Code Tex. 1895, art. 209, is a charge of crime within the meaning of Const. U. S. art. 4, § 2, par. 2, regulating interstate extradition. Judgment, *Ex parte Pierce* (C. C. 1907) 155 F. 663, affirmed.—*Pierce v. Creecy*, 28 S. Ct. 714, 210 U. S. 387, 52 L. Ed. 1113.

The executive of a state upon whom demand is made for the arrest and extradition of a fugitive criminal has no power to issue his warrant of arrest for a crime committed in another state, so far as any authority has been conferred upon him by the federal statutes, unless he is furnished with a copy of the indictment or affidavit required by the provisions of Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), governing interstate extradition. Judgment (1907) 44 So. 685, 152 Ala. 68, affirmed.—*Compton v. State of Alabama*, 29 S. Ct. 605, 214 U. S. 1, 53 L. Ed. 885, 16 Ann. Cas. 1098.

An affidavit before a notary who, under Civ. Code Ga. 1895, p. 982, § 4052, is *ex officio* a justice, must be regarded as satisfying the requirement of the provisions of Rev. St. U. S. (Pen. Code 1895, p. 93, § 293) § 5278 (U. S. Comp. St. 1901, p. 3597), governing interstate extradition, that such affidavit be made before a magistrate, where the Governor of Georgia has based his requisition upon such affidavit, and a warrant has been issued thereon by the Governor of the state upon whom the demand for arrest and extradition was made.—*Id.*

An indictment by a New York grand jury that accused, an insane criminal, conspired to escape to the obstruction of justice, and did escape, sufficiently charges a crime for the purpose of interstate extradition, in view of Penal Law N. Y. §§ 580, 583.—*Drew v. Thaw*, 35 S. Ct. 137, 235 U. S. 432, 59 L. Ed. 302, reversing order (D. C.) *Ex parte Thaw*, 214 F. 423.

34. Requisition and accompanying documents.

See 23 Cent. Dig. Extrad. §§ 35-38.

In extradition proceedings under Rev. St. § 5278, the fact that no copy of the laws of the demanding state, showing what constituted the crime charged, was submitted to the governor before the issue of his warrant for the fugitive, is not a valid objection to the validity of the proceedings.—*Roberts v. Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544, affirming judgment *In re Roberts* (D. C.) 24 F. 132.

35. Application for arrest and proceedings thereon.

See 23 Cent. Dig. Extrad. § 39.

The person demanded in interstate extradition proceedings has no right to a hearing before the governor on the question whether he has been substantially charged with a crime and whether he is a fugitive from justice. Judgment, *State v. Clough*, 53 A. 1086, 71 N. H. 594, 67 L. R. A. 946; *Id.* 55 Atl. 554, 72 N. H. 178, 67 L. R. A. 946, affirmed.—*Munsey v. Clough*, 25 S. Ct. 282, 196 U. S. 364, 49 L. Ed. 515.

Independent proof, apart from the requisition papers, that the accused was a fugitive from justice, need not be demanded by the Governor of the surrendering state before issuing his warrant of arrest in extradition proceedings.—*Pettibone v. Nichols*, 27 S. Ct. 111, 203 U. S. 192, 51 L. Ed. 148, 7 Ann. Cas. 1047; *Moyer v. Same*, 27 S. Ct. 121, 203 U. S. 221, 51 L. Ed. 160.

Arranging and carrying out the arrest and deportation of the accused so as to leave him no opportunity to prove before the Governor of the surrendering state that he was not a fugitive from justice, or to appeal to some court of that state to prevent his illegal deportation, does not violate the provisions of Const. U. S. art. 4, § 2, or Rev. St. U. S. § 5278 [U. S. Comp. St.

1901, p. 3597], relating to extradition proceedings.—*Id.*

An extradition requisition reciting that the accused was charged by indictment with a specified crime and had become a fugitive from the justice of that state, accompanied by a certified copy of the indictment, makes a *prima facie* case against the accused as an alleged fugitive from justice, and in the absence of proof to the contrary, authorizes the executive of the surrendering state to issue his warrant for the arrest and delivery of the alleged criminal.—*Marbles v. Creecy*, 30 S. Ct. 32, 215 U. S. 63, 54 L. Ed. 92.

The executive of the surrendering state may act upon the requisition papers in the absence of the accused, and without previous notice to him.—*Id.*

38. Agents to receive delivery.

See 23 Cent. Dig. Extrad. § 47.

An agent appointed by the state in which a fugitive from justice stands charged with crime to receive such fugitive from the state by which he is surrendered is not an officer of the United States, in such sense that he may not be compelled to produce such fugitive in his custody by writ of habeas corpus issued from a state court.—*Robb v. Connolly*, 111 U. S. 624, 4 S. Ct. 544, 28 L. Ed. 542.

39. Examination, determination, and review of proceedings.

See 23 Cent. Dig. Extrad. §§ 45, 46.

The courts of a state from which a fugitive from justice is demanded on extradition do not deny to such person any rights secured to him by the constitution and laws of the United States by refusing to pass on the constitutionality of the statute of the demanding state, under which the indictment against such person is sufficient.—*Pearce v. State of Texas*, 155 U. S. 311, 15 S. Ct. 116, 39 L. Ed. 164.

41. Rights and liabilities of accused after extradition.

See 23 Cent. Dig. Extrad. §§ 51-53.

A fugitive from justice, surrendered by one state upon the demand of another, may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders, without first having had an opportunity to return to the state by which he was surrendered.—*Lascelles v. State of Georgia*, 148 U. S. 537, 13 S. Ct. 687, 37 L. Ed. 549.

Nothing in the interstate extradition provisions of Rev. St. § 5278 (Comp. St. 1913, § 10126), gives immunity after acquittal in the demanding state from surrender to another state upon an extradition warrant.—*Innes v. Tobin*, 36 S. Ct. 290, 240 U. S. 127, 60 L. Ed. 562, affirming judgment *Ex parte Innes*, 173 S. W. 291.

The failure of Congress in Rev. St. § 5278 (Comp. St. 1913, § 10126), to provide for the case of one who has been brought into a state involuntarily by a requisition from another state, leaves the state free to deliver accused to any state from whose justice he has fled.—*Id.*

EXTRALATERAL RIGHTS.

See Mines and Minerals, 31.

EXTRA PAY.

See Army and Navy, 13, 23.

EXTRATERRITORIAL.

Operation of statutes, see Monopolies, 10.
Vendor and purchaser, statute relating to cancellation of contract, see Vendor and Purchaser, 2.

EXTRA WORK.

Compensation for, see—
Contracts, ¶232.
United States, ¶39, 70.

EXTREMIS.

Errors in extremis causing collision, see Collision, ¶108.

EXTRINSIC EVIDENCE.

See—
Evidence, ¶386-463.
Wills, ¶485-490.

FACT.

Evidence of matters of fact or conclusions, see Evidence, ¶471.
Findings of fact, see Trial, ¶349-358, 388-404.
Judicial notice of facts, see Evidence, ¶5-51.
Presumptions as to continuance of fact, see Evidence, ¶67.
Questions of law and fact, province of court and jury, see—
Criminal Law, ¶733-741.
Trial, ¶135-143.

FACTORIZING PROCESS.

See Garnishment.

FACTORS.*Scope-Note.*

[INCLUDES the regulation and conduct of the business of receiving and selling goods consigned or otherwise intrusted to factors, commission merchants, etc., for sale; rights, powers, duties, and liabilities of persons engaged in such business and the principals or consignors, as between themselves and as to others, arising from such consignments, etc., and incidental transactions, such as advances, pledges, etc., especially as affected by their possession or control of the goods or of evidences of title.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶19. Power to pledge.
- 46. Actions for compensation.
- 47. Lien.
- 58. Protection, under factors' acts, of persons dealing with factor.
- 63. — Purchasers.

Cross-References.

See Brokers.

¶19. Power to pledge.

See 23 Cent. Dig. Fact. § 20.

At common law a factor has no power to pledge, either by transfer of the goods themselves or of the bill of lading, or other symbol of title; and, under the Missouri act of March 4, 1869, applying in terms only to cases of negotiation of the symbol of title by written indorsement, a transfer not shown to have been made by written indorsement is not protected.—*Allen v. St. Louis Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

The fact that the active member of a firm of factors is also a partner of consignors of goods in working their cotton plantations will not validate a pledge of the goods by the factors to secure a debt due by them, if such partner was not held out by the consignors as the owner of the property, or as authorized by them to dispose of it otherwise than as a factor, and was not understood by the pledgee to be acting in any other capacity.—*Id.*

¶46. Actions for compensation.

See 23 Cent. Dig. Fact. §§ 72-80.

In an action by cotton factors for commissions earned and advances made by them for defendants in the execution of contracts made by them on behalf of defendants upon the New York Cotton Exchange, and under its rules and regulations, evidence is admissible of the statutes of

New York under which the exchange was organized, and of the rules under which its business was conducted.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

¶47. Lien.

See 23 Cent. Dig. Fact. §§ 65-71.

Where goods are transferred to a factor to secure his lien for advances, he is not bound to set off against his lien the amount of accommodation drafts drawn by the company and used by himself for his own benefit, but which were not due when the goods were transferred to him, and which have never been paid by the company.—*Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234, 11 S. Ct. 52, 34 L. Ed. 655, affirming decree (C. C.) 29 F. 611.

¶58. Protection, under factors' acts, of persons dealing with factor.

See 23 Cent. Dig. Fact. §§ 90-94.

¶63. — Purchasers.

See 23 Cent. Dig. Fact. § 94.

Act Mo. March 28, 1874, affixing a penalty to the negotiation or pledge of bills of lading or warehouse receipts by an agent or consignee without written authority of the owner or consignor, does not invalidate a transfer by an agent that previously was valid, as between his principal and his transferee.—*Allen v. St. Louis Bank*, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

FALSE IMPRISONMENT.

Scope-Note.

[INCLUDES restraint of the person of another, without sufficient authority, not merely incident to a malicious prosecution; justification or excuse for such restraint; and liabilities and remedies therefor, civil or criminal.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Civil Liability.

(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

- ①. Nature and elements of false imprisonment.
- 7. — Illegality of arrest.

(B) ACTIONS.

II. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. False Imp. §§ 122-126.]

Cross-References.

See—

Arrest, ⑥61, 62.
Malicious Prosecution.

I. CIVIL LIABILITY.

(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

- ①. Nature and elements of false imprisonment.

See 23 Cent. Dig. False Imp. §§ 1-73.

- ⑦. — Illegality of arrest.

See 23 Cent. Dig. False Imp. §§ 5-61, 79.

A warrant for the arrest of "James West," without other description of the person intended, gives no authority to arrest a person whose

name is "V. M. West" or "Vandy West," and who has never been known as "James West"; and it is immaterial that such person was the one the commissioner had in mind when he issued the warrant.—West v. Cabell, 153 U. S. 78, 14 S. Ct. 752, 38 L. Ed. 643.

(B) ACTIONS.

See 23 Cent. Dig. False Imp. §§ 80-121.

Federal jurisdiction, see Courts, ④414.

II. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. False Imp. §§ 122-126.]

FALSE PERSONATION.

Scope-Note.

[INCLUDES deception by assuming and acting in the character of another person, or by assuming to be a public officer, or a person having any special authority or privilege, and acting in such assumed capacity; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.]

Analysis.

- ④1. Nature of offense in general.
2. Elements of offenses.
3. Indictment or information.
4. — Requisites and sufficiency in general.

④1. Nature of offense in general.

See 23 Cent. Dig. False Pers. § 1.

A false representation as to an office having no legal existence is within Cr. Code, § 32, punishing one who, with intent to defraud, falsely assumes to be an officer or employé of the United States.—United States v. Barnow, 36 S. Ct. 19, 239 U. S. 74, 60 L. Ed. 155, reversing judgment (D. C.) 221 F. 140.

A Congressman is an officer acting under the authority of the United States within Cr. Code, § 32, making criminal false personation of officer with intent to defraud.—Lamar v. United States, 36 S. Ct. 535, 241 U. S. 103, 60 L. Ed. 912, affirming judgment (C. C. A.) 227 F. 1019.

Any overt act to carry out fraudulent intent falls within condemnation of Cr. Code, § 32, providing for punishment of one who with intent to defraud pretends to be an officer of the United States.—Id.

④2. Elements of offenses.

See 23 Cent. Dig. False Pers. § 1.

Consummation of fraud with consequent injury is not essential to the offense denounced by Cr. Code, § 32, punishing false personation of a federal officer.—United States v. Barnow, 36 S. Ct. 19, 239 U. S. 74, 60 L. Ed. 155, reversing judgment (D. C.) 221 F. 140.

④3. Indictment or information.

See 23 Cent. Dig. False Pers. §§ 2, 3.

④4. — Requisites and sufficiency in general.

See 23 Cent. Dig. False Pers. § 1.

Indictment charging false personation, with intent to defraud, of an officer of the United States contrary to Cr. Code, § 32, is not insufficient because nature of fraud was not set forth.—Lamar v. United States, 36 S. Ct. 255, 240 U. S. 60, 60 L. Ed. 526.

An indictment charging false personation of a United States officer contrary to Cr. Code, § 32, held not insufficient as failing to describe the circumstances of offense.—Lamar v. United States, 36 S. Ct. 535, 241 U. S. 103, 60 L. Ed. 912, affirming judgment (C. C. A.) 227 F. 1019.

FALSE PRETENSES.

See 23 Cent. Dig. False Pret.

See—

False Personation.
Forgery.

FALSE REPRESENTATIONS.

See cross-references under Misrepresentations.

FALSE SWEARING.

See Perjury.

In naturalization proceedings, see Aliens, ④67.

FALSIFYING.

Instruments, in general, see Forgery.

FAMILY.

See—

Homestead.
Husband and Wife.
Parent and Child.

FARES.

See Carriers, ④251-254, 354-356.

FAULT.

See—

Collision.
Negligence.

FEDERAL COURTS.

See—

Courts, ④256-470, 489-509, 518.
Removal of Causes.

FEDERAL EMPLOYERS' LIABILITY ACT.

See—

Appeal and Error, ④216, 231, 292, 719, 854, 1033, 1064, 1144.
Commerce, ④8, 27, 58.
Constitutional Law, ④301, 314.
Costs, ④280.
Courts, ④97, 352, 359, 382, 385(4, 6), 394(1, 2, 7, 25), 396, 399, 400.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

SUP. CT. DIG.—69

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See—

Damages, ¶218.
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 Jury, ¶32.
 Mandamus, ¶4.
 Master and Servant, ¶87, 100, 137, 204, 288,
 250¼, 253¼, 279, 286, 288, 289, 295.
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 Removal of Causes, ¶3.
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 Trial, ¶253.

FEDERAL EQUITY RULES.

See Courts, ¶388, and cross-references under
 Equity Rules.

FEDERAL GOVERNMENT.

See United States.

FEDERAL OFFICERS.**See—**

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FEDERAL QUESTIONS.**See—**

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In particular actions or proceedings.**See—**

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Ambassadors and Consuls, ¶7.
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FENCES.

See 23 Cent. Dig. Fences.

See Railroads, ¶103, 361.

FERÆ NATURÆ

See Animals, ¶2.

FERRIES.***Scope-Note.***

[INCLUDES the establishment, maintenance, regulation, and use of ferries for the passage of the public over inland waters, subject to payment of tolls; organization, franchises, and powers of ferry companies; and rights, duties, and liabilities of individuals or corporations exercising ferry franchises, in their capacities as carriers as well as otherwise.

[For related matters under other topics, see cross-references after analysis.]

Analysis.**I. Establishment and Maintenance.**

¶9. Franchises and privileges.

16. — Extent and exclusiveness of franchise.

II. Regulation and Operation.

¶30. Licenses and taxes.

32. Injuries incident to operation.

Cross-References.

Impairing obligation of contract, see Constitutional Law, ¶128.
 Powers of state to regulate ferriage across boundary streams, see Commerce, ¶10, 69.
 Tax as tax on tonnage, see Commerce, ¶78.

Taxation denying due process of law, see Constitutional Law, ¶280.
 Taxation of stock as interfering with commerce, see Commerce, ¶74.

I. ESTABLISHMENT AND MAINTENANCE.**¶9. Franchises and privileges.**

See 23 Cent. Dig. Ferries, §§ 9-66; 36 Cent. Dig. Mun. Corp. § 642.

¶16. — Extent and exclusiveness of franchise.

See 23 Cent. Dig. Ferries, §§ 33-40.

The owner of a ferry franchise purchased from the original licensee, to whom it was granted without any exclusive privileges, cannot claim an exclusive privilege to such franchise for the distance of a half mile from his ferry because, after the grant of the franchise, the state passed an act (Act Va. 1840) prohibiting county courts from granting ferry licenses within a half mile of existing ferries, but which was repealed by Act W. Va. 1882, providing that toll bridges might be erected over the Ohio river, and that no ferry privileges or franchises should preclude the erection of such bridges.—*Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 S. Ct. 301, 34 L. Ed. 967, affirming judgment *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009.

II. REGULATION AND OPERATION.

Interstate commerce regulations, see Commerce, ¶8.

¶30. Licenses and taxes.

See 23 Cent. Dig. Ferries, § 77.

Act Ill. March 2, 1819, authorizing Samuel Wiggins to establish a ferry across the Mississippi river at a point opposite the city of St. Louis, enacted in section 4 "that the ferry established shall be subject to the same taxes as are now, or hereafter may be, imposed on other ferries within this state, and under the same regulations and forfeitures." The charter of the Wiggins Ferry Company (Act Ill. Feb. 11, 1853), the authorized successor to the franchise of Samuel Wiggins, provided that nothing therein contained should "be construed to create any private right, so as to interfere with the powers of any existing municipal corporation, or with the right of the Legislature" to create municipalities within the limits specified, and to confer thereon the usual police powers. *Held*, that these provisions did not constitute a contract between the ferry company and the state, by which the power to tax the ferry was limited to the imposition of the same taxes as imposed on other ferries within the state, and did not exempt it from an annual license tax on each of its boats, under an ordinance of the city of East St. Louis, which made no discrimination in favor of any other ferry within its corporate limits.—*Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 2 S. Ct. 257, 27 L. Ed. 419.

¶32. Injuries incident to operation.

See 23 Cent. Dig. Ferries, §§ 73-87.

Mere failure of a ferry company to provide a seat for a passenger on its boat is, in law and of itself, no proof of negligence.—*Burton v. West*

Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215.

FERRYBOATS.

Requiring license for selling liquor on ferryboats as interference with commerce, see Commerce, ¶14.

FERTILIZERS.

Inspection as interference with commerce, see Commerce, ¶51.

FIDEI COMMISSUM.

See Trusts.

FIDELITY INSURANCE

See Insurance, ¶430.

FIDUCIARY RELATIONS.

See—

Account, ¶4.
 Adverse Possession, ¶61.
 Bankruptcy, ¶426.
 Brokers.
 Corporations, ¶308-319.
 Equity, ¶21.
 Factors.
 Guardian and Ward.
 Partnership.
 Principal and Agent.
 Trusts.
 Witnesses, ¶197-202.

FIELD NOTES.

Evidence of boundaries, see Boundaries, ¶36.

FIERI FACIAS.

See Execution.

FILING.

Bond or undertaking on appeal or writ of error, see Appeal and Error, ¶387.
 Certificate of delinquency, see Taxation, ¶687.
 Certificate of location of mine, see Mines and Minerals, ¶21.
 Charter or articles of association of foreign corporation, see Corporations, ¶644.
 Claim proved against bankrupt's estate, see Bankruptcy, ¶343.
 Lis pendens, see Lis Pendens, ¶18.
 Mortgage, see—
 Chattel Mortgages, ¶87.
 Mortgages, ¶95½, 96.
 Record on appeal or writ of error, see Appeal and Error, ¶619-633.

FINAL ACCOUNTS.

See Executors and Administrators, ¶462-495.

FINAL JUDGMENT.

See—
Appeal and Error, ¶75-80, 1175.
Courts, ¶387(4).
Criminal Law, ¶1187.

FINDING LOST GOODS.

[No paragraphs or references in this Digest. But see 22 Cent. Dig. Finding L. G.]

FINDINGS.

See—
Appeal and Error, ¶265, 266, 704, 1007-1022, 1071.
Collision, ¶149.
Commerce, ¶95, 98.
Courts, ¶468.
Criminal Law, ¶1157-1159.
Ejectment, ¶111.
Equity, ¶381, 409.
Limitation of Actions, ¶201.
Mines and Minerals, ¶38.
New Trial, ¶85.
Trial, ¶349-358, 388-404.

FINES.

See 22 Cent. Dig. Fines.
See—
Army and Navy, ¶48.
Contempt, ¶73-82.
Criminal Law, ¶1214.
Penalties.

FIREARMS.

See Weapons.

FIREBOATS.

Injuries from fireboats, see Admiralty, ¶27.
Jurisdiction of admiralty of action for injuries by fireboat, see Admiralty, ¶19.

FIRE INSURANCE.

See Insurance.

FIREMEN.

Fellow servant, see Master and Servant, ¶198.

FIRES.

See 22 Cent. Dig. Fires.
See—
Bailment, ¶14.
Depositions, ¶85.
Innkeepers, ¶2.
Judgment, ¶559.
Railroads, ¶453-485.
United States, ¶51.
Waters and Water Courses, ¶200, 206.

FISCAL MANAGEMENT.

See—
Counties, ¶150-194.
Municipal Corporations, ¶859-1000.
Schools and School Districts, ¶97-105.
States, ¶117-168.
Towns, ¶47-61.
United States, ¶81-91.

FISH.*Scope-Note.*

[INCLUDES animals inhabiting the water; regulations for their preservation; and nature and incidents of rights of fishery.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶3. Fish in public waters.
- 4. Seal fisheries.
- 5. Private rights of fishery.
- 15. Criminal prosecutions.

Cross-References.

Commerce regulations, see Commerce, ¶7, 61.
Due process of law, see Constitutional Law, ¶258, 278.
Fishing regulation as regulation of commerce, see Commerce, ¶15.

Power of state to make criminal the operation of a net within the territorial limits of another, see States, ¶12.
Prohibiting dredging for oysters as regulation of commerce, see Commerce, ¶55.
Treaty rights of Indians, see Indians, ¶3.

¶3. Fish in public waters.
See 22 Cent. Dig. Fish, §§ 3, 4, 6-8.

The provision of the tenth section of the compact of March 28, 1785, between Maryland and Virginia in relation to the waters of Chesapeake Bay and the Potomac and Pocomoke rivers, that all piracies, crimes, or offenses committed upon the waters forming the subject of

the agreement, by citizens of either state against citizens of the other, should be tried in the courts of the state of which the offender is a citizen, does not apply to an offense committed by a citizen of Maryland against the state of Virginia herself, as distinguished from her citizens, by a violation of the Virginia fish laws; and the Virginia courts have full jurisdiction to try and punish the offender.—Wharton v.

Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. Ed. 669.

Such compact was not a "treaty, confederation, or alliance," within the meaning of the prohibition of the articles of confederation (article 6, cl. 2), nor was its validity affected, on the subsequent adoption of the federal constitution, by the prohibition thereof against the making of any "agreement or compact" between states; for this prohibition applied only to future, and not to existing, agreements. Therefore the compact has remained in force, except as to any provisions which are inconsistent with the constitutional power of congress to regulate commerce; and, as the stipulations as to riparian rights of fishery, and as to jurisdiction in and over the waters of the Potomac and Pocomoke rivers, are not within this exception, they are still binding on the parties.—Id.

Section 7 of said compact provided that the citizens of each state, respectively, should have full property in the shores of the Potomac river adjoining their lands, and that the right of fishing in the river should be common to the citizens of both states: provided that it be not exercised by the citizens of one state to the disturbance of the fisheries on the shores of the other. Section 8 provided that all laws which might be necessary for the preservation of fish, or for the performance of quarantine in the river Potomac, or for preserving the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, should be made with the mutual consent and approbation of both states. *Held*, that said sections did not grant a common right of fishery, including the catching and taking of oysters, in Pocomoke river, to the citizens of Maryland, or a right to joint legislation for the protection of fish in such river to that state.—Id.

Even if a common right of fisheries in Pocomoke river had been granted by the compact, such right would not have extended to Pocomoke Sound, as a part of such river, since the river and sound have always been considered distinct bodies of water.—Id.

The right of taking fish "at all usual and accustomed places in common with the citizens of the territory" of Washington, and of "erecting temporary buildings for curing them," secured to the Yakima Indians by the treaty of 1859, survives the private acquisition of lands bordering on the Columbia river by grants from the United States or state of Washington.—*United States v. Winans*, 25 S. Ct. 662, 198 U. S. 371, 49 L. Ed. 1089.

Patents issued by the Land Department to lands bordering on the Columbia river, though absolute in form, can grant no exemption from the fishing rights secured to the Yakima Indians by the treaty of 1859.—Id.

Fishing rights in the Columbia river, secured to the Yakima Indians by the treaty of 1859, which provided for the extinguishment of the Indian title to the lands occupied and claimed by them, preparatory to opening the lands for settlement, are not subordinate to the powers acquired by the state of Washington in and over the shore lands on its admission into the Union.—Id.

④-4. Seal fisheries.

See 23 Cent. Dig. Fish, § 5.

Where a government lease of sealing privileges is made expressly subject to such regulations as the government may thereafter prescribe, and by subsequent lawful regulations the authorized annual catch is reduced, the lessee is not entitled to damages alleged to re-

sult from such reduction.—*North American Commercial Co. v. United States*, 18 S. Ct. 817, 171 U. S. 110, 43 L. Ed. 98, reversing judgment *United States v. North American Commercial Co. (C. C.)* 74 F. 145.

The provision in Rev. St. § 1962, for a proportionate reduction of rental under leases of sealing privileges, in case the lawful catch is reduced, applied not only to the then existing 20-year period, but to leases made after the expiration thereof, and to a further limitation of the catch made by the secretary of the treasury.—Id.

Under Rev. St. § 1962, authorizing the secretary of the treasury to reduce the permitted annual catch of seals, it is immaterial, as between the government and its lessee of sealing privileges, whether the secretary, in so reducing it, acts of his own motion, or in obedience to the will of the government; and in any case, if the lessee accepts the reduction without protest, it cannot afterwards claim that such reduction was a breach of the government contract.—Id.

A lease of sealing privileges from the United States provided for a fixed annual rental, and a fixed per capita royalty on the catch. The lawful catch being reduced, the lessee, under Rev. St. § 1962, directing a proportionate reduction of the rental in such cases, claimed a reduction, not only of the annual rental proper, but also of the per capita royalty. *Held*, that the royalty was no part of the rental referred to by the statute, and no reduction thereof was authorized.—Id.

The fact that the United States presented to the tribunal of arbitration with Great Britain in 1892 a claim for damages sustained by itself and its lessee by means of the limitation of the annual catch to 7,500 seals does not bind the government, as an admission of liability to its lessee for such damages, especially as such claim was subsequently abandoned.—Id.

④-5. Private rights of fishery.

See 23 Cent. Dig. Fish, §§ 11-15.

A definite "fishing right in the adjoining sea," described in the granting clause of a royal patent as "attached to this land," and which right is of a sort long recognized by the Hawaiian laws as private property, is included in the grant, although the habendum is to have and to hold "the above-granted land," which, standing alone, might not include a fishing right.—*Damon v. Territory of Hawaii*, 24 S. Ct. 617, 194 U. S. 154, 48 L. Ed. 916.

The grantees of land under a patent from the King of Hawaii, following an award of the Land Commission, are entitled to a fishery right in the adjoining sea which they and their predecessors in title had enjoyed from time immemorial, although the fishery is not described in the royal patent, and title thereto was not established before the Land Commission.—*Carter v. Territory of Hawaii*, 26 S. Ct. 248, 200 U. S. 255, 50 L. Ed. 470.

④-15. Criminal prosecutions.

See 23 Cent. Dig. Fish, §§ 27-30.

A libel charging a vessel with violating Act June 20, 1906, by landing sponges at a Florida port, must negative the fact that sponges may have been taken from waters within the limits of a state.—*The Abby Dodge v. United States*, 32 S. Ct. 310, 223 U. S. 166, 56 L. Ed. 390.

FISHING VESSEL

Exemption from capture, see War, ④-13.

FIXTURES.

Scope-Note.

[INCLUDES chattels affixed or annexed to real property; and rights and liabilities in respect of such fixtures incident to or affected by particular estates or interests in the realty.]

Analysis.

- 18. Between mortgagor and mortgagee of land and their privies.
- 20. — Mortgagee of land and vendor or vendee of chattels.
- 23. Between owner of easement and owner of land subject thereto.
- 27. Agreements.
- 28. Rights and remedies of creditors and purchasers at execution sales.

18. Between mortgagor and mortgagee of land and their privies.

See 23 Cent. Dig. Fixt. § 32-46.

20. — Mortgagee of land and vendor or vendee of chattels.

See 23 Cent. Dig. Fixt. § 44-46.

A lien of a mortgage covering a manufacturing plant and that which may be acquired and placed upon the premises does not extend to an automatic sprinkler system installed under a conditional contract of sale, which because unregistered, was, under Code Va. 1904, § 2462, void as to lien creditors where the system was by express terms of the contract to remain personalty until paid for.—*Holt v. Henley*, 34 S. Ct. 459, 232 U. S. 637, 58 L. Ed. 787, reversing decree 193 F. 1020, 113 C. C. A. 87.

The lien of a mortgage by a brewing company upon its lands, buildings, machinery, and appliances, erected or to be erected, does not extend to tanks, fixtures, and fittings installed under a conditional contract which, because unrecorded, was void as to creditors and purchasers under Code W. Va. 1906, § 3101, where, though bricked in, they could be removed with trifling damage.—*Detroit Steel Cooperation Co. v. Sistersville Brewing Co.*, 34 S. Ct. 753, 233 U. S. 712, 58 L. Ed. 1166, reversing decrees 195 F. 447, 115 C. C. A. 349, and 195 F. 1023, 115 C. C. A. 669.

23. Between owner of easement and owner of land subject thereto.

See 23 Cent. Dig. Fixt. § 18.

A railroad company occupying land under an agreement with the owner for a temporary easement therein may, on termination of such agreement, remove the rails which it has laid down. As between the parties, such rails are

not a part of the realty.—*Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 S. Ct. 188, 35 L. Ed. 1055.

27. Agreements.

See 23 Cent. Dig. Fixt. § 5, 22, 25, 44, 45, 54.

Machinery is placed in a plant by the owner within Code Porto Rico, § 335, where it is installed by a tenant under stipulation that it shall become a part of the plant, without compensation to the lessee.—*Valdes v. Central Altigracia*, 32 S. Ct. 664, 225 U. S. 58, 56 L. Ed. 980.

Transfer of a lease of realty which stipulates for the immobilization of machinery installed by a tenant is a contract concerning real rights to immovables within Civ. Code Porto Rico, § 613, requiring registration of titles to immovables in order to prejudice rights of third persons.—*Id.*

28. Rights and remedies of creditors and purchasers at execution sales.

See 23 Cent. Dig. Fixt. § 53, 59; 29 Cent. Dig. Judges, § 1338.

Judgment creditors of a corporation operating a sugar factory under lease, not parties to the lease and without notice of a condition by which the machinery became the lessor's property, acquired rights in such machinery by levy of an execution which were superior to those of a secured creditor of the corporation who claims under the lease, since as to the judgment creditors the machinery remained movable property, while as to him it was a part of the realty which, under the lease, he could not proceed separately against to collect his debt.—*Valdes v. Central Altigracia*, 32 S. Ct. 664, 225 U. S. 58, 56 L. Ed. 980.

FLAG.

Power of state to punish for using for advertising purposes, see Criminal Law, 5.
Prohibiting use for advertising denial of privileges of citizens, see Constitutional Law, 208; due process of law, see Constitutional Law, 258; equal protection of laws, see Constitutional Law, 212.

FLATS.

Ownership and control, see—
Navigable Waters, 36-38.
Public Lands, 58-61.

FLIGHT.

Accused, see Criminal Law, 351, 759.

FLOATAGE.

Rafts or logs, see Logs and Logging, 11-13.

FLOODS.

See Waters and Water Courses, 54.

FLOUR.

Inspection as regulation of commerce, see Commerce, 50.

FOG.

Collision of vessels, see Collision, 80-82, 100, 108.

FOLLOWING TRUST PROPERTY.

See Trusts, 355-358.

FOOD.

Scope-Note.

[INCLUDES regulation of manufacture, sale, or use of articles of food and drink and of substitutes and imitations thereof; rights of property and traffic in unwholesome or adulterated articles used as food, etc.; liabilities for injuries from the sale, use, etc., thereof; and violations of laws relating to such articles, and prosecution and punishment thereof as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④ 1. Power to make regulations.
- 2. Statutory and municipal regulations in general.
- 3. License and inspection.
- 5. Purity and quality.
- 6. Unwholesome or unfit for use.
- 11. Violations of regulations.
- 15. — Misbranding or want of notice to purchasers or public.
- 17. Criminal prosecutions.
- 19. — Preliminary proceedings.
- 24. Searches, seizures, and forfeitures.

Cross-References.

See Weights and Measures, ④ 2.

Due process of law, see Constitutional Law, ④ 258, 276, 278, 295, 296, 320.
Equal protection of law, see Constitutional Law, ④ 230, 239.

Interstate commerce regulations, see Commerce, ④ 8, 41, 51, 55, 60.
Medicines, see Druggists.
Privileges and immunities of citizens, see Constitutional Law, ④ 207.

④ 1. Power to make regulations.

See 23 Cent. Dig. Food, §§ 1, 2.

Statutes prohibiting the manufacture and sale of adulterated milk and butter, or of substances imitative of articles of food, are within the exercise of the police power of the state, and valid.—*Powell v. Commonwealth of Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253, affirming judgment 114 Pa. St. 265, 7 A. 913, 60 Am. Rep. 350; *Walker v. Commonwealth of Pennsylvania*, 127 U. S. 699, 8 S. Ct. 997, 32 L. Ed. 261.

Where oleomargarine was furnished by the federal government to be served as food to the inmates of a national home for federal soldiers, the governor of such institution is not amenable to the laws of the state in which it is located, regulating the use and sale thereof, since the legislature of the state has no constitutional power to interfere with the internal management of federal institutions located within its limits. *Order, In re Thomas*, 87 F. 453, 31 C. C. A. 80, affirmed.—*State of Ohio v. Thomas*, 19 S. Ct. 453, 173 U. S. 276, 43 L. Ed. 699.

The requirement that the name and percentage of the diluents shall be stated in the labels, under Code Supp. Iowa 1907, §§ 5077a6, 5077a24, relating to the sale in the state of concentrated commercial feeding stuffs, is a proper exercise of the police power.—*Standard Stock Food Co. v. Wright*, 32 S. Ct. 784, 225 U. S. 540, 56 L. Ed. 1197.

An ordinance prohibiting the shipment of milk into a city unless the cows have been subjected to the tuberculin test *held* constitutional.—*Adams v. City of Milwaukee*, 33 S. Ct. 610, 228 U. S. 572, 57 L. Ed. 971.

A regulation promulgated by the Secretaries of the Treasury, Agriculture, and Commerce and Labor, requiring the label on a preparation containing a derivative of any of the drugs enumerated in Food and Drugs Act June 30, 1906,

§ 8, to show not only the presence of such derivative, but to state the name of the drug from which it is derived, *held* a proper exercise of power under section 3 of such act, and not invalid as an attempt to add to the provisions of section 8.—*United States v. Antikamnia Chemical Co.*, 34 S. Ct. 222, 231 U. S. 654, 58 L. Ed. 419, Ann. Cas. 1915A, 49, reversing decree 37 App. D. C. 343.

Prohibition of sale of food preservatives containing boric acid by *Hurd's Rev. St. Ill.* 1913, c. 127b, §§ 8, 22, as construed by the state court, *held* valid.—*Price v. People of State of Illinois*, 35 S. Ct. 892, 238 U. S. 446, 59 L. Ed. 1400, affirming judgment *People v. Price*, 101 N. E. 196, 257 Ill. 587, Ann. Cas. 1914A, 1154.

④ 2. Statutory and municipal regulations in general.

See 23 Cent. Dig. Food, § 2.

The enactment by Congress of the prohibition contained in Act Aug. 30, 1890, c. 839, 26 Stat. 414 [U. S. Comp. St. 1901, p. 3185] § 2, against the importation of any adulterated or unwholesome food or drug, or any liquors, adulterated or mixed with any poisonous or noxious chemical, did not have the effect of rendering inoperative, as regards food products imported into the United States through the channels of foreign commerce, the provision of Laws N. Y. 1895, p. 1510, c. 661, § 41, prohibiting the sale within the state of adulterated food products, enacted in the exercise of the police power of the state, to prevent deception and fraud. Judgment 63 N. E. 1097, 171 N. Y. 329, 98 Am. St. Rep. 599, affirmed.—*Crossman v. Lurman*, 24 S. Ct. 234, 192 U. S. 189, 43 L. Ed. 401.

The word "may," as used in Pure Food and Drugs Act June 30, 1906, § 7, subd. 5, prohibiting the adding of deleterious matter which "may" render an article of food injurious to health, is used in its ordinary sense as expressing ability, liability, possibility, or probability

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup. Ct. Dig.—Page 1095]

of its so doing.—*United States v. Lexington Mill & Elevator Co.*, 34 S. Ct. 337, 232 U. S. 399, 58 L. Ed. 658, L. R. A. 1915B, 774 affirming judgment *Lexington Mill & Elevator Co. v. United States*, 202 F. 615, 121 C. C. A. 23.

Laws N. D. 1911, p. 355, prohibiting the sale of lard not in bulk unless put up in packages of specified weights, is not repugnant to the Pure Food and Drugs Act, which has reference merely to adulteration and misbranding.—*Armour & Co. v. State of North Dakota*, 36 S. Ct. 440, 240 U. S. 510, 60 L. Ed. 771, affirming judgment *State v. Armour & Co.*, 143 N. W. 1033, 27 N. D. 177.

3. License and inspection.

See 23 Cent. Dig. Food, §§ 3, 4.

Meat inspection provisions of Act June 30, 1906, cannot be construed as relating only to those engaged in the business of preparing meats for transportation, and the carrying or assisting in the carrying of such meats in interstate transportation.—*United States v. Lewis*, 35 S. Ct. 44, 235 U. S. 282, 59 L. Ed. 229.

5. Purity and quality.

See 23 Cent. Dig. Food, § 1.

The requirement in Food and Drugs Act June 30, 1906, § 8, that labels shall state the quantity or proportion of certain enumerated substances or their derivatives contained therein, means that the label shall also state the substance from which the derivative is produced.—*United States v. Antikamnia Chemical Co.*, 34 S. Ct. 222, 231 U. S. 654, 58 L. Ed. 419, Ann. Cas. 1915A, 49 reversing decree 37 App. D. C. 343.

A poisonous ingredient in a secret formula for a food product sold under its own name may be an "added ingredient" within Food and Drugs Act, condemning food containing added deleterious ingredient, and proviso of section 8, excluding from immunity foods only free from deleterious ingredients.—*United States v. Forty Barrels and Twenty Kegs of Coca Cola*, 36 S. Ct. 573, 241 U. S. 265, 60 L. Ed. 995, reversing judgment 215 F. 535, 132 C. C. A. 47.

Elimination of harmful ingredient from a proprietary food which, without it, would not be the same, held not an "adulteration" under Food and Drugs Act, § 7.—*Id.*

Caffeine introduced into a syrup in the melting held an added ingredient within Food and Drugs Act.—*Id.*

6. Unwholesome or unfit for use.

See 23 Cent. Dig. Food, § 6.

The addition of poisonous substances to an article of food in such minute quantities that the health of consumers cannot be injured is not condemned by Pure Food and Drugs Act June 30, 1906, § 7, subd. 5.—*United States v. Lexington Mill & Elevator Co.*, 34 S. Ct. 337, 232 U. S. 399, 58 L. Ed. 658, L. R. A. 1915B, 774 affirming judgment *Lexington Mill & Elevator Co. v. United States*, 202 F. 615, 121 C. C. A. 23.

11. Violations of regulations.

See 23 Cent. Dig. Food, §§ 9-14.

15. — Misbranding or want of notice to purchasers or public.

See 23 Cent. Dig. Food, § 14.

The word "package," as used in Food and Drug Act, §§ 7, 8, refers to the immediate container of the article which is intended for consumption by the public, and not simply the outside wrapper or box containing the package.—*McDermott v. State of Wisconsin*, 33 S. Ct. 431, 228 U. S. 115, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39 reversing judgment 128 N. W. 888, 143 Wis. 18, 21 Ann. Cas. 1315.

The name "Coca Cola" cannot be said to be distinctive rather than descriptive of a compound with coca cola ingredients so as to es-

cape condemnation under Food and Drugs Act, § 8, as misbranded in case of absence of coca or cola.—*United States v. Forty Barrels and Twenty Kegs of Coca Cola*, 36 S. Ct. 573, 241 U. S. 265, 60 L. Ed. 995, reversing judgment 215 F. 535, 132 C. C. A. 47.

Secondary significance cannot be attributed to the name "Coca Cola" so as to save it from condemnation under Food and Drugs Act, § 8, on the theory that it was within the protection accorded by the proviso in that section to food mixtures known under their own distinctive names.—*Id.*

17. Criminal prosecutions.

See 23 Cent. Dig. Food, §§ 20-23.

19. — Preliminary proceedings.

The notice and preliminary hearing by the Department of Agriculture which must be given under the Pure Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), to the person from whom the sample was obtained, when, upon examination by the board of chemistry, an article is found to be adulterated or misbranded, is not a condition precedent to the prosecution of a manufacturer, instituted by the Department of Agriculture or its agent, for shipping misbranded goods in interstate commerce.—(1911) *United States v. Morgan*, 32 S. Ct. 81, 222 U. S. 274, 56 L. Ed. 198, reversing judgment (C. C. 1910) 181 F. 587.

24. Searches, seizures, and forfeitures.

See 23 Cent. Dig. Food, § 17.

The remedy in rem in the federal courts provided by the food and drugs act (Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]), where any article of food that is adulterated is being transported from one state to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages may be invoked where adulterated eggs have been shipped into the state, not for sale, but intended solely for use by the consignee in the bakery business.—*Hipolite Egg Co. v. United States*, 31 S. Ct. 364, 220 U. S. 45, 55 L. Ed. 364.

Costs in personam may be assessed against the claimant in the proceeding in rem under the food and drugs act (Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]), to confiscate adulterated articles of food, the subject of interstate commerce, even if the principles of the admiralty law are made applicable by the provision of that section that the proceedings shall conform as near as may be to the proceedings in admiralty.—*Id.*

The government, when proceeding to condemn, under Pure Food and Drugs Act June 30, 1906, § 10, an article of food as adulterated under section 7, subd. 5, of that act, because containing deleterious ingredients, has the burden of proving that such added substance renders such article dangerous to health.—*United States v. Lexington Mill & Elevator Co.*, 34 S. Ct. 337, 232 U. S. 399, 58 L. Ed. 658, L. R. A. 1915B, 774 affirming judgment *Lexington Mill & Elevator Co. v. United States*, 202 F. 615, 121 C. C. A. 23.

Whether caffeine added to a food product is a deleterious ingredient within Act June 30, 1906, is a question for the jury where the evidence is conflicting.—*United States v. Forty Barrels and Twenty Kegs of Coca Cola*, 36 S. Ct. 573, 241 U. S. 265, 60 L. Ed. 995, reversing judgment 215 F. 535, 132 C. C. A. 47.

FOOD AND DRUGS ACT.

See Commerce, 60.

FORCED SALE.

See Judicial Sales.

FORCIBLE ENTRY AND DETAINER.

Scope-Note.

[INCLUDES violently taking or retaining possession of property, with threats, force, or arms, against the will of another entitled to its possession, and without authority of law; nature and extent of liability therefor in general; remedies for recovery of possession; and criminal responsibility for such forcible entry or forcible detainer, and prosecution and punishment thereof as a public offense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Civil Liability.

⇒ 1. Disseisin and remedies therefor in general.

6. Nature and form of remedy.

II. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Ford. E. & D. §§ 190-205.]

Cross-References.

See—
Landlord and Tenant, ⇒ 287-291, 293-303.
Trespass.

I. CIVIL LIABILITY.

Statutory limitations, see Limitation of Actions, ⇒ 19.

⇒ 1. Disseisin and remedies therefor in general.

See 23 Cent. Dig. Ford. E. & D. §§ 1-3.

A railroad track is "lands, tenements, or other possessions," within Mansf. Dig. Ark. § 3347, providing that, "if any person shall enter into or upon any lands, tenements, or other possessions, and detain or hold the same with force, * * * every person so offending shall be deemed guilty of a forcible entry and detainer, * * *," so as to make one entering and holding the same with force guilty of for-

cible entry and detainer.—Iron Mountain & H. R. Co. v. Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. Ed. 504.

⇒ 6. Nature and form of remedy.

See 23 Cent. Dig. Ford. E. & D. §§ 29-32.

The legal or equitable title to land is not concluded by the judgment in unlawful detainer between landlord and tenant.—Johnson v. Riddle, 36 S. Ct. 393, 240 U. S. 467, 60 L. Ed. 752, affirming judgment 139 P. 1143, 41 Okl. 759.

II. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Ford. E. & D. §§ 190-205.]

FORECLOSURE.

See—
Chattel Mortgages, ⇒ 268-281.
Corporations, ⇒ 482.
Mortgages, ⇒ 333-590.
Taxation, ⇒ 647.
Vendor and Purchaser, ⇒ 268-293.

FOREIGN ADMINISTRATION.

See Executors and Administrators, ⇒ 519-524.

FOREIGN ADOPTION.

See Adoption, ⇒ 25.

FOREIGN ASSIGNMENTS.

See Assignments for Benefit of Creditors, ⇒ 21, 199.

FOREIGN ATTACHMENT.

See Garnishment.

FOREIGN CORPORATIONS.

See—
Commerce, ⇒ 46.
Corporations, ⇒ 632-691.
Insurance, ⇒ 15-22.
Railroads, ⇒ 33.

FOREIGN COURTS.

See Courts, ⇒ 511.

FOREIGN DIVORCE.

See Divorce, ⇒ 325-331.

FOREIGNERS.

See Aliens.

FOREIGN GOVERNMENTS.

See—
Extradition, ⇒ 2-19.
International Law.
Neutrality Laws.
Treaties.
War.

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FOREIGN GUARDIANSHIP.

See Guardian and Ward, ¶170.

FOREIGN JUDGMENTS.

See Judgment, ¶814-832, 934-944.

FOREIGN LAWS.

See—

Evidence, ¶35.

Statutes, ¶226, 288-290.

FOREIGN MINISTER.

See Ambassadors and Consuls.

FOREIGN MONEY.

Payment in United States money as satisfaction of claim payable in foreign money, see Accord and Satisfaction, ¶10.

FOREIGN RECEIVERSHIP.

See Receivers, ¶210, 211.

FOREIGN WILLS.

See Wills, ¶434.

FOREMAN.

See Master and Servant, ¶182.

FOREST RESERVES.

Delegation of legislative powers, see Constitutional Law, ¶62.

FORESTS.

See Woods and Forests.

FORFEITURES.*Scope-Note.*

[INCLUDES loss of specific property, real or personal, as punishment for violation of law; nature and scope of such punishment in general; constitutional and statutory provisions relating thereto; in what cases, and as to what persons and property, and for what offenses forfeiture is imposed in general; jurisdiction over and proceedings for condemnation of property as forfeited; judgments or decrees therein, and enforcement thereof; review of proceedings; costs and proceedings for condemnation; effect of forfeiture; rights of informers; waiver or remission of forfeiture; and disposition of property forfeited.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶5. Proceedings for enforcement.
- 6. Operation and effect.
- 7. — In general.

Cross-References.

See—

Banks and Banking, ¶270.
 Constitutional Law, ¶190, 220, 284, 308.
 Corporations, ¶611-623.
 Courts, ¶420, 503, 518.
 Customs Duties, ¶130, 133.
 Druggists, ¶11.
 Insurance, ¶306-366, 372-401, 749-759.
 Internal Revenue, ¶46.

See—

Intoxicating Liquors, ¶249.
 Limitation of Actions, ¶35.
 Mines and Minerals, ¶23, 26.
 Neutrality Laws, ¶4.
 Penalties.
 Public Lands, ¶92.
 Searches and Seizures.
 Usury, ¶146.

¶5. Proceedings for enforcement.

See 23 Cent. Dig. Forfeitt. §§ 4-8.

A general verdict for the condemnation of goods mentioned in an information is supported if any one of the five counts in the information is good, where there was no motion made that the government should elect on which count it claimed the verdict.—*Friedenstein v. United States*, 125 U. S. 224, 8 S. Ct. 838, 31 L. Ed. 736.

¶6. Operation and effect.

See 23 Cent. Dig. Forfeitt. §§ 9, 10.

¶7. — In general.

See 23 Cent. Dig. Forfeitt. § 9.

The acts of the legislature of Maryland of 1781 confiscating to the use of the state all the property and estates of the then lord proprietary of Maryland within the state were within the powers of the state, and were valid and effective, and reached every title and interest which could be the subject of sale or devise.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

FORGERY.

Scope-Note.

[INCLUDES falsely and fraudulently making or materially altering instruments in writing, other than circulating notes issued as money or other government obligations or securities, and uttering such forged instruments; nature and elements of the crimes of forgery, uttering and publishing forged instruments, etc., and degrees thereof; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ☞3. Elements of offenses.
 - 7. — Nature of instrument.
 - 11. — Similitude of false instrument or signature to genuine!
 - 14. — Injury from forgery.

Cross-References.

See—
Counterfeiting.
Extradition, ☞5.
Discount of forged paper by bank, see Banks and Banking, ☞186.

Payment of forged paper by bank, see Banks and Banking, ☞147, 148.
Pledge of stock certificate under forged power of attorney, see Corporations, ☞123.
Violation of banking laws, see Banks and Banking, ☞256.

☞3. Elements of offenses.

See 23 Cent. Dig. Forg. § 1-49.

☞7. — Nature of instrument.

See 23 Cent. Dig. Forg. §§ 2, 3, 8-15.

The forgery of a note payable at a national bank, for the purpose of deceiving the national bank examiner, does not come within Rev. St. § 5418, which makes it penal to forge any instrument with intent to defraud the United States, or to present a forged instrument at the office of an officer of the United States with such intent.—*Cross v. State of North Carolina*, 132 U. S. 131, 10 S. Ct. 47, 33 L. Ed. 287, affirming *State v. White*, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

☞11. — Similitude of false instrument or signature to genuine.

See 23 Cent. Dig. Forg. § 27.

Texas statutes prior to 1876 (Pasch. Dig. art. 2093) provided that "he is guilty of forgery who, without lawful authority, and with intent to injure and defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument

so made would (if the same be true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred or in any manner affected any property whatever." *Held*, that if the name "J. H. Chisholm" was signed to the transfer of a certificate by another bearing that name, intending thereby to counterfeit the certificate of "J. H. Chism," and by reason of the fact that the two names were idem sonans, to produce the impression that the name signed was that of "J. H. Chism," such act constituted forgery.—*White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. Ed. 55.

☞14. — Injury from forgery.

See 23 Cent. Dig. Forg. § 49.

An actual financial or property loss need not be charged or proved in order to make out a case under Rev. St. § 5418 (U. S. Comp. St. 1901, p. 3666), of forging vouchers required upon examination by the Civil Service Commission of the United States, certifying to the character, physical capacity, etc., of the applicant, and presenting the same to the commission.—*United States v. Plyler*, 82 S. Ct. 6, 222 U. S. 15, 56 L. Ed. 70.

FORMER ADJUDICATION.

See Judgment, ☞541-632, 643-750.

FORMER JEOPARDY.

See—
Criminal Law, ☞162-204, 270, 289-296, 913.
Habeas Corpus, ☞81.

FORMS OF ACTION.

See Action, ☞17-27.

FORNICATION.

See 23 Cent. Dig. Forn.

See—
Adultery.
Prostitution.

FORWARDERS.

Authority, see Principal and Agent, ☞116.

FORWARDING AGENTS.

See Carriers, ☞32.

FOURTEENTH AMENDMENT.

See Constitutional Law, ☞24-27, 206, 209-320.

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FRANCHISES.

Scope-Note.

[INCLUDES nature and incidents of special rights, privileges, and powers which can be exercised legally only under a grant from the government, and exercise and protection of franchises in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

- | | |
|---|--|
| <p>As vested rights, see Constitutional Law, ¶101.
Compensation on condemnation of franchise, see Eminent Domain, ¶108.
Corporate franchises, see—
Corporations, ¶32-38, 611-623.
Electricity, ¶4.
Street Railroads, ¶17, 18, 60.
Waters and Water Courses, ¶188.
Grant of exclusive franchises as monopolies, see Monopolies, ¶4-7.
Grants by municipal corporations, see Municipal Corporations, ¶285, 679-686.
Laws affecting franchises as impairing obligation of contracts, see Constitutional Law, ¶133.</p> | <p>Power of territory to tax franchises granted by the Hawaiian government, see Taxation, ¶19.
Taxation, due process of law, see Constitutional Law, ¶283.
Taxation of corporate franchises, see Taxation ¶50, 376.
To establish and operate ferry, see Ferries, ¶9-16.
To supply water for domestic and municipal purposes, see Waters and Water Courses, ¶188, 189.
Validity of contract for services in procuring, see Contracts, ¶131.
Valuation of water works plant, see Waters and Water Courses, ¶183.</p> |
|---|--|

¶2. Grants in general.

See 23 Cent. Dig. Franch. § 1.

A legislative grant of special and exclusive privileges must be made in plain terms in order to convey private rights in respect to public

property, and to prevent the future control of such privileges in the public interest. Decree (C. C.) Govin v. City of Chicago, 132 F. 848, reversed.—Blair v. City of Chicago, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

FRANCHISE TAX.

See Commerce, ¶73.

FRATERNAL ASSOCIATIONS.

See Insurance, ¶700-759.

FRAUD.

Scope-Note.

[INCLUDES deception or perversion of the truth by statements, acts, or omissions intended or operating to injure another by depriving him of any property or right or obtaining any promise or unlawful or unfair advantage, not constituting or not regarded as a tort or offense of any distinct class; evidence relating thereto; nature and extent of liability for such fraud in general; actions for deceit and like actions for damages for fraud; and criminal responsibility for fraud in general, and prosecution and punishment thereof as a public offense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Deception Constituting Fraud, and Liability Therefor.

- ¶2. Elements of actual fraud.
 - 3. — In general.
 - 4. — Intent.
 - 8. Fraudulent representations.
 - 9. — Nature in general.
 - 10. — Matters of fact or of law.
 - 13. — Falsity and knowledge thereof.
 - 19. Reliance on representations and inducement to act.
 - 20. — In general.
 - 22. — Duty to investigate.

II. Actions.**(A) RIGHTS OF ACTION AND DEFENSES.****(B) PARTIES AND PLEADING.**

40. Pleading.

46. — Reliance and inducement and action thereon.

49. — Issues, proof, and variance.

(C) EVIDENCE.

58. Weight and sufficiency.

(D) DAMAGES.

59. Measure in general.

(E) TRIAL, JUDGMENT, AND REVIEW.

64. Questions for jury.

65. Instructions.

III. Criminal Responsibility.*Cross-References.*

See **Fraudulent Conveyances.**

Affecting right to trade-mark or trade-name, see **Trade-Marks and Trade-Names**, 22.

Conspiracy to defraud, see **Conspiracy**, 33.

Constructive trust arising from fraud, see **Trusts**, 96.

Discharge of bankrupt, effect on debts created by fraud, see **Bankruptcy**, 426.

Fraud as excusing laches, see **Equity**, 80.

Judgment in action for fraud discharge by bankruptcy, see **Bankruptcy**, 423.

Knowledge of corporate officer as notice of corporation, see **Corporations**, 423.

Limitation of actions for relief on ground of fraud, see **Limitation of Actions**, 98-100.

Offenses involving fraud, see—

Elections, 318.

Embezzlement.

False Personation.

Forgery.

Of plaintiff as defense to action for infringement of trade-mark or for unfair competition, see **Trade-Marks and Trade-Names**, 85.

Parol or extrinsic evidence to show fraud, see **Evidence**, 434.

Use of mails to defraud, see **Post Office**, 48.

By particular classes of persons, or persons in particular relations.

See—

Aliens, 71½.

Arbitration and Award, 64.

Attorney and Client, 114.

See—

Corporations, 317.

Insurance, 250-300.

Sales, 37-43.

Vendor and Purchaser, 32-37.

In particular classes of conveyances, contracts, transactions, or proceedings.

See—

Aliens, 71½.

Assignments for Benefit of Creditors, 142-151.

Banks and Banking, 147, 148, 245, 250, 287.

Bills and Notes, 103.

Compositions with Creditors, 11.

Compromise and Settlement, 8.

Corporations, 80.

Deeds, 70, 211.

Elections, 318.

Gifts, 38.

Insurance, 250-300, 553.

Judgment, 443.

Mines and Minerals, 45, 54.

Sales, 37-43.

Vendor and Purchaser, 32-37.

Wills, 162-166.

Particular remedies.

See—

Aliens, 71½.

Contracts, 34.

Equity, 12, 43.

Judgment, 443.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

Judgment discharged by bankruptcy, see **Bankruptcy**, 423.

2. Elements of actual fraud.

See 23 Cent. Dig. Fraud, § 1, 2.

3. — In general.

See 23 Cent. Dig. Fraud, § 1.

A contractor, who agrees with a bridge company to build the bridge in consideration of \$10,000 of its stock and certain notes secured by a mortgage on the bridge, and sublets a part of the work in consideration of the stock, may afterwards make a bona fide foreclosure of the mortgage, and buy in the bridge, without incurring any liability to the subcontractor, or giving

him any interest in the bridge, although the latter's stock is rendered utterly valueless by the operation.—*McLane v. King*, 144 U. S. 260, 12 S. Ct. 590, 36 L. Ed. 423.

4. — Intent.

See 23 Cent. Dig. Fraud, § 2; 43 Cent. Dig. Ven. & Pur. § 1029.

Cotton dealers in St. Louis, Mo., had "cotton notes" for 192,385 pounds, deposited with a local bank as collateral security. In some way, without knowledge of the bank, they got a large part of the cotton from the warehouse, and took it to a "pickery," where it was so treated that the marks on the bales called for 276,850 pounds. When the bank discovered this, they had part of the cotton reweighed, and made the dealers put up further margins. The cotton was then sold by the dealers to parties in Scotland, and the bank let the dealers have the "notes," so as

to enable them to get the cotton, and ship it. The dealers got the transportation company to take their word as to the weight, and a bill of lading was issued, contrary to custom, without reweighing. It called for 276,850 pounds. The bank knew nothing of all this. The brokers then negotiated the bill of lading and a draft on the parties in Scotland, and from the proceeds paid the bank, which had declined to take the draft. *Held*, in an action against the bank by the Scotch purchasers who accepted the draft, that it was not guilty of fraud, and was not liable.—*McLeod v. Fourth Nat. Bank*, 122 U. S. 528, 7 S. Ct. 1212, 30 L. Ed. 1237, affirming judgment (C. C.) 20 F. 225.

—8. Fraudulent representations.

See 23 Cent. Dig. Fraud, §§ 3-5, 8, 11-14.

—9. — Nature in general.

See 23 Cent. Dig. Fraud, § 8; 48 Cent. Dig. Ven. & Pur. § 1029.

In an action by the purchaser of a herd of cattle for false representations made by the seller, it is proper to instruct the jury that if the seller purposely kept silent when he ought to have spoken, or by any language or acts intentionally misled the purchaser about the number of cattle in the herd or the number of calves branded, or by any acts or by silence consciously misled or deceived him, or permitted him to be misled or deceived, the seller made material misrepresentations.—*Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439.

The seller of property who interferes with the efforts of the purchaser to ascertain its amount and condition is guilty of false representation.—*Id.*

—10. — Matters of fact or of law.

See 23 Cent. Dig. Fraud, § 11.

A mere expression of opinion as to a condition of a contract, which is a matter of law, in respect to which both parties are equally chargeable with knowledge, cannot constitute a false representation or deceit. Judgment 76 F. 617, 22 C. C. A. 425, reversed.—*Mutual Life Ins. Co. of New York v. Phinney*, 20 S. Ct. 906, 178 U. S. 327, 44 L. Ed. 1088.

—13. — Falsity and knowledge thereof.

See 23 Cent. Dig. Fraud, §§ 3-5; 48 Cent. Dig. Ven. & Pur. § 1029.

Representations recklessly made as of one's own knowledge, without in fact knowing whether they are true or not, are actionable as fraudulent.—*Cooper v. Schlesinger*, 111 U. S. 148, 4 S. Ct. 360, 28 L. Ed. 362.

—19. Reliance on representations and inducement to act.

See 23 Cent. Dig. Fraud, §§ 9, 10, 17-23.

—20. — In general.

See 23 Cent. Dig. Fraud, §§ 17, 18; 48 Cent. Dig. Ven. & Pur. § 1029.

Where a circular issued by a railroad company, though signed by its president, inviting purchasers for bonds to be secured by a mortgage of a proposed branch railroad, described it as extending the "distance of about fifty miles," "through the populous counties of Buchanan, Clinton, and Platte," and the mortgage given to secure the bonds describes it as "leading from the Missouri river, in the state of Missouri, at a point opposite the city of Atchison, in the state of Kansas, by the most practicable route, not exceeding fifty miles in length, to a junction with the main line," the bondholders will be presumed to have relied upon the mortgage, rather than upon the circular; and the fact that the road was only 29 miles long, and did not

touch Clinton county, will not enable the purchaser of such bonds to maintain a personal action against the president on the ground that the description in the circular amounted to a false and fraudulent representation, whereby plaintiff was induced to make the investment.—*Van Weel v. Winston*, 115 U. S. 228, 6 S. Ct. 22, 29 L. Ed. 384.

Recovery cannot be had for fraud unless plaintiff relied on the fraudulent inducements or representations of defendant.—*Ming v. Woolfolk*, 116 U. S. 599, 6 S. Ct. 489, 29 L. Ed. 740.

—22. — Duty to investigate.

See 23 Cent. Dig. Fraud, §§ 19-23.

The complaint alleged that defendant represented that it had a patent for the land, but not that the representation was untrue, and alleged that the occupant claimed by prior possession under the town site law, but did not allege when the occupant entered. It also showed that defendant brought ejectment against the occupant and finally recovered. *Held*, that it might be presumed that defendant evicted the occupant on its title under the patent, and that the possession of the patent justified the representations as to title and right of possession. If doubtful of defendant's statements, plaintiff should have asked to inspect the patent.—*Andrus v. St. Louis Smelting & Refining Co.*, 130 U. S. 643, 9 S. Ct. 645, 32 L. Ed. 1054.

II. ACTIONS.

(A) RIGHTS OF ACTION AND DEFENSES.

See 23 Cent. Dig. Fraud, §§ 27-34.

Limitation of actions for equitable relief on ground of fraud, see Limitation of Actions, —37.

(B) PARTIES AND PLEADING.

—40. Pleading.

See 23 Cent. Dig. Fraud, §§ 34-45.

—46. — Reliance and inducement and action thereon.

See 23 Cent. Dig. Fraud, § 41.

A complaint alleged that defendant induced plaintiff to purchase a lot by representing that defendant had obtained a release of all claims, and could put plaintiff in immediate possession, and that when plaintiff attempted to enter he found another in possession, who refused to surrender, and plaintiff was kept out of possession for several years, losing the rents. *Held*, that plaintiff should have required delivery of possession on payment of the price, and should have examined the premises, which were easily accessible, when he could have determined the truth of the representations. A complaint which does not allege that such examination was made is insufficient, though it alleges that plaintiff used all diligence in his power to ascertain whether or not the representations were true.—*Andrus v. St. Louis Smelting & Refining Co.*, 130 U. S. 643, 9 S. Ct. 645, 32 L. Ed. 1054.

—49. — Issues, proof, and variance.

See 23 Cent. Dig. Fraud, §§ 44, 45.

Where the principal misrepresentation relied on is as to the number of calves branded during a certain year, but the petition in an action for deceit also alleges that defendant made false representations as to the number of the whole herd sold, it is proper to submit to the jury the question whether defendant misrepresented about the number of cattle, and about the loss upon the herd.—*Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439.

(C) EVIDENCE.

⚡58. Weight and sufficiency.

See 23 Cent. Dig. Fraud, §§ 55-59.

Fraud in connection with purchases of land at tax and execution sales is not established by questionable evidence of value, and the fact that the purchaser was a man of great power and influence, and bought the land at much less than the value set by the owners, from which it was sought to be inferred that judges, mayors, appraisers, and possible purchasers, all were frightened or corrupt.—*Ubarri y Yramategui v. Laborde*, 29 S. Ct. 549, 214 U. S. 168, 53 L. Ed. 953; *Laborde v. Ubarri*, 29 S. Ct. 552, 214 U. S. 173, 53 L. Ed. 955.

(D) DAMAGES.

⚡59. Measure in general.

See 23 Cent. Dig. Fraud, §§ 60-62, 64.

The measure of damages in an action for deceit in the sale of property is not the difference between the value of the property as it proved to be and as it would have been if as represented, but it is the difference between the real value of the property, at the date of sale and the price paid, with interest thereon, together with such outlays as were legitimately attributable to defendant's conduct, since the damages are limited to the direct pecuniary loss, if any, of the plaintiff, and will not cover the expected fruits of an unrealized speculation. Judgment 84 F. 430, 28 C. C. A. 443, reversed.—*Sigafus v. Porter*, 21 S. Ct. 34, 179 U. S. 116, 45 L. Ed. 113.

(E) TRIAL, JUDGMENT, AND REVIEW.

Directing verdict, see Trial, ⚡168.

⚡64. Questions for jury.

See 23 Cent. Dig. Fraud, §§ 65, 67-71.

Whether the seller's acts amount to an interference with the purchaser's efforts to ascertain the quantity of goods sold is a question for the jury.—*Stewart v. Wyoming Cattle-Ranche Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439.

⚡65. Instructions.

See 23 Cent. Dig. Fraud, §§ 72-74.

The cause of action stated in plaintiff's petition rested upon an alleged positive misrepresentation of an existing fact, and all the evidence intended to establish fraud was directed to proof of that actual misrepresentation, with no suggestion of any legal obligation on the part of defendant to make any disclosures in respect to which he failed to speak. *Held*, that instructions to the jury assuming that the case was based on a fraudulent suppression of material facts which defendant was under some legal duty to communicate, and that there was evidence tending to prove the allegation, were error.—*Thorwegan v. King*, 111 U. S. 549, 4 S. Ct. 529, 28 L. Ed. 514.

III. CRIMINAL RESPONSIBILITY.

See 23 Cent. Dig. Fraud, §§ 76-78.

See—

Embezzlement.

False Personation.

Forgery.

Election frauds, see Elections, ⚡318.

Violation of customs laws, see Customs Duties, ⚡123.

FRAUD ORDERS.

Certiorari to review, see Certiorari, ⚡21.

FRAUDS, STATUTE OF.

Scope-Note.

[INCLUDES statutory provisions making a writing necessary to the creation, assignment or surrender of estates in land, the bringing of actions on promises, agreements, or representations, or the validity of contracts, and the operation and effect of such provisions in general; requisites and sufficiency of the instrument, agreement, memorandum, or note in writing required by statute, or of the acceptance and receipt of goods or giving of earnest or part payment therefor required on contracts for sales, etc.; effect of part performance in general; and pleading the statute and evidence relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Agreements in Consideration of Marriage.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 1-6.]

II. Promises by Executors or Administrators.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 7-12.]

III. Promises to Answer for Debt, Default or Miscarriage of Another.

⚡33. New consideration beneficial to promisor.

IV. Representations.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 59-64.]

V. Agreements Not to be Performed Within One Year or During Lifetime.

- 48. Possibility of performance.
- 50. ——— Dependent on contingency.

VI. Real Property and Estates and Interests Therein.

- 55. Statutory provisions.
- 56. Creation of estates or interests in general.
- 62. Assignment, grant, or surrender of existing estates, interests, or terms.
- 63. ——— In general.
- 71. Contracts for sale.
- 74. ——— Nature of contract in general.

VII. Sales of Goods.

(A) CONTRACTS WITHIN STATUTE.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 140-161.]

(B) ACCEPTANCE OF PART OF GOODS.

- 89. Acceptance in general.
- 90. Delivery and receipt.

(C) GIVING EARNEST OR PART PAYMENT.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 180-186.]

VIII. Requisites and Sufficiency of Writing.

- 105. Contents of memorandum.
- 106. ——— In general.
- 107. ——— Designation and description of parties.
- 108. ——— Statement of consideration.
- 110. ——— Description of lands.
- 118. Separate writings.

IX. Operation and Effect of Statute.

- 129. Part performance in general.
- 143. Persons to whom statute is available.
- 144. Waiver of bar of statute.

X. Pleading, Evidence, Trial, and Review.

Cross-References.

Compensation of broker as dependent on written contract of employment, see Brokers, 43.
Effect on creation of constructive trust, see Trusts, 92½.

Effect on creation of resulting trust, see Trusts, 63½.
Enforcement in federal courts, see Courts, 371.
State laws as rules of decision in federal courts, see Courts, 363.

I. AGREEMENTS IN CONSIDERATION OF MARRIAGE.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 1-6.]

II. PROMISES BY EXECUTORS' OR ADMINISTRATORS.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 7-12.]

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISARRIAGE OF ANOTHER.

33. New consideration beneficial to promisor.

See 23 Cent. Dig. Frds., St. of, §§ 50-53, 54.

One who has loaned a large sum to a mining corporation, and had also purchased and paid

for in advance a quantity of ore to be extracted from its mine, made a contract with it whereby he was to advance other sums, if needed for operating the mine, and a manager was appointed, with powers of attorney from the creditor and the company, irrevocable except at the creditor's instance, with sole control of the mine until such time as the ore should be delivered and the money repaid. *Held* that, although the creditor did not thereby obtain any ownership in the mine, he yet had such an interest in its operation that his verbal promise to be personally responsible to one engaged by the manager to haul ore was not within the statute of frauds, as being a promise to pay the debt of another.—*Davis v. Patrick*, 141 U. S. 479, 12 S. Ct. 58, 35 L. Ed. 826.

IV. REPRESENTATIONS.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 59-64.]

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR OR DURING LIFETIME.

◀48. Possibility of performance.
See 23 Cent. Dig. Frds., St. of, §§ 74-77.

◀50. — Dependent on contingency.
See 23 Cent. Dig. Frds., St. of, §§ 75-77.

A verbal contract to maintain a switch for plaintiff's benefit for shipping purposes "so long as he may need it" is not within the statute of frauds as being a contract not to be performed within a year.—*Warner v. Texas & P. Ry. Co.*, 17 S. Ct. 147, 164 U. S. 418, 41 L. Ed. 495, reversing judgment 54 F. 922, 4 C. C. A. 673.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

◀55. Statutory provisions.
See 23 Cent. Dig. Frds., St. of, § 82.

The civil law relating to transfers of land was superseded in New Mexico by Comp. Laws 1865, art. 19, c. 44, which required all conveyances to be subscribed by the grantor, and to be acknowledged and certified by a public officer, thus indicating that a written instrument was essential.—*Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

◀56. Creation of estates or interests in general.

See 23 Cent. Dig. Frds., St. of, §§ 83-89, 136-138.

Relinquishing possession of a mine by one of two adverse claimants to the other claimant, who patented it, where it does not appear that the antecedent relations of defendant to the land were changed by the contract, and the only change in possession was that plaintiff refrained from prosecuting an adverse claim thereto, is not such part performance as will take the case out of the statute, since the possession thereby gained may be referred to the patentee's claim of title, as well as to the contract between the parties.—*Ducie v. Ford*, 138 U. S. 537, 11 S. Ct. 417, 34 L. Ed. 1091, affirming judgment 8 Mont. 233, 19 P. 414.

A verbal contract to build and maintain a switch for plaintiff's benefit for shipping purposes, so long as he may need it, is not a grant of an "estate of inheritance, for more than one year, in lands and tenements," within the meaning of the Texas statute of frauds.—*Warner v. Texas & P. Ry. Co.*, 17 S. Ct. 147, 164 U. S. 418, 41 L. Ed. 495, reversing judgment 54 F. 922, 4 C. C. A. 673.

◀62. Assignment, grant, or surrender of existing estates, interests, or terms.

See 23 Cent. Dig. Frds., St. of, §§ 83, 97-112; 32 Cent. Dig. Land. & Ten. § 359.

◀63. — In general.

See 23 Cent. Dig. Frds., St. of, §§ 83, 97-104; 32 Cent. Dig. Land. & Ten. § 359.

The testimony of one who seeks to support his claim of title by evidence of a parol transfer under the civil law, to the effect that he met the former owner at a stage station four miles from the land, whence, however, some of the permanent objects thereon were visible, and that the owner then pointed out to him the land he was entitled to, can be given no weight whatever as evidence of a sufficient description or delivery to effect a transfer of title.—*Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

◀71. Contracts for sale.

See 23 Cent. Dig. Frds., St. of, §§ 83, 113-139.

◀74. — Nature of contract in general.

See 23 Cent. Dig. Frds., St. of, §§ 83, 122-131.

A verbal contract to procure the conveyance of certain land on the best possible terms, and to transfer an undivided interest in it to plaintiff, is a "contract for the sale of lands," within the Montana statute of frauds (Rev. St. 1879, c. 13, art. 1, § 162), and an action will not lie to enforce it.—*Dunphy v. Ryan*, 116 U. S. 491, 6 S. Ct. 486, 29 L. Ed. 703, affirming judgment *Ryan v. Dunphy*, 4 Mont. 342, 1 P. 710.

VII. SALES OF GOODS.

(A) CONTRACTS WITHIN STATUTE

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 140-161.]

(B) ACCEPTANCE OF PART OF GOODS.

◀89. Acceptance in general.

See 23 Cent. Dig. Frds., St. of, §§ 165-172.

In an action for the value of certain securities, sold under an oral contract alleged to have been made with defendant personally, who insisted that he entered into it as representative of a corporation of which he was trustee, it was shown that plaintiff handed the securities to the treasurer of the corporation, taking his receipt, reciting a condition precedent to their delivery. Defendant, when advised of what had been done, made no objection; and at another time, his attention being called thereto, said, "Yes; that's all right;" and, again, introduced plaintiff to a friend as the man from whom he had the securities. *Held* not sufficient evidence of acceptance and delivery to take the contract out of the statute of frauds.—*Hinchman v. Lincoln*, 124 U. S. 38, 8 S. Ct. 369, 31 L. Ed. 337.

◀90. Delivery and receipt.

See 23 Cent. Dig. Frds., St. of, §§ 162, 170, 171, 174-179.

C. bought an undivided one-third interest in a stage company, intending that S. should have one-half of the one-third, and, before the purchase, informed S. of such intention. At the time there was an unsettled account between C. and S., in respect of services rendered by S. to C., and of certain business in which they were both interested. After the purchase, C. agreed verbally with S. that S. should have the one-sixth at the price C. had paid for it, any amount due by C. to S. to be applied towards payment for the one-sixth; the ownership of it by S. to commence at once. Afterwards, the four owners of the property, of whom S. and C. were two, executed a paper, under seal, in which the interests of the four were defined, S. and C. being stated to be the owners of one-third; and all, including C., thereafter recognized S. as owning one-sixth, subject, as between S. and C. to the liability of S. to reimburse C. what he had paid for such one-sixth. *Held*, the contract was executed, and S. was put in possession, so that the statute of frauds (29 Car. II, c. 3, § 17) did not apply.—*Huntley v. Huntley*, 114 U. S. 394, 5 S. Ct. 884, 29 L. Ed. 130.

(C) GIVING EARNEST OR PART PAYMENT.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Frds., St. of, §§ 180-186.]

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

Ⓔ105. Contents of memorandum.

See 23 Cent. Dig. Frds., St. of, §§ 210-241.

Ⓔ106. — In general.

See 23 Cent. Dig. Frds., St. of, §§ 193, 210, 211.

Formal absurdities in a written contract for the sale of land do not make the contract insufficient under the statute of frauds, where it leaves no doubt as to who was the purchaser, who the seller, what the land, or what the terms.—(1911) *Lenman v. Jones*, 32 S. Ct. 18, 222 U. S. 51, 56 L. Ed. 89, affirming decree (1909) 33 App. D. C. 7.

Ⓔ107. — Designation and description of parties.

See 23 Cent. Dig. Frds., St. of, §§ 212, 213.

In an action by cotton factors for commissions earned and advances made, defendants alleged that the contracts for the sales of cotton were void under the statute of frauds. It was shown that defendants directed plaintiffs by telegraph to sell specified quantities of cotton for the account of certain fictitious names, which were intended and understood to represent defendants. Plaintiffs executed these orders by making "slip contracts" in duplicate, one copy being signed by plaintiffs and delivered to the purchaser, and the other signed by the purchaser and delivered to plaintiffs. These memoranda showed the quantity sold, the price, the name of the purchaser, and the seller, who was designated by the said fictitious name. *Held*, that such memoranda were sufficient to satisfy the statute of frauds, as parol evidence was admissible to show whom such fictitious name represented as the seller.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

Ⓔ108. — Statement of consideration.

See 23 Cent. Dig. Frds., St. of, §§ 214-221.

Though Code Ala. 1887, § 1732, provides that a special promise to answer for the debt of another is void "unless such agreement * * * expressing the consideration is in writing," etc., a guaranty of a negotiable note written by a third person on the note before its delivery need express no consideration, for the guaranty requires no other consideration than that which the note on its face implies to have passed between the original parties.—*Moses v. National Bank of Lawrence County*, 149 U. S. 298, 13 S. Ct. 900, 37 L. Ed. 743.

It is otherwise, however, when the guaranty is written on the note after it has been delivered and has taken effect as a contract, for the guaranty then requires a distinct consideration to support it, and must, under the Alabama statute, express such consideration.—*Id.*

Ⓔ110. — Description of lands.

See 23 Cent. Dig. Frds., St. of, §§ 225-234.

In ejectment by the United States to recover lands in Sault Ste. Marie, Mich., for the purposes of a military fort, purchased under a contract with defendant the written proposal of defendant to sell the land and the written acceptance thereof by the United States, in connection with the other writings, *held* to have sufficiently identified the land to render them a valid contract under the Michigan statute of frauds (How. Ann. St. § 6181).—*Ryan v. United States*, 136 U. S. 68, 10 S. Ct. 913, 34 L. Ed. 447.

Ⓔ118. Separate writings.

See 23 Cent. Dig. Frds., St. of, §§ 199, 262-265.

A husband, acting as agent for his wife, orally agreed to sell her land to defendants. Defendants' agent drew up and signed a written memorandum of the terms of sale, which was insufficient to satisfy the statute of frauds, because it did not identify the land sold. A

few days later the husband and wife executed a deed, which contained a full description of the land, but which was so defectively acknowledged by the wife as not to take effect as a conveyance, and sent it to defendants' agent, with a letter demanding payment of part of the price in money, and of the rest in notes, according to the terms of the original memorandum. *Held*, that a reply to this letter by defendants' agent, in which he requested the execution of another deed with a sufficient certificate of acknowledgment, and in which he promised that, on the receipt of the new deed, he would "forward money, notes, and old deed," taken in connection with the old deed and accompanying letter, constituted a sufficient memorandum signed by both parties or their agents, to take the case out of the statute of frauds.—*Bayne v. Wiggins*, 139 U. S. 210, 11 S. Ct. 521, 35 L. Ed. 144.

The vendor's execution of the deed and his written communication to the vendees that he had deposited such deed in a bank, for delivery to them upon payment of the purchase price, does not satisfy the requirement of Laws Okl. 1897, c. 8, § 4, that no contract relating to real estate "shall be valid until reduced to writing and subscribed by the parties thereto," even assuming that a memorandum to be gathered from connected documents may be sufficient, where the vendees were unwilling to accept the deed unless given a fuller and more undisputed possession than could be given at the time. Judgment 78 P. 118, 11 Okl. 674, affirmed.—*Halsell v. Renfrow*, 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189.

IX. OPERATION AND EFFECT OF STATUTE.

Specific performance of oral contracts partly performed, see Specific Performance, Ⓔ38-46.

Ⓔ129. Part performance in general.

See 23 Cent. Dig. Frds., St. of, §§ 237-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326.

Deceased having promised to deed a lot on which to build a house to complainant, delivery of possession to complainant and her husband, and the construction of the house under their direction and control, is a sufficient part performance to satisfy the statute of frauds.—*Brown v. Sutton*, 129 U. S. 238, 9 S. Ct. 273, 32 L. Ed. 664.

If a contract for exchange of land made by unauthorized officers and afterwards ratified, was not valid, under the statute of frauds, for want of the signature of the corporation or its lawful officers, the possession of the several tracts, and the erection of buildings and improvements thereon, was sufficient part performance, and it is immaterial that possession was taken before the ratification.—*Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 305, 9 S. Ct. 286, 32 L. Ed. 673, affirming decree (C. C.) *McAlpine v. Union Pac. Ry. Co.*, 23 F. 168.

The effect of complainant's possession as part performance is not weakened by the fact that her husband and a third person had leased the land during the previous year, before the negotiations were opened; it not appearing that the husband remained in possession after the termination of the lease, and, if the third person did so, he surrendered it when informed of the exchange.—*Id.*

Defendant's intestate agreed that if plaintiff would pay a certain sum towards the building of a house on a lot belonging to the former, and superintend the erection of the house, she would convey to him a half interest in the lot. *Held*, that allegations by plaintiff that plaintiff gave his personal attention to the purchase of materials for a dwelling, and the erection thereof on the lot, and paid \$4,000 towards the cost, showed a taking of possession of the lot by

plaintiff, and the making of improvements thereon, so as to take the case out of the statute of frauds.—*Townsend v. Vanderwerker*, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.

⚡143. Persons to whom statute is available.

See 23 Cent. Dig. Frds., St. of, §§ 344-350; 21 Cent. Dig. Execution, § 121.

On a suit brought under the captured and abandoned property act of March 12, 1863, by one claiming ownership by virtue of a sale which was sufficient to pass the title at common law, the government cannot set up the statute of frauds as a defense.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

⚡144. Waiver of bar of statute.

See 23 Cent. Dig. Frds., St. of, § 351; 44 Cent. Dig. Spec. Perf. § 119.

A prospector located lands for others under an oral agreement that he was to have one-third thereof. After a patent had issued in favor of the parties furnishing the money, but before

they had conveyed to the prospector, he conveyed to plaintiff. Subsequently the patentees executed a deed to the prospector, which was never delivered, and was finally lost. The patentees having decided to the prospector's wife at his request, plaintiff brought suit against her to recover the land. *Held*, that the fact that the agreement of the patentees to convey to the prospector could not, under the statute of frauds, have been enforced, cannot be invoked as a defense, inasmuch as they did not attempt to avail themselves of its invalidity while it remained executory, but, on the contrary, fully performed it by conveying under defendant's directions.—*Moore v. Crawford*, 130 U. S. 122, 9 S. Ct. 447, 32 L. Ed. 878, affirming decree (C.) *Crawford v. Moore*, 28 F. 824.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

See 23 Cent. Dig. Frds., St. of, §§ 352-381.

Review by federal supreme court, see Courts, ⚡887(4).

FRAUDULENT CONVEYANCES.

Scope-Note.

[INCLUDES transfers of property and other transactions or proceedings void as to creditors because intended or operating to delay, hinder, or defraud them, and conveyances void as to subsequent purchasers for inadequacy of consideration, reservation of power to revoke them, etc.; evidence relating thereto; rights, liabilities, and remedies in general of the parties and those claiming under them, and of creditors and subsequent purchasers, more particularly actions to set aside such transfers; and criminal responsibility for such fraudulent transfers.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Transfers and Transactions Invalid.

(A) GROUNDS OF INVALIDITY IN GENERAL.

⚡13. Badges of fraud.

14. — In general.

17. Transactions valid in inception.

18. Transactions fraudulent in part.

21. — Fraud in one or more separate conveyances or transactions.

(B) NATURE AND FORM OF TRANSFER.

⚡27. Transfers as security.

29. Collusive legal proceedings in general.

39. Payment of premiums for insurance.

(C) PROPERTY AND RIGHTS TRANSFERRED.

(D) INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR.

⚡56. Solvency of grantor.

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(E) CONSIDERATION.

⚡85. Pre-existing liability.

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95. Transactions between husband and wife.

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- 103. Husband and wife.
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(B) PURCHASERS FROM GRANTOR.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 598-604.]

(C) PURCHASERS FROM GRANTEE IN GENERAL.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 605-610.]

(D) BONA FIDE PURCHASERS FROM GRANTEE.

- ⇒ 197. Mortgagees and pledgees.

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[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 624-657.]

(B) REMEDIES ON GROUND OF NULLITY OF TRANSFER.

- ⇒ 228. Levy of attachment.

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(D) JURISDICTION, LIMITATIONS, AND LACHES.**(E) PARTIES AND PROCESS.**

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 738-755.]

(F) PLEADING.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 756-795.]

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[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 963-980.]

(K) DISPOSITION OF PROPERTY OR PROCEEDS.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 981-992.]

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[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 1004-1024.]

Cross-References.

By debtor prior to bankruptcy proceedings, see Bankruptcy, 174-180.
 Conveyances by corporations when insolvent or in contemplation of insolvency, see Corporations, 541, 542.
 Corporate stocks, see—
 Banks and Banking, 249.
 Corporations, 136.

Fraud in assignment for benefit of creditors, see Assignments for Benefit of Creditors, 142-151.
 Title of trustee in bankruptcy to property fraudulently conveyed by bankrupt, see Bankruptcy, 142.

I. TRANSFERS AND TRANSACTIONS INVALID.**(A) GROUNDS OF INVALIDITY IN GENERAL.****13. Badges of fraud.**

See 24 Cent. Dig. Fraud. Conv. §§ 17-19, 21, 22.

14. — In general.

See 24 Cent. Dig. Fraud. Conv. § 17.

The mere fact that a nonresident, who purchases lands from his brother, subsequently gives the latter a power of attorney to dispose of all his lands in the state, raises no presumption that the purchase was for the purpose of defrauding the brother's creditors, it appearing that the donor had other lands in the state.—*Gottlieb v. Thatcher*, 151 U. S. 271, 14 S. Ct. 319, 38 L. Ed. 157.

17. Transactions valid in inception.

See 24 Cent. Dig. Fraud. Conv. § 23.

Where a husband conveyed to his wife while engaged in a prosperous business, retaining more than sufficient property to pay all his debts, and the wife also took mortgages back in her

own name on property which the husband, in conjunction with her, had conveyed to a third person, the validity of these transactions, as against a subsequent creditor of the husband, was not affected by the fact that subsequent proceedings in bankruptcy, in which all the husband's debts except that owing to such creditor were satisfied, were fraudulent as to the latter.—*Schreyer v. Platt*, 134 U. S. 405, 10 S. Ct. 579, 33 L. Ed. 955.

18. Transactions fraudulent in part.

See 24 Cent. Dig. Fraud. Conv. §§ 24-29.

21. — Fraud in one or more separate conveyances or transactions.

See 24 Cent. Dig. Fraud. Conv. §§ 27-29.

A debtor, in order to secure a creditor, assigned to a trustee, meantime retaining the goods for sale, which assignment was void for irregularities under the laws of the state where made. *Held*, that a subsequent deed by him, in which the trustee joins, in favor of the creditor, and a bill of sale of the property by him to the creditor, in the absence of fraud, were valid.—*Stewart v. Dunham*, 115 U. S. 61, 5 S. Ct. 1163, 29 L. Ed. 329.

Where two brothers, both claiming to be creditors of a failing debtor, on the same day procure, through the agency of one of them, conveyances of property from the debtor, these conveyances are not necessarily so connected, as parts of the same transaction, that one may not be held valid and the other invalid, as to other creditors, when the instruments run to each separately, and convey different property, and the alleged considerations are separate.—*Crawford v. Neal*, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552.

(B) NATURE AND FORM OF TRANSFER.

6-27. Transfers as security.

See 24 Cent. Dig. Fraud. Conv. §§ 66-71.

Where the beneficiary, under a deed of trust which authorizes a sale either at public or private sale, as he may direct, accepts the land in satisfaction of the debt, which is thrice its value, and directs a conveyance of it in trust for the debtor's children as a gift from him, in which deed the debtor joins to perfect the legal title, the other creditors have no ground of complaint.—*Van Riswick v. Spalding*, 117 U. S. 370, 6 S. Ct. 788, 29 L. Ed. 913.

A mortgage of his individual property by a partner, to his firm, to enable it to continue business, is not a conveyance in fraud of the partnership creditors.—*Rio Grande R. Co. v. Vinet*, 132 U. S. 565, 10 S. Ct. 168, 33 L. Ed. 438.

6-29. Collusive legal proceedings in general.

See 24 Cent. Dig. Fraud. Conv. §§ 72, 76-78, 81.

On a bill by creditors of a testator to set aside sales of his real estate made under orders of the probate court by the executor, it appeared that the executor and the purchasers, with others, entered into a scheme to circulate statements that a large indebtedness of the succession existed in favor of the heirs, sufficient to absorb the estate, and secured by a mortgage, to depreciate the value of the estate so that this supposed indebtedness would cover it, to put forth claims to the estate which would complicate the title and affect the salable value of the land, and to procure a judicial sale by which the title might be cleared of incumbrances, and the land divided among the heirs according to their prior interests therein, free from liability for the debts of the estate; that, in pursuance thereof, the orders for sale were procured, the property was appraised by incompetent persons at a grossly inadequate value, the sale took place without competition, intending bidders being deterred; and that the proceedings at the sale and occurrences after it tended to prove conclusively that the sale was intended as a mere family arrangement for securing the property against the demands of the creditors. *Held*, that the sale was fraudulent as against general creditors of the estate.—*Johnson v. Waters*, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

Where a railroad company, having conveyed certain real property, fails, by mistake, to perfect the conveyance, a voluntary appearance and answer on the part of the company, in an action brought to have the title vested in the purchaser, is not proof of fraud.—*McConihay v. Wright*, 121 U. S. 201, 7 S. Ct. 940, 30 L. Ed. 932.

6-39. Payment of premiums for insurance.

See 24 Cent. Dig. Fraud. Conv. §§ 56, 57, 158.

Insurance on the life of a husband, taken out by the wife, or by the husband for the benefit of his wife and children, in a state whose statutes make the proceeds payable to the wife or children free from the claims of the husband's creditors, cannot be recovered by such creditors,

though the husband was insolvent when the policies were issued, and the premiums were paid out of his money.—*Central Nat. Bank v. Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370.

Nor can premiums so paid be recovered out of the proceeds of the policies, especially where there is no proof of fraud on the part of the wife or the insurance companies, and the provision for the family is not excessive.—*Id.*

(C) PROPERTY AND RIGHTS TRANSFERRED.

See 24 Cent. Dig. Fraud. Conv. §§ 96-127.

Due process of law, see Constitutional Law, 6-296.

Equal protection of laws, see Constitutional Law, 6-240.

(D) INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR.

Intent of debtor transferring property prior to bankruptcy proceedings, see Bankruptcy, 6-180.

6-56. Solvency of grantor.

See 24 Cent. Dig. Fraud. Conv. §§ 133-153.

6-57. — In general.

See 24 Cent. Dig. Fraud. Conv. §§ 133-142, 143, 150-153.

The conveyance of property to his wife for the purpose of a residence for his family, and its subsequent improvement with money drawn from his income, is not a fraud upon the rights of subsequent creditors, where it appears that, at the time of the conveyance and improvements, the debtor, though somewhat indebted, was possessed of sufficient other property within reach of his creditors to discharge all the demands against him.—*Wallace v. Penfield*, 106 U. S. 260, 1 S. Ct. 216, 27 L. Ed. 147.

Where the consideration of a deed of trust made by an insolvent married man to secure his wife is money realized from the sale of her individual property, and used by him, the deed is valid as against his creditors, although such individual property was bought with his own funds; it having been settled on his wife when he was free from debt and possessed of ample means.—*Bean v. Patterson*, 122 U. S. 493, 7 S. Ct. 1298, 30 L. Ed. 1126.

6-63. Intent to defraud pre-existing creditors.

See 24 Cent. Dig. Fraud. Conv. §§ 159-177.

6-64. — In general.

See 24 Cent. Dig. Fraud. Conv. §§ 159-161, 164, 165.

Only contracts in fraud of the rights of creditors are embraced in the provision of Porto Rico Civ. Code, art. 1291, including in the enumeration of contracts which may be rescinded, "those executed in fraud of creditors, when the latter cannot recover in any other manner what is due them," and such provision does not give the right to rescind a contract made by an insolvent debtor, merely because, without rescission, the creditor cannot otherwise recover his debt.—*Will v. Tornabelli*, 30 S. Ct. 424, 217 U. S. 47, 54 L. Ed. 660.

(E) CONSIDERATION.

6-85. Pre-existing liability.

See 24 Cent. Dig. Fraud. Conv. §§ 212, 213-225.

6-88. — Security.

See 24 Cent. Dig. Fraud. Conv. §§ 220-223.

Judgment notes purposely given to preferred creditors for sums largely in excess of the amounts due them, and afterwards satisfied in full, are fraudulent as to other creditors thereby prevented from receiving payment.—*Hardt v.*

Heidweyer, 152 U. S. 547, 14 S. Ct. 671, 38 L. Ed. 548.

The fact that a chattel mortgage of an insolvent debtor covers more property than enough to secure the debt is not a badge of fraud.—*Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289.

◀95. Transactions between husband and wife.

See 24 Cent. Dig. Fraud. Conv. §§ 243-283.

The conveyance of property to his wife for the purpose of a residence for his family, and its subsequent improvement with money drawn from his income, is not a fraud upon the rights of subsequent creditors, where it appears that, at the time of the conveyance and improvements, the debtor, though somewhat indebted, was possessed of sufficient other property, within reach of his creditors, to discharge all the demands against him.—*Wallace v. Penfield*, 106 U. S. 260, 1 S. Ct. 216, 27 L. Ed. 147.

A conveyance by a husband to his wife, through a trustee, in payment of moneys, the proceeds of real estate inherited from her father and brother, which had come into his hands from time to time, and which he had continually promised to repay, is not fraudulent, as against creditors, though he was insolvent at the time it was made, where it appeared that the wife was ignorant of his insolvency, and that the value of the property conveyed was not in excess of the debt and interest.—*Metsker v. Bonebrake*, 108 U. S. 66, 2 S. Ct. 351, 27 L. Ed. 654.

A deed by a husband and wife, in trust for her benefit, of real estate of the wife in which he joins to convey his estate in curtesy, upon the wife joining with him in conveying other property in which she is interested, to relieve him from financial embarrassment, is made on a valuable consideration, which may sustain the conveyance as against his creditors, if free from fraud.—*Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 S. Ct. 613, 28 L. Ed. 577; *Mattoon v. McGrew*, 112 U. S. 713, 5 S. Ct. 369, 28 L. Ed. 824.

(F) CONFIDENTIAL RELATIONS OF PARTIES.

◀102. Family relation in general.

See 24 Cent. Dig. Fraud. Conv. §§ 330-332.

The fact that the parties to a conveyance are brothers does not, of and in itself, cast suspicion on the transaction, or create such a prima facie presumption against its validity as will require a court to hold it to be invalid, without proof of fraud on the part of the grantor participated in by the grantee.—*Gottlieb v. Thatcher*, 151 U. S. 271, 14 S. Ct. 319, 38 L. Ed. 157.

◀103. Husband and wife.

See 24 Cent. Dig. Fraud. Conv. §§ 337-346.

◀104. — Transactions in general.

See 24 Cent. Dig. Fraud. Conv. §§ 337-344.

In 1871, defendant conveyed to his wife certain property, the deeds being duly recorded; and in 1874 certain persons, to whom he and his wife had conveyed property in 1870, executed to her two mortgages thereon to secure money loaned, for the purpose of erecting improvements. One V. afterwards contracted to make such improvements, and was to receive in payment a bond and mortgage held by defendant on property of his wife not included in the above transfers. When the bond and mortgage were duly assigned to V. according to the contract, he demanded a guaranty of defendant, which was given. Shortly afterwards a prior mortgage on the property covered by V.'s mort-

gage, of which V. had notice, was foreclosed, and the whole of the proceeds was required to satisfy the first mortgage; whereupon V. sued defendant on his guaranty, and recovered judgment. When defendant conveyed to his wife the realty above mentioned, which he testified had been partly paid for by her, he retained more than sufficient property to pay all his debts, and he continued in the same profitable business in which he had been engaged many years. *Held*, that neither the conveyances to the wife, nor the execution of the mortgages to her, were fraudulent as to V.—*Schreyer v. Platt*, 134 U. S. 405, 10 S. Ct. 579, 33 L. Ed. 955.

Where a factor has obtained the legal title to goods on which he had a valid antecedent lien for more than their value, he has the legal right to transfer them to his wife in satisfaction of a pre-existing bona fide indebtedness, and the conveyance cannot be upset as fraudulent by the holders of his acceptances, who have obtained judgment on them against him.—*Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234, 11 S. Ct. 52, 34 L. Ed. 655, affirming decree (C. C.) 29 F. 611.

◀108. Fiduciary and friendly relations.

See 24 Cent. Dig. Fraud. Conv. §§ 333-336.

The fact that chattel mortgages are given between midnight and morning, in anticipation of attachments by other creditors, that the mortgagees are relatives or intimate friends of the mortgagor, that they immediately foreclose and take possession, and that they are given for precedent debts, does not make them invalid, they being given bona fide and for a valuable consideration, in a state which allows preference of creditors except in connection with a general assignment.—*Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289.

(G) RESERVATIONS AND TRUSTS FOR GRANTOR.

◀110. Benefits reserved to grantor.

See 24 Cent. Dig. Fraud. Conv. §§ 352-359.

A deed of trust, for the benefit of sureties of the grantor on notes given for money borrowed by him, conveying his storehouse, the fixtures and goods therein, and other personal property, but not including a farm owned by him, provided that it should become void on payment of the notes, and that in case of default in such payment the trustee, on request of the beneficiaries, should sell the property, and pay them the proceeds in proportion to the amounts for which each might be surety at the time of sale, holding the remainder subject to the grantor's order. There was no express reservation of possession, and the trustee took possession immediately. *Held*, that the instrument, being in reality a chattel mortgage, was not fraudulent, notwithstanding the reservation of the surplus to the grantor.—*Huntley v. Kingman & Co.*, 152 U. S. 527, 14 S. Ct. 688, 38 L. Ed. 540.

The fact that the debtor was employed by the creditor, after the sale to the latter, to assist in the disposition of the goods and the getting in of accounts, does not show that the transaction was fraudulent, within the meaning of the Alabama law.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

◀113. Secret reservations or trusts.

See 24 Cent. Dig. Fraud. Conv. §§ 364-368.

Under the law of Alabama, a creditor who receives a valid preferential conveyance has full power to convey the property included therein to the wife of the debtor, and the transaction does not show a secret reserva-

tion for the grantor.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

(H) PREFERENCES TO CREDITORS.

By corporations to creditors in general when insolvent or in contemplation of insolvency, see Corporations, ¶544.

Ground of attachment, see Attachment, ¶16.

¶115. Right of debtor to prefer creditor.

See 24 Cent. Dig. Fraud. Conv. §§ 370, 375-377.

Other creditors cannot complain because their debtor in good faith secured a particular creditor, although the ultimate effect thereof may be to delay other creditors.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

Contracts made by an insolvent debtor, which, being upon adequate consideration, are not fraudulent simulations, cannot be rescinded under the law of Porto Rico, merely because their execution operates to give a preference in favor of a creditor.—*Will v. Tornabella*, 80 S. Ct. 424, 217 U. S. 47, 54 L. Ed. 660.

¶117. Intent to defeat other creditors.

See 24 Cent. Dig. Fraud. Conv. §§ 373, 374.

A sale by way of preference is not invalidated by a fraudulent intent on the vendor's part to defeat his other creditors, or by the fact that, as a result, the remaining creditors of the vendor cannot obtain payment of their debts.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

¶121. Payment or satisfaction of debts.

See 24 Cent. Dig. Fraud. Conv. §§ 385-391.

A debtor, in order to secure a creditor, assigned to a trustee, meantime retaining the goods for sale, which assignment was void for irregularities under the laws of the state where made. *Held*, that a subsequent deed by him, in which the trustee joins, in favor of the creditor, and a bill of sale of the property by him to the creditor in the absence of fraud, were valid.—*Stewart v. Dunham*, 115 U. S. 61, 5 S. Ct. 1163, 29 L. Ed. 829.

A conveyance of property by a debtor in payment of a debt, thereby leaving nothing for his other creditors, is valid, whatever be the motives of the parties, provided the debt is bona fide and enforceable, the payment absolute, and, if made in property, not materially in excess of the debt, and no pecuniary benefit is secured to the debtor.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

Defendant sent a letter to plaintiff, stating that their common debtor, "owing to disastrous failure of crops in his own section, finds himself forced to ask for extension," and expressing a willingness to grant an extension, provided plaintiff did likewise; but the latter failed to agree to this proposition, which evidently contemplated an extension till the next crop, and took short-time acceptances, running less than three months, for part of his claim. *Held*, that the receipt by defendant of payment of his claim from the debtor by a subsequent preferential sale was not a fraud upon plaintiff.—*Id.*

¶122. Mortgages and other transfers as security.

See 24 Cent. Dig. Fraud. Conv. §§ 392-398.

Mortgages given by an insolvent debtor to certain creditors are not invalid, as against the general creditors, because they also secure a note due another person, the preferred creditors doing so in good faith, supposing that

they had a right to it.—*Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289.

The fact that, during the night that an insolvent debtor gave chattel mortgages on his stock of goods to creditors, clerks took away from the store goods enough to satisfy their claims for wages, and that they were charged with the goods on the books, does not affect the validity of the mortgages, there being nothing to connect the mortgagor or mortgagees therewith.—*Id.*

¶126. Nature of debts preferred in general.

See 24 Cent. Dig. Fraud. Conv. § 402.

The indorser of commercial paper has full power, with the consent of the person discounting the paper, to use it as a debt due him, and to protect his indorsement by obtaining a conveyance from the debtor to the amount of such paper.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

(I) RETENTION OF POSSESSION OR APPARENT TITLE BY GRANTOR.

Delivery as element of pledge, see Pledges, ¶11.

Retention of possessions by chattel mortgagor, effect as to mortgagor's creditors, see Chattel Mortgages, ¶184-191.

¶131. Element or evidence of fraud in general.

See 24 Cent. Dig. Fraud. Conv. §§ 407-425.

¶132. — As to creditors.

See 24 Cent. Dig. Fraud. Conv. §§ 407-424.

Where an insolvent debtor transfers to a certain creditor his dwelling and mill property, the fact that he is allowed to remain in possession, and run the mill on a salary, is not conclusive evidence of a purpose to defraud other creditors, and is susceptible of explanation on the ground that the parties were life-long friends. Affirming *Neal v. Foster* (C. C.) 36 F. 29.—*Crawford v. Neal*, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552.

Where the nature of a sale precludes the possibility of a delivery consistent with avowed purpose of the sale, or the absence of delivery is excused by the usages of the trade at the place in which the sale is made, retention of possession by the vendor is not fraudulent in Pennsylvania.—*Taney v. Penn Nat. Bank of Reading*, 34 S. Ct. 288, 232 U. S. 174, 58 L. Ed. 558, affirming decree 187 F. 689, 109 C. C. A. 437.

¶134. Statutory provisions.

See 24 Cent. Dig. Fraud. Conv. §§ 423-431.

¶135. — Change of possession.

See 24 Cent. Dig. Fraud. Conv. § 427.

Under the Kansas statute of frauds (Act Oct. 31, 1868; 1 Dassel's St. c. 43, p. 441; Comp. Laws 1879, c. 43), which provides that every sale of personalty, unaccompanied by a change of possession, shall be deemed void as to creditors, until it is shown that the sale was made in good faith and upon consideration, when the sale of personalty is followed by an actual and continued change of possession, the vendee is not obliged, in order to maintain his right of possession, to prove both the payment of a sufficient consideration and the exercise of good faith on his part.—*Jones v. Simpson* 116 U. S. 609, 6 S. Ct. 538, 29 L. Ed. 742.

¶137. Nature of property transferred.

See 24 Cent. Dig. Fraud. Conv. §§ 432-437.

Physical delivery to the pledgee is not necessary in Pennsylvania to validate, as against creditors of the pledgor, a pledge by a distilling company of whisky stored in its own bonded

warehouse, accompanied by a transfer, according to trade usage, of the distilling company's warehouse receipts; the warehouse being in control of the federal government, and the whisky removable only on payment of the internal revenue tax.—*Taney v. Penn. Nat. Bank of Reading*, 34 S. Ct. 288, 232 U. S. 174, 58 L. Ed. 558, affirming decree 187 F. 689, 109 C. C. A. 437.

147. Sufficiency of transfer of possession.

See 24 Cent. Dig. Fraud. Conv. §§ 457-468, 473-478, 481.

149. — Immediate delivery.

See 24 Cent. Dig. Fraud. Conv. §§ 462-463½.

Where a bill of sale was executed and delivered on Saturday night, and the goods, which were 23 miles away, were taken possession of at 4 o'clock on the following Sunday morning, there was an "immediate delivery," within *Laws Mont.* 1872, p. 394, § 15, making a sale, unaccompanied by a change of possession, conclusive evidence of fraud against the creditors of the vendor.—*Kleinschmidt v. McAndrews*, 117 U. S. 282, 6 S. Ct. 761, 29 L. Ed. 905, reversing judgment 4 Mont. 8, 5 Pac. 281.

(J) KNOWLEDGE AND INTENT OF GRANTEE.

156. Knowledge or actual notice.

See 24 Cent. Dig. Fraud. Conv. §§ 495, 496.

Assuming that, under the statutes of Dakota territory relating to fraudulent conveyances (*Comp. Laws*, §§ 4654-4657), an innocent purchaser might obtain a good title without regard to the seller's intent, yet, under the provisions relating to notice (sections 4741-4743), the purchaser is chargeable with knowledge of a fraudulent intent on the part of the seller, if he had actual knowledge of circumstances sufficient to put him, as a prudent man, upon inquiry in regard thereto.—*Shauer v. Alterton*, 151 U. S. 807, 14 S. Ct. 442, 38 L. Ed. 286.

159. Operation and effect of knowledge or notice.

See 24 Cent. Dig. Fraud. Conv. §§ 506-509, 511, 515, 518.

In Oregon a transfer of property by an insolvent debtor for the bona fide purpose of satisfying a debt equal or greater in amount than the value of the property is not constructively fraudulent as to other creditors, even though the grantee is aware of the insolvency.—*Crawford v. Neal*, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Removal of cloud on title, see *Quieting Title*, 7.

(A) ORIGINAL PARTIES.

173. Mutual rights and liabilities of parties.

See 24 Cent. Dig. Fraud. Conv. §§ 530, 531, 533-548.

176. — Enforcement of executory contract.

See 24 Cent. Dig. Fraud. Conv. §§ 537-541; 44 Cent. Dig. Spec. Perf. § 176.

It being presumed, from the circumstances of the case, that a conveyance was made for the purpose of defrauding the grantor's creditors, and such fraudulent intent appearing from the testimony of witnesses, who further testified to an agreement that the property should be reconveyed to the grantor when he received a discharge in bankruptcy, such recon-

veyance cannot be enforced in equity after the accomplishment of the fraud.—*Dent v. Ferguson*, 132 U. S. 50, 10 S. Ct. 13, 33 L. Ed. 242.

180. Rights and liabilities of grantees as to creditors.

See 24 Cent. Dig. Fraud. Conv. §§ 554-559, 561-588, 595.

182. — Personal liabilities.

See 24 Cent. Dig. Fraud. Conv. §§ 568-577.

Where the action of the transferees amounted to fraudulent conversion, it was proper to charge that they were liable, not only for their collections on bills receivable, but also for the value of those remaining in their hands, to an amount equal to plaintiffs' claim.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373.

As the action of the garnishees amounted to fraudulent conversion, it was proper to charge that they were liable, not only for their collections on bills receivable, but also for the value of those remaining in their hands, to an amount equal to plaintiffs' claim.—*Id.*

Where it was alleged that a garnishee had received the transfer of the property of debtors, for the purpose of delaying creditors, the court charged that if the jury believed plaintiffs had a valid claim of over \$11,000 against the debtors, who were insolvent, and that the garnishee knew, or might have known, the fact; and that he took from the debtors bills receivable, on which his firm had collected nearly \$10,000, and still had uncollected bills of value,—they would find the garnishees liable, unless they found that they were in fact and in good faith creditors of the attached debtor in the full sum claimed; and that the dealings of the garnishee at the time of the transfer were fair and honest, and had with the single purpose of obtaining satisfaction of the debt of his firm; and that he received therefor no more than was reasonably worth the amount of the debt. *Held*, that there was no error in the instruction.—*Id.*

Where property is conveyed to a wife in fraud of her husband's creditors, a judgment in personam against her for rents, issues, and profits, and the use and occupation of the premises, is erroneous.—*Clark v. Beecher*, 154 U. S. 631, 14 S. Ct. 1184, 24 L. Ed. 705.

The liability of a creditor to whom goods were delivered by a debtor in fraud of other creditors is not affected by judicial proceedings thereafter taken in another state, to which the goods have since been carried, whereby the creditor attaches the goods as property of the debtor. Judgment 57 N. E. 337, 176 Mass. 48, affirmed.—*Rothschild v. Knight*, 22 S. Ct. 391, 184 U. S. 334, 46 L. Ed. 573.

(B) PURCHASERS FROM GRANTOR.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 598-604.]

(C) PURCHASERS FROM GRANTEE IN GENERAL.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 605-610.]

(D) BONA FIDE PURCHASERS FROM GRANTEE.

197. Mortgagees and pledgees.

See 24 Cent. Dig. Fraud. Conv. § 611.

An insolvent gave certain goods in payment of a debt to a creditor, who pledged them as security for a loan of \$15,000, consisting of \$5,000 cash, and two notes of like amount. An action by other creditors of the insolvent to have

the pledge set aside, as originally brought, attacked the reality of the pledge only. Before it was amended so as to charge fraud the two notes given by the pledgee became due, and he paid them. *Held* that, no personal wrong having been charged against him, he was not bound to let his paper go to protest, though it may have appeared that the transfer from insolvent to the pledgor was in fraud of creditors.—*Freiburg v. Dreyfus*, 135 U. S. 478, 10 S. Ct. 716, 34 L. Ed. 206, affirming *Weiler v. Same* (C. C.) 26 F. 824.

III. REMEDIES OF CREDITORS AND PURCHASERS.

Practice in federal courts, see Courts, 335.

(A) PERSONS ENTITLED TO ASSERT INVALIDITY.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 624-657.]

(B) REMEDIES ON GROUND OF NULLITY OF TRANSFER.

228. Levy of attachment.

See 24 Cent. Dig. Fraud. Conv. §§ 665-667.

The owner of land conveyed it to his nephew for the purpose of defrauding creditors, and it was afterwards conveyed to one I. without consideration. I. executed a mortgage on the land to secure a loan, which was afterwards foreclosed, and the land was purchased by the mortgagee. Shortly after the original owner had conveyed the land, a creditor, whom the conveyance was intended to defraud, attached it, and in the action judgment was rendered for the amount of the debt, and foreclosure of the attachment lien, which was had, and the land was purchased by the attaching creditor. This was after the conveyance to I., and the execution of the mortgage by him. *Held* that, as the laws of Texas declare conveyances in fraud of creditors absolutely void, there was nothing to affect the creditor's right to attach the land as he did, and title thereto vests in him under the attachment sale; for I.'s mortgagee, having purchased the land pendente lite, took it subject to the attachment lien.—*Thompson v. Baker*, 141 U. S. 648, 12 S. Ct. 89, 35 L. Ed. 889.

(C) RIGHT OF ACTION TO SET ASIDE TRANSFER, AND DEFENSES.

Restraining proceedings in state courts by bankruptcy, court, see Bankruptcy, 217.
Right of assignee in bankruptcy, see Bankruptcy, 279.

242. Defenses.

See 24 Cent. Dig. Fraud. Conv. §§ 689-691.

The cutting pendente lite by the grantee in a fraudulent deed of the timber valuable for turpentine purposes on a part of the land does not defeat the jurisdiction of equity to cancel the deed as a cloud on title. Decree, *Ashburn v. Graves* (1907) 149 F. 968, 79 C. C. A. 478, reversed.—*Graves v. Ashburn*, 30 S. Ct. 108, 215 U. S. 331, 54 L. Ed. 217.

(D) JURISDICTION, LIMITATIONS, AND LACHES.

See 24 Cent. Dig. Fraud. Conv. §§ 727-737.

Limitation of proceeding in bankruptcy to set aside conveyance, see Bankruptcy, 298.

(E) PARTIES AND PROCESS.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 738-755.]

(F) PLEADING.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 756-755.]

(G) EVIDENCE.

Hearsay evidence, see Evidence, 317.

270. Presumptions and burden of proof.

See 24 Cent. Dig. Fraud. Conv. §§ 796-821.

271. — In general.

See 24 Cent. Dig. Fraud. Conv. §§ 796-798, 821.

A creditor who assails a conveyance of his debtor for fraud must show it. It cannot be presumed.—*Allen v. Smith*, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732.

280. — Preferences to creditors.

See 24 Cent. Dig. Fraud. Conv. § 803.

Though the burden of proof was primarily on plaintiffs to establish their allegations of fraud and collusion in the transfer of a debtor's property to a garnishee, yet, after the garnishee's testimony showed that he knew the debtors were unable to pay their debts when he took nearly all their property in professed payment of his firm's debt, it was not error to charge that the burden was left on him to show the fairness of the transaction about which he had testified, and by which he came into possession of the property.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373.

282. — Knowledge and intent of grantee.

See 24 Cent. Dig. Fraud. Conv. §§ 817, 818.

Where, in an action to set aside a conveyance as in fraud of creditors, the grantee has shown a valuable consideration therefor, the burden of showing a fraudulent intent on the part of the debtor, and knowledge by the grantee, is on complainant.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374.

285. Admissibility.

See 24 Cent. Dig. Fraud. Conv. § 822-824.

291. — Consideration.

See 24 Cent. Dig. Fraud. Conv. §§ 849-856.

Where a merchant, to the prejudice of his creditors, has transferred his stock of goods to his brother in payment of an alleged indebtedness, the fact that he failed to mention any such indebtedness in making a confidential statement to a commercial agency several months before is admissible as bearing on the existence of such debt, although the statement was never brought to the notice of his creditors.—*Shauer v. Alterton*, 151 U. S. 607, 14 S. Ct. 442, 38 L. Ed. 296.

294. Weight and sufficiency.

See 24 Cent. Dig. Fraud. Conv. §§ 867-908.

298. — Intent of grantor.

See 24 Cent. Dig. Fraud. Conv. §§ 892-895.

Conversations in which a judgment debtor, who has previously conveyed lands to his brother, expresses strong dislike of the judgment creditor, and shows a disposition to obstruct the collection of the judgment, are not sufficient to show fraud on his own part in making the conveyance.—*Gottlieb v. Thatcher*, 151 U. S. 271, 14 S. Ct. 319, 38 L. Ed. 157.

299. — Nature and circumstances of transaction.

See 24 Cent. Dig. Fraud. Conv. §§ 876-890.

Plaintiffs, judgment creditors of an insolvent, alleged that he conspired with his son-in-law, S., to save a valuable part of his property from his creditors; that, in pursuance of that design, S. brought suit against the insolvent for

services never performed, being in fact indebted to the insolvent, and attached the latter's property; that he bought in for an inadequate sum land of the insolvent levied on by other creditors, which the insolvent did not redeem; that the insolvent appeared in S.'s suit and made a pretended answer, but did not plead limitation, as he could have done, to a large part of the demand; that S. bought in the property sold on his judgment for an inadequate sum. S. answered, denying fraud, and averring that his suit was vigorously contested by the insolvent; that he was justly entitled to the amount of the judgment; and that the lands he bought in were subject to mortgages. The insolvent's heirs and administrator also answered to a similar effect. The pleadings were all sworn to. S.'s judgment, which was in evidence, showed that his complaint was sworn to, and accompanied by an account; that the insolvent made a general denial; and that the case was tried to a jury, which found for S. *Held*, that plaintiffs' proof was insufficient. They could not argue anything from the insolvent's failure to plead limitation.—*Allen v. Smith*, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732.

In a creditors' suit to set aside certain alleged fraudulent conveyances of real estate by the debtor to his sisters, a decree dismissing the bill *held* proper, where every inference that might be drawn from the near relationship of the parties to the alleged fraudulent conveyance was rebutted by positive evidence of the unfriendly relations at the time the deed was made. Decree, 23 App. D. C. 389, affirmed.—*White v. Glover*, 26 S. Ct. 749, 199 U. S. 602, 50 L. Ed. 328.

◀302. — Good faith of purchaser.

See 24 Cent. Dig. Fraud. Conv. § 908.

An insolvent gave certain goods in payment of a debt to a creditor, who pledged them as security for a loan of \$15,000. In a suit by other creditors of insolvent to have the pledge set aside, it appeared that the pledgee had no other security; that he had the means to make such a loan, though he had never made one so large before; that he had loaned to the pledgor before; that his relations with him were such as to justify him in making the loan; that he had no knowledge of whence the goods were obtained; that there were no such circumstances as would arouse suspicion in the mind of a reasonably prudent man. *Held*, that the pledgee received the goods in good faith, and his title should be protected.—*Freiburg v. Dreyfus*, 135 U. S. 478, 10 S. Ct. 716, 34 L. Ed. 206, affirming *Weiler v. Same* (C.C.) 26 F. 824.

(H) DISCOVERY, INJUNCTION, AND RECEIVER.

◀304. Injunction.

See 24 Cent. Dig. Fraud. Conv. §§ 910-916.

The cutting pendente lite by the grantee in a fraudulent deed of the timber valuable for turpentine purposes on a part of the land does not defeat the jurisdiction of equity to enjoin further cutting. Decree, *Ashburn v. Graves* (1907) 149 F. 968, 79 C. C. A. 478, reversed.—*Graves v. Ashburn*, 30 S. Ct. 108, 215 U. S. 331, 54 L. Ed. 217.

(I) TRIAL.

◀308. Questions for jury.

See 24 Cent. Dig. Fraud. Conv. §§ 923-940.

A statutory rule making the question of fraud or good faith a question for the jury does not prevent the court from giving a peremptory instruction when the evidence is substantially all one way.—*People's Savings Bank v. Bates*, 7 S. Ct. 679, 120 U. S. 556, 30 L. Ed. 754.

Though the testimony of creditors of an insolvent secured by a fraudulent deed of trust was positive and uncontradicted that they accepted the security, which was necessary under the laws of the state where the deed was executed to give it validity it was proper to submit that question to the jury, since the witnesses were not disinterested, and the jury might have found that they had knowledge of the fraud at the time they accepted. Judgment, 75 F. 350, 21 C. C. A. 390, affirmed.—*Sonnen- theil v. Christian Moerlein Brewing Co.*, 19 S. Ct. 233, 172 U. S. 401, 43 L. Ed. 492.

Where there was evidence that fraudulent acts of an insolvent firm were currently known in the place where it was located, prior to its failure, it was not error to submit to the jury the question as to whether creditors located there, and preferred in a trust deed, had knowledge of the fraud before accepting it, though there was no direct proof of knowledge or of facts putting them on inquiry.—*Id.*

Proof that the agent of the mortgagees of chattels was a lawyer of long standing and considerable practice, and that a debt to himself which had been already partially paid was secured by the mortgage, and that he was the son-in-law of the head of the firm which gave the mortgage, and who had previously given deeds to members of his family, one of them being to the lawyer's wife, which deeds had been long withheld from record, and that the mortgagors were merchants, constantly buying and replenishing their stock, and standing in need of credit, is sufficient to go to the jury on the question of his connection with the scheme of the mortgagors to execute the mortgage for the purpose of defrauding their unsecured creditors. Judgment, 60 P. 534, 8 Okl. 239, affirmed.—*Browning v. De Ford*, 20 S. Ct. 876, 178 U. S. 196, 44 L. Ed. 1033.

An assignment, as security for a debt of a cause of action for damages under an indemnity bond, does not as a matter of law hinder, delay, or defraud creditors because of a reservation in favor of the assignor of any surplus remaining after paying the debt, by an agreement between the parties, not disclosed in the assignment itself, and not filed, as was such assignment, with the clerk of the court in which the action was pending.—(1911) *Merillat v. Hensley*, 31 S. Ct. 575, 221 U. S. 333, 55 L. Ed. 758, 38 L. R. A. (N. S.) 370, Ann. Cas. 1912D. 497, affirming decree (1908) 32 App. D. C. 64.

◀309. Instructions.

See 24 Cent. Dig. Fraud. Conv. §§ 941, 944-958.

There is no error in instructing the jury that transfers by failing debtors to relatives should be scrutinized with especial care, when the court further states that the mere fact of relationship is not a badge of fraud; that, notwithstanding the relationship, the law presumes good faith and honest intentions; that, if the evidence is evenly balanced on the question of intent, the transfer must be upheld; and other like expressions.—*Shauer v. Alerton*, 151 U. S. 607, 14 S. Ct. 442, 38 L. Ed. 286.

In laying down the statutory rule that a sale is void as to creditors unless accompanied by immediate, open, visible, and continued change of possession, the court is not bound to detail at length the circumstances of the particular case, but may leave it to the jury whether, under all the evidence, there was such immediate delivery and such actual change as was necessary to a valid transfer.—*Id.*

◀310. Verdict and findings.

See 24 Cent. Dig. Fraud. Conv. §§ 959-961.

A finding that the evidence in a creditors' suit failed to establish that a conveyance by an insolvent debtor and a mortgage executed by his

grantee were voluntarily made to hinder and delay the complaining creditors in the collection of their debts negatives the existence of fraudulent simulation, which was the controlling issue in the suit, although the court, in its conclusions of law, announced that an insolvent debtor had the right to give a preference, which must be regarded as intended to be responsive solely to other findings of fact, tending to establish the giving of such a preference.—*Will v. Tornabelli*, 30 S. Ct. 424, 217 U. S. 47, 54 L. Ed. 680.

(J) JUDGMENT OR DECREE AND EXECUTION.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 993-995.]

(K) DISPOSITION OF PROPERTY OR PROCEEDS.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 981-991.]

(L) REVIEW.

See 24 Cent. Dig. Fraud. Conv. §§ 993-1003.

Review of final judgment, see Appeal and Error, ¶80.

IV. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Fraud. Conv. §§ 1004-1024.]

FREEDOM OF THE PRESS.

See Constitutional Law, ¶90.

FREE LIST.

See Customs Duties, ¶33.

FREIGHT.

See—
Carriers, ¶45-201, 204-230.
Shipping, ¶49, 102-145.

FRENCH SPOILIATION CLAIMS.

See United States, ¶101.

FRIEND OF THE COURT.

See Amicus Curia.

FRIVOLOUS APPEAL.

See Appeal and Error, ¶783.

Damages and penalties, see Costs, ¶259-263.

FROGS.

Unblocked frogs, assumption of risks, see Master and Servant, ¶217; use of as negligence, see Master and Servant, ¶105.

FRONT-FOOT RULE.

Denying due process of law, see Constitutional Law, ¶290.

FUGITIVE FROM JUSTICE.

Extradition, see Extradition, ¶30.

Suspending statute of limitations, see Criminal Law, ¶153.

FULL FAITH AND CREDIT.

See Judgment, ¶828.

Denial as ground of review in federal Supreme Court, see Courts, ¶394(12, 13).

Foreign garnishment, see Garnishment, ¶237.

Foreign judgment, see—

Courts, ¶382.

Divorce, ¶331.

Foreign probate, see Wills, ¶434.

Foreign statute, see Courts, ¶8, 511.

Laws of other states, actions based on, see Courts, ¶8.

Territorial statute, see Territories, ¶11.

FUNDS.

See—

Counties, ¶150-194.

Municipal Corporations, ¶859-1000.

States, ¶117-168.

Towns, ¶47-61.

United States, ¶81-91.

Religious societies, see Religious Societies, ¶15-20.

FUTURE ESTATES.

Restrictions against perpetuities, see Perpetuities, ¶4.

FUTURES.

Regulations as denying equal protection of laws, see Constitutional Law, ¶240.

GAMBLING.

See Gaming.

GAME.

Scope-Note.

[INCLUDES wild animals pursued for sport or profit; regulations for their preservation; and nature and incidents of rights of taking game.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⌘ 3. Private rights of taking game.
3½. Power to protect and regulate.

Cross-References.

See Fish.

Prohibition against possession out of season, due process of law, see Constitutional Law, ⌘ 278.

Regulations as to possession and sale of, as interfering with commerce, see Commerce, ⌘ 55.

⌘ 3. Private rights of taking game.

See 24 Cent. Dig. Game, § 1.

The ownership of the wild game within the limits of a state, so far as it is capable of ownership, is in the state for the benefit of all its people in common.—*Geer v. State of Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793.

⌘ 3½. Power to protect and regulate.

See 24 Cent. Dig. Game, § 2.

The police power residing in a state authorizes it to forbid the killing of game within the state with intention to procure its transportation beyond the state limits.—*Geer v. State of Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793.

GAMING.

Scope-Note.

[INCLUDES wagers and other agreements to risk money or other property on the result of a contest or the happening of any uncertain event; nature, requisites, validity, incidents, construction, operation, and effect of such agreements in general; rights, liabilities, and remedies of the parties; and unlawfully betting, playing games, keeping or frequenting houses or other places for gaming, as public offenses, and liability therefor, civil and criminal.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Gambling Contracts and Transactions.

(A) NATURE AND VALIDITY.

- ⌘ 2. What law governs.
10. Speculative transactions and dealings.
11. — In general.
13. — Options.
14. — Agreements for payment of differences.
18. Loans for gambling purposes.
19. Obligations and securities for gambling considerations.

(B) RIGHTS AND REMEDIES OF PARTIES.

- ⌘ 35. Brokers in speculative transactions.
36. — Rights and liabilities in general.
37. — Margins and other deposits.
38. — Commissions.
40. Actions.
44. — Jurisdiction and venue.
49. — Evidence.

II. Penalties and Forfeitures.

III. Criminal Responsibility.

(A) OFFENSES.

63. Constitutional and statutory provisions.

(B) PROSECUTION AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Gaming, §§ 218-305.]

Cross-References.

See Lotteries.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) NATURE AND VALIDITY.

Equal protection of laws, see Constitutional Law, 240.

Note given for gambling transaction, see Bills and Notes, 375.

Regulation of sales on margins as denial of due process of law, see Constitutional Law, 276.

2. What law governs.

See 24 Cent. Dig. Gaming, § 2.

A note given in payment of margins was dated and payable in New York City, but it did not appear whether the original contract was executed in Virginia or New York. *Held* that, as the statutes of both states made wagering contracts void, it was immaterial which statute should control the determination of the validity of the original contract.—*Embrey v. Jemison*, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

10. Speculative transactions and dealings.

See 24 Cent. Dig. Gaming, § 19-27.

11. — In general.

See 24 Cent. Dig. Gaming, §§ 19-21, 23, 26.

While a valid contract may be made for the sale and future delivery of goods which the vendor does not own, yet such a contract, when merely disguising an intention to speculate in margins without actual delivery of the goods, is void.—*Irwin v. Williar*, 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225.

13. — Options.

See 24 Cent. Dig. Gaming, § 24.

Rev. St. Ill. c. 38, § 130, providing that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain," etc., shall be fined, "and all contracts made in violation of this section shall be considered gambling contracts and shall be void," does not render invalid a bona fide contract for the actual future delivery of grain, where the only option the defendant had is as to the time of delivery.—*White v. Barber*, 123 U. S. 392, 8 S. Ct. 221, 31 L. Ed. 243.

14. — Agreements for payment of differences.

See 24 Cent. Dig. Gaming, §§ 25, 26.

In an action on a note defendant pleaded that plaintiff was a broker who had contracted to purchase for him "on a margin" cotton for future delivery, that the notes were given for losses sustained by plaintiff in carrying said "cotton futures" for defendant, and that the purchase or delivery of actual cotton was never contemplated by either party, but it was understood between them that settlement was to be made by one party paying to the other the difference between the contract price and the market price of said cotton futures, according

to the fluctuations of the market. *Held*, that the plea showed a wagering contract, and a demurrer to it was improperly sustained.—*Embrey v. Jemison*, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

Contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are gambling contracts.—*Pearce v. Rice*, 142 U. S. 28, 12 S. Ct. 130, 35 L. Ed. 925.

18. Loans for gambling purposes.

See 24 Cent. Dig. Gaming, §§ 36-38.

Where it does not appear that plaintiff bank knew that a certificate of deposit sued on was delivered to it to be used by K., the beneficiary named in it, in connection with an attempt to "corner the market" in wheat, in violation of the statute of Illinois (1 Starr & C. St. 1885, pp. 791, 792, §§ 130, 131), which makes such an attempt an offense, and declares void all contracts to reimburse or pay any money knowingly lent or advanced at the time and place to any person gambling, that statute has no application to the case.—*Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747.

19. Obligations and securities for gambling considerations.

See 24 Cent. Dig. Gaming, §§ 39-43.

Under Rev. St. Ill. c. 38, §§ 130, 131, a contract to speculate in the rise and fall of the price of grain, with an explicit understanding that the grain apparently contracted for is not to be delivered, and that the transactions are to be closed only by the payment of the differences between the contract price and the market price, is illegal; and a transfer of notes in payment of such differences passes no title as between the immediate parties thereto.—*Pearce v. Rice*, 142 U. S. 28, 12 S. Ct. 130, 35 L. Ed. 925.

(B) RIGHTS AND REMEDIES OF PARTIES.

Validity of law making judgment against loser of money conclusive as against owner of gambling house, see Constitutional Law, 46.

35. Brokers in speculative transactions.

See 24 Cent. Dig. Gaming, §§ 73-75.

36. — Rights and liabilities in general.

See 24 Cent. Dig. Gaming, § 73.

Under Rev. St. Ill. 1883, c. 38, § 132, which provides that any person losing and paying money on a bet can recover the amount of the winner, a commission broker on the Board of Trade, selling grain by the orders of a principal, who meets with a loss thereby, is not a "winner" from his principal.—*White v. Barber*, 123 U. S. 392, 8 S. Ct. 221, 31 L. Ed. 243.

⚡37. — **Margins and other deposits.**
See 24 Cent. Dig. Gaming, § 74.

Where a commission merchant sues his principal for money paid in settlement of contracts in grain futures made for his account, and defendant pleads that the contracts were gambling transactions, and by way of counterclaim asks judgment for sums already paid thereunder, though plaintiff's action fails because of a non-compliance with rules of the Board of Trade under which the contracts were made, yet defendant cannot recover on his counterclaim, for his cause of action, by his own allegation, is based on an illegal consideration.—*Higgins v. McCrea*, 116 U. S. 671, 6 S. Ct. 557, 29 L. Ed. 764, modifying judgment (C. C.) 23 F. 782.

Complainant employed defendant to sell grain for him on a Board of Trade, and furnished him with money in the summer of 1882 to use as margins, in accordance with the rules of the Board of Trade, of which defendant was a member, and it was deposited by the defendant in a bank for that purpose. Complainant, with others, sought by a bill in equity to avoid payment of losses which ensued, but was unsuccessful. In 1883 he served a notice on defendant not to pay this money on the losses. Defendant was obliged to pay or lose his membership in the board, according to its rules. *Held* that, as the money had been devoted by complainant as well as defendant for purpose of paying damages under the rules of the board, he had no claim against defendant in equity.—*White v. Barber*, 123 U. S. 392, 8 S. Ct. 221, 31 L. Ed. 243.

⚡38. — **Commissions.**
See 24 Cent. Dig. Gaming, § 75.

Where the plaintiff, in an action on a note, was the broker who effected the purchases of the cotton futures, the margins for which the note was given, he was privy to the unlawful design, and is not entitled to recover for advances made in forwarding the unlawful transaction.—*Embrey v. Jamieson*, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

The facts that defendant executed his note for the balance due with full knowledge of the unlawful character of the original transaction and that the action is on the note are immaterial, as the note is not founded upon any new and independent consideration.—*Id.*

⚡40. **Actions.**
See 24 Cent. Dig. Gaming, §§ 77-107.

⚡44. — **Jurisdiction and venue.**
See 24 Cent. Dig. Gaming, § 90.

The Mississippi courts are not without jurisdiction of causes of action arising out of gambling transactions in futures because of the provision of Ann. Code Miss. 1892, § 2117, that contracts of that character "shall not be enforced by any court," since such statute only lays down a rule of decision.—*Fauntleroy v. Lum*, 28 S. Ct. 641, 210 U. S. 230, 52 L. Ed. 1039.

⚡49. — **Evidence.**
See 24 Cent. Dig. Gaming, §§ 100-102.

In an action by brokers to recover money paid out for the defendant, the issue was as to whether the sales and purchases made for him were gambling contracts; and the only evidence on that point was that of the defendant, who said: "I could not say that I had any understanding on the subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for." *Held*, that it was not error for the court to take that issue from the jury on the ground that there was no

evidence to support it.—*Roundtree v. Smith*, 108 U. S. 269, 2 S. Ct. 630, 27 L. Ed. 722.

In an action by brokers for services rendered and money advanced as members of a certain Board of Trade at the request of defendant, the latter resisted recovery on the ground that the sales and purchases made for him were gambling contracts on the prices of various articles of produce. *Held*, that evidence that a very large proportion of all the contracts for the sale of produce at such Board of Trade were settled by payment of differences, and that nothing else was expected by the parties to them, was insufficient to prove that the parties to the contracts in question intended to violate the law, where plaintiff testified that he had no such understanding, and nothing was proved as to the intention of the other parties, and the contracts were in writing.—*Id.*

In an action by cotton factors for commissions earned and advances made, the defense was that the contracts from which the claims accrued were wagering contracts; but the evidence failed to show that either plaintiffs or defendants had any understanding that the goods sold were not to be delivered, and it was shown that the rules of the cotton exchange at which the purchases were made recognized no contracts except for the purchase and sale of cotton that was to be actually delivered. *Held*, that the defense was not sustained by the evidence.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

A presumption of an intent to make a gaming contract under the guise of a sale of stock for future delivery does not arise from the mere fact that the seller did not at the time own the stock. Decree, 96 F. 648, 38 C. C. A. 473, reversed.—*Clews v. Jamieson*, 21 S. Ct. 845, 182 U. S. 461, 45 L. Ed. 1183.

A direction to a broker to sell certain stock "for the account" presumes the intention to deliver the stock, where the sale is made for future delivery on the last day of the month, though the seller does not at the time own any stock, but the rules of the exchange on which the sale is made, as well as the law of the state, make any fictitious sale illegal.—*Id.*

II. PENALTIES AND FORFEITURES.

See 24 Cent. Dig. Gaming, §§ 108-118.

Due process of law, see Constitutional Law, ⚡258, 303.

III. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

⚡63. **Constitutional and statutory provisions.**

See 24 Cent. Dig. Gaming, § 120.

Laws 28th Leg. p. 68, c. 50, § 1, which prohibits engaging or assisting in pool selling, under a certain penalty, and section 2 of which prohibits buying, pooling, or wagering anything under a different penalty, is not open to the objection of providing different punishments for the same offense, for section 1 refers solely to engaging in the business, and rightfully imposes a heavier penalty therefor, while section 2 refers to the individual better. Judgment, *Ex parte Hernan*, 77 S. W. 225, 45 Tex. Cr. R. 343, affirmed.—*Hernan v. State of Texas*, 25 S. Ct. 800, 198 U. S. 579, 49 L. Ed. 1171.

(B) PROSECUTION AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Gaming, §§ 218-305.]

GARBAGE.

Regulating removal due process of law, see Constitutional Law, ⚡278.

GARNISHMENT.

Scope-Note.

[INCLUDES subjection of property of defendants in civil actions, in possession of third persons, or of debts owing to such defendants, to payment of judgments recovered against them therein, by process of garnishment, trustee process, factorizing, etc.; nature and scope of the remedy in general; in what cases and to and against whom it is allowed, who may be charged as garnishees, trustees, factors, etc., and what property or credits may be reached; grounds of garnishment and jurisdiction over and proceedings to obtain garnishments; issuance, requisites, and validity of writs or summonses or notices of garnishment, trustee process, etc., and amendment thereof; service of writs, summonses, etc., and return thereof, and lien acquired by garnishment; quashing, vacating, or setting aside writs, etc., and dissolution thereof or discharge therefrom on giving security; claims of third persons to subject-matter of garnishment, interventions, and trials of such claims; liabilities of garnishees, trustees, etc.; proceedings to determine such liabilities, judgment therein, and enforcement of judgments; application of proceeds; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., garnishments; and liabilities of persons other than officers for wrongful procuring, issuance, service, etc., of garnishments.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds.

⇒ 11. Persons entitled.

II. Persons and Property Subject to Garnishment.

⇒ 44. Judgments.

III. Proceedings to Procure.

⇒ 76. Jurisdiction of person of garnishee.

78. — Nonresidents and foreign corporations.

79. Jurisdiction of property or other subject-matter of garnishment.

81. — Situs of property or indebtedness.

IV. Writ or Summons and Notice, Service, and Return.

V. Lien of Garnishment and Liability of Garnishee.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 214-237.]

VI. Proceedings to Support or Enforce.

⇒ 122. Grounds of objection and defenses by garnishee.

130. — Set-off or counterclaim by garnishee.

138. Answer or disclosure of garnishee.

148. — Conclusiveness and effect in general.

158. Traverse of answer and issues thereon.

VII. Quashing, Vacating, Dissolution, or Abandonment.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 380-392.]

VIII. Claims by Third Persons.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 393-422.]

IX. Operation and Effect of Garnishment, Judgment, or Payment.

⇒ 229. Effect of garnishment as between defendant and garnishee.

231. — Other actions and proceedings against garnishee.

234. Effect of judgment against garnishee and payment or other satisfaction thereof.

235. — In general.

237. — Foreign judgment.

X. Liabilities on Bonds or Undertakings.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 455-460.]

XI. Wrongful Garnishment.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 470-475.]

Cross-References.

See Attachment.

Appellate jurisdiction of federal court, see Courts, ¶385(4).

Appointment of receiver subsequent to garnish-

ment of bank affecting garnishment, see Banks and Banking, ¶77.

Due process of law, see Constitutional Law, ¶312.

I. NATURE AND GROUNDS.

¶11. Persons entitled.

See 24 Cent. Dig. Garn. § 18.

Plaintiff, having obtained a money judgment against a city in the federal circuit court of Louisiana, filed in that court a supplemental petition and interrogatories in accordance with Code Prac. La. art. 246, par. 2, added by Act March 30, 1839, against a street railroad corporation, as a debtor to the city, praying that it be cited as garnishee, and answer the interrogatories, and pay the judgment. *Held*, that the garnishment proceedings were warranted by Rev. St. U. S. § 916, providing that the party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies on the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held; such proceedings being authorized by laws of Louisiana in force when section 916—formerly section 6 of chapter 255 of the act of June 1, 1872 (17 Stat. 197)—was enacted.—*Canal & C. Sts. R. Co. v. Hart*, 114 U. S. 654, 5 S. Ct. 1127, 29 L. Ed. 228.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

Garnishment of sums due foreign carrier as interference with interstate commerce, see Commerce, ¶81.

¶44. Judgments.

See 24 Cent. Dig. Garn. § 90.

A judgment of a state court is foreign to another state, and therefore not subject to garnishment there. Judgment, *Tourville v. Wabash R. Co.*, 50 S. W. 300, 148 Mo. 614, 71 Am. St. Rep. 650, affirmed.—*Wabash R. Co. v. Tourville*, 21 S. Ct. 113, 179 U. S. 322, 45 L. Ed. 210.

III. PROCEEDINGS TO PROCURE.

¶76. Jurisdiction of person of garnishee.

See 24 Cent. Dig. Garn. §§ 143, 144.

¶78. — Nonresidents and foreign corporations.

See 24 Cent. Dig. Garn. §§ 25, 144; 13 Cent. Dig. Corp. § 2630.

The temporary presence of the garnishee within the state gives a court of that state jurisdiction to render judgment against him in the garnishment proceedings upon personal service of process within the state, if, during such temporary presence in the state, the principal debtor could have sued him there to recover the debt, and the laws of the state permit the garnishment of a debtor of the principal debtor. Judgment, *Balk v. Harris*, 41 S. E. 940, 130 N. C. 381, reversed.—*Harris v. Balk*, 25 S. Ct. 625, 198 U. S. 213, 49 L. Ed. 1023, 3 Ann. Cas. 1084.

A state court has jurisdiction to render a valid judgment in garnishment of a debt due by a railway company doing business in the state, and permanently liable there for service

and suit, to a nonresident who was served by such publication as the statutes of the state prescribe.—*Louisville & N. R. Co. v. Deer*, 28 S. Ct. 207, 200 U. S. 176, 50 L. Ed. 426.

¶79. Jurisdiction of property or other subject-matter of garnishment.

See 24 Cent. Dig. Garn. §§ 146-147.

¶81. — Situs of property or indebtedness.

See 24 Cent. Dig. Garn. §§ 146, 147.

A debt may be attached at the domicile of the debtor, though the creditor's domicile is in another state. Judgment 51 P. 1100, 58 Kan. 818, reversed.—*Chicago, R. I. & P. Ry. Co. v. Sturm*, 19 S. Ct. 797, 174 U. S. 710, 43 L. Ed. 1144.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

See 24 Cent. Dig. Garn. §§ 170-212.

Due process of law, see Constitutional Law, ¶309.

Review by supreme court of decisions of territorial court as to sufficiency of service, see Courts, ¶387(4).

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 214-237.]

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

¶122. Grounds of objection and defenses by garnishee.

See 24 Cent. Dig. Garn. §§ 243-261.

¶130. — Set-off or counterclaim by garnishee.

See 24 Cent. Dig. Garn. §§ 255-259.

A garnishee has a right to set up any defense against the attachment process which he could have done against the debtor in the principal action; and if the debtor be insolvent, and owes the garnishee on a note not due for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process.—*Schuler v. Israel*, 120 U. S. 506, 7 S. Ct. 648, 30 L. Ed. 707, affirming judgment (C. C.) 27 F. 851.

The insolvency and nonresidence of the principal debtor, to whom the garnishee is indebted in a definite amount, and against whom he has a valid claim for unliquidated damages for breach of contract between them, existing when the garnishment proceedings were commenced, is good ground for the exercise of equitable jurisdiction, after an order or judgment at law declaring the sum due the principal debtor applicable to the payment of the garnishing creditor, to stay the enforcement of such order or judgment until the unliquidated damages due the garnishee can be ascertained, and set off against the amount owing by him to the principal debtor.—*North Chicago Rolling-Mill Co. v. St. Louis Ore. & Steel Co.*, 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565, re-

versing judgment *Olyphant v. St. Louis Ore & Steel Co.* (C. C.) 39 F. 308.

A garnishee, having a valid claim for unliquidated damages against the principal debtor, who was a nonresident and insolvent, for breach of a contract between them prior to the garnishment, brought suit to restrain enforcement of payment to plaintiff in garnishment of the sum due from him to the principal debtor until such damages could be ascertained and set off. Pending such suit, plaintiff in garnishment assigned his claim to another. *Held*, that the assignee took the claim subject to the equities of the garnishee.—*Id.*

The right of a garnishee, because of the nonresidence and insolvency of the principal defendant, to maintain suit to restrain enforcement of payment to plaintiff in garnishment of the sum due from him to the principal defendant, until the ascertainment and set-off, against such sum, of his claim against the principal defendant for damages arising on a breach of contract between them prior to the garnishment, is not affected by the restoration of the principal defendant to solvency pending such suit, if such restoration is not pleaded as a defense, even though shown by the record.—*Id.*

138. Answer or disclosure of garnishee.

See 24 Cent. Dig. Garn. §§ 266-270, 273-279.

148. — Conclusiveness and effect in general.

See 24 Cent. Dig. Garn. §§ 275-279.

St. Okl. 1893, § 4085, providing that the answer of a garnishee "shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice in writing that he elects to take issue on his answer," means only that the answer will be conclusive on the question of the garnishee's liability, and a failure to give the notice cannot make it conclusive as against the defendant to the action. Judgment 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

158. Traverse of answer and issues thereon.

See 24 Cent. Dig. Garn. §§ 288-297.

In an action commenced by attachment and garnishment the garnishee set up in his answer a right in himself to the attached property under a contract, by which he had sold it, with certain reservations, to the defendant, and thereupon moved to discharge the attachment. Before this motion was heard, and before the expiration of the 20 days in which the plaintiff is required by St. Okl. 1893, § 4085, to give notice of intention to traverse the garnishee's answer, by an agreement between the plaintiff and garnishee (who were the only parties who had then appeared in the cause) the garnishee was appointed receiver of the property, to dispose of it at private sale, pay himself from the proceeds the amount due under the contract of sale, and hold the balance subject to the order of the court. *Held*, that by this action of the parties and the court the garnishee abandoned his claim to the property, and a traverse of his answer became unnecessary; so that the defendant, when he appeared, had no right to a dismissal of the action on the theory that the answer, being uncontroverted, showed title and right of possession in the garnishee. Judgment 49 P. 48, 5 Okl. 396, reversed.—*Central Loan & Trust Co. v. Campbell Commission Co.*, 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 380-392.]

VIII. CLAIMS BY THIRD PERSONS.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 393-422.]

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

229. Effect of garnishment as between defendant and garnishee.

See 24 Cent. Dig. Garn. §§ 435-444.

231. — Other actions and proceedings against garnishee.

In action for services, to sustain plea that portion of the debt had been garnished, the garnishment must have preceded the commencement of the suit in which the plea is made. Judgment, *Tourville v. Wabash R. Co.*, 50 S. W. 300, 148 Mo. 614, 71 Am. St. Rep. 650, affirmed.—*Wabash R. Co. v. Tourville*, 21 S. Ct. 113, 179 U. S. 322, 45 L. Ed. 210.

The duty of the garnishee to give notice of the garnishment proceedings to the principal debtor is discharged by pleading the judgment therein in bar to an action on the debt while there then remained nearly a year in which the principal debtor might litigate the question of his liability in the court which rendered the judgment. Judgment, *Balk v. Harris*, 41 S. E. 940, 130 N. C. 381, reversed.—*Harris v. Balk*, 25 S. Ct. 625, 198 U. S. 215, 49 L. Ed. 1023, 3 Ann. Cas. 1084.

234. Effect of judgment against garnishee and payment or other satisfaction thereof.

See 24 Cent. Dig. Garn. §§ 423-427, 439, 443, 444, 450-452.

235. — In general.

See 24 Cent. Dig. Garn. §§ 423-427, 443, 444, 447, 450-452.

The consent of a garnishee to a judgment impounding his debt to the principal debtor does not make the payment under the judgment voluntary, where he was absolutely without defense, so as to prevent him from pleading such payment in bar to an action on the debt. Judgment, *Balk v. Harris*, 41 S. E. 940, 130 N. C. 381, reversed.—*Harris v. Balk*, 25 S. Ct. 625, 198 U. S. 215, 49 L. Ed. 1023, 3 Ann. Cas. 1084.

237. — Foreign judgment.

See 24 Cent. Dig. Garn. § 439.

Jurisdiction in garnishment of a debt due from a railway company to a nonresident employé may be acquired so as to entitle the judgment to full faith and credit in the state of the defendant's residence, though such defendant receives no other than extrajudicial notice of the garnishment.—*Baltimore & O. R. Co. v. Hostetter*, 36 S. Ct. 475, 240 U. S. 620, 60 L. Ed. 829.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 455-469.]

XI. WRONGFUL GARNISHMENT.

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 470-475.]

GAS.

Scope-Note.

[INCLUDES regulation of the production, supply, and use of gas for illuminating, heating, and like purposes, obtained either from natural sources or by any process of manufacture, whether under franchises granted therefor or directly by municipalities; and rights, powers, duties, and liabilities of gas companies and of municipal corporations in respect of the supply of gas.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

4. Gas companies.

7. — Rights in streets and other public places.

14. Charges.

14½. Injuries incident to construction or operation of works in general.

Cross-References.

Change of mains as taking property without compensation, see Eminent Domain, 2.
Combination to control price of gas, see Monopolies, 17.
Dismissal of bill to enjoin enforcement of legislative regulations, see Dismissal and Nonsuit, 75.
Duty on, see Customs Duties, 41.
Effect of partial invalidity of statute regulating charges, see Statutes, 64.
Estoppel to question constitutionality of rate regulations, see Constitutional Law, 43.
Gas lands, construction and operation of leases, see Mines and Minerals, 72-79.
Gas lands, location and acquisition of claims, see Mines and Minerals, 38.
Impairing obligation of contract, see Constitutional Law, 121, 128, 129, 134, 138.

Jurisdiction of federal court to restrain enforcement of statute fixing rates, see Courts, 490.
Natural gas, subject of interstate commerce, see Commerce, 15, 61.
Noxious gases, see Nuisance, 84, 85.
Power of municipality to make improvements in lighting, see Municipal Corporations, 272.
Prohibiting transportation out of state, see Injunction, 210, 211.
Regulation of gas works as denying due process of law, see Constitutional Law, 296.
Regulations constituting taking of property for public use without just compensation, see Eminent Domain, 2.
Special privileges, see Constitutional Law, 205.

4. Gas companies.

See 24 Cent. Dig. Gas, § 1, 2.

7. — Rights in streets and other public places.

See 24 Cent. Dig. Gas, § 2.

An act incorporating a gaslight company, with the right to make and vend gas in a certain city, and lay all necessary pipes, fixtures, etc., in the streets, does not authorize it to lay electric wires, in disregard of reasonable police regulations subsequently adopted by the city in respect to the use of the streets for such purposes. —State of Missouri v. Murphy, 18 S. Ct. 505, 170 U. S. 78, 42 L. Ed. 955.

14. Charges.

See 24 Cent. Dig. Gas, § 10, 11.

Any contract exemption from state regulation of the price of gas, contained in the charter of a gas company, does not extend to the plants of, and territory occupied by, certain other gas companies, not possessing such immunity in their own right, when absorbed by the former company under the general power of consolidation and merger conferred upon gas companies by Act III. June 5, 1897, which provided that the consolidated corporation should be subject to the legal obligations of the companies absorbed. Decree (C.C.) 114 F. 384, affirmed. —People's Gaslight & Coke Co. v. City of Chicago, 24 S. Ct. 520, 194 U. S. 1, 48 L. Ed. 851.

A reduction by the state of the price of gas to be furnished by a gas company availing itself of the general power to absorb its rivals

conferred upon gas companies by Act III. June 5, 1897, was not precluded by the provision of section 11 of that act that such corporation should not exceed the rate it had been charging the year immediately preceding the acquisition of the absorbed corporations, since such provision was not intended to fix, and did not fix a rate unalterable by either party, but simply a rate which the consolidated companies could not exceed.—Id.

In determining the reasonableness of Laws N. Y. 1905, p. 2091, c. 736, and Laws 1906, p. 235, c. 125, fixing gas rates in New York City, a discrimination between individual consumers and the city is not material to the inquiry, if the total profits from the gas supplied to all consumers is sufficient to insure the requisite return upon the property used by the gas company in its business. Decree (C. C. 1907) Consolidated Gas Co. v. City of New York, 157 F. 849, reversed.—Willcox v. Consolidated Gas Co. of New York, 29 S. Ct. 192, 212 U. S. 19, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

The valuation of the franchises of the constituent gas companies as fixed by them when consolidating pursuant to Laws N. Y. 1884, p. 448, c. 367, which valuation was included in the total sum for which the consolidated corporation issued its stock, must be accepted by the courts as conclusive of such value at the time of consolidation, where the validity of the agreement fixing the valuation has always been recognized, and the stock has earned large dividends and has been largely dealt in for

many years on the basis of the validity of the valuation and of the stock.—Id.

The requirements as to gas pressure made by Laws N. Y. 1905, p. 2091, c. 736, and Laws 1906, p. 235, c. 125, are confiscatory, where to put this pressure upon the mains and other service pipes, in their present condition, is to run a great risk of explosion and consequent disaster, and to eliminate such danger requires an expenditure of many millions of dollars from which no return can be had at the rates established by those acts.—Id.

The valuation of the property of the company, upon which it is entitled to a fair return, must, as a general rule, be determined as of the time when the inquiry is made regarding the reasonableness of rates fixed by statute, giving the company the benefit of any increase in the value of the property since it was acquired.—Id.

No allowance for the value of the good will should be made in estimating the value of the property of the company upon which it is entitled to earn a fair return, where such company is secure from possible competition.—Id.

The assessed value for taxation of the franchises furnishes no criterion by which to ascertain their value, where the taxes are treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount applicable to dividends can be ascertained.—Id.

Gas rates which will yield a return of 6 per cent. upon the fair value of the property actually used by such company in its business are not confiscatory.—Id.

There is no particular rate of compensation which any corporation subject to legislative control respecting rates has the right to obtain without legislative interference.—Id.

Increase since consolidation of the tangible assets and in the amount of gas supplied by it does not justify the court, in attributing a proportional increase to the value of the franchises as fixed by the constituent companies at the time of consolidation.—Id.

The case must be a clear one before the courts should be asked to interfere by injunction in advance of any actual experience of the practical result of such rates.—Id.

A court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under such rates, where the rates complained of show a very narrow line of division between possible confiscation and proper regulation, as based upon the findings as to the value of the property, and the division depends upon variant opinions as to value and upon the results in the future of operating under such rates.—Id.

A municipality held not authorized to limit its power by contract to fix reasonable gas rates by Laws Kan. 1903, c. 122, §§ 2, 51, 169, 176, empowering first-class cities to make all necessary contracts and to "prescribe and fix" maximum gas rates which shall "at all times be reasonable and just," and to grant franchises and fix a reasonable schedule of maximum gas rates during the existence of such grant.—Wyandotte County Gas Co. v. State of Kansas ex rel. Marshall, 34 S. Ct. 226, 231 U. S. 622, 58 L. Ed. 404, affirming decree State v. Wyandotte County Gas Co., 127 P. 639, 88 Kan. 165.

The limitations imposed on first-class cities by Laws Kan. 1903, c. 122, §§ 2, 51, 169, 176, impliedly forbidding the contracting away of governmental power to fix gas rates, were made applicable to natural gas by section 170a, providing that nothing in the act should be construed to forbid the grant of a franchise for natural gas, etc.—Id.

The going value of a successful gas company was sufficiently considered in determining reasonableness of rates fixed by ordinance, where valuation was based on a plant in successful operation and overhead charges were allowed.—Des Moines Gas Co. v. City of Des Moines, 35 S. Ct. 811, 238 U. S. 153, 59 L. Ed. 1244, modifying decree (D. C.) 199 F. 204.

The expenses of taking up and replacing pavements on streets unpaved when gas mains were laid need not be included when valuing the property of the gas company on the basis of reproduction in testing reasonableness of municipal rates.—Id.

Refusal to enjoin municipal gas rates on determination that return of 6 per cent. on the company's property was not confiscatory will not be disturbed.—Id.

Dismissal of bill enjoining enforcement of ordinance fixing gas rates as confiscatory will be without prejudice, where the effect of such rates has not been tested by experience.—Id.

141. Injuries incident to construction or operation of works in general.

See 24 Cent. Dig. Gas, § 12.

A gaslight company was empowered to manufacture, make, and sell gas for the purpose of lighting a city, or the streets thereof, and any buildings, manufactories, or houses therein, and to lay pipes for that purpose in any of the streets. Held, that a gas box in the sidewalk, furnishing access to a cock in the service pipe conducting the gas from the main to the house, was a part of the apparatus of the company, over which it was bound to exercise proper care to prevent injury to persons on the sidewalk.—Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712.

GASOLINE.

Injuries from sale of explosive mixture of coal oil and gasoline, see Explosives, 149.

GENEALOGY.

Determination of right of inheritance, see Descent and Distribution, 38-47.

GENERAL AVERAGE.

See Shipping, 186-195.

GENEVA CLAIMS.

Vesting in trustee in bankruptcy, see Bankruptcy, 138.

GEOGRAPHICAL FACTS.

Judicial notice of, see Evidence, 10.

GEOGRAPHICAL NAMES.

Subject to trade-mark, see Trade-Marks and Trade-Names, 9.

GETTYSBURG BATTLEFIELD.

Condemnation for public use, see Eminent Domain, 41, 53.

GIFT ENTERPRISE.

See Lotteries, 3.

Discharge of person convicted of violating trading stamp laws, jurisdiction, see Habeas Corpus, 27.

Due process of law, see Constitutional Law, 258.

GIFTS.

Scope-Note.

[INCLUDES voluntary transfers of property without consideration, whether executed or to take effect on the death of the giver, and acceptance and revocation thereof; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; and rights and liabilities of parties thereto as between themselves and as to others in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Inter Vivos.

⌚ 35. Validity.

38. — Fraud, duress, and undue influence.

46. Evidence.

47. — Presumptions and burden of proof.

II. Causa Mortis.

⌚ 54. Gifts causa mortis distinguished from other transactions.

66. Gifts of deposits in bank.

Cross-References.

See Guardian and Ward, ⌚ 57.

As preferences by debtor, see Bankruptcy, ⌚ 178.

Between husband and wife, see Husband and Wife, ⌚ 49-49½.
Charitable gifts, see Charities.

I. INTER VIVOS.

⌚ 35. Validity.

See 24 Cent. Dig. Gifts, §§ 72-74.

⌚ 38. — Fraud, duress, and undue influence.

See 24 Cent. Dig. Gifts, § 74.

The fact that a mother, who has given to her daughters, to whom she sustains peculiarly close relations, certain bonds, leaves a writing declaring that she made the gift voluntarily, without suggestion from any one, is not to be considered as a ground for suspicion of undue influence, when it appears that on a prior occasion a member of the family had made an unfounded charge that the donees had, by undue influence, procured the insertion of certain legacies in their father's will.—*Towson v. Moore*, 19 S. Ct. 332, 173 U. S. 17, 43 L. Ed. 597.

⌚ 46. Evidence.

See 24 Cent. Dig. Gifts, §§ 81-100; 37 Cent. Dig. Parent & C. § 131.

⌚ 47. — Presumptions and burden of proof.

See 24 Cent. Dig. Gifts, §§ 81-86; 37 Cent. Dig. Parent & C. § 131.

Since there is no presumption that a gift by a parent to a child with whom she lives, and

to whom she sustains peculiarly close relations, is procured by undue influence, though such child thereby obtains a larger share than that received by the heirs of another child, the burden of proof to show undue influence is upon the party attacking the validity of the gift.—*Towson v. Moore*, 19 S. Ct. 332, 173 U. S. 17, 43 L. Ed. 597.

II. CAUSA MORTIS.

⌚ 54. Gifts causa mortis distinguished from other transactions.

See 24 Cent. Dig. Gifts, §§ 119-121.

Delivery of a certificate of deposit, payable to the order of the depositor, with an indorsement providing that it shall not be payable until after the donor's death, is a testamentary disposition, and will not pass title as a gift causa mortis.—*Basket v. Hassell*, 107 U. S. 602, 2 S. Ct. 415, 27 L. Ed. 500.

⌚ 66. Gifts of deposits in bank.

See 24 Cent. Dig. Gifts, §§ 135-138.

A certificate of deposit issued by a bank, payable to the order of the depositor, may be the subject of a valid gift causa mortis, by indorsement and delivery.—*Basket v. Hassell*, 107 U. S. 602, 2 S. Ct. 415, 27 L. Ed. 500.

GLASSWARE.

See Customs Duties, ⌚ 25.

GOOD FAITH.

See—

Bills and Notes, ⌚ 331-382, 509.

Bonds, ⌚ 93-98.

Chattel Mortgages, ⌚ 153.

See—

Ejectment, ⌚ 142.

Execution, ⌚ 270-272.

Lis Pendens, ⌚ 25.

Mortgages, ⌚ 152-155.

Municipal Corporations, ⌚ 940-948.

Public Lands, ⌚ 131-133, 138.

Specific Performance, ⌚ 87-101.

Trade-Marks and Trade-Names, ⌚ 22.

Trusts, ⌚ 357.

Vendor and Purchaser, ⌚ 222-244.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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GOODS.

See—
Chattel Mortgages.
Confusion of Goods.
Sales.

GOOD WILL.

See 24 Cent. Dig. Good Will.
See Contracts, ¶115-118.

GOVERNMENT.

See—
States.
Territories.
United States.
Distribution of governmental powers, see Constitutional Law, ¶50-80.

GOVERNOR.

Extradition of fugitives from justice, see Extradition, ¶23-41.

Federal jurisdiction of action against, for wrongful imprisonment, see Courts, ¶414.
Imprisonment under order of as denial of due process of law, see Constitutional Law, ¶255.

GRABIRONS.

See Railroads, ¶254.

GRAIN.

See—
Carriers, ¶32.
Crops.
Warehousemen.

GRAIN DOORS.

Carriers' liability for loss of, see Commerce, ¶89.

GRAND JURY.

Scope-Note.

[INCLUDES bodies of persons sworn to inquire into and make presentment of public offenses; nature and constitution of such juries; qualifications, selection, summoning, and compensation of grand jurors; challenges and objections; organization, powers and duties, and general conduct of business of grand juries; secrecy as to their proceedings; liabilities of grand jurors for misconduct, etc.; and liabilities of others for interference with grand juries.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶1. Nature and functions in general.
- 5. Qualifications of jurors.
- 17. Challenge to panel.
- 22. Oath.
- 24. Powers and duties.
- 25. — In general.
- 33. Conduct of proceedings in general.
- 36. Attendance and examination of witnesses.

Cross-References.

See Indictment and Information.
Application of Constitution to territories, see Territories, ¶8.
Conformity to state practice, see Courts, ¶352.
Discrimination as to service on juries by reason of race, color, or condition, see Constitutional Law, ¶221.
Due process of law, see Constitutional Law, ¶267.
Equal protection of laws, see Constitutional Law, ¶221.

Irregularities ground for habeas corpus, see Habeas Corpus, ¶30.
Plea in abatement raising objection to grand juror, see Criminal Law, ¶279.
Presumption as to performance of official duty, see Evidence, ¶83.
Submission of case to grand jury as affecting jeopardy, see Criminal Law, ¶173.
Subpoena duces tecum, see Searches and Seizures, ¶7.
Witnesses' privileges, see Witnesses, ¶298.

¶1. Nature and functions in general.

The institution of the grand jury is of very ancient origin in the history of England. It goes back many centuries. For a long period its powers were not clearly defined, and it would seem from the accounts of commentators on the laws of that country that it was at first

a body which not only arrested, but also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony, except in certain special cases, could be put upon his trial.—Ex

parte Bain, 7 S. Ct. 781, 121 U. S. 1, 30 L. Ed. 849.

☞5. Qualifications of jurors.

See 24 Cent. Dig. Gr. Jury, §§ 8-13, 15.

Under section 5, Act Cong. March 22, 1882 (22 Stat. 30), which provides "that in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a jurymen or talesman * * * that he believes it right for a man to have more than one living and undivorced wife at the same time," the proceedings to impanel the grand jury which finds an indictment for one of the offenses named, under a statute of the United States, against a person not before held to answer, are a part of the prosecution, and grand jurors are within the provision; and the indictment is good, although persons drawn and summoned as grand jurors were excluded by the court from serving on the grand jury, on being challenged by the United States, for the cause mentioned, the challenges being found true.—Clawson v. United States, 114 U. S. 477, 5 S. Ct. 949, 29 L. Ed. 179, affirming United States v. Clawson, 4 Utah, 34, 5 Pac. 689.

Statutory disqualification of grand jurors cannot be regarded as a mere defect or imperfection in form, within the meaning of the provision of Rev. St. U. S. § 1025 [U. S. Comp. St. 1901, p. 720], that no indictment shall be deemed insufficient, or the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.—Crowley v. United States, 24 S. Ct. 731, 194 U. S. 461, 48 L. Ed. 1075.

☞17. Challenge to panel.

See 24 Cent. Dig. Gr. Jury, §§ 42-47, 52.

To sustain his challenge to the grand jury on account of the exclusion of negroes therefrom, defendant moved for a subpoena duces tecum to the registrar of voters and to the jury commissioners. The court indorsed on the challenge the words, "Filed subject to argument on the face of papers," and on the motions for subpoenas the words, "Filed subject to orders." Held that, these indorsements evidently signifying merely that the court withheld immediate action on the challenge and motions, they constituted no ground of complaint.—Murray v. State of Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

☞22. Oath.

See 24 Cent. Dig. Gr. Jury, § 60.

An objection that neither in the indictment nor in proof at the hearing of pleas in abatement did it affirmatively appear that a grand juror, who was permitted to affirm instead of making oath, had conscientious scruples against taking an oath, is without merit, in view of the curative provisions of Rev. St. § 1025, and in view of the fact that the mode of ascertaining the existence or nonexistence of such scruples is committed to the discretion of the officer who affirmed the juror.—Bram v. United States, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

☞24. Powers and duties.

See 24 Cent. Dig. Gr. Jury, §§ 62-66.

☞25. — In general.

See 24 Cent. Dig. Gr. Jury, §§ 62, 63.

The provision of Act June 14, 1880, c. 213 (21 Stat. 198), amending Act Feb. 24, 1879, c. 97, § 5 (20 Stat. 318, 319), creating the Northern judicial district of Texas, by providing that all prosecutions shall be tried in that division,

to which process for the county in which the offenses are committed is by said section required to be returned, and that all writs and recognizances shall be returned to the division in which the prosecutions are to be tried, does not affect the authority of the grand jury for the district sitting at any place at which the court is appointed to be held to present indictments for offenses committed anywhere within the district.—Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment United States v. Logan (C. C.) 45 F. 872.

☞33. Conduct of proceedings in general.

See 24 Cent. Dig. Gr. Jury, §§ 70, 71, 79, 80.

The absence of the judge from the district during a part of the deliberations of the grand jury does not invalidate the indictment.—Badgers, v. United States, 36 S. Ct. 367, 240 U. S. 391, 60 L. Ed. 706.

☞36. Attendance and examination of witnesses.

See 24 Cent. Dig. Gr. Jury, §§ 75-78; 50 Cent. Dig. Witn. § 32.

In summoning witnesses before a grand jury it is sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against such persons. Order (C. C.) In re Hale, 139 F. 496, affirmed.—Hale v. Henkel, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652.

The examination of witnesses before a grand jury need not be preceded by a presentment, indictment, or other formal charge.—Id.

A corporation which, with unimportant exceptions, refuses to produce certain books and papers before a grand jury, in compliance with Act Vt. Oct. 9, 1906, p. 79, No. 75, cannot urge the sweeping character of the notice to produce to invalidate the order adjudging the corporation guilty of a contempt. Judgment. In re Consolidated Rendering Co. (Vt. 1907) 66 A. 790, affirmed.—Consolidated Rendering Co. v. State of Vermont, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

The grand jury may summon and examine witnesses, although there is no cause or specific charge pending before it.—Wilson v. United States, 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

GRANTS.

See—

Constitutional Law, ☞25-27.

Deeds.

Indians, ☞12.

Mines and Minerals, ☞2-46, 55.

Monopolies, ☞4-7.

Municipal Corporations, ☞285, 679-686.

Public Lands.

GRAVEL ROADS.

See Turnpikes and Toll Roads.

GRAVEYARDS.

See Cemeteries.

GREAT LAKES.

Jurisdiction of offenses committed thereon, see Criminal Law, ☞97.

GREEK LETTER FRATERNITIES.

See Colleges and Universities, ¶2.
 Due process of law, see Constitutional Law, ¶274.
 Equal protection of laws, see Constitutional Law, ¶211.
 Privileges and immunities of citizens, see Constitutional Law, ¶206.

GREENBACKS.

Power to issue, see United States, ¶90.

GROSS EARNINGS TAX.

See—
 Commerce, ¶70, 72.
 Constitutional Law, ¶46, 229, 284.
 Courts, ¶363.
 Statutes, ¶64.
 Taxation, ¶45, 47.

GROSS RECEIPTS.

Tax as interference with commerce, see Commerce, ¶74.

GROUND RENTS.

See 24 Cent. Dig. Gr. Rents.
 Impairing obligation of contract, see Constitutional Law, ¶175.
 Rents reserved in leases, see Landlord and Tenant, ¶198-248.

GUANO ISLANDS.

Jurisdiction of offenses committed thereon, see Criminal Law, ¶97.
 Part of United States, see United States, ¶2.
 Power of Congress to legislative in respect to, see United States, ¶22.
 Right to dower in islands discovered by husband, see Dower, ¶10.
 Right to remove guano as license, see Mines and Minerals, ¶6.

GUARANTY.*Scope-Note.*

[INCLUDES collateral promises to answer for the payment of a debt or performance of a duty or contract or other obligation by another, liable therefor in the first instance, in the event of his failure to pay or perform the same; nature, requisites, validity, incidents, construction, operation, and effect of such promises in general; and rights, liabilities, and remedies of guarantors, principal debtors, and creditors.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Requisites and Validity.**

¶6. Offer and acceptance in general.

II. Construction and Operation.

¶32. Negotiability and transfer of guaranty.
 36. Scope and extent of liability.
 37. Commencement and duration in general.

III. Discharge of Guarantor.

¶61. Taking additional security.

IV. Remedies of Creditors.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Guar. §§85-110.]

V. Rights and Remedies of Guarantor.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Guar. §§111-117.]

Cross-References.

See—
 Indemnity.
 Principal and Surety.
 Application of statute of frauds, see Frauds, Statute of, ¶33.
 Bank depositors guaranty law, see Banks and Banking, ¶4; due process of law, see Constitutional Law, ¶278; equal protection of laws, see Constitutional Law, ¶240; impairing obligation of contract, see Constitutional

Law, ¶129; taking of property for public use, see Eminent Domain, ¶17.
 By loan or trust company, see Banks and Banking, ¶315.
 Liability of national bank as guarantor, see Banks and Banking, ¶261.
 Parol or extrinsic evidence, see Evidence, ¶404.
 Work by contractor for public improvements, see Municipal Corporations, ¶368.

I. REQUISITES AND VALIDITY.**⌘6. Offer and acceptance in general.**

See 25 Cent. Dig. Guar. § 3.

The acceptance of a guaranty for future credit to be given to a third person should be shown in order to charge the guarantor.—*Davis Sewing-Mach. Co. v. Richards*, 115 U. S. 524, 6 S. Ct. 173, 29 L. Ed. 480.

II. CONSTRUCTION AND OPERATION.**⌘32. Negotiability and transfer of guaranty.**

See 25 Cent. Dig. Guar. § 35; 7 Cent. Dig. Bills & N. § 372.

A guaranty indorsed on a negotiable railroad bond payable to bearer, and itself running to the holder of the bond, is negotiable, and passes with the bond by delivery.—*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

⌘36. Scope and extent of liability.

See 25 Cent. Dig. Guar. §§ 38-45.

A guaranty, in a contract for the erection of blast furnaces for an iron company, that all the work shall be "done in good, workmanlike manner, and of suitable material, and each part to be adequate in design, strength, capacity, and workmanship for the purposes for which it is intended," the work to be examined by the company's superintendent biweekly, and finally accepted if to his satisfaction, is not a guaranty that the plant, as a whole, shall be adequate in design, strength, capacity, and workmanship for the purpose intended.—*Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordan*, 151 U. S. 285, 14 S. Ct. 343, 38 L. Ed. 164.

⌘37. Commencement and duration in general.

See 25 Cent. Dig. Guar. § 46.

Sales of merchandise for which the purchasers have not been called upon to pay

until four months have elapsed are covered, whether made on four months' credit or not, by a bond conditioned that the purchasers will pay the moneys due and to become due on merchandise sold and to be sold by the obligees which the purchasers "have bound and hereby bind themselves to pay for in four months after the date of each respective purchase."—*McGuire v. Gerstley*, 27 S. Ct. 332, 204 U. S. 489, 51 L. Ed. 581, affirming judgment (1905) 26 App. D. C. 193; *Clark v. Same*, 27 S. Ct. 337, 204 U. S. 504, 51 L. Ed. 589, affirming judgment (1905) 26 App. D. C. 205.

III. DISCHARGE OF GUARANTOR.**⌘61. Taking additional security.**

See 25 Cent. Dig. Guar. § 71.

The taking of additional security does not discharge a guarantor upon a mortgage executed by her to secure the debt.—*Cabrera v. American Colonial Bank*, 29 S. Ct. 623, 214 U. S. 224, 53 L. Ed. 974.

IV. REMEDIES OF CREDITORS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Guar. §§ 85-110.]

V. RIGHTS AND REMEDIES OF GUARANTOR.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Guar. §§ 111-117.]

GUARANTY INSURANCE.

See Insurance, ⌘430, 514.

GUARDIAN AD LITEM.

In action by or against infant, see Infants, ⌘76-80.

GUARDIAN AND WARD.*Scope-Note.*

[INCLUDES general guardianship, particularly of the persons and estates of infants, by nature or under parental or judicial appointment; rights, powers, duties, and liabilities of guardians in respect of the persons and property of their wards; and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Guardianship in General.**

⌘3. What law governs.

II. Appointment, Qualification, and Tenure of Guardian

⌘23. Resignation and discharge.

III. Custody and Care of Ward's Person and Estate.

33. Collection of assets.

40. Sale.

43. — Personal property.

45. Mortgage or pledge.

47. Contracts.

III. Custody and Care of Ward's Person and Estate—Continued.

- 50. — Borrowing money.
- 53. Investments.
- 57. Gifts.

IV. Sales and Conveyances Under Order of Court.

- 76. Statutory provisions.
- 81. Jurisdiction.
- 86. Petition or other application.
- 87. Citation or notice.
- 90. Order or decree.
- 92. Special bond for sale.
- 94. Sale.
- 100. — Requisites and validity in general.
- 104. — Ratification and curing defects.
- 112. Mortgage.

V. Actions.

- 125. Time to sue and limitations.

VI. Accounting and Settlement.

VII. Foreign and Ancillary Guardianship.

- 170. Actions by foreign guardians.

VIII. Liabilities on Guardianship Bonds.

- 180. Conclusiveness of adjudication against principal.

Cross-References.

See Parent and Child.

Guardian ad litem, see Infants, —76-80.

Guardianship of insane persons, see Insane Persons, —80.

Matters relating to infants and their property irrespective of guardianship, see Infants.

I. GUARDIANSHIP IN GENERAL.

—3. What law governs.

See 25 Cent. Dig. Guard. & W. § 3.

In accounting by a guardian in the state of his appointment, which is other than that of the ward's domicile, the propriety of his investment of the ward's property is to be governed by the laws of the state of the ward's domicile. —Lamar v. Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. Ed. 94.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

—23. Resignation and discharge.

See 25 Cent. Dig. Guard. & W. § 77.

The War of the Rebellion, and the residence of both guardian and ward in the enemy's territory throughout the war, did not terminate the obligation of a guardian appointed before the war in a state never within that territory, nor discharge him from liability to account to the ward in the courts of that state after the war. —Lamar v. Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, reversing (C. C.) Micon v. Lamar, 1 F. 14, and (C. C.) Micou v. Same, 7 F. 180.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

—33. Collection of assets.

See 25 Cent. Dig. Guard. & W. §§ 142-161.

A tutrix of minor children, legally appointed in Louisiana, is authorized, in pursuance of the duty imposed upon her of prosecuting the

legal claims of the children, to bind them by a contract with an attorney for the prosecution of the claim. —Taylor v. Bemiss, 110 U. S. 42, 3 S. Ct. 441, 23 L. Ed. 64.

Where by special act of congress money is made payable to certain minor children in Louisiana, a payment in the District of Columbia to the attorney of their tutrix, appointed under the laws of Louisiana, is a valid payment. —Id.

The acceptance by a father, as guardian, at the end of the tontine period, of the surrender value of a tontine dividend policy on his life, payable to his child, is the collection of a debt due in the alternative at the option of the guardian, and neither a compromise nor a sale, under Rev. Code, §§ 2065, 2106, 2110, providing for previous approval by the court. —Maclay v. Equitable Life Assur. Soc., 152 U. S. 499, 14 S. Ct. 678, 38 L. Ed. 528.

The mother of illegitimate minor children, who are, by statute, entitled to inherit from their father cannot release such right in their behalf as their natural guardian. Decree, De Cordova v. Korte, 41 P. 526, 7 N. M. (Gild.) 678, affirmed. —Naeglin v. De Cordoba, 19 S. Ct. 35, 171 U. S. 638, 43 L. Ed. 315.

—40. Sale.

See 25 Cent. Dig. Guard. & W. §§ 172-181.

—43. — Personal property.

See 25 Cent. Dig. Guard. & W. §§ 173, 186-188, 190, 191.

A guardian may, without order of court, sell personal property of the ward in his possession, and reinvest the proceeds. —Lamar v. Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, reversing (C. C.) Micon v. Lamar, 1 F. 14, and (C. C.) Micou v. Same, 7 F. 180.

45. Mortgage or pledge.

See 25 Cent. Dig. Guard. & W. §§ 202-205.

Rev. St. Ill. 1874, c. 64, §§ 26, 27, provide that mortgages by a guardian executed under said chapter shall be foreclosed only upon petition in the county court, and that no strict foreclosure shall be made, but that redemption shall be allowed as is provided by law in cases of sales under execution upon common-law judgments. *Held*, that it is not essential to the validity of the mortgage that these provisions should be embodied therein, as they could not exclude the jurisdiction of the circuit courts of the United States in proper cases, and as the right of redemption is expressly given by statute.—*United States Mortg. Co. v. Sperry*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969, reversing decree (C. C.) 26 F. 727.

47. Contracts.

See 25 Cent. Dig. Guard. & W. §§ 101, 219-221.

50. — Borrowing money.

See 25 Cent. Dig. Guard. & W. §§ 223, 229.

Const. Ill. art. 6, § 18, declares county courts to be courts of record, with original jurisdiction in the appointment of guardians and the settlement of their accounts. Rev. St. Ill. 1874, c. 64, provides that the guardian shall have the care and management of the estate of his ward, and shall manage it frugally and without waste, applying the income thereof so far as may be necessary to the support and education of his ward. He is also empowered to lease and sell the real estate of the ward subject to certain restrictions and the approval of the county court. Section 24 provides that "he may by leave of the county court mortgage the real estate of the ward"; and section 25 provides that, "before any mortgage shall be made, the guardian shall petition the county court for an order" authorizing it. *Held*, that the county court has jurisdiction to authorize a guardian to borrow money to pay off prior incumbrances, and to replace buildings on the land of his ward which have been burned.—*United States Mortg. Co. v. Sperry*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969, reversing decree (C. C.) 26 F. 727.

Where the guardian, in effecting a loan on mortgage for the benefit of his ward, with the approval of the court, stipulates that 9 per cent. interest shall be paid until the principal sum is fully paid, he thereby binds the ward to the payment of that rate after his majority until the debt is paid, though Rev. St. Ill. c. 64, § 24, provides that the time of the maturity of an indebtedness so contracted shall not be extended beyond the minority of the ward.—*Id.*

A guardian, having borrowed money for the estate of his ward, executed a bond therefor bearing interest semiannually, and the installments of interest were evidenced by coupons attached to the bond. It was recited in the bond that it was not intended to bind the guardian personally, or his personal estate, but only to bind him as guardian of the estate of the minor. *Held* that, as these coupons are not commercial securities on which the guardian can be held personally liable, they do not bear interest after maturity, under Rev. St. Ill. 1874, p. 614, providing that interest shall be allowed on all moneys after they become due on any bond, bill, promissory note, or other instrument of writing.—*Id.*

53. Investments.

See 25 Cent. Dig. Guard. & W. §§ 232-241.

A guardian, appointed in New York before the War of the Rebellion, of an infant then temporarily residing there, but domiciled in Georgia, sold bank stock of his ward in New York during the war, and there invested the proceeds in bonds issued before the war by the cities of Mobile, Memphis, and New Orleans, and in bonds issued by a railroad corporation

chartered by the state of Tennessee, and whose road was in Tennessee and Georgia; and the railroad bonds were indorsed by the state of Tennessee at the time of their issue. Such investments were authorized by the laws of Georgia. *Held*, that if in so doing he used due care and prudence, having regard to the best pecuniary interests of his ward, he was not accountable to the ward for loss by depreciation of the bonds, although one object of the sale and investment was to save the ward's money from confiscation by the United States.—*Lamar v. Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, reversing (C. C.) *Micon v. Lamar*, 1 F. 14, and (C. C.) *Micou v. Same*, 7 F. 180.

An investment by a guardian of money of his ward, during the War of the Rebellion, and while both guardian and ward were residing within the enemy's territory, in bonds of the so-called Confederate States, was unlawful, and the guardian is responsible to the ward for the sum so invested.—*Id.*

The guardian of a minor, appointed in one of the Confederate States before the Rebellion, is not chargeable with funds of his ward bona fide invested, during the Rebellion, in Confederate bonds, under state laws then existing. *Lamar v. Micou*, 5 S. Ct. 221, 112 U. S. 452, 28 L. Ed. 751, distinguished.—*Baldy v. Hunter*, 18 S. Ct. 890, 171 U. S. 388, 43 L. Ed. 208.

57. Gifts.

See 25 Cent. Dig. Guard. & W. §§ 261-263.

Where more than 11 years has elapsed after a ward has attained full age and his guardian has settled his accounts, a deed of gift of real estate from the former to the latter is not affected by Code Ga. § 2666, providing that a gift by a ward to his guardian, after having "just arrived at majority," shall be set aside at any time within five years of the making, on the slightest evidence of persuasion.—*Ralston v. Turpin*, 129 U. S. 663, 9 S. Ct. 420, 32 L. Ed. 747, affirming (C. C.) 25 F. 7.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

Due process of law, see Constitutional Law, 278.

76. Statutory provisions.

See 25 Cent. Dig. Guard. & W. § 326.

Act Md. 1798, c. 101, subc. 12, § 10, providing for the sale of a ward's estate for his support, was not repealed by Act Cong. March 3, 1843, c. 87, providing that, when the interest of an infant requires the sale of his real estate, the circuit court of the District of Columbia may order a sale thereof, and the proceeds shall be invested and applied for the benefit of the infant as the court may judge proper.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

81. Jurisdiction.

See 25 Cent. Dig. Guard. & W. §§ 334-336.

Acts Md. 1798, c. 101, § 10, subc. 12, provides that, upon the settlement of a guardian's account with the orphans' court, such court shall ascertain, at discretion, the sum to be annually expended in the maintenance and education of the orphan, and that the said court may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same under its order, "provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general court as well as of the orphans' court." Section 12 provides that, "in case the personal property of the ward shall consist of specific articles," the court may pass an order for the

sale, etc. By the Maryland statute of 1785 (chapter 80, § 9), the power of the guardian to apply the principal to such maintenance and education is expressly restricted to the personal estate of the ward. *Held* that, the act of 1798 having been continued in force in the District of Columbia, the orphans' court in such District, with the approval of the circuit court of the United States for such District, sitting in equity, has power under such act to order the sale of the real estate of infant wards for their maintenance and education.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

86. **Petition or other application.**

See 25 Cent. Dig. Guard. & W. §§ 340-344.

It is no objection to a sale of the real estate of infant wards that the petition of their guardian, who was also life tenant, asked for the sale to relieve her own immediate wants, as well as for the support of the wards, as it will be presumed that, in asking for a sale for the support of the guardian, the interest of the latter in the land was referred to.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

87. **Citation or notice.**

See 25 Cent. Dig. Guard. & W. § 345.

Notice to infant wards of a proceeding by their guardian for an order to sell real estate for their maintenance and education is unnecessary, there being no statute requiring it.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

90. **Order or decree.**

See 25 Cent. Dig. Guard. & W. §§ 349-355.

The order of the orphans' court permitting the sale to be made, or of the chancery court approving the sale, cannot be collaterally impeached on the ground that there is no record of any evidence on which the orders were based, or of any subsequent accounting by the guardian for the proceeds of the sale.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

92. **Special bond for sale.**

See 25 Cent. Dig. Guard. & W. §§ 358-362.

Where a sale of land by a guardian took place under order of the probate court, and the proceedings were regular and in proper form, save that the court dispensed with the giving of a bond by the guardian, to faithfully discharge his duties, and to account for all moneys arising from the sale, as required by the Ohio statute, the failure to furnish this bond did not render the sale void.—*Arrowsmith v. Harmoning*, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243.

Proceedings for the sale of a ward's realty are not void because of the failure to take an additional bond. The court having jurisdiction of the subject-matter, the proceedings are simply erroneous.—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 S. Ct. 237, 32 L. Ed. 630.

Under 1 Swan & C. Rev. St. Ohio, requiring a guardian on the sale of the ward's realty to execute a bond "with sufficient freehold sureties," the bond is not void because it has but one surety.—*Id.*

94. **Sale.**

See 25 Cent. Dig. Guard. & W. §§ 363-394.

100. **Requisites and validity in general.**

See 25 Cent. Dig. Guard. & W. §§ 372, 373.

A bill alleging that by collusion with the purchaser complainant's guardian privately made two sales of his realty three and four years after the granting of an order for private sale, and after a sale of part of the land had been made, and without further appraisal, though the land had increased in value, and

without additional bond, and for the purpose of getting money for the guardian's private gain, and allowing the purchaser to get the land at an under price, though the guardian had in his hands large sums, as the purchaser knew, discloses a case of fraud proper for equitable relief.—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 S. Ct. 237, 32 L. Ed. 630.

104. **— Ratification and curing defects.**

See 25 Cent. Dig. Guard. & W. § 382.

In pursuance of an order of the probate court, a guardian sold certain land of the ward. The ward never objected during his minority, and for 11 years after he became of age never indicated his intention to disaffirm the sale. *Held* equivalent to an express affirmation.—*Brazee v. Schofield*, 124 U. S. 495, 8 S. Ct. 604, 31 L. Ed. 484, affirming judgment 3 P. 265.

112. **Mortgage.**

See 25 Cent. Dig. Guard. & W. §§ 401-404.

Const. III. art. 6, § 18, declares county courts to be courts of record, with original jurisdiction in the appointment of guardians and the settlement of their accounts. Rev. St. Ill. 1874, c. 64, provides that the guardian shall have the care and management of the estate of his ward, and shall manage it frugally and without waste, applying the income thereof, so far as may be necessary, to the support and education of his ward. He is also empowered to lease and sell the real estate of the ward subject to certain restrictions and the approval of the county court. Section 24 provides that "he may, by leave of the county court, mortgage the real estate of the ward"; and section 25 provides that, "before any mortgage shall be made, the guardian shall petition the county court for an order" authorizing it. *Held*, that the county court has jurisdiction to authorize a guardian to borrow money to pay off prior incumbrances, and to replace buildings on the land of his ward which have been burned, and to execute a mortgage on such land to secure the loan.—*United States Mortgage Co. v. Sperry*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969, reversing decree (C. C.) 26 F. 727.

V. **ACTIONS.**

Proceedings in federal courts, see Courts, 311.

125. **Time to sue and limitations.**

See 25 Cent. Dig. Guard. & W. §§ 428, 429.

A ward who attained his majority in 1869 executed several deeds of the same property to his guardian, the last one being executed in 1881. *Held*, that Code, § 2666, providing that a gift by a ward to his guardian, after having "just arrived at majority," shall be set aside at any time within five years of the making, on slightest evidence of persuasion, has no direct bearing in this case.—*Ralston v. Turpin*, 129 U. S. 663, 9 S. Ct. 420, 32 L. Ed. 747, affirming (C. C.) 25 F. 7.

VI. **ACCOUNTING AND SETTLEMENT.**

See 25 Cent. Dig. Guard. & W. §§ 461-555.

Sales of property of infants under statute or order of court, see Infants, 36-39.

VII. **FOREIGN AND ANCILLARY GUARDIANSHIP.**

170. **Actions by foreign guardians.**

See 25 Cent. Dig. Guard. & W. §§ 570-573.

A guardian cannot sue in a court, even of the United States, held in a state other than that in which he was appointed, except as authorized by the laws of the other state.—*Mor-*

gan v. Potter, 157 U. S. 195, 15 S. Ct. 590, 39 L. Ed. 670.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

180. Conclusiveness of adjudication against principal.

See 25 Cent. Dig. Guard. & W. § 621.

A judgment establishing the liability of the estate of a ward for taxes, in a suit by the guardian to restrain their collection, is res judicata, as to that question, in a subsequent ac-

tion by the state against the sureties on the guardian's bond to collect the unpaid taxes. Judgment 43 A. 857, 89 Md. 587, affirmed.—Baldwin v. State of Maryland, 21 S. Ct. 105, 179 U. S. 220, 45 L. Ed. 160.

GUESTS.

See Innkeepers.

GUNSTOCKS.

See Customs Duties, 26.

HABEAS CORPUS.

Scope-Note.

[INCLUDES writs of habeas corpus commanding the production of a person detained by another, with the cause of such detention, for determination thereof; nature and scope of the remedy in general; grounds of such writs; to and against whom and for what restraint they are allowed; jurisdiction to grant and proceedings to obtain the writ; issuance, requisites, and validity of writs; service thereof, return thereto, and proceedings thereon; writs of certiorari in aid of writs of habeas corpus, and other incidental relief; judgments or orders and enforcement thereof; review of proceedings; costs in habeas corpus proceedings; disobedience to such writs; and suspension of the remedy.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds of Remedy.

- 2. Constitutional and statutory provisions.
- 3. Existence of other remedy in general.
- 4. Existence of remedy by appeal or writ of error.
- 5. Effectiveness of remedy by habeas corpus.
- 6. Discretion as to grant of writ.
- 8. Nature of restraint or detention.
- 9. — In general.
- 10. — Actual imprisonment.
- 12. Nature of authority for restraint or detention.
- 13. — In general.
- 18. Proceedings reviewable.
- 19. — In general.
- 21. — Arrest and commitment on criminal charges.
- 23. — Administrative proceedings.
- 24. Grounds for relief.
- 25. — In general.
- 27. — Want of jurisdiction.
- 29. — Invalidity of proceedings.
- 30. — Errors and irregularities.
- 31. — Former jeopardy.
- 32. — Invalidity of statute or ordinance.

II. Jurisdiction, Proceedings, and Relief.

- 40. Jurisdiction in general.
- 42. — Authority of state courts in respect to persons in custody of United States authorities.
- 45. — United States courts.
- 52. Petition.
- 54. — Particular averments.
- 55. — Copies of process or proceedings authorizing imprisonment.

II. Jurisdiction, Proceedings, and Relief—Continued.

- 66. Certiorari incident to writ.
- 69. Operation and effect of writ.
- 71. — Custody of prisoner.
- 73. Return.
- 76. — Cause or authority for restraint or detention.
- 79. — Conclusiveness and effect.
- 85. Evidence.
- 91. Scope of inquiry and powers of court.
- 92. — In general.
- 94. — Jurisdictional questions.
- 95. — Validity of proceedings.
- 96. — Errors and irregularities.
- 97. — Cause of detention existing at time of hearing.
- 98. Determination of particular issues or questions.
- 103. — Extradition.
- 105. — Final judgment, sentence, and commitment.
- 106. — Commitment for contempt.
- 108. Disposition of person.
- 109. — Remand or recommitment.
- 112. Judgment or order.
- 113. Appeal and error.
- 118. Operation and effect of refusal to discharge.
- 120. — Subsequent applications.

III. Suspension of Remedy.

Cross-References.

Due process of law, see Constitutional Law, §306.
Effect of habeas corpus on sentence, see Criminal Law, §1002.

Review of deportation proceedings, see Aliens, §32, 54.

I. NATURE AND GROUNDS OF REMEDY.

2. Constitutional and statutory provisions.

See 25 Cent. Dig. Hab. Corp. § 2.

Constitutional guaranty of the privilege of habeas corpus is not violated by Act Feb. 20, 1907, § 3, for deportation of aliens for practicing prostitution within three years after entry, though findings of fact of Department of Commerce and Labor are made conclusive. *Zakonaite v. Wolf*, 33 S. Ct. 31, 228 U. S. 272, 57 L. Ed. 218.

3. Existence of other remedy in general.

See 25 Cent. Dig. Hab. Corp. § 3; 21 Cent. Dig. Execution, § 1262.

One indicted in the circuit court cannot file a petition for habeas corpus in the supreme court, upon the ground that the matters set forth in the indictment do not constitute a crime, when the judgment of the circuit court thereon has not been invoked by motion to quash, or otherwise.—*In re Lancaster*, 137 U. S. 393, 11 S. Ct. 117, 34 L. Ed. 713.

Habeas corpus, being an extraordinary remedy, will not issue on behalf of a person imprisoned in default of payment of a small fine for disobeying a preliminary injunction granted by a federal Circuit Court, restraining the enforcement of a judgment of a state court, to inquire into the jurisdiction to grant the injunction, where the bill alleges facts which show a total want of jurisdiction in the state court, and implies, at least, that a fictitious service was made with deliberate fraud, and the writ is confessedly sought in order to obtain a summary disposition of the cause instead of awaiting the result of a trial in the regular way.—

Ex parte Simon, 28 S. Ct. 238, 208 U. S. 144, 52 L. Ed. 429.

4. Existence of remedy by appeal or writ of error.

See 25 Cent. Dig. Hab. Corp. § 4.

Habeas corpus will not be granted by a justice of the supreme court in chambers, in favor of the captain of a steamer licensed to navigate the public waters of the United States, who has been committed, under the laws of Pennsylvania (Act May 13, 1887), for selling liquor on the steamer, without license while within the limits of that state. The federal question, if any, can be raised by writ of error.—*Ex parte Clark*, 9 S. Ct. 2, 128 U. S. 395, 32 L. Ed. 487.

The writ of habeas corpus cannot be made a substitute for an appeal or writ of error.—*Felts v. Murphy*, 26 S. Ct. 366, 201 U. S. 123, 50 L. Ed. 689; *Valentina v. Mercer*, 26 S. Ct. 368, 201 U. S. 131, 50 L. Ed. 693.

Habeas corpus will not be granted by the Supreme Court of the United States on behalf of a person convicted in a district court of bringing intoxicating liquors into the Indian country, unless there are special circumstances making immediate action instead of the usual remedy by writ of error from a Circuit Court of Appeals necessary or expedient, especially where the term of his imprisonment had almost expired before the application for the writ.—*In re Lincoln*, 26 S. Ct. 602, 202 U. S. 178, 50 L. Ed. 984.

Habeas corpus will not be issued as a substitute for a writ of error on behalf of an Indian convicted in a federal Circuit Court of murder of another Indian upon a reservation, on the ground that such court was without jurisdiction because the accused was a citizen of the United States, and the place of the crime,

by reason of allotment and patent, had ceased to be a part of the reservation.—*Toy Toy v. Hopkins*, 29 S. Ct. 416, 212 U. S. 542, 53 L. Ed. 644.

A writ of habeas corpus cannot be made the basis of a review of a judgment of a court of competent jurisdiction where proceedings were had under a constitutional statute giving the court authority to examine into the charges and to convict or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority.—(1910) *Harlan v. McGourin*, 31 S. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849, affirming decree *Ex parte Harlan* (C. C. 1909) 180 F. 119.

—5. Effectiveness of remedy by habeas corpus.

See 25 Cent. Dig. Hab. Corp. § 5.

A writ of habeas corpus to release one convicted of crime by a state court will be denied by the United States supreme court if it appears from the face of the record that the decision of the federal question complained of was so clearly right as not to require argument; for the rule will then be applied that the writ must be denied when it is apparent that the only result of issuing it would be to remand the petitioner to custody.—*In re Durrant*, 18 S. Ct. 291, 169 U. S. 39, 42 L. Ed. 653.

Leave to file a petition for the writ of habeas corpus and certiorari will not be granted where it is obvious that before a return to the writ can be made, or any other action taken, the restraint of which the prisoner complains will be terminated.—*Ex parte Baez*, 20 S. Ct. 673, 177 U. S. 378, 44 L. Ed. 813.

—6. Discretion as to grant of writ.

See 25 Cent. Dig. Hab. Corp. § 6.

When a petitioner for a writ of habeas corpus is in custody under process from a state court of original jurisdiction, for an alleged offense against the laws of that state, and it is claimed that he is restrained of his liberty in violation of the constitution, a circuit court has a discretion whether it will immediately issue the writ and discharge him from custody in advance of his trial; and, after his conviction, it has still a discretion whether it will put the accused to his writ of error to the highest court of the state, or proceed summarily to determine whether he is deprived of his liberty in violation of the constitution.—*Ex parte Royall*, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 868.

—8. Nature of restraint or detention.

See 25 Cent. Dig. Hab. Corp. §§ 10-12.

—9. — In general.

See 25 Cent. Dig. Hab. Corp. §§ 10, 11.

On ordering a court-martial for the trial of a medical director in the navy, on charges relating to his conduct as chief of the bureau of medicine and surgery in the navy department, the secretary of the navy notified him that he was placed under arrest, and should confine himself to the limits of the city of Washington. *Held*, that this constituted no such restraint of liberty as to sustain a writ of habeas corpus.—*Wales v. Whitney*, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277.

The refusal to allow a Chinese passenger to land is a restraint of his liberty within the meaning of the habeas corpus act, and it is the duty of the court, justice, or judge to whom the application for a writ of habeas corpus is made to forthwith award the writ, unless it appears from the petition itself that the party is not entitled thereto.—*United States v. Jung Ah Lung*, 124 U. S. 621, 8 S. Ct. 663, 31 L. Ed. 581.

—10. — Actual imprisonment.

See 25 Cent. Dig. Hab. Corp. § 10.

Excessive bail is no ground for giving accused a hearing on habeas corpus as to the constitutionality of statute under which he was indicted, where since the appeal he has given bond and has been released from arrest.—*Johnson v. Hoy*, 33 S. Ct. 240, 227 U. S. 245, 57 L. Ed. 497.

—12. Nature of authority for restraint or detention.

See 25 Cent. Dig. Hab. Corp. §§ 13-16; 21 Cent. Dig. Execution, § 1262.

—13. — In general.

See 25 Cent. Dig. Hab. Corp. § 13.

Detention of a person, without formal release and rearrest, on a telegram from a foreign government seeking extradition, is no ground for discharge on habeas corpus from detention on an extradition warrant subsequently issued by the United States commissioner.—*Kelly v. Griffin*, 36 S. Ct. 487, 241 U. S. 6, 60 L. Ed. 861.

—18. Proceedings reviewable.

See 25 Cent. Dig. Hab. Corp. §§ 17-20.

—19. — In general.

See 25 Cent. Dig. Hab. Corp. § 17.

The civil courts can relieve a person from imprisonment under order of a court-martial only by writ of habeas corpus, and then only when it is apparent that the court-martial proceeds without jurisdiction.—*Wales v. Whitney*, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277.

Pending proceedings for extradition, regularly and constitutionally taken under the acts of congress, cannot be put an end to by writ of habeas corpus.—*Terlinden v. Ames*, 22 S. Ct. 484, 184 U. S. 270, 46 L. Ed. 534.

—21. — Arrest and commitment on criminal charges.

See 25 Cent. Dig. Hab. Corp. § 19.

Relief by habeas corpus will not be granted to inquire into detention under an extradition warrant, if the magistrate issuing warrant had jurisdiction and there was competent evidence of the commission of the crime charged in the complaint, which according to local law would justify commitment for trial if the crime had been committed within the state.—*Charlton v. Kelly*, 33 S. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, affirming judgment (C. C.) *Ex parte Charlton*, 185 F. 880.

—23. — Administrative proceedings.

See 25 Cent. Dig. Hab. Corp. § 17.

The decision of the Secretary of Commerce and Labor, affirming the denial by the immigration officers, after examination, of the right of a person of Chinese descent to enter the United States, is no less conclusive on the federal courts, under Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 372, 390 [U. S. Comp. St. 1901, p. 1303], in habeas corpus proceedings, when citizenship is the ground on which the right of entry is claimed, than when the ground is domicile and the belonging to a class excepted from the exclusion acts.—*United States v. Ju Toy*, 25 S. Ct. 644, 198 U. S. 253, 49 L. Ed. 1040.

Habeas corpus should not be granted in favor of a person of Chinese descent, detained for return to China by the steamship company, which brought him to an American port, where his petition alleges nothing but citizenship as making his detention unlawful, and he has been denied admission to the United States by the immigration officers after examination, and such denial has been affirmed on appeal by the Secretary of Commerce and Labor.—*Id.*

Habeas corpus should be granted by the federal courts to a Chinese person, claiming to be a citizen of the United States, who has arbitrarily been denied such a hearing and opportunity to prove his right to enter the United States as the exclusion acts demand, and has been placed in custody of a steamship company, to be returned to China, pursuant to the decisions of the Commissioner of Immigration and the Department of Commerce and Labor.—*Chin Yow v. United States*, 28 S. Ct. 201, 208 U. S. 8, 52 L. Ed. 369.

An alien detained for deportation for a reason not within Immigration Act Feb. 20, 1907, § 2, as Amended by Act March 26, 1910, § 1, is entitled to release on habeas corpus.—*Geglow v. Uhl*, 36 S. Ct. 2, 239 U. S. 3, 60 L. Ed. 114, reversing order United States ex rel. *Geglow v. Same*, 215 F. 573, 131 C. C. A. 641.

24. Grounds for relief.

See 25 Cent. Dig. Hab. Corp. § 21-31; 21 Cent. Dig. Execution, § 1262.

25. — In general.

See 25 Cent. Dig. Hab. Corp. § 21, 23, 30, 47; 21 Cent. Dig. Execution, § 1262.

In the record of a judgment of a United States district court, sentencing a person convicted in one state to imprisonment in a prison in another state, the omission to state that there was no suitable prison in the state in which he was convicted, and that the attorney general had designated the prison in the other state as a suitable place of imprisonment, is no ground for discharging the prisoner on habeas corpus.—*Ex parte Wilson*, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89.

A judgment of conviction of murder cannot be collaterally attacked on petition for a writ of habeas corpus, on the ground that there was a defect in the number of grand jurors.—*Ex parte Wilson*, 140 U. S. 575, 11 S. Ct. 870, 35 L. Ed. 513.

Relief by habeas corpus will not be granted by federal courts to a person held in custody to await an order for his removal under Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), to the District Court of Columbia for trial on the charge of refusing, contrary to sections 101-104 (U. S. Comp. St. 1901, pp. 54, 55), to furnish information demanded by a congressional committee, though he asserts that the resolution under which the committee acted did not authorize inquiry into the matter about which he refused to testify, but such issues are for the trial court.—*Henry v. Henkel*, 35 S. Ct. 54, 235 U. S. 219, 59 L. Ed. 203, affirming decree (D. C.) 207 F. 805.

The interstate extradition of a person charged with having successfully conspired to escape from a hospital for insane criminals will not be interfered with by habeas corpus on the theory that if he was insane when he escaped he was not guilty of a crime, and if he was not insane he was entitled to a discharge.—*Drew v. Thaw*, 35 S. Ct. 137, 235 U. S. 432, 59 L. Ed. 302, reversing order (D. C.) *Ex parte Thaw*, 214 F. 423.

27. — Want of jurisdiction.

See 25 Cent. Dig. Hab. Corp. § 22.

Where the want of jurisdiction to inflict a punishment imposed in pursuance of a conviction appears on the face of the judgment, the objection may be taken on a writ of habeas corpus.—*Ex parte Snow*, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658.

A person who has been convicted and sentenced for a crime by a judge de facto, acting under color of office, and who is detained in custody under such sentence, cannot be discharged on habeas corpus, though the judge had no valid title to the office.—*Ex parte Ward*, 19 S. Ct. 459, 173 U. S. 452, 43 L. Ed. 765.

Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if contrary to Const. U. S. Amend. 5, do not affect the jurisdiction of the court so as to justify relief by habeas corpus.—*In re Moran*, 27 S. Ct. 25, 203 U. S. 96, 51 L. Ed. 105.

Disobeying the law governing the selection of grand jurors does not affect the jurisdiction of the court so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors.—*Id.*

The failure to specify a building in the order of the Supreme Court of the territory of Oklahoma fixing Lawton as the place where the district court should be held in and for the county of Comanche, there being at the time of making the order and at the time of trial no county or court buildings in such county, did not go to the jurisdiction of such district court so as to justify relief by habeas corpus in favor of a person convicted of crime therein who makes no showing of any opportunities lost because no building was named.—*Id.*

The business of issuing and redeeming trading stamps is not so manifestly outside the range of judicial consideration, under Rev. St. D. C. § 1177, making it a crime to engage in any manner in any gift-enterprise business in the District, as to justify relief by habeas corpus to a person convicted of that offense, on the theory that the trial court was without jurisdiction.—*In re Gregory*, 31 S. Ct. 143, 219 U. S. 210, 55 L. Ed. 184.

29. — Invalidity of proceedings.

See 25 Cent. Dig. Hab. Corp. § 24.

A prisoner who has been tried, convicted, and sentenced to the penitentiary upon an indictment in a federal court, changed by order of the court, or by the prosecuting attorney, without resubmission to the grand jury, in violation of the fifth amendment to the United States constitution, is entitled to his discharge on habeas corpus.—*Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849.

The district courts have no jurisdiction of causes by reason of the diverse citizenship of the parties; and one who was imprisoned by authority of a district court for violating an order therein made, awarding the custody of an infant child as between persons of diverse citizenship, was illegally imprisoned, and will be released by a writ of habeas corpus.—*Ex parte Burrus*, 136 U. S. 586, 10 S. Ct. 850, 34 L. Ed. 1500.

The objection that the original sentence, before modification on motion of the government's counsel, exceeded the authority of the court, in that it required service at hard labor, is not available on habeas corpus, since, at most, only that part of the sentence in excess of the law is void.—(1910) *Harlan v. McGourin*, 31 S. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849, affirming decree *Ex parte Harlan* (C. C. 1909) 180 F. 119.

A count in an indictment for obtaining money by false pretenses, alleging that money was obtained from the state by falsely representing that certain machinery sold to the state was new, whereas in fact it was secondhand, substantially charges a crime so as to preclude a discharge on habeas corpus in extradition proceedings, although the contract of sale contains guaranty and testing clauses, which relate, however, only to workmanship and freedom from defects.—*Strassheim v. Daily*, 31 S. Ct. 558, 221 U. S. 280, 55 L. Ed. 735.

30. — Errors and irregularities.

See 25 Cent. Dig. Hab. Corp. § 25; 21 Cent. Dig. Execution, § 1262.

In the record of a general conviction and sentence upon two counts, one of which is good,

a misrecital of the verdict as upon the other count only, in stating the inquiry whether the convict had aught to say why sentence should not be pronounced against him, is no ground for discharging him on habeas corpus.—*Ex parte Wilson*, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89.

On an indictment under Act Cong. Feb. 9, 1889, for the carnal knowledge of a female under the age of 16 years, which contains a charge of rape at common law, and also of the statutory offense, the failure of the district court to compel the prosecuting attorney to elect upon which count he would try the prisoner, and its treatment of the charge of rape as surplusage, is not error that can be taken advantage of on habeas corpus, as the court has jurisdiction of both offenses.—*In re Lane*, 135 U. S. 443, 10 S. Ct. 760, 34 L. Ed. 219.

The decision of a United States commissioner, sentencing a judgment debtor to imprisonment for fraud in the disposition of his property, is not reviewable by the circuit court of the United States on habeas corpus, nor by the supreme court on appeal from the circuit court, where it appears that the commissioner had jurisdiction of the subject-matter and the person of the debtor, and the only objections raised are errors and irregularities in the proceedings.—*Stevens v. Fuller*, 136 U. S. 468, 10 S. Ct. 911, 34 L. Ed. 461.

The fact that, in a capital case, the prisoner exhausted his peremptory challenges, and the court overruled his challenges for cause, so that, as he avers, he was deprived of a trial by an impartial jury, as guaranteed by the Constitution of the United States, is not a matter affecting the jurisdiction of the trial court, but is mere matter of error, and hence is no ground for issuing a writ of habeas corpus.—*In re Schneider*, 148 U. S. 162, 13 S. Ct. 572, 37 L. Ed. 406.

That a verdict of "guilty" of murder does not specify the degree thereof does not make a sentence imposed thereunder void, but only erroneous, and the same is not reviewable on habeas corpus.—*In re Eckart*, 17 S. Ct. 638, 166 U. S. 481, 41 L. Ed. 1085.

The fact that improper evidence was considered by a grand jury, and an indictment based thereon, does not afford ground for the release of the defendant on habeas corpus by a court having no control or jurisdiction over the proceedings.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

The question whether a judge who had jurisdiction to make an order for the removal, under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], to another district for trial, of persons there charged with an offense against the United States, ought to have made such order upon the merits, is not one which can be reviewed by habeas corpus.—*Greene v. Henkel*, 22 S. Ct. 218, 183 U. S. 249, 46 L. Ed. 177.

The objection that the judge issuing the warrant of arrest in extradition proceedings made the warrant returnable before a United States commissioner specially designated, as required by Rev. St. U. S. § 5270 [U. S. Comp. St. 1901, p. 3591], to act in such cases, is not available when first made on habeas corpus, even though such section seems technically to require the warrant to be made returnable before the magistrate issuing it. Judgment (C. C.) *In re Grin*, 112 F. 790, affirmed.—*Grin v. Shine*, 23 S. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

A sentence of a federal Circuit Court of two years' imprisonment in a state prison will not be held void on habeas corpus, on the theory that, as the convict was found guilty on

two counts of the indictment, the imprisonment was directed for a period not exceeding one year on each count, where there is nothing in the record to show that there was a separate sentence of one year's imprisonment upon each count.—*Dimmick v. Tompkins*, 24 S. Ct. 780, 194 U. S. 540, 48 L. Ed. 1110.

The sufficiency of an indictment found in a federal District Court and removed to a circuit court cannot, in the absence of exceptional circumstances, be tested by habeas corpus in the latter court, on the application of the accused, who is in custody under a *capias* issued on the indictment, made before he has been compelled to take any step in the cause. Order (C. C.) *Ex parte Riggins*, 134 F. 404, reversed.—*Riggins v. United States*, 26 S. Ct. 147, 199 U. S. 547, 50 L. Ed. 303.

Questions respecting the qualifications of the grand jurors, open to the accused in the original case, cannot, after conviction, be raised collaterally by habeas corpus, which may not, in this manner, usurp the functions of a writ of error.—*Keizo v. Henry*, 29 S. Ct. 41, 211 U. S. 146, 53 L. Ed. 125.

An objection that the indictment was not properly presented by the grand jury, based on testimony that, after the presentation of the original indictment, the grand jury were informed by the district attorney that the indictment needed amendment in some particulars, that this amendment was read over in the presence of the grand jury, and was incorporated into an indictment, which was regularly returned to court, where it was produced with the consent of all the grand jurors, if ever available, cannot be first raised on habeas corpus after conviction.—(1910) *Harlan v. McGourin*, 31 S. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849, affirming decree *Ex parte Harlan* (C. C. 1909) 180 F. 119.

Whether an offense is sufficiently alleged in indictment is not a proper subject-matter for inquiry on habeas corpus.—*Ex parte Webb*, 32 S. Ct. 769, 225 U. S. 663, 56 L. Ed. 1248.

A sentence imposed in excess of what was authorized by statute is not void as to the excess, so as to justify relief by habeas corpus, where under the local practice the sentence was subject to change or reversal in a higher court and the accused subject to resentence.—*Ex parte Spencer*, 33 S. Ct. 709, 228 U. S. 652, 57 L. Ed. 1010.

Errors in point of law in criminal court in a case within its jurisdiction cannot be reviewed by habeas corpus.—*Frank v. Mangum*, 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 969.

Denial of request for time to prepare defense, contrary to Gen. Order No. 58, in the Philippine Islands, did not warrant discharge on habeas corpus because deprived of right under Philippine Organic Act July 1, 1902, § 5, to due process of law, but an error of law not reviewable by habeas corpus.—*McMicking v. Shields*, 35 S. Ct. 665, 238 U. S. 99, 59 L. Ed. 1220.

◀ 31. — Former jeopardy.

See 25 Cent. Dig. Hab. Corp. § 27.

If the district court improperly sustain a demurrer to a plea of former conviction, the defendant may be released from imprisonment under sentence for the offense charged by habeas corpus, as the court has no authority to render the judgment.—*Ex parte Nielsen*, 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118.

An allegation that petitioner was tried before a local court upon the same charge, and upon a full hearing was discharged by the court, affords no ground for his discharge on habeas

corpus.—Whitten v. Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed. 406.

—32. — **Invalidity of statute or ordinance.**

See 25 Cent. Dig. Hab. Corp. § 29.

Habeas corpus will not issue as a substitute for writ of error to review a holding of the federal Circuit Court that the affidavit of creditors authorized by Judicial Code of March 3, 1911, c. 231, 36 Stat. 1090 (U. S. Comp. St. Supp. 1911, p. 133) § 21, could not be filed after the trial or to test correctness of rulings on defenses of law or fact, though the law is asserted to be unconstitutional.—Glasgow v. Moyer, 32 S. Ct. 753, 225 U. S. 420, 56 L. Ed. 1147.

Habeas corpus is not ordinarily available to test in advance of trial constitutionality of statute under which petitioner was indicted.—Johnson v. Hoy, 33 S. Ct. 240, 227 U. S. 245, 57 L. Ed. 497.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

Decisions reviewable, see Appeal and Error, —131.

Exclusive or concurrent jurisdiction, see Courts, —489.

Remedy by appeal as affecting mandamus to review discharge, see Mandamus, —4.

—40. **Jurisdiction in general.**

See 25 Cent. Dig. Hab. Corp. §§ 34-45; 13 Cent. Dig. Courts, §§ 501, 502, 508, 544, 621, 637, 753, 766, 781, 786, 804, 805, 990, 1096.

—42. — **Authority of state courts in respect to persons in custody of United States authorities.**

See 25 Cent. Dig. Hab. Corp. §§ 40-42.

Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of habeas corpus in proceedings for the arrest of fugitives from justice, and their delivery to the authorities of the state in which they stand charged with crime.—Robb v. Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. Ed. 542.

Subject to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by commissioners of such courts, or by officers of the general government acting under its laws, are so held in conformity with law, the states have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the constitution and laws of the United States.—Id.

Nor will it interfere where the petitioner has been convicted in the state court of original jurisdiction, and no reason is shown why the supreme court of the state may not review the judgment, or why it should not be permitted to do so.—Ex parte Fonda, 117 U. S. 516, 6 S. Ct. 848, 29 L. Ed. 904.

—45. — **United States courts.**

See 25 Cent. Dig. Hab. Corp. §§ 38-45; 13 Cent. Dig. Courts, §§ 804, 805, 990, 1096, 1376-1385.

On habeas corpus, the supreme court has no general power to review the judgments of inferior courts of the United States in criminal cases, but is limited to such objections as relate to the authority of the court to render the judgment for which the prisoner is held.—Ex parte Curtis, 106 U. S. 371, 1 S. Ct. 381, 27 L. Ed.

232; Ex parte Carll, 106 U. S. 521, 1 S. Ct. 535, 27 L. Ed. 288.

Except in cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party, the supreme court can issue a writ of habeas corpus only under its appellate jurisdiction.—Ex parte Hung Hang, 108 U. S. 552, 2 S. Ct. 863, 27 L. Ed. 811.

Though the supreme court of the United States has, under the constitution, no appellate jurisdiction in criminal cases, yet, upon the matter being properly presented, it will intervene in the interest of a prisoner under sentence of a court of the United States which was not competent to try him.—The Ku-Klux Cases, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274.

A prisoner in the custody of a state court of competent jurisdiction, not illegally asserted, cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he has a defense growing out of a provision of the constitution of the United States. The right of the prisoner to a discharge depends alone upon the sufficiency of his defense to the information under which he is held, and whether this is sufficient or not is for the court which tries him to determine.—Ex parte Crouch, 112 U. S. 178, 5 S. Ct. 96, 28 L. Ed. 690.

The United States supreme court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge, on habeas corpus, a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence.—Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89.

The circuit courts of the United States have power, under Rev. St. § 753, upon writ of habeas corpus, to restore to liberty any person, within their respective jurisdictions, who is held in custody under the criminal process of a state court, when his imprisonment is in violation of the constitution of the United States.—Ex parte Royall, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 968.

The supreme court of the United States, on application for a writ of habeas corpus to bring before it a prisoner held in custody under process of a state court, in advance of his trial therein, on the ground that he is restrained of his liberty in violation of the constitution of the United States, will not assume that the constitutional provision will not be fully enforced by the state court, and will not grant the writ, in the absence of special circumstances requiring immediate action.—Ex parte Royall, 117 U. S. 254, 6 S. Ct. 742, 29 L. Ed. 872.

The question of how far the forcible seizure, without regard to extradition treaties, of a person in a foreign country, charged with an offense against state laws, would avail the prisoner thus forcibly brought within the state's jurisdiction in resisting trial, is one wholly subject to the decision of the state courts, and in which the federal courts have no right to interfere.—Ker v. People of State of Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421.

Since, under Act Cong. March 3, 1885, an appeal lies from the judgments of the United States circuit courts in habeas corpus cases, the supreme court will not issue such a writ in cases where it may as well be done in the proper circuit court, if there are no special circumstances in the case making direct action by the supreme court necessary or expedient.—Ex parte Mirzan, 119 U. S. 584, 7 S. Ct. 341, 30 L. Ed. 513; Ex parte Huntington, 137 U. S. 63, 11 S. Ct. 4, 34 L. Ed. 567.

The United States supreme court having no jurisdiction by habeas corpus to discharge a person imprisoned under the sentence of a terri-

torial court, unless that court has transgressed its jurisdiction cannot discharge such a prisoner because, under the authority of the law of the territory, an alien who had declared his intention to become a citizen of the United States sat on the grand jury that found the indictment against the prisoner. The objection goes merely to the regularity of the proceedings, not to the jurisdiction of the court.—*Ex parte Harding*, 120 U. S. 782, 7 S. Ct. 780, 30 L. Ed. 824.

The United States supreme court cannot discharge the prisoner because he was denied his right to have compulsory process for obtaining witnesses in his favor.—*Id.*

A criminal, having escaped from justice to another state, pending extradition proceedings, was forcibly seized by an agent appointed by the governor, demanding his extradition, carried to the state where he had been indicted, and was there arrested on a legal warrant. *Held*, that he could not be released on petition for habeas corpus to a federal court, on account of the personal injuries received from private persons acting against the laws of one state and without authority from the other, or because of the indignities committed against the state from which the prisoner was removed; the illegal mode in which he was brought from the other state violating no right secured by the constitution or laws of the United States, but solely concerning that state, which may bring the persons abducting the petitioner to justice.—*Mahon v. Justice*, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283.

Habeas corpus will not be granted by a justice of the supreme court in chambers in favor of the captain of a steamer licensed to navigate the public waters of the United States, who has been committed, under the laws of Pennsylvania (Act May 13, 1887), for selling liquor on the steamer without license while within the limits of that state. The federal question, if any, can be raised by writ of error.—*Ex parte Clark*, 128 U. S. 396, 9 S. Ct. 2, 32 L. Ed. 487.

The including in one indictment of illegal voting for presidential electors and for members of congress, the latter offense being within the jurisdiction of the federal courts, does not affect the jurisdiction of the state court, and cannot be taken advantage of on habeas corpus.—*Fitzgerald v. Green*, 134 U. S. 377, 10 S. Ct. 586, 33 L. Ed. 951.

Rev. St. § 753, giving circuit courts power to issue writs of habeas corpus on petition of a person alleged to be in custody "for an act done or omitted in pursuance of a law of the United States, * * * or in custody in violation of the constitution or of a law or treaty of the United States," does not require that the law shall be by express act of congress. Any obligation fairly and properly inferable from the constitution, or any duty of a United States officer to be derived from the general scope of his duties under the laws of the United States, is a "law," within the meaning of the statute.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) *In re Neagle*, 39 F. 833, 5 L. R. A. 78.

Rev. St. § 753, giving circuit courts power to issue writs of habeas corpus on petition of one in custody for an act done in pursuance of a law of the United States, or in custody in violation of the constitution and laws of the United States, and section 761, requiring the court, when the petitioner is brought before it, to hear testimony and dispose of him as law and justice require, gives the circuit court power to issue a writ of habeas corpus, on petition of a United States marshal in the custody of a sheriff on the charge of murder, and to discharge him, if it appears that he committed the act in pursuance of a law of the United States, or that he is in custody in violation of the constitution or laws of the United States.—*Id.*

The presumption is that the court of appeals of a state will determine, in accordance with the law of the state, the question whether or not the Penal Code and the Code of Criminal Procedure were enacted as prescribed by the state constitution, and its determination in that regard is not subject to review by the federal courts on habeas corpus.—*Duncan v. McCall*, 139 U. S. 449, 11 S. Ct. 573, 35 L. Ed. 219.

One indicted, tried, and convicted, for the crime of murder, in a state court of Texas, having jurisdiction over his person and the offense charged, cannot be released by the federal courts on habeas corpus, on the ground that the indictment was drawn and the trial conducted as prescribed by the Penal Code and the Code of Criminal Procedure of Texas, and that these had not been enacted in accordance with the state constitution, as his remedy for the failure of the trial court to apply the proper law to his case is by appeal to the court of appeals of the state.—*Id.*

The federal court cannot, by a writ of habeas corpus, review the decision of a state court in a criminal case, or disturb the custody of defendant, on the ground that persons of the negro race were excluded from the grand jury which found the indictment against him, and from the trial jury. *Laws N. Y. 1882, §§ 1638-1652* (Code Civ. Proc. § 1079), providing for the selection and qualification of jurors, do not exclude negroes; and the state court may, under Code Cr. Proc. N. Y. § 312, decide whether they have in fact been excluded, which decision can be reviewed by writ of error only. Whether defendant, when tried, was ignorant of his rights is immaterial.—*Wood v. Brush*, 140 U. S. 278, 11 S. Ct. 738, 35 L. Ed. 505; *Wood v. Brush*, 140 U. S. 370, 11 S. Ct. 942, 35 L. Ed. 505.

The assignment as counsel to defend one on trial in a state court of one who has not been admitted to practice as an attorney, a variance between the indictment and the evidence, and the exclusion from the jury of all persons of the color of defendant, are all matters within the jurisdiction of the trial court, and cannot be reached by habeas corpus from a federal court; and it is immaterial whether defendant is acquainted with the laws and language of this country, or that he is the subject of a foreign government.—*Jugiro v. Brush*, 140 U. S. 291, 11 S. Ct. 770, 35 L. Ed. 510.

Where a person who had been extradited from Illinois for a violation of a Wisconsin banking law sued out a writ of habeas corpus pending trial in a court of Wisconsin, on the ground that his extradition was in violation of the constitution and laws of the United States, it was discretionary with the circuit court to refuse to discharge him, since it was not an urgent case, involving either the authority and operations of the general government, or the obligations of this country to or its relations with foreign nations, and since state courts are, equally with federal courts, charged with the duty of protecting the accused in the enjoyment of his rights under the constitution of the United States.—*Cook v. Hart*, 146 U. S. 183, 13 S. Ct. 40, 36 L. Ed. 934, affirming judgment (C. C.) *In re Cook*, 49 F. 833, following *Ex parte Royall*, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 868.

Where one imprisoned under a sentence of a state court claims that such sentence violates his rights under the constitution or laws of the United States, it is the general rule, and better practice, in the absence of special circumstances, to require him to seek a review of the judgment by writ of error, instead of resorting to a writ of habeas corpus.—*Ex parte Frederick*, 149 U. S. 70, 13 S. Ct. 793, 37 L. Ed. 853, affirming judgment (C. C.) *In re Friedrich*, 51 F. 747.

Except in cases of urgency, one in custody under process from a state court should not be released by a federal court on habeas corpus on the ground that the crime with which he is charged is within the exclusive jurisdiction of the federal courts, or that he is detained in violation of the federal constitution; but the decision of the highest court in the state should be obtained on the question, and this, if adverse, may be reviewed by the supreme court of the United States.—*People of State of New York v. Eno*, 155 U. S. 89, 15 S. Ct. 30, 39 L. Ed. 80; *Andrews v. Swartz*, 156 U. S. 272, 15 S. Ct. 389, 39 L. Ed. 422.

A person merely indicted, and not tried, in the supreme court of the District of Columbia, cannot file in the United States supreme court a petition for habeas corpus, on the ground that the statute creating the offense with which he is charged is in conflict with the United States constitution, and the supreme court of such District is without jurisdiction, though the latter court and the court of appeals of the District have both held, on demurrer to the indictment, that such statute is valid, and such supreme court has jurisdiction.—*In re Chapman*, 156 U. S. 211, 15 S. Ct. 331, 39 L. Ed. 401.

Repugnancy of a state statute to the constitution of the state does not authorize a writ of habeas corpus from a United States court, unless petitioner is in custody by virtue of the statute, and it also conflicts with the constitution of the United States.—*Andrews v. Swartz*, 156 U. S. 272, 15 S. Ct. 389, 39 L. Ed. 422.

Where a state court having jurisdiction of the offense and person enters on the trial of a criminal case under a statute not repugnant to the constitution of the United States, no mere error in the conduct of the trial will give a United States court jurisdiction to review the proceeding on habeas corpus.—*Id.*

Where a conviction in a state court can be reviewed in a higher court of the state only on allowance of a writ of error by such court, and such allowance is refused, the judgment of the court of original jurisdiction may be reviewed on writ of error from the supreme court of the United States, and will not be reviewed on habeas corpus.—*Bergemann v. Backer*, 157 U. S. 655, 15 S. Ct. 727, 39 L. Ed. 845.

Whether or not an indictment sufficiently charged the crime of murder in the first degree was for the state court to determine, and the decision will not be reviewed on habeas corpus in the federal courts.—*Id.*

Where a state court had jurisdiction of the offense and of the accused, and proceeded under a statute not repugnant to the constitution of the United States, the circuit court of the United States cannot interfere, by means of a writ of habeas corpus, with the execution of the sentence, on the ground that the indictment was defective.—*Id.*

The facts that the indictment lacked the words "A true bill," and was found by the grand jury by mistake and misconception, afford no ground for interposition by the federal courts by writ of habeas corpus.—*Whitten v. Tomlinson*, 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed. 406.

The question whether a recognizance, entered into for one's appearance in the state court upon the day appointed by law for the beginning of the court term, requires his appearance at a subsequent day of the term, is a question for the state court, rather than for the federal court, upon a petition for a writ of habeas corpus.—*Id.*

The question whether the word "resides," as used in Gen. St. Conn. § 962, authorizing the surety on a recognizance, upon making affidavit that his principal intends to abscond, "to obtain from a justice of the peace in the county in which such principal resides a mittimus to commit him to jail," implies domicile or only

presence in the county, is for the decision of the state courts.—*Id.*

Where a person is in custody under process from a state court of original jurisdiction for an alleged offense against the state laws, and it is claimed that he is restrained of his liberty in violation of the United States constitution, the circuit court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the state court.—*Id.*

A warrant of extradition of a state governor, issued upon the requisition of the governor of another state, accompanied by a copy of an indictment, is prima facie evidence that the accused had been indicted, and was a fugitive from justice, and, if the court in which the indictment was found had jurisdiction of the offense, is sufficient to make it the duty of the federal courts to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the prisoner's detention in the state in which he was indicted to be determined in the first instance by the state courts.—*Id.*

The fact that the return of the sheriff to the writ does not set forth the indictment and the warrant of extradition as ground for the detention of the prisoner does not justify the federal courts in taking the latter out of the custody of the state authorities.—*Id.*

Except in peculiar and urgent cases, the United States courts will not discharge the prisoner by habeas corpus in advance of the final determination of his case in the state courts, and, even after such determination, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from the United States supreme court.—*Id.*

The questions whether a writ of error, in criminal cases punishable with death, can be prosecuted under the New Jersey law, if not allowed by the chancellor, under Cr. Proc. Act, § 83, and, if so under what circumstances and on what conditions, are matters for the state courts to determine.—*Kohl v. Lehlback*, 160 U. S. 293, 16 S. Ct. 304, 40 L. Ed. 432.

An appeal to a higher court from a judgment of conviction may be accorded by a state on such terms as it thinks proper, and the refusal of the state courts to grant a writ of error to a person convicted of murder will not of itself warrant interference in his behalf by a federal court by writ of habeas corpus.—*Id.*

Where the prisoner is held under a state proceeding in aid of a prosecution for violation of state laws, the courts of the United States may exercise a discretion in determining the question of discharge.—*Isagi v. Van De Carr*, 17 S. Ct. 595, 166 U. S. 391, 41 L. Ed. 1045.

Habeas corpus from a federal court will not lie to review a judgment of murder in the first degree in a state court, on the ground that the evidence showed, at most, murder in the second degree, and the court only submitted to the jury the question as to murder in the first degree. This is a matter of error for review by the state supreme court.—*Crossley v. State of California*, 18 S. Ct. 242, 168 U. S. 640, 42 L. Ed. 610.

Pen. Code Cal. §§ 1227, 1243, are not in violation of the constitutional laws of the United States merely because they do not provide that an appeal from an order directing execution in a capital case shall, of itself, operate to stay the execution of such judgment. And the question whether the judgment shall be stayed or superseded pending an appeal to the state supreme court is for the determination of the trial judge, or the judges of the state supreme court; and their refusal to stay it is no ground for interference by the United States supreme court, by writ of habeas corpus, on the ground that the failure to stay will deprive the prisoner of his privilege to sue out a writ of error from the supreme court to review the

final judgment to be entered by the state supreme court.—*In re Durrant*, 18 S. Ct. 291, 169 U. S. 39, 42 L. Ed. 653.

It is not a sufficient ground for the discharge by a federal court, on habeas corpus, of one charged with conspiracy under a state statute alleged to be in contravention of the federal constitution, that on an appeal by one of his alleged co-conspirators the state appellate court refused to decide the question of the validity of the statute under the federal constitution, but reversed the judgment and remanded the case for a new trial, on another ground. Nor is it material that the prosecution has allowed two terms of the state court to elapse without calling petitioner's case for trial, when it does not appear that he himself has made any effort to procure a speedy trial, especially where his actual imprisonment is due to his voluntary act in procuring the sureties on his bail bond to surrender him. *In re Grice*, 79 F. 627 (C. C.) reversed.—*Baker v. Grice*, 18 S. Ct. 323, 169 U. S. 284, 42 L. Ed. 748.

A federal court has jurisdiction to issue a writ of habeas corpus in behalf of one held by state authorities for trial on a charge of violating a state statute alleged to be in contravention of the federal constitution, but the prisoner should not be discharged unless under exceptional circumstances; the proper course ordinarily being to leave him to his remedies by appeal, in case he should be convicted.—*Id.*

It is only in exceptional and urgent cases that the federal courts will interpose by the writ of habeas corpus to discharge prisoners held in custody under state authority.—*Tinsley v. Anderson*, 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91.

The doctrine that, where the jurisdiction of a federal court first attaches to a matter of which it has concurrent jurisdiction with the courts of a state, it will hold such matter to the exclusion of the state courts, does not give a circuit court of the United States, which has in a suit in equity taken charge of the affairs and assets of a corporation, jurisdiction, by writ of habeas corpus to discharge such indicted official from the custody of the state officers.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

Unless under extraordinary circumstances, a court of the United States should not interfere with the custody by a state of a prisoner under indictment in its courts, by discharging him on a writ of habeas corpus, though it may believe the statute on which the indictment is based to be in conflict with the constitution of the United States, as such question can properly be raised and determined in defense to the indictment, subject to review on behalf of the prisoner by the supreme court.—*Fitts v. McGhee*, 19 S. Ct. 269, 172 U. S. 516, 43 L. Ed. 535.

Where a federal officer is arrested by state authorities for the violation of a state statute while acting in pursuance of a valid federal authority in the performance of his duties, the federal courts have jurisdiction to order his release on habeas corpus. Order, *In re Thomas*, 87 F. 453, 31 C. C. A. 80, affirmed.—*State of Ohio v. Thomas*, 19 S. Ct. 453, 173 U. S. 276, 43 L. Ed. 699.

Habeas corpus to review a judgment of a state court in a criminal case, on the ground that some right under the constitution of the United States has been denied to the person convicted, will not ordinarily be granted, as the proper remedy is by writ of error.—*Markuson v. Boucher*, 20 S. Ct. 76, 175 U. S. 184, Adv. S. U. S. 76, 44 L. Ed. 124.

The detention in prison by state authorities of an officer of the revenue service of the

United States whose presence at his post of duty is important to the public interests presents such a case of urgency as will warrant the interference by writ of habeas corpus from a federal court, even before final action by the state court, to determine whether or not the imprisonment is in violation of the constitution or laws of the United States. Judgment, *In re Comingore* (D. C.) 96 F. 552, affirmed.—*Boske v. Comingore*, 20 S. Ct. 701, 177 U. S. 459, 44 L. Ed. 846.

Interference with the execution of the sentence of a state court by writ of habeas corpus from a federal court, on the ground that the state law under which the prosecution was had upon an information is invalid, is properly refused where that question has not been raised in the state court, either by way of defense to the prosecution or by application for writ of habeas corpus, especially when a decision against the validity of prosecutions by information might result in the liberation of many convicts.—*Davis v. Burke*, 21 S. Ct. 210, 179 U. S. 399, 45 L. Ed. 249.

Habeas corpus from a federal court to release a prisoner held under sentence of a state court will not ordinarily be granted on the ground of the invalidity of the state law under which the sentence was passed, where that question has not been presented to and passed upon by the state court.—*Gusman v. Marrero*, 21 S. Ct. 293, 180 U. S. 81, 45 L. Ed. 436.

An application to a federal court for a writ of habeas corpus to release a person imprisoned under a judgment of a municipal court of a state, on the ground that the statute under which he was convicted is unconstitutional, should be denied without prejudice to a subsequent renewal of it, when the accused has not availed himself of such remedies as the laws of the state afford for a review of the judgment in the state courts. Judgment, *In re Brundage* (C. C.) 96 F. 963, reversed.—*State of Minnesota v. Brundage*, 21 S. Ct. 455, 180 U. S. 499, 45 L. Ed. 639.

A writ of habeas corpus will seldom be upheld as a writ of error to review in a federal court the proceedings in a criminal case in the state court. Judgment (C. C.) *In re Storti*, 109 F. 807, affirmed.—*Storti v. Commonwealth of Massachusetts*, 22 S. Ct. 72, 183 U. S. 138, 46 L. Ed. 120.

Habeas corpus in favor of a person who has been convicted and sentenced in a state court for an alleged violation of the criminal statutes of the state will not be granted by a federal court on the ground that he is held in violation of the federal constitution, where the case presents no exceptional facts which will take it out of the rule that he must ordinarily first take his case to the highest court of the state in which the judgment can be reviewed, and, if unsuccessful therein, bring it to the supreme court of the United States by writ of error.—*Reid v. Jones*, 23 S. Ct. 89, 187 U. S. 153, 47 L. Ed. 116.

The federal courts will not interfere by habeas corpus with a state in the administration of its criminal law unless fundamental rights specially secured by the federal constitution are invaded. Order (D. C.) *Ex parte Rogers*, 138 F. 961, affirmed.—*Rogers v. Peck*, 26 S. Ct. 87, 199 U. S. 425, 50 L. Ed. 256.

Relief by habeas corpus is properly refused in a federal Circuit Court to persons in the military service of the United States, held in the custody of state authorities to answer to a charge of homicide which is asserted by them to have been committed in the discharge of their duty, under the federal Constitution and laws, to apprehend the deceased for a larceny of

property from a federal arsenal, where there is conflicting evidence on the question whether or not the deceased had surrendered before the fatal shot was fired. Order (C. C.) 129 F. 823, affirmed.—United States ex rel. Drury v. Lewis, 26 S. Ct. 229, 200 U. S. 1, 50 L. Ed. 343.

The federal courts have no jurisdiction to release, by habeas corpus, a person held in the custody of the state authorities to answer for a contempt in refusing to appear and testify before a legislative investigating committee, either because such a committee cannot sit in vacation, or because the subject for investigation is excluded from the jurisdiction of the Legislature by the provision of the state Constitution for the separation of legislative, executive, and judicial powers, since no question under the federal Constitution or laws is involved. Order (C. C.) Ex parte Caldwell, 138 F. 487, reversed.—Carfer v. Caldwell, 26 S. Ct. 264, 200 U. S. 293, 50 L. Ed. 488.

Federal courts have no power to interfere by habeas corpus with the imprisonment of a person under a judgment of conviction of a crime in a state court, if that court had jurisdiction to try the case, and jurisdiction over the person of the accused, and did not lose such jurisdiction during the trial.—Felts v. Murphy, 26 S. Ct. 366, 201 U. S. 123, 50 L. Ed. 689; Valentina v. Mercer, 26 S. Ct. 368, 201 U. S. 131, 50 L. Ed. 693.

The federal courts will not release, on habeas corpus, a person convicted of murder in the first degree in a state court, on the theory that that court lost its jurisdiction to proceed in the trial because it charged the jury, in accordance with the admission of counsel for the accused, that the only question for their consideration was the degree of murder of which the accused was guilty.—Valentina v. Mercer, 26 S. Ct. 368, 201 U. S. 131, 50 L. Ed. 693.

The silence of Circuit Court of Appeals Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 488], on the subject of habeas corpus, prevents a Circuit Court of Appeals from issuing a writ of habeas corpus as an original and independent proceeding, although, in view of section 12 of that act, giving such courts the powers specified in Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], it may issue such a writ in cases when necessary for the exercise of a jurisdiction already existing. Order, Ex parte Dick, 141 F. 5, 72 C. C. A. 667, reversed.—Whitney v. Dick, 26 S. Ct. 584, 202 U. S. 132, 50 L. Ed. 663.

A person imprisoned under a conviction in an Oklahoma court is not entitled to his release on habeas corpus, under Rev. St. U. S. § 753 [U. S. Comp. St. 1901, p. 592], because the grand jurors were summoned from the body of the county, which resulted in the selection as such jurors of persons who were not electors nor residents of the territory, since the federal Constitution does not control the method of selection, and if any laws have been violated by this method they are territorial enactments, which are not laws of the United States.—In re Moran, 27 S. Ct. 25, 203 U. S. 96, 51 L. Ed. 105.

A person held in actual custody by a state for trial in one of its courts under an indictment for a crime against its laws will not be released on habeas corpus by a federal Circuit Court because the methods by which his personal presence in the state was secured may have violated the provisions of Const. U. S. art. 4, § 2, or Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597], relating to extradition proceedings.—Pettibone v. Nichols, 27 S. Ct. 111, 203 U. S. 192, 51 L. Ed. 148, 7 Ann. Cas. 1047; Moyer v. Same, 27 S. Ct. 121, 203 U. S. 221, 51 L. Ed. 160.

Relief by habeas corpus should not be accorded by a federal court to a person held in custody by the state authorities under an or-

der of commitment entered by a state court after a jury had returned a verdict of "not guilty, by reason of insanity," although the prisoner may be so held in violation of the federal Constitution, since he should be left to his remedy by writ of error from the federal Supreme Court to review the final action of the highest court of the state. Judgment, Brown v. Urquhart (C. C. 1905) 139 F. 846, reversed.—Urquhart v. Brown, 27 S. Ct. 459, 205 U. S. 179, 51 L. Ed. 760.

A railway ticket agent, acting under and in obedience to an order of a federal circuit court, enjoining, as being repugnant to the Federal Constitution, the enforcement by the State Corporation Commission and the Attorney General of state legislation reducing rates, is entitled to his discharge on habeas corpus, under Rev. St. U. S. § 753 (U. S. Comp. St. 1901, p. 592), from imprisonment under a conviction in a state court for disobeying such legislation. Order, Ex parte Wood (C. C. 1907) 155 F. 190, affirmed.—Hunter v. Wood, 28 S. Ct. 472, 209 U. S. 205, 52 L. Ed. 747.

Federal courts will not grant relief by habeas corpus on constitutional grounds to persons imprisoned under a conviction in a state court, where they fail to raise such questions when brought up for sentence or on appeal.—Ex parte Spencer, 33 S. Ct. 709, 228 U. S. 652, 57 L. Ed. 1010.

Habeas corpus will lie in a federal court in behalf of a person convicted of crime in a state court only where the judgment is absolutely void for want of jurisdiction.—Frank v. Mangum, 35 S. Ct. 532, 237 U. S. 309, 59 L. Ed. 969.

Habeas corpus will not issue out of a federal court in behalf of one convicted of crime who asserts existence at trial of mob domination, and denial of due process of law guaranteed by Const. U. S. Amend. 14, which questions were submitted to the trial court and passed upon by the highest state court.—Id.

52. Petition.

See 25 Cent. Dig. Hab. Corp. §§ 50-54; 10 Cent. Dig. Contempt, § 213; 21 Cent. Dig. Execution, § 1262.

54. — Particular averments.

See 25 Cent. Dig. Hab. Corp. § 51; 21 Cent. Dig. Execution, § 1262.

The general averment in a petition for a writ of habeas corpus that petitioner is detained in violation of the constitution and laws of the United States, and that the district court had no jurisdiction or authority to try and sentence him, is merely an averment of a conclusion of law, and not of facts which, if proved, would rebut the presumption in support of the judgment.—Ex parte Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154.

The general allegations in the petition that petitioner is detained in violation of the constitution and laws of the United States and of the state, and is held without due process of law, are averments of mere conclusions of law.—Whitten v. Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed. 406.

55. — Copies of process or proceedings authorizing imprisonment.

See 25 Cent. Dig. Hab. Corp. § 52.

Under Rev. St. § 754, a petition in habeas corpus for the release of one convicted of crime in a state court is wholly insufficient, where copies of the information, verdict, and judgment are not attached to the petition, nor the essential parts thereof stated, nor any cause assigned for such omission.—Craemer v. State of Washington, 18 S. Ct. 1, 168 U. S. 124, 42 L. Ed. 407.

A petition for a writ of habeas corpus to release a prisoner after his conviction, on the

ground that the proceedings and trial are void because the defendant was denied his constitutional rights therein, should set forth the essential parts of such proceedings and trial.—*Andersen v. Treat*, 19 S. Ct. 67, 172 U. S. 24, 43 L. Ed. 351.

⚡66. Certiorari incident to writ.

See 25 Cent. Dig. Hab. Corp. § 60.

The refusal of a federal circuit court to grant certiorari as ancillary to a writ of habeas corpus is within its discretion, and cannot be assigned as error.—*Hyde v. Shine*, 25 S. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, affirming judgment (D. C.) *United States v. Hyde*, 132 F. 545; *Dimond v. Shine*, 25 S. Ct. 766, 199 U. S. 88, 50 L. Ed. 90.

⚡69. Operation and effect of writ.

See 25 Cent. Dig. Hab. Corp. §§ 62, 63.

⚡71. — Custody of prisoner.

See 25 Cent. Dig. Hab. Corp. § 62.

On appeal from a decision on application for habeas corpus by a person imprisoned under conviction by a state court, the suspension of proceedings in the state court, required by Rev. St. § 766, has not the effect of a judge's certificate of reasonable doubt, under Code Cr. Proc. N. Y. § 531, to compel restoration of the prisoner to his original custody.—*McKane v. Durston*, 153 U. S. 684, 14 S. Ct. 913, 38 L. Ed. 867.

⚡73. Return.

See 25 Cent. Dig. Hab. Corp. §§ 65-73.

⚡76. — Cause or authority for restraint or detention.

See 25 Cent. Dig. Hab. Corp. § 67.

In habeas corpus proceedings to obtain the discharge of one held under the Governor's warrant in extradition, it is not indispensable that the return to the writ contain affirmative allegations of all the facts on which the extradition proceedings are based, but it is sufficient if it sets forth the Governor's warrant and the recitals of the warrant, together with the allegations of the application for habeas corpus showing facts justifying the detention of the accused. Judgment, *Ex parte Dennison*, 101 N. W. 1045, 72 Neb. 703, 117 Am. St. Rep. 817, affirmed.—*Dennison v. Christian*, 25 S. Ct. 795, 196 U. S. 637, 49 L. Ed. 630.

⚡79. — Conclusiveness and effect.

See 25 Cent. Dig. Hab. Corp. § 70.

In a petition for a writ of habeas corpus, verified by petitioner's oath, as required by Rev. St. § 754, facts duly alleged may be taken to be true unless denied by the return or controlled by other evidence, but no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous.—*Whitten v. Tomlinson*, 160 U. S. 231, 16 S. Ct. 297, 40 L. Ed. 406.

On habeas corpus to review the issuance of an extradition warrant by the governor of a state, the accused is concluded by the prima facie case made out by the papers upon which the governor acted, where such accused, upon the hearing in the habeas corpus proceedings, waived the right to introduce further evidence. Judgment, *State v. Clough*, 53 A. 1086, 71 N. H. 594, affirmed.—*Munsey v. Clough*, 25 S. Ct. 282, 196 U. S. 364, 49 L. Ed. 515.

⚡85. Evidence.

See 25 Cent. Dig. Hab. Corp. §§ 77, 78.

The supreme court will not assume that one sentenced to death, after the passage of Gen. Laws Minn. 1889, c. 20, providing for the solitary confinement of one convicted of a capital offense, for a murder committed before that time, is being kept in solitary confinement, con-

trary to the provisions of Gen. St. Minn. 1878, c. 118, which alone is applicable to the case, where there is nothing in the governor's warrant requiring such solitary confinement.—*Holden v. State of Minnesota*, 137 U. S. 483, 11 S. Ct. 143, 34 L. Ed. 734.

In habeas corpus to release one convicted of crime in a state court, where the judgment has been affirmed by the state supreme court, and a writ of error to the supreme court of the United States has been dismissed for want of jurisdiction, it cannot be assumed that any point on which jurisdiction by the latter court might have been sustained was overlooked, merely because that point was not specifically raised therein or in the state supreme court.—*Craemer v. State of Washington*, 18 S. Ct. 1, 168 U. S. 124, 42 L. Ed. 407.

Evidence to show that no extraditable offense has been committed is not admissible on an application for a writ of habeas corpus in behalf of a person arrested under extradition proceedings, since that is a matter to be determined by the commissioner, if competent legal evidence of the commission of such crime shall be presented to him.—*Terlinden v. Ames*, 22 S. Ct. 484, 184 U. S. 270, 46 L. Ed. 534.

A stipulation that a person sought to be extradited was not within the demanding state on the date specified in the indictment as the time of the commission of the crime charged is an admission that he was not within the state when the crime was, if ever, committed, where there is no claim of any error in the date named in the indictment.—Judgment, *People v. Hyatt*, 64 N. E. 825, 172 N. Y. 176, 60 L. R. A. 774, 92 Am. St. Rep. 706, affirmed.—*Hyatt v. People of State of New York*, 23 S. Ct. 456, 188 U. S. 691, 47 L. Ed. 657.

Contradictory evidence on the question of the presence or absence of the accused in the state at the time of the commission of the offense will not require his discharge on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings. Judgment, *State v. Clough*, 53 A. 1086, 71 N. H. 594, 67 L. R. A. 946, affirmed.—*Munsey v. Clough*, 25 S. Ct. 282, 196 U. S. 364, 49 L. Ed. 515.

The prima facie case arising on habeas corpus from an extradition warrant, regular on its face, and the requisition papers on which it was issued, charging a larceny from the person, committed at Kenosha, Wisconsin, on a specified day, is not rebutted by affidavits which import nothing more than that the accused was in Chicago, Illinois, at 1 o'clock and during the whole of the afternoon of that day, although the petition for habeas corpus contains an allegation that the accused had heard the person against whom the crime is alleged to have been committed testify in another habeas corpus proceeding that such crime was committed at 2 o'clock in the afternoon of the day named.—*People of the State of Illinois ex rel. McNichols v. Pease*, 28 S. Ct. 58, 207 U. S. 100, 52 L. Ed. 121.

Evidence held sufficient to establish crime of burglary, as defined by the law of New York on habeas corpus, so as to sustain the action of the United States commissioner in issuing an order of commitment for extradition.—*McNamara v. Henkel*, 33 S. Ct. 146, 226 U. S. 520, 57 L. Ed. 330.

The regularity of proceedings of a foreign legislative committee investigating frauds will be presumed on habeas corpus to discharge from detention in extradition proceedings, accused having appeared before such committee without objection.—*Kelly v. Griffin*, 36 S. Ct. 487, 241 U. S. 6, 60 L. Ed. 861.

The federal courts on habeas corpus to secure discharge in proceedings for extradition to

Canada will presume that the Canadian government will respect the convention between the United States and Great Britain, precluding trial on collateral charges.—*Id.*

—91. Scope of inquiry and powers of court.

See 25 Cent. Dig. Hab. Corp. §§ 81-96; 21 Cent. Dig. Execution, § 1262.

—92. — In general.

See 25 Cent. Dig. Hab. Corp. §§ 81, 83, 87-96; 10 Cent. Dig. Contempt, § 219; 21 Cent. Dig. Execution, § 1262; 23 Cent. Dig. Extrad. § 45.

Where a person is in custody under an order of the circuit court for contempt in refusing to answer under an order requiring him to submit to examination, the supreme court will release him by a writ of habeas corpus, on the ground that the order of imprisonment was without jurisdiction of the court.—*Ex parte Fisk*, 113 U. S. 713, 5 S. Ct. 724, 28 L. Ed. 1117.

Rev. St. § 5278, requiring the surrender of "a fugitive from justice" from one state or territory to another, does not direct or authorize such surrender unless it is made to appear that the person is in fact a fugitive from justice. If the determination of that fact, upon proof before the executive of the state or territory where the alleged fugitive is found, is subject to judicial review upon habeas corpus, the accused, being in custody under his warrant,—which recites the requisition of the demanding state, accompanied by an authentic indictment, charging him, substantially as required by her laws, with a specific crime committed within her jurisdiction,—should not be discharged, because, in the judgment of the court, the proof showing that he was a fugitive from justice may not be as full as might properly have been required.—*Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148, 29 L. Ed. 250.

Certain prisoners were charged specifically with an offense against the election laws of Indiana and of the United States. *Held*, that the district court of the United States for Indiana had jurisdiction to try and punish them for that offense, and in proceedings for habeas corpus, for a person held under sentence, the inquiry is not whether the indictment under which he was convicted was good on demurrer, but whether it describes a class of offenses of which the trial court had jurisdiction.—*Ex parte Coy*, 127 U. S. 731, 8 S. Ct. 1263, 32 L. Ed. 274.

Upon an original application to the supreme court of the United States for a writ of habeas corpus in favor of one committed for contempt by a circuit court, the facts as set forth in the order of commitment must be regarded as true and cannot be reviewed.—*In re Terry*, 128 U. S. 289, 9 S. Ct. 77, 52 L. Ed. 405.

Where the indictment of a postal employé for larceny from the mails is good, and he is convicted, the supreme court, on habeas corpus proceedings, will not inquire into the motives with which the letter was put into the mail, even though the object was to detect defendant in his criminal practices.—*Wight v. Nicholson*, 134 U. S. 136, 10 S. Ct. 487, 33 L. Ed. 865.

On a habeas corpus granted to a person committed after examination to await a warrant for his surrender in extradition proceedings, the only questions that can be considered by the court are whether the commissioner had jurisdiction, and whether there was legal evidence to warrant the commitment, and it has no power to review the evidence as to guilt or innocence.—*Oteiza v. Jacobus*, 136 U. S. 330, 10 S. Ct. 1031, 34 L. Ed. 464, affirming (C. C.) *In re Cortes*, 42 F. 47.

When a person is arrested in one district under a warrant based upon an indictment found in another district, to which he is to be removed for trial, the question of his identity is one of fact, to be determined by the United

States commissioner before whom his examination is had, and such determination is not reviewable on a writ of habeas corpus.—*Horner v. United States*, 143 U. S. 207, 12 S. Ct. 407, 36 L. Ed. 126, affirming order (D. C.) *United States v. Horner*, 44 F. 877.

A district judge, before issuing a warrant, under Rev. St. § 1014, for the removal of a person arrested in his district to another district for trial, is entitled to determine whether the district court of such other district has jurisdiction of the offense with which the prisoner is charged, and his determination is reviewable in the circuit court by writ of habeas corpus.—*Id.*

On habeas corpus sued out by a person arrested on complaint made of a violation of the lottery law (Rev. St. § 3894, Amend. Act Sept. 19, 1890, c. 903, 26 Stat. 465) in mailing a circular concerning an alleged lottery, and held to await the action of the grand jury, the court cannot determine whether the scheme to which the circular related was in fact a lottery, nor can such question be determined upon appeal to the supreme court from the order dismissing the writ.—*Horner v. United States*, 143 U. S. 570, 12 S. Ct. 522, 36 L. Ed. 266.

Where a state officer, who has seized under tax warrants property in the hands of a receiver of the United States circuit court, and who has disobeyed the order of the court that he release it forthwith, is committed for contempt, upon his application to the supreme court for the writ of habeas corpus the only question to be considered is whether the order of commitment was void for want of power to make it.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689; *Ex parte Riser*, 149 U. S. 191, 13 S. Ct. 793, 37 L. Ed. 693.

An indictment is not open to collateral attack on habeas corpus, after trial and conviction, on the ground that it does not allege with sufficient certainty the place of the offense unless it shows affirmatively that the offense was committed without the jurisdiction of the court.—*United States v. Pidgeon*, 153 U. S. 48, 14 S. Ct. 746, 38 L. Ed. 631.

It was within the jurisdiction of the trial court to determine whether or not the record of a prior conviction before a judge without a jury was legitimate proof of a first offense, where the prisoner had waived a trial by jury in accordance with a statute claimed to be unconstitutional, and its decision will not be reviewed on habeas corpus.—*Ex parte Belt*, 159 U. S. 95, 15 S. Ct. 987, 40 L. Ed. 88.

Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact; and the judgment of a magistrate, rendered in good faith, that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.—*Ornelas v. Ruiz*, 161 U. S. 502, 16 S. Ct. 689, 40 L. Ed. 787.

On habeas corpus to release one held under commitment for extradition by a commissioner the only matter of evidence to be considered is whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify commitment.—*Ex parte Bryant*, 17 S. Ct. 744, 167 U. S. 104, 42 L. Ed. 94.

The existence of the treaty of June 16, 1852, between the United States and Prussia, which has been repeatedly recognized by both governments as still in force, notwithstanding the incorporation of Prussia into the German Empire, cannot be questioned by the judicial department in proceedings for a writ of habeas corpus to prevent the extradition of a fugitive from Prussia who is held under extradition proceedings under that treaty, as the question is

a political one, and the courts must accept the determination thereof by the political department of the government.—*Terlinden v. Ames*, 22 S. Ct. 484, 184 U. S. 270, 46 L. Ed. 534.

Whether the depositions and other documents offered under Act Aug. 3, 1882, § 5, 22 Stat. 216, c. 378 [U. S. Comp. St. 1901, p. 3595], governing evidence in extradition cases, sufficiently establish the criminality of the accused for the purposes of extradition, cannot be reviewed upon habeas corpus. Judgment (C. C.) *In re Grin*, 112 F. 790, affirmed.—*Grin v. Shine*, 23 S. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

A federal court is not required to weigh the evidence of probable cause on habeas corpus to inquire into a detention to await the removal of the accused to another federal district for trial, although a prisoner may have the right, on habeas corpus, under the state practice, to have the state court consider that question, since the provision of Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], that the usual mode of process adopted in the state shall be pursued, refers to the proceedings in arrest and examination of the accused before the commissioner, and has no bearing upon a subsequent independent proceeding on habeas corpus.—*Hyde v. Shine*, 25 S. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, affirming judgment (D. C.) *United States v. Hyde*, 132 F. 545; *Dimond v. Shine*, 25 S. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

Where the Governor of another state makes an application on the Governor for an extradition warrant, the Governor must determine whether the person is substantially charged with the crime in such other state and whether he is a fugitive from justice; and when it appears in habeas corpus proceedings on what showing the Governor acted, it is a question of law for the court whether the accused has been substantially charged with the crime against the demanding state. Judgment, *Ex parte Dennison*, 101 N. W. 1045, 72 Neb. 703, 117 Am. St. Rep. 817, affirmed.—*Dennison v. Christian*, 25 S. Ct. 795, 196 U. S. 637, 49 L. Ed. 630.

The objection that an extradition requisition contains a clause that the demanding state will not be responsible for any expense attending the arrest and delivery of the alleged fugitive is not available to the accused on habeas corpus to inquire into the legality of the extradition proceedings, but is a matter for the consideration of the executive of the surrendering state when he receives the official demand for the surrender of the alleged fugitive criminal.—*Marbles v. Creecy*, 30 S. Ct. 32, 215 U. S. 63, 54 L. Ed. 92.

Matters in abatement and substantive defenses are not open on habeas corpus to test the validity of proceedings, under Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), to remove to another federal district for trial a person there charged with an offense against the United States. Order (C. C. 1909) 166 F. 621, affirmed.—*Haas v. Henkel*, 30 S. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The error, if any, in prosecuting proceedings for the removal to another federal district for trial of a person there charged with an offense against the United States, while similar proceedings in a federal Circuit Court for another district are pending, cannot be corrected on a writ of habeas corpus. Order (C. C. 1909) 166 F. 627, affirmed.—*Peckham v. Henkel*, 30 S. Ct. 255, 216 U. S. 483, 54 L. Ed. 579.

A finding of probable cause for the removal to the District of Columbia of a person there charged with an offense against the United States will not be disturbed on habeas corpus as being wholly without any evidence to support it, where certified copies of indictments for conspiring against the United States, found in the District of Columbia, were produced before the

commissioner, although copies of indictments found by a federal court of the district where the accused resides, laying the locus of the conspiracy in that district, were also offered in evidence, together with testimony tending to show that the accused had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed.—*Price v. Henkel*, 30 S. Ct. 257, 216 U. S. 488, 54 L. Ed. 581.

One good count in an indictment under which a trial might be had in the federal district to which a removal under Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), is sought, is enough to support an order for such removal in a habeas corpus proceeding.—*Id.*

Upon habeas corpus to inquire into a detention under a conviction in a federal Circuit Court, affirmed by the proper Circuit Court of Appeals, the bill of exceptions cannot be examined with a view to determining whether there was any testimony to support the accusation.—(1910) *Harlan v. McGourin*, 31 S. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849, affirming decree *Ex parte Harlan* (C. C. 1909) 180 F. 119.

A federal court will not consider on habeas corpus questions of the sufficiency of the information on which the conviction of the accused was had, or whether the acts set out in the agreed statement of facts, which it is stipulated should be considered as a part of the information, constituted a crime.—*In re Gregory*, 31 S. Ct. 143, 219 U. S. 210, 55 L. Ed. 184.

Decision of a committing magistrate in foreign extradition proceedings cannot be reviewed on habeas corpus if he had jurisdiction of the subject-matter and of the accused, and the offense charged was within the treaty, and the evidence was sufficient to establish the criminality of accused for extradition purposes, in view of Rev. St. § 5270 (U. S. Comp. St. 1901, p. 3591).—*McNamara v. Henkel*, 33 S. Ct. 146, 226 U. S. 520, 57 L. Ed. 330.

Inquiry on application in a federal court for writ of habeas corpus by one convicted of crime in a state court is not confined to proceedings in the trial court, but extends to appeals which the prisoner has had the benefit of.—*Frank v. Mangum*, 35 S. Ct. 582, 237 U. S. 309, 59 L. Ed. 869.

Courts of the United States on an application for writ of habeas corpus under Rev. Stat. §§ 754-761 (Comp. St. 1913, §§ 1282-1289), by a person confined under final judgment of a state court, may inquire into the truth of the causes of his detention.—*Id.*

Federal courts, on application for habeas corpus by person held under final judgment, of a state court, are confined to examination of such jurisdictional question.—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

Finding of United States Commissioner in foreign extradition proceedings that the evidence sustained the charge cannot be reversed on habeas corpus if he acted on adequate evidence and had jurisdiction and the offense was extraditable.—*Bingham v. Bradley*, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1136.

—94. — Jurisdictional questions.

See 25 Cent. Dig. Hab. Corp. §§ 82, 92.

A citizen of the Cherokee Nation having been convicted of a crime punishable with death in a court of the United States, he may, on application to the supreme court for writ of habeas corpus, allege and prove facts, not contradictory to the record, showing that the trial court was without jurisdiction.—*Ex parte Mayfield*, 141 U. S. 107, 11 S. Ct. 939, 35 L. Ed. 635.

Where the requisite citizenship appears upon the face of a bill in a federal court, the jurisdiction of the court cannot, in a collateral proceeding by habeas corpus by one who was not a party to the bill, be attacked by evidence dehors the record.—*Ex parte Lennon*, 17 S. Ct. 658, 166 U. S. 548, 41 L. Ed. 1110, affirming judgment 64 F. 320, 12 C. C. A. 134.

⚡95. — **Validity of proceedings.**

See 25 Cent. Dig. Hab. Corp. § 82.

The invalidity of a court-martial constituted entirely of officers in the regular army of the United States in direct violation of the seventy-seventh article of war, declaring that such officers "shall not be competent to sit on courts-martial to try the officers or soldiers of other forces," can be raised on habeas corpus. *Order, Deming v. McClaughry*, 113 F. 639, 51 C. C. A. 349, affirmed.—*McClaughry v. Deming*, 22 S. Ct. 786, 186 U. S. 49, 46 L. Ed. 1049.

⚡96. — **Errors and irregularities.**

See 25 Cent. Dig. Hab. Corp. § 81.

Questions depending upon state law—such as the lawfulness of a respite granted by the governor to a person under sentence of death, or the validity of a sentence before the expiration of a year during which the right to file a motion for a new trial is claimed to continue—will not be reviewed by a federal court on writ of habeas corpus. Judgment (C. C.) *In re Storti*, 109 F. 807, affirmed.—*Storti v. Commonwealth of Massachusetts*, 22 S. Ct. 72, 183 U. S. 138, 46 L. Ed. 120.

Whether an indictment in a state court sufficiently charged an offense is not open to inquiry on habeas corpus to inquire into a detention under a conviction in the state court. Writ of error, *State v. Howard* (1901) 40 S. E. 71, 129 N. C. 584, dismissed.—*Howard v. Fleming*, 24 S. Ct. 49, 191 U. S. 126, 48 L. Ed. 121.

Errors of a trial court in sustaining an indictment which fails to charge with sufficient certainty and fullness some particular fact cannot be reviewed on habeas corpus to inquire into the legality of an imprisonment under the sentence imposed after a conviction on such indictment.—*Dimmick v. Tompkins*, 24 S. Ct. 780, 194 U. S. 540, 48 L. Ed. 1110.

The technical sufficiency of the indictment and the question of the procedure under it are not open to inquiry on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings. Judgment, *State v. Clough*, 53 A. 1086, 71 N. H. 594, 67 L. R. A. 946, affirmed.—*Munsey v. Clough*, 25 S. Ct. 282, 196 U. S. 364, 49 L. Ed. 515.

The sufficiency of an indictment charging a conspiracy under Rev. St. U. S. § 5440 [U. S. Comp. St. 1901, p. 3676], "to defraud the United States out of the possession and use of, and the title to, divers large tracts of public lands of the United States," as against objections based on the lack of description of the lands, the uncertainty of the allegations as to the means to be used to carry out the alleged conspiracy, the failure to give the names of the fictitious or disqualified persons through whom the fraud was effected, the indefiniteness and inconsistency of the allegations, and the improper conclusion, will not be determined on habeas corpus to inquire into a detention to await a warrant for the removal of the accused, under section 1014 [U. S. Comp. St. 1901, p. 716], to the federal district where the trial is to be had, but such objections are for the trial court to determine.—*Hyde v. Shine*, 25 S. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, affirming judgment (D. C.) *United States v. Hyde*, 132 F. 545; *Dimond v. Shine*, 25 S. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

Error by United States commissioner in receiving in evidence in foreign extradition pro-

ceedings depositions taken in a foreign country, certified by the Consul General of the United States, cannot be reviewed on habeas corpus.—*McNamara v. Henkel*, 33 S. Ct. 146, 226 U. S. 520, 57 L. Ed. 330.

Errors in rejection of evidence in extradition proceedings are not reviewable by habeas corpus.—*Charlton v. Kelly*, 33 S. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, affirming judgment (C. C.) *Ex parte Charlton*, 185 F. 880.

Refusal by state court to consider, on trial for perjury, defense of immateriality of alleged false testimony, even if erroneous, could not be reviewed by federal court on habeas corpus.—*Collins v. Johnston*, 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

⚡97. — **Cause of detention existing at time of hearing.**

An order dismissing the writ, and remanding the petitioner to custody, is proper where the petitioner, though holding a consular office under a foreign government when the writ issued, has been removed from office, as a prisoner is not to be discharged for defects in the original arrest, where sufficient ground for his detention is shown at the time of the hearing.—*Iasigi v. Van De Carr*, 17 S. Ct. 595, 166 U. S. 391, 41 L. Ed. 1045.

⚡98. **Determination of particular issues or questions.**

See 25 Cent. Dig. Hab. Corp. §§ 84-96.

⚡103. — **Extradition.**

See 25 Cent. Dig. Hab. Corp. §§ 90, 91.

An unauthorized arrest by a state official on a requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to article 8 of the treaty with France of August 12, 1853, 10 Stat. 992, 996, does not entitle the seaman to his discharge on habeas corpus when brought before a federal district court, since the objection to the irregularity of the arrest is obviated by the action of that court in examining into the case under the authority conferred upon it by Act June 11, 1864, c. 116, 13 Stat. 121, carried forward in substance as Rev. St. U. S. §§ 4079-4081 [U. S. Comp. St. 1901, p. 2766], enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States.—*Dallemagne v. Moisan*, 25 S. Ct. 422, 197 U. S. 169, 49 L. Ed. 709.

The truth of an allegation in an indictment which may present a mixed question of law or fact cannot be inquired into on habeas corpus sued out by the accused, whose interstate extradition is sought. Judgment, *Ex parte Pierce* (C. C. 1907) 155 F. 663, affirmed.—*Pierce v. Creecy*, 28 S. Ct. 714, 210 U. S. 387, 52 L. Ed. 1113.

A showing that the accused was in the state in the neighborhood of the time alleged in the indictment as the date of the crime is enough to preclude a discharge upon habeas corpus in extradition proceedings on the ground that he was not a fugitive from justice.—*Strassheim v. Daily*, 31 S. Ct. 558, 221 U. S. 280, 55 L. Ed. 735.

⚡105. — **Final judgment, sentence and commitment.**

See 25 Cent. Dig. Hab. Corp. §§ 93, 94.

A sentence of a federal Circuit Court of two years' imprisonment in a state prison will not be held void on habeas corpus, on the theory that, as the convict was found guilty on two counts of the indictment, the imprisonment was directed for a period not exceeding one year on each count, where there is nothing in

the record to show that there was a separate sentence of one year's imprisonment upon each count.—*Dimmick v. Tompkins*, 24 S. Ct. 780, 194 U. S. 540, 48 L. Ed. 1110.

106. — Commitment for contempt.

See 25 Cent. Dig. Hab. Corp. § 95; 10 Cent. Dig. Contempt, § 220.

Where a person is in custody under an order of the circuit court for contempt in refusing to answer under an order requiring him to submit to examination, the supreme court will release him by a writ of habeas corpus, on the ground that the order of imprisonment was without jurisdiction of the court.—*Ex parte Fisk*, 113 U. S. 713, 5 S. Ct. 724, 28 L. Ed. 1117.

108. Disposition of person.

See 25 Cent. Dig. Hab. Corp. §§ 97-100; 21 Cent. Dig. Execution, § 1262.

109. — Remand or recommitment.

See 25 Cent. Dig. Hab. Corp. §§ 97, 98.

Where a prisoner, after conviction, is committed to the custody of the warden of the penitentiary for punishment, under a statute which is invalid as to the prisoner because *ex post facto*, he is entitled, on application for habeas corpus, to his discharge; but it appearing that he is nevertheless guilty, the supreme court, not being able to remand him to the custody of the sheriff to be proceeded against again, because the *ex post facto* law under which he is held has repealed the former law, under which he might otherwise have been punished, will, under Rev. St. § 753, authorizing the court to dispose of the party as law and justice require, order the warden of the penitentiary to notify the attorney general of the state in which he is held before discharging him.—*In re Medley*, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835; *In re Savage*, 134 U. S. 176, 10 S. Ct. 389, 33 L. Ed. 842.

112. Judgment or order.

See 25 Cent. Dig. Hab. Corp. § 101.

When a prisoner is entitled to be discharged on habeas corpus merely because the court exceeded its jurisdiction in passing the particular sentence, and not because of any matter affecting the verdict, the order of discharge should be made without prejudice to the right of the government to take any lawful measures to have a new and valid sentence imposed by the trial court.—*In re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149.

113. Appeal and error.

See 25 Cent. Dig. Hab. Corp. §§ 102-115; 2 Cent. Dig. App. & E. §§ 73, 150, 364, 461, 572; 3 Cent. Dig. App. & E. § 3400.

The supreme court of the United States has no jurisdiction under the form of an appeal or writ of error to review a decision of a circuit court upon a writ of habeas corpus, in the case of a person alleged to be "restrained of his liberty in violation of the constitution or any law or treaty of the United States." Such an appeal was given by Act Feb. 5, 1867, c. 28 (14 Stat. 385), but it was taken away again by Act March 27, 1868, c. 34 (15 Stat. 44), and has never been restored.—*Ex parte Royall*, 112 U. S. 181, 5 S. Ct. 98, 28 L. Ed. 690.

In habeas corpus proceedings, on appeal from the United States district court, where a party is present and participates without objection in a hearing in chambers of the circuit court, it is too late to object, on appeal to the supreme court, that the hearing was not in open court.—*Roberts v. Reilly*, 116 U. S. 80,

6 S. Ct. 291, 29 L. Ed. 544, affirming judgment (D. C.) *In re Roberts*, 24 F. 132.

Under Rev. St. §§ 763, 765, appeals from the United States district court in habeas corpus proceedings need not be taken to the next term of the circuit court, and, in view of the summary nature of the proceeding, may be heard at the current term.—*Id.*

An order of a district court of the United States refusing to issue a writ of habeas corpus is, so far as an appeal is concerned, equivalent to a refusal to discharge the petitioner on a hearing on the return to the writ; and under section 1909 of the Revised Statutes an appeal to the supreme court lies from such order.—*Ex parte Snow*, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658.

Act Cong. March 3, 1885, c. 353, gives an appeal to the United States supreme court in habeas corpus cases only from the final decision of the circuit court, and, where a prisoner was discharged from custody by an order of the circuit judge, an appeal by his jailer to the United States supreme court was dismissed.—*Carper v. Fitzgerald*, 121 U. S. 87, 7 S. Ct. 825, 30 L. Ed. 882.

Nor does rule 34 of the United States supreme court, relating to the custody of prisoner on habeas corpus, have that effect. The purpose of that rule is to regulate proceedings on appeals, under Rev. St. § 763, from a decision of a judge to the circuit court of the district, as well as under section 764, as amended by the act of March 3, 1885, from a circuit court to the supreme court.—*Id.*

Act Cong. March 3, 1885, amending Rev. St. U. S. § 764, and giving the right of appeal to the supreme court of the United States from the final decision of a circuit court in cases described in Rev. St. U. S. § 763, among which are cases of habeas corpus, on petition of persons alleged to be restrained of their liberty in violation of the constitution or laws of the United States, requires the supreme court, on such appeal, to examine into the evidence on which the circuit court has based its decision.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) *In re Neagle*, 39 F. 833, 5 L. R. A. 78.

Where a person imprisoned by the circuit court for violating an injunction seeks his discharge on habeas corpus in that court, on the ground that the court had no jurisdiction to commit him, the determination against him of the questions thus raised does not involve any question as to the jurisdiction of the court in the habeas corpus proceeding, and hence no appeal therein can be taken direct to the supreme court under the first subdivision of section 5 of the judiciary act of 1891.—*Ex parte Lennon*, 150 U. S. 393, 14 S. Ct. 123, 37 L. Ed. 1120, following *Carey v. Houston & T. C. Ry. Co.* (1893) 150 U. S. 170, 14 S. Ct. 63, 37 L. Ed. 1041.

The provisions of Rev. St. §§ 764-766, allowing appeals from the circuit courts directly to the supreme court in all cases of habeas corpus, were repealed by the judiciary act of March 3, 1891, but the right of direct appeal in habeas corpus proceedings still exists in the cases designated in section 5 of that act; and upon such appeals the act of March 3, 1893 (27 Stat. 751), amending Rev. St. § 766, so as to require appeals thereunder to be taken within six months, may operate.—*Id.*

Where one imprisoned by the circuit court for violating its injunction petitions for habeas corpus because of the circuit court's want of jurisdiction to make the commitment, the decision of the circuit court refusing to issue

the writ does not, on the theory that, if the court making the commitment was without jurisdiction, petitioner was deprived of his liberty without due process of law, involve the construction or application of the United States constitution so as to authorize an appeal to the supreme court of the United States, under the judiciary act of 1891 (26 Stat. 828), providing for appeals to that court in such cases.—*Id.*

On appeal from the circuit court in a case of habeas corpus, the supreme court has power to review both the law and the facts.—*Johnson v. Sayre*, 158 U. S. 109, 15 S. Ct. 773, 39 L. Ed. 914.

When an appeal to the United States supreme court by one under sentence of death of a state court from a refusal of an application for habeas corpus is dismissed, and final judgment is entered, and the mandate is issued, the state authorities may proceed with the execution of the sentence, though the mandate is delivered to them instead of the circuit court from which the appeal was taken.—*Lambert v. Barrett*, 159 U. S. 660, 16 S. Ct. 135, 40 L. Ed. 296.

Where persons, arrested on an application for their extradition, made under oath by the consul of a foreign state, are discharged on habeas corpus, an appeal is properly prosecuted by the consul on behalf of his government.—*Ornelas v. Ruiz*, 161 U. S. 502, 16 S. Ct. 689, 40 L. Ed. 787.

Act Cong. March 3, 1885 (23 Stat. c. 355), limiting appeals from the supreme court of the District of Columbia and the territorial supreme courts to cases in which the matter in dispute was money or some right ascertainable in money, did not, by implication, repeal Rev. St. § 1909, and section 10 of the organic law of New Mexico, authorizing appeals from the judgments of the territorial supreme court in habeas corpus proceedings. In *re Borrego*, 46 P. 211, 8 N. M. 655, reversed.—*Borrego v. Cunningham*, 17 S. Ct. 182, 164 U. S. 612, 41 L. Ed. 572.

An order made in habeas corpus proceedings discharging a prisoner from custody is a final judgment, from which an appeal lies.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

Although a writ of habeas corpus is granted by a circuit judge at chambers, an appeal lies where the final order, overruling the return and discharging the prisoner, was made by the court at a stated term.—*Id.*

The power of the supreme court on an appeal from a dismissal of a petition for habeas corpus by a circuit court of the United States for want of jurisdiction, a certificate thereof being given, is not limited to the question of jurisdiction by Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], but extends, under Rev. St. U. S. § 761 [U. S. Comp. St. 1901, p. 594], to such disposal of the party as law and justice require. Judgment (C. C.) In *re Storti*, 109 F. 807, affirmed.—*Storti v. Commonwealth of Massachusetts*, 22 S. Ct. 72, 183 U. S. 138, 46 L. Ed. 120.

A final order of a circuit court dismissing a writ of habeas corpus must be affirmed on appeal, if the return shows sufficient cause for detention, where the record of that court shows that the matter came on to be heard on petitioner's oral motion for discharge based upon the averments of the return; no evidence having been offered or considered by the court. Order (C. C.) 105 F. 614, affirmed.—*Carter v. McClaughry*, 22 S. Ct. 181, 183 U. S. 365, 46 L. Ed. 236.

The dismissal of an appeal from an order of a United States Circuit Court dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings is not required because of the

pendency, as appears on the argument of such appeal, of proceedings on a second complaint by the demanding government, which reiterates the original charge with some amplification, and charges an additional offense.—*Wright v. Henkel*, 23 S. Ct. 781, 190 U. S. 40, 47 L. Ed. 948, affirming order (C. C.) In *re Wright*, 123 F. 463.

A decision of a federal Circuit Court denying a writ of habeas corpus may be reviewed by direct appeal to the federal Supreme Court, where the petition averred that the imprisonment of the appellant was in violation of the federal Constitution.—*Dimmick v. Tompkins*, 24 S. Ct. 780, 194 U. S. 540, 48 L. Ed. 1110.

In determining whether the evidence below in a habeas corpus proceeding was sufficient to support the judgment, the Supreme Court will not regard errors in admitting incompetent evidence, if it appears from the whole record that no other conclusion could be reached on the competent evidence than the one reached. Judgment, *Ex parte Dennison*, 101 N. W. 1045, 72 Neb. 703, 117 Am. St. Rep. 817, affirmed.—*Dennison v. Christian*, 25 S. Ct. 795, 196 U. S. 637, 49 L. Ed. 630.

A federal court will not allow an appeal from its decision refusing a writ of habeas corpus to release one convicted of murder by a state court, when on a previous writ of error the United States Supreme Court had decided that no rights secured to the accused by the federal Constitution and laws had been violated, and the only ground for the application was that defendant was never properly charged before a committing magistrate. Order (D. C.) *Ex parte Look*, 134 F. 308, affirmed.—*Lee Look v. Ross*, 25 S. Ct. 801, 198 U. S. 579, 49 L. Ed. 1171.

A reprieve by the Governor of a state, postponing, until a fixed date, the execution of a death sentence, evidently granted to permit the prisoner to appeal to the Supreme Court of the United States from the order of a district court denying habeas corpus, is not a proceeding against the prisoner within the meaning of Rev. St. U. S. § 766, 27 Stat. 751, c. 226 [U. S. Comp. St. 1901, p. 597], nullifying any proceeding against a person in prison or confined or restrained of his liberty, in any state court, or by authority of any state, pending the proceedings or appeal in habeas corpus cases in the federal courts. Order (D. C.) *Ex parte Rogers*, 138 F. 961, affirmed.—*Rogers v. Peck*, 26 S. Ct. 87, 199 U. S. 425, 50 L. Ed. 256.

The death of the appellant abates an appeal to the federal Supreme Court from an order of a federal Circuit Court denying relief by habeas corpus.—*Johnson v. State of Tennessee*, 29 S. Ct. 651, 214 U. S. 485, 53 L. Ed. 1056.

Federal Supreme Court has jurisdiction, under Act July 1, 1902, § 10, of appeal from Supreme Court of Philippine Islands in habeas corpus proceeding involving section 5 of that statute.—*McMicking v. Schields*, 35 S. Ct. 665, 238 U. S. 99, 59 L. Ed. 1220.

118. Operation and effect of refusal to discharge.

See 25 Cent. Dig. Hab. Corp. § 121.

120. — Subsequent applications.

See 25 Cent. Dig. Hab. Corp. § 121.

Where a United States marshal, in custody for an act done in pursuance of a law of the United States, is brought before a federal court by habeas corpus and discharged, he cannot be afterwards tried in the state courts.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) In *re Neagle*, 39 F. 833, 5 L. R. A. 78.

III. SUSPENSION OF REMEDY.

See 25 Cent. Dig. Hab. Corp. §§ 122-124.

Review of moot questions, relating to suspension, see Appeal and Error, ¶19.

HABITATION.

See Domicile.

HABITUAL CRIMINALS.

See Criminal Law, ¶162, 1201, 1213.

Due process of law, see Constitutional Law, ¶270.

Equal protection of laws, see Constitutional Law, ¶250.

Imposition of heavier penalty as former jeopardy, see Criminal Law, ¶204.

HALF FARE TICKETS.

Impairing obligation of contract, see Constitutional Law, ¶126.

HANDWRITING.

Comparison by witnesses, see Evidence, ¶563-566.

Laws relating to comparison, as ex post facto laws, see Constitutional Law, ¶202.

HARBORS.

See—
Navigable Waters, ¶39.
Wharves.

Collisions between vessels, see Collision, ¶86-105.

Jurisdiction of offenses on vessels, see Criminal Law, ¶97.

Territorial powers as to taxation in harbor areas, see Taxation, ¶19.

HARD LABOR.

See Criminal Law, ¶1208.

HARMLESS ERROR.

In civil actions, see Appeal and Error, ¶1025-1074.

In criminal prosecutions, see—
Criminal Law, ¶1161-1177.
Homicide, ¶333-340.

HARTER ACT.

See—
Collision, ¶26.
Shipping, ¶135-138.

HAWAII.

Courts, decisions as precedents in federal courts, see Courts, ¶98.

Jurisdiction of Supreme Court on appeal from Supreme Court of Hawaii, see Courts, ¶387(4).

Taxation of franchises granted by the Hawaiian government, see Taxation, ¶19.

HAWKERS AND PEDDLERS.

See 25 Cent. Dig. Hawk. & P.

Due process of law, see Constitutional Law, ¶295.

Equal protection of law, see Constitutional Law, ¶239.

Itinerant vendors of drugs, see Druggists, ¶2.

License tax as interfering with commerce, see Commerce, ¶40, 67.

HAZARD.

See—
Gaming.
Lotteries.

HEADLIGHTS.

Due process of law, see Constitutional Law, ¶297.

Equal protection of law, see Constitutional Law, ¶241.

Locomotives, statutory requirements, see Railroads, ¶233.

Powers of states to regulate headlights on engines used in interstate commerce, see Commerce, ¶10.

HEADNOTES.

Court opinions, see Courts, ¶109.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

HEALTH.

Scope-Note.

[INCLUDES protection of public from disease or danger to life in general; and violations of health laws, and prosecution and punishment thereof as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Boards of Health and Sanitary Officers.

☞1. National board.

II. Regulations and Offenses.

- ☞21. Constitutionality of regulations.
- 22. Contagious and infectious diseases.
- 24. ——— Quarantine.
- 25. ——— Vaccination.

Cross-References.

Contagious and infectious diseases of animals, see Animals, ☞28-33.

Due process of law, see Constitutional Law, ☞320.

Person insured, representations, warranties, or conditions in policy or application therefor, see Insurance, ☞291.

Regulation of manufacture, sale, and use of articles of food or drink, see Food; medicines, see Druggists; poisons, see Poisons.

Regulation of practice of medicine, see Physicians and Surgeons.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

☞1. National board.

See 25 Cent. Dig. Health, § 1.

Act Cong. March 3, 1879, created a national board of health, the members of which were to receive as compensation \$10 per day, and reasonable expenses, when actually engaged in the performance of their duties. The sum of \$50,000 was appropriated to "pay the salaries and expenses" of the board, and to "carry out the purposes" of the act. Various subsequent acts appropriating moneys used the same language, and the act of August 7, 1882, declared "that no other public money than that hereby appropriated shall be expended for the purposes of the board of health." *Held*, that these provisions clearly evinced the purpose of congress to restrict the liability of the United States in respect to the expenditures of the board to the amounts appropriated, and there was no implied contract to pay a member, who was also the board's salaried employé, any compensation for services rendered in either capacity, after the appropriations were exhausted.—*Dunwoody v. United States*, 143 U. S. 578, 12 S. Ct. 465, 36 L. Ed. 269, affirming judgment 23 Ct. Cl. 82.

II. REGULATIONS AND OFFENSES.

Regulation of manufacture, sale, and use of articles of food or drink, see Food; poisons, see Poisons.

Regulation of practice of medicine, see Physicians and Surgeons.

Vaccination regulations, denial of personal liberty, see Constitutional Law, ☞83; equal protection of laws, see Constitutional Law, ☞212.

☞21. Constitutionality of regulations.

See 25 Cent. Dig. Health, § 25.

Rev. Laws, c. 75, § 137, authorizes the board of health of a city or town, if, in its discretion, it is necessary for the public health, to

require the vaccination and revaccination of all of the inhabitants thereof, and requires them to provide means of free vaccination, and declares that whoever, being over 21 years of age, and not under guardianship, refuses or neglects to comply with such requirement, shall forfeit \$5. *Held*, that such act was a valid exercise of police power as defined by Const. c. 1, § 1, art. 4, providing that the general court shall have power to establish all manner of wholesome orders, laws, statutes, etc., not repugnant to the Constitution, which they shall judge to be for the welfare of the commonwealth.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765, affirming *Commonwealth v. Pear*, 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935.

Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47, generally known as the "Tenement House Act," requiring all school sinks in the existing tenement houses in cities of the first class to be removed and replaced by water-closets, is a proper and constitutional exercise of the police power of the state for the protection of the public health. Judgment, *Tenement House Department of City of New York v. Moesch* (1904) 72 N. E. 231, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, affirmed.—*Moeschen v. Tenement House Department of City of New York*, 27 S. Ct. 781, 203 U. S. 583, 51 L. Ed. 328.

Regulations with respect to the height of buildings and in regard to their mode of construction in cities, made by legislative enactment for the safety, comfort, or convenience of the people, and for the benefit of property owners generally, are valid if the height and conditions provided for can be plainly seen not to be unreasonable or inappropriate. Judgment (1907) 79 N. E. 745, 193 Mass. 364, 118 Am. St. Rep. 523.—*Welch v. Swasey*, 29 S. Ct. 567, 214 U. S. 91, 53 L. Ed. 923.

☞22. Contagious and infectious diseases.

See 25 Cent. Dig. Health, §§ 26-28.

24. — Quarantine.

See 25 Cent. Dig. Health, § 27.

The presumption which the law attaches to the acts of public officers exists in favor of quarantine regulations established by the governor on the recommendation of a live-stock sanitary commission, with respect to the sufficiency of the information on which the regulations were adopted. Judgment, *St. Louis S. W. Ry. Co. v. Smith*, 49 S. W. 627, 20 Tex. Civ. App. 451, affirmed.—*Smith v. St. Louis & S. W. Ry. Co. of Texas*, 21 S. Ct. 603, 181 U. S. 248, 45 L. Ed. 847.

The quarantine laws of the several states were not abrogated by the immigration acts of March 3, 1875, c. 141, 18 Stat. 477 [U. S. Comp. St. 1901, p. 1285], August 3, 1882, c. 376, 22 Stat. 214 [U. S. Comp. St. 1901, p. 1288], June 26, 1884, c. 121, 23 Stat. 58 [U. S. Comp. St. 1901, p. 1290], February 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], February 23, 1887, c. 220, 24 Stat. 415 [U. S. Comp. St. 1901, p. 1292], and March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], and the regulations to enforce the same; but the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary and subject to such quarantine laws. Judgment 25 So. 591, 51 La. Ann. 645, 56 L. R. A. 795, 72 Am. St. Rep. 458, affirmed.—*Compagnie Française de Navigation à Vapeur v. State Board of Health of Louisiana*, 22 S. Ct. 811, 186 U. S. 380, 46 L. Ed. 1209.

25. — Vaccination.

See 25 Cent. Dig. Health, § 28.

A state Legislature, in enacting a statute purporting to be for the protection of local communities against the spread of smallpox, is entitled to choose between the theory of those of the medical profession who think vaccination worthless for this purpose, and believe its effect to be injurious and dangerous, and the opposite theory, which is in accord with common belief and is maintained by high medical authority, and is not compelled to commit a matter of this character, involving the public health and safety, to the final decision of a court or jury. Judgment, *Commonwealth v. Pear*, 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935, affirmed.—*Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765.

HEARING.

Particular actions or proceedings, see—

Admiralty, 81.

Aliens, 54.

Appeal and Error, 801, 818-835.

Contempt, 61.

Equity, 175, 241, 376-392, 464.

Particular actions or proceedings, see—
Indictment and Information, 140.
Mortgages, 476.
Wills, 322-332.

HEARSAY EVIDENCE.

See—

Criminal Law, 419, 420.

Evidence, 314-323.

HEATING.

Passenger cars, due process of law, see Constitutional Law, 297; equal protection of laws, see Constitutional Law, 241; power of state to regulate, see Commerce, 62.

HEAT OF PASSION.

Element of manslaughter, see Homicide, 38-40.

HEIRS.

See—

Constitutional Law, 309.

Descent and Distribution.

Estoppel, 28.

Taxation, 416.

Wills, 505, 506.

HEPBURN ACT.

See—

Carriers, 25.

Commerce, 61.

HIDES.

Inspections as regulation of commerce, see Commerce, 50, 51.

HIGH SCHOOLS.

Negroes, equal protection of laws, see Constitutional Law, 220.

HIGH SEAS.

Jurisdiction of offenses on vessels in harbors, see Criminal Law, 97.

Place of offense, see Homicide, 132.

HIGH-WATER MARK.

Ownership and rights in land between high and low water marks, see Navigable Waters, 36-38.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

HIGHWAYS.

Scope-Note.

[INCLUDES roads open for free passage to the public, established for public benefit; nature and scope of power to establish and maintain such roads in general; constitutional and statutory provisions relating thereto; appointment and removal, rights, powers, duties, and liabilities of highway boards, officers, etc.; establishment of such roads by statutory proceedings, construction, repair, and improvement thereof, and alteration, vacation, and abandonment thereof; taxes for highway purposes and local assessments for particular roads; title to and rights in the land occupied, and removal of and liabilities for obstructions, encroachments, etc.; and use of such roads, and liabilities for injuries from defects, obstructions, etc., therein, and for injuries from violations of the law of the road causing collisions, etc.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Establishment, Alteration, and Discontinuance.

(A) ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION.

⌚ 7. Adverse character of use in general.

11. Operation and effect.

14. — Extent of highway.

17. Evidence as to existence of highway.

(B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 25-233.]

(C) ALTERATION, VACATION, OR ABANDONMENT.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 234-287.]

(D) TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 288-300.]

II. Highway Districts and Officers.

III. Construction, Improvement, and Repair.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 323-378.]

IV. Taxes, Assessments, and Work on Highways.

⌚ 121. Power of taxation and assessment in general.

122. Constitutional and statutory provisions.

131. Local assessments and special taxes.

136. — Property liable and amount of benefit.

140. — Apportionment of benefits and expenses.

V. Regulation and Use for Travel.

(A) OBSTRUCTIONS AND ENCROACHMENTS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 417-455.]

(B) USE OF HIGHWAY AND LAW OF THE ROAD.

⌚ 165. Power to control and regulate.

(C) INJURIES FROM DEFECTS OR OBSTRUCTIONS.

Cross-References.

See—

Bridges.

Navigable Waters. ⌚ 1-35.

Turnpikes and Toll Roads.

Crossing by railroads, see Railroads, ⌚ 92-99, 301-353.

Dedication of land for highway, see Dedication.

Rights in and use of highways by railroads, see Railroads, ⌚ 74, 75; by street railroads, see Street Railroads, ⌚ 21-30.

Special or local laws, see Statutes, ⌚ 97.

Streets in cities, see Municipal Corporations, ⌚ 664-686.

Subjects and titles of acts, see Statutes, ⌚ 123.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

See Dedication.

(A) ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION.

Ⓒ7. Adverse character of use in general.

See 25 Cent. Dig. High. §§ 10, 12-14, 16, 18.

Mere use of land for a public highway is not sufficient to constitute the road a highway, unless the use is adverse to the owner of the fee, and not permissive.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440, affirming judgment 14 App. D. C. 512.

Ⓒ11. Operation and effect.

See 25 Cent. Dig. High. §§ 19-22.

Ⓒ14. — Extent of highway.

See 25 Cent. Dig. High. § 21.

The right to an easement of common and public highway, acquired by a prescriptive use of the road, is confined to the lines and width of the road as actually used for the period of prescription. Judgment 14 App. D. C. 512, affirmed.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440.

Ⓒ17. Evidence as to existence of highway.

See 25 Cent. Dig. High. § 24.

The surveying, platting, and recording of a road will not be presumed from the fact that the road has been worked and kept in repair by the authorities, where the evidence tends to establish that the road was never surveyed, platted, or recorded. Judgment 14 App. D. C. 512, affirmed.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440.

(B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 25-233.]

(C) ALTERATION, VACATION, OR ABANDONMENT.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 234-287.]

(D) TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 288-300.]

II. HIGHWAY DISTRICTS AND OFFICERS.

See 25 Cent. Dig. High. §§ 301-322.

Impairing obligation of contract, see Constitutional Law, Ⓒ127.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 323-378.]

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

Due process of law, see Constitutional Law, Ⓒ255, 278.

Involuntary servitude, see Constitutional Law, Ⓒ83.

Ⓒ121. Power of taxation and assessment in general.

See 25 Cent. Dig. High. § 379.

The legislature, in the exercise of the right of taxation, has authority to direct the whole, or such part as it may prescribe, of the expense of a highway improvement, to be assessed upon the owners of lands benefited thereby.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

Ⓒ122. Constitutional and statutory provisions.

See 25 Cent. Dig. High. §§ 380, 393.

Laws Fla. 1913, c. 6537, §§ 10, 12, making it a misdemeanor punishable by fine and imprisonment to fail to perform labor on the highways, held valid.—*Butler v. Perry*, 86 S. Ct. 258, 240 U. S. 328, 60 L. Ed. 672, affirming judgment 66 So. 150, 67 Fla. 406.

Rev. St. Mo. 1909, c. 102, art. 7, and Laws Mo. 1911, p. 373, providing for special road districts and special taxes, held not invalid.—*Embree v. Kansas City & Liberty Boulevard Road Dist.*, 36 S. Ct. 317, 240 U. S. 242, 60 L. Ed. 624, affirming judgment *Same v. Kansas City & Liberty Boulevard Road Dist.*, 166 S. W. 282, 257 Mo. 593.

Ⓒ131. Local assessments and special taxes.

See 25 Cent. Dig. High. §§ 388-404.

Ⓒ136. — Property liable and amount of benefit.

See 25 Cent. Dig. High. § 390.

The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district, or by other designation, or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as they shall decide to be benefited.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

Ⓒ140. — Apportionment of benefits and expenses.

See 25 Cent. Dig. High. § 393.

The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

The directions that the jury "shall ascertain and determine what property is benefited" by the establishment of the highway, and "shall assess against each parcel which it shall find to be so benefited its proper proportional part of" the whole sum directed to be assessed, making due allowance, when part only of a tract has been taken, for any deduction already made, in the assessment of damages for such taking, "on account of the benefit to the remainder of the tract," reasonably imply that the assessment is to be proportional to the benefit, and not to the market value or any other test.—*Id.*

V. REGULATION AND USE FOR TRAVEL.

Turnpikes and toll roads, see Turnpikes and Toll Roads, Ⓒ34.

(A) OBSTRUCTIONS AND ENCROACHMENTS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. High. §§ 417-455.]

(B) USE OF HIGHWAY AND LAW OF THE ROAD.

Due process of law, see Constitutional Law, 292.

Equal protection of laws, see Constitutional Law, 235.

165. Power to control and regulate.

Comp. Laws Utah, § 2087, making any one who drives a herd of horses, cattle, etc., over a public highway constructed on a hillside liable for damages done by such animals in destroying the banks or rolling rocks into the highway, is within the police power of the state, as a reasonable regulation incident to its right to establish and maintain highways.—*Jones v. Brim*, 17 S. Ct. 282, 165 U. S. 180, 41 L. Ed. 877.

(C) INJURIES FROM DEFECTS OR OBSTRUCTIONS.

See 25 Cent. Dig. High. §§ 478-542.

Accidents at railroad crossings, see Railroads, 301-353.

In streets, see Municipal Corporations, 755-825.

HINDERING.

Creditors, see Fraudulent Conveyances.

HIRING.

See—
Bailment.
Landlord and Tenant.

HISTORY.

Judicial notice of historical facts, see Evidence, 11.
Statute, as aid to construction, see Statutes, 217.

HOLDING COMPANY.

See Monopolies, 18.

HOLIDAYS.

See 25 Cent. Dig. Holidays.
See Sunday.

HOME.

See Domicile.

HOMESTEAD.

Scope-Note.

[INCLUDES exemption from forced sale, for payment of debts, of real property of debtors, as constituting the family residence; constitutional and statutory provisions for such exemption; nature, grounds, and extent thereof in general; who are entitled to benefit of such exemptions; acquisition, selection, declaration, and establishment of homestead; quantity or value of property exempt; as to what liabilities homesteads are exempt; waiver or forfeiture of right of exemption, abandonment, alienation, devise, or descent of homestead; rights of devisees, heirs, or surviving members of family; and duration and termination of exemption; and protection and enforcement of the right.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Acquisition, and Extent.

(A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 1-16.]

(B) PERSONS ENTITLED.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 17-36.]

(C) ACQUISITION AND ESTABLISHMENT.

40. Entry on record of title.

(D) PROPERTY CONSTITUTING HOMESTEAD.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 86-127.]

(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.

105. Debts to government.
106. Proceedings for enforcement of claims.
107. — In general.

II. Transfer or Incumbrance.

119. Acknowledgment of deed or mortgage.

III. Rights of Surviving Husband, Wife, Children, or Heirs.

⌚ 135. Constitutional and statutory provisions.

IV. Abandonment, Waiver, or Forfeiture.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 307-353.]

V. Protection and Enforcement of Rights.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 354-406.]

Cross-References.

See Indians, ⌚14.

As community property, see Husband and Wife, ⌚252.

Dower or rights of widow, see Dower.

Entry and possessory rights on public lands, see Public Lands, ⌚11, 35, 135.

Exemption of personal property, see Exemptions.

I. NATURE, ACQUISITION, AND EXTENT.**(A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.**

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 1-16.]

(B) PERSONS ENTITLED.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 17-36.]

(C) ACQUISITION AND ESTABLISHMENT.**⌚40. Entry on record of title.**

See 25 Cent. Dig. Home. § 59.

Gen. Laws Colo. 1877, c. 46, § 1, which declares that, before any one shall be entitled to claim exemption of his homestead from execution, he shall cause the word "homestead" to be entered of record on the margin of his recorded title, is peremptory; and, unless the statute is complied with, no exemption can be claimed, even as against a creditor having actual notice that the premises are occupied as a homestead.—Goodwin v. Colorado Mortg. & Inv. Co., 110 U. S. 1, 3 S. Ct. 473, 28 L. Ed. 47.

(D) PROPERTY CONSTITUTING HOMESTEAD.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 86-127.]

(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.**⌚105. Debts to government.**

See 25 Cent. Dig. Home. §§ 162-164.

Rev. St. Wis. 1878, § 2983, exempting the homestead of a debtor from sale on execution, was in force at the time of the enactment of Rev. St. § 916 (Act June 1, 1872, c. 255), providing that a party recovering judgment in a common-law cause in a federal court shall have similar remedies thereon as are now provided by the laws of the state in which such court is held. *Held*, that the homestead exemption applied to an execution on a judgment recovered by the United States.—Fink v. O'Neil, 106 U. S. 272, 1 S. Ct. 325, 27 L. Ed. 196.

⌚106. Proceedings for enforcement of claims.

See 25 Cent. Dig. Home. §§ 165-175.

⌚107. — In general.

See 25 Cent. Dig. Home. §§ 165, 166, 168-172.

The right to invoke Code Iowa 1897, § 2976, under which a mortgaged homestead may be sold only for any deficiency, may be asserted by junior mortgagee in a proceeding to marshal assets as to various mortgage liens.—Robert Moody & Son v. Century Sav. Bank, 38 S. Ct. 111, 239 U. S. 374, 60 L. Ed. 336, affirming decree in re Hartzell, 209 F. 775, 126 C. C. A. 499.

II. TRANSFER OR INCUMBRANCE.**⌚119. Acknowledgment of deed or mortgage.**

See 25 Cent. Dig. Home. §§ 210-214.

Under Act III, March 27, 1869, providing that any feme covert above the age of 18, joining with her husband in any deed, mortgage, or other writing relating to land, shall be bound by it as if she were sole and of full age, and that the acknowledgment of such instrument may be the same as if she were sole, a conveyance of the wife's land, executed by husband and wife, but not acknowledged by her, passes her title, subject only to homestead rights, which are governed by a different statute.—Knight v. Paxton, 124 U. S. 552, 8 S. Ct. 592, 31 L. Ed. 518, affirming decree (C. C.) Paxton v. Marshall, 18 F. 361.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.**⌚135. Constitutional and statutory provisions.**

See 25 Cent. Dig. Home. §§ 246-248.

The unconstitutionality under Const. Ark. 1874, art. 9, § 6, so far as it affects homesteads, of Mansf. Dig. Ark. c. 1, § 3, does not render that section inapplicable in a suit to quiet title to land in the Indian Territory, as such section was in force at close of Assembly of Arkansas in 1883 within Act May 2, 1890, § 31, adopting certain laws of Arkansas.—Perryman v. Woodward, 35 S. Ct. 830, 238 U. S. 148, 59 L. Ed. 1242, affirming decree 133 P. 244, 37 Okl. 792.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 307-353.]

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

[No paragraphs or references in this Digest. But see 25 Cent. Dig. Home. §§ 354-406.]

HOMICIDE.

Scope-Note.

[INCLUDES killing a human being, aiding in, attempting, or soliciting such killing, and assaults with intent to kill; nature and elements of murder, manslaughter, and of degrees thereof, and of attempts and assaults with intent to commit such offenses; nature and extent of criminal responsibility therefor, and grounds of defense, more particularly justification or excuse, and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. The Homicide.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Homic. §§ 1-11.]

II. Murder.

- ☞ 7. Nature and elements in general.
- 9. Intent or design to effect death.
- 10. Malice.
- 11. — In general.

III. Manslaughter.

- ☞ 38. Sudden passion or heat of passion.
- 40. — Time for cooling.
- 41. Provocation.
- 45. — Threatening or insulting language or conduct.
- 53. Homicide in resisting unlawful act.
- 55. — Unauthorized arrest or imprisonment.

IV. Assault with Intent to Kill.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Homic. §§ 110-130.]

V. Excusable or Justifiable Homicide.

- ☞ 108. Self-defense.
- 110. — Nature and purpose of attack.
- 111. — Resistance of arrest.
- 112. — Aggression or provocation of attack.
- 113. — Withdrawal after aggression.
- 116. — Apprehension of danger.
- 117. — Necessity of act in general.
- 118. — Duty to retreat.
- 122. Defense of another.
- 124. Defense of property.

VI. Indictment and Information.

- ☞ 127. Requisites and sufficiency in general.
- 128. Intent.
- 129. Malice.
- 132. Place of offense.
- 135. Means or instrument, and manner of use thereof.
- 137. Death from injury, and place and time thereof.
- 139. Specification of grade or degree of homicide.
- 142. Issues, proof, and variance.

VII. Evidence.

(A) PRESUMPTIONS AND BURDEN OF PROOF.

(B) ADMISSIBILITY IN GENERAL.

- ☞ 153. Corpus delicti.
- 155. Intent, malice, deliberation, and premeditation.
- 156. — In general.

VII. Evidence—Continued.

(B) **ADMISSIBILITY IN GENERAL—Continued.**

- ⚡ 158. — Previous threats and expressions of ill will by accused.
- 164. Physical condition of parties.
- 166. Motive.
- 169. Circumstances preceding act.
- 174. Subsequent incriminating or exculpatory circumstances.
- 178. Incriminating others.
- 186. Self-defense.
- 188. — Character and habits of person killed or assaulted.
- 190. — Previous threats by person killed or assaulted.
- 194. — Imminence and apprehension of danger to accused.

(C) **DYING DECLARATIONS.**

- ⚡ 210. Ratification of previous declaration.
- 212. Persons as to whom declarations are admissible.
- 216. Preliminary evidence.
- 220. Contradiction and corroboration.

(D) **PROCEEDINGS AT INQUEST.**

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Homic. §§ 465-470.]

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I. THE HOMICIDE.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Homic. §§ 1-11.]

II. MURDER.

- ⌚ 7. Nature and elements in general.
See 26 Cent. Dig. Homic. § 12.

Where a willful killing is shown, an instruction that "if self-defense does not exist, and if manslaughter does not exist, the only other condition that can exist is murder," is unobjectionable.—*Brown v. United States*, 150 U. S. 93, 14 S. Ct. 37, 37 L. Ed. 1010.

- ⌚ 9. Intent or design to effect death.
See 26 Cent. Dig. Homic. § 14.

Absence of specific intent to kill by one who repeatedly beat a person, who had been bound, with an instrument likely to produce death, does not prevent conviction, under Pen. Code P. I, art. 403, of murder with treachery, declared by article 10, § 2, to exist where the offender employs means tending directly to insure death without risk to himself.—*Pico v. United States*, 33 S. Ct. 482, 228 U. S. 225, 57 L. Ed. 812.

- ⌚ 10. Malice.
See 26 Cent. Dig. Homic. §§ 15-18.

- ⌚ 11. — In general.
See 26 Cent. Dig. Homic. §§ 15, 16.

A charge to the effect that the intent necessary to constitute malice aforethought need not have existed any particular length of time before the killing, but may spring up at the instant, and may be inferred from the fact of killing, is not erroneous, as applied to the common-law crime of murder.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

III. MANSLAUGHTER.

- ⌚ 38. Sudden passion or heat of passion.
See 26 Cent. Dig. Homic. §§ 59-64.

- ⌚ 40. — Time for cooling.
See 26 Cent. Dig. Homic. §§ 62-64.

If one, in a moment of passion, aroused by the commission of an assault upon his young brother, shoot and kill the offender without previous preparation, the crime is manslaughter; but if he prepares himself to kill, and has a previous purpose to do so, the mere fact of passion will not reduce the crime below murder.—*Collins v. United States*, 150 U. S. 62, 14 S. Ct. 9, 37 L. Ed. 998.

The fact that defendant armed himself after an altercation with the deceased does not necessarily as matter of law convert what

might otherwise have been a case of manslaughter into the crime of murder.—*Gourko v. United States*, 153 U. S. 183, 14 S. Ct. 806, 38 L. Ed. 680.

- ⌚ 41. Provocation.
See 26 Cent. Dig. Homic. §§ 65-75.

- ⌚ 45. — Threatening or insulting language or conduct.
See 26 Cent. Dig. Homic. § 69.

A charge that, to render a killing manslaughter, the deceased must be doing some act "of a character that would so inflame the mind" of the defendant "as that the law contemplates he does not act deliberately, but his mind is in a state of passion," and that mere words are not a sufficient provocation to reduce the killing to manslaughter, is not erroneous.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

- ⌚ 53. Homicide in resisting unlawful act.
See 26 Cent. Dig. Homic. §§ 78-81.

- ⌚ 55. — Unauthorized arrest or imprisonment.
See 26 Cent. Dig. Homic. § 79.

Defendant was tried for murder, in killing one of two persons who attempted to arrest him without a warrant, and when there was no charge against him,—probably mistaking him for another. The court, at defendant's request, charged that if such were the case, and the killing was done while resisting such arrest, it would be, not murder, but manslaughter, but added that if the killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose, it would still be murder. Held, that the modification was erroneous, as permitting the jury to return a verdict of guilty of murder merely because of the manner of the killing, even if they believed that otherwise the case was one of manslaughter only, whereas the proper inquiry was whether, at the time of the shooting, such circumstances were present, taking them all together,—including the mode of killing,—as made it a case of manslaughter, and not of murder.—*Brown v. United States*, 159 U. S. 100, 16 S. Ct. 29, 40 L. Ed. 90.

IV. ASSAULT WITH INTENT TO KILL.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Homic. §§ 110-130.]

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

- ⌚ 108. Self-defense.
See 26 Cent. Dig. Homic. §§ 133-176.

Ⓔ110. — Nature and purpose of attack.

See 26 Cent. Dig. Homic. §§ 140-142.

Where deceased was killed while engaged, with others, in an attack on defendant, with sticks and clubs, an instruction withdrawing the question of self-defense from the jury, on the ground that sticks and clubs are not deadly weapons, is erroneous.—*Allen v. United States*, 157 U. S. 675, 15 S. Ct. 720, 39 L. Ed. 854.

A charge defining the real danger which will render an act one in self-defense, as a present danger of "great injury to the person injured, that would maim him, or that would be permanent in its character, or that might produce death," and not a past danger or danger of a future injury, is not erroneous.—*Acers v. United States*, 17 S. Ct. 91, 164 U. S. 388, 41 L. Ed. 481.

Ⓔ111. — Resistance of arrest.

See 26 Cent. Dig. Homic. §§ 143, 144.

One who, having no knowledge, and not being informed or chargeable with notice, of the character or mission of an officer legally seeking to arrest him, kills the officer, if the killing is apparently necessary to save his own life, may be excusable on the ground of self-defense, although his threatening and violent conduct prevented the officer from making known his character and mission.—*Starr v. United States*, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841.

Whether, in such a case, the right of self-defense was legitimately exercised, depends on the circumstances of the particular transaction; and previous unlawful conduct of such person, and his seeking to avoid arrest therefor, are to be considered only as tending to show that he knew or believed that the mission of the officer was to arrest him.—*Id.*

A peremptory instruction to acquit one accused of homicide in resisting arrest because the statute under which the arrest was attempted and the arrest warrant was issued is void under the federal Constitution is properly refused, where, if the state's testimony is to be believed, the accused, without any warning, or resorting to any other means of resistance, and after the officer had knocked for admission, shot such officer upon his entering the open door, armed with a supposed warrant of arrest.—(1910) *Franklin v. State of South Carolina*, 30 S. Ct. 640, 218 U. S. 161, 54 L. Ed. 980, affirming judgment *State v. Franklin* (1908) 60 S. E. 953, 80 S. C. 332.

Ⓔ112. — Aggression or provocation of attack.

See 26 Cent. Dig. Homic. §§ 145-150.

An instruction open to the construction that defendant could not avail himself of the plea of self-defense if, apprehending danger from the conduct of deceased when he drove by him, he returned by the same way, which was the proper and convenient road home, having armed himself in the meantime, is erroneous.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

Where deceased had threatened to kill defendant, and, in a subsequent attack upon him, was himself killed, an instruction that the intentional arming himself with a pistol by the defendant, even with a view to self-defense, would make a case of murder, unless the actual affray developed a case of necessary self-defense, is erroneous.—*Allen v. United States*, 157 U. S. 675, 15 S. Ct. 720, 39 L. Ed. 854.

Where a difficulty is intentionally brought on for the purpose of killing deceased, the fact of imminent danger to the accused constitutes no defense. But where the accused embarks in a quarrel with no felonious intent or malice, or premeditated purpose of doing bodily harm, or

killing, and, under reasonable belief of imminent danger, inflicts a fatal wound, it is not murder.—*Wallace v. United States*, 162 U. S. 466, 16 S. Ct. 859, 40 L. Ed. 1039.

Ⓔ113. — Withdrawal after aggression.

See 26 Cent. Dig. Homic. §§ 151, 152.

Where one, after making a slight assault upon another, provoked by insulting words of the latter, in good faith withdraws from further contest, his right of self-defense, is restored if the assaulted person then, in violation of law, pursues him with a deadly weapon, and seeks to take his life, or do him great bodily harm.—*Rowe v. United States*, 17 S. Ct. 172, 164 U. S. 546, 41 L. Ed. 547.

Ⓔ116. — Apprehension of danger.

See 26 Cent. Dig. Homic. §§ 158-163.

Defendant testified that he tried to avoid deceased, but that the latter advanced upon him, and made a threatening demonstration of attempting to draw a pistol, whereupon defendant shot him. There was no evidence in corroboration of this statement by defendant. *Held*, that it was reversible error to charge that the question whether deceased was so acting as to lead a reasonable man in defendant's position to believe that deceased would kill defendant, and that this could be prevented only by the taking of deceased's life, was to be passed on by the jury, and that they "must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness, when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances; and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the party who did the killing."—*Allison v. United States*, 160 U. S. 203, 16 S. Ct. 252, 40 L. Ed. 395.

This error was not cured by the statement in a remote part of the charge that the defendant "is related to the case more intimately than anybody else," and "there is no odor of sanctity thrown around the statements of the defendant as a witness," and that the jury are to view his statements "in the light of their consistency, their reasonableness, and their probability, the same as the statements of any other witness," and they "are to look at them in the light of the interest he has in the result of the case."—*Id.*

An assault which will justify the killing of the assailant must be such as would lead a reasonable person to believe that his life was in peril.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

Ⓔ117. — Necessity of act in general.

See 26 Cent. Dig. Homic. §§ 164-167.

Where the evidence showed that the killing was done in resisting a deadly assault with a knife by the deceased, in the office of an hotel at which both parties were stopping, it was error to charge that if defendant, by stepping aside, could have avoided the attack, or if he could have inflicted a less dangerous wound, or "paralyzed the arm" of his assailant, the killing was not justifiable on the ground of self-defense.—*Rowe v. United States*, 17 S. Ct. 172, 164 U. S. 546, 41 L. Ed. 547.

Ⓔ118. — Duty to retreat.

See 26 Cent. Dig. Homic. §§ 168-171.

A man is entitled to stand his ground when, without having provoked an assault, he is attacked with a deadly weapon, and uses such force as he thinks necessary to save his life.—

Beard v. United States, 158 U. S. 550, 15 S. Ct. 962, 39 L. Ed. 1086.

A man who finds another man trying to obtain access to his wife's room in the night-time, by opening a window, may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so; and if the other threatens to kill him, and makes a motion as if to do so, and puts him in fear of his life or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault.—**Alberty v. United States**, 162 U. S. 499, 16 S. Ct. 864, 40 L. Ed. 1051.

To justify one in killing his assailant, he must first use all the means in his power otherwise to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power.—**Allen v. United States**, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

¶122. Defense of another.

See 26 Cent. Dig. Homic. §§ 177-181.

A deputy United States marshal, as such, is justified in killing a man who, within the state of California, makes a murderous assault on a justice of the supreme court of the United States while in discharge of his duties, since Rev. St. U. S. § 788, gives him the same powers in each state, in executing the laws of the United States, as the sheriffs and their deputies have by law in executing the state laws; and Pol. Code Cal. § 4176, provides that sheriffs and their deputies shall preserve the peace; and section 197, Pen. Code Cal., declares that homicide is justifiable when committed in resisting an attempt to murder any person, or do any bodily injury upon any person.—**Cunningham v. Neagle**, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) **In re Neagle**, 39 F. 833, 5 L. R. A. 78.

¶124. Defense of property.

See 26 Cent. Dig. Homic. §§ 184-188.

A person cannot repel a mere trespass on his land by the taking of life, or proceed beyond what necessity requires. When he uses in the defense of such property a weapon which is not deadly, and death actually ensues, the killing will not exceed manslaughter; but, when a deadly weapon is employed, it may be murder or manslaughter, according to the circumstances.—**Wallace v. United States**, 162 U. S. 466, 16 S. Ct. 859, 40 L. Ed. 1039.

VI. INDICTMENT AND INFORMATION.

Felonious nature of act, see Indictment and Information, ¶91.

¶127. Requisites and sufficiency in general.

See 26 Cent. Dig. Homic. §§ 192-194.

An indictment for murder, alleging that defendants at a certain time and place feloniously, willfully, and of their malice aforethought killed and murdered deceased, is sufficient, without an averment that the killing was unlawful.—**Davis v. People of Territory of Utah**, 151 U. S. 262, 14 S. Ct. 328, 38 L. Ed. 153, affirming judgment **People v. Davis**, 8 Utah, 412, 32 P. 670.

An indictment charging that defendant administered poison with the unlawful and felonious intent to take the life of deceased, and that, so administered, it caused his death, is sufficient, without any allegation that defendant knew it was a deadly poison.—**Westmoreland v. United States**, 155 U. S. 545, 15 S. Ct. 243, 39 L. Ed. 255.

¶128. Intent.

See 26 Cent. Dig. Homic. §§ 195, 196.

An indictment alleging that defendant, with premeditated malice, assaulted deceased with a

revolver, and beat her upon the head, inflicting a wound from which she instantly died, is not rendered insufficient by an omission to allege, in terms, an intent to kill, when "murder," as defined by the statute, may consist in an unlawful killing without any considerable provocation, or under circumstances showing an abandoned or malignant heart.—**Davis v. People of Territory of Utah**, 151 U. S. 262, 14 S. Ct. 328, 38 L. Ed. 153, affirming judgment **People v. Davis**, 8 Utah, 412, 32 P. 670.

¶129. Malice.

See 26 Cent. Dig. Homic. §§ 197, 198.

In an indictment for murder, charging that the accused did "willfully, feloniously, and with malice aforethought, strike and beat" deceased, giving him several mortal wounds, "and" did cast and throw him into the sea, and drown him, the words "willfully, feloniously, and with malice aforethought" refer to the casting into the sea, as well as to the striking and beating.—**St. Clair v. United States**, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

An indictment for murder, which avers that defendants did, with deliberate and premeditated malice, inflict a mortal wound, of which the victim instantly died, and that they killed and murdered him in the manner and form aforesaid, is not insufficient as failing to aver deliberate and premeditated malice in the killing, under Hill's Ann. Laws Or. § 1268, which provides that an indictment must contain a statement of the acts constituting the offense, in ordinary and concise language without repetition, and in such manner as to enable a person of common understanding to know what is intended.—**Fitzpatrick v. United States**, 20 S. Ct. 944, 178 U. S. 304, 44 L. Ed. 1078.

¶132. Place of offense.

See 26 Cent. Dig. Homic. §§ 210, 211.

An indictment under Rev. St. § 5339, charging murder as committed on the high seas, within the jurisdiction of the court, and within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state of the United States, on board of an American vessel, shows sufficiently the locality of the offense, without stating on what part of the high seas it was committed.—**St. Clair v. United States**, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

An indictment for murder on the high seas need not specify the locality where the alleged offense was committed. General averments that it was on an American vessel on the high seas, within the jurisdiction of the court and of the United States, and out of the jurisdiction of any particular state, are sufficient.—**Andersen v. United States**, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

¶135. Means or instrument, and manner of use thereof.

See 26 Cent. Dig. Homic. §§ 215-223.

An indictment charging that defendant administered poison with the unlawful and felonious intent to take the life of deceased, and that, so administered, it caused his death, is sufficient without any allegation that the poison was taken into the stomach of deceased.—**Westmoreland v. United States**, 155 U. S. 545, 15 S. Ct. 243, 39 L. Ed. 255.

¶137. Death from injury, and place and time thereof.

See 26 Cent. Dig. Homic. §§ 223-230.

An indictment for murder which fails to aver the place where deceased died is fatally defective.—**Ball v. United States**, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377.

An indictment charging that defendants inflicted upon the body of B. a "mortal wound, of which mortal wound the said B. did languish,

and languishing did then and there instantly die," sufficiently alleges that B. died of the mortal wound alleged to have been inflicted by defendants, and that he died at the time and place at which the mortal wound was inflicted.—*Ball v. United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

—139. Specification of grade or degree of homicide.

See 26 Cent. Dig. Homic. §§ 232-235.

Under a statute defining "murder" as it is defined at common law, and establishing degrees of the crime (2 Comp. Laws Utah, § 5076), it is sufficient to allege facts showing a murder, without indicating, in terms, the degree of the crime, leaving that to be determined by the jury, or by the judge, in case of confession.—*Davis v. People of Territory of Utah*, 151 U. S. 262, 14 S. Ct. 328, 38 L. Ed. 153, affirming judgment *People v. Davis*, 8 Utah, 412, 32 P. 670.

Under Revision N. J. p. 239, § 68, dividing murder into two degrees, and defining them, and section 45, providing that it shall be sufficient in every indictment for murder to charge that defendant did willfully, feloniously, and of his malice aforethought kill and murder the deceased, one convicted of murder in the first degree under an indictment in the language of the statute, and which did not specify the degree of murder charged, was not denied the equal protection of the laws, nor convicted without due process of law.—*Bergemann v. Backer*, 157 U. S. 655, 15 S. Ct. 727, 39 L. Ed. 845.

—142. Issues, proof, and variance.

See 26 Cent. Dig. Homic. §§ 250-259.

An indictment charging defendant, in the same count, with having caused the death of deceased both by shooting and drowning, is supported by evidence that the accused shot the deceased, and immediately afterwards caused him to be thrown into the sea.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

VII. EVIDENCE.

(A) PRESUMPTIONS AND BURDEN OF PROOF.

See 26 Cent. Dig. Homic. §§ 260-283.

Presumption from flight, see Criminal Law, —323.

Presumption from possession of articles taken from deceased, see Criminal Law, —323.

(B) ADMISSIBILITY IN GENERAL.

Admissibility by reason of admission of similar evidence, see Criminal Law, —396.

Confession, see Criminal Law, —519.

Declarations, see Criminal Law, —415, 422, 423.

Demonstrative evidence, see Criminal Law, —404.

Evidence of other offenses, see Criminal Law, —369.

Expert testimony, see Criminal Law, —483.

Hearsay evidence, see Criminal Law, —419, 420.

Opinion evidence, see Criminal Law, —452.

Res gestæ, see Criminal Law, —362-368.

Testimony of accomplices, see Criminal Law, —507.

—153. Corpus delicti.

See 26 Cent. Dig. Homic. § 284.

On trial of an indictment for murder by drowning of a seaman on a vessel at sea, testimony of her master that, during several days before and after the night deceased was missed, he saw no vessels, is competent, as evidence of the corpus delicti.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

The fact that blood stains are found at or near the place where the crime is alleged to have been committed, or upon articles belonging to the deceased which are found in defendant's possession shortly after the death, may be considered by the jury, unless satisfactorily explained, as a circumstance in determining whether or not a murder has been committed.—*Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

—155. Intent, malice, deliberation, and premeditation.

See 26 Cent. Dig. Homic. §§ 286-302.

—156. — In general.

See 26 Cent. Dig. Homic. §§ 286, 287.

An instruction that former threats against defendant not only cannot excuse defendant, if there was nothing indicating a deadly design against defendant at the time of the killing, but are evidence of special spite and special ill will on the part of defendant, is erroneous.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

Threats made by the deceased against defendant, and communicated to him, having been introduced by defendant to show that he had reasonable cause to apprehend an attack, and hence was justified in acting on a hostile demonstration by deceased of a much less pronounced character than if such threats had not preceded it, it was error to charge that such threats could be considered to show that defendant killed deceased because of malice, spite or ill will.—*Allison v. United States*, 160 U. S. 203, 16 S. Ct. 252, 40 L. Ed. 395.

—158. — Previous threats and expressions of ill will by accused.

See 26 Cent. Dig. Homic. §§ 293-296.

Testimony against the accused, on a trial for murder, that more than a month before the homicide he threatened violence to another member of the same party, and that he was very disagreeable and abusive and vulgar in his language towards the others, is inadmissible, because the time is too remote and because the facts do not show enmity towards the person whom he killed.—*Bird v. United States*, 21 S. Ct. 403, 180 U. S. 356, 45 L. Ed. 570.

—164. Physical condition of parties.

See 26 Cent. Dig. Homic. § 313.

In view of the medical testimony that deceased's wounds must have been caused by a powerful blow, it was proper to allow a witness to testify that defendant was a strong, powerful man.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

—166. Motive.

See 26 Cent. Dig. Homic. §§ 320-331.

In a trial for murder, evidence is admissible, as showing a motive for the crime, when it tends to prove that defendant was guilty of a prior murder, and knew that he was suspected by deceased to be so guilty, although evidence has already been put in by the prosecution tending to show another motive for the crime.—*Moore v. United States*, 150 U. S. 57, 14 S. Ct. 26, 37 L. Ed. 996.

On the trial of one for murder of his wife; there was evidence that two days before the murder defendant and deceased quarreled, that he slapped his wife, and that she refused to go to their home on the ground that if she did so defendant would kill her. Held that, in connection with such evidence, testimony that

witnesses had heard deceased scream several times, had seen her with black eyes and a bruised face, that she had cried on several occasions and appeared alarmed and scared, and that there had been bruises and discolorations on her body, was admissible to show ill treatment of deceased by defendant, and a state of bitter feeling between them, as bearing upon the question of motive.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

169. Circumstances preceding act.

See 26 Cent. Dig. Homic. §§ 341-350.

On trial of defendant, who was one of the crew of a vessel, for the killing of the mate, evidence of ill treatment of defendant by the captain, who was first killed by defendant, prior to the day of the homicide, is not admissible; there being no evidence to so connect it with the killing of the mate as to render it a part of the res gestæ.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

174. Subsequent incriminating or exculpatory circumstances.

See 26 Cent. Dig. Homic. §§ 359-371; 14 Cent. Dig. Crim. Law, § 778.

A witness testified that he and a neighbor searched the place where defendants camped at the time of the alleged murder, and found quantities of blood there, and that, when asked by his neighbor what kind of blood that was, he answered that he did not know, and that the neighbor then said that "maybe they have killed one of my hogs." *Held*, that this testimony could not have prejudiced defendants.—*Pierce v. United States*, 160 U. S. 355, 16 S. Ct. 321, 40 L. Ed. 454.

Testimony against an accused, on a trial for murder, that he tried to pick a fight with another about six months after the homicide, is inadmissible, since the time is too remote, and it does not show enmity against the person killed.—*Bird v. United States*, 21 S. Ct. 403, 180 U. S. 356, 45 L. Ed. 570.

178. Incriminating others.

See 26 Cent. Dig. Homic. §§ 307-309; 14 Cent. Dig. Crim. Law, § 791.

Defendant's testimony showed that on the day deceased disappeared, under circumstances implicating defendant in the crime, a party of armed men, not including defendant, were hunting for deceased and the wife of one of the party under the belief that they had eloped together. *Held*, that threats made by members of the party to kill deceased were also admissible, in favor of defendant, as part of the res gestæ, and as illustrative of their acts.—*Alexander v. United States*, 138 U. S. 353, 11 S. Ct. 350, 34 L. Ed. 954.

186. Self-defense.

See 26 Cent. Dig. Homic. §§ 390-420.

188. — Character and habits of person killed or assaulted.

See 26 Cent. Dig. Homic. §§ 391-397.

On an issue as to self-defense, evidence that deceased had the general reputation of being a quarrelsome and dangerous person is competent, especially if his character in this respect was known to defendant.—*Smith v. United States*, 161 U. S. 85, 16 S. Ct. 483, 40 L. Ed. 626.

190. — Previous threats by person killed or assaulted.

See 26 Cent. Dig. Homic. §§ 399-413.

Where deceased went, with several others, in a boisterous and disorderly manner, upon

land claimed and occupied by the accused, and refused to leave when warned to do so, and began building a fence, *held*, that the fact that the accused thereupon went for his gun was no ground—where the killing was done immediately upon threats and menaces by the deceased—for excluding evidence of prior threats made by deceased, and communicated to defendant, against defendant, in case he interfered with the building of the fence, or for excluding defendant's testimony that he procured his gun for the purpose of self-protection.—*Wallace v. United States*, 162 U. S. 466, 16 S. Ct. 859, 40 L. Ed. 1039.

194. — Imminence and apprehension of danger to accused.

See 26 Cent. Dig. Homic. §§ 417-419.

On the issue of self-defense, evidence that deceased was a larger and more powerful man than defendant is competent.—*Smith v. United States*, 161 U. S. 85, 16 S. Ct. 483, 40 L. Ed. 626.

(C) DYING DECLARATIONS.

210. Ratification of previous declaration.

See 26 Cent. Dig. Homic. § 442.

The ratification by deceased of his previous dying declaration is not admissible unless shown to have been made in expectation of death.—*Carver v. United States*, 160 U. S. 553, 16 S. Ct. 388, 40 L. Ed. 532.

212. Persons as to whom declarations are admissible.

See 26 Cent. Dig. Homic. § 428.

On a trial for murder, when there is admitted without objection, as a dying declaration, a statement by deceased that he did not know who shot him, it is error to exclude evidence of a further statement, made immediately afterwards, that he saw the parties who shot him, and that defendant was not among them.—*Mattox v. United States*, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917.

216. Preliminary evidence.

See 26 Cent. Dig. Homic. § 457.

As showing the circumstances under which dying declarations were made, the prosecution may prove that a Catholic priest had been summoned for the declarant, and had performed in her behalf the last rites of the church.—*Carver v. United States*, 17 S. Ct. 228, 164 U. S. 694, 41 L. Ed. 602.

220. Contradiction and corroboration.

See 26 Cent. Dig. Homic. § 461.

Contradictory statements by the deceased at the time of making a dying declaration are admissible as tending to impeach the declaration, whether competent as dying declarations or not.—*Carver v. United States*, 17 S. Ct. 228, 164 U. S. 694, 41 L. Ed. 602.

The rule that, to impeach a witness by proof of contradictory statements, a foundation must be laid by asking him whether he made such statements, does not extend to the case of dying declarations.—*Id.*

Statements made by deceased on his sickbed are competent evidence to contradict his dying declarations, though inadmissible as such.—*Id.*

(D) PROCEEDINGS AT INQUEST.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Homic. §§ 465-470.]

(E) WEIGHT AND SUFFICIENCY.

Proof of insanity, see Criminal Law, ¶570.

¶229. Identity of deceased.

See 26 Cent. Dig. Homic. § 477.

On the trial of an Indian for murdering a white man, there was no error in an instruction which, in substance, stated that if the corpus delicti were established by other evidence, and in that case only, the fact that deceased was a white man could be proved by the confessions of the defendant.—*Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229.

¶231. Malice.

See 26 Cent. Dig. Homic. § 479.

On a trial for murder, it appeared that defendant, after an altercation with deceased, in which each threatened the other with a deadly weapon, went into a saloon, under great excitement. Shortly afterwards deceased came to the door of the saloon and fired his pistol into the room, the bullet passing within a few inches of defendant's head. Defendant then immediately fired at deceased, and killed him. *Held*, that these facts constituted sufficient evidence as to the absence of malice on the part of defendant to require an instruction upon the subject of manslaughter, and the refusal of such an instruction was erroneous.—*Stevenson v. United States*, 162 U. S. 313, 16 S. Ct. 839, 40 L. Ed. 980.

¶233. Motive.

See 26 Cent. Dig. Homic. § 481.

Proof of a motive for the crime is not indispensable to conviction, for malice may be inferred from the mere fact of the killing; but the absence of evidence suggesting a motive is a circumstance in favor of the accused, to be given such weight as the jury deems proper.—*Pointer v. United States*, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208.

¶242. Exercise of authority or duty.

See 26 Cent. Dig. Homic. § 505.

T. and his wife, on rendition of a decision against them by a justice of the supreme court, while in his circuit, became violent and insulting in his language, and attempted to draw deadly weapons. By order of the justice, they were committed for contempt. Afterwards, both of them, known to be violent and vindictive in disposition, made frequent and open threats of personal violence against the justice, expressing a desire to meet and kill him. *Held*, that the facts were sufficient to justify the belief that T. and his wife contemplated a murderous assault when they should meet the justice, justifying the killing of the husband by a deputy marshal detailed to protect the justice.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) *In re Neagle*, 39 F. 833, 5 L. R. A. 78.

Where a person who had threatened the life of a justice of the supreme court afterwards, on meeting the justice, deliberately comes up behind him, strikes him in the face, and, on being ordered to stop by a deputy marshal detailed to protect the justice, puts his hand to his pocket as if to draw a weapon, the officer, knowing the man's disposition and feeling towards the justice, is justified in believing the assault to be with intent to kill.—*Id.*

VIII. TRIAL.

Continuance, see Criminal Law, ¶589, 598.

(A) CONDUCT IN GENERAL.

See 26 Cent. Dig. Homic. §§ 553-561.

Argument of counsel, see Criminal Law, ¶721½, 722½.

Due process of law, see Constitutional Law, ¶268.

Objection to evidence, see Criminal Law, ¶695.

Striking out evidence, see Criminal Law, ¶698.

(B) QUESTIONS FOR JURY.**¶268. Questions of law or of fact in general.**

See 26 Cent. Dig. Homic. § 562.

The trial court properly refuses to instruct the jury to bring in a verdict of not guilty in a homicide case, on the theory that the corpus delicti has not been proved, although there was no witness to the homicide, and the identification of a partly burned body as that of the victim was not perfect, where, taking all the circumstances together, there is clearly enough evidence to warrant the jury in finding that such body was that of the deceased, and that he had been killed by the defendant.—*Perovich v. United States*, 27 S. Ct. 456, 205 U. S. 86, 51 L. Ed. 722.

¶276. Self-defense.

See 26 Cent. Dig. Homic. § 569.

Defendant, while in an hotel office with deceased, being provoked by insulting words of the latter, kicked him lightly, and then stepped back, and leaned against the counter, whereupon he was assaulted by deceased with a knife. *Held*, that it was for the jury to say whether defendant, after kicking the deceased, withdrew in good faith from further contest; and it was error to charge that, if defendant kicked deceased, however lightly, he could not justify the killing of deceased in resisting his assault, though it were necessary to save his life.—*Rowe v. United States*, 17 S. Ct. 172, 164 U. S. 546, 41 L. Ed. 547.

(C) INSTRUCTIONS.

Assuming facts, see Criminal Law, ¶761.

Construction, see Criminal Law, ¶822.

Credibility of witnesses, see Criminal Law, ¶757, 758.

Error cured by giving other instructions, see Criminal Law, ¶823.

Evidence of accomplice, see Criminal Law, ¶779.

Ignoring evidence, see Criminal Law, ¶815.

Relating to punishment, see Criminal Law, ¶797.

Weight of evidence, see Criminal Law, ¶763, 764.

¶283. Province of court and jury in general.

See 26 Cent. Dig. Homic. §§ 576-581, 583.

On a trial in which defendant alleged that the killing was in self-defense, the court, in its charge, after remarking that an innocent man had every motive to seek investigation of any act on his part, quoted from the Bible in reference to Cain's concealment of Abel's murder, saying that there might be exceptions to the general rule, but it was for the jury to say whether there were acts on defendant's part looking towards a concealment of the killing; "what these acts were; if they were cruel, if they were unnatural, if they were barbarous, if they were brutal,—you still have a right, and it is your duty, to take them into consideration. If they were of that character, you are to bring to bear your observation in life that men who are conscious of innocence do not usually characterize their conduct after a killing by that sort of acts." *Held*, that this portion of the charge was erroneous, as practically instructing that the concealment of the killing was conclusive proof of guilt.—*Hickory v. United States*, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474.

284. *Corpus delicti.*

See 26 Cent. Dig. Homic. § 584.

Where the court charged that the corpus delicti could be established by circumstantial testimony, *held*, that the omission to add that this circumstantial evidence should be such as creates cogent, irresistible grounds of presumption was not erroneous in the absence of any request for such an addition to the charge.—*Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229.

285. *Elements of offense in general.*

See 26 Cent. Dig. Homic. § 585.

It was proper for the judge, in a murder case, under the statutes of Utah, to inform the jury what those statutes defined as murder.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

Omission of the court, in distinguishing between murder and manslaughter, to charge that an intentional killing, to constitute manslaughter, must be unlawful and willful, is not prejudicial to the accused, where the jury are told that they cannot find him guilty of murder if the killing, though intentional, was without malice, and are properly instructed as to the law of self-defense.—*Addington v. United States*, 17 S. Ct. 288, 165 U. S. 184, 41 L. Ed. 679.

286. *Intent, malice, deliberation, and premeditation.*

See 26 Cent. Dig. Homic. §§ 586-591.

A charge that, where one performs an act which it is known will produce a particular result, he is presumed to have anticipated and intended that result; and that "from the very fact of a blow being struck we have the right to infer as presumption of fact that the blow was intended prior to the striking, though at a period of time inappreciably distant," is not error.—*Allen v. United States*, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

A charge that, if the jury believe the testimony of certain witnesses to the effect that defendant drew his pistol, went into the field where the deceased was, struck him with his fist, and then shot and killed him, they might, from these facts, infer that the killing was done willfully, and with malice aforethought is not error.—*Id.*

287. *Motive.*

See 26 Cent. Dig. Homic. § 592.

A statement, contained in the charge of the court on a trial for murder, that the lack of any evidence of motive is immaterial so far as the question of guilt or innocence is concerned, is not erroneous although the defense is insanity, where that part of the charge containing such statement is directed to the subject of proving motive, and in it the jury are charged that it is unnecessary to show a motive for the commission of the crime so long as the evidence satisfies the jury that the person charged was in fact guilty of the act, and had sufficient mental ability to be held responsible for his acts.—*Hotema v. United States*, 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

288. *Nature and circumstances of act.*

See 26 Cent. Dig. Homic. § 593.

On the trial of one for the murder of his wife, when there is no evidence as to what took place at the time of the homicide, it is error to charge in effect that the jury should give little weight to testimony of marital discord and quarrels between them unless an express connection between such quarrels and the homicide is shown.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

290. *Nature of means or instrument used.*

See 26 Cent. Dig. Homic. § 595.

A charge defining a deadly weapon as "anything with which death may be easily and readily produced," regardless of the purpose for which it was made, or whether it was made by man at all, is not open to exception.—*Acers v. United States*, 17 S. Ct. 91, 164 U. S. 388, 41 L. Ed. 481.

The court may properly call the attention of the jury to the manner in which, and the part of the body upon which, a weapon is used, as circumstances to be considered in determining whether it is a deadly weapon.—*Id.*

292. *Elements of assault with intent to kill.*

See 26 Cent. Dig. Homic. §§ 597, 598, 600, 601.

Where the charge clearly distinguishes between the assault and the intent, directs specifically that each must be proved, and that the intent is to be deduced from all the circumstances of the case, nowhere stating that the assault itself necessarily proves the intent, a recital that "you may take the act itself as done, and from it you may find that it was willfully done," is not error.—*Acers v. United States*, 17 S. Ct. 91, 164 U. S. 388, 41 L. Ed. 481.

294. *Insanity or intoxication.*

See 26 Cent. Dig. Homic. § 605; 14 Cent. Dig. Crim. Law, §§ 1824, 1830.

At a trial for murder, the jury were instructed that if defendant, at the time of the killing, was in such condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or to do the act that he did do, his crime would be reduced to manslaughter. *Held*, that it was not error to refuse, as covered by the instructions given, an instruction that if defendant at the time of the killing, was so drunk as to render the formation of any specific intent to take the life of the woman killed impossible on his part, and before becoming drunk he entertained no malice towards her, and no intention to take her life, he could not be convicted of murder.—*Tucker v. United States*, 151 U. S. 164, 14 S. Ct. 299, 38 L. Ed. 112.

A charge that defendant's belief in witches, and of his right to kill them, if the product of a diseased brain, relieves him from responsibility for murder, but that he is responsible if his belief is simply an erroneous conclusion of a sane mind, properly submits the issue of the defendant's mental capacity to the jury, when read in connection with the charge that the burden is on the government of proving beyond a reasonable doubt that the defendant was sane at the time of the commission of the crime, and that defendant is responsible for his acts if at the time of their commission he was of sufficient mental capacity to understand their nature and quality and that the particular act was wrong and a violation of the law of the land, for which he would be amenable to punishment.—*Hotema v. United States*, 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

An instruction to find defendant not guilty of murder if it should be found that he was not able to know that the act of killing was wrongful, and was not able to comprehend and understand the consequences of such act, is not open to the objection that it made it necessary for the jury to find that both conditions existed in order to acquit, where the condition of a verdict of guilty was made by the same instruction to be a finding beyond a reasonable doubt that the prisoner knew and understood that it was wrong to take the life, and was able to comprehend and understand the consequences of such act. Judgment, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, affirmed.—*Queenan v. Territory of*

Oklahoma, 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175.

←307. **Excuse or justification in general.**

See 26 Cent. Dig. Homic. § 611.

An instruction that former threats to kill defendant cannot excuse him if there was nothing indicating a deadly design against defendant at the time of the killing is erroneous in omitting all reference to deceased's conduct showing a present intention to carry out the previous threats.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

←300. **Self-defense.**

See 26 Cent. Dig. Homic. §§ 614, 616-620, 622-630.

It is reversible error for the court, without subsequent modification, to enlarge upon the magnitude of the power to slay in self-defense, and to advise the jury to inquire into the character of the deliberation which accompanied it, as tested by the standard of the successive acts of a judge, jury, and executioner in the discharge of their appropriate duties.—*Allen v. United States*, 150 U. S. 551, 14 S. Ct. 196, 37 L. Ed. 1119; *Hickory v. Same*, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

It was error to charge that defendant was guilty if he armed himself for the purpose of killing deceased, and hunted up deceased for that purpose, without referring to his testimony, which was corroborated, and not contradicted, that he had the gun with which he killed deceased with him merely for hunting deer, and that his stop at the house at which the killing occurred was accidental.—*Allison v. United States*, 160 U. S. 203, 16 S. Ct. 252, 40 L. Ed. 395.

A charge relative to self-defense, based on apparent danger, to the effect that the defendant must have had reasonable ground to believe that there was danger to his life, or of "deadly violence to his person," is not error, where it clearly appears, from the charge, that the word "deadly" was used in the sense of "great."—*Acers v. United States*, 17 S. Ct. 91, 164 U. S. 888, 41 L. Ed. 481.

A charge to the effect that if the circumstances of the killing were such as to produce on the mind of defendant, or that of any reasonably prudent person situated as defendant was, the impression that he could save his own life or escape serious bodily harm only by killing deceased, such killing was justified, unless defendant had gone to the place to provoke a difficulty with, and to kill, deceased, was not error.—*Addington v. United States*, 17 S. Ct. 288, 165 U. S. 184, 41 L. Ed. 679.

←306. **Grade or degree of offense.**

See 26 Cent. Dig. Homic. §§ 638-647, 649, 650, 652-655, 657-661.

←307. — **In general.**

See 26 Cent. Dig. Homic. §§ 632-641.

It is error, in an instruction as to the degree of homicide, to assume that the act of defendant in arming himself, after he had reason, from deceased's conduct, to apprehend danger, showed a purpose to kill before the actual affray.—*Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146.

←309. — **Manslaughter.**

See 26 Cent. Dig. Homic. §§ 649, 650, 652-655.

If there is any evidence which tends to show such a state of facts as may bring the crime within the grade of manslaughter, it is then a proper question for the jury whether this evidence is true, and whether it showed

that the crime was manslaughter instead of murder; and it is then error to refuse an instruction upon that subject.—*Stevenson v. United States*, 162 U. S. 313, 16 S. Ct. 839, 40 L. Ed. 980.

Where, if defendant was sane, and responsible for his actions, the evidence furnishes no suggestion of any degree of homicide less than murder, a requested charge on the subject of manslaughter is properly refused.—*Davis v. United States*, 17 S. Ct. 360, 165 U. S. 373, 41 L. Ed. 750.

(D) VERDICT.

←312. **Form and requisites in general.**

See 26 Cent. Dig. Homic. §§ 664-670.

On an indictment for murder, a verdict of guilty is sufficient, as referring to the single offense charged, although the jury had the power to find the accused guilty of a lesser offense included therein.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

←313. **Specification of grade or degree of offense.**

See 26 Cent. Dig. Homic. §§ 671-675; 14 Cent. Dig. Crim. Law, § 2069.

The Washington statutes define murder in the first degree, and make it punishable by death on conviction. They also define the crimes of murder in the second degree and of manslaughter, and fix maximum and minimum periods of imprisonment for each; and, on an indictment or information charging a crime consisting of different degrees, the jury are authorized to find the defendant not guilty of the degree charged, but guilty of any inferior degree. The statutes prescribe the form of verdict as follows: "We, the jury, * * * find the defendant (guilty or not guilty, as the case may be)." *Held* that, on an information for murder in the first degree, a verdict of "guilty as charged" was a sufficient verdict of murder in the first degree, and left no room for inferring that the jury intended to find defendant guilty of murder in the second degree or manslaughter; and that consequently the judgment rendered on such verdict was not in violation of any rights of the defendant under the Constitution of the United States.—*Craemer v. State of Washington*, 18 S. Ct. 1, 163 U. S. 124, 42 L. Ed. 407.

←314. **Assessment of punishment.**

See 26 Cent. Dig. Homic. §§ 676-678.

Rev. St. § 5339, declares that every person who commits murder in any place or district under the exclusive jurisdiction of the United States shall suffer death; and Act July 15, 1897, c. 29 (29 Stat. 487), provides that, in all cases in which the accused is found guilty of murder under section 5339, the jury may qualify their verdict by adding thereto "without capital punishment." *Held*, that the latter provision authorized the jury to so limit their verdict in any case, without regard to the existence of mitigating circumstances, and that instructions confining the right to such cases were erroneous.—*Winston v. United States*, 19 S. Ct. 212, 172 U. S. 303, 43 L. Ed. 456.

The provision for verdict of guilty of murder "without capital punishment" contained in federal Criminal Code of March 4, 1909, c. 321, § 330, 35 Stat. 1152 (U. S. Comp. St. Supp. 1911, p. 1686), which Code, in section 272, makes murder a crime against the United States when committed on lands reserved for the exclusive use of the United States, does not apply to the District of Columbia.—*Johnson v. United States*, 32 S. Ct. 748, 225 U. S. 405, 56 L. Ed. 1142, affirming judgment 38 App. D. C. 347.

IX. NEW TRIAL.

See 26 Cent. Dig. Homic. §§ 683-689.

Affidavit of juror to impeach verdict, see Criminal Law, 3957.

X. APPEAL AND ERROR.

Jurisdiction of United States Supreme Court, see Courts, 385(2).

Necessity of objections, see Criminal Law, 1035.

Scope of record on appeal, see Criminal Law, 1086.

325. Presentation and reservation in lower court of grounds of review.

See 26 Cent. Dig. Homic. § 692.

An objection that a complaint charging murder with treachery in violation of Pen. Code P. I. art. 403, by killing a bound person, was defective, comes too late when not made in the Supreme Court of the Philippine Islands nor in the trial court.—*Pico v. United States*, 33 S. Ct. 482, 228 U. S. 225, 57 L. Ed. 812.

327. Record.

See 26 Cent. Dig. Homic. § 695.

An objection to the submission of the question of irresistible impulse to the jury on a trial for murder is not available to defendant on appeal, where the bill of exceptions contains none of the evidence, and the submission of the question, if authorized by the evidence, was as fair to defendant as he could ask.—*Hotema v. United States*, 22 S. Ct. 895, 186 U. S. 413, 46 L. Ed. 1225.

332. Review of questions of fact.

See 26 Cent. Dig. Homic. §§ 699-704.

On a murder trial, the evidence for the government showed that defendant, in company with deceased, started on horseback to visit persons about four miles away. At noon of that day, shots were heard in the vicinity of the place where the body of deceased was subsequently found. In the evening of the same day, defendant returned alone with the two horses, stating that deceased had accompanied a third person, whom they had met, to another place. Deceased had \$50 on his person when he left with defendant, but no money was found on his corpse. There was evidence that an overcoat belonging to deceased was in defendant's possession the next day. When the corpse was found, and the report of it came to defendant, he left the neighborhood, and went away some 20 or 25 miles, where he was arrested. *Held*, that this evidence was sufficient to warrant the submission of the case to the jury, and that the weight of the evidence, and the extent to which it was contradicted or explained away by defendant's witnesses, were questions exclusively for the jury, and not reviewable by the supreme court on writ of error.—*Crumpton v. United States*, 138 U. S. 361, 11 S. Ct. 355, 34 L. Ed. 958.

333. Harmless error.

See 26 Cent. Dig. Homic. §§ 705-721.

340. — Instructions.

See 26 Cent. Dig. Homic. §§ 715-717, 720.

An instruction that officers had the right to use all necessary force to arrest the accused, and that he had no right to resist, is prejudicial error where the accused, who was thereupon convicted of murder committed in resisting an arrest, had not been guilty of any offense for which the officers had any legal authority to make the arrest.—*John Bad Elk v.*

United States, 20 S. Ct. 729, 177 U. S. 529, 44 L. Ed. 874.

XI. SENTENCE AND PUNISHMENT.

Death sentence, see Criminal Law, 1219.

Ex post facto laws, see Constitutional Law, 203.

Legal execution as not within insurance risk, see Insurance, 438.

354. Nature and extent of punishment.

See 26 Cent. Dig. Homic. § 731.

A sentence to imprisonment for life for conspiracy accompanied with murder, in violation of Rev. St. U. S. §§ 5506, 5509, providing for such punishment as the laws of the state in which the offense is committed may impose, is not in excess of the authority of a circuit court of the United States, although the verdict of the jury has not indicated the punishment, as required by the state statutes in case of murder, since Act Cong. Jan. 15, 1897, c. 29, abolishes the death penalty in such cases, and provides for a sentence to imprisonment for life.—*Motes v. United States*, 20 S. Ct. 993, 178 U. S. 458, 44 L. Ed. 1150.

HORSES.

See—

Animals.

Livery Stable and Garage Keepers.

HOSPITAL CORPS.

See Army and Navy, 23.

HOSPITALS.

See 26 Cent. Dig. Hosp.

See Asylums.

Charitable devises, see Charities, 20.

Hours of labor in hospitals, see Master and Servant, 13.

HOSTILE POSSESSION.

Occupant of real estate holding adversely, see Adverse Possession, 59-85.

HOTELS.

See Innkeepers.

Bankruptcy proceedings against hotel company, see Bankruptcy, 72.

HOURS OF LABOR.

See—

Commerce, 8, 27, 58, 85.

Master and Servant, 13, 17, 131.

Searches and Seizures, 7.

Statutes, 47.

Witnesses, 292.

HOUSEBREAKING.

See Burglary.

HUMANITARIAN DOCTRINE.

Injury avoidable notwithstanding contributory negligence, see Negligence, 83.

HUNTING.

See Game.

HUSBAND AND WIFE.

Scope-Note.

[INCLUDES the marital relation; rights, powers, duties, and liabilities of married persons, as between themselves and as to others, incident to the existence of the relation or arising from conveyances or agreements in consideration or in consequence of marriage; disabilities and privileges of married women by reason of their coverture, and protection of their persons and property; and legal proceedings affecting husbands and wives and their property.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Mutual Rights, Duties, and Liabilities.

⌚ 6. Property of husband.

II. Marriage Settlements.

⌚ 26. Nature in general.

35. Enforcement.

III. Conveyances, Contracts, and Other Transactions Between Husband and Wife.

⌚ 47. Conveyances by husband to or for wife.

49. Gifts.

49½. — Gift by husband to or for wife.

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(A) IN GENERAL.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 272-289.]

(B) PROPERTY AND CONVEYANCES.

(C) CONTRACTS.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 314-364.]

(D) TRADE OR BUSINESS.

⌚ 98. Married women as members of corporations or joint-stock companies.

(E) TORTS.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 377-383.]

(F) CRIMES.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 384-392.]

V. Wife's Separate Estate.

(A) WHAT CONSTITUTES.

⌚ 110. Nature of equitable or statutory estate.

120. Property acquired by husband in trust for wife.

121. Property purchased with wife's money.

129. Estoppel to claim property.

130. Evidence as to ownership.

133. — Weight and sufficiency.

(B) RIGHTS AND LIABILITIES OF HUSBAND.

⌚ 138. Authority as wife's agent or attorney.

(C) LIABILITIES AND CHARGES.

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148. Purchase money and prior incumbrances.

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- 167. — Debts of husband.
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- 171. — Debts of husband.

(D) CONVEYANCES AND CONTRACTS TO CONVEY.

- ⌘ 181. Statutory provisions.
- 184. Consent of husband.
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- 193. — Joinder of husband.
- 194. — Acknowledgment.
- 196. Contracts and conveyances by agents or attorneys.

VI. Actions.

- ⌘ 203½. What law governs.
- 205. Rights of action between husband and wife.
- 206. Rights of action by husband or wife or both.
- 209. — For torts.
- 211. Rights of action against husband or wife or both.
- 212. — In general.
- 228. Pleading.
- 229. — In general.
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VII. Community Property.

- ⌘ 247. Statutory provisions.
- 252. Public lands acquired by grant or entry.
- 261. Evidence as to character of property.
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- 265. Rights of husband and wife during existence of community.
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[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 1100-1116.]

X. Enticing and Alienating.**XI. Criminal Conversation.***Cross-References.*

See—

Bigamy.
Curtesy.
Divorce.
Dower.
Marriage.

Assignment to wife as preference, see Assignments for Benefit of Creditors, ⌘109.

Competency as witnesses for or against each other, see Witnesses, ⌘51-61.

Declarations of husband as affecting wife, see Evidence, ⌘248.

Married women's statutory liability for debts of national bank, see Banks and Banking, ⌘248.

Possession of wife as notice affecting bona fide purchasers, see Vendor and Purchaser, ⌘232.

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I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

☞6. Property of husband.

See 26 Cent. Dig. Hus. & W. §§ 13-13.

Act Cong. Sept. 27, 1850, which conferred title to lands in Oregon territory on certain settlers, required four years' residence on and cultivation of the land before the settler should become the grantee, and that, if he were married, the title, at the end of that time, should inure to the benefit of himself and wife, in equal parts. Plaintiff's father settled on land under the act, as a married man, but, before the four years had expired, was divorced from his wife, plaintiff's mother, whose share under the act he claims as her heir. *Held*, that the right of the wife to one-half of the lands settled was not vested, and was defeated by the divorce.—*Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

II. MARRIAGE SETTLEMENTS.

☞26. Nature in general.

See 26 Cent. Dig. Hus. & W. § 156.

Property may be settled by a husband on his wife, to be held independently of his control, as her separate estate, provided the transaction is clear of fraud.—*Moore v. Page*, 111 U. S. 117, 4 S. Ct. 388, 28 L. Ed. 373.

☞35. Enforcement.

See 26 Cent. Dig. Hus. & W. §§ 209-217.

Any confusion of the property settled on the wife by the husband with that of the husband is a badge of fraud rendering the transaction open to suspicion, and the transfer will only be sustained in such a case by clear proof of the honesty of the transaction.—*Moore v. Page*, 111 U. S. 117, 4 S. Ct. 388, 28 L. Ed. 373.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Common law relating to intervention of trustee, see Common Law, ☞12.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances, ☞86.

☞47. Conveyances by husband to or for wife.

See 26 Cent. Dig. Hus. & W. §§ 232-241.

The adoption of the common law of England by Laws Ariz. 1885, No. 68, so far as not repugnant to or inconsistent with the United States constitution, bill of rights, or laws and customs of the territory, does not include an adoption of the common-law rule precluding a husband from making a conveyance directly to his wife without the intervention of a trustee, since the pre-existing laws of the territory provide for community property of husband and wife, allowing the latter to have separate property and the absolute disposition thereof. Judgment 57 P. 605, 6 Ariz. 340, affirmed.—*Luhns v. Hancock*, 21 S. Ct. 726, 181 U. S. 567, 45 L. Ed. 1005.

☞49. Gifts.

See 26 Cent. Dig. Hus. & W. §§ 249-260.

☞49½. — Gift by husband to or for wife.

See 26 Cent. Dig. Hus. & W. §§ 249-255, 257.

A wife acquired property by gift or conveyance from her husband, within the meaning of a statute restricting her disposition of such property, although it was transferred to her through a third party as a mere medium of

transfer of title, when there was no real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character. Judgment 9 App. D. C. 48, reversed.—*Hamilton v. Rathbone*, 20 S. Ct. 155, 175 U. S. 414, Adv. S. U. S. 155, 44 L. Ed. 219.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(A) IN GENERAL.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 272-289.]

(B) PROPERTY AND CONVEYANCES.

See 26 Cent. Dig. Hus. & W. §§ 290-314.

Acknowledgment of married woman, see Acknowledgment, ☞37.

(C) CONTRACTS.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 314-364.]

(D) TRADE OR BUSINESS.

☞98. Married women as members of corporations or joint-stock companies.

See 26 Cent. Dig. Hus. & W. § 374.

A bill to enforce against the separate estate of a married woman an assessment on shares of national bank stock is not open to the objection that it does not allege that she had capacity to become a stockholder, whether she became such before or after marriage, where it alleges that she was the owner of the shares, and where a statute of the state in which the bank is located (Dig. St. Ark. 1874, § 4194) provides that a married woman may transfer her property, carry on any business, and perform any services, on her separate account, and that her earnings shall be her separate property, and may be used or invested by her in her name.—*Bundy v. Cocke*, 128 U. S. 185, 9 S. Ct. 242, 32 L. Ed. 896.

(E) TORTS.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 377-383.]

(F) CRIMES.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 384-392.]

V. WIFE'S SEPARATE ESTATE.

(A) WHAT CONSTITUTES.

☞110. Nature of equitable or statutory estate.

See 26 Cent. Dig. Hus. & W. §§ 396-407.

Rev. St. Ark. 1858 (Gould's Dig. c. 111) provided that any married woman might become possessed of property, in her own right and name, by will, gift, or distribution, if such property did not come from the husband after coverture; that such property should not be exempt from liability for the debts of the husband unless a schedule of it was filed; and that, when the deed or other transfer of property to the wife expressly stipulated that it should be exempt from the debts of the husband, it should not be subject to execution therefor. The constitution of 1863 provided that property acquired by any female, either before or after marriage, by gift, grant, inheritance, devise, or

otherwise, "shall, so long as she may choose," be her separate estate, and that laws for the registration of the wife's separate property should be enacted, and, when such property was so registered, it should not be liable for the debts of the husband. In 1873 an act was passed providing that the separate property of the wife should not be liable for such debts, provided she should cause such property to be recorded in her name, etc. The constitution of 1874 provided that the separate estate of the wife, however acquired, should not be subject to the debts of the husband. Plaintiff was married in 1859, and in that year issue was born alive of the marriage, capable of inheriting. In 1864 land descended to plaintiff's husband subject to a life estate; and in 1871, on the termination of such estate, the husband caused the land to be conveyed to plaintiff. The deed to her was recorded in 1875. *Held*, that the husband could not claim any marital rights in such land, which the wife acquired after the adoption of the constitution of 1868, and that such land was not subject to levy for the debts of the husband contracted after the recording of the deed to plaintiff, although no schedule was filed, as required by the act of 1858.—*Allen v. Hanks*, 136 U. S. 300, 10 S. Ct. 961, 34 L. Ed. 414.

120. Property acquired by husband in trust for wife.

See 26 Cent. Dig. Hus. & W. §§ 430-434.

Code Ga. 1847, §§ 1776, 1778, 2305, 2632, provide that a husband may convey property to a trustee for the benefit of his wife, and that, until recorded, the trust shall not be valid against purchasers and creditors. One R. conveyed certain property to himself in trust for his wife, and duly recorded the deed in 1853. He gave defendant a mortgage on the property for money loaned to him in 1870, and the land was sold under foreclosure in 1876. *Held*, that the trust was valid against defendant.—*Wilson v. Riddle*, 123 U. S. 608, 8 S. Ct. 255, 31 L. Ed. 280.

Since Act Cong. 1869, providing that the right of any married woman in the District of Columbia to her own separate property shall be absolute as if she were sole, and that it shall not be subject to the disposal of the husband, nor liable for his debts, whenever a husband obtains possession of his wife's separate property, whether with or without her consent, he is deemed to hold it in trust for his wife, in the absence of evidence that she intended to make him a gift of it.—*Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. Ed. 136.

121. Property purchased with wife's money.

See 26 Cent. Dig. Hus. & W. §§ 432, 435-441.

A husband, having possession of his wife's entire estate, which he managed for her, purchased and improved real property wholly with her money, under an explicit assurance by him before the purchase, on which she relied, that the property would be put in her name. Without her knowledge, he caused the conveyances to be made to himself. On her request, after discovering this fact, and after he had become financially embarrassed, but before any rights of attaching creditors had intervened, he, owing her more than the amount of her money so expended, for the purpose of satisfying the debt, in good faith conveyed the property to her brother, that it might be conveyed to her, which was done. No representations that her husband owned the property had been made by the wife, or with her knowledge, and no fraud was imputed to her. *Held* that, as against attachments for the husband's debts levied after the conveyance to the wife, she was entitled to the property.—*Garner v. Second Nat. Bank*, 151 U. S. 420, 14 S. Ct. 390, 38 L. Ed. 218.

129. Estoppel to claim property.

See 26 Cent. Dig. Hus. & W. §§ 283, 468-470; 19 Cent. Dig. Estop. §§ 191, 195, 197.

In 1846 mortgaged property was purchased under foreclosure by a purchaser who was alleged to hold it in trust for the mortgagor's wife. The mortgagor and wife remained in possession until the mortgagor's death, and the wife and her second husband thereafter; the rents and profits in part being used to pay off the mortgagor's debts. In 1858 the purchaser and such wife and her husband joined in a lease reciting that the purchaser was the sole, legal, and equitable owner of the property, and conveying a life estate to the wife, which was recorded by her. In 1870 the purchaser died, leaving a will devising the property to such wife for life, remainder to G., and in 1881 the wife and her husband brought suit to cancel the lease, set aside the will, and have the alleged trust enforced. *Held*, that the wife, by permitting the execution and recording of the lease to remain unquestioned for more than 20 years, was estopped from setting up the parol trust alleged.—*Laughlin v. Mitchell*, 121 U. S. 411, 7 S. Ct. 923, 30 L. Ed. 987.

130. Evidence as to ownership.

See 26 Cent. Dig. Hus. & W. §§ 471-494.

133. — Weight and sufficiency.

See 26 Cent. Dig. Hus. & W. §§ 487-494.

Even if there were a presumption, from the wife's allowing the husband to use her separate property, that a gift was intended, such presumption would be rebutted by evidence that she had repeatedly directed him to invest it in her name, for her benefit.—*Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. Ed. 136.

(B) RIGHTS AND LIABILITIES OF HUSBAND.

Unacknowledged instruments, see Acknowledgment, 5.

138. Authority as wife's agent or attorney.

See 26 Cent. Dig. Hus. & W. §§ 524-537.

A contract for the sale of the lands of a married woman will not be enforced where the agent who executed the contract exceeded the powers conferred on him in writing by her, and it does not appear that she ever executed any other writing relating to the sale, or ratified it, though the agent had authority signed only by the husband; the latter's assent alone being insufficient to pass her title by the law of the state wherein the land was situated.—*Hennessey v. Woolworth*, 128 U. S. 438, 9 S. Ct. 109, 32 L. Ed. 500.

(C) LIABILITIES AND CHARGES.

Liability of curtesy to husband's debts, see Curtesy, 12.

147. Property subject to liability.

See 26 Cent. Dig. Hus. & W. §§ 466, 562-566; 17 Cent. Dig. Divorce, § 728.

A married woman having no power, in Ohio, to contract in reference to her separate estate previous to its existence, her note, charging her separate state with the payment thereof, cannot be enforced in equity against a separate estate acquired by her subsequent to the execution of the note.—*Ankeney v. Hannon*, 147 U. S. 118, 13 S. Ct. 206, 37 L. Ed. 105.

148. Purchase money and prior incumbrances.

See 26 Cent. Dig. Hus. & W. §§ 567-572, 796.

A lien reserved in a deed to a married woman of land purchased with her husband's

consent, to secure her notes given therefor, may be enforced against the land, though the notes are void because of her coverture, and she is not entitled to have the conveyance declared void, and the money paid by her refunded, though consenting to account for rents and profits, nor can she or her husband recover for improvements.—*Bedford v. Burton*, 106 U. S. 338, 1 S. Ct. 98, 27 L. Ed. 112.

—152. Contracts in general.

See 26 Cent. Dig. Hus. & W. §§ 596-602.

The provisions of Rev. St. Ohio, §§ 3108-3111, as existing in 1880, in regard to contracts by married women, whether considered by themselves or in connection with sections 4996, 5319, which relate to the remedy merely, do not enlarge the capacity of married women to make contracts, except in the instances specifically mentioned, and therefore confer no power to charge any after-acquired separate estate.—*Ankeney v. Hannon*, 147 U. S. 118, 13 S. Ct. 206, 37 L. Ed. 105.

—156. Bills and notes.

See 26 Cent. Dig. Hus. & W. §§ 608-622.

Plaintiff supplied provisions to a household in which a husband and wife and their children were living together, and the husband gave, in payment for a part thereof, notes, describing himself as trustee for the wife. *Held*, that this was not sufficient to charge the wife's separate estate in equity for the balance of the account, or for the notes so given, without clear proof that she contracted the debt on her own behalf, or intended to bind her separate estate therefor.—*Dodge v. Knowles*, 114 U. S. 430, 5 S. Ct. 1197, 29 L. Ed. 296.

—163. Debts charged on separate estate.

See 26 Cent. Dig. Hus. & W. §§ 641-659.

—167. — Debts of husband.

See 26 Cent. Dig. Hus. & W. §§ 654-659.

Though there had been an authorization by the judge, if as a matter of fact the party taking a note had advanced money to the husband, knowing it to be for his benefit, neither the wife nor her property would be bound for the payment.—*Marchand v. Griffon*, 140 U. S. 516, 11 S. Ct. 834, 35 L. Ed. 527.

—168. Mortgage or pledge.

See 26 Cent. Dig. Hus. & W. §§ 660-691, 702, 721, 949-951.

—171. — Debts of husband.

See 26 Cent. Dig. Hus. & W. §§ 671-683, 721, 950, 951; 35 Cent. Dig. Mts. § 864.

Const. Or. art. 15, declaring that "the property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise, or inheritance," shall not be subject to the debts or contracts of the husband, merely preserves her property from its compulsory subjection to his debts or contracts. It does not control her voluntary disposal of it for any purpose, including her mortgaging it to secure the payment of a debt owing to him.—*Barrell v. Tilton*, 119 U. S. 637, 7 S. Ct. 332, 30 L. Ed. 511.

Rev. St. D. C. §§ 727, 728, provide that the separate property of a married woman shall not be liable for the debts of her husband. *Held* that, by a deed voluntarily executed by a husband and wife, her separate real estate may be conveyed to secure the payment of his debt.—*Hitz v. Jenks*, 8 S. Ct. 143, 123 U. S. 297, 31 L. Ed. 156.

Plaintiff, a married woman, and her husband, conveyed by deed her separate property to one who conveyed it to a third party to hold in trust to secure the payment of certain notes payable to the husband, and indorsed by him

to a creditor. She filed a bill to set aside the deeds. Pending the suit the court appointed a receiver to collect the rents and profits. The court held the deeds valid, and the land when sold was insufficient, by more than the rents and profits collected, to pay the debt secured by the deeds. *Held*, that she had no claim on the fund created by the rents during the pendency of the suit.—*Id.*

Code Ga. 1882, § 1783, forbidding a wife to bind her separate estate by any assumption of her husband's debts, and declaring void any sale of her separate estate made to a creditor of her husband in extinguishment of his debts, does not prevent a wife from joining with her husband in mortgaging, for the husband's debts, property conveyed by the husband to a trustee for the wife's sole benefit; the trustee being authorized in the deed to mortgage the property on request of the husband and wife.—*Brodnax v. Aetna Ins. Co.*, 128 U. S. 236, 9 S. Ct. 61, 32 L. Ed. 445.

Under the constitution and laws in force in Oregon on November 1, 1871, and January 23, 1872, a married woman could by mortgage bind her separate property for her husband's debt.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree *Allen v. O'Donald* (C. C.) 28 F. 346.

(D) CONVEYANCES AND CONTRACTS TO CONVEY.

Persons who may make acknowledgment for wife, see Acknowledgment, —11.

Subsequent acknowledgment to cure defects, see Acknowledgment, —44.

Time of taking acknowledgment, see Acknowledgment, —10.

—181. Statutory provisions.

See 26 Cent. Dig. Hus. & W. §§ 713, 730.

The right of a married woman to convey, devise, and bequeath "her property" under Rev. St. D. C. 1874, § 728, is not limited by the provisions of the act of April 10, 1869, which governed the subject before the revision was made, in which the right was limited to property acquired otherwise than by gift or conveyance from her husband. Judgment, 9 App. D. C. 48, reversed.—*Hamilton v. Rathbone*, 20 S. Ct. 155, 175 U. S. 414, 44 L. Ed. 219.

—184. Consent of husband.

See 26 Cent. Dig. Hus. & W. §§ 716-718.

Under the Ohio and Virginia statutes, a deed by husband and wife, made in either state, conveying the wife's land, is inoperative to pass her title, unless the husband, she having duly acknowledged the deed, has in her lifetime and by an acknowledgment in the form prescribed by law signified his consent. His acknowledgment, made after her death, is of no effect.—*Sewall v. Haymaker*, 127 U. S. 719, 8 S. Ct. 1348, 32 L. Ed. 299.

—190. Conveyances in general.

See 26 Cent. Dig. Hus. & W. §§ 716-718, 725-730, 940, 946-948.

—193. — Joinder of husband.

See 26 Cent. Dig. Hus. & W. §§ 716-718, 940.

To make valid a deed of the wife's land, it is not necessary that the husband should be named in the body of the deed, provided he duly signs and acknowledges it.—*Schley v. Pullman's Palace-Car Co.*, 120 U. S. 575, 7 S. Ct. 730, 30 L. Ed. 789, affirming judgment (C. C.) 25 F. 890.

—194. — Acknowledgment.

See 26 Cent. Dig. Hus. & W. § 726; 1 Cent. Dig. Ack. §§ 19-21.

Under the statutes from 1674 to 1819, condensed substantially into Va. Code 1873, c. 117,

§ 7, relating to conveyances, and prescribing the effect of acknowledgments of a married woman when recorded, the acknowledgment and recording of conveyances, by husband and wife, of lands in that state, in strict compliance with the mode prescribed, is essential to pass the estate of the wife.—*Sewall v. Haymaker*, 127 U. S. 719, 8 S. Ct. 1348, 32 L. Ed. 299.

196. **Contracts and conveyances by agents or attorneys.**

See 26 Cent. Dig. Hus. & W. §§ 732, 941.

Where power is given by statute to a married woman to convey her interest in real estate by an instrument privily acknowledged by her and joined in by her husband, her right to authorize another to make the conveyance, by a power of attorney similarly executed, is implied.—*Williams v. Paine*, 18 S. Ct. 279, 169 U. S. 55, 42 L. Ed. 658.

Laws Md. 1715, c. 47, Id. 1752, c. 8, and Id. 1766, c. 14, were in force in the District of Columbia in 1859, and under such statutes a married woman owning real estate in the District, which she had the power to convey by deed joined in by her husband, and privily acknowledged by her, might, by a power of attorney similarly executed in another state, authorize an attorney in fact to execute such conveyance in her behalf.—Id.

The act of congress to quiet titles to property in the District of Columbia (13 Stat. 531), providing, among other things, that powers of attorney which shall have been executed by a feme covert in a certain manner shall be held sufficient, clearly recognizes the then existing right of a married woman to convey her real estate in the District through an attorney in fact.—Id.

VI. ACTIONS.

Limitation of actions, see Limitation of Actions, 155.

203½. **What law governs.**

The right of a married woman to sue in Arkansas in her own name for personal injuries, under Sand. & H. Dig. Ark. § 5641, extends to a woman injured in that state, but domiciled in Louisiana, where the damages claimed would constitute community property. Judgment 97 F. 837, 38 C. C. A. 502, affirmed.—*Texas & P. Ry. Co. v. Humble*, 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

205. **Rights of action between husband and wife.**

See 26 Cent. Dig. Hus. & W. §§ 744, 748-755, 970.

The common-law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person, by Code D. C. § 1155, authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried."—(1910) *Thompson v. Thompson*, 31 S. Ct. 111, 218 U. S. 611, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921, affirming judgment (1908) 31 App. D. C. 557.

206. **Rights of action by husband or wife or both.**

See 26 Cent. Dig. Hus. & W. §§ 756-758, 760-764, 766-772, 774-782, 968, 972, 973.

209. **For torts.**

See 26 Cent. Dig. Hus. & W. §§ 766-772, 968, 973.

In an action by a married woman to recover damages for a personal injury, under Sand. & H. Dig. Ark. § 5641, the impairment of her capacity to perform labor may be considered as an element of the damages, since the husband's right to recover for loss of serv-

ices does not preclude her right to recover for the loss of her capacity to earn for herself. Judgment 97 F. 837, 38 C. C. A. 502, affirmed.—*Texas & P. Ry. Co. v. Humble*, 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

The right of a married woman to recover for loss of capacity to labor or earn money on account of a personal injury will not be denied because there is no evidence showing any capacity to labor or earn money at and just before she was injured, where it appears that she had been for some years in business on her own account, though it had been discontinued at the time of the injury on account of temporary illness.—Id.

211. **Rights of action against husband or wife or both.**

See 26 Cent. Dig. Hus. & W. §§ 734-794.

212. **In general.**

See 26 Cent. Dig. Hus. & W. §§ 784-786.

Under Act Or. Oct. 21, 1880, repealing all laws imposing or recognizing any civil disabilities of the wife not imposed or recognized as to the husband, except that the right to vote and hold office was not conferred on her, the wife's identity is no longer merged with that of her husband; and she can be joined as co-defendant with him in an action for the recovery of land of which both are in possession, especially when the greater part of it is claimed by her as her separate property.—*Barrell v. Tilton*, 119 U. S. 637, 7 S. Ct. 332, 30 L. Ed. 511.

228. **Pleading.**

See 26 Cent. Dig. Hus. & W. §§ 816-842, 979, 980.

229. **In general.**

See 26 Cent. Dig. Hus. & W. §§ 816-835, 838, 840-842, 979, 980.

In an action by a wife and her husband to recover possession of her separate property, conveyed by the husband under a power of attorney from the wife, where the petition demands judgment for the land, and the notice thereon says the action is brought to try title, although the question may be technically not one of title, but merely whether a boundary was changed by the authority and ratification of the wife, under the Texas procedure, the power of attorney and deed are not admissible in evidence to prove such authority and ratification.—*Mexia v. Oliver*, 148 U. S. 664, 13 S. Ct. 754, 37 L. Ed. 602.

231. **Evidence.**

See 26 Cent. Dig. Hus. & W. §§ 844-848, 981.

232. **In general.**

See 26 Cent. Dig. Hus. & W. §§ 844-848, 981.

Rev. Code La. 1870, art. 126, provides that a married woman, with the authorization of her husband and the sanction of the judge, may borrow money for her separate benefit, and mortgage her separate estate to secure the same. Article 127 requires the judge to examine the wife "separate and apart from her husband, touching the objects for which the money is to be borrowed." Article 128 provides that, if the wife shall satisfy the judge that money about to be borrowed is solely for her separate advantage, the judge shall give her a certificate, which shall be authority to a notary "for drawing a mortgage, or other act which may be required for the security of the debt contracted, and shall be annexed to the act; which act, when executed as herein prescribed, shall furnish full proof against her and her heirs, and shall be as binding in law and equity, and have the same effect, as if made by a feme sole." Held, that such certificate is not conclusive, but imposes on the wife the burden of showing that the money was not borrowed for her separate benefit.—*Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 5 S. Ct. 234, 28 L. Ed. 764.

VII. COMMUNITY PROPERTY.

Inheritance tax law as impairment of obligation of contract, see Constitutional Law, ◀137.

Scope of review in federal supreme court as to nature of right of survivor of community property, see Courts, ◀399.

Vested rights, see Constitutional Law, ◀66.

◀247. Statutory provisions.

See 26 Cent. Dig. Hus. & W. §§ 879, 886.

The community system of property was not destroyed, so as to make it impossible for community or common property to exist, by Act Wash. 1893, giving the administration and disposition of the community property to the husband. Judgment 52 P. 233, 532, 18 Wash. 511, affirmed.—Warburton v. White, 20 S. Ct. 404, 176 U. S. 484, 44 L. Ed. 555.

◀252. Public lands acquired by grant or entry.

See 26 Cent. Dig. Hus. & W. § 895.

Land acquired under the federal homestead laws on a settlement before the settler's marriage does not fall into the community, where his wife died before final proof, but under Act May 14, 1880, § 3, he did not acquire any vested right until final proof prior to which his rights were exclusively within the operation of Rev. St. § 2291 (U. S. Comp. St. 1901, p. 1390), which confers no right on the wife unless the entryman dies before perfecting his entry, when the widow has the right of residence, cultivation, and patent.—Wadkins v. Producer Oil Co., 33 S. Ct. 380, 227 U. S. 368, 57 L. Ed. 551, affirming judgment Same v. Producers' Oil Co., 57 So. 937, 130 La. 308.

There is nothing in the federal laws which prevents the application, where a patent has been issued to a homestead entryman, of the local law that land in the state, acquired by a husband under the homestead laws, is community property.—Buchser v. Buchser, 34 S. Ct. 46, 231 U. S. 157, 58 L. Ed. 166, affirming decree Same v. Morss, 202 F. 854, 121 C. C. A. 212, which affirms (D. C.) 196 F. 577.

◀261. Evidence as to character of property.

See 26 Cent. Dig. Hus. & W. §§ 913-916.

◀264. — Weight and sufficiency.

See 26 Cent. Dig. Hus. & W. § 916.

Although, by the laws of Texas, property purchased during marriage is *prima facie* community property, whether the conveyance be to the husband or wife, yet the presumption may be rebutted, in case of a conveyance to the wife, by proof that the consideration was nominal, and that the conveyance was intended as a gift to the wife.—Hanrick v. Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

◀265. Rights of husband and wife during existence of community.

See 26 Cent. Dig. Hus. & W. §§ 896, 917-924.

The mortgage which the law gave the wife on the husband's property for her money used by him, though not registered, was not merged in the fraudulent title conveyed to her as dation en paiement.—Bradley v. Claffin, 132 U. S. 379, 10 S. Ct. 125, 33 L. Ed. 367.

The preservation of the wife's legal mortgage or privilege against the husband's estate depends on the record of the evidence thereof.—Nalle v. Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. Ed. 560.

A debt by a husband to his wife, on account of money received by him from the proceeds of an insurance policy on the life of her father, and from her father's estate, is para-

phernal property, for the restitution of which she has, under Rev. Civ. Code La. art. 3319, a legal mortgage on her husband's property.—Id.

The extinguishment of the wife's general mortgage on her husband's property by the transfer of a special mortgage of a third party, satisfied by the act, as between the immediate parties thereto, can take place only in accordance with Rev. Civ. Code La. arts. 2379, 2390, and must be recorded, as required by article 3345.—Id.

The power of the husband as the head and master and administrator of the community property, under Civ. Code Porto Rico 1889, arts. 1412, 1413 (Civ. Code 1902, §§ 1327, 1328), is such that, in the absence of express limitation, he cannot, after the dissolution of the community, be required to account for money which he may have recklessly and extravagantly expended during the existence of the community.—Garrozi v. Dastas, 27 S. Ct. 224, 204 U. S. 64, 51 L. Ed. 369.

◀266. Contracts, conveyances, and gifts between husband and wife.

See 26 Cent. Dig. Hus. & W. §§ 925-928.

Rev. Civ. Code La. art. 3319, provides that the wife has a legal mortgage on property of her husband for restitution of her dowry and reinvestment of the dotal property sold by her husband; for restitution of dotal property received after marriage, and for restitution or reimbursement of her paraphernal property. Articles 3347, 3349, provide that no mortgage shall affect third parties unless recorded in the parish where the property is situated. Property was conveyed, as a dation en paiement, to a wife by her husband, but the conveyance was set aside for fraud at the suit of the husband's attaching creditors, who obtained personal judgments against him after the writs of attachment were dissolved. *Held*, that a legal mortgage of the wife, recorded after commencement of the attachment suits, but before judgment, gave her a prior lien on the property, though the conveyance from the husband had not been set aside at the time she inscribed her mortgage.—Bradley v. Claffin, 132 U. S. 379, 10 S. Ct. 125, 33 L. Ed. 367.

◀267. Sales, conveyances, and incumbrances.

See 26 Cent. Dig. Hus. & W. §§ 896, 929-938.

Community property acquired by the husband before the passage of Laws N. M. 1901, c. 62, § 6 (a), is subject to the provision of that section that neither husband nor wife shall dispose of real estate acquired during coverture by onerous title unless both join in the execution of the deed.—Arnett v. Reade, 31 S. Ct. 425, 220 U. S. 311, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, reversing judgment Reade v. De Lea (1908) 95 P. 131, 14 N. M. 442.

Contract between married man owning an option to buy realty and a corporation *held* not invalid because wife did not assent thereto as is necessary in Porto Rico as to community property.—Parker v. Monroig, 36 S. Ct. 42, 239 U. S. 83, 60 L. Ed. 159.

◀268. Community and separate debts.

See 26 Cent. Dig. Hus. & W. §§ 953-967.

Civ. Code La. art. 2398, provides that a married woman cannot bind herself for her husband's debts. Article 126 provides that with the authority of her husband and the sanction of the judges she can borrow money for her separate benefit, and secure the same on her separate estate. Article 127 provides that in order to borrow and bind herself or her property she must be examined by the judge, and if he finds that it is for her husband's debts or ben-

efft he shall not give his sanction. Article 128 provides that if she satisfy the judge that the debt about to be contracted is for her separate advantage he shall furnish a certificate, which shall be authority for a notary's drawing any act necessary for securing the debt, which, when executed, shall furnish full proof against her and her heirs, and be as binding, and have the same effect, as if made by a feme sole. *Held* that, as the effect of the latter articles was only to put on the wife the burden of showing that the debt did not inure to her benefit, and, as parol evidence was admissible to prove that the debt for which the note and mortgage were given was in fact that of her husband, there was no error in instructing the jury that they might consider whether defendant had received any consideration for the note, it appearing that plaintiff's assignor received her first note long after it was due, merely as collateral for a loan to her husband; that her second note was not a novation of the first, but merely an accommodation note representing the original indebtedness given by her under the controlling influence of her husband, and on the pressing solicitations of said assignor; and that plaintiff was cognizant of those facts when he purchased the notes.—*Marchand v. Griffon*, 140 U. S. 516, 11 S. Ct. 834, 35 L. Ed. 527.

272. Dissolution of community.

See 26 Cent. Dig. Hus. & W. §§ 1003-1007.

The rule of the Spanish law that the wife against whom a judgment of divorce for adultery has been decreed forfeits all right to her share in the community property does not obtain in Porto Rico, because of the provision of Civ. Code 1889, art. 1417 (Civ. Code 1902, § 1330), that the spouse who, by bad faith, has been the cause of the nullity of the marriage shall not have a share in the common property, since this provision relates, not to the dissolution of a marriage by a decree of divorce, but to the recognition of the nullity of a seeming marriage for causes which have operated to prevent it from ever having existed.—*Garrozi v. Dastas*, 27 S. Ct. 224, 204 U. S. 64, 51 L. Ed. 369.

A rule of limited forfeiture, in lieu of the rigorous rule of the Spanish law that the wife against whom a divorce for adultery was decreed forfeited all right to her share in the community property, was adopted for Porto Rico by the provisions of Civ. Code 1889, art. 73, par. 3 (Civ. Code 1902, tit. 5, c. 5, § 174), to the effect that the guilty spouse shall forfeit all gifts from the innocent party, who shall retain everything which has been acquired from the other.—*Id.*

The objection that the District Court of the United States for the District of Porto Rico should not have given a money decree in a suit by the wife to obtain the liquidation of the community is not a valid one, where the rights of the wife arise simply from an increased value of property or assets brought by the husband to the marriage, or as a result of the falling into the community of the revenues of the property of the husband.—*Id.*

The amount of alimony pendente lite and the expenses incurred by the wife in a divorce suit in a Porto Rico court, which were sanctioned by that court, are properly allowed to the divorced wife in her suit to obtain a liquidation of the community and a decree for the payment of her share.—*Id.*

Counsel fees cannot be allowed by the District Court of the United States for the District of Porto Rico to a wife in her suit to obtain a liquidation of the community and a decree for the payment of her share.—*Id.*

A divorced wife is entitled to obtain the liquidation of the community and the payment to her of her share, under Civ. Code Porto Rico 1902, § 173, providing that a divorce carries with it a complete dissolution of all the

matrimonial ties, and the division of all property and effects between the parties to the marriage.—*Id.*

276. Administration.

See 26 Cent. Dig. Hus. & W. §§ 1032-1046.

On the death of the wife, the husband, if surviving, was entitled, under the Spanish law in force in the Philippine Islands, to settle the affairs of the community, and on his death his executor was the proper administrator of the same.—*Enriquez v. Go-Tiongco*, 31 S. Ct. 423, 220 U. S. 307, 55 L. Ed. 476.

Services rendered in aid of winding up the community business were a proper charge on the community estate, under Civ. Code P. I. 1889, art. 1064, even though rendered after the death of both husband and wife.—*Id.*

VIII. SEPARATION AND SEPARATE MAINTENANCE.

See 26 Cent. Dig. Hus. & W. §§ 1046-1099.

Alimony in actions for divorce, see Divorce, 278-285.

Domicile of wife after separation affecting right to sue in federal court on ground of diverse citizenship, see Courts, 307.

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IX. ABANDONMENT.

[No paragraphs or references in this Digest. But see 26 Cent. Dig. Hus. & W. §§ 1100-1116.]

X. ENTICING AND ALIENATING.

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XI. CRIMINAL CONVERSATION.

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IMMIGRATION.

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See Exemptions.
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 From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, ¶54.
 From prosecution for furnishing evidence, see Criminal Law, ¶42.
 From taxation, see Taxation, ¶192-251, 871-876.

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See Constitutional Law, ¶113-183.

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See Jury, ¶148.

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[No paragraphs or references in this Digest. But see 27 Cent. Dig. Incest.]

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See—
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Descent and Distribution, ¶119-147.
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See Assumpsit, Action of.

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Schools and School Districts, ¶97.
States, ¶117-168.
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INDECENCY.

See Obscenity.

INDEMNITY.

Scope-Note.

[INCLUDES contracts to make good or compensate for loss or damage, sustained or anticipated, from acts or omissions of others as well as those of the person indemnified, or to protect against claims of or liabilities to third persons; nature, requisites, validity, incidents, construction, operation, and effect of such contracts in general; bonds and other instruments in writing promising such indemnity; and rights, liabilities, and remedies of the parties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

②. Requisites and validity of contracts.

4. — Bonds of indemnity.

13. Implied contracts.

Cross-References.

See—

Guaranty.

Principal and Surety.

By corporation, see Corporations, ③09.

Public policy affecting validity of contract, see Contracts, ③108.

To surety by principal, see Principal and Surety, ③176-185.

②. Requisites and validity of contracts.

See 27 Cent. Dig. Indem. §§ 2-6; 5 Cent. Dig. Atty. & C. § 247.

④. — Bonds of indemnity.

See 27 Cent. Dig. Indem. §§ 2-6.

A bond under seal conditioned on indemnification of the obligee, a surety company, for loss under an official bond, is a completed contract of indemnity on delivery, without notice of acceptance.—United States Fidelity & Guaranty Co. v. Rieffer, 36 S. Ct. 12, 239 U. S. 17, 60 L. Ed. 121.

⑬. Implied contracts.

See 27 Cent. Dig. Indem. §§ 29-35; 34 Cent. Dig. Mast. & S. §§ 1237, 1240.

A municipality against which a judgment is recovered on account of a defect in a street, resulting from another's negligence, has a remedy over against the latter.—Washington Gas-light Co. v. District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712.

In an action against the District of Columbia for injuries resulting in the death of a pedestrian, caused by the want of a cover on a gas box placed by a gas company in the sidewalk, judgment was rendered for plaintiff. *Held*, in an action by the District over against the gas company, that the fact that a defect in a brick next to the gas box also contributed to the accident did not affect the liability of the company to the District, there being no evidence in either action to show notice to the District of the defect, or its existence for such length of time as would impute notice to it.—Id.

A terminal company, whose negligence toward one of its employes in failing by a proper inspection to discover a defective brake on a car delivered to it by a railroad company has been established by a competent tribunal, cannot recover indemnity from the railroad company because of the latter's like neglect of duty.—Union Stockyards Co. of Omaha v. Chicago, B. & Q. R. Co., 25 S. Ct. 226, 196 U. S. 217, 49 L. Ed. 453, 2 Ann. Cas. 525.

INDEMNITY INSURANCE.

See Insurance, ③430, 514.

INDEPENDENT CONTRACTORS.

See Master and Servant, ③88, 316-319.

INDETERMINATE SENTENCE.

Due process of law, see Constitutional Law, ③270.

Equal protection of laws, see Constitutional Law, ③223.

INDIAN AGENTS.

Power to contract, see United States, ③62.

INDIAN RESERVATIONS.

See Boundaries, ③3.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 1177]

INDIANS.

Scope-Note.

[INCLUDES persons wholly or partly of Indian blood; their rights and disabilities in general; protection and regulation of such persons; and government of the Indian country and of the Indian reservations.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④1. Who are Indians.
2. Status of Indian nations or tribes.
3. Treaties and engagements with Indian nations or tribes.
4. Officers of Indian affairs.
5. Status and disabilities of Indians in general.
7. Support and supplies.
8. Instruction.
9. Lands.
10. — Title and rights to Indian lands in general.
11. — Cession by treaties.
12. — Reservations or grants to Indian nations or tribes.
- 13. — Allotment or partition.
14. — Grants and patents to individual Indians.
15. — Alienation in general.
16. — Lease.
17. — Cutting timber.
18. — Descent.
20. — Judicial sale.
22. — Adverse possession and improvements by intruders.
23. Personal property.
24. Contracts.
25. Liabilities for depredations and injuries to property.
27. Actions.
31. Admission to citizenship.
32. Jurisdiction and government of Indian country and reservations in general.
33. Regulation of intercourse with Indians.
34. Selling or furnishing liquors.
35. Introducing liquors into Indian country.
36. Crimes in Indian country or reservations.
38. Criminal prosecutions.
39. Government and laws of Indian Territory and inhabitants thereof.

Cross-References.

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|---|--|
| Abandonment of contest for allotment as consideration for note, see Bills and Notes, ④92. | Depredation claims, jurisdiction of court of claims, see Courts, ④456. |
| Appellate jurisdiction of United States Supreme Court in actions involving, see Courts, ④385(6). | Due process of law, see Constitutional Law, ④274, 278, 318. |
| Bona fide purchasers of public lands, see Public Lands, ④138. | Enforcement of treaty restrictions as legislative rather than judicial question, see Constitutional Law, ④68. |
| Cancellation of land patent, see Public Lands, ④120. | Exemption from taxation, see Taxation, ④204. |
| Change of jurisdiction of actions involving Indians, see Courts, ④52. | Gross revenue taxes on mines operated under Indian land leases, see Taxation, ④8. |
| Claims against United States, see United States, ④94, 105. | Jurisdiction of federal courts, see Courts, ④299. |
| Construction of statutes by interior department, see Statutes, ④219. | Mandamus as remedy where secretary of interior has erased name of allottee from rolls of citizenship in Indian nations, see Mandamus, ④85. |
| Court of claims, jurisdiction as to claim for attorney's fees, see Courts, ④448; proceedings affecting Indians, see Courts, ④448. | Mandamus to compel approval of allotment, see Mandamus, ④64. |
| Courts of Indian Territory, see Courts, ④435. | Mandamus to compel restoration of names to rolls, see Mandamus, ④10, 73. |
| Deed by Indian as color of title, see Adverse Possession, ④81. | Mandamus to control discretion of Secretary of Interior, see Mandamus, ④73, 85. |
| Depredation claims, see United States, ④106. | |

Mining claims, exclusion from reservation, see *Mines and Minerals*, ¶38.
 Multifariousness in pleading in suit to cancel conveyances, see *Equity*, ¶150.
 Partial invalidity of statutes, see *Statutes*, ¶64.
 Personal disabilities as affecting laches, see *Equity*, ¶76.
 Railroad right of way over Indian land, see *Public Lands*, ¶92.
 Retrospective operation of laws relating to allotments, see *Constitutional Law*, ¶191.

Review of decisions on direct writ of error by United States supreme court to court of appeals, see *Courts*, ¶385(4).
 Right of prosecution to review decision on demurrer to indictment for introducing liquors into Indian country, see *Courts*, ¶385(1½).
 Statutes conferring jurisdiction of federal court, see *Courts*, ¶257.
 Vested rights, see *Constitutional Law*, ¶92, 93, 100.

¶1. Who are Indians.

See 27 Cent. Dig. Indians, § 1.

Those Indians of the Cherokee Nation who, under article 12 of the treaty of New Echota, December 29, 1835 (7 Stat. 478), being competent to take care of themselves and their property, were allowed to remain behind, and become citizens of North Carolina, when the rest of the nation were removed across the Mississippi river, and who were declared to be entitled to receive their due proportion of all the personal benefits arising under the treaty for their claims, improvements, and their per capita, severed their relations with the Cherokee Nation as a political entity, and are not entitled to any share or right either in the commuted annuity fund of \$214,000, nor in the fund created by sales of lands west of the Mississippi, which had been ceded to the Cherokee Nation by the United States, and which are held in trust by the general government.—*Eastern Band of Cherokee Indians v. United States*, 117 U. S. 288, 6 S. Ct. 718, 29 L. Ed. 880.

An illegitimate child of a Choctaw Indian by a colored woman who was a slave in the Cherokee Nation must be regarded, not as an Indian, but as a negro, for the purposes of the jurisdiction of the United States courts.—*Alberty v. United States*, 162 U. S. 499, 16 S. Ct. 864, 40 L. Ed. 1051.

The provision in the ninth article of the treaty of 1866, by which the Cherokee Nation agreed to abolish slavery, that certain classes of freedmen in the nation shall have "all the rights of native Cherokees," does not make such freedmen Indians, within the meaning of Rev. St. § 3146, relating to the criminal jurisdiction of the federal courts in respect to Indians, or absolve them from responsibility to the criminal laws of the United States.—*Id.*

The Choctaw Nation having adopted its freedmen as citizens, there is no presumption that a negro found within the Indian Territory, associating with that nation, is not a member thereof.—*Lucas v. United States*, 163 U. S. 612, 16 S. Ct. 1168, 41 L. Ed. 282.

The marriage of defendant to a Cherokee woman was solemnized by a regularly ordained minister, under a license issued by an assistant in the office of the district clerk, who, though not a regularly appointed deputy, was authorized to act, and transacted most of the business of the office, his acts being recognized by the Nation as valid. No certificate of moral character, which the statute requires shall accompany the application for license in such a case, was found in the office, but the assistant testified that one was presented; and it was shown that the papers of the office had since been burned. There was evidence that defendant had voted since the marriage, his vote being accepted after challenge and inquiry as to his citizenship. *Held* sufficient evidence that defendant was a Cherokee citizen by adoption.—*Nofire v. United States*, 17 S. Ct. 212, 164 U. S. 657, 41 L. Ed. 588.

Civil and political, and not property rights, were alone within the purview of the amendment made in 1866 to Cherokee Const. 1839, § 5, relating to eligibility to a seat in the National Council, by which "whites legally members of the Nation by adoption" were declared to be citizens of the Cherokee Nation. Decree. *In re Persons Claiming Rights in Cherokee Nation* (1905) 40 Ct. Cl. 411, affirmed.—*Red Bird v. United States*, 27 S. Ct. 203, 203 U. S. 76, 51 L. Ed. 96.

¶2. Status of Indian nations or tribes.

See 27 Cent. Dig. Indians, §§ 2, 3.

Under the contract of April 8, 1867, between the Cherokees and Delawares, made with reference to the treaty of July 19, 1866, with the Cherokees, and with the declared purpose of "a location of the Delawares upon the Cherokee lands and their consolidation with the said Cherokee Nation," and providing that, on payment of certain money by the Delawares into the Cherokee national fund, the Delawares should become members of the Cherokee Nation, with the same rights and immunities, and the same participation in the national fund, as the Cherokees, and that their children should be regarded as native Cherokees, the Delawares so incorporated had equal property rights with the native Cherokees in all the common lands of the Cherokee Nation.—*Cherokee Nation v. Journey-cake*, 155 U. S. 196, 15 S. Ct. 55, 39 L. Ed. 120.

Under the agreement of June 7, 1869, between the Cherokees and Shawnees, differing materially from that between the Cherokees and Delawares of April 8, 1867, only in that no provision is made for the purchase of homes by the Shawnees or payment on account thereof into the national fund of the Cherokees, the Shawnees have equal rights with the native Cherokees in all the common property of the Cherokee Nation.—*United States v. Blackfeather*, 155 U. S. 218, 15 S. Ct. 63, 39 L. Ed. 126.

The Indian tribes have always been recognized as distinct communities, and have been permitted to a large extent to make and enforce the laws for their own government; but they are in no sense sovereign nations, and are, like all other communities within the territory of the United States, subject to the paramount authority of congress, which may, in its discretion, assume such part of the control and government of any tribe as, in its judgment, is necessary, or for the best interest of the members.—*Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174 U. S. 445, 43 L. Ed. 1041.

The original Cherokee law as duly passed and approved must prevail as against omissions in subsequent compilations, where the acts providing for such compilations did not declare that they should be effective as laws of the Cherokee Nation. Decree. *In re Persons Claiming Rights in Cherokee Nation* (1905) 40 Ct. Cl. 411, affirmed.—*Red Bird v. United States*, 27 S. Ct. 203, 203 U. S. 76, 51 L. Ed. 96.

Congress, in pursuance of the long-established policy of the government, has a right to

determine for itself when the guardianship which has been maintained over the Indian shall cease.—(1911) *Tiger v. Western Inv. Co.*, 31 S. Ct. 578, 221 U. S. 286, 55 L. Ed. 738, reversing judgment (1908) *Western Inv. Co. v. Tiger*, 96 F. 602, 21 Okl. 630.

—3. **Treaties and engagements with Indian nations or tribes.**

See 27 Cent. Dig. Indians, §§ 5-7, 11.

A claim for \$30,000, based on the resolution of the Cherokee council, November 16, 1846, for losses suffered by individual Indians forced to go to the states for safety, should not be included in an account, when the persons to whom it might be due were not parties, and it had no relation to a per capita distribution.—*United States v. "Old Settlers"*, 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509, modifying decree *Western Cherokee Indians v. Same*, 27 Ct. Cl. 1.

The cost of removal of both Eastern and Western Cherokees—16,957 persons in all—at \$20 a head should be deducted from the \$5,600,000 granted by the treaty of 1835, but no deduction should be made for subsistence in view of the first senate resolution of September 5, 1850; that body having been agreed upon as umpire on that question.—*Id.*

The amount of the deductions for debts and claims against the Cherokee Nation by citizens thereof, and by citizens of the United States for services rendered, should be limited to \$60,000, under article 10 of the treaty of 1835.—*Id.*

The second senate resolution of September 5, 1850, decided that interest should be allowed from June 12, 1838, at 5 per cent. upon the sum found due to the Western Cherokees. The senate had been agreed upon as umpire, and interest was allowed and paid upon the accounting. *Held*, that interest at 5 per cent. from the same date should be allowed upon any sums found due the Indians upon readjusting the account, under Act Feb. 25, 1889 (25 Stat. 694), referring the Western Cherokee claims to the court of claims.—*Id.*

The sums found due should be distributed, as provided by the fifth article of the treaty of 1846, to each individual or head of family of the Western Cherokees (those who emigrated west of the Mississippi prior to the treaty of 1835), or his legal representatives, determined by the Cherokee law, and should not be decreed to the petitioners, styling themselves "commissioners," for distribution.—*Id.*

The expenses of the committee to carry the treaty of 1835 into effect, as provided for in article 12, should not be deducted from the sums due the Cherokees.—*Id.*

Shawnee Treaty Dec. 30, 1825, art. 4, obliged the government to keep a blacksmith for the Indians' use for five years, "or as long as the president may deem it advisable." The court of claims found that a certain sum had been paid the tribe for blacksmiths from 1825 to 1854, but did not find how much thereof had been paid in the five years or further period "deemed advisable." *Held*, that the government had no claim, in this regard, available as a set-off to a claim of said Indians.—*United States v. Blackfeather*, 155 U. S. 180, 15 S. Ct. 64, 39 L. Ed. 114.

The provision, in the treaty of February 24, 1869, with the Bannock tribe of Indians, that they "shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," was intended to confer a privilege of merely limited duration, and was repealed by the subsequent act admitting the territory of Wyoming into the Union with an express declaration that it should have all the powers of the other states, and making no reservation in favor of the Indians.—*Ward v.*

Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244.

An act of congress may supersede a prior treaty, and the validity of an act cannot be questioned by the courts on the ground that it is in conflict with a treaty between the government and an Indian tribe.—*Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174 U. S. 445, 43 L. Ed. 1041.

A treaty with Indians must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.—*Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

The obvious, palpable meaning of the words of an Indian treaty may not be disregarded because of the dependent character of the Indians, or because, in the judgment of the court, the Indians may have been overreached. Decree 34 Ct. Cl. 17, reversed.—*United States v. Choctaw Nation*, 21 S. Ct. 149, 179 U. S. 494, 45 L. Ed. 291.

That the result of accepting the interpretation placed by the United States upon the treaty of 1866 with the Choctaw and Chickasaw Nations will be to render the general government less liberal towards them than towards other tribes constitutes no reason why the court should depart from the ordinary signification of the words used in the treaty.—*Id.*

The plenary power of Congress over the tribal relations and lands of the confederated tribes of Kiowa, Comanche, and Apache Indians could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of the act of June 6, 1900 (31 Stat. 677, c. 813), providing for allotments to the Indians in severalty out of the lands held in common within the reservation and purporting to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Decree, 19 App. D. C. 315, affirmed.—*Lone Wolf v. Hitchcock*, 23 S. Ct. 216, 187 U. S. 553, 47 L. Ed. 299.

The expense of removing the Eastern Cherokees to the Indian Territory was, by the treaties of May 23, 1836 (7 Stat. 478), and August 6, 1846 (9 Stat. 871), imposed upon the United States. Award, *Eastern Cherokees v. United States* 40 Ct. Cl. 252.—*United States v. Cherokee Nation*, 26 S. Ct. 538, 202 U. S. 101, 50 L. Ed. 949.

Interest included in the account of the sums due the Indians under treaty stipulation, transmitted by the Secretary of the Interior to the Cherokee Nation pursuant to the agreement for the cession to the United States of the Cherokee Outlet, made between the United States and the Cherokee Nation on December 19, 1891, and ratified by Congress in Act March 3, 1893, c. 209, 27 Stat. 641, is properly allowed by Court of Claims, notwithstanding the provision of Rev. St. U. S. § 1091 [U. S. Comp. St. 1901, p. 747], forbidding the allowance of interest on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, where the question of interest was a subject of difference while the negotiations were being carried on, the determination of which was provided for in the agreement itself.—*Id.*

The United States is liable for the amount stated to be due the Indians under the treaty of May 23, 1836 (7 Stat. 488), in the account transmitted by the Secretary of the Interior to the Cherokee Nation, and accepted by the latter pursuant to the agreement for the cession of the Cherokee Outlet to the United States, made between the United States and the Cherokee Nation on December 19, 1891, and ratified by Congress in Act March 3, 1893, c.

200, 27 Stat. 641, by which an account of moneys due the Cherokee Nation under treaty stipulations was to be rendered by the United States to such nation without delay, the amount of which, if accepted by such nation, was to be appropriated at once by Congress, the agreement further providing that if the Cherokee Nation did not accept the account, and carried it into the courts, and recovered a judgment, Congress was to make an appropriation for the payment of such judgment at its next session after the cause should be finally decided.—Id.

The Eastern Cherokees as individuals, whether east or west of the Mississippi, who were parties either to the treaty of May 23, 1836 (7 Stat. 478), or that of August 6, 1846 (9 Stat. 871), exclusive of the "Old Settlers," who had been fully paid, are entitled to share in the distribution, through the Secretary of the Interior, of the amount awarded the Indians as due under those treaties for the removal of the Eastern Cherokees to the Indian Territory, by the Court of Claims pursuant to Act July 1, 1902, c. 1375, § 68, 32 Stat. 726, which, as construed by Act March 3, 1903, c. 994, 32 Stat. 996, confers jurisdiction on that court to adjudicate any claim "the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," in a suit to which both the Cherokee Nation and the Eastern Cherokees shall be made parties, and authorizes that court to render judgment in favor of the rightful claimants, and to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part.—Id.

Indians absent from their reservation without permission from the United States had no individual rights to the annuities promised to their tribes by treaty, and paid at the tribal agency conformably to Act Aug. 30, 1852, c. 103, § 3, 10 Stat. 56, which forbade payment to be made to any attorney or agent, and required it to be made directly to the Indians themselves or to the tribe per capita, "unless the imperative interest of the Indian or Indians or some treaty stipulation shall require the payment to be made otherwise, under the direction of the President."—(1911) *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma*, 31 S. Ct. 473, 220 U. S. 481, 55 L. Ed. 552, affirming judgment (1910) 45 Ct. Cl. 287.

Individual rights were not created by the provision of the Indian appropriation act (Act March 2, 1867, c. 173, 14 Stat. 492), that, as permitted by Treaty Oct. 1, 1859, art. 6, 15 Stat. 469, the band of Sacs and Foxes "now in Tama county, Iowa, shall be paid pro rata according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that state."—Id.

The payments theretofore made to the band of Sacs and Foxes who had left their reservation in Kansas and returned to their former home in Iowa, as their proportion of the annuities promised to their tribes, were ratified as to the amount by Act May 17, 1882, c. 163, 22 Stat. 78, providing that thereafter they should have apportioned to them from appropriations for fulfilling treaty stipulations no greater sum thereof than that theretofore set apart for them.—Id.

The band of Sacs and Foxes who had left their reservation in Kansas and returned to their former home in Iowa possessed no individual rights in the annuities apportioned to them from treaty appropriations, under Act July 4, 1884, c. 180, 23 Stat. 76, which confined its benefits to the "Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior."—Id.

The chiefs of the band of Sacs and Foxes who left their reservation in Kansas and returned to their former home in Iowa could claim no right to the sum which, under Treaty October 11, 1842 (7 Stat. 596), each of the principal chiefs should receive annually "out of the annuities payable to the tribe," especially where the parties to the treaty have treated the chiefs on the reservation as the only ones to be paid.—Id.

The direction to the Secretary of the Interior in Act May 31, 1900, c. 598, 31 Stat. 221, thereafter to pay a named head chief of the band of Sacs and Foxes, who had left their reservation in Kansas and returned to their former home in Iowa, an annuity, in accordance with the terms of the treaty of Oct. 11, 1842, art. 4, 7 Stat. 597, is not enough to establish that he had been guilty of mistake in not making the same payment in previous years.—Id.

The condition attached to the provisions of Treaty Oct. 1, 1859, art. 7, 15 Stat. 469, inviting nonresident members of the Sac and Fox Tribes to come in, and providing for notice to them, that those who do not rejoin and permanently reunite with the tribe within one year shall have none of the benefits of any of the treaty stipulations, is an absolute condition precedent to the acquisition by persons not parties to the treaty of any rights, whether given notice or not.—Id.

A merely moral claim is not made the foundation of a possible recovery, under Act March 1, 1907, c. 2290, 34 Stat. 1055, giving the Court of Claims "full legal and equitable jurisdiction" to adjudicate "as justice and equity shall require" claims of the Iowa Sacs and Foxes for their alleged proportionate shares of appropriations to fulfill treaty obligations.—Id.

The entire territory ceded by the Chippewa Indians to the United States, including that portion lying within the exterior boundaries of the cession which was set apart as Indian reservations, was still subject to the federal laws prohibiting the introduction, manufacture, or traffic in, of intoxicating liquors in the Indian country by the Chippewa treaty Feb. 22, 1855, art. 7, until otherwise provided by Congress.—*Johnson v. Gearlds*, 34 S. Ct. 794, 234 U. S. 422, 58 L. Ed. 1383, reversing decree (C. C.) *Gearlds v. Johnson*, 183 F. 611.

The equal footing clauses of the Minnesota enabling and admitting acts (Act Feb. 26, 1857, and Act May 11, 1858) do not operate as an implied repeal of the prohibition of the Chippewa treaty Feb. 22, 1855, art. 7, against the introduction, manufacture, and sale of intoxicating liquors within the territory thereafter ceded to the United States.—Id.

The recession to the United States by the Chippewa treaties of May 7, 1864, and March 19, 1867, of portions of the original cession set apart as reservations by the treaty of Feb. 22, 1855, did not operate to remove from such territory the prohibition of article 7 of the earliest treaty against the introduction, manufacture, or sale of intoxicating liquors within the ceded territory until otherwise provided for by Congress.—Id.

Reservation to Indians of right to fish on ceded lands which is contained in treaty of September 15, 1797, by which Seneca Indians ceded to Robt. Morris certain lands in New York, does not give tribal Seneca Indians on a reservation right to take fish from waters on land outside the reservation as prohibited by game laws of the state.—*People of State of New York ex rel. Kennedy v. Becker*, 36 S. Ct. 705, 241 U. S. 556, 60 L. Ed. 1166, affirming judgment *People ex rel. Kennedy v. Same*, 109 N. E. 116, 215 N. Y. 42.

—4. Officers of Indian affairs.

See 27 Cent. Dig. Indians, §§ 8-10.

A statute fixing the salary of an Indian agent (Rev. St. § 2052) is repealed by subsequent appropriation acts setting apart a less sum, when they show that the amount appropriated is all the compensation intended to be given; and this construction is especially applicable when it appears that the claimant was notified on receiving his commission that the less amount was to be his salary, and that he had receipted for such amounts as in full.—*Belknap v. United States*, 150 U. S. 588, 14 S. Ct. 183, 37 L. Ed. 1191.

—5. Status and disabilities of Indians in general.

Chickasaw freedmen, whom the United States has not removed from the Chickasaw Nation in compliance with its agreement in article 3 of the treaty of July 10, 1866 (14 Stat. 769), with the Choctaw and Chickasaw Nations to remove such freedmen as were willing to be removed, are not entitled to share as beneficiaries in the fund held in trust by the United States under such treaty, to be paid to the Indians upon the adoption of the freedmen, and, in default thereof, to be held in trust for such freedmen as should remove. Decree 38 Ct. Cl. 558, affirmed.—*United States v. Choctaw Nation*, 24 S. Ct. 411, 193 U. S. 115, 48 L. Ed. 640.

The adoption of the Chickasaw freedmen into the Chickasaw Nation was not completed by the congressional approval given in Act Cong. Aug. 15, 1894, c. 290 (28 Stat. 336), to the Chickasaw legislation of January 10, 1873, in which the freedmen were declared to be adopted in conformity with article 3 of the treaty of July 10, 1866 (14 Stat. 769), between the United States and the Choctaw and Chickasaw Indians, upon certain expressed conditions, and with a proviso that this legislation was only to have effect when approved by the proper authority of the United States—where the Chickasaw legislature, prior to this approval by Congress, had consented to the exercise by the United States of the right of removal given by the treaty for the benefit of the freedmen in case of failure to adopt, and in the act of October 22, 1885, had declared that the Chickasaws refused to accept or adopt the freedmen upon any terms or conditions, and provided for memorializing Congress to remove such freedmen from the Chickasaw Nation to Oklahoma.—*Id.*

A regulation of the Department of the Interior that the adoption of a person into an Indian tribe must be approved by the Indian Office to be valid can hardly be said to be beyond the power of that Department to adopt, in view of the provision of Rev. St. U. S. § 463 [U. S. Comp. St. 1901, p. 262], that the "Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations." Judgment (1905) 26 App. D. C. 290, affirmed.—*United States v. Hitchcock*, 27 S. Ct. 423, 205 U. S. 80, 51 L. Ed. 718.

The enrollment of Cherokee freedmen on the tribal rolls is not absolutely confirmed by the confirmatory provision as Act June 10, 1896, c. 398, 29 Stat. 321, in view of subsequent acts (Act June 28, 1898, c. 517, § 1, 30 Stat. 495; Act July 1, 1902, c. 1375, § 27, 32 Stat. 720; and Act April 26, 1906, c. 1876, § 3, 34 Stat. 138).—(1912) *United States ex rel. Lowe v. Fisher*, 32 S. Ct. 196, 223 U. S. 95, 56 L. Ed. 364, affirming judgment (1910) *Same v. Ballinger*, 35 App. D. C. 524.

Roll of Cherokee freedmen made by administrative officers under instructions from Court of Claims under Act Oct 1, 1890, c. 1249, 26 Stat. 636, held superseded by roll made by

Dawes Commission under Act June 28, 1898, c. 517, 30 Stat. 495, and Act July 1, 1902, c. 1375, 32 Stat. 716.—(1912) *Cherokee Nation v. Whitmire*, 32 S. Ct. 200, 223 U. S. 108, 56 L. Ed. 370, reversing decree (1911) *Whitmire v. United States*, 46 Ct. Cl. 227.

—7. Support and supplies.

See 27 Cent. Dig. Indians, § 13.

Payments made by the United States on account of depredations by the Sisseton and Wahpeton bands of Sioux Indians, sums paid to their chiefs for removal and subsistence, and for manual labor schools under the treaty of July 23, 1851 (10 Stat. 949), and expenditures for their support made because of the destitution produced by the forfeiture of their annuities, which was declared by Act Feb. 16, 1863, c. 37, 12 Stat. 652, are properly set off against their annuities by the Court of Claims, in the exercise of its jurisdiction under Act June 21, 1906, c. 3504, 34 Stat. 372, to adjudicate and award the balance, if any, due such Indians, for annuities under the treaty, as if the act of forfeiture had not been passed, and to ascertain and set off all payments or other provisions made to or for such bands or any members thereof since the act of forfeiture "which are properly chargeable against unpaid annuities." Judgment (1907) 42 Ct. Cl. 416, affirmed.—*United States v. Sisseton and Wahpeton Bands of Sioux Indians*, 28 S. Ct. 352, 208 U. S. 561, 52 L. Ed. 621.

—8. Instruction.

See 27 Cent. Dig. Indians, § 14.

The declaration of policy that the government shall make "no appropriation whatever for education in any sectarian school," contained in the various Indian appropriation acts, has reference only to gratuitous appropriations of public moneys, and has no application to appropriations made to fulfill obligations under the Sioux Treaty of April 29, 1868 (15 Stat. 635, 637), or to expenditures of the income of the trust fund set apart by Act March 2, 1889, c. 405, § 17, 25 Stat. 888, 894, 895, for the use of the Sioux Nation, in part consideration of cessions of lands to the United States.—*Reuben Quick Bear v. Leupp*, 28 S. Ct. 690, 210 U. S. 50, 52 L. Ed. 954.

—9. Lands.

See 27 Cent. Dig. Indians, §§ 2, 17, 25-56; 1 Cent. Dig. Adv. Poss. § 11.

—10. — Title and rights to Indian lands in general.

See 27 Cent. Dig. Indians, §§ 25, 29, 46.

The manner, time, and conditions of extinguishing the Indian right of occupancy of lands granted by the United States are exclusively matters of consideration of the government.—*Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 S. Ct. 100, 30 L. Ed. 330, affirming judgment *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217, 14 N. W. 103.

An Indian claim or title that has been confirmed by congress is a "just and unextinguished" one, within the meaning of Private Land Claim Act, § 13, subd. 2, providing that no claim shall be allowed that shall interfere with or overthrow any such title.—*United States v. De la Paz Valdez de Conway*, 20 S. Ct. 13, 175 U. S. 60, 44 L. Ed. 72.

A release by the Wichita and affiliated bands of Indians of all claims to any and all lands within the limits of the United States, except those allotted to them, cannot be made a condition of a decree for compensation on account of surplus lands under the treaty of 1891, under the act of congress of March 2, 1895 (28 Stat. 876, 895-897, c. 188), which authorizes the court of claims to determine the claim of the Choctaw and Chickasaw Nations to an interest in such lands as are within the "leased dis-

tract," and the claim of the Wichita Indians to be compensated in money for their possessory right in such land. Decree, 34 Ct. Cl. 17, reversed.—*United States v. Choctaw Nation*, 21 S. Ct. 149, 179 U. S. 494, 45 L. Ed. 291.

Only a right of occupancy for life, with the additional privilege secured in case of allotment, was acquired by the registered Delaware Indians in the lands which the Cherokees agreed, in their contract of April 8, 1867, with the Delawares, who were to be incorporated into the Cherokee Nation, to sell to such Delawares "for their occupancy," to be equal in the aggregate to 160 acres for each individual registered Delaware, with a guaranty to each of not less than 160 acres, with improvements, in case of the allotment of the Cherokee lands among the members of that nation, and with a stipulation that the lands sold were to be held on the same terms as the Cherokee citizens held their lands, and that the children thereafter born of such Delawares should, in all respects, be regarded as native Cherokees. Decree 38 Ct. Cl. 234, modified.—*Delaware Indians v. Cherokee Nation*, 24 S. Ct. 342, 193 U. S. 127, 48 L. Ed. 646.

White persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation, are equally interested, and have per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose. Decree, *In re Persons Claiming Rights in Cherokee Nation* (1905) 40 Ct. Cl. 411, affirmed.—*Red Bird v. United States*, 27 S. Ct. 29, 203 U. S. 76, 51 L. Ed. 96.

The lands of the Pueblo Indians in New Mexico, though held in communal fee-simple ownership by the Indians of each pueblo, are subject to the legislation of Congress and the exercise of its guardianship over Indians.—*United States v. Sandoval*, 34 S. Ct. 1, 231 U. S. 28, 58 L. Ed. 107, reversing judgment (D. C.) 198 F. 539.

11. — Cession by treaties.

See 27 Cent. Dig. Indians, § 26.

By the treaty of 1820, between the United States and the Choctaws, the latter ceded a portion of their lands east of the Mississippi to the former, for which the United States ceded to them a tract west of the Mississippi, the expressed object of the treaty being to promote the civilization of the Choctaws, and to perpetuate them as a nation by exchanging for a small part of their land in Mississippi a country beyond the Mississippi; and it was stipulated that "the boundaries hereby established between the Choctaw Indians and the United States, on this [east] side of the Mississippi river, shall remain without alteration until the period at which said nation shall become so civilized and enlightened as to be made citizens of the United States." Afterwards it became desirable to obtain the remaining lands held by the Choctaws east of the Mississippi, and, great pressure being brought to bear upon them, they consented to the treaty of 1830, by which they ceded their remaining lands east of the river, and they removed west of the river to the tract before ceded to them. No payment was pretended to be made for the lands thus taken; and the only money payments secured by the treaty, over and above the necessary expense of moving the Indians, providing for their subsistence for 12 months after reaching their new homes, and paying for their cattle and improvements, was an annuity of \$20,000 for 20 years, and certain sums to be expended for education,

public buildings, and furnishing tools, implements, and weapons, in addition to several annuities secured under former treaties. By the treaty large reservations of land east of the river were made, and those Indians desiring to remain and become citizens of the United States were promised grants in fee simple after a certain term of settlement thereon. The United States failed to fulfill the obligations imposed upon it by this treaty in various particulars, especially as to the lands reserved; and as to some of the claims, but not all, arising from such violations, it made a settlement, with the Indians, in making which advantage was taken of their necessities. *Held* that, under the circumstances, the award of the senate, under the treaty of 1855 (giving to the award the effect of prima facie evidence of the correctness of the claim thereby reduced to judgment), by which the United States was required to account to the Choctaws for all the pecuniary benefits derived from the lands ceded by the act of 1830, was a fair, just, and equitable settlement, and the amounts thereby awarded should be adjudged due, deducting the amount of a payment made on account of said award, under the act of March 2, 1861.—*Choctaw Nation v. United States*, 119 U. S. 1, 7 S. Ct. 75, 30 L. Ed. 306.

They should also be compensated for land excluded from the tract ceded to them west of the Mississippi by a mistake in surveying and fixing the boundaries of such tract.—*Id.*

By the Cherokee treaty of 1828, land in the Indian Territory was granted with the express purpose of securing a home for both the Eastern and Western Cherokees. The treaty of 1835, conveying more land, declared that such had been the purpose of those of 1828 and 1833. The patent granted December 31, 1838, ran to the "Cherokee Nation," and the Indian office treated the grant as if to the whole nation as a unit. In 1843 the Western Cherokees, by memorial to congress, claimed that they had been dispossessed of two-thirds of the lands thus granted by the forcible removal and settlement among them of the Eastern Cherokees. In June, 1846, they agreed to submit the question to commissioners, who decided against them. In August, 1846, they declared that they did not acquiesce in this decision, and should reassert their exclusive right to the country, "should the treaty now proposed fail from any cause." The treaty did not fail, but was duly executed on that basis August 6, 1846. An accounting was had thereunder, and payments were made and receipted for "in full of all demands under the fourth article of the treaty," in pursuance of Act Sept. 30, 1850 (9 Stat. 544, 556). *Held*, that the question of the ownership of the lands was thoroughly set at rest by the treaty of 1846.—*United States v. "Old Settlers"*, 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509, modifying decree *Western Cherokee Indians v. Same*, 27 Ct. Cl. 1.

The treaty of September 26, 1833 (7 Stat. 431), between the United States and the united nation of the Chippewa, Ottawa, and Pottawatomie Indians, whereby the latter ceded lands on Lake Michigan in consideration of an equal area west of the Mississippi, and an annuity of \$14,000 a year for 20 years, provided that a just proportion of such annuity money, and moneys due under former treaties, should be paid, west of the Mississippi, to such portion of the nation as should have removed thither within three years, and after that time the whole amount should be paid at the reservation west. On the following day, supplementary articles were made between the United States and the chiefs and headmen of the said nation, ceding certain other lands in Michigan. 7 Stat. 442. It was agreed that these Indians should be considered parties to the treaty of the preceding day, and, further, that there should be paid by the United

States an annuity of \$2,000 a year for 20 years, in addition to the 20-year annuity of \$14,000 a year. *Held*, that the two agreements constituted, practically, one treaty, and that the Indians who remained east, and those who removed west, of the Mississippi, were entitled to share in the additional annuity of \$2,000 a year, in the ratio of their numbers.—*Pam-to-pee v. United States*, 148 U. S. 691, 13 S. Ct. 742, 37 L. Ed. 613, affirming *Potawatamie Indians v. Same*, 27 Ct. Cl. 403.

June 16, 1820, the Chippewa Indians ceded certain land at the Sault Ste. Marie to the United States; a perpetual right of fishing at the falls, and also a place of encampment upon the tract ceded, being reserved. March 28, 1836, the Ottawas and Chippewas ceded to the United States certain lands, including the previous cession, the treaty providing that the reservation for a place of fishing and encampment made under the former treaty should remain unaffected thereby. In 1845 the United States surveyed and set apart to the Indians a tract as an Indian reservation under the treaty of 1820, and in 1855 the Chippewas relinquished to the United States the right of fishing and encampment secured to them by said treaty. *Held*, that until this latter date the Indian reservation was not extinguished; and hence it was not liable to entry in 1859 under the pre-emption law of 1841, which provided that no "Indian reservations to which the title has been extinguished by the United States at any time during the operation of this act * * * shall be liable to entry under" said act.—*Spalding v. Chandler*, 160 U. S. 394, 16 S. Ct. 360, 40 L. Ed. 469.

An intention of the Choctaw and Chickasaw Nations to pass to the United States by the treaty of 1866 an absolute title to the "leased district," and to abrogate the existing lease, is apparent from the failure to accompany the cession of the lands with any declaration of trust in respect to them, while the money to be paid by the United States in consideration of the cession was to be invested and held in trust for certain specified objects. Decree 34 Ct. Cl. 17, reversed.—*United States v. Choctaw Nation*, 21 S. Ct. 149, 179 U. S. 494, 45 L. Ed. 291.

The absolute cession to the United States, apparently made by the Choctaw and Chickasaw Nations in the treaty of 1866, of the "leased district" then held by the United States under a prior treaty for the permanent settlement of other Indians, will not be deemed to be attended with a trust for the settlement of Indians because of a statement by the United States' representatives in the preliminary negotiations that the new treaty to be made with the Indian tribes must provide that a portion of the lands hitherto owned and occupied by them must be set apart for the friendly tribes, and must exclude white settlers from the territory.—*Id.*

A declaration in the act of congress of March 3, 1891 (26 Stat. 989, 1025, c. 543), appropriating a sum to the Choctaw and Chickasaw Nations for their claims to lands situated within the "leased district," that the cession made by the treaty of 1866 was attended by a trust, is not sufficient to defeat as to other lands in such district the absolute, unconditional cession which the words of the treaty manifestly import, in view of the subsequent enactment reciting that the government was not committed to the payment of any further sum to those nations for any alleged interest in the remainder of the leased district, and of the proviso in the act authorizing the submission of their claim to the courts, that it should not be construed as an admission of the existence of such claim.—*Id.*

The United States retained the same exclusive power over land used for an Indian burying ground, which was excepted in Wyandotte

Treaty Jan. 31, 1855 (10 Stat. 1159) art. 2, from the cession of the lands of the tribe for subdivision in severalty to the members, that it would have had if the tribe had continued in existence after that treaty.—*Conley v. Ballinger*, 30 S. Ct. 224, 216 U. S. 84, 54 L. Ed. 393.

Tribal rights only were retained by the Wyandotte Indians in and over their cemetery, under Wyandotte Treaty Jan. 31, 1855 (10 Stat. 1159) art. 2, by which they ceded their land to the United States for subdivision in severalty to the members of the tribe, excepting the portion then inclosed and used as a public burying ground, which was permanently to be reserved and appropriated for that purpose.—*Id.*

An individual descendant of Wyandotte Indians has no right, as against the United States, to the continued use as a cemetery of the parcel of land excepted in Wyandotte Treaty Jan. 31, 1855 (10 Stat. 1159) art. 2, ceding the lands of the tribe to the United States for subdivision in severalty to the members, except the portion then inclosed and used as a public burying ground, which was permanently to be reserved and appropriated for that purpose.—*Id.*

Existing bona fide pre-emption of homestead entries in the Mille Lac Reservation were embraced by the proviso for perfecting subsisting pre-emption and homestead entries, if valid, contained in section 6, Act Jan. 14, 1889, assented to by the Chippewa Indians in Minnesota, since the act adjusted the then existing controversy as to the rights of the Mille Lacs in their reservation under the treaty of May 7, 1864.—*United States v. Mille Lac Band of Chippewa Indians*, 33 S. Ct. 811, 229 U. S. 498, 57 L. Ed. 1299, reversing judgment *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415.

12. — Reservations or grants to Indian nations or tribes.

See 27 Cent. Dig. Indians, §§ 27, 28.

Where a treaty contains a present grant of lands to an Indian tribe, with a clause authorizing the government to forfeit the grant in case the Indians refused to remove to the land, the forfeiture can only be made by a legislative or judicial act; and mere executive action, such as throwing the lands open to settlement, etc., is insufficient. Judgment 30 Ct. Cl. 413, reversed.—*New York Indians v. United States*, 18 S. Ct. 531, 170 U. S. 1, 42 L. Ed. 927; *Id.* 18 S. Ct. 735, 170 U. S. 614, 42 L. Ed. 1165.

A provision, in a treaty granting lands west of the Mississippi to Indians, that the same should be forfeited by their refusal to remove thereto within five years or such other time as the president might appoint, did not become operative by the mere declaration of the Indians that they did not wish to remove, when no notice to remove at a fixed time was given, and no formal tender made by the government to perform its obligation to remove them.—*Id.*

Recognition, by legislative and executive action, of the right of Indians to lands ceded to them, for 20 years after their refusal to remove thereto, *held* sufficient to show that their claim to the lands was not abandoned.—*Id.*

The treaty of Buffalo Creek of January 15, 1838, whereby the government ceded to certain tribes of New York Indians a body of lands in Kansas in consideration of the relinquishment of their title to certain lands in Wisconsin, and their agreement to remove to the Kansas lands, constituted a grant in present of such Kansas lands to the Indians.—*Id.*

In a resolution of the senate amending and provisionally ratifying an Indian treaty whereby certain lands were granted to them by the United States, a proviso directing the president to retain a proportional amount of land in case any of the Indians refuse to remove thereto *held* not to have become a part of the

treaty, it appearing that it was not included in the published copy or in the president's proclamation promulgating the treaty, and there being no evidence of the assent of the president or the Indians thereto. Judgment 30 Ct. Cl. 413, reversed.—*Id.*

Under a treaty with Indians, a grant was made to them of certain land, on the basis of 320 acres "for each soul of said Indians, as their numbers are at present computed." *Held*, that the grant was not of 320 acres for each soul, but of a tract en bloc, and a present title passed to the Indians, and the United States are thereafter in no position to show that the government erred in its computation of the souls, or that certain tribes named in the treaty did not assent to it.—*United States v. New York Indians*, 19 S. Ct. 487, 173 U. S. 464, 43 L. Ed. 769.

An Indian tribe, by accepting without objection a congressional grant whose boundaries are identical with those mentioned in the treaty in pursuance of which the grant was made, and conform to the lines described in an earlier treaty so far as they are contained within the limits of the United States, is estopped to claim under the earlier treaty any lands not within such limits. Decree 34 Ct. Cl. 17, reversed.—*United States v. Choctaw Nation*, 21 S. Ct. 149, 179 U. S. 494, 45 L. Ed. 291.

The Cherokee Nation was not so vested, by the treaty of 1835 (7 Stat. 478), and the patent based thereon, with the sole control over the lands thus ceded to it as to preclude congress, under its plenary power of control over the Indian tribes in the Indian Territory, from enacting those provisions of Act June 28, 1898 (30 Stat. 495, c. 517), which authorize the secretary of the interior to prescribe regulations for the leasing of minerals in its tribal lands for the purpose of making them productive and of securing therefrom an income for the benefit of the tribe.—*Cherokee Nation v. Hitchcock*, 23 S. Ct. 115, 187 U. S. 294, 47 L. Ed. 183.

A title in fee may pass under a treaty with the Indians without the aid of an act of Congress, and without any patent from the United States. Judgment (1904) 99 N. W. 14, 136 Mich. 288, affirmed.—*Francis v. Francis*, 27 S. Ct. 129, 203 U. S. 233, 51 L. Ed. 165.

A reservation of the waters of Milk river for irrigation purposes in favor of the Indians on the Fort Belknap reservation will be implied from the agreement of May 1, 1888 (25 Stat. 113, c. 213), by which the Indians, having the right to occupy and use a large tract of arid lands, ceded to the United States all those lands except a small tract set apart as such reservation. Decree (1906) 148 F. 684, 78 C. C. A. 546, affirmed.—*Winters v. United States*, 28 S. Ct. 207, 207 U. S. 564, 52 L. Ed. 340.

The reservation of the waters of Milk river for irrigation purposes, implied in favor of the Indians on the Fort Belknap reservation from the agreement of May 1, 1888 (25 Stat. 113, c. 213), in which the Indians ceded to the United States all their lands except a small tract set apart as such reservation, was not repealed by the admission of Montana into the Union by Act Feb. 22, 1880, c. 180, 25 Stat. 676, on an equal footing with the original states.—*Id.*

No trust in favor of the then existing members of the tribe and their descendants was created by letters patent which, following the language of the Choctaw treaty Sept. 27, 1830 (7 Stat. 333) art. 2, under the authority of which the patent was made, granted to the Choctaw Nation a tract of land "in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and

live on it," but such grant was one to the Nation only, limited in point of time to the corporate existence of the nation.—*Fleming v. McCurtain*, 30 S. Ct. 16, 215 U. S. 36, 54 L. Ed. 88.

The creation by President Grant of the Hoopa Valley Indian reservation by executive order July 23, 1876, did not exhaust the authority conferred on the executive by Act April 8, 1864 (13 Stat. 39, c. 48, § 2), to establish Indian reservations in California, but authorized the order of President Harrison of October 16, 1891, extending the boundaries of such reservation.—*Donnelly v. United States*, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

The bed of the Klamath river, if owned by the United States, was included in the extension of the Hoopa Valley Indian reservation, established by executive order, as embracing a tract one mile in width on each side of the Klamath river, and extending from the present limits of the Hoopa Valley Indian reservation to the Pacific Ocean.—*Id.*

The creation of a school district by California including public land other than school sections or lieu lands granted to the state by Act March 3, 1853, § 6, and Act July 23, 1866, § 6, could not impair the title of the United States to those lands, or limit its authority over them when set apart for an Indian reservation.—*Id.*

Lands allotted in severalty to individuals under Act July 1, 1892, were excepted from that part of the Colville Indian Reservation which was restored to the public domain by that act and which was thrown open to settlement by the President's proclamation, April 10, 1900, which excepted such tracts as had been or might be allotted to, or reserved for, the Indians under the governing statutes.—*United States v. Pelican*, 34 S. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

§13. — Allotment or partition.

See 27 Cent. Dig. Indians, § 30.

Actual residence on the Umatilla Indian reservation at the time of the passage of Allotment Act March 3, 1885, c. 319 (23 Stat. 340), cannot be deemed essential to give the right of allotment to a member of one of the confederated Indian tribes mentioned in the act as residing on the reservation, where such condition would exclude from the benefits of the act a majority of the members of the different tribes. Judgment 119 F. 114, 55 C. C. A. 216, affirmed.—*Hy-yu-tse-mil-kin v. Smith*, 24 S. Ct. 676, 194 U. S. 401, 48 L. Ed. 1039.

The right of a member of one of the confederated Indian tribes residing on the Umatilla reservation to insist upon her original selection, made under Allotment Act March 3, 1885, c. 319 (23 Stat. 340), as against a subsequent allottee, where the Land Department has corrected its mistake of law which denied her right to allotment because of her absence from the reservation when the census was taken, is not lost by her selection of other land after the department had reconsidered her case, when such selection was made after advising with the Indian agent, and upon his statement that it would not affect her claim for the land she had previously selected, and from which she had been ordered by the officers of the government.—*Id.*

The courts cannot interfere with the allotment and patenting by the Land Department of swamp lands within the limits of an Indian reservation, while the legal title is still in the federal government.—*State of Oregon v. Hitchcock*, 26 S. Ct. 568, 202 U. S. 60, 50 L. Ed. 935.

White persons who intermarried with Cherokees after November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired no right of soil or interest in the vested funds of the Cherokee Nation, are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to such Nation, and are not entitled to be enrolled for that purpose. Decree, *In re Persons Claiming Rights in Cherokee Nation* (1905) 40 Ct. Cl. 411, affirmed.—*Red Bird v. United States*, 27 S. Ct. 29, 203 U. S. 76, 51 L. Ed. 96.

The ratification by the Cherokee Nation of Act Cong. July 1, 1902, c. 1375, 32 Stat. 716, which in section 26 declares that no white person intermarried since December 16, 1895, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation, does not amount to a concession of property rights by the Indians to all who intermarried prior to that date.—*Id.*

White persons who intermarried with Cherokees by blood, and, after the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and white men who, having married Cherokee women, abandoned them, have no part or share in the Cherokee property, and are not entitled to share in the allotments of the lands or in the distribution of any of the funds belonging to the Cherokee Nation, or to be enrolled for that purpose, although the proceedings in the nature of office found authorized by the Cherokee laws have not been instituted to deprive them of the rights and privileges acquired by intermarriage.—*Id.*

White persons who have intermarried with Delaware or Shawnee citizens of the Cherokee Nation, not thereby becoming citizens themselves under the Cherokee laws, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds belonging to such Nation, and are not entitled to be enrolled for that purpose.—*Id.*

The fact that the legal title to allottable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law, his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate and is in possession of the land. Judgment (1907) 30 App. D. C. 177, affirmed.—*Garfield v. United States ex rel. Goldsby*, 29 S. Ct. 62, 211 U. S. 249, 53 L. Ed. 168; *Garfield v. United States ex rel. Alhson*, 29 S. Ct. 67, 211 U. S. 264, 53 L. Ed. 176.

The Secretary of the Interior is without authority to erase from the approved rolls of citizenship in the Choctaw and Chickasaw Nations, without notice or hearing, the name of one who has received an allotment certificate and is in possession of the land.—*Id.*

Where an enrolled member of the Choctaw Nation, entitled to share in the allotment of tribal lands, selected as her allotment a 40-acre lot on which were her buildings and improvements, and received a certificate of allotment from the tribal commission, after the expiration of the time prescribed for contest, no contest having been made, and afterwards received a patent therefor from the chief authorities of the Choctaw and Chickasaw Nations, her right to a patent became vested, and the Secretary of the Interior could not thereafter, as he attempted to do, segregate the land for townsite purposes, as having been under urban occupancy, and cancel her allotment, with leave to select other lands in lieu thereof. Judgment *Garfield v. United States* (1907) 30 App. D. C. 165, affirmed.—*Ballinger v. United States ex*

rel. Frost, 30 S. Ct. 338, 216 U. S. 240, 54 L. Ed. 464.

The corrective power of the Secretary of the Interior over Indian allotments under Act March 3, 1905, c. 1479, 33 Stat. 1060, and Act April 26, 1906, c. 1876, § 3, 34 Stat. 138, include the right to strike from the approved roll of citizens of the five civilized tribes names of Cherokee freedmen allottees whose ancestors have not returned to the nation within the time designated by a treaty stipulation notwithstanding Act July 1, 1902, c. 1375, § 29, 32 Stat. 720.—(1912) *United States ex rel. Lowe v. Fisher*, 32 S. Ct. 198, 223 U. S. 95, 56 L. Ed. 364, affirming judgment (1910) *Same v. Ballinger*, 35 App. D. C. 524.

Nothing contained in Allotment Act Feb. 8, 1887, c. 119, 24 Stat. 388, nor Amendatory Act Feb. 28, 1891, c. 383, 26 Stat. 794, which would forbid the allotment of pine lands, was imported into Steenerson Act April 28, 1904, c. 1786, 33 Stat. 539, providing for allotment to the Chippewa Indians residing on the White Earth Reservation.—(1912) *Fairbanks v. United States*, 32 S. Ct. 292, 223 U. S. 215, 56 L. Ed. 409, affirming decree (1909) *United States v. Fairbanks*, 171 F. 337, 96 C. C. A. 229.

An Indian need not have been on the reservation at the instant when Act Feb. 28, 1891, c. 383, 26 Stat. 794, amending General Allotment Act Feb. 8, 1887, c. 119, 24 Stat. 388, was passed, in order to avail himself of the provisions of the later act giving to each Indian located thereon one-eighth section of land.—*Id.*

Steenerson Act April 28, 1904, c. 1786, 33 Stat. 539, providing for allotment of lands to Chippewa Indians on White Earth Reservation, held to modify prior acts of February 8, 1887, c. 119, 24 Stat. 388, January 14, 1889, c. 24, 25 Stat. 642, and February 28, 1891, c. 383, 26 Stat. 794.—*Id.*

Cancellation of Indian allotments by Secretary of Interior after changes in decisions of the department held not ordered without notice and opportunity to be heard.—*Id.*

The requirement of paragraph 12 of the supplement of July 1, 1902, with the Choctaws and Chickasaws as to designation of homestead by allottee, does not extend to a case where a person died after ratification of the agreement and before receiving the allotment, where the act provided by paragraph 22 for allotment in the name of the deceased.—*Mullen v. United States*, 32 S. Ct. 494, 224 U. S. 448, 56 L. Ed. 834.

Children born to enrolled members of the Cherokee tribe after September 1, 1902, though expressly excluded by Act July 1, 1902, from participation in the distribution of the tribal property, were, if living on March 4, 1906, embraced by provision of Act April 26, 1906, § 2, as amended by Act June 21, 1906, for the enrollment of children who were minors living March 4, 1906.—(1912) *Gritts v. Fisher*, 32 S. Ct. 580, 224 U. S. 640, 56 L. Ed. 928, affirming decree (1911) 37 App. D. C. 473.

Legal title to land in the Columbia reservation allotted to Indians in severalty under the so-called Moses agreement of July 7, 1883, and the confirmatory act July 4, 1884, did not vest in the allottees, but remained in the United States until after patent.—*Starr v. Long Jim*, 33 S. Ct. 358, 227 U. S. 613, 57 L. Ed. 670, affirming judgment 109 F. 810, 59 Wash. 190.

Whether the contestants in a Cherokee allotment contest had improved the lands so as to give them a preferential right of selection under Act July 1, 1902, § 11, is a question of mixed law and fact on which the decision of the Secretary of the Interior is conclusive in the absence of fraud or mistake.—*Ross v. Day*, 34 S. Ct. 233, 232 U. S. 110, 58 L. Ed. 528, affirming judgment *Same v. Wright*, 116 F. 949, 29 Okl. 186.

The guardianship of the federal government over an Indian does not cease when allotment is made and the allottee becomes a citizen.—*Bowling v. United States*, 34 S. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080, affirming decree 191 F. 19, 111 C. C. A. 561.

Creek allotments made by the Dawes Commission after passage of Curtis Act June 28, 1898, and before Original Creek Agreement adopted March 1, 1901, were made under the Curtis Act, though the conditions precedent imposed by that act had not then been performed.—*Woodward v. De Graffenried*, 35 S. Ct. 764, 238 U. S. 284, 59 L. Ed. 1310, affirming judgment 131 P. 162, 36 Okl. 81.

Selections by living Indians only were contemplated by General Indian Allotment Act, which, after providing for allotments, provided that, if any one entitled to an allotment failed to select within four years, the Secretary of the Interior could direct a selection by an agent, and by agents for orphan children.—*La Roque v. United States*, 36 S. Ct. 22, 239 U. S. 62, 60 L. Ed. 147, affirming decree United States v. La Roque, 198 F. 645, 117 C. C. A. 349.

The six-year limitation prescribed by Act March 3, 1891, § 8, for suits by the United States to annul patents, does not govern suit on so-called trust patent for allotment in an Indian reservation as made in contravention of Nelson Act.—*Id.*

Jurisdiction of federal court to entertain a suit by the United States to cancel a so-called trust patent for allotment in an Indian reservation as in contravention of Nelson Act is not affected by Act April 23, 1904, defining authority of Secretary of Interior to cancel trust patents for Indian allotments.—*Id.*

No intention to dissolve tribal relations and terminate national guardianship on making of allotments and issuing of trusts patents without waiting for expiration of trust period is shown by Indian Allotment Act, §§ 5, 6.—*United States v. Nice*, 36 S. Ct. 696, 241 U. S. 591, 60 L. Ed. 1192.

◀14. — Grants and patents to individual Indians.

See 27 Cent. Dig. Indians, §§ 2, 31-36, 46.

A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of congress or any patent from the executive authority of the United States, if such is the intention of the treaty.—*Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

A reservation, to a chief or other member of a tribe of Indians, of a specified number of sections of land, whether already identified or to be surveyed and located in the future, when made by the United States in a treaty with the tribe, and as part of the consideration for a cession by the tribe of a tract of country to the United States, converts the reserved sections into individual property, and, if unaccompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple, which is alienable at the pleasure of the grantee, unless the United States, by provision of the treaty or of an act of congress, has expressly or impliedly prohibited or restricted its alienation.—*Id.*

A reservation of lands "set apart" by article 9 of the treaty of October 2, 1863, between the United States and the Chippewa Indians, made "upon the urgent request of the Indians," for their chief, constituted a present grant to the chief of an alienable title in fee, subject only to the selection of the land in due form, and to the definition of its boundaries by survey and patent.—*Id.*

No direct connection with the land or claim for personal use by one to whom Sioux half-breed scrip has been issued, under the act of July 17, 1854, is essential to the validity of a location of such scrip under the provisions of the act authorizing such location upon "any unsurveyed land * * * upon which they (the half-breeds) have respectively made improvements."—*Midway Co. v. Eaton*, 22 S. Ct. 261, 183 U. S. 602, 46 L. Ed. 347, affirming judgment 82 N. W. 861, 79 Minn. 442; *Id.*, 22 S. Ct. 268, 183 U. S. 619, 46 L. Ed. 357, affirming judgment 82 N. W. 1118, 79 Minn. 442.

Improvements caused to be erected upon unsurveyed land by an attorney in fact of a Sioux half-breed, to locate scrip issued under the act of July 17, 1854, are made by the half-breed, within the meaning of the provision of that act that such scrip may be located upon any "unsurveyed lands * * * upon which they (the half-breeds) have respectively made improvements."—*Id.*

The erection of a house 14 by 16 feet in size, upon unsurveyed lands, is a sufficient improvement to satisfy the provision of the act of July 17, 1854, for the location of Sioux half-breed scrip issued under that act, upon any "unsurveyed lands * * * upon which they (the half-breeds) have respectively made improvements."—*Id.*

Act June 25, 1910, § 32, relating to deeds to tribal lands in the Five Civilized Tribes, makes the patented land part of the estate of the nominal patentee, and gives a title to the heir or other party named in the act as purchaser.—*Perryman v. Woodward*, 35 S. Ct. 830, 238 U. S. 148, 59 L. Ed. 1242, affirming decree 133 P. 244, 37 Okl. 792.

Indian who had made a homestead entry under Act March 3, 1875, and had substantially performed the conditions entitling him to a patent, except the making of final proof, at passage of Act July 4, 1884, is not affected by provisions of the latter act that patents issued thereunder should contain a 25 years' limitation on alienation.—*United States v. Hemmer*, 36 S. Ct. 659, 241 U. S. 379, 60 L. Ed. 1055, affirming decree *Hemmer v. United States*, 204 F. 898, 123 C. C. A. 194.

◀15. — Alienation in general.

See 27 Cent. Dig. Indians, §§ 17, 29, 34, 37-44.

A deed appearing, from its terms, to be granted in breach of the restriction in a government patent to an Ottawa Indian that the grantee shall not alienate or incumber the land until he shall become a citizen of the United States is void, and is rightly rejected, when offered in evidence in an action of ejectment.—*Libby v. Clark*, 118 U. S. 250, 6 S. Ct. 1045, 30 L. Ed. 133.

By the treaty of Prairie du Chien, July 29, 1829, land was granted to certain Indians, with the proviso that the land should never be leased or conveyed by the grantees or their heirs to any persons whatever without the permission of the president of the United States. *Held*, that this provision did not cease to operate when a patent was delivered to the Indian, but continued in force as long as the lands were owned by him or his heirs.—*Pickering v. Lomax*, 145 U. S. 310, 12 S. Ct. 860, 36 L. Ed. 716, reversing judgment 120 Ill. 289, 11 N. E. 175.

The purpose of the proviso was not to prevent the alienation of the land but to protect the Indian from an improvident disposition thereof; and it will be presumed that the president, before affixing his approval, satisfied himself that no fraud or imposition had been practiced on the Indian.—*Id.*

Act Cong. July 25, 1868, confirming to persons holding by deed from the patentees the title of certain lands in the city of Omaha, which were located under scrip issued to Indians or half-breeds, conferred no right as against third persons having a legal or equitable title thereto.—*Felix v. Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719, affirming decree (C. C.) 36 F. 457.

One who comes into possession of inalienable, unlocated land scrip issued to an Indian, together with a power of attorney from him, wherein the name of the attorney, the description of the land, and the number of the scrip are left blank, and of a quitclaim deed wherein the grantee and the description are blank, is not a person "holding by deed from the patentees," within the meaning of Act Cong. July 25, 1868, confirming to persons holding by deed from the patentees the title of certain lands in Omaha, which were located under such scrip, confirming land titles, since the quitclaim deed, being in blank, was incapable of conveying any particular land.—*Id.*

One who comes into possession of inalienable, unlocated land scrip issued to an Indian, together with a power of attorney from him, wherein the name of the attorney, the description of the land, and the number of the scrip are left blank, and of a quitclaim deed wherein the grantee and the description are blank, is chargeable with notice that these instruments were designed as a means of evading the law against the alienation of the scrip; and if he locates the scrip in the name of such Indian, and then fills out the blanks and causes a deed to be made to himself, he holds the lands as trustee for the Indian.—*Id.*

It appearing that the blank deed and power of attorney were originally procured from the Indian by fraud, the person filling them out cannot be considered as his agent in so doing, since, if there was no intent to deliver the deed, it would have been ineffectual, even if complete in all respects.—*Id.*

Act March 3, 1875, § 15, allows Indians born in the United States, and abandoning their tribal relations, to have the benefit of the homestead act, provided that the title to lands acquired by any Indian shall be and remain inalienable for five years from the date of the patent. *Held*, that the computation of time should include the day of the issue of the patent.—*Taylor v. Brown*, 147 U. S. 640, 13 S. Ct. 549, 37 L. Ed. 313, affirming decree 5 Dak. 335, 40 N. W. 525.

Act March 3, 1875, § 15, allows Indians born in the United States, and abandoning their tribal relations, to have the benefit of the homestead act, provided that the title to lands acquired by any Indian shall be and remain inalienable for five years from the date of the patent. *Held*, that the limitation on the Indian's power of alienation is valid.—*Id.*

The treaty of August 8, 1831, with the Ohio Shawnees, by article 7 obliged the United States to expose the lands ceded "to public sale to the highest bidder, in the manner of selling the public lands." A part of the lands was so sold at a price above \$2 an acre. The rest was sold at private sale at \$1.25. *Held*, that though the government failed in its trust by selling at private sale, yet in view of Act April 24, 1820, then in force, which required the public lands to be offered for sale at \$1.25, and made those remaining unsold subject to private sale at that price, and on the assumption that the government acted as it deemed best for the tribe, the proof was against any claim for actual damages.—*United States v. Blackfeather*, 155 U. S. 180, 15 S. Ct. 64, 39 L. Ed. 114.

Under the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior, as construed in connection with the act of December 19, 1854, the half-breed scrip issued under the provisions of article 2, par. 7, of the treaty, could only be located within the territory ceded thereby, and the power to locate was confined to the half-breeds to whom the scrip was issued; and locations under powers of attorney, and in other states, were void.—*Fee v. Brown*, 162 U. S. 602, 16 S. Ct. 875, 40 L. Ed. 1086, affirming judgment 17 Colo. 510, 30 Pac. 340.

By the treaty of 1862 the individual Indians were to receive patents for their allotments of land, with a condition against alienation until, by the terms of the treaty, they became citizens. The treaty of 1867 allowed immediate separation of the individuals from the tribe by a declaration in the district court, and provided that all who should not make such declaration before the expiration of the additional two years should be "still considered members of the tribe," and were then to remove to the Indian Territory. In order "to enable the tribe to dispose of their lands in Kansas," it was provided that patents in fee simple should issue to heads of families and allottees who had come of age, "so that they may sell their lands without restriction." *Held*, that the treaty of 1867 contemplated that some of the Indians would become citizens, and the rest retain their tribal relations, and remove to the territory; and that in respect to patents already issued it restricted the right of alienation to heads of families and persons of full age; so that lands patented to a girl of seven before the expiration of the five years could not be alienated by her guardian after that period by proceedings pursuant to the laws of Kansas.—*Wiggin v. Conolly*, 163 U. S. 56, 16 S. Ct. 914, 41 L. Ed. 69.

The fact that a patent had already issued to an allottee did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of an individual Indian in respect to alienation for the land and the allottee were still under the care of the nation and the tribe.—*Id.*

A deed by an Indian, having no power to convey without the president's permission, was recorded without such permission. indorsed thereon; but some years later such indorsement was procured, and the deed, after a further period, was re-recorded. In the meantime the Indian had given another deed to a third person, which the president, through inadvertence, also indorsed, after having indorsed the prior deed. The second deed, however, with such indorsement, was recorded before the re-recording of the earlier deed. *Held*, that the second grantee was not an innocent purchaser, and that full title passed by the first deed. Judgment 46 N. E. 238, 165 Ill. 431, affirmed.—*Lomax v. Pickering*, 19 S. Ct. 416, 173 U. S. 26, 43 L. Ed. 601.

Where a deed by an Indian, who had no power of alienation without permission of the president of the United States, was recorded in Illinois without the president's permission indorsed thereon, the record is notice to subsequent purchasers, under Conveyancing Act Ill. § 30, that the grantor had at least attempted to convey.—*Id.*

Where an Indian records a deed to property without having it indorsed by the president of the United States, a subsequent purchaser from the Indian takes subject to the chance that the president has in fact approved the recorded deed, and has thereby exhausted his power.—*Id.*

The omission of the words "any Indian" from the prohibition of purchases and leases

"from any nation or tribe of Indians," as contained in Act Cong. June 30, 1834, c. 161, § 12, while the former statute had extended the prohibition to purchases or leases from "any Indian," shows an intention of congress to remove the general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States.—*Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

Powers of attorney to locate Sioux half-breed scrip, and to sell the lands located therewith, do not amount to an assignment of such scrip, in violation of the provisions of the act of July 17, 1854, in pursuance of which such scrip was issued, that "no transfer or conveyance of any of said certificates or scrip issued shall be valid."—*Midway Co. v. Eaton*, 22 S. Ct. 261, 183 U. S. 602, 46 L. Ed. 347, affirming judgment 82 N. W. 861, 79 Minn. 442; *Id.*, 22 S. Ct. 268, 183 U. S. 619, 46 L. Ed. 357, affirming judgment 82 N. W. 1118, 79 Minn. 442.

Consent of the secretary of the interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian grantor, and when so given is retroactive in its effect, and relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land.—*Lykins v. McGrath*, 22 S. Ct. 450, 184 U. S. 169, 46 L. Ed. 485.

An alienable title in fee simple which could not be affected by restrictions, in a subsequent patent, upon the power of alienation, passed under the reservation of 640 acres of land for the use of the children of Bokowtonden and their heirs, made by the treaty of September 24, 1819, with the Chippewa Nation, for the cession of Indian lands to the United States. Judgment (1904) 99 N. W. 14, 146 Mich. 288, affirmed.—*Francis v. Francis*, 27 S. Ct. 129, 203 U. S. 233, 51 L. Ed. 165.

Powers of attorney, one to locate certain Sioux half-breed scrip, and the other to convey the land thereby located, taken separately or together, did not amount to an assignment or transfer of the scrip itself. Judgment, *Buffalo Land & Exploration Co. v. Strong* (1903) 97 N. W. 575, 91 Minn. 84, affirmed.—*Strong v. Buffalo Land & Exploration Co.*, 27 S. Ct. 780, 203 U. S. 582, 51 L. Ed. 327.

The approval by the Commissioner of Indian Affairs of a contract for the sale of timber by an Indian allottee, which, under the rules and regulations established by the President on December 6, 1893, pursuant to article 3 of the treaty with the Chippewa Indians of September 30, 1854 (10 Stat. 1110), was to "operate as specific consent of the Executive to the sale of the timber to which the contract relates," did not end the authority of the President, so as to prevent a modification of the contract by making it subject to an amendment of those rules, giving the Indian agent, subject to the approval of the Commissioner of Indian Affairs, authority to fix the sums which an allottee should be permitted to withdraw from the proceeds of the timber deposited in a national bank.—*Starr v. Campbell*, 28 S. Ct. 365, 208 U. S. 527, 52 L. Ed. 602.

Restrictions in a patent of timber land to an Indian upon the sale, lease, or alienation of the tract conveyed without the consent of the President extend to the sale of the timber on such tract.—*Id.*

The prohibition against the alienation of allotted lands by the allottee or his heirs, without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902 (Act June 30,

1902, c. 1323, 32 Stat. 500), was continued, as to conveyances by full-blooded Indian heirs, beyond the five-year limitation therein expressed, by Act April 26, 1906, c. 1876, §§ 22, 29, 34 Stat. 145, 148, which, in section 22, after empowering adult heirs of a deceased Indian of either of the Five Civilized Tribes to convey their inherited lands, provided that "all conveyances made under this provision by heirs who are full-blooded Indians are to be subject to the approval of the Secretary of the Interior," and in section 29 repealed all inconsistent legislation.—(1911) *Tiger v. Western Inv. Co.*, 31 S. Ct. 578, 221 U. S. 286, 55 L. Ed. 738, reversing judgment (1908) *Western Inv. Co. v. Tiger*, 96 F. 602, 21 Okl. 630.

The rights of the Creek Indians in the Indian Territory who were made citizens of the United States by Act March 3, 1901, c. 868, 31 Stat. 1447, with all of the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902 (Act June 30, 1902, c. 1323, 32 Stat. 500), beyond the five-year limitation therein expressed.—*Id.*

Consents of the Puyallup Indian allottees and owners to the sale of such portion of the lands allotted to them under the treaty with the Omahas not required for their homes, approved under Act March 3, 1893, c. 200, 27 Stat. 612, held to survive their decease.—(1912) *Jacobs v. Prichard*, 32 S. Ct. 289, 223 U. S. 200, 56 L. Ed. 405, affirming judgment (1907) *Prichard v. Jacobs*, 90 F. 922, 46 Wash. 562.

Act April 26, 1906, § 19, extending period of inalienability fixed by Act July 1, 1902, §§ 11–15, with respect to lands allotted to Cherokee Indians of the full blood, is constitutional.—(1912) *Heckman v. United States*, 32 S. Ct. 424, 224 U. S. 413, 56 L. Ed. 820, affirming judgment (1910) *United States v. Allen*, 179 F. 13, 103 C. C. A. 1.

The United States can invoke equity jurisdiction to cancel conveyances of allotted lands by Cherokee Indians in violation of existing restrictions, in view of the peculiar relationship of the United States to such Indians and explicit recognition of such rights by Act May 27, 1908.—*Id.*

Indian grantors are not necessary parties to suit by the United States to cancel conveyances by Cherokee Indians on the ground that they were in violation of existing restrictions on power of alienation.—*Id.*

The United States has the right to invoke equity jurisdiction to cancel illegal conveyances of allotted lands by Choctaw Indians, in view of its relationship with the Indians, and the recognition of such right by Congress in Act May 27, 1908.—(1912) *Mullen v. United States*, 32 S. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, affirming judgment upon conditions (1910) *United States v. Allen*, 179 F. 13, 103 C. C. A. 1.

Indian grantors are not necessary parties to a suit by the United States to cancel conveyances of allotted lands by Choctaw Indians.—*Id.*

Restrictions on alienation by heirs of Indian allottee of the land allotted in excess of the homestead made by supplemental agreement of July 1, 1902, par. 12, with the Choctaws and Chickasaws, are not applicable to a person whose name appeared on the rolls and who died after ratification of the agreement and before receiving the allotment, in which case provision for allotment was made by paragraph 22.—*Id.*

The heirs of a deceased Indian allottee under the supplemental agreement of July 1, 1902, with the Choctaws and Chickasaws have an

equitable interest which they may convey before patent.—Id.

Conveyances by heirs of an Indian allottee under the supplemental agreement of July 1, 1902, with the Choctaws and Chickasaws, whose ancestors died after ratification of the agreement and before allotment, are not invalid because made before issuance of the patent, in view of Act April 26, 1906, § 19.—Id.

Conveyances by Seminole freedmen of lands allotted to them in severalty for homesteads under Act July 1, 1898, executed before the passage of Act May 27, 1908, were invalid.—(1912) *Goat v. United States*, 32 S. Ct. 544, 224 U. S. 458, 58 L. Ed. 841, affirming judgment upon conditions (1910) *United States v. Allen*, 179 F. 13, 103 C. C. A. 1.

Conveyances of surplus of adult Seminole freedmen allottees under Act July 1, 1898, executed before patent and prior to Act April 21, 1904, are invalid, as are also conveyances by minor allottees.—Id.

Authorization by Act April 26, 1906, of the execution of patents to Seminole allottees under Act July 1, 1898, did not repeal provisions of that act making invalid all contracts for the sale or incumbrance of any allotment prior to the date of the patent.—Id.

Removal by Act April 21, 1904, of restrictions on alienation of lands of allottees of the Five Civilized Tribes, not of Indian blood, except minors and except as to homesteads, left adult Seminole freedmen allottees under Act July 1, 1898, free to convey, before patent, surplus lands allotted to them in severalty.—Id.

The rule that a conveyance with warranty estops the grantor when he becomes the owner of the land granted to deny the grantee's title does not apply to a conveyance by an Indian allottee while the legal title remained in the United States.—*Starr v. Long Jim*, 33 S. Ct. 358, 227 U. S. 613, 57 L. Ed. 670, affirming judgment 109 P. 810, 59 Wash. 190.

Restrictions of alienation of an Indian allottee by Act Feb. 8, 1887, § 5, were not instantly removed by Indian Appropriation Act March 3, 1905, but remained until patent issued by the Secretary of the Interior to the allottee.—*Monson v. Simonson*, 24 S. Ct. 71, 231 U. S. 341, 58 L. Ed. 200, reversing judgment *Simonson v. Monson*, 117 N. W. 133, 22 S. D. 238.

Title of Indian allottee by unrestricted patent issued under Indian Appropriation Act March 3, 1905, could not under any state statute inure to the benefit of a grantee of an allottee while restrictions on alienation under Act Feb. 8, 1887, § 5, were still in force.—Id.

The removal by Act April 21, 1904, of all restrictions on alienation of lands of all allottees of the Five Civilized Tribes of Indians, who were not of Indian blood, did not authorize a white member of the Choctaw Tribe to sell before allotment.—*Franklin v. Lynch*, 34 S. Ct. 505, 233 U. S. 269, 58 L. Ed. 954, affirming judgment 130 P. 599, 37 Okl. 60.

After-acquired title of a white member of the Choctaw Nation cannot inure to the benefit of her grantee in a deed which, under Act July 1, 1902, §§ 15, 16, was void when made because executed before allotment, notwithstanding *Mansfield's Dig. Ark.* § 642, since this statute was extended to the Indian Territory by Act Feb. 19, 1903, only so far as not inconsistent with the law of Congress.—Id.

A conveyance by heirs of Indian allottees, forbidden by Act March 2, 1889, could not be saved by a judgment sustaining the validity of a contract of sale in a suit by such heirs against the purchaser.—*Bowling v. United States*, 34 S. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080, affirming decree 191 F. 19, 111 C. C. A. 561.

Land whether in the hands of an Indian allottee or his heirs is bound by the restriction in Act March 2, 1889, forbidding alienation

for 25 years from the issuance of the patent.—Id.

Every Chippewa Indian having an identifiable admixture of white blood is a mixed-blood Indian within the meaning of the Clapp amendment (Act June 21, 1906, and Act March 1, 1907), removing all restrictions as to sale, incumbrance, or taxation of allotments within the White Earth Indian reservation held by mixed-blood Indians, and providing that the right of full-blood Indians to be free from such restrictions shall rest with the Secretary of the Interior.—*United States v. First Nat. Bank of Detroit, Minn.*, 34 S. Ct. 846, 234 U. S. 245, 58 L. Ed. 1298, affirming decree *First Nat. Bank of Detroit, Minn., v. United States*, 208 F. 988, 126 C. C. A. 76.

Restrictions on alienation by Indian allottees terminated by the lapse of time have been "removed" within Act May 27, 1908, § 1, which while extending the period of such restrictions as to allotted lands of enrolled mixed-bloods, declares that nothing herein shall impose restrictions removed from land under any law prior to its passage.—*United States v. Bartlett*, 35 S. Ct. 14, 235 U. S. 72, 59 L. Ed. 137, affirming decree *Bartlett v. United States*, 203 F. 410, 121 C. C. A. 520.

Restrictions on alienation by Indian allottees made under supplementary agreement with the Choctaws and Chickasaws, pars. 12, 15, and 16, ratified by Act Congress July 1, 1902, extend to a devise by will.—*Taylor v. Parker*, 35 S. Ct. 22, 235 U. S. 42, 59 L. Ed. 121, affirming judgment 126 P. 673, 33 Okl. 199.

Extension of the laws of Arkansas in force in Indian Territory embraces all persons and estates in said territory made by Act April 28, 1904, § 2, enabled an Indian in the Indian Territory to devise his alienable property alone by a will made under the laws of the state of Arkansas.—Id.

Restrictions on alienation by heirs of an Indian allottee under supplemental Creek agreement June 30, 1902, § 16, apply only to allotments to living citizens, and not to allotments on behalf of deceased persons under original agreement March 1, 1901, § 28, or of sections 7, 8 of the supplemental agreement.—*Skelton v. Dill*, 35 S. Ct. 60, 235 U. S. 206, 59 L. Ed. 198, reversing judgment 119 P. 267, 30 Okl. 278.

One who contracts to convey Indian lands not belonging to him, but allotted and patented to members of the Pottawatomie tribe, under Act Feb. 8, 1887, cannot in view of the restrictions on alienation made by section 5 of that act and Act Aug. 15, 1894, and Act May 31, 1900, § 7, be held bound by his contract so as to be liable for its breach.—*Sage v. Hampe*, 35 S. Ct. 94, 235 U. S. 99, 59 L. Ed. 147, reversing judgment *Hampe v. Sage*, 125 P. 53, 87 Kan. 536.

Allotments on behalf of deceased members of the Creek Tribe held not subject to restrictions on alienation imposed by a Supplemental Creek Agreement June 30, 1902, § 16.—*Adkins v. Arnold*, 35 S. Ct. 118, 235 U. S. 417, 59 L. Ed. 294, affirming judgment 121 P. 186, 32 Okl. 167.

Authority given Secretary of Interior by Reclamation Act June 17, 1902, to acquire for United States interests in property, empowers him to acquire for cash and grant of selection of other lands the lands in the Blackfeet Indian Reservation occupied by an Indian family under agreement of September 28, 1896, approved by Act June 10, 1896.—*Henkel v. United States*, 35 S. Ct. 536, 237 U. S. 43, 59 L. Ed. 831, affirming judgment 196 F. 345, 116 C. C. A. 165.

Minor Indians are bound by action of their mother in relinquishing to the United States their rights in land occupied by them with

their parents in the Blackfeet Indian Reservation.—Id.

Only a personal right to the exclusive use of the surface to be enjoyed by persons identified by the Dawes Commission as entitled to a place on the citizenship rolls of the Creek Nation was conferred by Curtis Act June 28, 1898, § 11, and the allottee took no assignable or inheritable interest in the land.—*Woodward v. De Graffenried*, 35 S. Ct. 764, 238 U. S. 284, 59 L. Ed. 1810, affirming judgment 131 P. 162, 36 Okl. 81.

Congress held to have power to provide by Act April 21, 1904, that restrictions on alienation by allottees of Indian blood under Act July 1, 1902, which that act imposes, could be removed by the Secretary of the Interior on application to the Indian agent if he were satisfied.—*Williams v. Johnson*, 36 S. Ct. 150, 239 U. S. 414, 60 L. Ed. 358, affirming judgment 122 P. 485, 82 Okl. 247.

Restrictions on alienation of Osage Indian allotments under Act June 28, 1906, do not apply to lands in possession of a white man, not a member of the tribe, under allotments of certain deceased Indians to their respective heirs.—*Lerindale Lead & Zinc Mining Co. v. Coleman*, 36 S. Ct. 644, 241 U. S. 432, 60 L. Ed. 1080, reversing judgment 140 P. 607, 43 Okl. 13.

Restriction on alienation of Indian allotments in possession of a white man under allotments in right of deceased Indian allottees to their respective heirs was not imported into Osage Allotment Act June 28, 1906, by amendatory Act April 18, 1912.—Id.

16. — Lease.

See 27 Cent. Dig. Indians, § 45.

The rights of lessees of the heir of an Indian to whom title to land was granted by an Indian treaty cannot be divested by any subsequent action of the lessor, or of congress, or of the executive departments.—*Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

The collection of royalties due and owing to the lessors of coal mines in the Choctaw Nation for coal mined under valid leases prior to the Curtis act of June 28, 1898, was not prohibited by the provisions of section 16 of that act, making it unlawful for any person after the passage of such act to demand or receive any such royalty, or for any one to pay any such royalty to any individual. Judgment 104 F. 1007, 43 C. C. A. 683, affirmed.—*Southwestern Coal & Improvement Co. v. McBride*, 22 S. Ct. 763, 185 U. S. 499, 46 L. Ed. 1010.

The action taken by the secretary of the interior upon applications for leases for mining purposes of tribal lands in the Indian Territory, under Act June 28, 1898 (30 Stat. 495, c. 517), authorizing him to execute such leases, is a matter of administration, cognizable solely by the executive department.—*Cherokee Nation v. Hitchcock*, 23 S. Ct. 115, 187 U. S. 294, 47 L. Ed. 183.

Conferring rights of majority, conformably to a state statute, on a minor Indian allottee so as to authorize him to make a lease, is beyond the power of an Oklahoma district court, notwithstanding removal of restrictions on alienation by Indian allottees by Act May 27, 1908, §§ 1, 4, in view of sections 2 and 6 of the act defining minors.—*Truskett v. Closser*, 35 S. Ct. 385, 236 U. S. 223, 59 L. Ed. 549, affirming decree 198 F. 835, 117 C. C. A. 477.

Assignments of rent and royalties under mining leases of a Quapaw Indian allotment were not permitted by Act June 7, 1897, modifying restrictions of Act March 2, 1895, authorizing such Indians to lease their lands for ten years.—*United States v. Noble*, 35 S. Ct.

582, 237 U. S. 74, 59 L. Ed. 844, reversing decree 197 F. 292, 116 C. C. A. 654.

Authority granted to Quapaw Indian allottees by Act June 7, 1897, modifying Act March 2, 1895, to lease lands for ten years, does not empower an allottee to make a ten-year mining lease subject to existing ten-year mining lease of the same property.—Id.

17. — Cutting timber.

See 27 Cent. Dig. Indians, § 48.

Contracts with individual Indians for the cutting and delivery of a designated quantity of dead and down timber on an Indian reservation will not be construed as authorizing the removal of all timber of that character on the reservation because such construction was put upon the contracts by the parties interested, and was approved by the government agent under whose superintendence the work under the contracts was done, since such a construction would be inconsistent with the regulations prescribed by the president under the authority of Act Feb. 16, 1889 (25 Stat. 673, c. 172), for the disposal of dead and down timber from Indian reservations, the design of which, as interpreted by such regulations, was to permit every deserving Indian not otherwise employed to engage in the work. Judgment 105 F. 1004, 44 C. C. A. 685, affirmed.—*Pine River Logging & Improvement Co. v. United States*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

That portion of the stipulated compensation for timber to be cut and delivered by individual Indians from the Indian reservation, which was paid by the vendees, as agreed, to the Indian department for the poor fund of the tribe, will not be deducted from the damages recoverable by the United States from such vendees for the conversion of so much of the timber as was unlawfully removed from the reservation.—Id.

Evidence tending to show the amount of dead and down timber on an Indian reservation is not material in an action by the United States against the vendees of such timber under contracts entered into with individual Indians, with the approval of the commissioner of Indian affairs, to recover damages for the conversion of so much of the timber as was cut and delivered in excess of the amount designated in such contracts.—Id.

The value of the logs when delivered is the measure of damages recoverable by the United States from persons who have knowingly purchased timber which was unlawfully removed from Indian reservations, and not the value to the government of the timber before any labor was expended upon it.—Id.

Indian allottees under the Stockbridge and Munsee treaty of February 5, 1856 (11 Stat. 663), and Act Feb. 6, 1871, c. 38, 16 Stat. 404, are, notwithstanding the restraint upon alienation of the land, vested with sufficient title in their allotments to authorize the cutting of timber therefrom for sale, and not by way of improvements, without approval of the Department of the Interior.—*United States v. Paine Lumber Co.*, 27 S. Ct. 697, 206 U. S. 467, 51 L. Ed. 1139, affirming judgment (C. C. 1904) *Same v. Torrey Cedar Co.*, 154 F. 263.

18. — Descent.

See 27 Cent. Dig. Indians, § 49.

An affidavit by an Indian, signed by mark, in which he states that others besides himself are heirs of his father and entitled to share with him in the estate, is not conclusive against his right to be the sole heir, when the affidavit was procured from him by the Indian agent, under direction of the secretary of the interior, to show who were entitled to the distribution of certain rents, and was evidently considered by him when he made it as a mere matter of

form, with which he was obliged to comply in order to get any part of the rent.—*Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

The right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the laws, usages, and customs of the tribe, and not by the law of the state in which the land is situated, nor by any action of the secretary of the interior.—*Id.*

Lands allotted to an enrolled Creek Indian who died intestate after receiving his allotment were still "lands of the Creek Nation" within Supplemental Creek Agreement June 30, 1902, § 6, providing that only citizens of the Creek Nation and their descendants shall inherit lands of the Creek Nation, and if there be none then the inheritance should go to noncitizen heirs.—*Washington v. Miller*, 35 S. Ct. 119, 235 U. S. 422, 59 L. Ed. 295, affirming decree 129 P. 53, 34 Okl. 250.

The provisos in Supplemental Creek Agreement June 30, 1902, § 6, providing that only citizens of the Creek Nation and their descendants shall inherit lands of the Creek Nation, and if there be none to take the descent it shall go to noncitizen heirs, held not repealed by Act April 28, 1904.—*Id.*

The devolution of an allotment in behalf of a deceased Creek citizen after Supplemental Creek Agreement June 30, 1902, held governed by Arkansas laws of descent, which by section 6 and Act May 27, 1902, were substituted for Creek tribal laws recognized by Original Creek Agreement March 1, 1901, § 28.—*Sizemore v. Brady*, 35 S. Ct. 135, 235 U. S. 441, 59 L. Ed. 308, affirming judgment *Brady v. Sizemore*, 124 P. 615, 33 Okl. 169.

A noncitizen, if an heir under the Creek laws, held entitled to take an allotment made to a deceased Creek citizen under the Creek Agreement of March 1, 1901, in view of section 28 of such agreement.—*Reynolds v. Fewell*, 35 S. Ct. 230, 236 U. S. 58, 59 L. Ed. 465, affirming judgment 124 P. 623, 34 Okl. 112; *Shellenbarger v. Same*, 35 S. Ct. 234, 236 U. S. 68, 59 L. Ed. 470.

Uncertainty in the Creek tribal laws of descent and distribution will not justify the federal Supreme Court in disturbing a local rule of property that an intermarried noncitizen may inherit from his citizen wife or child.—*Id.*

No purpose to interpret the reference in the Original Creek Agreement of March 1, 1901, §§ 7, 28, to the Creek tribal laws of descent as controlling the devolution of the lands of a deceased Creek allottee can be gathered from the Supplemental Creek Agreement of June 30, 1912.—*Id.*

The allotment of an infant Creek Indian enrolled after death under Supplemental Creek Agreement of June 30, 1902, passes to his father, of Creek blood, though his mother is not; the allotment not being a new acquisition within Mansf. Dig. Ark. c. 49, § 2531.—*McDougal v. McKay*, 35 S. Ct. 605, 237 U. S. 372, 59 L. Ed. 1001, affirming judgment 142 P. 987, 43 Okl. 251.

The estate of an enrolled full-blooded Creek citizen dying intestate after receiving patent is an ancestral estate, within Mansf. Dig. Ark. § 2531.—*Pigeon v. Buck*, 35 S. Ct. 608, 237 U. S. 386, 59 L. Ed. 1007, affirming judgments 131 P. 1083, 38 Okl. 101 and *Roberts v. Underwood*, 132 P. 673, 38 Okl. 376.

Land allotted and patented to full-blooded Chickasaw Indian dying intestate without descendants held an ancestral estate within Mansf. Dig. Ark. § 2531, made applicable by Act April 28, 1904, § 2.—*Id.*

The conclusion that the Creek laws govern descent of allotted land of an enrolled Creek Indian who died after April 1, 1899, having received under Curtis Act June 28, 1898, § 11, the use of the surface of her provisional allotment,

but before ratification of the Original Creek Agreement is demanded by Act March 1, 1901, § 6, confirming previous allotments as required by sections 7 and 28.—*Woodward v. De Graffenried*, 35 S. Ct. 764, 238 U. S. 234, 59 L. Ed. 1310, affirming judgment 131 P. 162, 36 Okl. 81.

Equitable title vested under Original Creek Agreement March 1, 1901, in heirs of a Creek allottee to be determined according to the Creek laws of descent, was not divested by Act May 27, 1902, or the Supplemental Creek Agreement June 30, 1902, § 6, which substituted the Arkansas laws of descent.—*Id.*

Death of Chippewa Indian before selecting allotment under Nelson Act, terminates all right to an allotment on his behalf in view of Allotment Act contemplating selections on the part of living Indians only.—*La Roque v. United States*, 36 S. Ct. 22, 239 U. S. 62, 60 L. Ed. 147, affirming decree *United States v. La Roque*, 198 F. 645, 117 C. C. A. 349.

Rights of inheritance as to Creek lands in Indian territory were not affected by Act Feb. 28, 1891, § 5, amending Act Feb. 8, 1887, by providing that in determining descent of land under section 5 of the act of 1887, the issue of Indians living as husband and wife according to Indian custom shall be deemed the legitimate issue of the father of the child, since by section 8 of the former act Creek Indian lands were excepted.—*Porter v. Wilson*, 36 S. Ct. 91, 239 U. S. 170, 60 L. Ed. 204, affirming judgment 135 P. 732, 39 Okl. 500.

20. — Judicial sale.

See 27 Cent. Dig. Indians, § 53.

Lands allotted to a Choctaw Indian after restrictions on alienation were removed are not subject to an execution under a judgment for a tort, recovered theretofore, without violating Act July 1, 1902, § 15, providing that such lands shall not be affected by any deed, debt, or obligation, contracted prior to the time at which they may be alienated under the act.—*Mullen v. Simmons*, 34 S. Ct. 857, 234 U. S. 192, 58 L. Ed. 1274, reversing judgment *Simmons v. Mullen*, 122 P. 518, 33 Okl. 184.

22. — Adverse possession and improvements by intruders.

See 27 Cent. Dig. Indians, § 47; 1 Cent. Dig. Adv. Poss. § 11.

A deed executed by an Indian patentee under the treaty of January 31, 1855, between the United States and the Wyandotte Indians, valid upon its face, in which the grantor covenanted that he was seised in fee simple, had good right to sell the same, that it was free from incumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons, constitutes color of title in the grantees, who paid value therefor and had no notice of any defect in the title of their grantor, although the patentee was classed as an incompetent under such treaty, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs without the consent of the secretary of the interior. Judgment, *Schrimpscher v. Stockton*, 51 P. 276, 58 Kan. 758, affirmed.—*Schrimpscher v. Stockton*, 22 S. Ct. 107, 183 U. S. 290, 46 L. Ed. 203.

23. Personal property.

See 27 Cent. Dig. Indians, § 15.

In an action in the Indian Territory for the burning of hay cut from land of the Creek Nation, there was evidence that the hay was cut for one of plaintiffs, who was a member of that nation, by the other plaintiff, who was a non-citizen, licensed trader, in consideration of the receipt by the latter of an interest in the hay. There was no evidence that the former acted illegally, or as a trespasser, in having the hay

cut; and it appeared that, by the laws of the nation, citizens thereof could cut hay from the common land without limit. *Held*, that it would be presumed that the hay was lawfully cut, so as to vest title thereto in plaintiffs.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441.

No rights, interest, or share in any funds belonging to the Cherokee Nation, except where such funds were derived by lease, sale, or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, were acquired by white persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired the rights of soil or interest in the vested funds of the Nation. Decree, *In re Persons Claiming Rights in Cherokee Nation* (1905) 40 Ct. Cl. 411, affirmed.—*Red Bird v. United States*, 27 S. Ct. 29, 203 U. S. 76, 51 L. Ed. 96.

—24. Contracts.

See 27 Cent. Dig. Indians, § 18.

Rev. St. §§ 2103–2105, prescribing the form and substance of contracts between Indians and agents or attorneys respecting claims against the United States, and making the approval of the secretary of the interior necessary, are only intended to protect the Indians from improvident contracts, and do not create a legal obligation on the part of the United States to see that the Indians perform their part of the contracts.—*In re Sanborn*, 148 U. S. 222, 13 S. Ct. 577, 37 L. Ed. 429.

The contractual agreement of an Indian tribe or its individual members to pay for supplies furnished for logging operations out of the proceeds from the sale of the logs is governed by Rev. St. § 2103.—*Green v. Menominee Tribe of Indians in Wisconsin*, 34 S. Ct. 706, 233 U. S. 558, 58 L. Ed. 1093, affirming judgment 47 Ct. Cl. 281.

The requirement of Rev. St. § 2103, that contracts with Indians shall be void unless in writing and formally executed and approved, is applicable to an agreement by a tribe or individual members to pay for supplies for logging operations out of proceeds received by Indian agent from the sale of the logs, though the other contracting party was a licensed Indian trader.—*Id.*

An Indian tribe and its members should not, on theory of an implied contract, be held liable for supplies furnished to certain members of the tribe for logging operations under an express agreement void under Rev. St. § 2103, because not in writing, where the Indian agent failed as agreed to apply the proceeds in his hands from the sale of the logs in payment of the supplies so furnished.—*Id.*

—25. Liabilities for depredations and injuries to property.

See 27 Cent. Dig. Indians, § 18.

The treaty of October 28, 1865, with the Ogallalla band of Indians, by which they agreed to cease all hostilities against the persons and property of United States citizens, did not involve a promise by the Indians to pay for damages caused during hostilities subsequently arising.—*Leighton v. United States*, 161 U. S. 291, 16 S. Ct. 495, 40 L. Ed. 703.

—27. Actions.

See 27 Cent. Dig. Indians, §§ 19, 20.

A United States citizen who has become a citizen of an Indian nation by marriage with

one upon whom citizenship in the nation has been conferred by the legislature of the nation, but who has ceased to be such owing to a withdrawal by the legislature of all rights of citizenship possessed by his wife, may enforce his claim against one of that nation in the federal courts.—*Roff v. Burney*, 18 S. Ct. 60, 168 U. S. 218, 42 L. Ed. 442.

The heirs of a Wyandotte Indian to whom, as an incompetent, was allotted a tract of land, under the treaty of January 31, 1855, between the United States and the Wyandotte Indians, are bound to institute ejectment against those claiming to hold such land adversely under a grant from such incompetent within the period specified by the statute of limitations, after the date of ratification of the treaty of February 23, 1867, removing all restrictions upon sales of lands patented to incompetent Wyandottes which should thereafter be made. Judgment, *Schrimpscher v. Stockton*, 51 F. 276, 58 Kan. 758, affirmed.—*Schrimpscher v. Stockton*, 22 S. Ct. 107, 183 U. S. 290, 46 L. Ed. 203.

Conceding that so long as Indians maintain their tribal relations they are not chargeable with laches, or failure to assert their claims within the time prescribed by statute, they lose such immunity when their relations with their tribe are dissolved by accepting allotments of land in severalty under a treaty which provides that the organization and relation of such Indians with the United States as an Indian tribe shall be dissolved and terminated on the ratification of such treaty, and that such Indians shall be deemed to be citizens of the United States, and entitled to all rights, privileges, and immunities as such.—*Id.*

The failure of the secretary of the interior to confirm or avoid a sale of land by an incompetent Indian in violation of the treaty of January 31, 1855, between the United States and the Wyandotte Indians, does not prevent the statute of limitations from beginning to run against the right of his heirs to maintain ejectment against his grantees at the date of ratification of the treaty of February 23, 1867, removing all restrictions upon sales of land patented to incompetent Wyandottes which should thereafter be made, and authorizing the secretary of the interior to investigate and confirm or avoid such sales theretofore made.—*Id.*

The finding of a special examiner as to the fact of membership in an Indian tribe, which has been adopted by the two lower courts, will not be disturbed by the federal Supreme Court, where not plainly erroneous. Judgment 119 F. 114, 55 C. C. A. 216, affirmed.—*Hy-yu-tse-mil-kin v. Smith*, 24 S. Ct. 676, 194 U. S. 401, 48 L. Ed. 1039.

The United States cannot be regarded as a necessary party to a suit brought under Act Aug. 15, 1894, c. 290 (28 Stat. 286, 305), prior to Amendatory Act Feb. 6, 1901, c. 217 (31 Stat. 760), to determine the respective rights of two Indians, each claiming under Allotment Act March 3, 1885, c. 319 (23 Stat. 340), in view of the provision of the act under which the action was brought, that the judgment or decree of the court in favor of any claimant to an allotment, upon being properly certified to the Secretary of the Interior, shall have the same effect as if the allotment had been allowed and approved by the Secretary.—*Id.*

The United States can sue to set aside a conveyance of land allotted to an Indian when restrictions on alienation have been transgressed.—*Bowling v. United States*, 34 S. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080, affirming decree 191 F. 10, 111 C. C. A. 561.

31. Admission to citizenship.

See 27 Cent. Dig. Indians, § 23.

An Indian cannot make himself a citizen of the United States without the consent and co-operation of the government; the fact that he has abandoned his tribal relations does not affect his status.—*Elk v. Wilkins*, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643.

By the treaty ratified July 16, 1862, the tribal relations of the Ottawa Indians were to cease, and they were to become citizens of the United States, five years from that date. On February 23, 1867, a new treaty was negotiated, postponing for two years the time for dissolution of the tribe. Amendments were proposed by the senate, and accepted by the Indians, so that this treaty was not finally concluded and ratified until October 14, 1868, being after the expiration of the original five years. *Held*, that the negotiations amounted to a proposition by the Indians before, and an acceptance by the United States after, the expiration of that time, and that the acceptance related back to the date of the proposition, so that there was no ground for contending that the Indians became citizens of Kansas at the end of the five-year period, so as to disqualify the United States from entering into the new treaty with them without the state's consent.—*Wiggan v. Conolly*, 163 U. S. 56, 16 S. Ct. 914, 41 L. Ed. 69.

An Indian allottee, on the receipt of his first patent under Act Feb. 8, 1887, c. 119, 24 Stat. 388, must be deemed within the provision of section 6 of that act, that, "upon the completion of said allotments and the patenting of the lands to said allottees," each allottee shall have the benefits of, and be subject to, the laws of the state where he resides, in view of the further grant of citizenship which that section extends to every allottee, and of the fact that the issue of the final patent provided for by section 5 was to be delayed for 25 years, when it was to be issued to the first patentee or his heirs.—*In re Heff*, 25 S. Ct. 506, 197 U. S. 488, 49 L. Ed. 848.

Citizenship is not an obstacle to the exercise by Congress of its power to enact laws for the protection of tribal Indians as a dependent people.—*United States v. Sandoval*, 34 S. Ct. 1, 231 U. S. 28, 58 L. Ed. 107, reversing judgment (D. C.) 198 F. 539.

32. Jurisdiction and government of Indian country and reservations in general.

See 27 Cent. Dig. Indians, §§ 4, 52, 53, 57, 58.

The question whether a statute of the Cherokee Nation, not repugnant to the constitution of the United States or any treaty or law thereof, has been repealed by another statute of that nation, and the determination of what is the existing law of the Cherokee Nation as to the constitution of the grand jury, is a matter solely within the jurisdiction of the courts of that nation.—*Talton v. Mayes*, 163 U. S. 376, 16 S. Ct. 986, 41 L. Ed. 196.

Indian policemen are not marshals or deputy marshals within the meaning of Rev. St. U. S. § 788, giving such officials in each state the same powers in executing the laws of the United States as sheriffs and their deputies may have by law in executing the laws thereof.—*John Bad Elk v. United States*, 20 S. Ct. 729, 177 U. S. 529, 44 L. Ed. 874.

An officer at the Pine Ridge Indian reservation in South Dakota has no authority to arrest a resident on such reservation without a warrant, on a charge of misdemeanor not committed in his presence.—*Id.*

An intention to repeal existing federal laws as to Indians is not shown by Oklahoma En-

abling Act of June 16, 1906, § 1, reserving to the United States power to make regulations in the future as to Indians.—*Ex parte Webb*, 32 S. Ct. 769, 225 U. S. 663, 56 L. Ed. 1248.

33. Regulation of intercourse with Indians.

See 27 Cent. Dig. Indians, §§ 52, 59.

The federal Constitution is not violated by regulations promulgated by the Secretary of the Interior for the enforcement and collection of the annual privilege or permit tax on live stock owned or held by noncitizens within the territory of the Chickasaw Nation, imposed by Chickasaw legislation which had received the approval of the governor of such nation and the sanction of the President of the United States, made by Act June 28, 1898, c. 517, § 29 (30 Stat. 505), a condition of its validity. Judgment 21 App. D. C. 565, affirmed.—*Morris v. Hitchcock*, 24 S. Ct. 712, 194 U. S. 384, 48 L. Ed. 1030.

Chickasaw legislation imposing an annual privilege or permit tax on live stock owned or held by noncitizens within the limits of the Chickasaw Nation, which has received the approval of the governor of such nation and the sanction of the President of the United States, made by Act June 28, 1898, c. 517, § 29 (30 Stat. 505), a condition of its validity, is not repugnant to the federal Constitution.—*Id.*

Reservation in Oklahoma Enabling Act June 16, 1906, § 1, of the authority of Congress to legislate as to Indians within the state, is within the power given Congress to regulate commerce with Indian tribes.—*Ex parte Webb*, 32 S. Ct. 769, 225 U. S. 663, 56 L. Ed. 1248.

The prohibition against the sale of cattle purchased by the government and in possession of Indians, to any other than a member of the tribe, unless with the written consent of the agent of the tribe, under Indian Appropriation Act July 4, 1884, covers sales of cattle bought by the government out of the price of land sold by the Indians to the United States and issued to various Indians on the reservations entitled thereto.—*United States v. Anderson*, 33 S. Ct. 500, 228 U. S. 52, 57 L. Ed. 727.

A licensed trader on the Osage Indian reservation suing on a note from an Indian who defends under Act June 21, 1906, making it unlawful for a trader to give credit to any Indian for more than 75 per cent. of the next quarterly annuity of the Indian, must prove that the note represented lawful credits.—*Tinker v. Midland Valley Mercantile Co.*, 34 S. Ct. 252, 231 U. S. 681, 58 L. Ed. 434, reversing judgment 105 P. 333, 25 Okl. 160.

34. Selling or furnishing liquors.

See 27 Cent. Dig. Indians, § 60.

Congress was not given the power, by the commerce clause of the federal Constitution, to penalize by Act Jan. 30, 1897, c. 109, 29 Stat. 506, the sale of liquor within a state to an Indian to whom an allotment had been made under Act Feb. 8, 1887, c. 119, 24 Stat. 388, which grants the allottees the privilege of citizenship, and gives them the benefit of, and requires them to be subject to, the civil and criminal laws of the state where they reside, since this emancipation from federal control is not affected by the fact that the statute provides that the Indian title shall not be alienated or incumbered for 25 years, when a final patent shall issue, and stipulates that the grant of citizenship shall not impair their right to tribal or other property.—*In re Heff*, 25 S. Ct. 506, 197 U. S. 488, 49 L. Ed. 848.

The power to protect Indians against the evils of intemperance authorizes Congress when securing cession of an Indian reservation to

prohibit the sale of intoxicants on the ceded lands if reasonably essential to the protection of Indians on the unceded lands.—*Perrin v. United States*, 34 S. Ct. 387, 232 U. S. 478, 58 L. Ed. 691.

Prohibition against sale of intoxicating liquors on any of the ceded lands by Act Aug. 15, 1894, by which the Yankton tribe of Sioux Indians ceded to the United States all unallotted lands in a reservation in South Dakota, does not transcend the power of Congress, where the reservation embraced 400,000 acres, and the lands allotted to the Indians are in small tracts scattered throughout the ceded district, and aggregate nearly 100,000 acres.—*Id.*

Failure to limit the duration of the prohibition against sale of liquors on ceded lands by Act Aug. 15, 1894, by which the Yankton tribe of Sioux Indians ceded all unallotted lands in a reservation in South Dakota, will not invalidate such prohibition while the period during which the United States under Act Feb. 8, 1887, § 5, holds the allotted lands in trust, has not expired, and the wardship of the Indians has not terminated.—*Id.*

During the 25 years under which Indian allottees under Acts Feb. 8, 1887, and March 2, 1889, remain tribal Indians under guardianship, the allotted lands are inalienable, Congress may, as is done by Act Jan. 30, 1897, regulate or prohibit sale of intoxicating liquors to such Indians within a state.—*United States v. Nice*, 36 S. Ct. 696, 241 U. S. 591, 60 L. Ed. 1192.

—35. Introducing liquors into Indian country.

See 27 Cent. Dig. Indians, §§ 61, 62.

The treaty between the Red Lake and Pembina Chippewa Indians and the United States, of October 2, 1863 (13 Stat. 667), provided that the laws of the United States then in force or thereafter enacted, prohibiting the introduction of liquor into the Indian country, should be in full force and effect throughout the country thereby ceded, until otherwise directed by congress or the president. *Held*, that the payment of an internal revenue tax as a retail liquor dealer, for selling liquor in the internal revenue district which embraced the ceded territory, did not relieve such dealer from the penalties imposed by Act Cong. March 15, 1864 (13 Stat. 29), for introducing liquor into Indian country.—*United States v. Forty-Three Gallons of Whisky*, 108 U. S. 491, 2 S. Ct. 906, 27 L. Ed. 803.

Act June 30, 1834, § 1, defining "Indian country," though not re-enacted in the Revised Statutes of the United States, and therefore repealed by section 5596 thereof, may be referred to for the purpose of ascertaining the meaning of the term "Indian country," found in other sections of the Revised Statutes, which were re-enactments of the act of June 30, 1834.—*United States v. Le Bris*, 121 U. S. 273, 7 S. Ct. 894, 30 L. Ed. 946.

Under Act Cong. June 30, 1834, § 1, defining Indian country as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi, and not within any state, to which the Indian title has not been extinguished," the Red Lake and Pembina Indian reservation is Indian country.—*Id.*

As Rev. St. § 2139, previous to the amendment of July 23, 1892, made punishable the introduction into the Indian country of "spirituous liquor or wine," only, it did not include lager beer; that being a malt liquor made by fermentation.—*Sarlls v. United States*, 152 U. S. 570, 14 S. Ct. 720, 38 L. Ed. 556, reversing judgment (D. C.) *United States v. Ellis*, 51 F. 808.

The words, "Indian country," as used in Rev. St. U. S. § 2139, as amended and re-enacted by Act July 23, 1892, c. 234, 27 Stat. 260, forbidding the introduction of intoxicating liquors into such country, do not, standing alone, embrace territory in which, at the time, the Indian title had been extinguished, and over which, with its inhabitants, the jurisdiction of the state, for all purposes of government, was full and complete.—*Dick v. United States*, 23 S. Ct. 399, 208 U. S. 340, 52 L. Ed. 520.

The stipulation in the agreement of May 1, 1893, between the United States and the Nez Perce Indians, that the federal laws prohibiting the introduction of intoxicating liquors into the Indian country shall, for a period of 25 years, apply to the lands thereby ceded to the United States and to those retained by the Indians and to those allotted to them in severalty, was a valid regulation, based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with the Indians, and was not an invasion of the sovereignty of the state of Idaho, which had by Act July 3, 1890, c. 656, 26 Stat. 215, been admitted into the Union upon an equal footing with the other states.—*Id.*

A conviction of an Indian of the offense of introducing intoxicating liquor into the Indian country and into an Indian allotment while the title to the same is held in trust by the government may be had under Act Jan. 30, 1897, c. 109, 29 Stat. 506, although the defendant Indian is a citizen of the United States, and entitled, under Act Aug. 7, 1882, c. 434, § 7, 22 Stat. 342, and Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, to the rights, privileges, and immunities of such citizens, and to the benefit of the laws, civil and criminal, of the state in which his allotment is situated, and upon which the offense is alleged to have been committed.—*Hallowell v. United States*, 31 S. Ct. 587, 221 U. S. 817, 55 L. Ed. 750.

The scope of any repeal of the prohibitions of Act March 1, 1895, § 8, against manufacture and sale of liquors in the Indian Territory, effected by implication from the provisions of Oklahoma Enabling Act June 16, 1906, which contains a reservation to the government of the United States of authority to regulate as to the Indians in the future, retains in full force so much of the prohibitions of the earlier act as relate to the carriage of liquor without the state of Oklahoma into that part which was the Indian Territory, except liquors brought in by the state for the use of state agencies.—*Ex parte Webb*, 32 S. Ct. 769, 225 U. S. 663, 56 L. Ed. 1248.

Congress, in the exercise of its power to regulate commerce with Indian tribes, may, when creating a new state out of territory inhabited by Indians, in which territory introduction of liquors is by law prohibited, legislate so as to preserve those laws to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition.—*Id.*

Right of way through the Flathead Indian Reservation granted the Northern Pacific Railway Company by Act July 2, 1864, § 2, the Indian title to which was extinguished without reservation by agreement of Sept. 2, 1882, is not Indian territory within Act Jan. 30, 1897, making it an offense to introduce intoxicating liquors into the Indian Territory.—*Clairmont v. United States*, 32 S. Ct. 787, 225 U. S. 551, 56 L. Ed. 1201.

An intent to repeal Act March 1, 1895, § 8, prohibiting the bringing of intoxicating liquors into the Indian Territory, cannot be inferred from the provisions of Act Jan. 30, 1897, punishing sales of intoxicants to Indian allottees; the later act not mentioning the earlier

one.—United States v. Wright, 33 S. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160.

The prohibition against the introduction and sale of liquors in the Indian country made by Act July 23, 1892, amendatory of Rev. St. § 2139, was not superseded in the Indian Territory by Act March 1, 1895, §§ 8, 12.—Id.

The existing prohibitions against the introduction of liquor into Indian country made by Rev. St. § 2139, as amended by Acts July 23, 1892, and Jan. 30, 1897, were not superseded as to transactions within the state by the admission of Oklahoma into the Union under Enabling Act June 16, 1906.—Id.

Congress, in the exercise of its control over Indians, may prohibit, as it did by Act Jan. 30, 1897, as supplemented by section 2 of the New Mexico enabling act of June 20, 1910, introduction of intoxicating liquors into the Indian pueblos in the state of New Mexico.—United States v. Sandoval, 34 S. Ct. 1, 231 U. S. 28, 58 L. Ed. 107, reversing judgment (D. C.) 198 F. 530.

Regulations and practices under which special officers were, for the suppression of the liquor traffic among the Indians, charged with the duty of rendering true reports to the Commissioner of Indian Affairs, and making recommendations as to clemency to those convicted of selling liquor to Indians, could be established by the commissioner under Rev. St. § 463 (U. S. Comp. St. 1901, p. 262).—United States v. Birdsall, 34 S. Ct. 512, 233 U. S. 223, 58 L. Ed. 930, reversing judgment (D. C.) 206 F. 818.

Pending continuance, under Oklahoma Enabling Act, § 3, of the prohibition under state laws of sale of liquors in the former Indian Territory and their introduction into that territory, provisions of Act March 1, 1895, § 8, against introduction of liquors, are not enforceable as to intrastate transactions.—Joplin Mercantile Co. v. United States, 35 S. Ct. 291, 236 U. S. 532, 59 L. Ed. 705, affirming judgment (C. C. A.) 213 F. 926, 131 C. C. A. 160.

36. Crimes in Indian country or reservations.

See 27 Cent. Dig. Indians, §§ 62, 65.

Rev. St. § 2146, excepting "crimes committed by one Indian against the person or property of another Indian" from the provision of Id. § 2145, extending the jurisdiction of crimes against the laws of the United States to offenses committed in the Indian country, is not repealed by the provision of the treaty with the Sioux Indians, April 29, 1868, art. 1 (15 Stat. 635), that "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith," he shall be given up to be tried and punished according to the laws of the United States; nor by Act Cong. Feb. 28, 1877 (19 Stat. 254), ratifying an agreement with the Sioux Indians providing that congress shall secure them an orderly government, and that they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life; and the territorial district court of Dakota, sitting as a circuit court of the United States, has no jurisdiction of a murder committed by one Indian on another on the Sioux reservation.—Ex parte Kangi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. Ed. 1030.

The term "Indian country" embraces all land within the limits of the United States to which the Indian title has never been extinguished, except that which lies within the exterior geographical limits of a state, and which was not excepted from the jurisdiction of that state at the time of its admission into the Union.—Id.

Act Cong. March 3, 1885, § 9 (23 Stat. 385), provides that all Indians committing certain crimes "against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the same crimes within the exclusive jurisdiction of the United States." *Held*, that this is a valid and constitutional law, for, so long as the Indians preserve their tribal relations, they owe no allegiance to the state in which they live, and the state has no power over them; but, being within the limits of the United States, they are subject to acts of congress.—United States v. Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228.

The federal courts have no jurisdiction of a crime committed by one Indian against another in the Indian Territory (Act Feb. 18, 1875); and there is nothing in the treaty of July 19, 1866, which prevents the application of this statute to the Cherokee Nation.—Smith v. United States, 151 U. S. 50, 14 S. Ct. 234, 38 L. Ed. 67.

To sustain federal jurisdiction, the government is bound to show that one killed by an Indian in the Indian Territory was a white man; and this burden is not sustained, as against strong evidence that he was an Indian, by merely showing that he said he had lived in Arkansas, without stating why or how long, and that he was refused a vote in the district where the crime was committed, on the ground that he had not lived there long enough, for these facts have no legitimate tendency to prove that he was a white man, or that he had severed his tribal relations and become a citizen.—Id.

Under section 30, Act May 2, 1890, providing for a temporary government for Oklahoma territory, and enlarging the jurisdiction of the federal courts in the Indian Territory, that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation, by nativity or adoption, "shall be the only parties," and the corresponding provision in section 31, are to be construed, in criminal cases, as meaning parties to the crime, and not simply parties to the prosecution of the crime.—Alberty v. United States, 162 U. S. 499, 16 S. Ct. 864, 46 L. Ed. 1051.

The crime of murder committed by one Cherokee Indian upon another within the jurisdiction of the Cherokee Nation is an offense, not against the United States, but against the local laws of the Cherokee Nation.—Talton v. Mayes, 163 U. S. 376, 16 S. Ct. 986, 41 L. Ed. 196.

Act May 2, 1890, gives the judicial tribunals of the Indian nations jurisdiction when members of the nation by nativity or adoption are the only parties. *Held* that, on the prosecution in a United States court of an Indian for a murder committed in the Indian Territory, an averment that deceased was a negro, and not a white man, was jurisdictional.—Lucas v. United States, 163 U. S. 612, 16 S. Ct. 1168, 48 L. Ed. 282.

The provision of the enabling act of Montana, that all Indian lands within the state "shall remain under the absolute jurisdiction and control of the congress of the United States," does not amount to a reservation by the United States of jurisdiction over crimes committed on such lands by or against persons not Indians.—Draper v. United States, 17 S. Ct. 107, 164 U. S. 240, 41 L. Ed. 419.

The term "Indian country," as used in Rev. St. U. S. § 2145, extending to that country certain laws of the United States as to the punishment of crime, includes land lawfully set apart

for an Indian reservation out of the public domain, and not previously occupied by Indians.—*Donnelly v. United States*, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied, 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

Land allotted to an Indian under Act July 1, 1892, and excepted from that part of the Colville Indian Reservation which was restored to the public domain by that act, is during the trust period "Indian country," within Rev. St. § 2145, extending to the Indian country certain general laws of the United States as to the punishment of crime.—*United States v. Pelican*, 34 S. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

Adultery committed by Indian on Indian reservation held not punishable under Pen. Code, § 316, it not referring in terms to Indians in view of the express enumeration in sections 328 and 329 of other crimes and offenses against the United States, though such crime is not an offense within provisions of Rev. St. § 2146 (Comp. St. 1913, § 4149), excepting such offenses from operation of section 2145 (Comp. St. 1913, § 4148), by which general criminal laws of United States were extended to the Indian Territory.—*United States v. Quiver*, 36 S. Ct. 699, 241 U. S. 602, 60 L. Ed. 1196.

—38. Criminal prosecutions.

See 27 Cent. Dig. Indians, §§ 22, 64, 66.

Act Cong. March 3, 1885, provides that all Indians committing the crime of murder against the person of another Indian or other person within any territory of the United States, within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crime, and shall be tried therefor in the same courts and in the same manner as other persons charged with the commission of said crime, and also that when an Indian commits the crime within a state, and within an Indian reservation, he shall be tried as are other persons committing crimes within the exclusive jurisdiction of the United States. Held that, when the Indian is charged with committing the crime within a territory, it is improper to indict and try him before the district court of the territory, while sitting for the trial of cases arising under the constitution and laws of the United States.—*Ex parte Gon-shay-ee*, 130 U. S. 343, 9 S. Ct. 542, 32 L. Ed. 973; *Ex parte Captain Jack*, 130 U. S. 353, 9 S. Ct. 546, 32 L. Ed. 976.

Act Cong. March 3, 1885 (23 Stat. 385), conferring upon the territory of Arizona and her courts full jurisdiction of the offense of murder committed on an Indian reservation by an Indian, did not take away from the courts of the United States jurisdiction over the offense there committed by one other than an Indian, conferred by Rev. St. § 2145, on the ground that the United States, by yielding up a part of her jurisdiction over the offense, lost all. Congress could provide for the punishment in one court of an offense committed by one person, and in another court of the same offense committed by another person.—*Ex parte Wilson*, 140 U. S. 575, 11 S. Ct. 870, 35 L. Ed. 513.

Rev. St. § 2146, provides that the preceding section, declaring that the general laws of the United States as to punishment of crimes shall extend to the Indian country, shall not be construed to extend to any case where by treaty stipulations the exclusive jurisdiction over such offenses is secured to the Indian tribes. The treaty with the Cherokee Nation (14 Stat. 799, art. 13) contains an agreement that a court may be established by the United States in that territory, provided that the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all cases arising within their country in which members of the nation shall be the only parties, or where the

cause of action shall arise in the Cherokee Nation. Act March 1, 1889 (25 Stat. 783), provides for the establishment of a court in the Indian Territory with criminal jurisdiction limited to cases not punishable by death or hard labor. Held that, even if the establishment of a court was necessary to give validity to the proviso of the treaty, on establishment of such court jurisdiction of the crime of adultery committed by a citizen of the nation with a white woman, within the territory where they both resided, was vested in the Indian courts.—*Ex parte Mayfield*, 141 U. S. 107, 11 S. Ct. 939, 35 L. Ed. 635.

The right acquired by the state of Wisconsin, under her enabling act, to the sixteenth section of land in every township, for school purposes, was subject to the Indian right of occupancy in regions where such right had not been extinguished; and, where a permanent Indian reservation was subsequently established so as to include one of these sections, the state's title thereto constitutes no obstacle to the exercise of jurisdiction by the federal courts over crimes committed thereon by Indians.—*United States v. Thomas*, 151 U. S. 577, 14 S. Ct. 426, 38 L. Ed. 276.

Independently of any question of title, the federal courts have jurisdiction, for, regarding them as the wards of the nation, the United States has full power to pass such laws as may be necessary to their full protection, and to punish all offenses committed against them or by them within the reservation.—*Id.*

The part of the Cherokee Outlet not included within Oklahoma Territory by Act May 2, 1890, creating the territory, and which, in pursuance of that statute, was attached, for judicial purposes, to a judicial district of the territory, continued to be Indian country; and the offense of horse stealing, within Act Feb. 15, 1888, committed therein, was an offense against the United States, and within the jurisdiction of the district court for such district sitting as a court of the United States.—*United States v. Pridgeon*, 153 U. S. 48, 14 S. Ct. 746, 38 L. Ed. 631.

An indictment against a person for murder in the Indian Territory, which describes him and deceased as "white persons, and not Indians," negatives the exception to the jurisdiction of the circuit court contained in Rev. St. § 2146, providing that its jurisdiction shall not extend to crimes committed by one Indian against another, or to an Indian committing an offense in the Indian Territory who has been punished by the local law of the tribe, as the term "Indian" does not include a white person adopted into a tribe.—*Westmoreland v. United States*, 155 U. S. 545, 15 S. Ct. 243, 39 L. Ed. 255.

Though treaty April 28, 1866 (14 Stat. 779) art. 38, provides that a white person who marries a Choctaw or Chickasaw, and resides in the Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of the nation, and shall be tried before its tribunals as though a native Choctaw or Chickasaw, the exception to the jurisdiction of the circuit court contained in Rev. St. § 2146, of a case where, by treaty stipulation, exclusive jurisdiction over the offense is or may be secured to the Indian tribes, will, after verdict, be held sufficiently negated by an allegation in an indictment that defendant was not a citizen of the Indian Territory.—*Id.*

Under Act June 9, 1888 (25 Stat. 178, c. 382), providing that any Indian committing certain crimes against any deputy marshal, posse comitatus, or guard while engaged in the performance of duty, or who shall commit either of such crimes in the Indian Territory against any person who at the time of the commission of such crime, or at any time pre-

vious thereto, belonged to either of the classes of officials named, shall be subject to the laws of the United States relating to such crimes, the offense of killing a posse man or guard is within the jurisdiction of the United States, though the killing occurred when deceased was not engaged in performing any services.—*Wright v. United States*, 158 U. S. 232, 15 S. Ct. 819, 39 L. Ed. 963.

A de facto deputy marshal is within the protection of Act June 9, 1888 (25 Stat. 178, c. 382), giving the federal courts jurisdiction of certain crimes committed by Indians against certain United States officers.—Id.

The jurisdiction of the courts of the Cherokee Nation over offenses committed by one Indian upon the person of another includes not only Indians by birth, but also citizens of the Nation by adoption.—*Nofire v. United States*, 17 S. Ct. 212, 164 U. S. 657, 41 L. Ed. 588.

Crimes committed by one Indian upon the person of another within the limits of the Tulalip Reservation, in the state of Washington, are not excepted from the exclusive jurisdiction of the federal courts, under Act March 3, 1885, c. 341, § 9, 23 Stat. 385, because both parties hold patents from the United States, issued under the authority of the treaty with the Omahas of March 16, 1854 (10 Stat. 1043), and the treaty of Point Elliott of January 22, 1855 (12 Stat. 927), and are therefore, by virtue of Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 388, citizens of the United States.—*United States v. Celestine*, 30 S. Ct. 93, 215 U. S. 278, 54 L. Ed. 196.

Land within the Tulalip Indian Reservation, in the state of Washington, allotted and patented in severalty, pursuant to the treaty with the Omahas of March 16, 1854, 10 Stat. 1043, and the treaty of Point Elliott of January 22, 1855, 12 Stat. 927, which provide for a conditional alienation only, is not, by reason of such allotment and patent, excepted from the reservation, so as to defeat the exclusive jurisdiction of the Federal courts under Act March 3, 1885, c. 341, § 9, 23 Stat. 385, of crimes committed on such land by one Indian upon the person of another.—Id.

The murder of one negro by another within the limits of an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction of the United States, within the meaning of Rev. St. § 5339 (U. S. Comp. St. 1901, p. 3627), defining and punishing the crime of murder, as amended by act Jan. 15, 1897, c. 29, 29 Stat. 487 (U. S. Comp. St. 1901, p. 3620), and extended by section 2145 to the Indian country, when not within the exceptions made by section 2146, which, by reason of the race of the accused and deceased, do not apply.—*Pickett v. United States*, 30 S. Ct. 265, 216 U. S. 456, 54 L. Ed. 566.

The murder of one negro by another within the limits of the Osage Indian reservation subsequent to the Oklahoma enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), but prior to the admission of that state into the Union, is justiciable, after such admission, in the District Court of the United States for the Western District of Oklahoma, under section 14 of that act (34 Stat. 275 [U. S. Comp. St. Supp. 1909, p. 155]), providing for the transfer of jurisdiction in respect of all crimes against the United States to the federal courts therein provided.—Id.

The killing of an Indian by one not of Indian blood on an Indian reservation within the limits of a state is cognizable in the federal courts under Rev. St. U. S. § 2145, and section 5339 (U. S. Comp. St. 1901, p. 3627).—*Donnelly v. United States*, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, re-

hearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

No implied repeal of Rev. St. U. S. § 2145, extending to the Indian country certain general laws of the United States as to punishment of crimes, can be inferred from provisions of Act March 3, 1885, § 9, providing for the punishment of certain enumerated crimes committed by Indians within the territory, and for the punishment of the same crimes committed by an Indian on an Indian reservation within the state.—Id.

Admission of California into the Union under Act Sept. 9, 1850, on an equal footing with the original states, without any express reservation by Congress of governmental jurisdiction over the public lands within her borders, did not qualify former federal jurisdiction over the Indian country therein, so as to withdraw from the United States authority to punish crimes committed by or against Indians on an Indian reservation.—Id.

The killing of an Indian allottee during the trust period by persons not of Indian blood when committed on land allotted to him by Act July 1, 1892, within that part of the Colville Indian Reservation restored to the public domain by that act, is cognizable in the federal courts under Rev. St. § 2145.—*United States v. Pelican*, 34 S. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

Murder committed by Indians on a reservation within a state is a crime against the United States, punishable by Penal Code (Act March 4, 1909, c. 321) § 328, 35 Stat. 1151 (U. S. Comp. St. Supp. 1911, p. 1685).—*Apapas v. United States*, 34 S. Ct. 704, 233 U. S. 587, 58 L. Ed. 1104.

Destination of intoxicants held sufficiently averred to have been in the Indian country under an indictment for introducing liquors into the Indian territory contrary to Act Jan. 30, 1897.—*Joplin Mercantile Co. v. United States*, 35 S. Ct. 291, 236 U. S. 531, 59 L. Ed. 705, affirming judgment (C. C. A.) 213 F. 926, 131 C. C. A. 160.

—39. Government and laws of Indian Territory and inhabitants thereof.

A decree of the Choctaw and Chickasaw citizenship court in the test case against 10 persons who had been admitted to citizenship or enrollment by the United States courts in the Indian territory, vacating, for certain irregularities, the judgments of those courts, is binding on a person similarly situated who was not made a party, but who did not avail himself of his privilege, under Act July 1, 1902, c. 1362, 32 Stat. 641, to transfer his individual case from the territorial court to the citizenship court, but chose to abide the outcome of the case against the 10 representatives of his class. Judgment (C. C. A.) 143 F. 718, affirmed.—*Wallace v. Adams*, 27 S. Ct. 363, 204 U. S. 415, 51 L. Ed. 547.

Congress could constitutionally empower the Choctaw and Chickasaw citizenship court, created by Act July 1, 1902, c. 1362, 32 Stat. 641, to review and annul, for irregularities, the judgments of the United States courts of the Indian territory in Indian citizenship cases, although, by the terms of Act June 10, 1896, c. 398, 29 Stat. 339, 340, those judgments had become final.—Id.

A conveyance by a married woman in Indian territory held governed by Mansf. Dig. Ark. § 4621, put in force in Indian territory by Act May 2, 1890, § 31, rather than by Mansf. Dig. Ark. § 648, put in force by Act Feb. 19, 1903.—*Adkins v. Arnold*, 35 S. Ct. 118, 235 U. S. 417, 59 L. Ed. 294, affirming judgment 121 F. 186, 32 Okl. 167.

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